UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

COMPARATIVE ANALYSIS OF TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA, PARTICULARLY LABOUR BROKERS

Research paper submitted in partial fulfilment of the requirements of

M Phil Degree in Labour Law

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Date:

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DECLARATION

I declare that comparative overview of temporary employment services in South Africa, particularly labour brokers is my own work, that it has not been submitted before for any degree or assessment in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Wellington Thabo Madiehe

Signature: …………………………… Date: ………………………

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ACKNOWLEDGEMENTS

First, I give thanks to Almighty God for the continuous gift of life He is granting me. I give thanks to my parents and especially my wife for all the support they have been giving me.

As regards to this research paper, I gratefully give thanks to my supervisor, Ms E. Huysamen, for supporting me throughout the completion of this work.

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LIST OF ABBREVIATIONS AND ACRONYMS

AAEI (WADDI) - Act of Allocation of Employees by Intermediaries

ANC - African National Congress

APS - Africa Personnel Services

BCEA - Basic Conditions of Employment Act

BUSA - Business Unity South Africa

CAPES - Confederation of Associations in the Private Employment Sector

ConCourt - Constitutional Court

CCMA - Commission for Conciliation, Mediation and Arbitration

COIDA - Compensation for Injuries and Diseases Act

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COPE - Congress of the People

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COSATU - Congress of South African Trade Unions

DA - Democratic Alliance

DOL - Department of Labour

EEA - Employment Equity Act

EFF - Economic Freedom Fighters

Flexicurity Act - Flexibility and Security Act

ICPEA - International Confederation of Private Employment Agencies

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ILO	-	International Labour Organisation
LRA	-	Labour Relations Act
LRAA	-	Labour Relations Amendment Act
NEDLAC	-	National Economic Development and Labour Council
NDP	-	National Development Plan
RIA	-	Regulated Impact Assessment
SA	-	South Africa
TPA	-	Temporary Placement Act
TAWA	-	Temporary Agency Work Act
TES	-	Temporary Employment Service
UDM	-	United Democratic Movement
UDA	-	Unemployment and Disability Act
UN	-	United Nations
UNDHR	-	United Nations Declaration of Human Rights

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KEY WORDS

- Democracy
- Employment relationship
- Flexibility
- Globalisation
- Labour Brokers
- Labour Hire
- Subcontractor
- State
- Temporary Employment Services
- Trade unions
- Technology

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

In the early 1990s, South Africa (SA) entered its democratic transition, which created expectations of a dramatic turnaround in the country's economy.[1] The readmission of SA to the global arena introduced the economy to concepts such as globalisation. Globalisation came with some implications and impact that have been widely debated.[2] The democratic transition brought a significant change to the job spectrum, generating an increase in Temporary Employment Service (TES) and a decrease in permanent employment.[3]

The reasons leading to this increase are that subcontracting is beneficial to employers in that this process results in the transferral of social risks to the subcontractor, reducing direct exposure to labour legislation.[4] Regarding the pertinence of this issue, the Congress of South African Trade Unions (COSATU), the biggest union federation in the country, and the ruling party, the African National Congress (ANC), have long called for the elimination of labour brokers.[5] COSATU, in its presentation to the Portfolio Committee on Labour in 2009, argued that labour brokers act as intermediaries to access jobs that allegedly exist, and which in many cases would have existed previously as permanent full time jobs.[6]

On the other hand, political organisations, such as the Democratic Alliance (DA), Congress of the People (COPE) and Business Unity South Africa (BUSA), have called for the regulation of labour

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[1]Du Plessis & Smit 'South Africa's growth revival after 1994' (2007) *Stellenbosch Economic Working Papers*: 01/06 2.
[2]Mubangizi JC 'Democracy and development in the age of globalisation' (2010) 14 *Law, Democracy & Development Law Journal* 192.
[3]Kruger J 'Written Comments Submitted by Solidarity Trade UnionLabour Brokering In South Africa' (2009) available at *http://www.solidarityinstitute.co.za/docs/labour-brokering-in-south-africa.pdf* (accessed 15 February 2019).
[4]Craven P 'COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCAWU and SATAWU submission on labour brokering presentation to Portfolio Committee on Labour on 26 August 2009' available at *http://www.busa.org.za/docs/BUSA%20FINAL%20SUBMISSION%20ON%20LABOUR%20BILLS.pdf* (accessed 3 December 2018).
[5]Craven P (2009).
[6]Craven P (2009).

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brokers.[7] These organisations argued that competition among businesses has increased over the past few decades. Therefore, in order to remain competitive, it is imperative to enhance technology and to adopt flexibility regarding human resource processes to minimise costs and to allow companies to broaden their investment based on the positive turnover that will occur. The continuing point of view of the opposition political coalitions has been to boost the corporate.[8]

Despite the tripartite work relationship associated with Temporary Employment Services (TESs) being an issue in SA, the process seems to work for the Netherlands. Moreover, Namibia, similar to SA having battled with the issue for quite some time, has managed to finalise regulation on the matter.[9]

However, looking at the increasing factor of social ambiguity in SA mostly because of the lack of job security, it is fitting to seek solutions to standardise the marketplace, in order to generate economic growth. Therefore, with this research paper, an attempt will be made to examine the antagonism regarding the existence of labour brokers in SA. Despite the call by mostly workers and unions alike to ban TESs, the LRA amendments of 2014[10] have been tasked with regulating and standardisation of TESs.[11]

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1.2 AIMS OF THE STUDY

In growing economies, it is important to create an environment attractive to investors, as securing investment contributes towards establishing confidence in a country's economy.[12] However, in the process of welcoming investors, one cannot just observe that the economic actors are disregarding the country's legislation.[13]

[7] Craven P (2009).
[8] Brand, Steadman & Todd *Commercial Mediation: A User's Guide* (2012) 152.
[9] Dugard J *International Law: A South African Perspective* 4th ed (2011) 93.
[10] Through the Labour Relations Amendment Act 6 of 2014 (LRAA).
[11] Olivier, Dupper, & Govindjee *The Role of Standards in Labour and Social Security Law* (2013) 165.
[12] Rob J 'South Africa needs to attract domestic and foreign investment for economic growth.' *Econometrix*, ee publishers available at https://www.ee.co.za/article/need-south-africa-attract-domestic-foreign-direct-investment-policy-change-reuniting-country-focussing-economic-growth.html (accessed 06 May 2019).
[13] Ntsika *Enterprise Promotion Agency Basic Conditions of Employment Act – Impact Assessment* (1998) 101.

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Looking at the history of SA it is without a doubt that the country has endured a lot, with some vicious policies enforced on the people during the era of apartheid pre-1994. The apartheid regime caused a significant social imbalance that the government is still battling to redress. The post-apartheid era brought significant challenges in itself, to preserve the continuity principle of the State while trying to make the economy competitive in attracting investors for job creation purposes.[14]

It is important to recognise that the arrival of some multinational companies came with a practice of labour brokers to facilitate their operations. Often multinational companies may have their headquarters in a specific European or American country and operate in various other countries throughout different continents.[15] TES also known as labour broking, has in practice had a connotation of merely placing workers where and when needed by businesses, as opposed to facilitating job creation.[16] TESs brought a culture of discrimination, unfairness, inequality, and lessening of opportunity. In other words, it can be regarded in a sense as suppression of human rights in the workplace.[17] This is a matter of concern that requires attention, and for which political actors together with business operators as well as the State should try to find a remedy.

It is without a doubt that the SA labour market is the most regulated on the continent. From section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution) to the Basics Conditions of Employment Act 75 of 1997 (BCEA), Labour Relations Act 66 of 1995 (LRA), Employment Equity Act 55 of 1998 (EEA), Compensation of Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and many more, several key features of the labour sector have been legislated. On the issue of TESs, conflicts arose regarding the definition of 'employer' of the

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[14] Albertyn C and McCann R Alcohol, *Employment and Fair Labour Practice* (1993) 88.

[15] Benjamin P, *Untangling the Triangle: The Regulatory Challenges of Triangular Employment* (2009) 105

[16]Andrew M 'The key sectors that keep South Africa's economic engine running are finance, real estate and business services, general government services, as well as trade, catering and accommodation, and manufacturing.' *Brand South Africa*, 30 January 2014, available at https://www.brandsouthafrica.com/investments-immigration/economynews/south-africa-economy-key-sectors (accessed 06 May 2019).

[17]Gaston JB 'Discrimination, Inequality, and Poverty—A Human Rights Perspective.
Accepted under the Addressing Inequalities' Global Thematic Consultation - Call for Proposals for Background Papers, 2012. 11 January 2013, *HRWLJ*, available at https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective (accessed 06 May 2019).

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worker and the liability attached to the TESs and its client over worker rights. Practically the effect of labour brokering was that the business owner, i.e. the client of the TES, was exempted from any form of legal obligations towards workers with the labour broker assuming all the responsibilities.[18] This situation often left TES employees with limited rights, such as the inability to join a trade union due to their employment not being permanent.[19]

Because of the impact of labour broking on workers, and in light of the opposing views toward the future of labour brokers, significant amendments to labour legislations were tabled at the Portfolio Committee on Labour in Parliament. The result was the amendment of the LRA through the Labour Relations Amendment Act 6 of 2014 (LRAA). In terms of the amendments, section 198 (together with the newly inserted sections 198A to D) of the LRA broadened the scope of the employer in labour broking arrangements, as both the TES and the client are now jointly and severally held liable over certain issues pertaining to TES workers.[20]

The aim of this study is to demonstrate the relevance of the debate to ban or to regulate TES in light of the 2014 amendment to the LRA. The study will consider the challenges experienced in Namibia over the same issue. The study will also adopt a comparative approach with the Netherlands' regulations of TESs, which seems to have established a proper legislative system around TESs. The Netherlands presents a well-advanced labour broking market. The Netherlands is one of the biggest users of labour brokers; and as such, SA can learn from that experience.

1.3 RESEARCH QUESTION

The paramountcy of the SA economy requires sound labour mechanisms for fairness purpose. Knowing that it is the State's onus to establish sound regulations to encourage the private sector's investment, susceptible to job creation, decent human resource system should apply in order to do so successfully.[21] Therefore, in the light of the debate of whether to ban or regulate the TES, can

[18] Landis H and Folster J, *Employment and the Law: Standard Operating Procedures and Policies* (2014) 91.

[19]Bendix, S *Industrial Relations: A Southern African Perspective* 6th ed (2015) 170.

[20]Landis & Folster *Employment and the Law: Standard Operating Procedures and Policies* (2014) 192.

[21] Clauweart, S, *Survey of Legislation on Temporary Agency Work. European Trade Union Institute* (2012) 37.

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we say that this practice is the hindrance of the SA labour market in creating fairness and progress in the labour market? Should this practice be fully regulated in comparison to the workable system found in countries such as Namibia, and specifically the Netherlands?

1.4 IMPORTANCE OF THE STUDY

This research paper intends to examine the utilisation of labour brokers in SA. In addressing the antagonism in the marketplace and the political arena to the abolition or harmonisation of labour brokers, and in order to keep the economy globally competitive, this research sets out to make recommendations, which will give confidence to investors. In the process, harmonising the labour regulations that promote the observation of human rights for a sound working relationship, and the application of TES as per the 2014 LRA amendments will be promoted.

This research paper will also elaborate on the regulatory mechanisms of labour brokers subsequent to the 2014 amendments in terms of the LRA.

1.5 RESEARCH METHODOLOGY

This research will consist of desktop work in following the methodology adopted in conducting comparative studies by collecting and analysing both primary (case law, legislation) and secondary (books, journal articles, reports, etc.) sources on the regulation of labour brokers in Namibia, the Netherlands and South Africa.

A comparative approach will be taken in observing how the Netherlands and Namibia have managed to establish sound labour mechanisms regulating TES, and what SA can learn from these jurisdictions over their regulation of TES.

1.6 CHAPTER OUTLINE

Chapter two outlines the International Labour Organisation (ILO) Conventions on the subject of labour brokers. The ILO has been a key player on the topic of labour brokers; it has generated Conventions and Recommendations that seek to provide guidelines for the betterment of its

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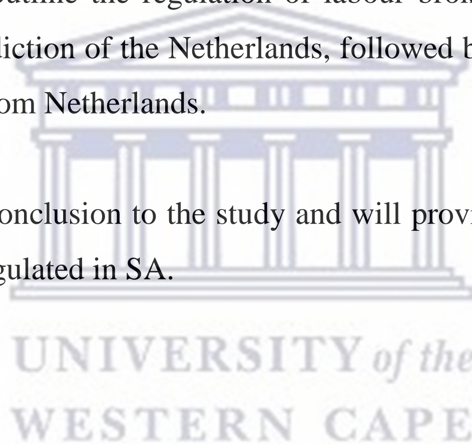
functionality. These instruments are invaluable for this research paper in obtaining an international perspective on this industry.

Chapter three will discuss the applicable labour legislations in SA, particularly in as far as TESs are concerned.

Chapter four will provide an overview of labour brokers and the regulation thereof in Namibia. Reference will be made to the ground-breaking case dealing with the banning of labour brokers in the matter of Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others case.[22]

Chapter five sets to briefly outline the regulation of labour brokers and highlight their proper functionality within the jurisdiction of the Netherlands, followed by a brief examination of some of the lessons SA can learn from Netherlands.

Chapter six will serve as a conclusion to the study and will provide some recommendations on how labour brokers can be regulated in SA.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[22]Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others (2009) Case No. A4/2008 NASC.

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CHAPTER TWO

INTERNATIONAL LABOUR STANDARDS

2.1 INTRODUCTION

The International Labour Organisation (ILO) has been in existence since 1919. It is a specialised United Nations (UN) agency,[23] dealing with labour issues pertaining to the international legal framework. SA re-joined the ILO on 26 May 1994 after having withdrawn its membership in 1964.[24] Since 1994, SA has ratified the ILO's entire core Conventions and has confirmed its commitment into ILO affairs. The ILO Constitution, in its Preamble, emphasises the promotion of harmony and peace in the workplace.[25]

Section 39 of the Bill of Rights enshrined in the SA Constitution provides that every court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider the international legal framework; and may consider foreign law. In *South African Defence Union v Minister of Defence and Another*,[26] the Constitutional Court (ConCourt) stated that an important source of international law in labour relations would be the Conventions and Recommendations of the ILO. This is an indication that the ratified ILO mechanisms have constitutional values within SA as enshrine in section 233 of the Constitution as well as section 3 of the LRA.[27]

2.2 INTERNATIONAL LABOUR STANDARDS

International labour standards is the ILO international legal framework supporting the fundamental principles and workers' rights worldwide, by defining the basic minimum standards in the

[23] Van Niekerk A, Christianson M, McGregor M, Van Eck BPS, *Law @Work (*2008) 19..

[24] Erasmus G & Jordaan B 'South Africa and the ILO: Towards a New Relationship*?'* (1993) 19 *South African Journal of International Law 65.*

[25] See ILO Constitution of 1919 Preamble, 5, available at http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf (Accessed 07 May 2019).

[26] South African National Defence Union vs. Minister of Defence (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (26 May 1999).

[27] Section 233 of the Constitution of South Africa of 1992 & Section 3 of the LRA.

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workplace, through the establishment of decent employment relationships.[28] This international legal framework is ratified by the Member States, after which it is inserted into a country's supreme law.[29]

2.2.1 Fundamental Standards

Throughout the application of its prerogatives, the ILO has identified eight pertinent Conventions, covering areas that are considered as fundamental principles and rights at work:[30]

Freedom of association and the effective recognition of the right to collective bargaining are covered by Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and Right to Organise and the Collective Bargaining Convention 98 of 1949, both ratified by SA on 26 May 1994.[31]

The elimination of all forms of forced or compulsory labour is provided for in the Forced Labour Convention 29 of 1930 and the Abolition of Forced Labour Convention 105 of 1957.
The effective abolition of child labour is regulated in the Minimum Age Convention 138 of 1973 and the Worst Forms of Child Labour Convention 182 of 1999.[32]

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The elimination of discrimination in respect of employment and occupation is covered in the Equal Remuneration Convention 100 of 1951 and the Discrimination (Employment and Occupation) Convention 111 of 1958.

[28] See ILO 'Introduction to International Labour Standards Conventions and Recommendations' available at *http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm* (accessed 07 May 2019).
[29] Article 19 ILO Constitution 1919.
[30] ILO 'Declaration on Fundamental Principles and Rights at Work and its Follow-up' available at http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (accessed 07 May 2019).
[31] Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948 and Right to Organise and the Collective Bargaining Convention No. 98 of 1949. This Convention was ratified by SA on the 26 May 1994, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO...ID.. (accessed 07 May 2019).
[32] The Forced Labour Convention No 29 of 1930 and the Abolition of Forced Labour Convention No 105 of 1957 (ratified by SA on the 26 May 1994).
The effective abolition of child labour is regulated in the Minimum Age Convention No. 138 of 1973 (ratified by SA on the 26 May 1994) and the Worst Forms of Child Labour Convention No. 182 of 1999 (ratified by SA on 26 May 1999).

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Based on the international requirements set out by the Right to Organise and the Collective Bargaining Convention 98 of 1949, Articles 1 and 2 (a) and (b) reads as follows:

'*1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to-(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours*.'

It appears that in SA labour brokers often do not fully observe to the collective bargaining rights of workers. This therefore makes it difficult for workers to exercise these rights in the true sense of the provisions.[33] The ILO Declaration on Fundamental Principles and Rights at Work[34], adopted by the International Labour Conference in 1998, states that all ILO members:

'Even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the (ILO) Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.'[35]

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The fundamental standards as promoted by the ILO have one specific motivation: establishing a sound working environment that Member States have the obligation to preserve through a

[33] See COSATU on Labour Brokers, available at http://www.cosatu.org.za/show.php?ID=6359#sthash.8Kc0dt9p.dpuf (accessed on 07 May 2019).
[34] See ILO '1998 Declaration on Fundamental Principles and Rights at Work' available at *http://www.ilo.org/dyn/normlex/en/f?p=1000:62:3936003731968290::NO:62:P62_LIST_ENTRIE_ID:2453911:NO* (accessed 07 May 2019).
[35] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up
Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010) available at https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (accessed 07 May 2019).

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regulatory mechanism allowing all stakeholders and actors in the marketplace to play fair for the betterment of all.[36]

Upon the re-insertion of SA into the United Nations (UN) spheres led by the lifting of the embargo imposed on the country during the apartheid era, SA proceeded to the ratification of the major ILO Conventions on the 26 May 1994.[37]

2.2.2 Freedom of Association and Right to Collective Bargaining

Freedom of association is the right of workers and employers to organise themselves in promoting their interests in the workplace.[38] Collective bargaining is an essential element of freedom of association. It helps to ensure that employees and employers have an equal voice in negotiations and provides employees with the opportunity to seek to improve their living and working conditions.[39]

The Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 of the ILO establishes that workers and employers alike have the right to create and join organisations.[40] Similarly, the Right to Organise and Collective Bargaining Convention 98 of 1949 stipulates that employees shall be protected against all forms of discrimination. Governments should promote voluntary collective bargaining to regulate the terms and conditions of employment, amongst others.[41] In the perspective of building a stable economy, it is imperative to seek the freedom of association to ensure that workers and employers alike have an efficient platform to table all

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[36] Kalula E and Woolfrey D (eds) 'The new labour market: Reconstruction, development and equality' (1995) 122 *(Labour Law Unit: University of Cape Town; Centre for Socio-legal Studies), University of Natal; and the Centre for Applied Legal Studies: University of the Witwatersrand).*

[37] Pako E 'United Nations lifts arms embargo on South Africa' available at https://www.sahistory.org.za/dated-event/united-nations-lifts-arms-embargo-south-africa (25 May 1994) *SAHOJ* (accessed 07 May 2019). https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO::: (accessed 07 May 2019).

[38] Hayter S, *The role of collective bargaining in the global economy: negotiating for social justice* (2010) 101.

[39] Hayter S *The role of collective bargaining in the global economy: negotiating for social justice* (2010) 185

[40] Article 2 of Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948. available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-yangon/documents/genericdocument/wcms_191411.pdf (accessed on 07 May 2019).

[41] Article 1of Right to Organize and Collective Bargaining Convention No 98 of 1949 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C098 (accessed on 07 May 2019).

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bargaining practices equally, yielding fair and reasonable outcomes.[42] The ratification of these requirements by SA means that it is the responsibility of the State to uphold and enforce their application.[43]

2.2.3 Private Employment Agencies Convention 181 of 1997

The Private Employment Agencies Convention[44] seeks to provide guidelines in respect of labour brokering. The Convention has at yet not been ratified by SA. The Convention permits labour broker operations while however providing for the protection of workers of these agents.[45] The Convention attempts to modernise the law related to temporary work agencies in order to promote flexibility in the functioning of the labour markets.[46] The workers recruited by labour brokers should not be denied the freedom of association and bargaining rights.[47] Both section 23 of the Constitution and the provisions of the LRA have embedded the requirements of the abovementioned Convention into the SA marketplace, admonishing commitment to the application of ILO mechanisms.[48]

The Private Employment Agencies Convention enumerates key aspects to make private agencies function within acceptable limits where they will not contravene the labour legislations in inducing some sort of one-sided profit, by disregarding the TES employees' rights. In this perspective, the Convention prohibits private agencies to charge directly or indirectly, in whole or in part, any fees or fees or costs to workers.[49]Member States have to ensure that necessary measures are taken to protect the workers employed by private agencies to safeguard a sound working relationship.[50]

[42]Article 2 of Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948.
[43]ILO 'South Africa Ratifies Conventions on Freedom of Association and Collective Bargaining 'available at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_008060/lang--en/index.htm(accessed on 07 May 2019).
[44]Private Employment Agencies Convention No. 181 of 1997.
[45]Article 2(3).
[46] Sello Nkurumah M 'Agency work in Namibia and South Africa: Legal comparison and appraisal of compliance with international norms' (2017) 5-65 *University of Pretoria.*
[47] Article 4 of the Private Employment Agencies Convention No. 181 of 1997.
[48]Constitution of the Republic of South Africa, Act 108 of 1996.
[49]Article 7 of Private Employment Agencies Convention No. 181 of 1997.
[50]Article 11 of Private Employment Agencies Convention No 181 of 1997which refers 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.

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2.2.4 Private Employment Agencies Recommendation No 188 of 1997

Despite the fact that SA has not ratified Recommendation 188, it has *'... an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the (ILO) Constitution, the principles concerning the fundamental rights which are the subject of those Conventions'*[51]

The Recommendation 188 of 1997 is aimed at enhancing the components of the Private Employment Agencies Convention 181 of 1997. It encourages Member States to establish processes preventing unethical practices by private employment agencies.[52] A company's management has to put in place occupational health and safety measures to avoid exposing employees to hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind.[53]

The TES, should be prohibited, or by other means prevented, from drawing up and publishing vacancy notices or offers of employment in ways that directly or indirectly result in discrimination on grounds such as race, colour, sex, age, religion, political opinion, national extraction, social origin, ethnic origin, disability, marital or family status, sexual orientation or membership of a workers organisation.[54] The TES should be encouraged to promote equality in employment through affirmative action programmes. The TES should be prohibited from recording, in files or registers, personal data that are not required for judging the aptitude of applicants for jobs for which they are being or could be considered.[55] The TES should store the personal data of a worker only for so long as it is justified by the specific purposes for which they have been collected, or so

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[51] See ILO '1998 Declaration on Fundamental Principles and Rights at Work' available at *http://www.ilo.org/dyn/normlex/en/f?p=1000:62:3936003731968290::NO:62:P62_LIST_ENTRIE_ID:2453911:NO* (accessed 07 May 2019).
[52] Article 4 of Private Employment Agencies Recommendation No 188 of 1997.
[53] Article 8 (a) Private Employment Agencies Recommendation Convention No 181 of 1997, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:SUP,en,R188,/Document (accessed 07 May 2019).
[54] Darcy du Tiot Protection against unfair discrimination in the workplace: Are the Courts getting it right? (2007) *Social Law Project UWC,* available at www.saflii.org/za/journals/LDD/2007/20.pdf (accessed 07 May 2019).
[55] Ntsika T, *Enterprise Promotion Agency Basic Conditions of Employment Act – Impact Assessment* (1998) 203.

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long as the worker wishes to remain on a list of potential job candidates.[56] Measures should be taken to ensure that workers have access to all their personal data as processed by automated or electronic systems, or kept in a manual file.[57] These measures should include the right of workers to obtain and examine a copy of any such data and the right to demand that incorrect or incomplete data be deleted or corrected. Unless directly relevant to the requirements of a particular occupation and with the express permission of the worker concerned, private employment agencies should not require, maintain or use information on the medical status of a worker, or use such information to determine the suitability of a worker for employment. Private employment agencies and the competent authority should take measures to promote the utilization of proper, fair and efficient selection methods.[58]

Labour brokers in SA must ensure that their practices are in accordance with the abovementioned recommendations.

2.3 CONCLUSION

Labour law has traditionally provided a set of minimum conditions, as a minimum floor of rights, for employees.[59] In the 21st century, securing the human rights of workers remains an 'elusive goal, as workers, businesses, trade unions and governments still have to pursue an object mandate in this regard'.[60] In the galloping factor of globalisation, the labour legislation should efficiently protect individual and collective rights by promoting fundamental values.

The ILO requirements should be used as a reference in determining improved ways of regulating labour brokers. The ILO provides support and guidance to its Member States in strengthening their

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[56] Olivier MP, Dupper OC and Govindjee A, *The Role of Standards in Labour and Social Security Law* (2013) 77.
[57] Olivier MP, Dupper OC and Govindjee A, (2013) 79.
[58] Articles 9. 10, 11, 12 (1, 2, 3), 13, 14 of the Private Employment Agencies Recommendation, 1997 Convention 188.
[59]Benjamin P A '*Review of Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives'* Human Sciences Research Council (2005) at 3 available at http://www.hsrc.ac.za/en/research-outputs/ktree-doc/1312 (accessed at 07 May 2019).
[60]Cornish M S*ecuring Sustainable Human Rights Justice for Workers* (2007) 1 available at http://www.cavalluzzo.com/docs/default-source/publications/securing-sustainable-human-rights-justice-for-workers-%28mary-cornish%29---human-rights.pdf?sfvrsn=0 (accessed on 07 May 2019).

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public and private employment services, by encouraging productive corporation between the two.[61]

The ILO regulations provide an avenue facilitating the harmonisation of labour brokers rather than its proscription. Hence, while the ILO requirements provide clear mechanisms to observe, in SA the labour regulations still make their way to cover all possible labour concepts.

It is a clear indication that SA is failing to uphold the international legal framework. Labour broking in SA has generated countless number of complaints to the established institutions, such as the CCMA, leading to court cases being dragged for years without yielding successful outcomes. As a result, it has brought key functions of important aspects of administrations to a standstill without fulfilling the purpose of their establishment.[62]

[61]ILO 'Employment for Social Justice and a Fair Globalization' available at *http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_140947.pdf* (accessed on 07 May 2019).

[62] Theto M ANC and unions welcome court ruling on labour brokers http//www.businesslive.co.za (accessed 20 October 2018).

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CHAPTER THREE

LABOUR BROKER IN SOUTH AFRICA

3.1 INTRODUCTION

25 years into democracy, and SA is still experiencing many social imbalances that are placing huge constraint on labour laws to cater for the entire labour force. Despite the availability of rigid labour regulations, capable of facilitating a balanced employment relationship between employers and employees, there are still wide-ranging disregards for legislation.[63]

The practice of labour broking in SA, although imbedded in legislation, remains a cause for concern. The growth of the population, the shortage of skilled labour, and the weakening of the economy are leaving labour regulation fragile. As much as political actors are being vocal on the matter, on ground level, there are not enough results because of lack of enforcement of regulation, such as the regulation of labour brokering.[64]

The labour broker, according to its design, is supposed to assist job seekers to access the workforce. However, in practice, it took a different path by operating as TESs, facilitating workers placement only where and when needed.[65] The result is the existence of a tripartite work relationship, consisting of the client (the company using the labour broker services), the employer (the labour broker) and the employee.[66] Trade unions and trade federation such as COSATU have for years manifested concerns over the use of labour brokering in SA, which concerns the 2014 amendments to the LRA only partially managed to answer.[67] Based on the growing number of complaints reported to be received by the Commission for Conciliation, Mediation and Arbitration (CCMA), there is an imperative to consider a proper enforcement mechanism.[68]

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[63] Maria-Stella V Alternative means to regulate the employment relationship in the changing world of work. (Unpublished LLD thesis, University of Pretoria, 2005) 86-380.
[64] Carin S 'Legal experts weigh in on labour broker ruling' available at https://www.fin24.com/Economy/legal-experts-weigh-in-on-labour-broker-ruling-20180727(accessed 06 May 2019).
[65] Rossouw JP, *Labour relations in education: a South African perspective* (2010) 56.
[66] Webster E and von Holdt K, *Beyond the Apartheid Workplace: Studies in Transition*, (2005) 88.
[67] Pretorius J.L, Klinck M.E and Ngwenya C.G, *Employment Equity Law* (2012) 101.
[68] Barrie T 'Unfairly dismissing the CCMA', *Mail & Guardian* (06 Nov 2008 06:00) available at https://mg.co.za/article/2008-11-06-unfairly-dismissing-the-ccma (accessed 13 June 2019).

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This chapter will consider the legislative framework in relation to labour brokering in SA and address the issue of whether to ban or continue to regulate labour brokers.[69]

3.2 THE LEGAL FRAMEWORK IN RELATION TO LABOUR BROKERS

The legislative framework on labour law in SA is predominantly made up of the following: The Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA); the Employment Equity Act 55 of 1998 (EEA); and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). The Constitution however remains the cornerstone of democracy in SA. It enshrines the rights of all the people of SA and, amongst others, affirms the democratic values of human dignity, equality and freedom.[70] The State must respect, protect, promote and fulfil the rights contained in the Bill of Rights (chapter 2 of the Constitution).[71] The Constitution also protects workers' rights, such as the right to strike. In terms of section 23, "everyone has the right to fair labour practices".[72] This must be read in conjunction with rights afforded to citizens generally such as, the rights to equality, privacy, dignity and life.[73]

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Since 1994, the increasing attraction of foreign investors has seen the establishment of numerous multinational companies in the country. With multinational companies, labour broker resurfaced in SA, which could be traced back to 1652 and the beginning of colonialism.[74] It is argued that slavery was the first form of labour brokering.[75]

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[69]Hastie L 'To Ban or not to Ban Labour Brokers in South Africa' (2011) 66 Creamer Media Reporter 325-405.
[70] Kalula E and Woolfrey D (eds) *The new labour market: Reconstruction, development and equality* (1995) 122.
[71] Chapter 2, Bill of rights of the Constitution of 1995.
[72] Chapter 2, Bill of rights of the Constitution of 1995.
[73]Employment Equity Act (EEA) [No. 55 of 1998], the Department of Labour, available at http//www.labour.gov.za/.../legislation/acts/employment-equity/employment-equity-act-and-a... (accessed 31 October 2018).
[74]Ntokozo M *A Dream of Azania1: Political and socio-economic struggles in post-apartheid South Africa* (2010) 26-103.
[75]Frederic B 'Convict Stations & Labour in the Cape Colony' *SAHOJ* available at https://www.sahistory.org.za/topic/convict-stations-labour-cape-colony (accessed 06 May 2019).

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3.2.1 Section 23 of the Constitution

The Constitution provides the foundation for all legislation that regulates labour relations in SA. Section 23(1) (2) (a) (b) (c) of the Constitution stipulates the following:

'(1) everyone has the right to fair labour practices;

(2) Everyone has the right;

(a) to form and join a trade union;

(b) to participate in the activities and programs of a trade union; and

(c) to strike.'

The issue of equality needs to be taken into consideration when one deals with the rights of employees. The Constitution makes the following provision in this regard in section 9 (1) (2) (3) (4) (5);

'(1) Everyone is equal before the law and has the rights to equal protection and benefit of the law;

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislation and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken;

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of section 9(3). National legislation must be enacted to prevent or prohibit unfair discrimination;

(5), Discrimination on one or more of the grounds listed in section 9(3) is unfair unless it is established that the discrimination is fair.'

Section 23 of the Constitution clarifies the entitlements of the workforce in SA in the same manner as the Universal Declaration of Human Rights (UDHR of 1948).[76] With the ILO's Private

[76]United Nations Universal Declaration of Human Rights of 1948.

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Employment Agencies Convention 181 of 1997 being sound, SA should see the possibility of incorporating the spirit of the international legal framework within the domestic mechanisms.[77]

3.2.2 Labour Relations Act 66 of 1995 (LRA)

The LRA aims to promote economic development, social justice, labour peace, and democracy in the workplace.[78] It provides mechanisms to facilitate the employment relationship between employer and employee.

Subsequent to 2014 amendments to the LRA, section 198(1) of the LRA now holds that a TES means 'any person who, for reward, procures for or provides to a client other person- (a) who perform work for the client; and (b) who are remunerated by the temporary employment service.' Furthermore, the LRA now provides that a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person's employer.[79] Section 198(4)(f) stipulates the following: '[n]o person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation, and the fact that a temporary employment service is not registered will not constitute a defence to any claim instituted in terms of this section or 198A. This section is however not operative yet, as the date of implementation of same must still be proclaimed.[80]

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In section 198(4) of the LRA it is stipulated that the TES and client are jointly and severally liable in respect of contraventions by the TES of conditions of service arising from collective agreements concluded at bargaining councils, rights as set out in the BCEA,[81] and arbitration awards that regulate terms and conditions of service.[82]

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[77] International Labour Organisation (ILO)'s Private Employment Agencies Convention, 1997 (No. 181), also called Convention C181.
[78] Kruger & Tshoose 'The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective' (2013) *AJO*L, N4, 487.
[79] Section 198(2) of the LRA.
[80] Section 198(4)(f) of the LRA.
[81] Basic Conditions of Employment Act 75 of 1997.
[82] Section 198(4) of the LRA.

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The contract between the TES and the employees is often made subject to the continuation of the commercial contract between the TES and the client.[83] The termination of the contract of employment on the ground that the client has terminated the commercial contract with the TES does not constitute dismissal.[84] Van Eck argues that 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.[85] Section 198A(3)(b)(i) of the LRA provides that an employee of a TES not performing a temporary service for the client is "deemed to be the employee of that client and the client is deemed to be the employer". There are two schools of thought over the interpretation and working of s 198A(3)(b)(i) of the LRA. The first is that once the deeming provision kicks in the client of the TES becomes the sole employer of the employees, meaning that the TES employees are effectively *transferred* to the client. The second is that a dual employment relationship arises with both the TES and client constituting the employer of the employee(s). It is submitted that section 198A(3)(b) of the LRA supports the sole employer interpretation.[86] Section 198A(3)(b)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client.[87]

TES is only intended to regulate those employees who are truly temporary in nature, such as standing in for another employee. In light of the *Assign* case, employers should be careful not to treat TES employees any differently or less favourably within the three month threshold, as this may essentially be seen as abuse of the TES system.

Along with numerous other changes, the LRAA amended section 198 of the LRA and introduced sections 198A to D, all dealing with the regulation of non-standard forms of employment, particularly TES workers, and fixed- and part-time employees. The amendments aimed at providing labour broker employees, employees employed on fixed-term contracts, and part-time

[83]van Eck (2010) 109.
[84]van Eck (2010) 109.
[85]van Eck (2010) 109 & *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (CCT194/17) [2018] ZACC 22; [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC) (26 July 2018).*
[86] NUMSA v Assign Services & Others (2017) 38 ILJ 1978 (LAC).
[87] Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others [2018] ZACC 22.

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employees' greater protection than that experienced before 2014. The new amendments called for the noble aim of (attempting) to provide vulnerable employees with better job security.[88]

Section 198A (1)(a) now stipulates that 'temporary service' means work done by an employee for a client for a period not exceeding three months.

Section 198B (3) states that an employer may only employ an employee on successive fixed-term contracts for longer than 3 months provided that the nature of work is of limited or definite duration, or the employer has another justifiable reason for the longer term.[89]

A key feature of the LRA amendments is that section 198B(8)(a) now provides for the equal treatment of employees employed on fixed-term contracts in excess of three months with employees employed on a permanent basis, unless there is a justifiable reason for different treatment as provided for in section 198D (2).[90]

3.2.3 Basic Conditions of Employment Act 75 of 1997 (BCEA)

The BCEA gives effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and providing for the regulation of basic conditions of employment thereby complies with the obligations of the Republic as a member of the ILO.[91]
In the event of TES, employees getting injured while on duty, the TES and the client are jointly and severally liable, in respect of any employee who provides services to the client.[92]

According to the BCEA, both the client and the TES will be held liable if they do not comply with the BCEA in providing employees with a safe working environment.[93]

3.2.4 Employment Equity Act 55 of 1998 (EEA)

[88] Marco S 'Fixed term employees – The new Labour Relations Amendment Act of 2014' (2019) 4-77 *Polity Media Report* available at https://www.polity.org.za/article/fixed-term-employees-the-new-labour-relations-amendment-act-of-2014-2015-09-04 (Accessed 13 June 2019).

[89] Marco S (2019) 4-77.
[90] Assign Services (Pty) Limited v NUMSA and Others (CCT194/17) [2018] ZACC 22; [2018] 9 BLLR 837 (CC).
[91] Basic Conditions of Employment Act (BCEA) 75 of 1997.
[92] Section 23 of the BCEA.
[93] Albertyn & McCann *Employment and Fair Labour Practice* (1993) 102.

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The purpose of the EEA is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups.[94] This Act provides for additional reporting requirements. Employers have the additional burden of submitting an Employment Equity Report annually to the Department of Labour (DoL). The provisions of the EEA cover both TES and client with whom employees are placed, in prohibiting all form of ill-treatment in the workplace.[95]

3.2.5 Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

The aim of COIDA is to provide for compensation in the case of disablement caused by occupational injuries and diseases, sustained or contracted by employees in the course of their employment, or death resulting from such injuries and diseases; and to provide for matters connected therewith.[96]

In the tripartite work relationship, every employee is considered to be executing a work task relative to their duty to fulfil the purpose of their employment. In so doing, it is required that the environment should be safe, meeting all the Occupational, Health and Safety Regulations criteria.[97]

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In *Crown Chickens (Pty) Ltd t /a Rockland Poultry v, Rieck 2007 (2) SA 118 (SCA)* the Court held the client liable for the damages that occurred in respect of the TES employees on duty at the client's premises.[98]

[94]Employment Equity Act 55 of 1998
[95]Pretorius, Klinck & Ngwenya *Employment Equity Law* (2012) 102.
[96]3.2.6 Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).
[97]Landis & Folster *Employment and the Law: Standard Operating Procedures and Policies* (2014) 85.
[98]Crown Chickens (Pty) Ltd t/a Rockland Poultry v Rieck (483/05) [2006] ZASCA 168; 2007 (2) SA 118 (SCA); [2007] 1 BLLR 1 (SCA) (28 September 2006).

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3.3 TO PROHIBIT OR TO HARMONISE (THROUGH REGULATION) LABOUR BROKERS IN SA

Based on SA's already fragile economy[99], tripartite forms of employment have become a fashion. Employers are opting for the procurement of workers through TES, which is seen as facilitating the administrative and LRA obligations imposed on employers. With the increasing unemployment rate, workers are desperate to secure any form of employment even on a temporary basis.[100]

TES relationships are criticised for placing the client in a preferential position of having no obligations towards the worker, and as a result, the rights enjoyed by the worker under the LRA are exploited. Because of these abuses, many jurists, along with some political actors, have been vocal in arguing for the abolition of TESs.[101]

In the matter of *LAD Brokers (Pty) Ltd v Mandla 2002 (6) SA 43 (LAC)*, it was however held that the TES employees are subject to the wage arrangement between the TES and the workers.[102] The Court nevertheless held that though the TES is fully responsible of the workers, the TES and the client are jointly and severally liable if the TES contravenes a bargaining council agreement regulating the terms and conditions of employment; an arbitration award; the BCEA; or a sectoral determination. The outcome of this matter is important as it generates the potential liability of clients and obligates them to uphold the workers' rights.[103]

As mentioned the benefit of a TES is that it offers labour to clients without the obligations imposed on employers by the LRA. Yet the issue remains that workers are placed in a vulnerable position and without suitable job security. Moreover, workers employed under a TES will rarely integrate

[99] National Treasury, *National Budget Review 2019* available at http://www.treasury.gov.za/documents/national%20budget/2019/review/Chapter%202.pdf (Accessed on 11 May 2019).

[100] Benjamin P, *To Regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia' in Malherbe K & Sloth-Nielsen J* (eds) (2012) 55.

[101] Hastie L 'To Ban or not to Ban Labour Brokers in South Africa' (2011) 101 *Creamer Media Reporter 325-405*

[102] LAD Brokers (Pty) Ltd v Mandla 2002 (6) SA 43 (LAC).

[103] Gqubekha T 'Labour brokers solutions in the South African marketplace' (2009) 87 *Academic Research Platform* 722.

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into trade unions as they are not active in a particular industry long enough to categorise themselves, which significantly diminishes their bargaining power. However, with new amendments, labour legislation seeks to establish parameters to re-install human dignity.[104]

Section 185 of the LRA provides employees with the right not to be unfairly dismissed. This is another complexity that surrounds TES employees. A dismissal occurs where a TES terminates a contract of employment without a fair reason or process, where the client terminates its service with the TES. Consequently, the accountability measures regarding the clients are challenging, because of the client's unilateral conduct in terminating the contract with the TES, leaving the TES with no option than to dismiss the workers. These loopholes create a space for exploitation of employees' rights, as the client may dismiss without consequence.

In *SACCAWU v Primeserv, ABC v Recruitment Ltd 2007 (1) BLLR 78 (LC)* and *the SACCAWU obo Bongumusa Mvuyana and 14 Others V Oyster Box Hotel (Pty) Ltd (2018) D711/07 (LC)* the Labour Court established the responsibility imposed on a TES regarding their workers.[105] The Court held that a TES is not freed from its obligation to observe fairness to employees even while the contract if the client is ending. Hence, the TES and the client are still required to comply with the provisions of the LRA with regards to substantive and procedurally fair dismissals.[106]

While TES are still provided for in the LRA, the topic remains the subject of debate that ranges from the abolition to the regulation thereof. The Namibian Supreme Court of Appeal (NSCA) previously in the matter of *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others (SA 51/2008) [2009] NASC 17 (14 December 2009)* held that banning TESs is unconstitutional, as such a decision lack proportionality and rationality.[107] Regulating TESs based on constitutional mandates would be more favourable.[108]

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[104] Convention 111 of 1958 to fight Discrimination in Employment & Occupation.
[105]SACCAWU v Primeserv, ABC v Recruitment Ltd 2007 (1) BLLR 78 & SACCAWU obo Bongumusa Mvuyana and 14 Others V Oyster Box Hotel (Pty) Ltd (2018) D711/07 (LC).
[106] Hastie L 'To Ban or not to Ban Labour Brokers in South Africa'(2011) 112*Creamer Media Reporter* 325-405.
[107]Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others (SA 51/2008) [2009] NASC 17 (14 December 2009).
[108]Lagrange P 'The Namibian jurisprudence on labour brokers' (2009) 42 *NHSR*.

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3.4 CONCLUSION

The SA labour market is by far the most regulated on the continent.[109] Based on the hostile history of the country, the legislature has taken precautionary measures to regulate the key features of the labour market in order to avoid any form of exploitation. However, with the globalisation phenomenon, some economic entities, mostly in the private sector, have resorted to making use of the TES because of the cost-effective mechanisms.[110] With the already fragile SA economy, the labour broker process has proved to be helpful for some companies because of exemption of the obligations of the labour regulations. Nevertheless, with the increasing number of complaints from employees regarding unfair labour practice, discrimination in the workplace, the lack of job security, etc., the matter became a manifesto of some political coalitions and trade unions to seek a complete abolition on labour brokers.[111]

Upon the submission of several amendment proposals, the 2014 LRA amendments brought clarity where tensions were created in the labour market. The confusion that surrounded the definition of employer in the tripartite work relationship, as well as the question of liability in the labour employment conflicts between the TES, the client and the employees, were finally clarified.[112]

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In the aftermath of the clarification of the legal obligations and status as employers of TES's, SA now has the task to establish how Government, together with the other stakeholders, should challenge the ever-increasing rate of unemployment, especially amongst the youth.

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[109] Bendix S, *Industrial Relations: A Southern African Perspective* 6th ed (2015) 88.

[110]Fourie ES 'Non-standard workers: the South African context, international law and regulation by the European Union' (2008) *ARTICLES PER vol.11 n.4 Potchefstroom* available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812008000400005(accessed 07 May 2019).

[111]Barker FS & Holtzhausen *South African Labour Glossary* (1996) 95.

[112]Landis H and Grossett L *Employment and the Law: A Practical Guide for the Workplace* 3rd ed (2014) 73.

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CHAPTER FOUR

LABOUR BROKERING IN NAMIBIA

4.1 INTRODUCTION

Similar to the position in SA, trade unions in Namibia emphasise the promotion and protection of decent employment within the country.[113] In Namibia, labour brokering is generally called 'labour hire' while in SA, they are generally referred to as Temporary Employment Services (TES). Despite being termed differently, the nature of the practice remains the same.

In spite of opposition to the practice of labour hire, particularly by trade unions, the Constitution of Namibia of 1990 has paved a way for the practice to be used. [114] This means that the trade sector can make use of labour hire as long as it falls within legislative confines.

Section 21(1) (j) of the Namibian Constitution provides that 'all persons shall have the right to: practice any profession, or carry on any occupation, trade or businesses'. Apart from section 21(1) (j) of the Constitution, the Labour Act 11 of 2007, Employment Service Act 8 of 2011 and the Labour Amendment Act 2 of 2012 are the pieces of legislation that deal with labour hire in Namibia. Section 128 of the Labour Act banned the practice of labour hire; where after sections 6 and 7 of the Labour Amendment Act of 2012 reinstated the practice following the Supreme Court's (SC) decision in the matter of African Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others (2009) NASC 17 (the APS case).[115]

This chapter will examine labour hire in Namibia, with a special emphasis on the growth of the practice in the country. The controversy over the practice and the contributions by trade unions to the debate, who largely advocated for the abolition of the practice, will also be discussed. The impact of the practice on the Namibian economy and the legislation that deals with the issue will also be discussed.

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[113] Jauch H *Namibia's Labour Hire Debate in Perspective* (2010) 102.
[114] Section 21(1)(j) of the Constitution of Namibia of 1990.
[115] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* Case (2009) NASC 17.

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4.2 HISTORY OF LABOUR HIRE IN NAMIBIA

During the early 1990s, with the gaining of independency by Namibia, there emerged new forms of labour practice such as labour hire.[116] Labour hire encompasses the supply of employees for short or extended periods for the client company.[117]

Labour hire emanated from the apartheid era when Namibia was still part of SA. Labour hire is said to have its roots in historic slave practices, where slaves were contracted to work for colonial masters through the assistance of an intermediary.[118] In most instances, the intermediary was either a third party from the colonialists or a Black individual. The practice became the norm because of the apartheid policies that were in place at the time.[119] Labour hire however continued to exist in the post-apartheid Namibia and SA.[120]

Labour hire would supply mostly unskilled and semi-skilled workers to client companies in various industries, including mining, fishing, and retail.[121] As the practice evolved, the demand for such services in Namibia increased, with labour hire also subsequently employing skilled and highly educated staff for companies that required such employees both in the civil and corporate spheres.[122]

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4.3 LEGISLATIVE REGULATION OF LABOUR HIRE IN NAMIBIA

Because of the challenges surrounding the labour hire operations in the tripartite work relationship, it is imperative to look at how labour hire is regulated in Namibia. This will be done by considering relevant legislation as well as the findings of the Namibian Supreme Court (SC) in the APS case.

[116]Jauch H *Confronting Outsourcing Head On? Namibia's Ban On Labour Hire In Perspective* (2009) 50.
[117]Jauch H (2009) 55.
[118]van Eck BPS ‘Temporary Employment Services (Labour Brokers) In South Africa and Namibia’(2010) 13 (2)*PELJ*108.
[119]*Africa Personnel Services* para 7–8.
[120]*Africa Personnel Services* para *7–8.*
[121]Benjamin P, *Untangling the Triangle: The Regulatory Challenges of Triangular Employment* (2008) 75.
[122]*Africa Personnel Services* para 9.

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4.3. 1 Section 21 (1) (j) of the Constitution of Namibia

The Constitution of Namibia, the supreme law of the country, provides guidelines governing all State apparatus as well as civil society.
Section 21 (1) (j) states: *'All persons shall have the right to; practice any profession, or carry on any occupation, trade or business.'* This component of the Constitution clarifies the freedom of choice regarding the nature of employment.

Namibia being a member state of the United Nations (UN) has incorporated the Declaration of Human Rights (UNDHR) and the ILO framework within the Constitution. Therefore, it is imperative to ensure its enforcement in the trade sector for the viability of an equitable working relationship.

4.3. 2 Labour Act 11 of 2007

The Act defines an employer as 'any person, including the State who[123]

(a) employs or provides work for, an individual and who remunerates or expressly or;
(b) tacitly undertakes to remunerate that individual or;
(c) permits an individual to assist that person in any manner in the carrying or, conducting that person's business.'

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This Act, in simple language, clarifies the concept of employer and attempts to avoid the confusion arising in the tripartite work relationship regarding the role of the client and the labour hire.

According to section 128 of the 2012 Labour Amendment Act 'no person may, for reward, employ any person with the view of making that person available to a third party to perform work for [that] third party.'[124] The prohibition does not apply to job agencies, which, unlike labour hire companies, are only involved in 'matching offers of and applications for employment.' Violation

[123]Section 1(1) of the Labour Act 11 of 2007.
[124] Section 128 the Labour Amendment Act 2 of 2012.

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of the provision on labor hire will entail a fine in the amount of N$80,000 (about US $7,785) and/or imprisonment not exceeding five years.[125]

Section 128(4) of the Act stipulates the following: 'It is an offence for an employer to - (a) fail to comply with subsection (1) or (2); or (b) intentionally make a false entry in a record or submission made in terms of this section.' This statement does acknowledge that section 128 is not in accordance with section 21(1) (j) of the Constitution, which promises fundamental freedoms. The section holds that these restrictions are necessary in the interests of decency and morality, and section 21(2) of the Constitution allows such restrictions.

4.3. 3 Employment Services Act 8 of 2011 (ESA) compared to SA

The ESA terms labour hires as private employment agencies. A private employment agency is defined as any natural or juristic person, except the State, that provides the labour market services by means of matching offers of and applications for employment, without them becoming a party to the employment relationship, and other services such as providing information to job seekers.[126] Private employment agencies are not permitted to charge a fee from persons looking for jobs and any person who fails to comply may be fined N$ 20 000 or sentenced to imprisonment for a period not exceeding two years or both. Moreover, this Act serves to provide for the establishment of the National Employment Service; to impose reporting and other obligations on certain employers and institutions, to provide for the licensing and regulation of private employment agencies; and to deal with matters incidental thereto.[127]

In addition, part IV of the ESA, which came into force on 1 September 2012, regulates the mechanisms to facilitate the well-functioning for labour hire as per the international legal framework.[128]

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[125] Goitom H, *Labour Law in Namibia* (2008) 139.
[126] Moima S.N. 'Agency work in Namibia and South Africa: Legal comparison and appraisal of compliance with international norms' Research Paper, Faculty of Law, University of Pretoria, 2017.
[127] Employment Services Act 8 of 2011, Parliamentary comments, 2017-2019, available at www.parliament.na (accessed 17 January 2019).
[128] Anri B *The history of labour hire in Namibia: a lesson for South Africa LLM* (NWU Junior Lecturer at the Faculty of Law, North-West University 2010) 119.

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4.3.4 Labour Amendment Act 2 of 2012 (LAA)

The LAA came into effect on 1 August 2012. The SC in the *APS case,* which will be discussed below highlighted the importance of regulating the labour hire market, rather than banning the operations of labour hire agencies. The new section 128 of the LAA regulates the employment relationship in the context of labour hire. The following are the new additions to section 128:

(a) An organisation that uses employees placed by a private employment agency, including a labour hire agency, assumes all obligations of an employer for these employees.

(b) Employees placed with a user enterprise have the right to join trade unions and to bargain collectively with the private employment agency's client or receiving enterprise.

(c) Employees placed by a private employment agency with a user enterprise 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; An employee who is placed by a private employment agency with a receiving enterprise has the same rights and duties in relation to the receiving enterprise as any other employee in relation to his or her employer, including for example, the guarantee of basic conditions of employment, of safety and health at the workplace, and protection against unfair dismissal.

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(d) A receiving 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.

Section 128A is a new addition to the Labour Act which stipulates that a person who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, as long as:

(a) The person's job is subjected to the control or direction of another person.

(b) The person's hours of work are subjected to the control or direction of that other person.

(c) The person has worked for that other person for an average of at least 20 hours per month over the past three months.

(d) The person is economically dependent on that person for whom he or she works or renders services.

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(e) The person is provided with tools of trade or work equipment by that other person.

(f) The individual only works for or renders services to that other person.[129]

4.3.5 *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia*: a turning point on labour hire in Namibia.

In the matter of *APS*,[130] African Personnel Services applied to the Supreme Court (SC) of Namibia to challenge the constitutionality of section 128 of the Labour Act of 2007, which outlawed labour hire as a practice in Namibia.[131] Section 128 of the Labour Act of 2007 stated: '1. 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. 2. Sub-section (1) does not apply in the case of a person who offers services consisting of matching offers of applications for employment without that person becoming a party to the employment relationship that may arise there from.'

APS was of the view that section 128 infringed on its right to carry on a trade, which right is enshrined in section 21 (1) (j) of the Namibian Constitution. The issue was, whether section 128 was in violation of APS's constitutional right. In addressing this issue, the SC considered the history of labour hire in Namibia. It was traced back to the Roman law where 'the only other form of hiring or letting labour under Roman law was slavery, where the slave was the possession of its owner. A slave could be the object of a *locatio conditio rei*, and as such be hired out and be *locatio conductio operas (faciendi)* – the independent contractor.'[132]

The Court argued that Roman law recognised slavery of persons who were not Roman citizens and as such, persons (slaves) could be hired or rented to another person for whom the slaves performed

[129] Section 128 A of the LAA of 2012.
[130] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51/2008) [2009]. NASC 17.
[131] Act 11 of 2007.
[132] Power, C. 2002. 'Labour hire: The new industrial law frontier'. *Law Institute Journal*,76, 6 (July):64.

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a personal service.[133] In the context of slavery under Roman law, the Court held that renting out of employees to another person, for reward; fell outside the law of contract of employment.[134]

The Court then proceeded to discuss the legal basis for the practice of labour hire. In its examination of common law, Judge Parker held that common law recognizes only one labour contract: that of the rendering of personal service by the *locator operarum* (servant) to the *conductor operarum* (master).[135]

The Court then addressed section 21(1) (j) of the Namibian Constitution, which protects the right of parties to practice a trade of their choice. The court held that this practice constituted a trade, which had to fall within the ambit of the law.

In conclusion, Judge Parker held that labour hire was not lawful in Namibia because it had no legal basis in Namibian labour law. First, because section 128 of the primary legislation (the Namibian Labour Act 11 of 2007) banned the practice, and secondly, on the basis that employment contracts are based on Roman law[136], i.e. 'the letting or hiring of personal services in return for monetary profit.'[137]

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The SC specified that one could not instantly determine that section 21 was not relevant to trades that were statutorily prohibited. According to the SC, this conclusion would have been settled if it would define that, the prohibition also fell inside the realm of section 21(2) of the Constitution. Consequently, the interrogation had to take place if the said prohibition infringed a fundamental constitutional right, such as the right protected by section 21(1) (j). Upon an affirmative answer, it had to be proven that the prohibition explicitly fell within the ambit of section 21(2). If not, the limitation of the right would deem to be unconstitutional, resulting in section 21 becoming applicable to the business in question. The Court afterwards held that the prohibition of labour hire

[133]Jauch H (2000) 70.
[134]Jauch H (2000) 70.
[135]*Africa Personnel Services* NASC 37.
[136]*Africa Personnel Services* NASC 43.
[137] Parker, Ndauendapo & Swanepoel 'African Personnel Services v Government of Namibia and Others, decided on 1 December2008. Case No. A4/2008. Commentaries.' *Law Institute Journal*, 86, 7 (Dec):77.

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did not fall within the ambit of section 21(2), meaning that APS could claim the right embedded in section 21(1) (j).[138]

APS had the onus to show that section 128 infringed its right in terms of section 21(1) (j). It established that if the prohibition could be affected, its operation as a business entity would have ceased. The Court found that, sufficient proof of the infringement was present. It was then imperative to determine the constitutional justification of such limitation. This would be done through proving that the limitation met the standards set out in section 21(2).

The focus of the Court nonetheless, was on the main requirements of 'proportionality' and 'rationality'. The words 'reasonable', 'necessary' and 'required' established the understanding of these requirements.[139] To find proportionality, the relevant interests in conjunction to the requirements had to be balanced. The reason for the limitation should compensate the right itself to prove the infringement.[140] The limitation should lastly have the purpose of reflecting the objectives set out in the preamble of the Namibian Labour Act of 2007.[141]

The Supreme Court clarified that the vital objective of the 2007 Labour Act was the provision of fair labour practices for the wellbeing of Namibian citizens. Another opinion to consider was that these objectives reflected the constitutional aims, grounded in decency and morality. The Court then deliberated that the ban of labour hire was essential for attaining decency and morality. It indicated that section 128 was framed so broadly; that the ban would not affect labour hire only but also banned all types of non-conforming employment. This was inconsistent and irrational, and did not serve any effective purpose.[142]

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[138] Anri B *The history of labour hire in Namibia: a lesson for South Africa* LLM (NWU Junior Lecturer at the Faculty of Law, North-West University 2010) 101.
[139] Anri B 'The history of labour hire in Namibia: a lesson for South Africa' (2013) *Potchefstroom Electronic Law Journal* PER vol.16 n.1 available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812013000100017 (accessed 07 May 2019).
[140] Power, C. 2002. 'Labour hire: The new industrial law frontier'. *Law Institute Journal*, 76, 6 (July):64.
[141] Anri B Anri B 'The history of labour hire in Namibia: a lesson for South Africa' (2013*) Potchefstroom Electronic Law Journal* PER vol.16 n.1 available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727- 37812013000100017 (accessed 07 May 2019).
[142] Anri B 'The history of labour hire in Namibia: a lesson for South Africa' (2013) Potchefstroom Electronic Law Journal PER vol.16 n.1 44/77 4.

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As the International Labour Organisation (ILO) permits labour hire through the enactment of appropriate legislation, the Court decided that the ban was not necessary to achieve decency and morality. The Court stated that to address the problems triggered by labour hire in the most concise way, thus, the ban was measured to be inconsistent. The limitation did not fall within the realm of section 21(2). The Court held that section 128 was broadly framed and did not inflict a sensible limitation on the right contained in section 21(1) (j) of the Constitution. It thus held that section 128 of the 2007 Labour Act was unconstitutional, with the result that APS prevailed.[143]
After the Supreme Court's judgment, the Ministry of Labour and Social Welfare started drafting new legislation to regulate labour hire. Upon meeting with ILO experts, the Government issued position papers allowing several possibilities to legalise labour hire. In April 2012, the Namibian government promulgated the LAA, which came into force on 1 August 2012.

4.4 CONCLUSION

Considering the historical fact that most African people were subjected to slavery in general, particularly Namibian citizens during the apartheid era, it is fitting to look at ways in which to protect the working class. The nature of the tripartite work relationship, having its source in Roman law, could not stand the test of time within the current marketplace. Therefore, there was an imperative need to harmonise the operations of labour hire in accordance with the ILO requirements.

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The labour brokering industry in Namibia provides work for a significant number of workers.[144] The banning of the industry could have affected the employment rate drastically.[145] For this reason alone the finding of the SC in the *APS that* the banning of labour hire would not be in accordance with the Constitution and the international legal framework was welcomed.[146]

The power granted to the ESA to issue fines up to N$ 20 000 or sentencing to imprisonment for a period not exceeding two years, or both, for failure to comply with its regulations is an approach

[143] Anri B (2013) 123.
[144] Nghiishililwa F 'The banning of labour hire in Namibia: How realistic is it?' (2009) 1(2) *NLJ* 94.
[145] Nghiishililwa F (2009) 94.
[146] Nghiishililwa F (2009) 94.

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SA could adopt to enforce the compliance to the labour legislation.[147] Further, the Namibian LAA of 2012 in s 128(a) states: "An organisation that uses employees placed by a private employment agency, including a labour hire agency, assumes all obligations of an employer for these employees". This requirement will cease the confusion arising within the TES in SA. With the countless amount of cases being reported to the CCMA, it shows the discrepancies happening within the TES's.[148] Furthermore, the Namibian approach is more engaging in terms of aligning all stakeholders from the perspective of observing human rights mechanisms.[149]

[147] ESA of 2011 of Namibia in comparison to SA.
[148] Section 128 (a) of the LAA of 2012 of Namibia, very tangible to SA.
[149] Jauch H, *Confronting Outsourcing Head On? Namibia's Ban on Labour Hire In Perspective* (2009) 95.

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CHAPTER FIVE

LABOUR BROKERING IN THE NETHERLANDS

5.1 INTRODUCTION

In the Netherlands, labour brokers are called 'temporary work agencies' and the employees are called 'temporary agency workers.'[150] Since 1995, there has been a rapid increase in the number of temporary agency workers by 40%. During the same period the number of temporary jobs in full time equivalents increased by 50%.[151] This is indicative of an increase in the flexible jobs market, also called flexibility in the labour market, in the Netherlands.[152]

In the Netherlands, the practice of temporary work is regulated by several pieces of legislations, viz, the Temporary Agency Work Act of 1965 (TAWA); the Temporary Placement Act of 1991 (TPA); the Act of Allocation of Employees by Intermediaries Act of 1998, also called (WADDI); and the Flexibility and Security Act of 1999 (FSA).

The above pieces of legislations each deal with different aspects of temporary work in the Netherlands, including, protection of temporary work agencies and temporary workers, security for temporary workers, flexibility for the clients of the temporary work agencies, and profits for the temporary work agencies.

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The Netherlands is one of the countries where the practice of labour brokering is long established, and as such, it has a wealth of experience in this field. Regarding work agencies' profit, the Netherland legislature has managed to establish transparency in directing it towards economic growth.[153] SA can learn from the Netherlands how to regulate the labour brokering mechanisms according to different parameters affecting the industry.

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[150]van Ginkel MA et al (2002) 3.
[151]van Ginkel MA et al (2002) 3.
[152]van Ginkel MA et al (2002) 3.
[153]Clauweart, S. *Survey of Legislation on Temporary Agency Work. European Trade Union Institute, Brussels* (1999) 105.

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This chapter will discuss the legal framework regulating labour brokering in the Netherlands, highlighting the fundamental pieces of legislation on the practice of temporary work with special emphasis on flexibility and security, equal pay for equal work value, and the entitlement of profit for work agencies.

5.2 LEGISLATIVE FRAMEWORK FOR THE NETHERLANDS

Legislation on temporary work in the Netherlands dates back to 1965, five decades earlier than the introduction of legislative intervention on this issue in both Namibia and SA. The Netherlands legislature's understanding of the importance of a balance in the employment relationship resulted in the introduction of legislative regulation of the prominent aspects of flexibility versus security, equal pay, and profits for work agencies for economic equitability purposes.

5.2.1 Flexibility and security

Coming into force in January 1999, the Flexibility and Security Act of 1999, (FSA) is the result of tireless work to decrease unemployment by introducing more flexibility into Dutch labour law. In the 1980s, the Netherlands underwent a period of high unemployment and stagnation in economic growth. During the 1990s, there was an improvement in the Dutch economy and the unemployment rate dropped to 3.4%. This improvement can be ascribed to an array of factors, including the drop in tax rates, reasonable wage demands, increased disability benefits that could cover unemployment, and a rising rate of part-time work.[154] The FSA is regarded as having played an integral part in these positive developments.

The FSA intervenes in the regulation of temporary work services as guaranteed in the Temporary Agency Work Act of 1965 (TAWA). According to the TAWA, temporary workers are granted social security under the Unemployment and Disability Act of 1989 (UDA).

In terms of the FSA, flexibility is established for the client of the temporary work agency. It ensures that there is no responsibility on the part of the client during the termination of the employment contract entered to with the client as per the prerogatives of the TAWA.[155]

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[154]Clauweart S. (1999) 112.
[155]Clauwaert S, *Survey of Legislation on Temporary Agency Work* (2012) 45-96.

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According to the TPA of 1991, employers are guaranteed security, prohibiting workers from entering into employment with another employer during a placement; and ensuring that the work will be available for the duration of the contract. This differs from SA where the contract could be terminated anytime, pending the client's satisfaction with the employee's performance.[156]

5.2.2 The Allocation of Employees by Intermediaries Act of 1998

The Netherlands is a forerunner with regard to legislation in respect of temporary agency work. A focus in the legislation is the Collective Labour Agreement (CLA), which is a collective agreement between employers and trade unions regarding wages and other conditions of employment. The government is not a party to this agreement. In 1971, during the first CLA, discussions led to the improvement of the allocation, compensation and safeguard of temporary agency workers and the human resource management function of temporary work agencies.[157] The CLA partners, due to the influx of migrant workers, have begun initiatives with the government to comply with systems directed at enforcing better working conditions and more action against non-conforming agencies.

Based on WADDI, proper mechanisms were established and employees were guaranteed job security, and the use of agency work to replace workers on strike was prohibited. In the same view, the Flexibility and Security Act of 1999 further granted workers security by ensuring that temporary employees have the same rights as permanent workers. The Flexibility and Security Act of 1999 does establish a safe working environment and a proper working relationship for temporary agency workers.[158]

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5.2.3 Equal pay for work of equal value

Equal pay for work of equal value is a mechanism signifying the equitable treatment of employees no matter the nature of the employment contract. The TAWA expressly provides that workers on temporary basis must be given the equivalent treatment in terms of wages as permanent employees or as for similar jobs in the receiving enterprises.[159]

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[156] Cornish M, *Securing Sustainable Human Rights Justice for Workers* (2007) 237.

[157] Grünell & Beltzer *Temporary agency work and industrial relations; the Netherlands. HIS*. (1999) 87.

[158] Grünell & Beltzer (1999) 95.

[159]Moolenaar D *The Dutch Market for Agency Work* (unpublished PHD thesis, Amsterdam University, 2002) 104.

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The principle of equal pay for work of equal value seeks to eradicate discrimination in the workplace. This differentiation in pay based is listed in the Dutch Equal Treatment Commission (ETC) Regulations since 1994 and other international legal frameworks.[160] The ETC requirements prohibits unfair discrimination in any employment policy or practice, on one or more of the grounds listed in the section, or on any arbitrary ground. These grounds include, for example, race, gender, age, language and sexual orientation.[161]

This principle contributes towards eliminating the inferiority complex between temporary and permanent employees. This principle only applies when the employees perform the same duties. The transparency of this principle led it to be inserted into the WADDI of 1998.[162]

5.2.4 Work agencies and profits

As regards to work agencies and profit, the TAWA obliges temporary work agencies to become licensed before trading. However, the TPA of 1991 allows the temporary work agencies to make profits just like any other economic entity.[163] In the same process, the work agencies' operations have to be conducted with transparency, in complete observation of the legal framework, and enable the government to address and correct any mischief that may occur in the running of their businesses.[164]

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5.3 CONCLUSION

The labour brokering market in The Netherlands is more developed than in SA. The Netherlands has demonstrated a complete inclusion of human rights in the labour legislation, in creating a fair and equitable work environment that banishes all sorts of injustices that may occur in the process.

Both SA's and Namibia's labour legislations arguably continue to fail in providing well-balanced mechanisms capable of guaranteeing a sound working environment for labour broker employees as well.

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[160] Janny, Dierx & Rodrigues 'The Dutch Equal Treatment Act in theory and practice.' *Errc journal* available at http://www.errc.org/ (accessed 07 May 2019).
[161] Grünell, M., and R. Beltzer (1999) 99.
[162] Grünell, M., and R. Beltzer (1999) 103.
[163]van Ginkel MA et al (2002) 8.
[164] Grünell, M., and R. Beltzer (1999) 112.

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In addition, the SA administration should consider standardizing labour brokers' operations in terms of the deductions made from employees. With a view to creating a social security environment in the workplace, labour brokers should be ordered to establish provident funds, medical aids and others social benefits coming with employment. This may address COSATU's concerns that the relationship between workers and labour brokers is one that is based solely on the 'commercial rationale of using labour brokers to lower costs for clients, which is commonly achieved by reducing wages and excluding employment benefits'.[165]

[165]Craven P (2009).

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CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 CONCLUSION

Embedded in several key ILO Conventions, labour brokering is a practice recognised worldwide. With SA, Namibia and the Netherlands all members of the ILO, the full application of the international legal framework is paramount.

SA legislation continues to struggle to establish comprehensive regulation of TESs. In practice, legislation on TESs lacks the rigidity to effect compliance by all the stakeholders. The legislation in place has not done enough to ensure that the practice safeguards the interests of the stakeholders. Although the Constitution and the LRA acknowledge the practice of labour brokering in SA, legislative regulation of these practices remains too broad.

The onus rests on the State to ensure that the regulation of labour brokering is fair and that it provides a balanced employment relationship in the tripartite employment situation. The State has to create a conducive atmosphere to benefit all the stakeholders. Labour law, through regulation, in the 21st century will continue to strive for a fair balance relationship between employers and workers. The contending rights and interests of protecting workers against the unfair exercise of employers' superior economic power, by promoting collective bargaining, and regulating basic conditions of employment, will remain the focus of labour law.[166]

Labour law, just as any other law domain, has a mandate to motivate economic development, social justice, labour peace, harmonisation, and the democratisation of the workplace.[167] With labour brokering becoming a prominent role-player in the economy, in addition to facilitating

[166]Yvonne, Joubert, & Loggenberg II 'The impact of changes in labour broking on an integrated petroleum and chemical company.' (2017) *ActaCommer*. vol.17 n.1, 22/103 14.
[167]Section 1 of the Labour Relations Act.

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employment creation, training workers and assisting businesses to optimise their operational design, there is a need to harmonise labour brokering's contribution into the labour mechanisms[168]. In comparison with Namibian labour law, which created an interesting balance in the tripartite employment relationship in the *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* case,[169] ambiguities were cleared in the matter, providing the labour brokering with decent employment regulations to observe. Nevertheless, the situation is still experiencing a mist of misunderstanding that requires the regulating authority to be hands-on in attempting to avoid all forms of abuse.[170]

The situation in the Netherlands differs from that of Namibia. In the Netherlands there are specific Acts that explicitly deal with the practice of temporary work. These Acts ensure the safeguarding of the interests of the tripartite arrangement in the employment relationship. In the process it guarantees the employer that employees will honour their contracts, eliminating the stress of searching for, and training, new employees. For the employee there is the benefit of job security and non-discrimination in terms of rights between the employee of a temporary work agency and an employee directly in contract with an employer.[171]

When considering the vast experience of the Netherlands and the fair mechanisms established by Namibia, SA can learn several lessons from these two countries.

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6.2 WHAT CAN SA LEARN FROM NAMIBIA AND THE NETHERLANDS?

In SA, a total ban on labour brokering could have negative consequences for the country, where a decline in labour market flexibility could see employers moving toward increased mechanisation and capital intensive production methods, at the expense of job creation. As was seen in Namibia, such ban could however give rise to constitutional challenges. In the *Africa Personnel Services* case, the Supreme Court of Namibia held that a blanket approach to banning labour brokering was

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[168]If there were no need for the labour brokers, they would not have evolved or survived in the marketplace. It is submitted that labour law can balance the opposing rights of workers and employers in this area of labour broking.
[169]Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others (SA 51/2008) [2009] NASC 17 (14 December 2009).
[170]Anri B 'The history of labour hire in Namibia: a lesson for South Africa' (2013) *Potchefstroom Electronic Law Journal* PER vol.16 n.1 44/77 4.
[171]Janny, Dierx & Rodrigues 'The Dutch Equal Treatment Act in theory and practice.' *ERRC journal* available at http://www.errc.org/ (accessed 07 May 2019).

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a disproportionate and unconstitutional response to the abuses associated with labour hire. The court found that the prohibition violated the constitutional rights of labour hire firms to conduct businesses.

Given the fact that the Constitutions of SA and Namibia, as well as labour legislation of the two countries are quite similar, a total ban of labour brokering in SA is likely to be faced with the same downfall, as was the result in Namibia.

Given the aforesaid, it is important to consider other ways to address the issue, as is the case in the Netherlands. For example, having dedicated legislation that addresses labour brokering similar to that found in the Netherlands where there are several Acts that deal with each aspect of labour brokering. Though this issue is now provided for in section 6(4) of the EEA and section 198A (5) of the LRA in SA, legislation governing labour brokering should comprehensively provide for equal pay for work of equal value.

6.3 RECOMMENDATIONS

For to the reasons given above a ban on labour brokers should best be avoided. Further, SA could benefit from enacting legislation that will deal with issues related to labour brokers specifically. Such legislation should create an association that will govern the industry and that will self-regulate labour brokers in conjunction with the Department of Labour. Legislation should also provide for the registration of labour brokers who will need a licence in order to operate as per the requirements of Employment Services Act Draft Regulations 2018. The labour broker must renew the licence each year after providing evidence of a well-operated entity. Given their controversial nature, it is not advisable to leave labour brokers to regulate themselves. The envisioned regulation should establish a regulatory body comprised of the government and all the stakeholders in the industry viz are employers and labour representatives..

This co-regulation should benefit all in ensuring that the needs of all stakeholders are met. The recommended Act of Parliament should provide for the regulatory body for labour brokers to safeguard the operations of the industry. Further to sections 198A to 198D of the LRA, labour broking legislation must also clearly distinguish between different categories of workers, i.e., part-time workers, fixed time workers and on-call contracts.

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The pay rates for part-time workers must be fair in relation to those of full-time workers, and they must have access to training and development, thus ensuring no less-favourable treatment.

The recommended legislation must prevent labour brokers from charging workers any fees. Labour brokers must remunerate employees placed at a company the same as the permanent employees of the company. The principle of equal pay for work of equal value must be actively enforced. In the event where it is impractical to provide fringe benefits for employees of labour brokers, the employer must pay the same value of the fringe benefits to the employee from labour brokers on a pro rata basis.

The fees that a labour broker charges their clients for providing them with workers need to have a maximum ceiling. The law should also provide consequences for not abiding with the law, in the form of a fine or prison sentence or both.

TES employees' grievances must be referred to a regulatory body that must resolve them within a reasonable period of time, which must not exceed a month. In the event that the regulatory body does not resolve the matter within the designated time, the employee may refer the matter to the CCMA or Labour Court. This is an attempt to ensure speedy resolution of all complaints laid against labour brokers.

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In conclusion, there is a big responsibility on the State to make efforts to introduce innovative ways to regulate the labour broker industry to improve its trading mechanisms for the benefit of all three parties to a TES agreement, that is, employer, employee and client. While the 2014 amendments to the LRA, specifically as far as section 198 and the inclusion of sections 198A to 198D are concerned, is welcomed, further detailed and innovative legislative regulation is still required.

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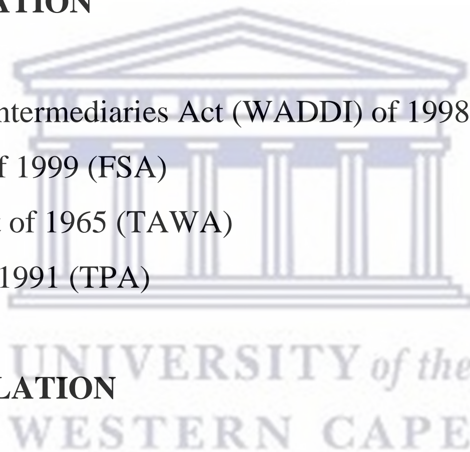
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