

The Constitutionality of the contracts of labour brokers in South Africa

by

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LIST OF ABBREVEATIONS

BCEA	<i>Basic Conditions of Employment Act 75 of 1997</i>
CCMA	Commission for Conciliation Mediation and Arbitration
Constitution	<i>Constitution of the Republic of South Africa, 1996</i>
EEA	<i>Employment Equity Act 55 of 1998</i>
ILO	International Labour Organisation
LRA	<i>Labour Relations Act 66 of 1995</i>
NABC	National Association of Bargaining Councils
NEDLAC	National Economic Development and Labour Council
PEA Convention	<i>Private Employment Agencies Convention 181 of 1997</i>
SACCAWU	South African Commercial Catering and Allied Workers Union
TES	Temporary Employment Service(s)

SUMMARY

A temporary employment service (hereafter TES), also referred to as a labour broker is defined as a person or entity that provides workers to others, (their clients) to perform duties for the benefit of the client for compensation. The Labour Relations Act 66 of 1995 makes legal provision for a TES to exist. A threefold relationship between the TES and the client, and the TES and the worker is created. In this dissertation the relevant sections of the Labour Relations Act are examined and the agreements and the consequences that flow from the relationship that is created by this threefold relationship are discussed.

The situation often occurs where workers are informed that their services are no longer required on a client's site. No procedures for dismissals or retrenchment are followed. The worker is then under the impression that he or she has been dismissed. When the matter is referred to the Commission for Conciliation Mediation and Arbitration for adjudication, the client is cited as the employer. The application is then dismissed as the client is not the employer. The worker only has recourse against his employer, being the TES, and not a third party. This then leaves the worker confused and frustrated. Employees of TES typically work longer hours and are also underpaid. TES and their clients escape labour obligations and standards as their contracts allow for this.

The question that arises is whether this situation is fair to the employees that are being subjected to this type of treatment which is justified by the contracts between the TES and the client, and the TES and the worker. The relationship is weighed against the provisions of the Constitution and the common law requirements for a lawful contract. A comparison with international standards as well as the legal position of TES in other countries is done to establish whether employees of TES in South Africa are treated fairly. The position will be studied further by examining the findings of courts and tribunals.

Courts have begun to intervene and in decisions, that are discussed in the dissertation, the courts have found that the clauses in the contracts between the TES, its clients and the workers that allow for the "automatic dismissal" without

having to follow the prescribed steps, are regarded as against public policy. It has also found that TES are not permitted to contract out of their obligations.

The South African Government has introduced proposed amendments to the current labour legislation. These proposed amendments and the effect thereof on TES is studied to determine whether it will better the current issues experienced with TES.

Trade unions in South Africa articulate their opinions regarding TES and push for the banning of the practice. The situation is more complicated; however, as a large number of people in South Africa are employed by TES and the TES assist them in finding work. When the situation is examined on the background of international standards, the ILO and the rights that are guaranteed to everyone in the Constitution, 1996, a complete ban will not be feasible as it will have an enormous effect on the South African employment sector.

Regulation of the practice of TES is suggested as the most practicable solution to the problems that flow from TES contracts. The suggestion is that the clauses permitting the unlawful treatment of employees are deleted and sanctions for non-compliance with labour standards are implemented.

OPSOMMING

'n Tydelike werkverskaffingsdiens (hierna TWD), ook na verwys as 'n arbeidsmakelaar word gedefinieer as 'n persoon of entiteit wat werkers aan ander, hul kliënte, verskaf om dienste te verrig vir die voordeel van daardie kliënt teen vergoeding. Die Wet op Arbeidsverhoudinge 66 van 1995 maak voorsiening vir hierdie TWD om regtens te bestaan. 'n Drievoudige verhouding tussen die TWD, die kliënt en die werker ontstaan. In hierdie navorsingsverslag word die relevante artikels van die Wet op Arbeidsverhoudinge en die ooreenkomste en gevolge van hierdie drievoudige verhouding ontleed en bespreek.

Die situasie kom voor waar die werknemer ingelig word dat sy dienste nie langer benodig word by 'n kliënt se werksplek nie. Geen prosedure vir afdankings of afleggings word gevolg nie. Die werker word onder die indruk geplaas dat hy afgedank is en verwys dan die aangeleentheid na die CCMA (Kommissie vir Konsiliësie Mediasie en Arbitrasie) vir beregting, met die kliënt as die werkgever. Die aansoek word dan van die hand gewys, omdat die kliënt nie die werkgever is nie. Die werker het slegs 'n aksie teen die werkgever, wat die TWD is en nie teen derdes nie. Dit los dan die werknemer deurmekaar en gefrustreerd. Werknemers van TWD werk oor die algemeen langer ure en word laer lone betaal. TWD en hul kliënte is in staat om arbeidsverpligtinge en standaarde vry te spring, omdat die kontrak dit toelaat.

Die vraag wat derhalwe ontstaan is of hierdie situasie regverdig is teenoor werknemers wat aan hierdie behandeling onderworpe gestel word en wat regverdig word deur die kontrak tussen die werker, die TWD en die kliënt. Die verhouding word opgemeet teen die bepalinge van die Grondwet en die gemeenregtelike vereistes vir 'n geldige kontrak. 'n Vergelyking met internasionale standaarde, asook die regsposisie ten opsigte van TWD in ander lande word gedoen om vas te stel of TWD se werknemers in Suid Afrika regverdig behandel word. Die posisie word verder ondersoek deur die bevindings van howe en tribunale te bestudeer.

Die howe het begin ingryp en in bevindings, wat bespreek word in hierdie navorsingsverslag, het die howe bevind dat die klousules in die kontrakte tussen die

TWD, sy kliënte en die werkers wat die “outomaties afdanking” sonder dat enige voorgeskrewe stappe gevolg word toelaat, geag word teen publieke beleid te wees. Dit was ook gevind dat TWD nie uit hul verpligtinge mag kontrakkeer nie.

Die Suid-Afrikaanse regering het voorgestelde wysigings tot die bestaande arbeidswetgewing voorgestel. Hierdie voorgestelde wysigings en die effek daarvan op TWD word bestudeer om vas te stel of dit die huidige probleme wat ervaar word met TWD sal verbeter.

Vakbonde in Suid Afrika verwoord hul menings oor TWD en druk dat daar ‘n verbod geplaas word op TWD. Die situasie is egter baie meer kompleks, omdat ‘n groot aantal werkers in Suid Afrika deur TWD in diens geneem word en dat die TWD hul bystaan by die verkryging van betrekkinge. Wanneer die situasie ontleed word teen die agtergrond van internasionale standaarde, die Internasionale Arbeidsvereëninging en die regte wat aan almal in die Grondwet gewaarborg word; is ‘n totale verbod op TWD nie ‘n haalbare oplossing nie, omdat dit ‘n reuse effek sal hê op die Suid Afrikaanse werksektor.

Die regulasie van die TWD praktyk is voorgestel as die mees praktiese oplossing vir die probleme wat vloei vanuit die TWD kontrakte. Daar word voorgestel dat die klousules wat die onregmatige behandeling van werkers uitgelaat word en dat sanksies ingestel word vir die nie-nakoming van arbeidstandaarde.

1 Introduction

A temporary employment service (hereafter TES), which is more commonly referred to as a labour broker is defined as a person or entity that provides workers to others (their clients) to perform duties for the benefit of the client for compensation. The TES is discussed in more detail hereunder. The *Labour Relations Act*¹ makes provision for a TES to legally exist. A threefold relationship between the TES and the client, and the TES and the worker is created.

What commonly occurs in practice is that the client of the TES can end the services of the worker, who has been placed in its workplace, by informing the TES that the worker's services are no longer required and that the worker has to be removed from the workplace, or that the worker has to be replaced by another worker. The contracts between the TES and their clients usually make provision for these situations. The worker is then returned to the pool of workers of the TES that are available for placement at other clients, and does not receive any payment until he is placed with another client.

The worker is then usually placed under the impression that he has been dismissed and usually refers the matter to the Commission for Conciliation Mediation and Arbitration (hereafter CCMA) as an unfair dismissal, citing the client as the employer. The client then raises a *point in limine* at the CCMA on the basis that it is not the worker's employer and these matters are generally dismissed. The worker only has recourse against his employer, being the TES, and not a third party. This then leaves the worker confused and frustrated. Workers are usually not sure what their remedies are, as they are typically under the impression that the client is their employer despite the fact that they sign a contract of employment with the TES.

Section 198 of the LRA creates a joint and several liability for the TES and the client. The liability is however not extended to the situation sketched above, where the worker is unfairly dismissed. This liability is limited to the non-fulfilment of labour standards, collective agreements and legislation. The client of the TES can

1 *Labour Relations Act* 66 of 1995 (hereinafter the LRA).

conversely avoid certain collective agreements, as the main business of the TES does not fall within the scope of the collective agreement of the client.

Is this situation fair to the employees that are subjected to this type of treatment that is justified by the contracts between the TES and the client, and the TES and the worker? How does this relationship compare with the standards for fair labour practices set in the Constitution?²

Over the past few years there have been several arguments and discussions regarding the existence of TES and the fairness of its practices. On the one hand it has been argued that TES have to be banned, because of the alleged exploitation of workers and no accountability for it.³ On the other hand it has been argued that TES aid workers in acquiring work and it creates opportunities for work in these times when unemployment is very high.

Courts have attempted to intervene and are making decisions, within the framework of the Constitution, to give effect to the right to fair labour practices, by placing certain obligations on TES to prevent the client from requiring the TES to remove the worker without a valid reason. These judgments may hold the possibility that the contracts between the parties have to be adjusted to give effect to the Constitution. The government is further also considering new legislation herein, which could have an impact on the triangular relationship.

Section 23 of the Constitution provides that everybody has the right to fair labour practices. The general guarantee of fair labour practices that is given in this section has far-reaching effects on the courts' approach to the interpretation of the rights of the parties to an employment contract. Courts have to, when applying and developing the common law, have due regard to the spirit, objects and purports of the Bill of Rights.⁴

2 S 23 of the *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as: the Constitution).

3 Ndima G 2011 *Labour brokers exploit workers* <http://www.politicsweb.co.za> [date of use 1 August 2011].

4 S 8 of the Constitution. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

Section 198 of the LRA makes the provision that an employee who is placed with a client and who works for the client of the temporary employment services, more commonly known as a labour broker, is the employee of the labour broker. For this reason the specific grouping of employees who are normally considered to be a vulnerable group are also protected by the provisions of section 23 of the Constitution.

Section 198 of the LRA has a great effect on the relationship between the employer and the employee and the impact of constitutional provisions on labour law, especially the impact of those provisions embodied in the *Bill of Rights*, should not be underestimated.⁵ Under the Constitution every employee is entitled to fair treatment during their appointment, for the duration of and the termination of the employment contract. The right to fair labour practices is not limited to employees, because the word “everyone” extends the application.

Section 39 of the Constitution provides the guidelines regarding the interpretation of the *Bill of Rights*. The implication of section 39, on the employment relationship, is that the common law rule that an employer can determine the nature of, the duration of, the content of and the termination of the contract of employment. Because of the unequal relationship between the contracting parties, it must be interpreted in such a way that it also complies with the doctrine of fairness. The courts have recently dealt with the right to fair dealing in the contracts of employment in which the common law principles were relinquished in favour of fairness principles.⁶

The fundamental rights in the *Bill of Rights* are not absolute; they may be limited, in compliance with the provisions set out in the Constitution. Limitation of rights may only be affected in terms of “law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”⁷ There are factors that also have to be considered

5 Kahn-Freund O “Impact of Constitutions on Labour Law” 1976 *Cambridge Law Journal* 240.

6 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA), *Boxer Superstores Mthatha & Another v Mbenya* 2007 8 BLLR 693 (SCA); *Murray v Minister of Defence* 2008 6 BLLR 513 (SCA).

7 S 36 of the Constitution.

when a limitation is contemplated.⁸ A right ingrained in the Bill of Rights may not be limited by any law.

It is important to have regard for the Constitution when interpreting labour legislation. Section 2 of the Constitution states that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it, is invalid, and the obligations imposed by it must be fulfilled. The LRA confirms this, as it is stated that one of its objectives is to give effect to and regulate fundamental rights bestowed in the Constitution and compels everyone interpreting it to do so in accordance with the Constitution.⁹

In this study, the practice of labour broking and the relationship created by TES is analysed and also the issues of unfair labour practices that flow from the contracts between the TES, the client and the worker. The relationship is weighed against the provisions of the Constitution and the common law requirements for a lawful contract. A comparison with international standards as well as the legal position of TES in other countries is made to establish how TES in South Africa compare.

2 The International Labour Organisation¹⁰

The Constitution¹¹ binds all courts, tribunals or forums to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom; to consider international law; and to consider foreign law.”

Labour broking has, internationally, been associated with the ILO concept of forced labour.¹² The ILO condemns forced labour in any form; in fact the ILO’s *Forced*

8 S 36(1)(a)-(e). These factors include the following: The nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

9 S 3(a) and 3(b) of the LRA.

10 Hereafter referred to as the ILO.

11 S 39(2) of the Constitution.

12 Anti-Slavery International Date unknown *Why is forced labour my business* <http://www.antislavery.org> [date of use 1 August 2011]; Barrientos S *Labour chains: analysing the role of labour contractors in global production networks* 2011 (BWPI Working Paper 153 for the University of Manchester); Van der Burg A *et al Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* (Published by the Centre for Rural Legal

*Labour Convention*¹³ demands the abolition of all forms of forced or compulsory labour.¹⁴ The *Forced Labour Convention* and the *Abolition of Forced Labour Convention* are essential ILO Conventions. For the achievement of decent work, freedom from forced labour, freedom of association, the right to collective bargaining, and the eradication of child labour and of discrimination at work, are essential. South Africa has ratified these Conventions on forced labour and consequently South Africa is bound to guarantee that the values of these Conventions are incorporated in South Africa's legislation and executed accordingly.

An ILO Convention that successfully allows for the operation of labour brokers is the convention on so-called Private Employment Agencies.¹⁵ The ILO recognises labour broking as a labour market service and states that:

One purpose of the Convention is to allow the operation of private employment agencies as well as the protection of workers using their services, within the framework of its provisions.¹⁶

Section 3 of the *PEA Convention* makes provision for the circumstances governing the operation of these employment agencies in accordance with recommendations concerning registration and licensing before according them legal status. In South Africa, labour brokers are accorded with legal status by legislation. They, therefore, do not have to be registered before they can operate as a TES. The LRA does not have a requirement that a TES has to register as a TES. The *Skills Development Act*¹⁷ does however provide that "any person who wishes to provide employment services for gain must apply for registration."¹⁸ By registration of TES it would be possible to monitor the TES and the activities thereof. If the TES did not comply with the requirements for registration, it would not be entitled to trade as a TES. This is not the situation in South Africa.

Studies, Stellenbosh 2009); *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* par 51.

13 *Forced Labour Convention* 29 of 1930.

14 This convention was supplemented by the *Abolition of Forced Labour Convention* 105 of 1957. At the time the convention was adopted, there had been an increasing use of forced labour for political purposes and it called for the suppression of forced labour.

15 *Private Employment Agencies Convention* 181 of 1997 (hereafter the *PEA Convention*).

16 S 2(3) of the *PEA Convention*.

17 *Skills Development Act* 97 of 1998. (Hereafter the *Skills Development Act*).

18 S 24 of the *Skills Development Act*.

Section 4 of *PEA Convention* further requires that certain measures be taken to ensure that employees who are placed by the labour brokers are not deprived of their right to freedom of association and the right to collective bargaining. In South Africa SACCWU has contended that temporary employees should also have the same benefits as permanent employees and should therefore be included in bargaining groups.¹⁹ When workers join a TES, as their new employer, they are in effect removed from the sector within which they bargained. The workers then obtain theoretical rights to bargaining with their employer, the TES. This is essentially of no benefit to the worker, seeing as his or her workplace is not that of the TES, but that of the client. This practise then subsequently reduces the extent to which a more centralised mode of bargaining can be implemented, and then in effect demoralises the right to collective bargaining of trade unions wishing to exercise such rights in the workplace where the employees of the TES are placed.²⁰

The *PEA Convention* necessitates that measures be taken to make certain that employees employed by labour brokers are given sufficient protection equivalent to minimum wages, working time, social security benefits, occupational safety and health compensation and maternity protection.²¹ Temporary employment in South Africa is known to accompany lower income,²² as temporary employees earn considerably lower wages than permanent employees. Cashiers that are employed on a full time basis, by a leading retailer in South Africa, earn R25,95 per hour as opposed to cashiers that are employed on a temporary basis who earn as little as R13,24 per hour for exactly the same work performed.²³ There is a large number of TES offering their services to employers in South Africa and therefore the competition to sign commercial contracts with clients is stiff. These TES then attempt

19 Mathekga MJ *The political economy of labour market flexibility in South Africa* (Master of Philosophy - Political Management Thesis for Stellenbosch University 2009) 60.

20 Craven P 2009 *COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCWU AND SATAWU submission on labour broking* <http://www.cosatu.org.za> [date of use 4 April 2011].

21 S 11 of the *PEA Convention*.

22 Mathekga MJ *The political economy of labour market flexibility in South Africa* (Master of Philosophy - Political Management Thesis for Stellenbosch University 2009) 59.

23 Mathekga MJ *The political economy of labour market flexibility in South Africa* (Master of Philosophy - Political Management Thesis for Stellenbosch University 2009) 60.

to give better and cheaper quotations to prospective clients, which leads to lower wages being paid to workers.²⁴

The working hours of temporary workers also differ from that of permanent employees. Many temporary employees are required to work more than the 45 hours per week (more often than permanent employees) that is prescribed by the *Basic Conditions of Employment Act 75 of 1997* (hereafter the BCEA²⁵).²⁶ These workers also do not receive payment for the hours that they have worked in excess of the ordinary hours of work as they are too happy to have employment and an income and accept these terms as they are afraid that they may lose their jobs.²⁷ This further contributes to the deterioration of health and safety standards. In the road freight industry the contracts of drivers stipulate that they are remunerated according the loads and the distance that they have travelled. Drivers now, in order to ensure that they receive payment, take unnecessary safety risks to drive more kilometres and deliver more loads.²⁸

It is clear that the purpose of this Convention is not to outlaw the practice of labour broking, but to recognise the existence of these agencies or labour brokers and to control their economic activity and by doing so ensuring that workers, who are working for labour brokers, are not exploited.

The ILO has another agenda which is relevant in the circumstances. This concerns decent work. The ILO considers decent work as "...work which is productive and carried out in conditions of freedom, equity, security and human dignity..."²⁹ Decent work is recorded as fundamental principles, rights at work and international labour

24 Craven P 2009 *COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCABU AND SATABU submission on labour broking* <http://www.cosatu.org.za> [date of use 4 April 2011].

25 S of the BCEA.

26 Mathekga MJ *The political economy of labour market flexibility in South Africa* (Master of Philosophy - Political Management Thesis for Stellenbosch University 2009) 54-56.

27 Mathekga MJ *The political economy of labour market flexibility in South Africa* (Master of Philosophy - Political Management Thesis for Stellenbosch University 2009) 58.

28 Craven P 2009 *COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCABU AND SATABU submission on labour broking* <http://www.cosatu.org.za> [date of use 4 April 2011].

29 International Labour Organisation Date unknown *Decent Work* <http://www.ilo.org> [date of use 7 September 2010].

standards; employment and income opportunities; social protection and social security; and social dialogue.³⁰

The Decent Work Agenda is creative and delivers a fair income, security in the workplace and social protection for families, improved prospects for personal growth and social integration. It also delivers freedom for people to express their concerns, organise and participate in the decisions that affect their lives, including equality of opportunity and treatment for all women and men. The ILO further elucidates that these objectives protect all workers in both formal and informal economies; in wage employment or working on their own account; in the fields, factories and offices; in their home or in the community. The decent work agenda and principles should be very applicable to workers who are employed by labour brokers.³¹

The recommendation on the employment relationship³² seeks to address uncertainties that employees experience concerning their status of employment. The uncertainty occurs in situations where contracts conceal the true legal standing of the workers, as is the situation with labour brokers, where workers do not have much protection.³³ According to the recommendation an employment relationship has to be directed by the circumstances of the working relationship, and not so much by the agreement that exists between the parties.³⁴

3 Labour Brokers

3.1 Definition of a labour broker

Labour broking is referred to in both the LRA and in the BCEA as temporary employment services. Labour broking is an activity involved with the placement of

30 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 16.

31 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 16.

32 The recommendation was adopted on June 15, 2006 by the ILO.

33 Gericke E "Temporary Employment Services: Closing a Loophole in Section 198 of the Labour Relations Act 66 of 1995" 2010 *Obiter* 102.

34 Gericke E "Temporary Employment Services: Closing a Loophole in Section 198 of the Labour Relations Act 66 of 1995" 2010 *Obiter* 102.

workers by the labour broker at a client's workplace. Labour broking is distinguished from the activities of placement agencies in that the labour broker remains involved with the worker after the worker has been placed with the client. The labour broker pays the worker for the services rendered at the workplace of the client.³⁵

Section 198 of the LRA defines a labour broker as the following:

- (1) Any person who, for reward, procures for or provides to a client other persons –
 - (a) Who render services to, or perform work for, the client;
 - (b) Who are remunerated by the temporary employment service.

In terms of the *Employment Equity Act*,³⁶ an employee who provides services for an indefinite duration or a period of three months is deemed an employee of that particular client, for the purposes of employment equity.³⁷ This definition deems the worker that is placed with the client to be an employee of that client, if he or she has been working at the workplace of the client for more than three months. This situation is however only applicable for affirmative action purposes and the TES will still be deemed to be the employer of the worker in the event of unfair labour practices or breaches, as discussed above. This section creates joint and several liability for the TES and the client in the event of unfair discrimination.³⁸

3.2 The practice of labour brokers in South Africa

The Wiehahn Commission, which initiated the first introduction of South Africa's current labour relations system in the early 1980's noted the activities of a new type of placement service where undertakings would lease the services of persons in their employment to other persons, being their clients. It recommended amendments to the 1956 LRA.³⁹ The amendment⁴⁰ introduced a definition of the business of a labour

35 S 198(b).

36 *The Employment Equity Act* 55 of 1998 (hereafter EEA).

37 S 57 of the EEA.

38 S 57(2) of the EEA.

39 Van Der Riet March H 2010 *Labour Brokers – The Future?* <http://www.saslaw.org.za> [date of use 7 September 2010].

40 The amendment was affected by Act 2 of 1983.

broker.⁴¹ It deemed the labour broker to be the employer of the employees placed with the client and held that the labour broker would be liable for the acts committed to the employees concerned by the client. The ostensible intention of the legislation was to protect employees.⁴² This arrangement was distributed in the LRA and therefore section 198(4) of the LRA was initiated to provide additional protection for employees.

During 1994 a ministerial task team was selected, by the Government of South Africa to draft a new Labour Relations Bill. This team had to ensure that the new bill on labour relations was in line with the Interim Constitution⁴³ and the requirements set by numerous ILO Conventions on labour relations and fair labour practices.

There has been a significant growth in the use of labour brokers in South Africa over the past years. This growth is mainly due to the perception that costs of complying with statutory employment requirements are high, as are the costs of the direct administration of employees. Associations receive better service from labour brokers who possess the structure to manage their compliance with statutory requirements.⁴⁴

During 2010 the National Association of Bargaining Councils⁴⁵ created an estimation of the number of TES-workers in South Africa. The NABC put forward that there were approximately 979,539 TES workers in South Africa during 2010, compared to the previous estimate of approximately 500,000⁴⁶ TES workers.⁴⁷

The cost of utilising the services of a labour broker is much lower than the cost of directly employing a temporary employee. Temporary employees are also regarded as being more productive than permanent workers.⁴⁸ Making use of a labour broker

41 This was similar to the definition of temporary employment services in s 198 of the LRA.

42 Van Der Riet H March 2010 *Labour Brokers – The Future?* <http://www.saslaw.org.za> [date of use 7 September 2010].

43 *Interim Constitution of the Republic of South Africa*, 1993.

44 Anon Date unknown *Labour Outsourcing in South Africa* <http://www.c-force.co.za> [date of use 1 August 2011].

45 Hereafter the NABC.

46 2006 figures.

47 Cape Business News February 211 *Facing the Facts on Labour Brokers* <http://www.cbn.co.za> [date of use 25 March 2011].

48 Mathekga MJ *The political economy of labour market flexibility in South Africa* (Master of Philosophy - Political Management Thesis for Stellenbosch University 2009) 55.

has become very attractive for many employers for the following reasons: the labour broker takes care of the payroll of the workers that are placed on the client's workplace; the labour broker also distributes the workers' pay slips and it also deals with other administrative issues. This saves the client a lot of money by cutting out extra costs. The client also does not have to calculate the employees' bonuses and leave pay. In addition to these benefits, the client does not need to deal with other financial issues when it comes to the end of the financial year and it does not have to provide the workers with their IRP 5 documents from SARS, as it is the labour broker's responsibility.⁴⁹

A labour broker usually assists its clients with employment contracts. When emoluments attachment orders or garnishee orders are granted against the salary of a worker, it is the responsibility of the labour broker to make the deductions. This saves the employer time. Time is further saved in the handling of provident and pension fund matters, be it deductions, queries on withdrawals. When employees borrow money, the labour broker monitors the payment or deductions from the said employee's salary. When an incident occurs at the workplace of the client, the labour broker assists with the completion of the documentation regarding injury on duty. Another benefit which attracts clients is the fact that recruitment for workers is done by the labour brokers and labour brokers are in a position to acquire the quality grade artisans with specific skills that the client requires. This is a very attractive attribute of the labour broking practice as there is a shortage of workers with certain skills in South Africa.⁵⁰ Labour brokers have a large number of specialist employees who can be provided to clients and utilised at the maximum level of efficiency on short notice.⁵¹

Making use of such labour brokers, is directly linked to the fact that these workers that are supplied to the client by the labour broker are not regarded as employees of the client, but are still in the employment of the labour broker and that they are the

49 Abaphansi Trading Outsourcing Specialists Date unknown *Benefits of Using Labour Brokers* <http://www.abaphansi-hbl.co.za> [date of use 4 April 2011]; Origin Consulting "Main advantages of labour hire" <http://www.labourbroker.co.za> [date of use 4 April 2011].

50 Abaphansi Trading Outsourcing Specialists Date unknown *Benefits of Using Labour Brokers* <http://www.abaphansi-hbl.co.za> [date of use 4 April 2011].

51 Gericke E "Temporary Employment Services: Closing a Loophole in Section 198 of the Labour Relations Act 66 of 1995" 2010 *Obiter* 96.

exclusive responsibility of the labour broker. In reality the labour broker is not the employer. The broker is more of a liaison between the client and the worker. The client has the benefit of enjoying the rights connected to being an employer.⁵² This is however exactly where most problems with labour brokers arise. Employers are increasingly using labour brokers to procure workers who are employed on a fixed term contract, in order to engage them on a task to task basis. The client then does not have to pay the employee when work is unavailable.

Another benefit for clients making use of a labour broker's services is that they may dispose of workers that they do not require.⁵³ The client is given the freedom to define the duration of the contract of the worker. Clients of labour brokers are also not compelled to keep workers working at their workplaces for periods that are predetermined. The use of labour brokers takes away the issue surrounding unfair dismissals and retrenchments; the costs relating thereto,⁵⁴ for example the payment of severance pay; and procedures.⁵⁵ A clause is usually included in the agreement between the broker and the client⁵⁶ stipulating that if the client is not happy with the performance or the conduct of a certain worker, it can request that the worker be replaced by another. This can be done very speedily.⁵⁷

4 Contracts of labour brokers

4.1. *Triangular relationship*

The contractual relationship of labour brokers is triangular in character.⁵⁸ Labour brokers make workers available to third-party clients and these clients assign tasks to the workers and oversee the execution thereof. The labour broker enters into a

52 Roskam A *An Exploratory Look into Labour Market Regulation* (DPRU Working Paper 07/116) 43.

53 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

54 Gericke E "Temporary Employment Services: Closing a Loophole in Section 198 of the Labour Relations Act 66 of 1995" 2010 *Obiter* 95.

55 Roskam A *An Exploratory Look into Labour Market Regulation* (DPRU Working Paper 07/116) 42.

56 Roskam A *An Exploratory Look into Labour Market Regulation* (DPRU Working Paper 07/116) 42.

57 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

58 Theron J "Employment is Not What it Used to Be" 2003 ILJ 1271.

contract of employment with workers and is also responsible for the administering of the payroll of workers who have been placed with the clients. The labour broker is also responsible for the deduction of employee's tax from the workers' salaries.⁵⁹

The contract of employment between the labour broker and the employee is usually made subject to the condition that the agreement only continues for the period within which the client requires the services of the employee.⁶⁰ The labour broker concludes a further business agreement with the client in terms of which the client is invoiced for the services that are rendered by the worker. The labour broker pays the worker's wages and there is no contractual relationship between the client and the worker.

This situation can be very confusing for employees of the labour broker, as they are placed in the client's workplace and are required to perform certain duties, as prescribed by the client under the client's supervision. They are also provided with tools of the trade by the client and form part of the client's organisation. Many employees of labour brokers are under the impression that they are actually employed by the client and that the client must be held accountable for unfair dismissals and unfair labour practices against them. The parties to the employment relationship are difficult to ascertain.

In *Sindane v Prestige Cleaning Services*⁶¹ Mr. Sindane was employed by Prestige Cleaning Services (hereafter Prestige) as a cleaner from June 2002. His services were terminated during April 2007. He was dismissed for operational reasons. Prestige contended that there was no dismissal, as Mr. Sindane's contract of employment was automatically terminated when Prestige's cleaning contract with their client was reduced. The contract between Prestige and the client was not terminated, but only reduced or scaled down, because the client no longer needed the services of Mr. Sindane.

59 Anonymous Date unknown *Employees Tax* <http://www.amadwalagb.com> [date of use 4 April 2011].

60 Theron J "The Shift to Services and Triangular Employment: Implications for Labour Market Reform" 2008 *ILJ* 14.

61 *Sindane v Prestige Cleaning Services* 2009 JOL 24202 (LC).

The contract between Mr. Sindane and Prestige was a “fixed term eventuality contract of employment.” It is a type of fixed term contract that would end when the contract between Prestige and the client is terminated. Mr. Sindane had been moved from one placement to another before. The client gave Prestige less than one day’s notice that it no longer needed the services of Mr. Sindane. Prestige took the matter up with its client, but to no avail. Mr. Sindane shortly thereafter received a notice stating that his employment contract was terminated as a result of the fact that Prestige’s contract with its client was scaled down. This letter was dated 1 April 2007 and it indicated that his contract would end at the end of that month. Mr. Sindane also received a letter called a “consulting checklist” which recorded that there were two consultation meetings held with Mr. Sindane on the 3rd of April and on the 17th of April 2007.

The first question before the Court was the issue of whether there was in fact a dismissal, as defined in section 186(1) of the LRA. Prestige argued that there was no dismissal. Their motivation was that the contract of employment between itself and Mr. Sindane expressly provided that his employment contract would come to an end if Prestige’s cleaning contract with a client was terminated or was reduced. The court indicated that a consequence of this argument would be that an employer could make the termination of the contract of employment dependent on the happening of a future event, as in this case the termination of another contract. If this event took place, the employment contract would automatically come to an end and in this sense the employer could then argue that there was no “dismissal”.

When considering this, the Labour Court referred to one of its previous decisions in *SA Post Office Ltd v Mampeule*⁶² wherein the employer approached the Labour Court for an order declaring that the employee had not been dismissed. The employer contended that his employment contract came to an end as a result of him being removed from the Post Office’s board of directors. This argument was based on a stipulation of the employee’s contract of employment to the effect that if the employee was to be removed from the board, his employment would automatically be terminated.

62 *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC).

The Labour Court concluded that the employee had indeed been dismissed by the employer. It reaffirmed that any act by an employer which results in the termination of an employee's contract of employment constitutes a dismissal for the purposes of section 186(1)(a) of the LRA. The Labour Court additionally held that the automatic termination clause was impermissible as it comprised an effort to limit the provisions of schedule 8 of the LRA and the fundamental right to fair labour practices. Provisions providing for the automatic termination of the contract were against public policy and they evaded statutory rights conferred on employees.

The court compared this position to one where a standard fixed-term contract comes to an end upon the expiration of the contract period. It explained that a fixed term contract, when its period has expired or the project has been completed and it automatically comes to an end (without the employer and/or the employee having to give notice of the termination) is not caused by an act of the employer. The court however stated that the facts in this matter (*Sindane v Prestige Cleaning Services*) could be distinguished from the facts in *SA Post Office v Mampeule*.

The motivation for the removal of the employee in *SA Post Office v Mampeule* related to allegations of misconduct. The termination of the employee's contract was not linked to the expiry of a specific period, or as in this case, an event, which gives rise to the termination of the contract. The matter of *SA Post Office v Mampeule* did not relate to the issue whether the termination of the employee's contract was connected to the employer's contract with a client. In this case, the Labour Court held that the employee was not "dismissed" as the term is defined in section 186(1) of the LRA and this meant that the employee's claim of unfair dismissal stood to be rejected.

The Court continued by stating that the dismissal was substantively and procedurally fair. Meetings took place between the employer and the employee, and Mr. Sindane was appropriately informed of the scaling down of Prestige's contract with its client. Mr. Sindane was given an opportunity to make representations in respect of the termination of his contract and, even though the employer was not obliged to do so, it tried to find an alternative position for Mr. Sindane. The employee's claims were dismissed.

In *Old Mutual Life Assurance Co SA Ltd v Gumbi*⁶³ the Court held that the right to a pre-dismissal hearing is now included by developing the common law contract of employment in accordance with the Constitution. The consequence hereof is that every employee now not only has an unfair labour practice claim in terms of the LRA, but also a contractual claim in terms of the common law.

A duty of fair dealing with employees is, at all times imposed on employers by section 23(1) of the Bill of Rights, which includes rights that are not specifically mentioned in the LRA:⁶⁴

The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity ... for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.

In *Affordable Medicines Trust v Minister of Health*⁶⁵ the honourable Ngcobo J stated that: “one’s work is part of one’s identity and is constitutive of one’s dignity, and there is a relationship between work and the human personality as a whole.”⁶⁶

In *Murray v Minister of Defence* it was contended that the plaintiff was permitted to rely directly on the right to have his dignity respected and protected.⁶⁷ It was asserted that the Constitution imposes “a continuing obligation of fairness towards the employee on the employer when he makes decisions affecting the employee in his work.”⁶⁸ this is an obligation that has procedural and substantive elements to it and it is now summarised in the right to fair dealings in the workplace under the Constitution.⁶⁹

63 *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 SCA 52 RSA par 5-8.

64 *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) par 27.

65 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC).

66 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) par 59.

67 In terms of s 10 of the Constitution; *Murray v Minister of Defence* 2008 ZASCA 44 par 5.

68 *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1998 18 ILJ 361 (LAC) 366, as quoted from *Murray v Minister of Defence* 2008 ZASCA 44 par 11.

69 *Sidumo v Rustenburg Platinum Mines Ltd* 2007 ZACC 22 (CC) par 74.

In *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*⁷⁰ the respondent was a labour broker in the IT industry and supplied mainly computer programmers and engineers to its clients. The respondent entered into a labour broking agreement with their client. In terms of this agreement it supplied brand managers and computer project managers to their client. The contract between the labour broker and its client also provided that the client had the right to call for any of the respondent's employees to be substituted for whichever reason whatsoever or to request that the employees be removed from its premises.

The applicant was employed by the respondent, the labour broker, and was placed with the client in 2005. In terms of the employment contract between the applicant and the respondent, the respondent could terminate the contract before the 31st of August 2007 on grounds proven by the client to be reasonable and/or substantively and procedurally fair. This clause was, however, not incorporated in the labour broker agreement between the respondent and the client, which allowed it to request the removal of employees for any reason whatsoever.

During September 2006, the applicant received and circulated an offensive email to other individuals at the work place of the client, using one of the client's computers. The client filed a complaint with the respondent and demanded that the applicant be removed from its premises. The respondent held a disciplinary enquiry and issued the applicant with a final written warning. However, the client refused to permit the applicant to return to its premises. The respondent proceeded to retrench the applicant as it was impossible to place the applicant, in his capacity as a sales representative, with any of the respondent's other clients. The applicant challenged his dismissal in the Labour Court claiming that his retrenchment was unfair.

The court referred to section 198. As discussed above, this section provides that the labour broker is the employer of the employee and the employee has no right of recourse against the client for an unfair dismissal claim. The Labour Court held that, even though labour broking arrangements are legally permissible:

70 *Simon Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 ILJ 2120 (LC).

...this does not mean that the labour broker and the client are at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client. Nor does it mean that labour brokers and clients may structure their contractual relationship in ways that would undermine the employees' constitutionally guaranteed right to fair labour practices.

The Labour Court referred to the Constitutional Court decision of *Barkhuizen v Napier*⁷¹ in which the court held that public policy, determined with reference to the Constitution, would prevent the enforcement of a contractual term if the enforcement would be unjust or unfair. Thus, "while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties". The court continued:

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

The court went further and stated that:

63. The Constitution provides that everyone and not just employees have a right to fair labour practices. Consequently, even though a person may not be regarded by the law as an employee of the client but of the labour broker, the client still has a legal duty to do nothing to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation.

66. In applying the right not be unfairly dismissed, a court is not bound by contractual limitations created by parties through an agreement when the agreement conflicts with the fundamental rights of workers.

70. Accordingly, any clause in a contract between a labour broker and a client which allows a client to undermine the right not to be unfairly dismissed would in my view be against public policy.

In *Mozart Ice-cream Classic Franchises (Pty) Limited v Davidoff and Another*⁷² the court stressed the significance of being observant when private power is abused. The court further made reference to *Du Plessis v De Klerk*⁷³ where the court held:

71 *Barkhuizen v Napier* 2007 7 BCLR 691 (CC).

72 *Mozart Ice-cream Classic Franchises (Pty) Limited v Davidoff and Another* 2009 3 SA 78 (C).

73 *Du Plessis v De Klerk* 1996 3 SA 850 (CC).

Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/ individual relations, but equally to individual/ individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.

The court held that whilst the legislature makes specific provision for a labour broker arrangement, it does not mean that labour brokers and clients may structure their contractual relationship in a way that would undermine the employee's constitutionally guaranteed right to fair labour practices.

The court further held that the respondent was not powerless to oppose demand to have the applicant removed from its premises, in situations where the demand undermined the fundamental rights of the employee. The court indicated that the respondent could approach either the High Court or the Labour Court to compel the client to accept the employee on its premises. After considering the facts of the case, the court held that the client's demand that the applicant be removed was unlawful and in breach of the applicant's right to fair labour practices.

The applicant did not commit an offence for which dismissal was justified. The client had no right to insist that the respondent should dismiss the applicant because its internal policy concerning offensive emails provided for dismissal; the provision in the contract between the respondent and the client which permitted the client to arbitrarily require the removal of the applicant from its premises was unlawful and against public policy because it took no account of the right of the applicant not to be unfairly dismissed. The respondent should have resisted the client's attempts to invoke this clause of the contract in circumstances where it undermined the applicant's right to fair labour practices. The respondent was ordered to pay the applicant compensation for the substantively unfair dismissal. This judgment significantly reduces the flexibility of the labour broker arrangement.

4.2. *Issues with the contracts of labour broking in South Africa*

Some of the problems faced by the employees of labour brokers are that the wrong entity is often cited in unfair dismissal proceedings; labour brokers find it easy to convince the CCMA that no dismissal, as defined in section 186 of the LRA, took place. If an unfair dismissal claim is established against the labour broker, the proceedings mostly produce no effective remedy for the employee.⁷⁴ This situation is discussed in more detail in 4.3 hereunder.

Labour brokers are often used as a service that provides not only temporary workers to clients, as the term temporary employment service suggests, but also workers that provide services to clients on a more permanent basis. This situation occurs when employees of the TES are placed at the workplace of a specific client on a temporary contract, but the work is of an ongoing nature and it is not specified when the work will come to an end. These workers are referred to as the "permanent temp".⁷⁵ In certain circumstances the worker would be placed at the workplace of a client for a certain specified period on a fixed term contract. When the contract comes to an end, the contract is just renewed and the employee remains in the position at the workplace of the client.

When the client decides to terminate its commercial contract with the labour broker, it gives notice to the TES in terms of the contract. The TES, if it cannot place the employees with a different client, simply keeps the employee on its books without placing the employee. The TES then argues that there was no dismissal within the meaning of section 186 of the LRA.

In terms of section 186 of the LRA a dismissal entails a termination of the contract of employment contract by the employer. As labour brokers argue in this situation, termination by agreement or due to the fulfilment of an agreed condition in the contract between the parties cannot be regarded as a dismissal.

74 Theron J "Intermediary or Employer? Labour brokers and the triangular employment relationship."

75 Craven P 2009 *COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCABU AND SATABU submission on labour broking* <http://www.cosatu.org.za> [date of use 4 April 2011].

In *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others*⁷⁶ the facts were briefly as follows: during June 2008, Gubevu Security Group (Pty) Ltd, (hereafter referred to as Gubevu) employed the applicant as a security officer. His contract of employment included the typical clause that explained that his employment contract would commence on the 23rd of October 2008, and would automatically terminate on either the expiry of the contract between the employer and the client alternatively, or in the event where the client no longer required the services of the employee for whatsoever reason.

The client informed Gubevu that it would no longer require their services at the site where the applicant was based, with immediate effect. During March 2009, Guvebu informed the applicant in writing that the contract with the client had been cancelled and that due to the lack of alternative positions, his services were no longer required. The letter referred to the clause of the contract, suggesting that the contract had terminated automatically.

The matter was referred to the CCMA and the representative for Guvebu confirmed that the applicant's contract had terminated automatically when the client advised them that it no longer required their services on the sites concerned. Guvebu further contended that they did have alternative positions available, but that the applicant had refused to accept the lower position after it had been offered to him. The applicant's case was dismissed. In his award the arbitrator held that the applicant's employment contract particularly indicated that his employment would terminate automatically if the client no longer required his services. He found that the applicant's employment had terminated automatically and there was therefore no 'dismissal' for the purposes of section 192 of the LRA, due to the fact that the client had indicated that the applicant's services were no longer required.⁷⁷

The matter was referred to the Labour Court. The court, in coming to its decision, also considered the facts of the Labour Appeal Court's ruling in *SA Post Office Ltd v*

76 *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others* 2011 4 BLLR 381 (LC).

77 Par 5.

*Mampuele*⁷⁸ where the court upheld that Mampuele had been dismissed. The court was of the view that these clauses in contracts amount to a contracting out of the statutory protection against unfair dismissal. The Labour Appeal Court referred to section 5 of the LRA. The following was said about a clause which provided for an automatic termination of the contract:⁷⁹

The onus rests on South African Post Office to establish that the 'automatic termination' clause prevails over the relevant provisions in the Act (referring to section 5 of the LRA) and the clause the of the contract that established employment for a fixed term of five years subject to the employer's right to terminate the contract with due regard to fair labour practices. A heavier onus rests on a party which contends that it is permissible to contract out of the right not to be unfairly dismissed in terms of the Act. I am in agreement with the submission made by Mampuele's counsel, supported by authorities, that parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of 'automatic termination' provisions or otherwise because the Act had been promulgated not only to cater for an individual's interest but the public's interest.

The court found that South African Post Office had failed to explain why the automatic termination clause had been activated. As discussed above the court held that South African Post Office's conduct was designed to evade its statutory responsibilities. The court found that section 5 of the LRA had precedence over the clause in the contract that provided for automatic termination. Here the court found that the facts were similar to the facts in the *SA Post Office Ltd v Mampuele* case as discussed above and found that the automatic termination clause had also been triggered by a third party, namely the client.⁸⁰

The court stated that it is commonplace that the LRA must be purposively interpreted in order to give effect to the Constitution. Section 5 must be interpreted in such a manner that it protects employees against unfair dismissal.⁸¹ The court had to determine whether the automatic termination clause in the contract was invalid in terms of section 5(2)(b) and section 5(4) of the LRA.

78 *SA Post Office Ltd v Mampuele* 2010 31 ILJ 2051 (LAC).

79 *SA Post Office Ltd v Mampuele* 2010 31 ILJ 2051 (LAC) Par 23.

80 Par 9.

81 Par 12.

The court found that the automatic termination clause in the contract fell within the restrictions of section 5(2)(b) and had to determine whether it could be placed within the exception contained in section 5(4) of the LRA.⁸² The employer had to prove that the automatic termination provision was allowed in terms of the LRA. The court referred to Brassey's Commentary on the LRA stated as follows:⁸³

A distinction has to be made between the statutory rights that can and cannot be waived. So much is to be inferred from ... sub-section (4), which is prompted by recognition that the waiver of some rights is competent and seeks to put the rights in subsections 4 and 5 beyond renunciation. ... Deciding which rights can be waived is ultimately a matter of statutory interpretation: the test, unsurprisingly, is whether the subject of the right is intended to be its sole beneficiary. If others have an interest in the existence of the right, it cannot be waived; so too if the interests of the public are served by the conferment of the right.'

The court also referred to Brassey's commentary on section 199 of the LRA that states that collective agreements or arbitration awards may not be ignored by contracts of employment.⁸⁴

The constant and abiding principle is that statutes take precedence over contracts where they conflict. The problem is to decide whether a conflict exists, for a statutory provision can, without relinquishing its dominant status, countenance its own variation or waiver by agreement. ... Whether it does is always a matter to be determined upon a construction of the specific provision, but the general rule is that a provision cannot be waived or abandoned unless it is also designed to serve the public interest. Since the public has an interest in ensuring that the weak are not exploited, provisions cannot be waived if they are intended for the special protection of those who cannot effectively protect themselves.

Employers are generally regarded as strong enough to fend for themselves, but not employees – at least, not when they act merely as individuals – and, as a result, they seldom have the power to waive or abandon rights that have been given to them by the legislature. The present section, by giving collective agreements and awards precedence over the employee's contractual undertakings, illustrates the principle. Its application is evident in a line of cases that make it clear that an employee cannot contract out of his protection against unfair dismissal or renounce his right to bring such a claim. ... Each case, it must be stressed, must be individually considered, but as a rule of thumb we can say that employers can make an agreement varying or waiving their rights under the Act but employees cannot do so by means of individual consent.

The court indicated that parties to an employment contract cannot ignore the provisions of the Act that afford protection against unfair dismissal to employees:⁸⁵

82 This section provides that limiting contractual provisions are invalid, unless the contractual provision is permitted by the LRA.

83 Par 19.

84 Par 20.

...a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is precisely the mischief that section 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in section 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.

The Court overturned the award and held that the commissioner had committed a reviewable irregularity in the form of a material error of law.

It has been contended that labour brokers exploit their employees who are placed at the workplaces of their clients. Further to this, TES do not comply with labour legislation and regulations as all other full time employers do. Research has shown that many workers are underpaid. Many workers that are employed by TES complain that they do not receive the double payment for work performed on Sundays and public holidays as prescribed by the BCEA.⁸⁶ The research has also shown that employees of TES do not receive the sick leave benefits as prescribed by the BCEA⁸⁷ as they are not permanent employees. These employees do not complain about these issues as they are too happy to have employment. The employees are aware of the fact that their rights are being desecrated, but their employment and survival is dependent on the mercy of the TES.⁸⁸

There are also arguments that labour broking does not encourage the skills development of employees, and employees of labour brokers are insecure about their employment. As clients can easily dispense with the workers, the employment is unstable.⁸⁹

A very important outcome of the use of labour brokers and the legislative provisions regulating it is that employees provided by labour brokers are in effect excluded from the collective bargaining processes, except in the instance where the union negotiates directly with the TES. It is however found to be extremely difficult for trade

85 Par 22.

86 S 16(1) and s 18(2) of the BCEA.

87 S 22 of the BCEA.

88 Van der Burg A *et al Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 36.

89 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

unions to acquire organisational rights, as they would not be able to show sufficient representativeness at the workplace of the labour brokers' clients, as the workers are spread over numerous sectors.⁹⁰

Without being able to engage the client in collective bargaining, the right to participate in collective bargaining is worthless. As discussed above, the wages of employees procured by labour brokers are considerably lower than the wages of employees in standard permanent employment, often even at the same employer. It is more financially feasible for the client to pay for the services of a TES rather than to pay the salary of a permanent employee, as one TES specifically decreases its fees to compete with another TES.⁹¹

When it comes to disciplining employees in the workplace, the situation is also confusing and creates problems. In *Labuschagne v WP Construction*⁹² the employee was charged with sleeping on duty. One of the issues before the CCMA was whether a fair pre-dismissal procedure had been followed. Having found that the employee was employed by WP Construction, and that WP Construction in turn had provided the services of the employee to another, the Commissioner affirmed what should have been done: the client should have contacted the labour broker, and the broker should have been part of the disciplinary proceedings because it was his employee that allegedly committed misconduct.

The portfolio committee on labour tabled that the utilisation of labour brokers subverts fundamental rights protected in the Constitution and the LRA. It also undermines the effectiveness of job security protection provided by the LRA.⁹³

4.3. Identity of the employer

In *Vitapront Labour Brokers CC v SACCAWU & others*⁹⁴ the labour broker's employees were assigned to a client. The union and the employees were of the view

90 As discussed above.

91 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

92 *Labuschagne v WP Construction* 1997 9 BLLR 1251 (CCMA).

93 S 189 of the LRA.

that they were employed by the client and not the broker. The employees' fixed term contracts came to an end and their services were terminated and the employees were of the view that this constituted unfair dismissals and an illegal strike followed. The Labour Court found that it was clear that the employees and the union had confused the employer. Vitapront CC was a separate legal entity from the client and at all times the employees were employed on fixed term contracts with Vitapront and not the client. In its order, the Labour Court interdicted the employees and the union from intimidating, harassing or interfering with other employees regarding continuing with their normal work and their access and exit of the premises of the client.

The term 'employer' is not defined in labour legislation. The term must be established by referring to the definition of an employee. It can be said that an employer is a person or entity who receives services from another. A problem however arises when an employer must be distinguished from a client of a labour broker or a hirer of work. The *LRA*⁹⁵ provides some certainty as to the identity of the employer of an employee placed in a client's workplace by a labour broker:

(2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.

In *LAD Brokers (Pty) Limited v Robert Mandla*⁹⁶ the issue that the provisions governing temporary employment services do not apply to independent contractors was discussed. The facts of the matter were shortly as follows: A United Kingdom-based company, Weatherford U.K. Limited,⁹⁷ required two technicians on an offshore oil drilling platform. Two technicians were recruited by Weatherford. The position of the technicians, their conditions of employment and their remuneration were agreed upon. Weatherford, however had no existence in South Africa. Weatherford did not even have a bank account in South Africa. The services of a TES, LAD Brokers⁹⁸, were therefore enlisted to facilitate the employment of the two technicians. LAD

94 *Vitapront Labour Brokers CC v SACCAWU & others* 2000 2 BLLR 238 (LC).

95 S 198 of the LRA.

96 *LAD Brokers (Pty) Limited v Robert Mandla* 2001 9 BLLR 993 (LAC).

97 Hereafter Weatherford.

98 Hereafter LAD.

would then issue monthly invoices to Weatherford setting out its fee and the remuneration of the two technicians, as the situation typically is with TES'.

A contract was concluded between LAD and the two technicians, Mr. Robert Mandla being one of them. This was the first time LAD and Mr. Mandla had worked together. Weatherford wanted Mr. Mandla to work for them on the oil and drilling plant. No negotiations or discussions took place between LAD and Mr. Mandla, and Mr. Mandla even began working for Weatherford before a written contract had been concluded with LAD. Mr. Mandla entered into an agreement of work as an independent contractor with LAD. LAD then concluded the commercial agreement with Weatherford in terms of which LAD undertook to place Mr. Mandla with Weatherford as technician and Weatherford would then remunerate LAD. Invoices were issued to Weatherford by LAD on a monthly basis and Weatherford would pay the amount into LAD's offshore bank account. LAD was responsible for the payment of Mr. Mandla's salary. Weatherford had control and supervision over the activities of the two technicians.

During March 1999, 5 months after the two technicians had commenced work in December 1998, Weatherford gave notice to LAD that it would be terminating the Independent Contracting Agreements of Mr. Mandla and his co-worker with effect from 30 April 1999. LAD subsequently terminated the contract between itself and Mr. Mandla, due to operational requirements, as the contract had been terminated by Weatherford. Mr. Mandla, after failing to resolve the matter with Weatherford, referred the matter to the Labour Court.

As stated above section 198 of the LRA provides that a person who is performing duties or work, whose services have been procured for or provided to a client by a temporary employment service, is the employee of that temporary employment service, and the temporary employment service is that person's employer. Therefore, the fact that a person works at the premises and under the control and supervision of another does not change the fact that the labour broker or the temporary employment service remains the employee's employer. However, the court considered section 198(4) of the LRA which prescribes that despite the fact that the TES is deemed to be the employer of the worker, "a person who is an independent

contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.”

LAD admitted that it was a labour broker, but it argued that an employment relationship existed between Mr. Mandla and Weatherford. It argued further that the contract between Mr. Mandla and LAD was one of an independent contractor. The court did however not agree with this contention.

The court cited that the legal relationship between the parties to the agreement has to be determined from the assembly of the contract between them.⁹⁹ The court further considered the definition of an employee in the LRA.¹⁰⁰ The court also examined the independent contract between the parties, and more specifically the clauses indicating that the worker is an independent contractor and is not regarded as an employee of the Weatherford. It also considered the clause stating that not a single object in the agreement can be interpreted as creating an employer and employee relationship between the parties.

The court further referred to the right of supervision and control and indicated that it was a significant indication of an employment contract.¹⁰¹ According to the court, the more supervision and control the employer or client has over the employee, the more probable it will be that the agreement between the parties is one of employment.¹⁰² The court herein considered the dominant impression test, which is discussed in detail below.

The relationship between Weatherford and Mr. Mandla was found to be that of employer and employee, in terms of the definition of employee in the LRA. Mr. Mandla’s services were placed at the disposal of Weatherford and it was not done on

99 The court, in this regard, referred to the judgments in: *SA Broadcasting Corporation v McKenzie* 1999 20 ILJ 585 (LAC) and *Niselow v Liberty Life Insurance Association of South Africa Ltd* 1998 19 ILJ 752 (LAC) 754C.

100 S 213 of the LRA defines an employee as follows: any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of employee.

101 In this regard the court referred to the judgment of *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) at 62D-G.

102 At par 16.

the basis of the performance of a certain specified task, as the situation is with independent contractors. Mr. Mandla was also under the complete control and supervision of Weatherford. On this basis, the court found that Mr. Madla was an employee of Weatherford and not an independent contractor as contended.

The Labour Appeal Court, in dismissing the appeal against the decision of the Labour Court, came to the following conclusions:¹⁰³

[32] The finding by the Labour Court that Weatherford employed the respondent and that their relationship was not that of an independent contractor was not disputed. I agree with that conclusion. The appellant paid his remuneration. The finding of the court that although the appellant did not “procure” the services of the respondent it “provided” his services to Weatherford was not attacked on appeal. In the circumstances the provisions of section 198(2) are applicable and for the purposes of the Act the respondent was the employee of the appellant.

[33] Appellant’s termination of the respondent’s contract of employment with effect from 30 April 1999 constituted dismissal in terms of section 186(a) of the Act. The appellant completely failed to comply with the provisions of section 189 which prescribes the procedures for dismissals for operational reasons. There was no consultation at all. The finding that the dismissal was both procedurally and substantively unfair was not attacked.

Both the temporary employment service and its client were rendered jointly and severally liable, as the temporary employment service contravened a binding collective agreement, wage determination or arbitration award, and the provisions of the BCEA.

This judgment indicates that TES and clients must follow the procedures that are prescribed in the LRA. Even though TES attempt to evade the statutory requirements that are placed on them by signing an independent contractor agreement with a worker, they are still regarded as the employer of the worker and will be held liable together with their clients.

4.4. Is the worker employed by the client?

In section 213 of the LRA an employee is defined as:¹⁰⁴

103 Para 32 and 33.

104 The definition of an employee in s 1 of the BCEA is identical.

- (a) any person, excluding an independent contractor, who works for another person or for the State, and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

There is still some confusion regarding whether the employee is an employee of the client. Employees are placed with clients for long periods in time and it is accepted that the employee is a permanent employee of the client.

4.4.1. Tests developed by the court system

A number of tests have been developed by the courts to assist in determining who an employee is.

4.4.1.1. The multiple or dominant impression test

This test is often seen as the standard test that is used in our courts to determine whether a person is in fact an employee. Here, the relationship is viewed as a whole and a conclusion is drawn from the complete image. This approach was followed in *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB*.¹⁰⁵

A contract of service exists if three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with it being a contract of service.

The other provisions of the contract refer to all applicable characteristics of the relationship, including amongst others, the form of the contract; supply of tools; the method of payment and the employer's right of discipline, suspension and dismissal.

In *Medical Association of South Africa & others v Minister of Health & another*¹⁰⁶ it was found that this test examines a number of factors:

105 *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A).

106 *Medical Association of South Africa & others v Minister of Health & another* 1997 5 BLLR 562 (LC).

The dominant impression test, it seems, entails that one should have regard to all those considerations or indicia which would contribute towards an indication whether the contract is that of service or a contract of work and react to the impression one gets upon consideration of all such *indicia*...

This is still unsatisfactory but, it seems to me that, it is as unsatisfactory as is the question of how one decides whether a dismissal is fair or unfair and indeed, whether certain conduct is reasonable or unreasonable.

Some of the factors that would be taken into consideration to obtain the dominant impression are: The right to supervision; the extent to which the worker depends on the employer in the performance of duties; whether the employee is not allowed to work for another; whether the worker is required to devote to a specific time to his work; whether the worker is obliged to perform his duties personally; whether the worker is paid according to a fixed rate or by commission; whether the worker provides his own tools and equipment; and whether the employer has the right to discipline the worker.

In *Midway Two Engineering & Construction Services v Transnet Bpk*¹⁰⁷ the Supreme Court of Appeal held that, when establishing vicarious liability where the employee, who had caused the damage, was supplied by a temporary employment service or labour broker, the control test is out-of-date and will not suffice. According to the court a more comprehensive and multifaceted test is required.

The test has to take into account all relevant factors to establish whether the employer or the labour broker was more closely associated with the risk-creating act. The question here is not whether the worker is producing a particular result, but whether a person who works for another places his or her productive capacity at the disposal of the other. This type of test involves identifying who profits from the work done by the services performed.

In *Montreal v Montreal Locomotive Works*,¹⁰⁸ the court projected a test that concerned asking whose business it is, whether the party performing the work or performing the service is carrying on the business for himself and on his own behalf

107 *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 19 ILJ 738 (SCA).

108 *Montreal v Montreal Locomotive Works* 1947 1 DLR 161.

or for the benefit of another. The parties' explanation of their relationship is never decisive if the court finds that the facts support a conflicting structure.

The 1956 LRA defines casual employees as:¹⁰⁹

A salaried shareholder reporting to the managing director; a director of a company; an estate agency working in terms of a contract in which he/she was styled an 'independent contractor'; former employees who had been lawfully and fairly dismissed, but offered re-employment if jobs became available; and seasonal workers whose former contracts had expired but who were not offered re-employment the next season.

The statutory definitions of employer and employee make no reference to the existence of a contract of service between the parties. Although it was long thought that the existence of a valid contract was a *sine qua non* for two parties to be deemed employer and employee, respectively, the Appellate Division of the former Supreme Court held that this was not so under the 1956 LRA. The new LRA ends this debate by expressly including 'selective re-employment' among the acts deemed to constitute dismissal.¹¹⁰

Sections 83A of the BCEA and 200A of the LRA provide a guideline in determining who is an employee. These sections create a presumption that, despite the form of the contract, a person who earns below a certain amount is an employee if that person is subject to the control or direction of another person or forms part of the employer's organisation.

The Constitution can be used as an instrument to conclude whether an employment relationship does indeed exist. The Constitutional Court applied the Constitution as an apparatus to determine whether an employment relationship exists in order to determine whether the persons concerned will qualify for either constitutional or statutory labour law protection or coverage.¹¹¹

109 Definition of casual employees in the LRA.

110 S 186(1)(f).

111 Olivier M "Reshaping Private and Public Employment in South Africa: The Impact of the Constitution and the Bill of Rights" *Public Law Conference* 8 – 10 September 2005 Stellenbosch University.

In *SA National Defence Union v Minister of Defence*¹¹² it was held that members of the Defence Force are covered by the freedom of association provisions of the Constitution. The Court was convinced to find this by the fact that the basis on which permanent members of the Defence Force are employed is similar to that of workers employed in terms of a contract of employment.

In *NEHAWU & another v Nursing Services of South Africa*¹¹³ a nurse was in the service of Nursing Service of SA, an agency supplying nurses on its panel to its clients at agreed fees. The nurse's remuneration is paid to the agency, which deducts its commission, and the agency then pays the nurse. At a stage, the involved nurse noted that her name was no longer on the duty roster and her colleagues starting saying farewell to her. The client, Newhaven, had indicated that the nurse's services would no longer be required and requested that she be removed from site. In essence, while the nurse had been engaged at Newhaven for almost ten years, Newhaven could legally refuse to have her on the premises and effectively make it the problem of the labour broker to discipline or terminate her services in a fair manner.

On the facts, the CCMA Commissioner held that Newhaven had in effect terminated its long-standing and virtually indefinite engagement of the nurse, and relying on section 198(2), the termination was deemed to have been effected by NSSA as the nurse's employer. The dismissal was held to have been unfair. The nurse had been an employee of Newhaven for many years and could no longer be regarded to be a temporary employee. Newhaven had to follow the procedure that is prescribed by the LRA for retrenchments. Newhaven failed to consult with the employee and did not give her proper notice of the termination. The selection of the specific nurse was also not made clear. There is agreement with the commissioner herein that the dismissal was unfair.

5 Requirements for a lawful employment contract

112 *SA National Defence Union v Minister of Defence* 2003 3 SA 1 (CC).

113 *NEHAWU & Another v Nursing Services of South Africa* 1997 10 BLLR 1387 (CCMA).

A contract of employment is an agreement between two legal persons in terms of which one party, the employee, undertakes to perform services personally for the other party, the employer, for an unclear or determined period in return for a fixed or determinable compensation. It entitles the employer to define the employee's duties and to manage the way in which the employee performs them.

Subsequent to this, the following are described by Grogan J in *Workplace Law* 9th ed (Juta Cape Town 2007) as the *essentialia* of the contract of employment:

1. it is a voluntary agreement;
2. there are two legal *personae*;
3. the employee agrees to perform certain particular and/or implied tasks for the employer;
4. there is an indefinite or specified period;
5. the employer agrees to pay a fixed or ascertainable remuneration to the employee;
6. the employer gains a right to command the employee as to the manner in which he carries out his duties.

When the worker is however provided to a client by a TES, the contract of employment is atypical. In the triangular relationship,¹¹⁴ that is created when a TES is involved in the employment of a worker, there are three legal personae, being the TES, the worker and the client of the TES. The agreement with the worker to perform duties at a certain workplace is also not completely voluntarily, seeing as the worker has to be satisfied with the workplace where he or she is placed by the TES.

The situation often occurs that a worker is employed by the TES and placed at the workplace of a client for a specified period on a fixed term contract. When the term of the contract expires, the employee remains with the client, with no certainty of the duration of the contact.¹¹⁵ The employees are not placed on a permanent basis and their employment at the specific client's workplace could be ended on short notice in the event of the client requesting removal of the said employee. The uncertainty of

114 Discussed at 4.1 above.

115 "Permanent Temp" situation that is discussed in detail at 4.2 above.

employment that is created by this relationship is not in line with the common law requirement for a lawful contract of employment.

Employed by the TES and in terms of section 198, the TES shall be regarded to be the employer of the employee at all times. Remuneration for the employee is however agreed upon between the TES and the client. The employee has to accept the remuneration and the terms of employment as presented to him or her by the TES. The employee receives remuneration only when he or she is placed at a client's workplace. The situation often occurs where an employee is removed from the client's workplace, either due to the client's operational requirements or the client's preference. The employee is, in that instance, still employed by the TES, but receives no remuneration until such time as he or she is placed at the workplace of another client.

When the employee is placed with another client, the terms, conditions and remuneration may differ immensely from those of the previous client. The employee is consequently not certain of the amount of remuneration that he or she will receive during his or her employ with the TES, nor if the remuneration be stable.¹¹⁶

The TES, being the lawful employer of the worker, is not the one issuing the duties to the worker and the worker is not subject to the control of the TES, but to the control of the client at whose workplace he or she has been placed. This also digresses from the common law requirement of a lawful employment contract. The manner in which workplace is defined in the LRA makes no provision for the triangular agreement of a TES.¹¹⁷

6 International Comparison

6.1. Temporary Employment Services in the United States of America

116 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 36.

117 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 19.

In America TES are known as labour contractors. The Bureau of Labour Statistics America has indicated that 2.6% of employment in America is made up of temporary employment.¹¹⁸ These labour contractors facilitate large scale temporary employment of migrant workers on American farms. The labour contractor recruits workers, which are usually migrant workers, places them with employers, and moves them from employer to employer. This is however done at a cost to the worker, as the contractor charges a fee for housing and transportation. The problem facing these workers is that the hours of work that they are offered are minimal in relation to the fees payable to the labour contractor.¹¹⁹

As in South Africa organising of workers is a difficult task for trade unions. The working situation of these workers can be compared to forced labour and workers are exploited, as they are not afforded the protection under the employment legislation of America. The situation is, however much worse than in South Africa, because not only do these employees work for very low wages or remuneration, they are further not permitted to join a union. The temporary workers receive payment on a task basis and not in line with the minimum wage. High expectations are set and employees have to perform a certain amount of work before they receive the minimum wage.¹²⁰

The payment on a task basis has ultimately been rejected and the minimum wage has been extended to the employees of labour contractors. A triangular connection has been created between the minimum wage, the task-rate and the standards of efficiency that are expected of the workers.¹²¹

In South Africa the minimum wage is determined by the Minister of Labour and published in the Government Gazette or in Sectoral Determinations¹²² of certain sectors and employees that do not receive minimum wages can approach the

118 Shivangulula SE *Labour Hire: The impact of labour broking on employee job satisfaction and commitment in a number of Namibian organizations* (thesis submitted for degree of Masters of Commerce in Organizational Psychology at Rhodes University 2009).

119 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 10.

120 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 10.

121 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 11.

122 S 51 of the BCEA.

relevant forum for enforcement thereof. A labour inspector may be appointed and a compliance order can be issued to the employer.¹²³

In America employees could also be dismissed without notice. The American Government started to regulate labour contractors by introducing a requirement for registration in terms of which the labour contractor was required to apply for a state license to operate as such. Without the license they would be penalised with fines. These licenses also had to be renewed and before renewal the contractors had to pass labour related tests.¹²⁴ The registration of TES is not a requirement in South Africa and the TES do not necessarily have to have knowledge of labour legislation to operate as such.¹²⁵

In America, similar to South Africa, there is several and joint liability for the contractor and employer for any violations of labour legislation or provisions. The enforcement of the liability is however, as in South Africa, a challenge.¹²⁶

6.2. Temporary Employment Services in Thailand

In Thailand TES are known as informal brokers. Workers migrate to Thailand and are assisted by the brokers to secure work. The brokers are paid for all services that are provided, which also includes abusive and dangerous working conditions and travelling. Workers that migrate to Thailand are ignorant about their rights and are seen as cheap labour by the brokers that exploit them.¹²⁷ In “Inter-Agency Project on Human Trafficking: Phase II, Thailand” the United Nations found that corruption plays a huge role here as these workers are transported to the Thai border by the

123 Ss 63 to 69 of the BCEA.

124 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 11.

125 Kruger J Date Unknown *Labour brokering in South Africa* <http://www.solidarityinstitute.co.za> [date of use 1 August 2011].

126 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 11.

127 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 11.

brokers and delivered to other brokers to find work for them, all with the knowledge of law enforcement officials. The brokers will register the worker for a work permit.¹²⁸

As in South Africa a contract is entered into between the employer (client) and the broker. In terms of these agreements the broker is hardly ever held responsible and employers are never accountable for unfair labour practice and violation of human rights.¹²⁹ This practice can also be compared to slavery as the broker limits the worker's freedom by withholding his or her working permit. The worker is then not able to change his broker or work for another employer. Desperate workers will even go as far as to pay the brokers for their discharge and permits.¹³⁰

6.3. Temporary Employment Services in Namibia

Labour broking is called labour hire in Namibia and is regarded as a particular form of outsourcing which appeared in the 1990's. The situation is very similar to that in South Africa. Labour broker companies supply labour to third parties with whom they have a commercial agreement. This labour hire practice applies to both part- and full-time employees. In studies it was established that employers used labour hire companies to cope with peaks in demand for employees, to reduce costs, to avoid industrial relations issues, to ensure larger flexibility in the workplace and also to avoid trade unions.¹³¹

As in South Africa the employees were also faced with job uncertainty, low wages and poor working conditions, limited training and skills growth and little possibility of collective bargaining. The same situation also occurred, as in South Africa, where workers were confused about who their employer was. The workers did not receive paid leave or severance pay and were employed on a 'no work-no pay' basis. It was

128 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 11.

129 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 11.

130 Van der Burg A *et al* *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* 11.

131 Jauch H *Confronting Outsourcing Head-on? Namibia's ban on Labour Hire* (International Labour Research and Information Group 2009).

found that most labour hire workers earned a very low hourly wage, they enjoyed very few benefits and most of them worked excessive hours per week.¹³²

Most of the labour hire workers were migrant workers who came from towns in the northern parts of Namibia to find work. These migrant workers mainly rented rooms in private houses and sent money back to their families and also had to sustain themselves on a daily basis; their wages were often insufficient to cover all their expenses. Most labour broking companies in Namibia described themselves as black economic empowerment companies, but failed to contribute very much to the decent work principle.

In 2007, the Namibian Parliament adopted the new *Labour Act*¹³³ and section 128 thereof was a very controversial section, as it stated the following:

(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.

(3) Any person who contravenes or fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding N\$80,000.00 or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

Namibia's *Labour Act*, which came into operation on 1 November 2008, thus prohibited the practice of labour hire. The provision hampered a potential infringement on the constitutional right to carry on any trade or business and to choose an occupation freely, by saying that it is "in the interest of decency and morality."

In *African Personnel Services v Government of Namibia and Others*¹³⁴ the labour broking company brought a Constitutional challenge to the section. African Personnel Services made an application in the High Court that challenged the constitutionality of section 128 of the *Namibian Labour Act*. The application was

132 Jauch H *Confronting Outsourcing Head-on? Namibia's ban on Labour Hire*.

133 *Namibian Labour Act* 11 of 2007.

134 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2008 NAHC 148.

based on the grounds that the section contravened the fundamental freedom to engage in any profession, to choose any occupation, trade or business.

The Roman law origin of the common law contract of employment was considered by the court and it held that *locatio conductio operarum*, involved the letting and hiring of personal services in return for monetary return.¹³⁵ Another form of hiring that was considered was slavery. This practice involved the owner of the slave renting out his slave in terms of the *locatio conductio rei*.¹³⁶

The court unanimously found that labour hire is not lawful in Namibia because it has no legal basis in Namibian law and that the right to carry on trade or a business is not absolute, it only comprises lawful trades or businesses. In the judgment, the court dismissed the argument that the company's freedom of trade had been infringed, as a labour broker's contract of employment had 'no basis in law'. In coming to this conclusion, the court defined labour hire as a splitting of what would otherwise be a contract of employment into a number of contracts for the provision of personal service between the employee and the labour broker and between clients of the labour broker for whom the employee renders his service.

The court also referred to the universal principles of a legitimate contract of employment. It was also held that the common law contract of employment comprises an agreement between two *personae* and that a third party is not welcome in this relationship.¹³⁷ The court compared labour broking to slavery and found that it is very similar and should therefore be done away with. The court held that labour should not be used as a commodity.¹³⁸

The court concluded that it is not possible for contractual privity of a third-party labour broker to an employment contract to exist. The court was of the view that a tripartite employment relationship could not give rise to a lawful contract of employment and

135 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2008 Par 20.

136 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2008 Par 17.

137 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2008 par 20-21.

138 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2008 par 26.

therefore labour hire was regarded as not a lawful business or trade that is entitled to protection in terms of section 21 of the *Namibian Constitution*.¹³⁹

The judgment was taken on appeal to the Supreme Court of Namibia in *Personnel Services (Pty) Ltd v Government of the Republic of Namibia*¹⁴⁰ which held that a prohibition on labour broking is unconstitutional under their legal structure. It was found that the labour broker is one of the biggest employers in Namibia.

The court further held that it was possible for a labour broker to depend on the fundamental right to freedom of occupation, profession, trade or business. The Namibian Supreme Court of Appeal considered and declared section 128 of the *Namibian Labour Act* invalid. The court unanimously found that Africa Personnel Services had never introduced the argument concerning permitting a third party into the employment relationship in the court *a quo*. The labour broker had not been given the opportunity to argue this controversial argument prior to the High Court reaching its decision.

The Supreme Court of Appeal also held that major changes have taken place in the manner in which work is done in the modern globalised economy. The court held that if contracts of service had remained isolated in common Roman law of pre-modern times, the restricted scope of their application would have been completely inappropriate to attend to the demands of the modern era.

The Supreme Court of Appeal held that the sheer fact that the *National Labour Act* declared labour brokers unlawful did not place limits on the ambit of the rights and freedoms contained in the Constitution, or on the ability of the Supreme Court of Appeal to consider the constitutionality of legislative provisions that established potential infringements on constitutional rights. The Supreme Court of Appeal held that:¹⁴¹

139 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

140 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 NASC 17; 2011 1 BLLR 15 (NmS) ; 2011 32 ILJ 205 (Nms).

141 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* par 51.

Statutory, customary or common law restrictions that fall outside the ambit of permissible limitations under sub article (2) are unconstitutional. Impermissible restrictions contained in legislation cannot be considered as “legislation lawfully enacted” ... If the limitation of a fundamental freedom by 'the law of Namibia' is unconstitutional, the scope of the fundamental freedom is not circumscribed by it. To hold otherwise would be to put the proverbial cart before the horse.

The Government of Namibia argued that the fundamental freedom protected by its Constitution is linked to human dignity and that it is vested in natural persons and not in juristic persons. This argument was rejected by the court and it indicated that the section applied to all persons, including both natural and juristic persons. The court stated that it was necessary to follow a generous and purposive interpretation. The court held that labour broking might be associated with the objectionable history of labour hire of the past, but that the Constitution supplies a direction for current and future developments of the law. The court acknowledged that the freedom of trade and occupation is crucial to the social, economic and political wellbeing of humanity overall, which is not only applicable to individuals, but also to groups such as partnerships and companies.

The Supreme Court of Appeal considered international guidelines. It also considered whether the constraint imposed by section 128 was reasonable and justifiable in an open and democratic society. The court acknowledged that everyone who seeks to justify the limitation of a fundamental freedom by law accepts the burden to show that the justification falls clearly and unambiguously within the terms of permissible constitutional limitations, interpreted objectively and as narrowly as the Constitution's exact words will allow.¹⁴² The court further held that limitations on the rights and freedoms that are guaranteed by the Constitution and section 128 of the *Namibian Labour Act* were unconstitutional. Subsequent to this decision, section 128 of the *Namibian Labour Act* has been invalidated and the bar against labour brokers in Namibia has been lifted in its entirety.

7 The South African Government’s Proposed Amendments and the impact thereof on labour broking

142 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* par 65.

In 2009 the Department of Labour released a discussion paper, entitled, "Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa." After the release of this paper, public hearings were held and stakeholders were given the opportunity to communicate their views. During that time numerous ministers in government associated TES- labour broking to slavery and slave trading.

COSATU, amongst others called for an absolute ban on the use of TES, while other unions that were not affiliated to COSATU proposed an arrangement within which the practices that, according to them, lead to mistreatment of workers be outlawed. Businesses suggested that a total ban on TES is not possible and that adequate legislation is already in place. It was contended that the Department of Labour has to enforce these regulations properly.¹⁴³

The Department of Labour published proposed amendments to labour legislation¹⁴⁴ and also introduced the Public Employment Service Bill during December 2010. The proposed amendments, if enacted, will effectively prohibit the practice of labour broking and will have far reaching implications for employers whether they make use of temporary employees provided by a TES or not. The amendments that affect TES and the impact that they will have, if they are passed, as well as the submissions made by business in South Africa, mainly through BUSA¹⁴⁵, are briefly discussed hereunder:

143 Bradley Conradie Attorneys *February 2011 Future of Labour Brokers in SA still unclear* <http://legalbrieftoday.co.za> [Date of use: 4 April 2011].

144 *The Labour Relations Amendment Bill*, 2010.

145 BUSA is a confederation consisting of 58 business organisations, including amongst others, chambers of commerce and industry, professional associations, corporate associations and uni-sectoral organisations. BUSA has a board of Trustees made up of 58 members. BUSA is the representative of South African business on high-level and macroeconomic matters that concern business at national and international levels. It is also the primary delegate of organised business in South Africa. BUSA embodies the vision of its members in a number of statutory and non-statutory national organisations and bodies. The businesses' interests are also represented by BUSA at the National Economic Development and Labour Council, or more commonly known as NEDLAC. Globally, BUSA is a member of the following international organisations: *International Organisation of Employers*, the *Pan-African Employers' Confederation* and the *Southern African Development Community Employers' Group*. It is also represents business at the *International Labour Organisation*, *African Union*, *Social Affairs Commission* and the *World Trade Organisation*.

7.1. The amendments to the LRA

7.1.1. The definition of an employer

Section 213 of the LRA does not define an employer. In terms of the amended LRA, a definition of an employer will be added to section 213. An employer will be defined as: *“any person, institution, organisation, or organ of state that employs or provides work to an employee or any other person and directly supervises, remunerates or tacitly or expressly undertakes to remunerate or reward such employee for services rendered”*.

The definition makes it apparent that “any person or institution” that provides work to another person and directly supervises such a person is considered to be the employer of such a person. The client of a TES would therefore also be considered to be the employer of the employee and not the TES, as the position currently stands.

This addition to the LRA may assist employees with the problems that they face with the identification of their employer, as discussed above. This will eliminate the problem regarding the referral of unfair labour disputes to the CCMA (discussed above), as the client, where the worker has been placed, is now regarded as the employer of the worker. The client will no longer be able to evade obligations that are placed on employers regarding the right to fair labour practice and fair procedure. The client will no longer be able to dispose of employees at will, without facing the consequences of its actions.

7.1.2. The definition of an employee

Section 213 of the LRA¹⁴⁶ defines an employee as any person, excluding an independent contractor, who works for another person or for the State, and who

146 Amendments are made to the definitions not only in s 213 of the LRA, but also in s 1 of the BCEA and s 1 of the EEA.

receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer.¹⁴⁷

In terms of the amended LRA an employee will be defined as “any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit and works under the direction or supervision of an employer.”

The worker that is placed in a client’s workplace will be regarded as being employed by the client. The client will have to adhere to the standards that are set for fair labour practices and obligations placed on employers. The client will not be able to evade the obligations regarding disciplinary procedures, proper retrenchment procedures, employee benefits etcetera.

Business made the submission that the South African law is clear on the definitions of an employer and an employee. It also submitted that the code of good practice exists on the identification of an employee. It is also of the view that the proposed amendments seem to constrict the definition of an employee and the group of people that are regarded as employees under the current labour legislation are being ground down. It basically seems that the reasons for the introduction of the new definitions and the amendments to the old definitions are uncertain.¹⁴⁸

7.2. Repeal of section 198

In terms of the proposed amendments, section 198 of the LRA will be abolished. As noted above, this section regulates the existence of TES. If this section is annulled, TES are no longer recognised in labour legislation. As discussed above section 198(2) states that “a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person’s

147 As quoted and discussed at 4.3 above.

148 Anonymous 2011 *BUSA submission: Labour Relations Amendment Bill, Basic Conditions of Employment Amendment Bill, Employment Equity Amendment Bill, Employment Services Bill* www.busa.org.za [Date of use 4 April 2011].

employer.” Clients of TES will no longer be able to rely on that section. This also ties in with the new definition of an employer and the amended definition of an employee. The protection that was provided to the client by the LRA is now taken away and the client is now left to answer for its actions.

Business submitted that the elimination of section 198 will result in the demise of TES, significant job losses and place limitations on employment flexibility. Companies that have short-term position needs, for example when their permanent employees are on maternity leave, sick leave or study leave, rely on TES to provide a worker. If this option is no longer available to employers, they might have to put the work on hold until the permanent employee returns or to circulate the work between workforces, which could lead to a negative impact on productivity.¹⁴⁹

It also submitted that it will lead to less certainty for employers and employees of employment services. According to them the identity of the employer will become uncertain to the almost four million persons that are employed by sub-contractors, outsourcing entities and labour brokers (TES).¹⁵⁰ It is further submitted that it will complicate matters, as “employees will first have to approach the CCMA and determine the employer before being able to proceed any further.”¹⁵¹ Business believes that this amendment will have a devastating impact on commerce in South Africa, as it will create instability in the South African labour market.¹⁵²

The repealing of this section would effectively come down to a ban on labour brokering.¹⁵³ There can be severe consequences if the section is repealed and labour brokers are banned. A danger coupled with the banning of labour brokers is that there will be a decreased flexibility for employees as TES supports the need for flexibility and temporary assignments in the employment market. The service supplies work, for example part-time students, older people not wanting to be placed on a permanent basis, female employees that prefer to work flexible hours due to

149 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za.

150 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za.

151 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za.

152 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za.

153 Association of Personnel Services Organisations 2011 *Submission in respect to proposed labour law amendments* <http://www.apso.co.za> [date of use: 4 April 2011].

their family obligations and other persons wanting flexible work. A ban on TES would deprive these people of the employment opportunities that are available to them.¹⁵⁴

A ban on TES creates the danger of violating people's constitutional right in terms of section 22 of the Constitution to choose their trade, occupation or profession freely.¹⁵⁵ The provisions do not explicitly forbid TES, but that effect is created. The section indicates that it has to be regulated by law; however a stipulation that excludes an activity does not amount to the regulation of that activity.¹⁵⁶ If the section were to be challenged in the Constitutional Court, it would have to be shown that this limitation is reasonable and justifiable.¹⁵⁷ It is understood that the purpose of this clause is to prevent the abuse of workers employed by labour brokers, but when the purpose of the clause is brought in relation to the banning of TES, the severe effect of this clause is not justified.¹⁵⁸

In the PEA Convention, discussed above, the ILO recognises the operation of TES and directs that it be regulated. In terms of this convention, the rights of employees must not be reduced by the regulation. The prohibition of TES is therefore not in accordance with international standards. Also in the light of the *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* case where the court held that the blanket prohibition of labour hire was an unconstitutional response to the abuses that were associated with TES, and that they could be dealt with by regulation.

The amendments also have a further major drawback for employers. After the amendments, each employer will have to register the employees and will be responsible for contributions towards Unemployment Insurance for every employee even if the employment relationship is for just a few days. This also imposes extra administrative costs for the involved public institutions such as the Unemployment Insurance Fund and the Compensation Fund, who have to collect UIF, Workman's

154 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za.

155 Association of Personnel Services Organisations 2011 *Submission in respect to proposed labour law amendments* <http://www.apso.co.za> [date of use: 4 April 2011].

156 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za.

157 S 36 of the Constitution.

158 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za.]

Compensation, and skills development levies from a number of employers for whom the employee worked.¹⁵⁹

The amendments also create an administrative burden on employees as they will have to ensure that they collect IRPS forms for tax purposes from each employer that they have worked for over the previous year.¹⁶⁰ This has never been necessary as the employees received IRP forms from the labour broker.

7.3. Amendments to section 186

Section 186(1) relating to dismissals will also be amended. This section of the LRA will be amended with regard to the use of fixed term contracts by a substitution that will be made in subsection (1)(b). This subsection will be substituted by the following:¹⁶¹

- (b) an employee engaged under a fixed term contract of employment reasonably expected the employer—
 - (i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
 - (ii) to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it on less favourable terms, or did not offer it, where there was reasonable expectation;

Besides the amendments and additions above, it is also proposed that a new section be inserted in the Act stating that “an employee must be employed permanently, unless the employer can establish a justification for employment on a fixed term.” Employing staff temporarily instead of using a labour broker will therefore also not be an option.

Those employers that will be able to justify the use of temporary staff as per section 200B of the proposed amendments will have to be extremely careful because of the proposed amendments to section 186(1)(b). It would be considered to be a dismissal if the employer failed to appoint an employee engaged under a fixed term contract

159 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za].

160 Anon 2011 *BUSA submissions Amendment Bills* www.busa.org.za; Association of Personnel Services Organisations 2011 *Submission in respect to proposed labour law amendments* <http://www.apso.co.za> [date of use: 4 April 2011].

161 *The Labour Relations Amendment Bill*, 2010.

permanently and such employee can prove that reasonable expectation of a permanent appointment was created.

The Minister of Labour, Mrs. Mildred Oliphant indicated that the essential objective of the amendments to the existing labour legislation is to manage the rise in the practise of labour broking and to control the exploitation of workers that is related to this practice.¹⁶²

The Minister further indicated that this challenge requires expansion of the extent of the protection given further than the employees who are formally employed. This will involve changing power to guarantee that workers have to access opportunities for work in the conditions in the ILO's Decent work agenda, being freedom, equity, security and human dignity. She stated that additional protection must be provided for employees who are employed on fixed term contracts, employees who are employed on a part-time basis and temporary employees. She indicated that the Government is aware of the numbers of employees who wish to work on fixed term contracts, and indicated that the Government's goal is not to limit people's freedom to work in the manner they prefer, but rather to assure that workers who are employed on a fixed term contract are afforded the same protection as workers that are employed on a permanent basis and to provide certainty around the identity of the employer.¹⁶³

The Minister further indicated that the amendments are being considered by NEDLAC¹⁶⁴ and that new legal drafting is underway on a number of issues, including fixed term contracts, temporary employment agencies, part-time work and probation.

With the PEA,¹⁶⁵ which permits the operation of labour brokers, the South African Government has to consider the banning of labour brokers tactically.

7.4 Regulation of Labour Brokers

162 Oliphant M 19 July 2011 *Labour broking will be dealt with* <http://www.politicsweb.co.za> [date of use 22 July 2011].

163 Oliphant M 19 July 2011 *Labour broking will be dealt with* <http://www.politicsweb.co.za> [date of use 22 July 2011].

164 National Economic Development and Labour Council.

165 As referred to in 2 above.

The suggestion has also been made to allow TES to continue, but to regulate its activities. This would assist with the protection against exploitation.¹⁶⁶ It was suggested that TES register and that registration only takes place after the TES has complied with labour regulations. This will also create a liability for the client, when proof of the registration of the TES, whose services they use cannot be provided. Clients will then only use the services of TES who are registered, and therefore comply with labour legislation.¹⁶⁷

A regulatory body that is established in terms of an Act of Parliament has been suggested to regulate the TES industry. This regulatory body would be responsible for the registration of the TES that meet the minimum standard and it would also enforce the compliance with a code of ethics regarding TES relationships, such as dismissal of workers, trade union recognition and collective bargaining. There also have to be mechanisms put in place to manage the non compliance with the code, labour legislation and collective agreements and sanctions need to be imposed.¹⁶⁸

The worker that is placed at the workplace of a client could also become an employee of the client after a certain time period. This would prevent the employee from being employed *ad infinitum* under the triangular employment relationship.¹⁶⁹

8 Conclusion

There have been many cases where employees who are employed by labour brokers and placed on clients' premises have been deprived of their basic rights under labour legislation. As discussed above most TES employees do not have the same benefits as permanent employees, are paid poor wages and have to work extended hours. It is also difficult for trade unions to organise employees of TES and

166 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

167 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

168 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

169 Bamu PH and Godfrey G *Exploring labour broking in the South African construction industry* (Labour and enterprise policy research group University of Cape Town 2009).

bargain with these TES for better benefits. The fact that there are not understandable definitions for the regulation of the practice of labour broking adds to TES being capable of evading the prescriptions of labour legislation, which leads to the exploitation of employees by TES.

Employees are also dismissed without any justifiable reason when a client decides to end the relationship with the TES or when it no longer requires the services of the employee or even if it just does not like the employee, without following the correct procedure and without paying severance packages. This is possible, because the contracts between the TES and its client and also the worker make provision for this and gives the client of the TES the right to cancel the agreement without a justifiable reason or a reasonable notice period. Many employees are then left confused and without a remedy. However the courts have, in similar situations, found in the favour of the employee and have held the employer, being the TES and the client liable. As discussed in the matter of *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, the court found that these provisions in contracts are contrary to public policy and without legal effect. It has also been found, in other cases, that the labour broker is not entitled to contract out of its obligation to treat their employees fairly in terms of labour legislation. The situation is therefore being addressed by courts and more and more TES and their clients are being held liable for unfair labour practices.

Trade unions in South Africa express their belief that labour broking should be banned and highlight all the issues of exploitation and other negative aspects of the practice. When the practice is, however, examined against the background of international labour movement – the situation in other countries that were referred to above, and the conventions of the ILO, like the PEA - a more calculated retort is required. The PEA allows the existence of TES and prescribes the regulation thereof.

Labour broking is not only negative in character, there is a positive side. As indicated above, by the NABC-figures, an enormous number of people are employed by labour brokers in South Africa. Many lower skilled employees are employed by labour brokers who assist them in finding employment and banning of TES may make it difficult for these lower skilled workers to access potential work opportunities. A ban

on labour brokering and TES will have an immense effect on the South African employment sector, as it would contribute to the already high unemployment rate, which then, in turn, would contribute to poverty and higher crime statistics. Banning of labour brokers is not practicable in a country with elevated levels of poverty and crime.

When the effect of banning TES is weighed against the consequences thereof the banning would have more negative effects than positive, as discussed above. In the event that labour brokers were to be banned, a similar situation as the one that occurred in Namibia could arise, where the ban would be challenged in the Constitutional Court as it can also be seen as an infringement on a fundamental right. The Government would then have to prove that the limitation of the right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, as prescribed in section 36 of the Constitution and would have to consider the importance of the purpose of the limitation and the relation between the limitation and its purpose. The court would also have to consider if there is a possibility of less restrictive means to achieve the purpose of protecting workers who are being exploited by the practice of TES.

There is agreement with Business South Africa and the many submissions that were made to introduce measures to regulate the practices of labour brokers. By doing this, the many employees that are employed by TES would not be left unemployed and their interests would still be protected. The suggestion that TES should be registered after they have complied with labour standards and that they should be punished if they do not adhere to the labour standards, is supported.

It is therefore clear that the Labour Broking has more advantages than disadvantages. The practise is also very valuable for a large part of South Africa's Labour Market. It would be beneficial for South Africa's economy and labour system if the practise is retained, provided that proper legislation is introduced to regulate it.

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