

**TITLE PAGE**

THE LEGAL FRAMEWORK FOR THE PROTECTION OF EMPLOYEES OF LABOUR  
BROKERS IN SOUTH AFRICA

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## ABSTRACT

Current South African legislation allows the use of temporary employment services ('labour brokers' in common parlance). Labour broking involves a triangular employment relationship between client, labour broker and worker. In terms of this arrangement the labour broker would employ a worker and supply him/her to a client, who then supervises and controls the worker. Even though the client supervises and controls the worker, the labour broker would remain the employer and be responsible for paying the worker.

In South Africa, the use of labour brokers has increased exponentially, because it provides employers with an opportunity to circumvent the onerous provisions of constitutional, international and statutory law that seek to protect workers. In 2010, the Parliamentary Portfolio Committee on Labour identified a number of bad and abusive practices being perpetrated against labour broker employees and recommended that the Department of Labour review all labour legislation. In July 2009 the Department of Labour had in fact already submitted its recommendations for statutory amendments to the NEDLAC for discussion. Although it can be ascertained with relative certainty that South Africa's labour legislation will be amended, it is still not clear what form the amendments will take on. Whilst the ANC prefers a regulatory solution, COSATU maintains its call for a complete ban of labour broking.

The thesis firstly determines why the bad and abusive practices are occurring and identifies a number of areas of insufficient or ineffective regulation (referred to as 'loopholes' in common parlance) that allow the abuse of labour broker employees. Secondly, the thesis examines the debate around either prohibition or regulation being the most suitable option for curbing the bad and abusive practices. Thirdly, the thesis explores the DOL's recommendations and foreign examples of regulation. Finally, the thesis critiques the DOL's recommendations and suggests ways in which they could be amended or supplemented to effectively close the loopholes in current regulation and provide practical legal solutions for the protection of labour broker employees in South Africa, whilst maintaining a balance between labour broker employees' need for protection and employers' need for labour market flexibility.

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21. Fee-Charging Employment Agencies Convention, 96 of 1949
22. Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948
23. ILO Constitution, Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia)
24. Private Employment Agencies Convention, 181 of 1997
25. Private Employment Agencies Recommendation, 188 of 1997
26. Right to Organise and Collective Bargaining Convention, 98 of 1949
27. Termination of Employment Convention, 158 of 1982

**LIST OF ABBREVIATIONS**

ABU	Dutch Association of Temporary Work Agencies
ANC	African National Congress
BBBEEA	Broad Based Black Economic Empowerment Act
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of South African Trade Unions
DOL	Department of Labour
EU	European Union
EWI	Employing Workers Indicators
EEA	Employment Equity Act
GCR	Global Competitiveness Report
GDP	Gross Domestic Products
HIV	Human Immune Deficiency Virus
ILO	International Labour Organisation
IMF	International Monetary Fund
LAC	Labour Appeal Court
LRA	Labour Relations Act
NEDLAC	National Economic, Development and Labour Council
OECD	Organisation for Economic Co-operation and Development
SDA	Skills Development Act
SWANLA	South West Africa Native Labour Association
UK	United Kingdom
USA	United States of America

## CHAPTER 1: INTRODUCTION

In 2010, the Labour Court, in *Building Bargaining Council v Melmons Cabinets CC*<sup>1</sup>, strongly criticised an attempt by the employer to deprive its employees of labour law protection and labelled it as a 'cruel hoax' and 'sham'. In that case, the employer persuaded the vast majority of its hourly paid employees to resign as employees and enter into an independent contractor contract for an indefinite period. The employees were blissfully ignorant of their newly acquired obligations and loss of rights and privileges. They forfeited, amongst others, the following: the right not to be unfairly dismissed; the benefits of union membership and collective bargaining; protection against accident or illness at work; unemployment insurance benefits and the right to minimum terms and conditions of employment, such as paid holiday leave, paid sick leave and severance benefits. Many other employers followed suit and attempted to convert their employees into independent contractors. This moved the legislature to curb this by amending labour legislation and introducing a presumption of employment clause.

### 1.1 The use of labour broker arrangements to avoid the demands of labour law provisions

Although the amendment of labour legislation curbed the practice of converting employees into independent contractors, employers soon found other ways of circumventing labour law protection. The exponential increase in the use of temporary employment services ('labour brokers' in common parlance) in recent years seems to suggest that labour broking has now replaced independent contractor arrangements as the popular mechanism for avoiding labour law provisions which protect the employee. This is seen by some scholars as exploiting vulnerable employees.<sup>2</sup>

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<sup>1</sup> *Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC and Another* (P478/00) [2000] ZALC 127 (8 November 2000), at 21.

<sup>2</sup> See reference to this in P. Benjamin, 'Workers' Protection in an increasingly informalised labour market: the South African case', paper presented at a workshop 'A Decent Work Research Agenda for South Africa', Cape Town, South Africa, April 2007, 6.

Current legislative provisions allow the practice of labour broking. Labour broking involves a triangular employment relationship between client, labour broker and worker. In terms of this arrangement the labour broker would employ a worker and supply him/her to a client, who would then supervise and control the worker's activities at the workplace. Even though the client supervises and controls the worker, the labour broker remains the employer and pays the worker. This feature distinguishes labour broking from other labour market intermediaries, such recruitment agents, who would not enter into an employment relationship with the worker before supplying him/her to a client. In the case of recruitment agents, the client is regarded as the employer of the worker and pays him/her.

According to Benjamin current legislative provisions also provide opportunities for employers to deprive workers of labour law protection.<sup>3</sup> The recent public hearings on labour broking, held by the Parliamentary Portfolio Committee on Labour (hereinafter referred to as the 'Portfolio Committee'), confirmed this. In 2010 the Portfolio Committee issued its report (hereinafter referred to as the 'Report of the Portfolio Committee'), in which it identified a number of 'bad and abusive practices' being perpetrated by labour brokers.<sup>4</sup> The following, amongst others, are cited as examples of such practices: dismissing workers without following proper procedure, clients instructing labour brokers to replace workers for arbitrary reasons, labour brokers keeping workers in their employ but not giving them any assignments and workers being moved around between different workplaces to prevent them from unionising. Other bad and abusive practices include reducing their number of hours if workers manage to negotiate a higher rate, paying workers supplied by labour brokers less than their directly employed counterparts for doing the same job at the same workplace, applying racial profiling systems in determining appropriate placements and labour broker employees not being afforded access to training and development opportunities.

While most of the labour broker employees and trade unions who testified at the public hearings held by the Portfolio Committee called for the total banning of labour

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<sup>3</sup> *Ibid*

<sup>4</sup> Report of the Portfolio Committee on Labour on the public hearings on Labour Broking, 73-76, available at: <http://www.pmg.org.za/docs/2010/comreports/100323pclabourreport.htm> (accessed on 10 June 2010).

broking, the labour brokers, as well as a few labour broker employees, were of the opinion that there are some labour brokers who operate according to labour laws and therefore suggested that the industry should be regulated.<sup>5</sup> The Portfolio Committee concluded its 2010 report by recommending that the Department of Labour (hereinafter referred to as the 'DOL') should review all labour legislation to curb the abuse of labour broker employees.<sup>6</sup>

Fourteen years prior to the Portfolio Committee's recommendation the DOL had in fact already expressed its concern about the inability of labour legislation to protect labour broker employees. It did so in 1996 when it submitted the Minimum Standards Directorate Policy Proposals for a New Employment Standards Statute Green Paper (hereinafter referred to as the 'Green Paper') to the National Economic, Development and Labour Council (hereinafter referred to as 'NEDLAC')<sup>7</sup> for discussion by labour, business and government. According to the Green Paper labour broker employees 'have, in theory, the protection of current legislation but in practice the circumstances of their employment make the enforcement of their rights extremely difficult.'<sup>8</sup> It is not surprising then that the ANC, in its 2009 election manifesto (hereinafter referred to as the '2009 Election Manifesto'), committed itself to 'address the problem of labour broking and prohibit certain abusive practices'.<sup>9</sup> In July 2009, soon after the ANC won the 2009 general elections, Minister Mdladlana<sup>10</sup> submitted the DOL's recommendations for statutory amendments to NEDLAC for discussion in a document titled 'Decent work and non-standard employees: options for legislative reform in South Africa – a discussion document' (hereinafter referred to as the 'Discussion Document').<sup>11</sup>

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<sup>5</sup> *Ibid*, 73.

<sup>6</sup> *Ibid*, 76.

<sup>7</sup> Established by section 2 of the National Economic, Development and Labour Council Act (35 of 1994).

<sup>8</sup> Minimum Standards Directorate Policy Proposals for a New Employment Standards Statute Green Paper, 13 February 1996, 14, available at: <http://www.info.gov.za/greenpapers/1996/labour.htm> (accessed on 31 May 2010).

<sup>9</sup> Elections 2009: ANC Manifesto, 8, available at: <http://www.anc.org.za/show.php?e=elections/2009/manifesto/manifesto.html> (accessed on 31 May 2010).

<sup>10</sup> South Africa's Minister of Labour from 1998 to present.

<sup>11</sup> Prepared for the Department of Labour by Professor P. Benjamin. Submitted to NEDLAC for discussion by the Minister of Labour on 24 July 2009.

## **1.2 Scope and methodology**

The abovementioned findings of the Portfolio Committee seem to suggest that labour broking has indeed replaced the practice of converting employees into independent contractors as the preferred strategy of employers to deprive workers of labour law protection. Workers seem to have fallen victim to new employer tactics and the legislature is called upon once more to step in and curb the abuse. The thesis focuses on the practice of labour broking. It sets out to explore the reasons why this practice has led to such widespread abuse of workers and to identify possible solutions available to the legislature to curb the abuse.

The thesis draws from primary sources such as the Constitution of the Republic of South Africa<sup>12</sup>; the constitution, conventions and recommendations of the International Labour Organisation<sup>13</sup>; South African Acts of Parliament and judgements of South African courts. The thesis also draws from secondary sources such as published writings of South African and foreign academics; repealed South African legislation; reports of Parliamentary Portfolio Committees; green papers and discussion documents submitted to NEDLAC; foreign Bills and Acts of Parliament; European Union directives; judgements of foreign courts; foreign collective agreements and reports of international organisations.

## **1.3 Summary of chapters**

Chapter 2 of the thesis sets out to determine the reasons why the practice of labour broking has led to such widespread abuse of workers. To do this, the chapter firstly determines the current level of legal protection afforded to labour broker employees by the South African Constitution, international law, statutory law and common law. Secondly it considers the sufficiency of the current level of legal protection afforded to labour broker employees; particularly in light of the view expressed by the DOL that although labour broker employees, in theory, enjoy the protection of current legislation, the circumstances of their employment make the enforcement of their rights extremely

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<sup>12</sup> Constitution of the Republic of South Africa, 108 of 1996 (hereinafter referred to as the 'South African Constitution').

<sup>13</sup> Hereinafter referred to as the 'ILO'.

difficult.<sup>14</sup> Thirdly, the chapter explores examples of how the legal protection afforded, in theory, to labour broker employees is circumvented, in practice, by labour brokers and their clients. Fourthly, areas of insufficient or ineffective regulation that may create loopholes that allow for the abuse of labour broker employees are identified. The possibility of foreign law providing South Africa with a model for effectively protecting labour broker employees is also explored. Furthermore, the chapter investigates why labour brokers and their clients continuously seek to exploit loopholes in the regulatory framework by exploring the socio-economic context of labour broking. Finally, chapter 2 explores the political context of labour broking, in particular the debate around prohibition and regulation of labour broking, to identify possible solutions available to the legislature to curb the abuse of labour broker employees.

Chapter 3 of the thesis sets out to determine the prospects of the legislature using either prohibition or regulation as measure to curb the abuse of labour broker employees. To do this, it explores arguments for and against prohibition and regulation; based on criteria such as effectiveness, proportionality and practicality. When considering arguments for and against prohibition and regulation this chapter extensively draws from recent judgments of the Namibian High Court and Supreme Court.

Chapter 4 of the thesis sets out to explore regulatory options for the protection of labour broker employees in South Africa. This chapter explores the legislative measures as recommended by the DOL in its Discussion Document. This chapter also explores the well established and mature regulatory framework of the Netherlands, which successfully strikes a balance between the need to protect labour broker employees and the need for flexibility in the labour market.

Chapter 5 sets out to conclude the thesis. To do this, the chapter firstly summarizes the findings of the preceding chapters. Secondly, it critiques the DOL's recommendations in the Discussion Document and explores the possibility of South Africa borrowing ideas from the Dutch model. Finally, chapter 5 makes recommendations on how labour broker employees in South Africa may be protected.

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<sup>14</sup> Green Paper, *ibid*, 14.

## CHAPTER 2: LEGAL, SOCIO-ECONOMIC AND POLITICAL CONTEXT OF LABOUR BROKING IN SOUTH AFRICA

### 2.1 Historical precursor to modern day labour broking

Just a few decades ago a system of institutionalised racial discrimination permeated virtually every aspect of South African society. Influx control and pass laws limited the rights of Africans to live and work in urban areas. If they wanted to work in an urban area they had to register at a labour bureau and could only stay there for as long as they were employed.<sup>15</sup> If they lost their employment they could not remain in an urban area for longer than 72 hours. It was a criminal offence to do so. They were required to carry a pass book (known as a 'dompas'), containing their employment and criminal records, everywhere and at all times.<sup>16</sup> Failure to carry the dompas rendered the worker liable to arrest and imprisonment. If a worker displeased their employer and they in turn declined to endorse the dompas for the relevant time period, the worker's right to stay in the area was jeopardized.

Under South African administration the abovementioned influx control and pass laws were also implemented in Namibia.<sup>17</sup> A practical example of this is the contract labour system, as operated by the South West Africa Native Labour Association (hereinafter referred to as 'SWANLA'). The operation of this system was very well described in a 2009 Namibian Supreme Court Case, *African Personnel Services v Government of Namibia*.<sup>18</sup>

As confirmed in the 2009 APS case, the South African Native Urban Areas Consolidation Act of 1945 was transposed to Namibia in the form of the Native (Urban Areas) Proclamation of 1951 (hereinafter referred to the '1951 Proclamation').<sup>19</sup> In terms of the 1951 Proclamation it was a crime for Africans to be in an urban area for

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<sup>15</sup> Native Urban Areas Consolidation Act, 25 of 1945, and the Natives Laws Amendment Act, 54 of 1952.

<sup>16</sup> Natives Abolition of Passes and Coordination of Documents Act, 67 of 1952.

<sup>17</sup> Namibia, or South West Africa as it was known then, was under South African administration from 1920 to 1990.

<sup>18</sup> *Africa Personnel Services (Pty) Ltd v Government of Namibia and Others* (SA 51/2008) [2009] NASC 17, at 2-4 (hereinafter referred to as the '2009 APS case').

<sup>19</sup> *Supra*, at 2.

more than 72 hours without a permit. It was also a crime to employ them if they did not have a permit. If they wanted to work African workers basically had no choice but to offer themselves to SWANLA for recruitment.

As described in the 2009 APS case, once African workers offered themselves to SWANLA for recruitment they were classified according to health and physical fitness and given tags reflecting their classification.<sup>20</sup> This tag or metal badge had to be prominently displayed on their person. They were registered with the relevant authority to secure a permit and placed with employers who had requisitioned labour from SWANLA. They were required to sign a contract at a minimum wage, which could be for a period of up to 2 years at a time without any leave.

As described in the 2009 APS case, SWANLA workers were subjected to an array of offensive and coercive regulatory provisions.<sup>21</sup> It was a crime punishable by imprisonment for them to fail or refuse a lawful instruction of their employer; to be absent from work without authorised leave or lawful cause; not to perform any work they were under duty to perform or improperly perform such work; to enter the services of another employer during the currency of their contract or fail or refuse to commence service at the stipulated time. These workers also had to return to their reserves when their contract ended. It was a crime not to. This basically gave them no choice but to offer themselves to SWANLA again if they wanted to work.

In the court *a quo* the respondents, being the Government of Namibia and the President of the Republic of Namibia, submitted that modern day labour broking shares certain attributes with the erstwhile SWANLA system.<sup>22</sup> The merits of this argument will be explored further in this chapter. To do this, it is firstly necessary to understand the legal and socio-economic context of modern day labour broking.

## 2.2 Constitutional labour rights

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<sup>20</sup> *Supra*, at 3.

<sup>21</sup> *Supra*, at 4.

<sup>22</sup> *Africa Personnel Services v Government of Namibia and Others* (Case No.: A 4/2008 ) [2008] NAHC 148 (1 December 2008), at 3 (hereinafter referred to as the '2008 APS case').

Although discriminatory laws and exploitative practices such as the abovementioned have been abolished in the new constitutional state of South Africa, they serve as a reminder of how very precious the labour rights are which workers enjoy today and that they must not be taken for granted. In the words of Arendse AJ in *FAWU v Pets Products*, 'the rights found in our Constitution ... are hard-earned and well-deserved'.<sup>23</sup> This section explores to what extent labour broker employees today are protected by constitutional labour rights.

The adoption of the South African Constitution finally established constitutional democracy in South Africa. The South African Constitution is the 'supreme law' of the country and 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.<sup>24</sup> The South African Constitution contains a Bill of Rights that affords all workers a suite of rights.<sup>25</sup> The Bill of Rights 'applies to all law and binds the legislature, the executive, the judiciary and all organs of state'.<sup>26</sup> The rights in the Bill of Rights are however not absolute and may be limited in specific circumstances.<sup>27</sup>

According to the Bill of Rights 'everyone' has inherent dignity and the right to have their dignity respected and protected.<sup>28</sup> In *S v Makwanyane* the Constitutional Court held that the 'importance of dignity as a founding value of the new Constitution cannot be overemphasized' and that 'human beings are entitled to be treated as worthy of respect and concern'.<sup>29</sup>

The Bill of Rights holds that 'no person' may unfairly discriminate against 'anyone' on one or more of the listed grounds.<sup>30</sup> The listed grounds include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation,

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<sup>23</sup> *FAWU v Pets Products* (2000) 21 ILJ 1100 (LC), at 15.

<sup>24</sup> *Ibid*, Section 2.

<sup>25</sup> *Ibid*, Chapter 2 (hereinafter referred to as the 'Bill of Rights').

<sup>26</sup> *Ibid*, Section 8(1).

<sup>27</sup> *Ibid*, Sections 7(3) and 36.

<sup>28</sup> *Ibid*, Section 10.

<sup>29</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC), at 507A-B (hereinafter referred to as the 'Makwanyane case').

<sup>30</sup> *Ibid*, Section 9(4).

age, disability, religion, conscience, belief, culture, language and birth.<sup>31</sup> In *Harksen v Lane* the Constitutional Court held that this is not an exhaustive list and that differentiation on an analogous ground may constitute discrimination if it can be shown that it is 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.'<sup>32</sup>

The Bill of Rights also protects the right of 'everyone'<sup>33</sup> to fair labour practices as well as the right of 'every worker'<sup>34</sup> to form and join trade unions, to participate in the activities and programmes of a trade union and to strike. In *NEHAWU v UCT* the Constitutional Court held that the word 'everyone' applies to workers, employers, trade unions and employer organisations.<sup>35</sup> In *SANDU v Minister of Defence* the Constitutional Court interpreted the term 'every worker' so generously as to include those engaged in a work relationship 'akin to an employment relationship' and held that permanent members of the South African National Defence Force, even though they are not employees in the full contractual sense of the word, are also entitled to the section 23(2) constitutional labour rights.<sup>36</sup>

It can be concluded that the Bill of Rights applies to labour broker employees and binds the legislature, judiciary and executive. As from 27 April 1994 labour broker employees are therefore protected by the same constitutional labour rights as all other workers.

### 2.3 International labour standards

Soon after the advent of democracy in 1994 South Africa resumed its membership of the ILO and ratified the following core conventions: the Forced Labour Convention 29 of

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<sup>31</sup> *Ibid*, Section 9(3).

<sup>32</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC), at 46.

<sup>33</sup> *Ibid*, Section 23(1).

<sup>34</sup> *Ibid*, Section 23(2).

<sup>35</sup> *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (2) BCLR 154 (CC), at 37-40.

<sup>36</sup> *SA National Defence Union v Minister of Defence & Another* (1999) 20 ILJ 2265 (CC), at 24-28 (hereinafter referred to as the 'SANDU case').

1930, the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 (hereinafter referred to as 'Convention 87'), the Right to Organise and Collective Bargaining Convention 98 of 1949 (hereinafter referred to as 'Convention 98'), the Equal Remuneration Convention 100 of 1951 (hereinafter referred to as 'Convention 100'), the Abolition of Forced Labour Convention 105 of 1957, the Discrimination (Employment and Occupation) Convention 111 of 1958 (hereinafter referred to as 'Convention 111'), the Minimum Age Convention 138 of 1973, and the Worst Forms of Child Labour Convention 182 of 1999.

This means that domestic policy and practice must comply with the ILO constitution and the ratified conventions.<sup>37</sup> This however does not mean that unratified conventions have no legal significance, because the South African Constitution states that a court 'must' consider international law when interpreting the Bill of Rights.<sup>38</sup> It also states that when interpreting legislation a court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>39</sup> This section explores to what extent labour broker employees are protected by these international labour standards.

### 2.3.1 Ratified ILO conventions

Two of the ratified conventions impose public international law obligations on South Africa in respect of freedom of association, the right to organise and collective bargaining. They are the Convention 87 and Convention 98. Convention 87 guarantees the right of 'all workers' and employers to organise and join organisations of their own choosing.<sup>40</sup> Convention 87 also imposes a duty on member countries to ensure that the laws of the land do not impair, or shall not be applied as to impair, the guarantees provided for in this convention.<sup>41</sup> Convention 98 protects *all workers* against

<sup>37</sup> South African Constitution, Section 231(2).

<sup>38</sup> *Ibid*, Section 39(1)(b).

<sup>39</sup> *Ibid*, Section 233.

<sup>40</sup> Articles 2 and 11, available at: <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 24 July 2010).

<sup>41</sup> *Ibid*, Article 8(2).

anti-union discrimination and promotes the right to organise.<sup>42</sup> Convention 98 furthermore imposes a duty on member countries to take measures to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and trade unions, with a view to regulating terms and conditions of employment by means of collective agreements.<sup>43</sup>

In the SANDU case the Constitutional Court turned to Conventions 87 and 98 for authority when it considered the meaning and scope of 'worker' and found that members of the armed forces and police are deemed to be workers for the purposes of these Conventions.<sup>44</sup> In *NUMSA v Bader Bop* the Constitutional Court also turned to these Conventions for authority when it considered the right of a minority union to strike to enforce its demand to represent its members and found that ILO jurisprudence confirms such rights of unions to recruit and represent members, as well as strike to enforce collective bargaining demands.<sup>45</sup>

Another ratified convention, Convention 100, places an obligation on member countries to ensure that the principle of equal remuneration for men and women workers who perform work of equal value is applied to *all workers*.<sup>46</sup> Differential rates may however be paid if such differences can be justified on the basis of objective appraisals of jobs.<sup>47</sup> In terms of Convention 111, member countries furthermore undertake to eliminate discrimination in respect of employment and occupation.<sup>48</sup> The terms 'employment' and 'occupation' include terms and conditions of employment.<sup>49</sup>

### 2.3.2 Unratified ILO conventions

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<sup>42</sup> Articles 1 and 3, available at: <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 24 July 2010).

<sup>43</sup> *Ibid*, Article 4.

<sup>44</sup> *Supra*, at 26.

<sup>45</sup> *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Minister of Labour* (2003) 24 ILJ 305 (CC), at 34.

<sup>46</sup> Article 2(1), available at: <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 24 July 2010).

<sup>47</sup> *Ibid*, Article 3.

<sup>48</sup> Article 2, available at: <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 10 September 2010).

<sup>49</sup> *Ibid*, Article 1(3).

An unratified convention that specifically deals with labour broking is the Private Employment Agencies Convention, 181 of 1997 (hereinafter referred to as 'Convention 181'). The notion of employing workers with the view of 'renting' their services to a third party, who then assigns their tasks and supervises them, was foreign to international law until the adoption of Convention 181 by the ILO. Before 1997 the Fee-Charging Employment Agencies Convention, 96 of 1949 (hereinafter referred to as 'Convention 96') regulated the activities of private employment agencies. Convention 96 only recognized two activities of private employment agencies; that is to procure employment for workers and supply workers for employers against the payment of levies by either the worker or the employer for the rendering of these services.<sup>50</sup> It was not envisaged by Convention 96 that the activities of private employment agencies would ever increase beyond this scope. On the contrary Convention 96 propagated that private employment agencies should be strictly regulated, or even abolished, to avoid the abuse of workers.<sup>51</sup>

At its eighty-fifth session, held in June 1997, the ILO made an about-turn in its policy toward private employment agencies by adopting Convention 181. The reason for the change in policy by the ILO can be found in the preamble of Convention 181.<sup>52</sup> The reason is that private employment agencies operate in a very different environment from the conditions that prevailed in 1949. The preamble furthermore notes awareness 'of the importance of flexibility in the functioning of labour markets'; recognises the 'role which private employment agencies may play in a well-functioning labour market'; recalls 'the need to protect workers against abuses' and recognises 'the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system'. Convention 181 states that one of its purposes is 'to allow the operation of private employment agencies as well as the protection of the workers using their

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<sup>50</sup> Article 1(a), available at: <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 24 July 2010).

<sup>51</sup> *Ibid*, Part II and III.

<sup>52</sup> Available at: <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 24 July 2010).

services'.<sup>53</sup> Convention 181 attempts therefore to strike a balance between the opposing needs of employers and workers.

Convention 181 expands the scope of activities of private employment agencies beyond those determined by Convention 96. Over and above the recruitment and placement of workers for clients, Convention 181 recognizes services '... consisting of employing workers with a view to making them available to a third party ... which assigns their tasks and supervises the execution of these tasks ...'.<sup>54</sup>

Article 3 of Convention 181 provides for the determination of the legal status of private employment agencies and the conditions governing their operation in accordance with a system of licensing or certification.<sup>55</sup> Article 4 requires measures to be taken to ensure that workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively.<sup>56</sup> Article 5 requires that measures be taken to promote equality of opportunity and treatment in access to employment and to a particular occupation.<sup>57</sup> Article 11 imposes a duty on member countries to ensure that labour broker employees are adequately protected in relation to, amongst others, the following: freedom of association, collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits and access to training.<sup>58</sup> Article 12 requires member countries to determine and allocate the respective responsibilities of private employment agencies and user enterprises in relation to the matters mentioned in Article 11.<sup>59</sup>

It is noteworthy that Convention 181 does not explicitly protect labour broker employees against unfair dismissal. Such protection may however be provided by another unratified convention, the Termination of Employment Convention 158 of 1982 (hereinafter referred to as 'Convention 158'). Article 4 of this convention states that the

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<sup>53</sup> *Ibid*, Article 2(3).

<sup>54</sup> *Ibid*, Article 1(1)(b).

<sup>55</sup> *Ibid*, Article 3.

<sup>56</sup> *Ibid*, Article 4.

<sup>57</sup> *Ibid*, Article 5.

<sup>58</sup> *Ibid*, Article 11.

<sup>59</sup> *Ibid*, Article 12.

'employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking'.<sup>60</sup> Article 5 excludes amongst others the following as valid reasons for dismissal: union membership, participation in union activities, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, social origin or absence from work during maternity leave.<sup>61</sup> Article 7, in addition, requires employers to afford workers an opportunity to defend themselves against allegations made before terminating their employment.<sup>62</sup> Article 2(2) allows member countries to exclude the following categories of workers from all or some of the provisions of Convention 158: workers engaged in terms of a contract of employment for a specified period or a specified task (fixed term contract employees); workers serving a period of probation or workers engaged on a casual basis for a short period.<sup>63</sup> Member countries must however provide for adequate safeguards to avoid recourse to fixed term contracts by employers with the sole purpose of avoiding protection under Convention 158.<sup>64</sup> Fixed term contracts were used in the past to control African migrant workers and this mechanism is still relied upon by labour brokers today.<sup>65</sup>

Convention 181 is supplemented by the Private Employment Agencies Recommendation, 188 of 1997 (hereinafter referred to as 'Recommendation 188').<sup>66</sup> Recommendation 188 recommends that private employment agencies should have written contracts with agency workers<sup>67</sup> and refrain from making agency workers available to agency clients to replace workers who are on strike<sup>68</sup>. It also recommends

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<sup>60</sup> Available at: <http://www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 24 July 2010).

<sup>61</sup> *Ibid*, Article 5.

<sup>62</sup> *Ibid*, Article 7.

<sup>63</sup> *Ibid*, Article 2(2).

<sup>64</sup> *Ibid*, Article 2(3).

<sup>65</sup> J. Theron, 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (2005) 26 *ILJ*, 623.

<sup>66</sup> Recommendation 188 of 1997, Preamble, available at: <http://www.ilo.org/ilolex/english/recdisp1.htm> (accessed on 24 July 2010).

<sup>67</sup> *Ibid*, Article 5.

<sup>68</sup> *Ibid*, Article 6.

that private employment agencies should not knowingly, recruit, place or employ agency workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind.<sup>69</sup> Recommendation 188 furthermore recommends that private employment agencies should not prevent agency clients from employing agency workers, restrict the occupational mobility of agency workers or impose penalties on an agency worker for accepting employment in another enterprise.<sup>70</sup>

Although Convention 158 still depends on the existence of an employment relationship, more recent conventions show a conscious policy to extend their application to workers not employed in conventional employment relationships, for example the Convention on Maternity Protection (183 of 2000), which applies to all women 'including those in atypical forms of dependant work'.<sup>71</sup>

### 2.3.3 ILO constitution

A fundamental principle of the ILO constitution is that 'labour is not a commodity'.<sup>72</sup> At first glance, the practice of 'renting' out workers seems to be a contravention of this principle. On the other hand, the ILO, by way of Convention 181, accepts the practice of labour broking. How can this apparent contradiction be reconciled? The Namibian Supreme Court recently addressed this question in the 2009 APS case. The Court interpreted the principle that labour is not a commodity to mean that 'labour is not a tradable innate object but an activity of human beings'.<sup>73</sup> Labour therefore cannot be bought or sold on the market like a commodity and that regard must be had for the 'inseparable connection it has to the individual who produces it'. The Court warned of the risk that 'bargaining imbalances' may cause labour to be bought or sold like a

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<sup>69</sup> *Ibid*, Article 8(a).

<sup>70</sup> *Ibid*, Article 15(a)-(c).

<sup>71</sup> See reference to this in P. Benjamin, 'An Accident of History: Who is (and who should be) an Employee in South African Labour Law' (2004) 25 *ILJ*, 800-801.

<sup>72</sup> ILO Constitution, 'Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia)', available at: <http://www.ilo.org/ilolex/english/constg.htm> (accessed on 18 June 2010).

<sup>73</sup> *Supra*, at 70.

commodity, especially when these types of employment relationships are supported by discriminatory laws and practices.<sup>74</sup> An obvious example of such commodification is Namibia's SWANLA system, as discussed above.

In the 2009 APS case, the Namibian Supreme Court held that Convention 181 is not in conflict with the principle that labour is not a commodity, because the very purpose of Convention 181 is to ensure that the work of labour broker employees is not treated as a commodity and 'that their human and social rights as workers are respected and protected in the same respects as the protection accorded in labour legislation to employees in standard employment relationships'.<sup>75</sup> The Court furthermore held that if member countries implemented the provisions of Convention 181, 'it would not allow for the labour of agency workers ... to be treated like a commodity'.

The ILO has also placed the concept of 'decent work' on the international agenda. In his report on the topic the ILO's Director-General, Juan Somavia, noted the following: 'The ILO is concerned with decent work. The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. ... The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adapting to rapidly changing circumstances in a highly competitive global market'.<sup>76</sup>

#### **2.3.4 Conclusion**

It can be concluded that as a full-fledged member of the ILO, South Africa's legislature, judiciary and executive must give effect to the ILO's constitution and ratified conventions, such as Conventions 87, 98, 100 and 111. These conventions apply to all workers and afford direct protection to labour broker employees. In addition, the South African Constitution also instructs the judiciary to consider international law, which may include unratified ILO conventions. Unratified conventions therefore provide indirect protection to labour broker employees. An unratified convention that provides extensive protection to labour broker employees is Convention 181. This convention however

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<sup>74</sup> *Supra*, at 71.

<sup>75</sup> *Supra*, at 100.

<sup>76</sup> See reference to this in C. Thompson, 'The changing nature of employment' (2003) 24 *ILJ*, 1794.

does not protect labour broker employees against unfair dismissal. Such protection may flow from another unratified convention, Convention 158, but this convention allows member countries to exclude fixed term, probationary or casual employees from its protection. Labour broker employees are often employed in terms of fixed term contracts, and here lies the problem.

## 2.4 Statutory law

The South African Constitution, ILO constitution and ILO conventions set the standards for worker protection in South Africa and challenge the legislature, judiciary and executive to develop and maintain a regulatory framework that will effectively meet such standards. The nature and extent of the abuses identified by the Portfolio Committee, mentioned in Chapter 1, seem to suggest however that the current regulatory framework may not be sufficient to meet South Africa's constitutional and international law obligations. This section explores how effectively South African legislation protects labour broker employees.

Minister Mboweni<sup>77</sup> initiated a complete overhaul of the regulation of the South African labour market soon after the 1994 elections, which resulted in the enactment of the following: the Labour Relations Act, 66 of 1995 (hereinafter referred to as the 'LRA'), the Basic Conditions of Employment Act, 75 of 1997 (hereinafter referred to as the 'BCEA'), the Employment Equity Act, 55 of 1998 (hereinafter referred to as the 'EEA') and the Skills Development Act, 97 of 1998 (hereinafter referred to as the 'SDA'). The concept of 'regulated flexibility' informed the Minister's approach to labour law reform.<sup>78</sup>

In terms of the Green Paper, 'regulated flexibility' combines the protection of basic employment standards with rules and procedures to vary these standards through collective bargaining, sectoral determinations for unorganised sectors and administrative variations (exemptions).<sup>79</sup> The new regulatory framework is therefore characterised by, amongst others, the following: promotion of collective bargaining, enforceability of collective agreements, promotion of workplace forums and codes of

<sup>77</sup> Minister of Labour from 1994 to 1998.

<sup>78</sup> See reference to this in H. Cheadle, 'Regulated Flexibility: revisiting the LRA and the BCEA' (2006) 27 *ILJ*, 668-670.

<sup>79</sup> Green Paper, *ibid*, 2-3.

good practice, permitting the variation of employment standards in certain circumstances and the selective application of legislative requirements subject to certain thresholds. As mentioned in Chapter 1, the Green Paper also expresses concern about the vulnerability of labour broker employees and mentions that although they are in theory protected by legislation, the circumstances of their employment make the enforcement of their rights very difficult.<sup>80</sup>

#### 2.4.1 The Labour Relations Act

The LRA must be interpreted purposefully to give effect to South Africa's constitutional and international law obligations, as well as its 'primary objects'.<sup>81</sup> In line with the concept of regulated flexibility one of the 'primary objects' of the LRA is to promote collective bargaining.<sup>82</sup> The LRA sets out to promote collective bargaining by affording trade unions the following organisational rights: access to the employer's premises, stop order facilities, leave for trade union office bearers, election of trade union representatives and the right to information for bargaining and monitoring purposes.<sup>83</sup> Trade unions earn these rights by meeting the stipulated membership threshold for each right. To determine if a trade union meets a threshold, one must consider the number of union members as a percentage of the total number of employees in the workplace. Workplace is defined as the 'place or places where the employees of an employer work'.<sup>84</sup>

Despite the abovementioned labour law reform that followed the 1994 elections, the definition of 'employee' was imported virtually unchanged from its apartheid era predecessor.<sup>85</sup> Employee is defined as 'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is

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<sup>80</sup> *Ibid*, 14.

<sup>81</sup> LRA, Section 3.

<sup>82</sup> *Ibid*, Sections 1(c)(i) and 1(d)(i)-(ii).

<sup>83</sup> *Ibid*, Sections 12-16.

<sup>84</sup> *Ibid*, Section 213.

<sup>85</sup> See reference to this in P. Benjamin, 'Workers' Protection in an increasingly informalised labour market: the South African case', *ibid*, 5.

entitled to receive, any remuneration; and any other person who in any manner assists in the carrying on or conducting the business of an employer'.<sup>86</sup> The BCEA<sup>87</sup>, EEA<sup>88</sup> and SDA<sup>89</sup> contain the same definition of employee. This definition therefore determines the ambit of labour legislation.

Section 200A, which was inserted into the LRA in 2002<sup>90</sup>, provides more clarity as to who is an employee. This section creates a rebuttable presumption as to who is an employee. Section 83A, which is very similar to section 200A, was inserted in the BCEA.<sup>91</sup> According to subsection 200A(1) of the LRA a person is an employee if one or more of the following factors are present: '(a) the manner in which the person works is subject to the control or the direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organization, if the person forms part of the organization; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders service; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person.'

In the case of a labour broker employee, who works at the workplace of the client and is supervised by the management of the client, most, if not all, of the section 200A(1) factors are present. So why then is the labour broker employee not regarded as the employee of the client enterprise? The answer, quite simply, is because the LRA says so. The LRA specifically designates the labour broker employee as the employee of the labour broker and not the client enterprise.<sup>92</sup>

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<sup>86</sup> LRA, Section 213.

<sup>87</sup> BCEA, Section 1.

<sup>88</sup> EEA, Section 1.

<sup>89</sup> SDA, Section 1.

<sup>90</sup> Inserted by section 51 of Act 12 of 2002.

<sup>91</sup> Inserted by section 21 of Act 11 of 2002.

<sup>92</sup> LRA, Section 198(2).

Although the ILO only accepted the notion of the private employment agency being the employer and not the client enterprise in 1997 with the adoption of Convention 181, it was already introduced in South Africa as early as 1983 with the adoption of the Labour Relations Amendment Act 2 of 1983 (hereinafter referred to as the '1983 LRA'), which amended the Labour Relations Act 28 of 1956. The 1983 LRA defined 'labour broker' as a person who conducts a labour broker office.<sup>93</sup> A 'labour broker office' is defined as a business conducted by a labour broker who, for reward, procures or provides to a client other persons to render services to or perform work for the client and who remunerates such persons for the services provided or work performed. The 1983 LRA furthermore inserted a deeming provision in the definition of 'employee', in terms of which the labour broker is deemed to be the employer of workers provided to the client and such workers are in turn deemed to be employees of the labour broker.<sup>94</sup>

Although now called a temporary employment service, the LRA retained the 1983 LRA definition. The LRA defines 'temporary employment service' as '...any person who, for reward, procures for or provides to a client other persons – (a) who render services to, or perform work for, the client; and (b) who are remunerated by the temporary employment service.'<sup>95</sup> The LRA takes a step further than the 1983 LRA and drops reference to the word 'deem' when it designates the person provided to a client by a temporary employment service as the employee of the temporary employment service, and the temporary employment service providing the person to the client as the employer.<sup>96</sup>

Instead of promoting collective bargaining the LRA's definitions of 'workplace' and 'employee' have quite the opposite effect. Should a trade union attain the prescribed threshold in respect of directly employed employees in a workplace this does not mean that they have attained the threshold in respect of labour broker employees, who may work at the same workplace but for a different employer, the labour broker. The number of labour broker employees at a workplace constantly varies and labour

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<sup>93</sup> 1983 LRA, Section 1.

<sup>94</sup> 1983 LRA, Section 1(3)(a).

<sup>95</sup> LRA, Section 198(1).

<sup>96</sup> *Ibid*, Section 198(2).

broker employees often move between workplaces. How does a labour broker grant a trade union access to another employer's workplace? This and other questions remain unanswered. These regulatory challenges make it very difficult for trade unions to organise labour broker employees and for labour broker employees to exercise their organizational rights and engage in collective bargaining. This may very likely be a major contributing factor to the sharp decline in trade union membership in South Africa, particularly outside the public sector.<sup>97</sup> Evidence also suggests that established trade unions do not represent labour broker employees.<sup>98</sup>

This abovementioned confirms the DOL's concern about the vulnerability of labour broker employees as expressed in the Green Paper. Although the LRA, in theory, affords all employees organizational rights, the circumstances of employment of labour broker employees make the practical application of these rights very difficult. This lack of effective application may even be regarded as a contravention of the constitutional right of every worker to form and join trade unions, to participate in the activities and programmes of a trade union and to strike.<sup>99</sup> It may equally be regarded as a contravention of sub-article 8(2) of Convention 87, which places an obligation on member countries to ensure that the law of the land does not impair, or shall not be applied as to impair, the right of all workers to organise and join organisations of their own choosing.

Another one of the 'primary objects' of the LRA is to promote the effective resolution of labour disputes.<sup>100</sup> The LRA establishes the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the 'CCMA') and Labour Court for this purpose.<sup>101</sup> The LRA prohibits unfair labour practices and unfair dismissals and allows employees to refer such disputes to the CCMA and/or Labour Court.<sup>102</sup> As

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<sup>97</sup> See reference to this in S. Godfrey, J. Theron and M. Visser, 'The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining' (UCT DPRU Working Paper 07/130), 99.

<sup>98</sup> See reference to this in J. Theron, 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship', *ibid*, 646.

<sup>99</sup> South African Constitution, Section 23(2).

<sup>100</sup> LRA, Section 1(d)(iv).

<sup>101</sup> *Ibid*, Sections 112 and 151.

<sup>102</sup> *Ibid*, Sections 186-195.

mentioned above the LRA specifically designates labour broker employees as the employees of the labour broker and not the client.<sup>103</sup> The LRA however provides protection to labour broker employees in respect of their terms and conditions of employment by holding the client and the labour broker jointly and severally liable for contraventions of bargaining council agreements, arbitration awards, the BCEA and wage determinations.<sup>104</sup> The BCEA provides the same protection by holding the client enterprise and labour broker jointly and severally liable for breaches of the BCEA or a sectoral determination.<sup>105</sup> Similar protection is however not extended to include breaches of the LRA, such as unfair labour practices and unfair dismissals. The consequences of joint and several liability is that if a labour broker fails to pay amounts owing to its employees, the client for whom the employees work is liable to make those payments. However, the client's liability is a default liability: the client cannot be sued directly in the CCMA or Labour Court because it is not the employer.<sup>106</sup> As such the labour broker employee can only proceed against the client enterprise if it has obtained a judgement or order against the labour broker which the labour broker declines or fails to pay. This makes it very difficult for labour broker employees to enforce their constitutional right to fair labour practices.<sup>107</sup>

#### **2.4.2 The Basic Conditions of Employment Act**

The BCEA contains the same definition of temporary employment service as the LRA.<sup>108</sup> In line with the principle of regulated flexibility, the BCEA has a dual purpose: on the one side to establish and enforce basic conditions of employment and on the other to regulate the variation of basic conditions of employment.<sup>109</sup> The BCEA overrides the common law contract of employment and a basic condition of employment

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<sup>103</sup> *Ibid*, Section 198(2).

<sup>104</sup> *Ibid*, Section 198(4).

<sup>105</sup> BCEA, Section 82(3).

<sup>106</sup> See reference to this in the Discussion Document, *ibid*, 5-6.

<sup>107</sup> South African Constitution, Section 23(1).

<sup>108</sup> BCEA, Section 1.

<sup>109</sup> *Ibid*, Sections 2(a)(i) -(ii).

is automatically inserted into the contract of employment, unless the contract already has a more favourable term.<sup>110</sup> Parties therefore may not normally agree to less favourable terms than the basic conditions of employment. Certain basic conditions of employment may however be varied within certain limits by agreement and by the Minister.<sup>111</sup> According to Cheadle, the limits on the variations which were introduced during the negotiations over the BCEA have blunted the impact of regulated flexibility.<sup>112</sup> According to Theron, however, the current limitations on variation do however serve the purpose of protecting labour broker employees, because they are not represented by established trade unions and cannot therefore be adequately protected by collective bargaining.<sup>113</sup>

The BCEA allows the Minister to establish basic conditions of employment for employees in a sector and area by making sectoral determinations.<sup>114</sup> Non-standard employees, such as labour broker employees, increasingly rely on sectoral determinations to provide them with basic conditions of employment, in particular minimum wages, but many however fall outside the scope of a sectoral determination.<sup>115</sup> The fact that labour broker employees often move between workplaces and sectors may very likely be the reason why so many of them fall outside the protective scope of a sectoral determination.

A bargaining council may request the Minister to extend a collective agreement concluded in the bargaining council to any non-parties within its registered scope.<sup>116</sup> The Minister may only extend such collective agreement when requested to do so by the bargaining council and does not have the power to do so on his/her own initiative. Labour broker employees who fall within the registered scope of a bargaining council

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<sup>110</sup> *Ibid*, Section 4(c).

<sup>111</sup> *Ibid*, Sections 49-50.

<sup>112</sup> H. Cheadle, 'Regulated Flexibility: revisiting the LRA and the BCEA', *ibid*, 670.

<sup>113</sup> J. Theron, 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship', *ibid*, 646.

<sup>114</sup> BCEA, Section 51.

<sup>115</sup> See reference to this in the Discussion Document, *ibid*, 25.

<sup>116</sup> LRA, Section 32(1).

will therefore most likely not be protected if the bargaining council has not requested the Minister to extend collective agreements to non-parties.<sup>117</sup>

### 2.4.3 The Employment Equity Act

The EEA, for the purposes of its affirmative action provisions, reverses the designation as found in section 198(2) of the LRA and section 82(1) of the BCEA by deeming the client to be the employer if the labour broker employee is placed with the client for a period of three months or longer.<sup>118</sup> The EEA prohibits employers from unfairly discriminating against employees.<sup>119</sup> In addition, the client enterprise and the labour broker are held jointly and severally liable for unfair discrimination by the labour broker on the express or implied instructions of the client.<sup>120</sup>

Notwithstanding the EEA's prohibition of unfair discrimination, research commissioned by the DOL shows that labour broker employees are paid less for doing the same job as employees directly employed by the client.<sup>121</sup> Although the EEA prohibits unfair discrimination in the workplace, it places no obligation on the client to pay similar wages to employees engaged through a labour broker, even if they perform the same work as directly employed employees. This is in contrast to a number of countries (i.e. Australia, Belgium, France, Italy, Luxembourg, the Netherlands, Portugal and Spain), which have laws guaranteeing that labour broker employees enjoy the same pay and conditions as directly employed employees working in the same host organisation.<sup>122</sup> Unlike these countries, South Africa does not have separate equal pay for equal work protection and claims must be brought under the head of unfair discrimination.<sup>123</sup> For a discrimination claim to succeed the employee must show that the reason for discrimination is one of the listed grounds on which unfair discrimination

<sup>117</sup> See reference to this in the Discussion Document, *ibid*, 25.

<sup>118</sup> EEA, Section 57(1).

<sup>119</sup> *Ibid*, Section 6.

<sup>120</sup> *Ibid*, Section 57(2).

<sup>121</sup> See reference to this in the Discussion Document, *ibid*, 21.

<sup>122</sup> 2009 APS case, *supra*, at 114.

<sup>123</sup> See reference to this in the Discussion Document, *ibid*, 22.

is prohibited or an analogous ground. Discrimination between employees on the basis of their contractual status is therefore not actionable in itself. In this regard South Africa has been criticised by the ILO for not giving effect to Convention 100, which it has ratified. It is therefore no surprise that the wages of labour broker employees are significantly lower than those directly employed in the firms whom they supply with goods and services.<sup>124</sup>

#### **2.4.4 The Skills Development Act**

Unlike the LRA, BCEA and EEA, the SDA does not make any reference to temporary employment service, but introduces a broader category called 'private employment services agency'.<sup>125</sup> It is defined as 'any person that provides employment services for gain'.<sup>126</sup> The SDA defines 'employment services' as, amongst others, the 'procuring for or providing to a client other persons to render services to or perform work for the client, irrespective of by whom those persons are remunerated'.<sup>127</sup> This is definitely broader than the definition of temporary employment service in the LRA and BCEA, which requires that the labour broker employee be remunerated by the labour broker and not the client. In terms of the SDA a private employment services agency must apply for registration to the Director-General in the 'prescribed manner' and the Director-General must register the applicant if it is satisfied that the 'prescribed criteria' have been met.<sup>128</sup>

In 2000 the Minister of Labour elaborated on the prescribed manner for registration by issuing regulations in terms of section 36 of the SDA (hereinafter referred to as the '2000 Regulations').<sup>129</sup> Subsequently, in 2007, the Minister of Labour elaborated on the prescribed criteria for registration by publishing draft regulations for

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<sup>124</sup> See reference to this in P. Benjamin, 'Workers Protection in an increasingly informalised labour market: the South African case', *ibid*, 6.

<sup>125</sup> SDA, Section 24.

<sup>126</sup> *Ibid*, Section 1.

<sup>127</sup> *Ibid*, Section 1(d)(A).

<sup>128</sup> *Ibid*, Sections 24(1)-(2).

<sup>129</sup> Regulations with regard to private employment agencies, Government Gazette No. 6830 (13 June 2000), available at: [http://us-cdn.creamermedia.co.za/assets/articles/attachments/07882\\_regulation608.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/07882_regulation608.pdf) (accessed on 19 August 2010)

public comment (hereinafter referred to as the '2007 Draft Regulations').<sup>130</sup> In its definition of private employment services agency the 2007 Draft Regulations specifically includes 'Temporary Employment Services' and 'Labour Brokers'.<sup>131</sup> The Minister has however up to date not issued any final regulations in this regard.

#### 2.4.5 Conclusion

In concluding this section, it can be asserted that South African legislation does not effectively protect labour broker employees. Due to this lack of protection, employers are incentivised to replace directly employed employees with labour broker employees, because they are, as seen above, cheaper, less organised and easier to get rid of. This contributes to the rise in informalisation in South Africa. Informalisation is defined as the process by which employment is increasingly unregulated and workers are not protected by labour law.<sup>132</sup> Since 1994 informalisation has increased significantly within the South African labour market and figures for 2002 show that in South Africa, out of a total economically active population of 20.3 million people, 6.6 million were in full-time employment; 3.1 million were in atypical employment (temporary, part-time, outsourced and domestic workers); 2.2 million in informal work and 8.4 million were unemployed.<sup>133</sup>

Cheadle attributes the rise in informalisation to the fact that South African labour law is still based on the outdated model of full-time, life-time employment with one employer.<sup>134</sup> As mentioned above, despite the labour law reform of the 1990's, the definition of 'employee', which determines the ambit of the labour legislation, was imported virtually unchanged from its apartheid era predecessor.<sup>135</sup>

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<sup>130</sup> Regulations with regard to employment services, Government Gazette No. 30113 (27 July 2007), available at: [http://us-cdn.creamermedia.co.za/assets/articles/attachments/06161\\_notice919.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/06161_notice919.pdf) (accessed on 5 August 2010)

<sup>131</sup> *Ibid*, 5.

<sup>132</sup> See reference to this in P. Benjamin, 'Beyond The Boundaries: Prospects for Expanding Labour Market Regulation in South Africa', in G. Davidov and B. Langille (eds) *The Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006), 188.

<sup>133</sup> *Ibid*, 182.

<sup>134</sup> H. Cheadle, 'Regulated Flexibility: revisiting the LRA and the BCEA', *ibid*, 698.

<sup>135</sup> See reference to this in P. Benjamin, 'Workers' Protection in an increasingly informalised labour market: the South African case', *ibid*, 5.

## 2.5 Common Law

Hepple describes common law as the 'rich stream of English law that is created by the judges case by case on the basis of judicial precedent'.<sup>136</sup> In South Africa, the common law is of course fed by both English and Roman-Dutch law sources. This section explores to what extent labour broker employees are protected by common law.

### 2.5.1 The contract of employment

In *Smit v Workmen's Compensation Commissioner*, the Appeal Court held that the contract of employment under our common law is based on the Roman Law contract of *locatio conductio operarum*.<sup>137</sup> This was a consensual contract between an employee and employer, whereby the employee undertook to place his/her personal services for a certain period of time at the disposal of the employer, who in turn undertook to pay him/her the agreed salary for such services. The practice of labour broking does not fit into this traditional legal construct. In this practice, the employee does not deliver his/her personal services to the employer, but to a client, who has entered into a common law commercial contract with the employer. The client does not pay the employee directly for the delivery of such services, but pays the employer in terms of the aforementioned contract, who in turn pays the employee. A third party, the client, therefore enters the employment relationship between the employer and the employee.

In *LAD Brokers v Mandla*, the first judgement of the Labour Appeal Court (hereinafter referred to as the 'LAC') dealing with section 198 of the LRA, the Court had to determine whether workers were employed by a temporary employment service or whether they were independent contractors as envisaged in section 198(3) of the LRA.<sup>138</sup> The LAC unequivocally confirmed that the legislature intended labour brokers and the like who pay the remuneration to be held liable as employers under the LRA.<sup>139</sup> The LAC furthermore found that the temporary employment service in question did not

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<sup>136</sup> Sir B. Hepple QC, 'Rights at Work: Global, European, and British Perspectives', *The Hamlyn Lectures* (Thomson, Sweet & Maxwell), 39.

<sup>137</sup> *Smit v Workmen's Compensation Commissioner* (1979) 1 All SA 152 (A), at 56E.

<sup>138</sup> *LAD Brokers (Pty) Ltd v Mandla* (CA14/00) [2001] ZALAC 9 (29 June 2001), at 2.

<sup>139</sup> *Supra*, at 28.

comply with section 189 of the LRA which prescribes the procedure for dismissals based on operational requirements and confirmed the Labour Court's compensation order of 12 months remuneration.<sup>140</sup> The LAC held that the relationship created by section 198 of the LRA is a 'unique and *sui generis* tripartite employment relationship'.<sup>141</sup>

In the 2008 APS case, the High Court of Namibia however held that there is no room for a third party in the servant (employee) – master (employer) relationship.<sup>142</sup> This court went a step further and drew a similarity between labour broking and another Roman Law contract, *locatio conductio rei*, in terms of which the master of a slave could hire or rent the slave to another person for whom the slave performed personal services.<sup>143</sup> In terms of this view of labour broking, the employee is nothing more than a thing or commodity that is hired or rented by the employer to another person for monetary reward, often at the expense of the employee.

In the 2009 APS case, which was the appeal from the 2008 case, the Supreme Court of Namibia dismissed the notion that labour broking is not lawful. The Supreme Court pointed out that 'contracts for the letting and hiring of services have not remained static but [have] continuously evolved in scope and application to address continuously emerging challenges presented by socio-economic changes at the workplace over more than 2000 years'.<sup>144</sup> The Court also held that non-standard employment relationships, such as labour broking, are forged with increased frequency and that 'they demand new legal categorisations which may not always neatly fall within the ambit of binary classical employment models'.<sup>145</sup> The Court furthermore held that the mere fact that the labour broker employment relationship does 'not fit the typical mould of a bilateral

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<sup>140</sup> *Supra*, at 33.

<sup>141</sup> *Supra*, at 2.

<sup>142</sup> 2008 APS case, *supra*, at 24.

<sup>143</sup> *Supra*, at 27.

<sup>144</sup> 2009 APS case, *supra*, at 21.

<sup>145</sup> *Supra*, at 24.

contract of service described in Roman and Common Law does not mean that' it is not lawful.<sup>146</sup>

### 2.5.2 The freedom to contract

The common law accepts the freedom of consenting parties to decide whether, with whom, and on what terms to contract.<sup>147</sup> The notion of individual autonomy has been confirmed by the Constitutional Court, which held in *Barkhuizen v Napier* that 'the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity'.<sup>148</sup> The freedom to contract is however not absolute. The principles of morality or socio-economic expediency, which will in many circumstances support a policy favouring the strict enforcement of contracts freely entered into by consenting parties, may in particular circumstances require that less weight be attached to the ideal of individual autonomy.<sup>149</sup>

In *SAMSA v Mckenzie* the Supreme Court of Appeal has confirmed that the notion of individual autonomy is also limited by legislation.<sup>150</sup> The rights arising from a contract of employment depend on the actual or imputed consent of the parties whilst the rights arising from legislation are imposed by the legislature in order to give effect to social policies underpinning the legislation. The rights imposed by legislation, for example, limit the extent to which employers and employees are free to determine the terms of their relationship. In most instances, the employee cannot waive such statutory rights because such waiver would be against public policy.

The LRA's unfair dismissal protection provides a good example of this interplay between legislation and the common law principle of freedom to contract. Although labour broker employees, as employees, are in theory entitled to the statutory remedies for unfair dismissal in terms of section 191 of the LRA, the nature of the contract between the client and the labour broker and the nature of the contract between the

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<sup>146</sup> *Supra*, at 26.

<sup>147</sup> See reference to this in Van der Merwe *et al*, *Contract General Principles* (Juta & Co, Ltd 1993), 10.

<sup>148</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC), at 341C-D.

<sup>149</sup> See reference to this in Van der Merwe *et al*, *Contract General Principles*, *ibid*, 10.

<sup>150</sup> *SA Maritime Safety Authority (SAMSA) v McKenzie* (17/09) (2010) ZASCA 2 at 14.

labour broker and the labour broker employee often make it impossible for them to effectively exercise their rights.

The so-called service provider agreement between the client and the labour broker is a commercial contract. To circumvent the tedious dismissal procedure as prescribed in the LRA many clients stipulate in their service provider agreements with labour brokers that they reserve the right of admission to their respective properties and that labour broker employees must be removed from their property when labour brokers are called upon to do so. It was held by the CCMA that removal from the client's property in effect means dismissal to the labour broker employee because the duration of his/her employment contract coincides with the period of de facto employment with the client.<sup>151</sup>

In the *Nape v INTCS Corporate Solutions* (hereinafter referred to as the 'Nape case'), the Labour Court has recently extended protection to labour broker employees against the excesses of the common law commercial contract between the client and labour broker.<sup>152</sup> In the Nape case the Labour Court discharged its constitutional obligation to give effect to the Bill of Rights by developing the common law to the extent that legislation does not give effect to such rights.<sup>153</sup> In this case, the Labour Court considered the rights of the labour broker against the client enterprise when the client demands that a labour broker employee be removed from its premises in terms of a contractual provision and where no fair grounds exist for such removal. The LRA is silent on this and the Labour Court had to develop the common law to give effect to the Bill of Rights. The Labour Court held that in such a case the labour broker is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed even if a contractual provision allows for such removal.<sup>154</sup> Such contractual provision would be against public policy and therefore unenforceable. Similarly, if a court were to reinstate an employee into the employ of the labour broker, that labour broker may enforce such

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<sup>151</sup> *Dick v Cozens Recruitment Services* (2001) 22 ILJ 276 (CCMA).

<sup>152</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* (JR617/07) [2010] ZALC 33 (10 March 2010).

<sup>153</sup> South African Constitution, Section 8(3)(a).

<sup>154</sup> The Nape case, *supra*, at 77

an order against the client to give effect to the employee's right to fair labour practices.<sup>155</sup>

The contract of employment between the labour broker and the labour broker employee is normally an on-call type of hourly paid fixed term contract. In terms of this contract, labour broker employees are called upon when they are needed and paid an hourly wage for every hour they work, with no guaranteed minimum number of working hours. The fixed term contract would terminate automatically on the termination date. Even if the contract does not stipulate a termination date it has been held by the CCMA, as mentioned above, that the duration of such contract coincides with the period of de facto employment with the client.<sup>156</sup> In fact, the labour broker does not even have to bother with dismissing the labour broker employee; all it has to do is to stop providing work to such employee. Keeping labour broker employees in their employ, but not giving them any assignments has been identified as a 'bad and abusive practice' in the Report of the Portfolio Committee.<sup>157</sup>

According to Theron, the use of fixed term contracts in this manner is similar to how fixed term contracts were used years ago to control African migrant workers.<sup>158</sup> The courts have not as yet extended any protection to labour broker employees against the aforementioned excesses of the contract of employment between the labour broker and the labour broker employee.

### 2.5.3 Conclusion

It can be concluded that, following the Nape case, the common law currently recognises the tripartite labour broking employment relationship. Not only does it recognise labour broking, it also protects labour broker employees in cases where the client demands that a labour broker employee be removed from its premises in terms of the commercial agreement between the client and the labour broker, and where no fair grounds exist for such removal. The common law, as yet, however does not protect labour broker

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<sup>155</sup> *Supra*, at 78.

<sup>156</sup> *Dick v Cozens Recruitment Services* (2001) 22 ILJ 276 (CCMA).

<sup>157</sup> Report of the Portfolio Committee, *ibid*, 73-75.

<sup>158</sup> J. Theron, 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship', *ibid*, 623.

employees in cases where they are kept in the labour broker's employ but not given any more assignments for the duration of the contract of employment between the labour broker and the labour broker employee. Due to the nature of such contract this has the same effect as dismissal of the labour broker employee, but with no consequences for the labour broker.

## 2.6 Summary of legal protection provided to labour broker employees

The current legal protection provided to labour broker employees and the sufficiency or effectiveness thereof are summarized in the following tables:

Table 1 - Sources and extent of legal protection of labour broker employees.

	<i>Protection against unfair dismissal</i>	<i>Basic conditions of employment</i>	<i>Equal pay for equal work</i>	<i>Collective bargaining</i>
<i>South African Constitution</i>	Yes, but indirect <sup>1</sup>	Yes, but indirect <sup>1</sup>	Yes, but indirect <sup>2</sup>	Yes, Section 23(2)
<i>ILO</i>	Yes, but indirect and limited <sup>3</sup>	Yes, but indirect *	Yes, Conventions 100 and 111	Yes, Conventions 87 and 98
<i>Legislation</i>	Yes, but ineffective **	Yes, but ineffective ***	Yes, but indirect °	Yes, but ineffective <sup>a</sup>
<i>Common Law</i>	Yes, but limited ^	No	No	No

Table 2 - Qualifications to the legal protection available to labour broker employees.

Areas of insufficient or ineffective regulation that may allow for the abuse of labour broker employees (loopholes):	
<sup>1</sup>	Section 23(1) only affords a general right to fair labour practices.
<sup>2</sup>	Section 9(4) only affords a general right not to be unfairly discriminated against.
<sup>3</sup>	Convention 158 is unratified and allows for the exclusion of fixed term contract workers.
*	Convention 181 is unratified.
**	The protection provided by the LRA is rendered ineffective by the fact that only the labour broker, as employer, is liable for the unfair dismissal of labour broker employees.
***	The joint and several liability imposed on the labour broker and client for breaches of the BCEA is rendered ineffective by the fact that it is only a default liability.

°	The EEA only affords a general right not to be unfairly discriminated against and the employee must show that the difference in pay is based on a listed or analogous ground.
a	Trade unions find it difficult to meet the membership thresholds for organisational rights as stipulated in the LRA, because labour broker employees often move between workplaces.
^	Protection is provided against unfair removal from the client's premises in terms of the contract between the labour broker and client. In terms of the on-call employment contract between the labour broker and the labour broker employee, the labour broker may however simply keep the labour broker employee in its employ but not give it any more assignments.

## 2.7 Foreign Law

According to the Constitution, a court may consider foreign law.<sup>159</sup> This section explores to what extent foreign law may provide guidance for the protection of labour broker employees in South Africa.

Although it is common practice these days for countries to borrow from foreign legal systems and institutions, scholars disagree on the requirements for successful borrowing. According to Kahn-Freund the degree to which any foreign legal institution may be borrowed depends on how closely it is linked with the foreign power structure.<sup>160</sup> A country's power structure is determined by the role played by organised interest groups in the making and maintenance of legal institutions.<sup>161</sup> These organised interests groups include, amongst others, big business, agriculture, trade unions, consumer organisations, organised cultural interests, religious groups and charitable organisations. All of them share in the political power and the extent of their influence and the way it is exercised varies from country to country. Successful borrowing therefore requires not only knowledge of the foreign law, but also knowledge of its social, and above all its political, context.<sup>162</sup>

<sup>159</sup> South African Constitution, Section 39(1)(c).

<sup>160</sup> O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review*, 13.

<sup>161</sup> *Ibid*, 12.

<sup>162</sup> *Ibid*, 27.

Watson is however of the opinion that legal institutions, deeply imbedded in their political context, may be successfully borrowed by a country with very different traditions.<sup>163</sup> The successful borrowing of foreign legal institutions by South Africa provides strong support for Watson's view that successful borrowing can be achieved even if nothing is known of the political, social or economic context of the foreign law.<sup>164</sup> Foreign law informed the character of Southern Africa's first proto-collective bargaining statute, the Industrial Disputes Act (Transvaal) of 1909.<sup>165</sup> Canada's Lemieux Act (the 1907 Industrial Disputes Investigation Act) supplied the model: a procedural bar on industrial action (including unilateral employer action) pending compulsory conciliation. Over the next decade, the legal and industrial community in South Africa absorbed the notion that recourse to economic weapons is irregular unless conciliation efforts have been exhausted. This is still a governing principle of the LRA.

A more dramatic example of successful borrowing by South Africa is that of the Industrial Court which was established in 1979 following the recommendations of the Wiehahn Commission. To a large degree foreign law informed the Industrial Court and foreign authority featured in a number of cases.<sup>166</sup> The development of the right not to be unfairly dismissed and the right to strike serve as good examples of this process. The post-Wiehahn legislation said effectively nothing about the right not to be unfairly dismissed and the right to strike. These were issues, however, that dominated union life and demanded legal answers. The Industrial Court therefore had to 'raid' foreign systems and rapidly introduced, in a handful of years, what other systems had taken decades to evolve.<sup>167</sup> In retrospect, it is apparent that the conventions and recommendations of the ILO and, to a lesser extent, English case law, formed the foundation of South Africa's unfair dismissal law and the German notion of proportionality has been closely followed by the Industrial Court in affording protection

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<sup>163</sup> A. Watson, 'Legal Transplants and law reform' (1976) 92 *Law Quarterly Review*, 82-83.

<sup>164</sup> *Ibid*, 79.

<sup>165</sup> See reference to this in C. Thompson, 'Borrowing and Bending: The Development of South Africa's Unfair Labour Practice jurisprudence' (1993) 6, 3 *International Journal of Comparative Law and Industrial Relations*, 185-186.

<sup>166</sup> *Ibid*, 196.

<sup>167</sup> *Ibid*, 204.

to striking workers.<sup>168</sup> Although hasty, this process of borrowing was very successful if one considers how many of the foreign legal rules were absorbed by the South African legal and industrial community and informed the post 1994 legal framework. Such rules include, amongst others, the following: the right to strike, the right not to be unfairly dismissed and the notion that recourse to economic weapons is irregular unless conciliation efforts have been exhausted.

What is important, according to Watson, is the recipient's desire to find an 'idea' to solve a pressing problem at home.<sup>169</sup> The abovementioned borrowing of foreign legal rules by the Industrial Court was therefore successful because it had a need for ideas, specifically in respect of the right not to be unfairly dismissed and the right to strike. The Industrial Court had such a need, because, as mentioned above, the post-Wiehahn South African labour legislation said effectively nothing about the right not to be unfairly dismissed and the right to strike. The Discussion Document confirms that there is once again such a desire in South Africa, more specifically a desire to find regulatory solutions for the protection of labour broker employees.

Recent developments in Namibia may provide South Africa with rich 'pickings' for the purpose of borrowing. Just before the Namibian Labour Bill of 2007 was passed in the National Assembly, a significant amendment was made to clause 128.<sup>170</sup> Before it was amended section 128 of the Labour Bill of 2007 was very similar to section 198 of the LRA. After amendment, section 128(1) read: '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.'<sup>171</sup> This amendment effectively banned labour broking in the Republic of Namibia. With its business falling squarely within the ambit of the prohibition, Africa Personnel Services (Pty) Ltd brought an application in the High Court to have section 128 of the Labour Act 11 of 2007 struck down as unconstitutional.<sup>172</sup> The basis of the

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<sup>168</sup> *Ibid*, 191.

<sup>169</sup> A. Watson, 'Legal Transplants and law reform', *ibid*, 79.

<sup>170</sup> See reference to this in H. Jauch, Labour Resource and Research Institute (LaRRI), 'Namibia's Ban on Labour Hire in Perspective', *The Namibian* (published on 3 August 2007), 1.

<sup>171</sup> The Labour Act of the Republic of Namibia, Act 11 of 2007, available at: <http://www.namibia-law.com/content.php?menuid=173> (accessed on 13 July 2010).

<sup>172</sup> 2008 APS case, *supra*.

applicant's challenge was that section 128 infringes its fundamental freedom to 'carry on any ... trade or business' entrenched in section 21(1)(j) of the Namibian Constitution.<sup>173</sup> The full bench of the High Court dismissed the application with costs. On appeal, the Supreme Court however overturned the High Court's decision and held that section 128(1) had to be struck down as unconstitutional.<sup>174</sup> Some of the questions addressed by the Namibian courts are similar to the 'tough' questions currently facing the legislature and executive in South Africa, for example: should labour broking be prohibited or regulated? This is discussed in the next chapter.

Highly regulated countries, such as the Netherlands, may also provide South Africa with a model for regulating labour broking. Not only has the Netherlands ratified Convention 181, but as a member of the European Union it is also subject to the European Framework Agreement on Part-Time Work (hereinafter referred to as 'Directive 97/81/EC'). The objectives of Directive 97/81/EC are: (a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work; and (b) to facilitate the development of part-time work on voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.<sup>175</sup> Directive 97/81/EC stipulates that, in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.<sup>176</sup> It also stipulates that, where appropriate, the principle of *pro rata temporis* shall apply.<sup>177</sup>

During the 1980s the Netherlands suffered under a high unemployment and relatively low economic growth rate, similar to South Africa's current economic

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<sup>173</sup> *Supra*, at 11.

<sup>174</sup> 2009 APS case, *supra*.

<sup>175</sup> Framework Agreement on Part-Time Work concluded on 6 June 1997 between the Union of Industrial and Employer's Confederations of Europe, the European Trade Union Confederation and the European Centre of Enterprises with Public Participation, Clause 1.

<sup>176</sup> *Ibid*, Clause 4(1).

<sup>177</sup> *Ibid*, Clause 4(2).

situation.<sup>178</sup> During the 1990's this picture changed drastically. At the end of the 1990's the unemployment rate in the Netherlands (4%) was below the average for the European Union (10%) and below that of the United States (4.5%). The economic growth rate (GDP) of the Netherlands (3%) was above the average for the European Union (2.1%), but below that of the United States (3.8%). The idea is generally accepted that at least one of the contributing factors to the Dutch success story is the promotion of labour market flexibility. Labour market flexibility in the Netherlands is based on the principle that at the beginning of any employment relationship flexibility is allowed, but the longer it lasts, the stronger the security of the worker should be (as well as the responsibility of the employer), no matter the form of the contract that was initially chosen.<sup>179</sup> This principle is also applied to labour broking through legislation<sup>180</sup> and collective bargaining.<sup>181</sup>

At this point it can be concluded that, as it did in the past, foreign law may provide South Africa with very good guidance on how to best address a pressing problem at home.

## 2.8 Socio-economic and political context

According to Cheadle, the purpose of constitutionally guaranteeing the right to fair labour practices is the protection of vulnerable human beings, namely workers, and not employers.<sup>182</sup> Workers need protection because they are vulnerable. Their vulnerability flows from the inequality in bargaining power that characterises the employment relationship. This notion is particularly relevant to labour broker employees who have historically been exploited. To fully appreciate the vulnerability of labour broker

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<sup>178</sup> See reference to this in G. Heerma van Voss, *The Flexibility and Security Act: Discussion Paper, 2*, available at: <http://www.mutual-learning-employment.net/uploads/ModuleXtender/PeerReviews/44/ind-exp-paperNL1000.pdf> (accessed on 6 August 2010).

<sup>179</sup> *Ibid*, 6.

<sup>180</sup> The Act on Allocation of Workers by Intermediates of 1 July 1998 and the Act on Flexibility and Security of 1 January 1999.

<sup>181</sup> The national collective agreement between general trade unions and the ABU (Dutch Association of Temporary Work Agencies).

<sup>182</sup> H. Cheadle, 'Labour Relations', in H. Cheadle, D. Davis and N. Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2005) 2<sup>nd</sup> edition, 18-5.

employees, it is necessary to place the practice of labour broking in the context of South Africa's socio-economic reality.

The practice of labour broking features prominently on the political agenda of the ANC and its alliance partners. In its 2009 Election Manifesto (hereinafter referred to as the 'ANC's 2009 Election Manifesto') the ANC commits itself to dealing with South Africa's socio-economic challenges and the 'problem' of labour broking.<sup>183</sup> In its submission to the Portfolio Committee the Congress of South African Trade Unions (hereinafter referred to as 'COSATU's submission to the Portfolio Committee') called for the banning of labour broking.<sup>184</sup> The practice of labour broking must therefore also be placed within the context of the current political debate in South Africa.

About one third of the South African population live below the poverty line and many of these families are, effectively, trapped in poverty because parents lack the education and resources to enable their children to escape poverty.<sup>185</sup> The South African economy is in fact split by a 'structural fault' between a 'first economy' populated by skilled labour that is integrated within the global economy and a 'second economy' populated by the unemployed and those unemployable in the formal sector.<sup>186</sup> Because of the deliberate social, political and economic exclusion of the African majority during the long period of colonialism and apartheid, the divide between the first and second economies runs along racial fault lines.

The divide between the first and second economies is exacerbated by South Africa's high unemployment rate. In March 2003, South Africa's unemployment rate peaked at 32% (5.1 million people), which equates to 42.5% (8.4 million people) in terms of the expanded definition of unemployment (including discouraged work

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<sup>183</sup> Elections 2009: ANC Manifesto, *ibid*, 8.

<sup>184</sup> COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCAWU and SATAWU Submission on Labour Broking, Presented to the Portfolio Committee on Labour on 26 August 2009, 1, available at: <http://www.cosatu.org.za/show.php?include=docs/subs/2009/submission0826.html&id=2237&cat=Policy> (accessed on 18 May 2010).

<sup>185</sup> See reference to this in A. Hirsch, 'South Africa's Development Path and the Government's Programme of Action' (2004), 2, available at: <http://www.sarpn.org.za/documents/d0001084/index.php> (accessed on 5 May 2010).

<sup>186</sup> African National Congress National General Council 2005, *Discussion document: development and underdevelopment learning from experience to overcome the two-economy divide*, 6, available at: <http://www.anc.org.za/ancdocs/ngcouncils/2005/2economydivide.html> (accessed on 5 May 2010).

seekers).<sup>187</sup> South Africa has the highest unemployment rate of the 34 member states of the Organisation for Economic Co-operation and Development.<sup>188</sup> To make matters worse, South Africa's GDP growth rate since 1994 has been below the average for developing countries and this means that opportunities for new entrants into the labour market are not created fast enough.<sup>189</sup>

In addition to being very high, South Africa's unemployment rate is also racially skewed and confirms the abovementioned racial fault lines between the first and second economies. Amongst tertiary and secondary educated members of the labour force, Africans have the highest unemployment rates.<sup>190</sup> In 2002, 25.2% of tertiary educated Africans were unemployed compared to 7.4% Coloureds, 4.8% Indians and 4% Whites. In 2002 55.7% of secondary educated Africans were unemployed compared to 23.8% Coloureds, 24.1% Indians and 8.6% Whites. At the same time the gap between Africans and the other racial groups is widening. In 1995 the unemployment rate amongst African graduates was four times that of Whites (10.1% v 2.5%), while in 2002 it was more than six times higher (25% v 4%). Over this period the unemployment rate amongst Coloured and Indian graduates declined slightly. Similarly the unemployment rate of matriculants increased most amongst Africans, rising by 13.6% from 42.1% in 1995 to 55.7% in 2002. Over this period the unemployment rate of matriculants amongst Coloureds, Indians and Whites increased by 3.5%, 10.4% and 3.7% respectively.

South Africa's high rate of unemployment is further compounded by illegal immigration and the prevalence of HIV/Aids. The number of illegal immigrants in South Africa is estimated at between 5 million<sup>191</sup> and 10 million<sup>192</sup>. A study conducted in 2006

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<sup>187</sup> See reference to this in P. Benjamin, 'Workers' Protection in an increasingly informalised labour market: the South African case', *ibid*, 3.

<sup>188</sup> OECD Economic Surveys, South Africa: Economic Assessment 2008, available at: <http://www.finance.gov.za/publications/other/OECD%20-%20South%20Africa%20Economic%20Assesment.pdf> (accessed on 4 May 2010), 106-107.

<sup>189</sup> See reference to this in A. Hirsch, 'South Africa's Development Path and the Government's Programme of Action' (2004), *ibid*, 2.

<sup>190</sup> See reference to this in ANC Economic Transformation Committee (ETC) Workshop Report, Labour Market Regulation and the Second Economy, available at: <http://www.anc.org.za/show.php?doc=./ancdocs/discussion/2005/etcdiscuss2.html> (accessed on 31 May 2010), 3-4.

<sup>191</sup> [http://en.wikipedia.org/wiki/illegal\\_immigration](http://en.wikipedia.org/wiki/illegal_immigration) (accessed on 16 April 2010).

by the Human Sciences Research Council estimated that approximately 10.8% of South Africans over the age of 2 were living with HIV/AIDS and that the rate was as high as 17.6% in the rural areas and informal settlements.<sup>193</sup>

In addition to the abovementioned macro-economic challenges, the nature of employment is also changing. Globalization, deregulation and technological changes are changing full-time employment as we know it universally and new forms of work are continuously emerging.<sup>194</sup> The large bureaucratic firm, which employs a large full-time workforce to perform in-house production functions is disappearing rapidly.<sup>195</sup> Employers these days prefer to only focus on the high value dimensions of their business and to outsource the components that are non-core or simply low margin.<sup>196</sup> Employers also prefer a workforce of variable size, one that fluctuates in sync with the peaks and troughs of the customer demand for goods and services.<sup>197</sup> Increased casualisation and outsourcing have created a segmented workforce; segmented between those employed in full-time employment and those who have been casualised (part-time or temporary workers) and segmented between those who are directly employed by an enterprise and those who are employed by a labour broker or contractor.<sup>198</sup>

The ruling party set itself the target of halving the levels of poverty and unemployment by 2014.<sup>199</sup> It also identified the creation of 'decent work' and

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<sup>192</sup> Study conducted by Mike Schussler, [http://www.fin24.com/articles/default/display\\_article.aspx?Articled=1518-25\\_2035097](http://www.fin24.com/articles/default/display_article.aspx?Articled=1518-25_2035097) (accessed on 16 April 2010).

<sup>193</sup> See reference to this in P. Benjamin, 'Workers' Protection in an increasingly informalised labour market: the South African case', *ibid*, 4.

<sup>194</sup> See reference to this in E. Fourie, 'The Informal Economy, Social Security and Legislative Attempts to Extend Social Security Protection', in Blanpain et al, *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective*, 272.

<sup>195</sup> See reference to this in M. Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing'; in C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell and A. O'Donnell (eds) *Labour Law and Labour Market Regulation* (2006); 526.

<sup>196</sup> See reference to this in C. Thompson, 'The changing nature of employment', *ibid*, 1795.

<sup>197</sup> *Ibid*, 1797.

<sup>198</sup> See reference to this in P. Benjamin, 'Beyond The Boundaries: Prospects for Expanding Labour Market Regulation in South Africa', *ibid*, 189.

<sup>199</sup> ANC's 2009 Election Manifesto, *ibid*, 5.

sustainable livelihoods as one of its five priority areas for the next five years.<sup>200</sup> To create decent work the ANC commits itself to: 'introduce laws to regulate contract work, subcontracting and outsourcing, address the problem of labour broking and prohibit certain abusive practices'.<sup>201</sup> This seems to suggest a preference for a regulatory solution to curb the abovementioned abusive practices as identified by the Portfolio Committee. The Congress of South African Trade Unions (hereinafter referred to as 'COSATU'), an alliance partner of the ANC, has however expressed a contrary view. In its submission to the Portfolio Committee COSATU expressed the view that the Discussion Document is a 'watered down' approach to addressing the problem of labour broking and that it maintains its call for a complete ban on labour brokers.<sup>202</sup> COSATU furthermore expressed its intention to pursue this objective 'in the forthcoming engagement at NEDLAC and at a political level'. The ANC government therefore faces a political challenge to reconcile its tempered approach in favour of regulation with COSATU's more radical approach in favour of a total ban.

It can be concluded that although the purpose of constitutionally guaranteeing the right to fair labour practices is the protection of workers, this protection must be balanced with South Africa's pressing socio-economic needs. How to protect vulnerable labour broker employees, without inhibiting employment creation and economic growth, is the challenge facing the governing alliance. There however seems to be opposing views within the governing alliance on how to best achieve this. The ANC seems to prefer a regulatory solution, whilst COSATU maintains its call for a complete ban of labour broking. The next chapter explores the debate around prohibition and regulation of labour broking.

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<sup>200</sup> *Ibid*, 7

<sup>201</sup> *Ibid*, 8

<sup>202</sup> COSATU's submission to the Portfolio Committee, *ibid*, 1.

## **CHAPTER 3: THE DEBATE AROUND PROHIBITION AND REGULATION OF LABOUR BROKING**

The final decision on how to protect labour broker employees rests with the legislature, which makes laws in response to public opinion and perceptions. South Africa is however a constitutional state and laws made by the legislature are subject to the South African Constitution and the Bill of Rights.<sup>203</sup> This chapter determines the prospects of the legislature using either prohibition or regulation as a measure to curb the abuse of labour broker employees, by exploring arguments for and against prohibition and regulation. These arguments are based on, amongst others, the following criteria: effectiveness, proportionality and practicality. In this chapter, examples are drawn from foreign law, where necessary.

### **3.1 The prohibition of labour broking in South Africa: arguments and prospects**

Should the legislature choose to prohibit labour broking, such prohibition may be challenged by labour brokers in terms of sections 22 and 36 of the South African Constitution.

#### **3.1.1 Section 22 of the South African Constitution**

Section 22 of the South African Constitution affords a right to 'every citizen' to 'choose their trade, occupation or profession freely'. Section 22 furthermore states that 'the practice of a trade, occupation or profession may be regulated by law'. Labour brokers may challenge the prohibition of labour broking in South Africa on the grounds that it infringes their section 22 rights. Section 22 however applies to 'every citizen' and the question of *locus standi* would therefore have to be addressed should a juristic person claim their section 22 rights.

Section 8(4) of the Constitution provides that juristic persons are 'entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the

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<sup>203</sup> South African Constitution, Section 2.

nature of that juristic person'. Since the 'nature' of the right bestowed by section 22 does not prevent it from benefiting juristic persons they should, in theory, be able to rely on the protection of section 22.<sup>204</sup> Because juristic persons are capable of choosing and practicing a trade, occupation or profession it follows that the nature of the right protects the activities of juristic persons. In the Canadian case *Black v Law Society of Alberta* a regulation forbidding law firms to open branches in other provinces was declared to be a violation of the right to earn a livelihood.<sup>205</sup>

However juristic persons would only be able to rely on section 22 if they could be regarded as citizens.<sup>206</sup> If 'citizen' is to be interpreted as defined by the South African Citizenship Act 88 of 1995, then it applies to natural persons only, but this is not the only conceivable or authoritative interpretation of the term. If the right is extended to juristic persons a court may regard juristic persons incorporated in South Africa as citizens. The court may also disregard the corporate veil and look at the members who control the company. In *Beckett v Kroomer* the court did this to determine the residence or domicile of a company.<sup>207</sup> In the 2009 APS case the Supreme Court of Namibia held that 'behind the corporate veil of juristic persons are their members' and 'behind the legal fiction of a separate legal entity are, ultimately, real people'.<sup>208</sup>

Even if the section 22 right is restricted to citizens who are natural persons, juristic persons would still be entitled to rely on the right where they have sufficient interest in doing so.<sup>209</sup> In terms of section 38 of the Constitution 'anyone ... has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened'. The approach to standing in Bill of Rights matters therefore contrasts dramatically with the common law approach to standing. Under the common law, South African courts take a restrictive approach to standing. A person who approaches a court for relief is required to have an interest in the subject matter of the

<sup>204</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook* (Juta & Co Ltd 2001), 382.

<sup>205</sup> *Black v Law Society of Alberta* (1989) 1 SCR 591.

<sup>206</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 382.

<sup>207</sup> *Beckett (TW) & Co Ltd v H Kroomer Ltd* 1912 AD 324, at 334.

<sup>208</sup> 2009 APS case, *supra*, at 40.

<sup>209</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 382-383.

litigation, in the sense of being personally adversely affected by the alleged wrong.<sup>210</sup> The plaintiff or applicant must therefore allege that his/her own rights have been infringed. In *Ferreira v Levin NO* the Constitutional Court held however that in terms of section 38 the allegation must merely be that, objectively speaking, a right in the Bill of Rights is infringed or threatened.<sup>211</sup> It is sufficient to show that a right in the Bill of Rights has been violated by a law or conduct and it is not necessary to show that the rights of the applicant have been violated. It does not even have to be any particular person's fundamental right. The 'sufficient interest' must, however, be linked to one of the categories listed in section 38. If the applicants approach the court in their own interest, they must themselves have a sufficient interest. If the applicants approach the court on behalf of another person, the applicant must show that that person has sufficient interest and so on.

The section 38 approach therefore makes it unnecessary for juristic persons to show that they are beneficiaries of a right in terms of section 8(4) or that they are citizens.<sup>212</sup> Like other applicants, juristic persons will have standing when they allege that a fundamental right has been infringed or threatened (whether or not it is their own right) and that they have a sufficient interest in the remedy they seek.

Section 22 of the Constitution closely resembles article 12(1) of the German Constitution.<sup>213</sup> According to article 12(1) of the German constitution 'all Germans have the right freely to choose their occupation or profession, their place of work, and their place of training'. Similar to section 22 of the Constitution, article 12(1) states that 'the practice of trades, occupations and professions may be regulated by or pursuant to a law'. Because of the similarities between the two provisions, German jurisprudence dealing with the interpretation of article 12(1) will have considerable comparative value when interpreting section 22 of the Constitution.

The leading German decision on article 12(1) is the *Pharmacy case*, 7 BVerfGE 377 of 1958, in which the Constitutional Court held that the provision allows the

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<sup>210</sup> *Ibid*, 81-82.

<sup>211</sup> *Ferreira v Levin NO* 1996 (1) SA 984 (CC), at 165.

<sup>212</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 86.

<sup>213</sup> *Ibid*, 381.

legislature to regulate both the choice and the practice of an occupation or profession.<sup>214</sup> However, different levels of constitutional scrutiny apply to each: if the legislature seeks to regulate choice it is subject to greater constraints than if it seeks to regulate the practice of a trade, occupation or profession. As for the latter, the practice of a trade, occupation or profession can be restricted by reasonable regulations based on considerations of the common good. As for the freedom to choose a trade, occupation or profession this may be restricted only insofar as an especially important public interest compellingly requires and only to the extent that protection cannot be accomplished by a lesser restriction of freedom of choice.

The graduated approach of the German Constitutional Court, or 'Stufentheorie', is likely to be followed in the interpretation of section 22 of the Constitution.<sup>215</sup> Similar to the case in Germany, the South African legislature would have to discharge a greater onus when it seeks to regulate choice than when it seeks to regulate practice. Although the practice of a trade, occupation or profession can be regulated by the legislature without falling foul of the section 22 right, the freedom to choose a trade, occupation or profession cannot be regulated by the legislature unless the restriction is justifiable in terms of the limitation clause (section 36 of the South African Constitution).<sup>216</sup> The prohibition of labour broking by the legislature would undoubtedly restrict the section 22 right to choose a trade, occupation or profession and would undoubtedly have to be justified by the legislature in terms of section 36 of the South African Constitution.

### **3.1.2 Section 36 of the South African Constitution**

In terms of section 36 of the South African Constitution 'the rights in the Bill of Rights may be limited only 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'. In order to determine the reasonableness of the limitation, certain 'relevant factors' must be taken into account. These 'relevant factors' include the nature of the right; the importance of the purpose of the limitation; the nature and

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<sup>214</sup> *Ibid*

<sup>215</sup> *Ibid*

<sup>216</sup> *Ibid*

extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. To satisfy the limitation test in section 36 of the Constitution, it must therefore be shown that the law in question serves a constitutionally-acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of the fundamental rights) and the benefits it is designed to achieve (the purpose of the law).<sup>217</sup>

In the Makwanyane case, the Constitutional Court considered the 'relevant factors' when it had to determine the constitutionality of a limitation of section 11 (the right to life) in the form of the death penalty.<sup>218</sup> The Constitutional Court considered the first factor, the nature of the right, and held that the rights to life and dignity are the most important of all human rights.<sup>219</sup> This means that very compelling reasons would have to exist to justify the limitation of such an important right. In *Affordable Medicines Trust v Minister of Health* the Constitutional Court interpreted the section 22 rights and held that 'what is at stake is more than one's right to earn a living' and that the 'freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution'.<sup>220</sup> The section 22 rights relate to human dignity and can therefore be regarded as important. The legislature would therefore have to advance very good reasons for the limitation of the section 22 rights.

The second factor, the importance of the purpose of the limitation, requires that the limitation of a right must be to serve some purpose and that this purpose be one that is worthwhile and important in a constitutional democracy.<sup>221</sup> The protection of labour broker employees against the 'bad and abusive practices' as identified by the Portfolio Committee may be regarded as a purpose that is worthwhile and important in a constitutional democracy, because the Bill of Rights protects the right of 'everyone'<sup>222</sup> to

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<sup>217</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 154-155.

<sup>218</sup> Makwanyane case, *supra*.

<sup>219</sup> *Ibid*, at 144.

<sup>220</sup> *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC), at 274H-275B.

<sup>221</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 158.

<sup>222</sup> South African Constitution, Section 23(1).

fair labour practices as well as the right of 'every worker'<sup>223</sup> to form and join trade unions, to participate in the activities and programmes of a trade union and to strike.

The third factor, the nature and extent of the limitation, requires that the infringement of rights should not be more extensive than is warranted by the purpose that the limitation seeks to achieve.<sup>224</sup> As was expressed by the Constitutional Court in *S v Manamela*, legislation that limits constitutional rights should not use a sledgehammer to crack a nut.<sup>225</sup> In the Makwanyane case the Constitutional Court assessed whether there was proportionality between the harm done by the death penalty (the infringement of the rights to life, human dignity and freedom from cruel punishment) and the purposes it sought to achieve (deterrence and prevention). The Constitutional Court found that the death penalty had grave and irreparable effects on the rights concerned.<sup>226</sup> Similar to the death penalty's effect on the right to life, prohibition of labour broking would have an irreparable effect on the section 22 right to choose a trade, occupation or profession. The legislature would therefore have to advance very good reasons to justify the prohibition of labour broking.

The fourth factor, the relation between the limitation and its purpose, requires that legislation serve the purpose it is designed to achieve.<sup>227</sup> If legislation does not serve the purpose it is designed to achieve at all it cannot be a reasonable limitation of the right and if it only marginally contributes to achieving its purpose it cannot be an adequate justification for an infringement of fundamental rights. In the Makwanyane case, the Constitutional Court held that there was no satisfactory evidence establishing a rational connection between the death penalty and a reduction in the incidence of violent crime.<sup>228</sup> As in the Makwanyane case, it would be very difficult for the legislature to identify satisfactory evidence establishing a rational connection between prohibition and a reduction of the abuse of labour broker employees.

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<sup>223</sup> *Ibid*, Section 23(2).

<sup>224</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 160.

<sup>225</sup> *S v Manamela* 2000 (3) SA 1 (CC), at 34.

<sup>226</sup> Makwanyane case, *supra*, at 236.

<sup>227</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 161.

<sup>228</sup> Makwanyane case, *supra*, at 184.

The fifth factor, less restrictive means to achieve the purpose, requires that other means to achieve the same ends must be considered.<sup>229</sup> The limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent. In the Makwanyane case, the Constitutional Court held that the death penalty is not the only means to serve the goals of prevention and deterrence of violent crime.<sup>230</sup> These goals could just as well be served by a sentence of imprisonment for a long period or for life.<sup>231</sup> Similarly, prohibition is not the only means to serve the goal of preventing the abuse of labour broker employees. This goal could just as well be served by regulation. Regulation would be much less restrictive of the section 22 fundamental rights than prohibition and the principle of proportionality therefore dictates that labour broking should be regulated rather than prohibited.

The above discussion suggests that it would be less onerous for the legislature to regulate labour broking than to prohibit it. An onus would rest on the legislature to justify any attempt to prohibit labour broking in terms of the constitutional limitation test. As indicated above, such onus may however be difficult to discharge.

### **3.2 The regulation of labour broking in South Africa: arguments and prospects**

Although it would be less onerous for the legislature to regulate labour broking, some would however object to regulation by arguing that the South African labour market is already too regulated and that further regulation would inhibit employment creation.<sup>232</sup> Those objecting to further regulation would most likely support their argument by quoting the Employing Workers Indicators (hereinafter referred to as the 'EWI'), published by the World Bank, or the Global Competitiveness Report (hereinafter referred to as the 'GCR'), published by the World Economic Forum. In terms of the EWI and GCR, South Africa is consistently ranked as having some of the most rigid labour

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<sup>229</sup> See reference to this in J. De Waal, I. Currie and G. Erasmus, *The Bill of Rights Handbook*, *ibid*, 161-162.

<sup>230</sup> Makwanyane case, *supra*, at 123-128.

<sup>231</sup> *Ibid*

<sup>232</sup> See reference to this in P. Benjamin, 'Bend debate around labour flexibility back to the facts', *Business Day* (29 June 2009), available at: <http://www.businessday.co.za/articles/Content.aspx?id=74361> (accessed on 21 July 2010).

laws in the world.<sup>233</sup> These objections cannot be taken lightly as South Africa is in desperate need of employment creation. This much can be gathered from the above discussion of the South Africa's socio-economic realities. This section explores whether the South African labour market is already too regulated, whether further regulation would decrease employment and whether deregulation would increase employment.

### 3.2.1 The over regulation argument

The EWI, since 1993 in its Doing Business reports, ranks countries according to the extent to which they regulate their labour markets.<sup>234</sup> The greater protection workers receive (irrespective of the quality or social benefits of these laws) the less favourable a country's ranking. South Africa's mid-table ranking (102<sup>nd</sup> out of 182 countries) has often been used to argue that South Africa's labour laws are too rigid and inhibit employment creation. In late April 2009, the World Bank however withdrew the EWI.<sup>235</sup> The EWI was withdrawn after criticism by the ILO and, very significantly, the World Bank's own Independent Evaluation Group. Their criticism is, very importantly, based on the finding that there is no relationship between labour market deregulation and genuine improvement in economic performance, such as higher economic growth, investment or employment creation rates. The World Bank now acknowledges that a sole focus on improving the business climate is not a sound basis for economic policy, which must balance other goals, including political stability, social safety nets to protect the poor and vulnerable from unacceptable levels of risk and protecting worker rights. The EWI will be replaced by a new indicator, which (unlike the EWI) will recognise that well-designed worker protections benefit society as a whole.

The GCR figures claim that, of the 134 countries measured, South Africa is 129<sup>th</sup> with regard to hiring and firing practices and has similar poor ratings on issues such as wage determination and co-operation between labour and business.<sup>236</sup> The GCR is however a subjective survey of employer perception and based on the views of

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<sup>233</sup> *Ibid*

<sup>234</sup> *Ibid*

<sup>235</sup> See reference to this in P. Benjamin, 'Bend debate around labour flexibility back to the facts', *ibid*.

<sup>236</sup> *Ibid*

business executives who participate in the survey. All that these statistics indicate is that a small number of South African executives do not like South African labour laws and industrial relations (and that most executives do not bother to respond to these surveys). Benjamin labels the claim that South Africa's hiring and firing practices are the sixth most restrictive in the world as 'bizarre', because employers in South Africa can engage workers through labour brokers without restriction and make widespread use of temporary and fixed-term contracts.<sup>237</sup> As a result, large numbers of workers are not protected or are inadequately protected by labour law.

Quite contrary to the findings of the EWI and GCR, other international reports such as the 2008 Country Survey of South Africa by the Organisation for Economic Co-operation and Development (hereinafter referred to as the 'OECD') rates South Africa's employment protection legislation as relatively flexible.<sup>238</sup> It concludes that out of the 29 OECD members (which include most of the developed countries) only the United States has less restrictive laws on hiring and hours of work. South African dismissal laws, whilst given a less flexible rating, are nevertheless found to be more flexible than the average of the OECD countries. The OECD study shows that South Africa's employment protection legislation is more flexible than that of countries such as Brazil, Chile, China and India, with which it is often compared. The OECD study also makes the point that despite the significant level of labour market flexibility in South Africa, there is a widespread perception that the labour market is highly regulated.<sup>239</sup> It can however be gathered from the above that although South Africa's labour market is perceived to be highly regulated, it is in reality not the case.

### **3.2.2 The regulation versus job creation argument**

The view that further regulation would decrease employment and deregulation would increase employment is an orthodox view of labour law and economics, in terms of which it is argued that trade unions use labour law to cartelise the labour market and that employment protection legislation interferes with efficient incentive structures

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<sup>237</sup> *Ibid*

<sup>238</sup> *Ibid*

<sup>239</sup> *Ibid*

operating at the level of the individual contract of employment.<sup>240</sup> Deregulatory policies, based on this orthodox (or 'neoliberal' as it is often referred to) view, were practised, to varying degrees, in most of the advanced economies, such as the UK and the USA, in the 1980's and 1990's. These policies undoubtedly influenced the view of the World Bank and the World Economic Forum, as expressed in the EWI and GCR.

The fundamental question posed by the orthodox view of the labour market is why should we exclude or replace the ordinary private law that supports markets with special regulation of the employment relation?<sup>241</sup> In the context of the common law, this question asks why the ordinary law of contract and the ordinary incidents of ownership of private property should be revised for one particular species of contract, the contract of employment? Labour lawyers tend to justify special regulation of the employment relationship on the grounds of the inequality of power and resources between employer and employee.<sup>242</sup> Although economists initially rejected the application of the notion of power for being too imprecise, most branches of economic theory now accept the idea that the employment relationship has distinctive and particular characteristics which set it apart from other transactions and which render inapplicable certain aspects of orthodox free market analysis. In this regard the replacement of the normal rules of common law by special regulation of the employment relationship is justified on the basis of 'market failure' and 'distributive concerns' arguments.<sup>243</sup>

According to market failure arguments, the ordinary market rules are not working as efficiently as they would with some additional special regulation for the purpose of facilitating competitive labour markets.<sup>244</sup> An example is grievance and dispute regulation mechanisms such as the CCMA.<sup>245</sup> The absence of adequate default governance structures for the peaceful and expeditious resolution of disputes, such as

<sup>240</sup> See reference to this in S. Deakin and F. Wilkinson, 'Labour law and economic theory: A reappraisal', in Collins *et al*, *Legal Regulation of the Employment Relation* (Kluwer Law International 2000), 29.

<sup>241</sup> See reference to this in H. Collins, 'Justifications and techniques of legal regulation of the employment relation', in Collins *et al*, *Legal Regulation of the Employment Relation* (Kluwer Law International 2000), 6.

<sup>242</sup> See reference to this in S. Deakin and F. Wilkinson, 'Labour law and economic theory: A reappraisal', *ibid*, 42.

<sup>243</sup> See reference to this in H. Collins, 'Justifications and techniques of legal regulation of the employment relation', *ibid*, 6.

<sup>244</sup> *Ibid*

<sup>245</sup> *Ibid*, 10.

the CCMA, could lead to disruptions in production and other inefficiencies. Unlike other contracts such as sales, where in the event of a dispute, the parties can simply turn to an alternative supplier in the market, in contracts of employment, the parties are likely to be bound together by strong economic ties such as sunk investments in training on firm-specific skills, which render the choice of exit far more costly than the alternative of dispute resolution.

According to arguments based on distributive concerns the ordinary market rules produce outcomes in the distribution of wealth, power and other goods, which are unacceptable by reference to distributive criteria such as fairness and welfare maximisation.<sup>246</sup> An example is the imposition of a legislated minimum wage and legal rules against arbitrary dismissals.<sup>247</sup> If we conclude that the market is producing such low wages that it leads to unacceptable degrees of poverty among workers, we could exclude the market mechanism for setting wages by the imposition of a legislated minimum wage. Similarly, we might conclude that if the market produces an unsatisfactory number of arbitrary dismissals of workers, again we could exclude the market mechanism by a mandatory rule against arbitrary dismissals.

A standard objection to regulation based upon distributive considerations is that such interventions usually back-fire in the sense that regulation harms those whom it was designed to help.<sup>248</sup> For example, this kind of objection to a minimum wage law holds that whilst some low paid workers may benefit from its enactment, another specific group will be worse off, because employers will reduce their requirements for labour in order to keep down labour costs, and so some workers will become unemployed. A similar objection to a compulsory law of unfair dismissal insists that employers will reduce the numbers of workers hired, with the effect that those most likely to incur dismissal will not have jobs at all. According to this reasoning employers will hire less employees because of the transaction cost of dismissing them, thereby increasing unemployment. These objections however assume a rational response of

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<sup>246</sup> *Ibid*, 6.

<sup>247</sup> *Ibid*, 11-12.

<sup>248</sup> *Ibid*, 13.

employers to increased labour cost. The evidence of the effects of regulation is however much more ambiguous and the labour market seems to be unpredictable.

### 3.2.3 The unpredictability of the labour market

The structural reforms implemented by Argentina, Brazil and Mexico in the 1980's and 1990's in compliance with the so-called Washington Consensus provides a practical example of the unpredictability of the labour market.<sup>249</sup> The 'Washington Consensus' is a term used to describe the 10 policy principles as formulated by economist, John Williamson.<sup>250</sup> Williamson's principles were augmented and adopted as eligibility requirements for assistance by international financial institutions such as the International Monetary Fund (IMF) and World Bank.<sup>251</sup> Principle 9 advocates the 'abolition of regulations that impede the entry of new firms or restrict competition'.<sup>252</sup> Critics view the international financial institutions as 'agents of neoliberalism', seeking to minimize the role of the state and opening developing countries for exploitation by already developed countries.<sup>253</sup> In line with the 'Washington Consensus' the structural reforms implemented by Argentina, Brazil and Mexico had the objective of deregulating the labour market. An analysis of the consequences of these deregulatory policies on the labour market and specifically on employment creation, would therefore be of considerable comparative value. The results of such an analysis, conducted by Marshall, show that, whilst labour regulations did contribute to shape employer practices (the creation of flexible contracts was reflected in the changes in the structure of recruitment and of employment; the tightening of job security reduced lay-offs), it did not seem to have influenced employment creation.<sup>254</sup> According to Marshall, this is in

<sup>249</sup> See reference to this in A. Marshall, 'Labour Market Policies and Regulation in Argentina, Brazil and Mexico: Programmes and Impacts' (Employment Strategy Paper 2004/13, Geneva, International Labour Office, 2004), Preface, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_elm/documents/publications/wcms\\_114302.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/documents/publications/wcms_114302.pdf) (accessed on 5 May 2010).

<sup>250</sup> See reference to this in J. Williamson, 'The Washington Consensus as Policy Prescription for Development', available at: <http://www.iie.com/publications/papers/williamson0204.pdf> (accessed on 23 July 2010), 1.

<sup>251</sup> *Ibid*, 1-2.

<sup>252</sup> *Ibid*, 10.

<sup>253</sup> *Ibid*, 2.

<sup>254</sup> A. Marshall, 'Labour Market Policies and Regulation in Argentina, Brazil and Mexico: Programmes and Impacts', *ibid*, 43

agreement with findings of previous studies dealing with Latin American countries, showing once again that, contrary to the simplistic argument stating that relaxation of constraints on contracts and dismissals would suffice to improve employment performance, multiple causes intervene in the process of job creation, among which labour regulations are but one.

The unpredictability of the labour market may also be attributed to the fact that it does not operate according to perfect competitive conditions.<sup>255</sup> Inelasticities in the demand for labour and the significant transaction cost to participants, in the form of recruitment and training costs, mean that the labour market has less predictable outcomes than a pure competitive market model would suggest. A minimum wage law may under certain circumstances even lead to increased levels of employment, such as when the higher pay induces workers to fill vacancies. Contrary to expectation, a law of unfair dismissal may increase levels of employment, because employers might not hire fewer workers, but merely hire more carefully and employ personnel to carry out more thorough checks on applicants for jobs, whilst at the same time dismissing fewer employees.

Not only is there no rational connection between labour market regulation and the increase or decrease of employment, but a completely deregulated labour market also seems to be a contradiction in terms.<sup>256</sup> A completely deregulated market is a contradiction in terms, because all markets are based on and constituted by a structure of legal rules. Thus in a common law system, deregulation by way of the removal of statutory employment protection rules, may simply result in the restoration of a different type of regulation, such as contract law. What will have changed is the nature and content, not the existence of the regulation. It is furthermore clear that deregulation does not necessarily mean a reduced role for the state.<sup>257</sup> In fact, deregulation often has the opposite effect. For example, in many member states of the European Union (hereinafter referred to as the 'EU'), legislation has been introduced during the 1990's

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<sup>255</sup> H. Collins, 'Justifications and techniques of legal regulation of the employment relation', *ibid*, 13.

<sup>256</sup> See reference to this in D. Ashiagbor, 'Flexibility and adaptability in the EU employment strategy', in Collins *et al*, *Legal Regulation of the Employment Relation* (Kluwer Law International 2000), 395.

<sup>257</sup> *Ibid*

with the aim of deregulating employment practices, by creating exceptions from existing labour codes.

### 3.2.4 The changing nature of regulation

The nature of regulation is also changing. Traditionally regulatory techniques are either based on the private law model of an individual right protected by a liability rule or the criminal law model of enforcement mechanisms with inspectors and prosecutions through the courts. Traditional regulatory techniques tend to be costly and time-consuming. Contemporary regulation theory however encourages an agenda of considering alternative regulatory techniques.<sup>258</sup> More productive alternatives may be found in such techniques as promoting self-regulation, providing incentives for compliance with standards, auditing procedures and disclosure of information. The Broad Based Black Economic Empowerment Act (hereinafter referred to as the 'BBBEEA') serves as a good example of this. The BBBEEA promotes self-regulation by incentivising companies to obtain a broad based black economic empowerment rating (hereinafter referred to as a 'BBBEE rating'). Only by obtaining a BBBEE rating can a company compete for lucrative government contracts. By procuring from companies with a high BBBEE rating, a company improves its own BBBEE rating. A higher BBBEE rating, in turn, means that it is more attractive to other companies to procure from. The BBBEEA also requires a company to be audited annually by an accredited auditor, followed by disclosure of the necessary information.

Collective bargaining provides another alternative to traditional regulatory techniques. Collective bargaining is often viewed as superior to legislation as a method for regulating employment relations.<sup>259</sup> Collective agreements have certain advantages over legal regulation. The agreements can be designed for the exact circumstances of the business and can create their own effective and inexpensive non-legal enforcement mechanisms such as arbitration or grievance procedures. It was the aim of the Minister of Labour to harness the benefits of collective agreements as a method of regulation

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<sup>258</sup> See reference to this in H. Collins, 'Justifications and techniques of legal regulation of the employment relation', *ibid*, 20.

<sup>259</sup> *Ibid*, 22.

when he introduced the notion of 'regulated flexibility' in the LRA and BCEA.<sup>260</sup> The limits on the variations which were introduced during the negotiations over the BCEA unfortunately blunted the impact of regulated flexibility.<sup>261</sup> So did the CCMA and Labour Court by not following the codes of good practice and over-proceduralising pre-dismissal hearings, in particular pre-dismissal hearings during the probation period.<sup>262</sup>

### 3.2.5 Conclusion

We have certainly come a long way from the position that free exchange must be efficiency-enhancing and external regulation efficiency-reducing.<sup>263</sup> Formalistic claims that the South African labour market is already too regulated, that regulating the labour market would reduce employment and that deregulating the labour market would increase employment have been dismissed as simplistic. According to Collins, extensive regulation of employment relations can be justified, but not necessarily in the same format as the current legislation.<sup>264</sup> The focus of policy makers must begin to shift away from deregulation and towards the design of labour legislation with economic policy goals in mind.<sup>265</sup>

### 3.3 Key comparative jurisdiction: Namibia

When determining the prospects for prohibition and regulation of labour broking, Namibia serves as a key comparative jurisdiction. The developments in the Namibian jurisdiction are of high comparative value, because, like South Africa, Namibia is a constitutional state and its legal system shares a common heritage with South Africa's.

The Namibian legislature decided to prohibit labour broking after it was initially proposed that labour broking would be regulated.<sup>266</sup> Although the Labour Bill of 2007

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<sup>260</sup> See reference to this in H. Cheadle, 'Regulated Flexibility: revisiting the LRA and the BCEA', *ibid*, 668-670.

<sup>261</sup> *Ibid*, 670.

<sup>262</sup> *Ibid*

<sup>263</sup> See reference to this in S. Deakin and F. Wilkinson, 'Labour law and economic theory: A reappraisal', *ibid*, 50.

<sup>264</sup> See reference to this in H. Collins, 'Justifications and techniques of legal regulation of the employment relation', *ibid*, 5.

<sup>265</sup> See reference to this in S. Deakin and F. Wilkinson, 'Labour law and economic theory: A reappraisal', *ibid*, 62.

<sup>266</sup> See reference to this in the 2009 APS case, *supra*, at 63.

initially prescribed the regulation of labour broking, a significant amendment was made to section 128 just before the Bill was passed.<sup>267</sup> The amended section 128(1) read: '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.'<sup>268</sup> This amendment effectively prohibited labour broking in the Republic of Namibia. Trade unions enthusiastically welcomed the amendment, because they regarded labour broking as exploitative of workers and reminiscent of the old SWANLA system, as discussed above.<sup>269</sup> Employers on the other hand, opposed the amendment and argued that the Bill would not only prohibit labour broking but also other practices such as outsourcing and sub-contracting. This set the scene for litigation in the High Court and an appeal to the Supreme Court of Namibia.

### 3.3.1 The decision of the Namibian High Court

With its business falling squarely within the ambit of the prohibition, Africa Personnel Services (Pty) Ltd brought an application in the High Court to have section 128 of the Labour Act 11 of 2007 struck down as unconstitutional.<sup>270</sup> The basis of its challenge was that section 128 infringes its fundamental freedom to 'carry on any ... trade or business' as entrenched in section 21(1)(j) of the Namibian Constitution.<sup>271</sup> The respondents opposed the application on, amongst others, the following grounds: the applicant being a juristic person does not have *locus standi* to invoke the fundamental right protected by section 21(1)(j) because that right is only accorded to natural persons and any limitation of the section 21(1)(j) fundamental right by section 128 is a

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<sup>267</sup> See reference to this in H. Jauch, Labour Resource and Research Institute (LaRRI), 'Namibia's Ban on Labour Hire in Perspective', *ibid*, 1.

<sup>268</sup> Labour Act 11 of 2007 of the Republic of Namibia, *ibid*.

<sup>269</sup> See reference to this in H. Jauch, Labour Resource and Research Institute (LaRRI), 'Namibia's Ban on Labour Hire in Perspective', *ibid*, 1.

<sup>270</sup> 2008 APS case, *supra*, at 1.

<sup>271</sup> *Supra*, at 11.

permissible limitation authorised by section 21(2) of the Namibian Constitution.<sup>272</sup>

Section 21(2) of the Namibian Constitution reads:<sup>273</sup>

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

The full bench of the High Court dismissed the application with costs. It did so however not on any of the grounds advanced on behalf of the respondents in opposition to the application. The principal finding which the High Court made was that 'labour hire has no legal basis at all in Namibian law, and, therefore, is not lawful'.<sup>274</sup> The High Court also held that labour broking 'violates a fundamental principle on which the ILO is based, namely, that labour is not a commodity'.<sup>275</sup>

### 3.3.2 The decision of the Namibian Supreme Court

Africa Personnel Services (Pty) Ltd however appealed to the Supreme Court of Namibia, which overturned the High Court's decision and struck down section 128(1) as unconstitutional.<sup>276</sup>

The Supreme Court dismissed the notion that labour hire is not lawful and held that the mere fact that the labour hire arrangements do 'not fit the typical mold of a bilateral contract of service described in Roman and Common Law does not mean that they are not lawful'.<sup>277</sup> The Supreme Court held that labour broking does not violate the principle that labour is not a commodity if member states implement and enforce the

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<sup>272</sup> *Supra*, at 18.

<sup>273</sup> *Supra*, at 13.

<sup>274</sup> *Supra*, at 29.

<sup>275</sup> *Supra*

<sup>276</sup> 2009 APS case, *supra*.

<sup>277</sup> *Supra*, at 26.

regulative framework proposed by Convention 181.<sup>278</sup> According to the Supreme Court the numerous regulative requirements proposed by Convention 181 are intended to ensure that the labour of labour broker employees are not treated as a commodity and that their human and social rights as workers are respected and protected in the same respects as the protection accorded in labour legislation to employees in standard employment relationships. Had that not been so, then the adoption of Convention 181 by the ILO would be in conflict with one of the most basic principles upon which it was founded.

The Supreme Court also addressed the original grounds advanced on behalf of the respondents in opposition to the application in the High Court. The Supreme Court held that the phrase 'all persons' in the introductory part of section 21(1) of the Namibian Constitution is inclusive of both natural and legal persons.<sup>279</sup> The Supreme Court also examined section 21(2) of the Namibian constitution and set out to answer the following question: 'given the requirement of proportionality implied by the criterion of reasonableness in Article 21(2), have the respondents shown that the prohibition of agency work – rather than the regulation thereof – is necessary in a democratic society and required in the interest of the legitimate objectives being pursued by the enactment?'.<sup>280</sup> The answer to this question is of high comparative value to South Africa, because, similar to section 21(2) of the Namibian constitution, section 36 of the Constitution also contains a limitation clause which is based on the requirement of reasonableness and 'triggers the proportionality test for determining the constitutionality of a legislative restriction on the exercise of a fundamental freedom'.<sup>281</sup>

With reference to an Indian case, *Narenda Kumar v The Union of India*<sup>282</sup>, the Supreme Court of Namibia held that legislation may prohibit the exercise of a fundamental right.<sup>283</sup> But when restriction reaches that stage of prohibition, special care

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<sup>278</sup> *Supra*, at 100.

<sup>279</sup> *Supra*, at 44.

<sup>280</sup> *Supra*, at 111.

<sup>281</sup> *Supra*, at 95.

<sup>282</sup> *Narenda Kumar and Others v The Union of India and Others* [1959] INSC 147 (3 December 1959).

<sup>283</sup> 2009 APS case, *supra*, at 97.

must however be taken by the Court to ensure that the test of reasonableness is satisfied. The greater the restriction, the more the need there is for scrutiny by the Court.<sup>284</sup> The Supreme Court held that the section 128(1) prohibition is tailored much wider than that which reasonable restrictions would require for the achievement of the same objectives and is disproportionately severe compared to what is necessary in a democratic society for those purposes.<sup>285</sup>

The Supreme Court advanced a number of reasons for its finding, including the fact that the sweep of the prohibition in section 128(1) goes beyond labour broking.<sup>286</sup> It prohibits all persons to employ, for reward, 'any person with a view to making that person available to a third party to perform work for the third party'. Unlike article 1(b) of Convention 181 it does not require that the third party also 'assigns the tasks and supervises the execution of these tasks'. As long as the labour constitutes 'work for the third party', it does not matter that it is assigned or supervised by the employer and not by the third party: it will still fall within the ambit of the prohibition. Equally significant are the implications which flow from the use of the word 'work' in the prohibition.<sup>287</sup> The prohibition is not in any way limited to the rendering of personal services to the third party by the person employed but, on the face thereof, also includes the performance of work by independent contractors. So construed, the broad scope of the prohibition may even prevent law firms from making lawyers, for reward, available to clients (third parties) to perform work of a legal nature for those clients.<sup>288</sup> The same holds true for auditors, architects, doctors and other professional persons.

Another reason advanced by the Supreme Court is the fact that, neither the experts who filed affidavits in the application nor counsel representing the litigants, were able to refer the Court to any other democratic society where labour broking is prohibited *in toto*.<sup>289</sup> The Supreme Court held that, although Namibia has not ratified

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<sup>284</sup> *Supra*, at 97.

<sup>285</sup> *Supra*, at 118.

<sup>286</sup> *Supra*, at 85.

<sup>287</sup> *Supra*, at 87.

<sup>288</sup> *Supra*, at 86.

<sup>289</sup> *Supra*, at 113.

Convention 181, the ratification thereof by many other notable constitutional democracies (including Belgium, Finland, Hungary, Italy, Japan, the Netherlands, Poland, Portugal and Spain) and the fact that it has not been denounced by any country, are all considerations of significance in determining what is required in a democratic society.

Based on the abovementioned the Supreme Court held that ‘the prohibition of the economic activity defined in section 128(1) is so overbroad that it does not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected in Article 21(1)(j) of the Constitution and, on that basis alone, the section must be struck down as unconstitutional’.<sup>290</sup>

### 3.3.3 Conclusion

As can be gathered from the Namibian example, an attempt by the South African legislature to prohibit labour broking would most likely not succeed. Although effective, the infringement of the section 22 constitutional rights would be disproportionate to the purpose that the limitation seeks to achieve, which is the protection of labour broker employees. The disproportionality of prohibition is exacerbated by the fact that the same purpose may just as well be achieved by regulation, which would be less invasive of the section 22 constitutional rights. Regulation is also prescribed by the ILO in the form of Convention 181, which has been ratified by many constitutional democracies.

In the light of South Africa’s socio-economic reality, prohibition is furthermore not practical, because it only focuses on the need of workers, being protection, and not the need of employers, being flexibility. It disregards the possible benefits of labour broking, such as increased flexibility of the labour market, which may stimulate employment creation. On the contrary, Convention 181 attempts to strike a balance between the opposing needs of employers and workers. It notes awareness ‘of the importance of flexibility in the functioning of labour markets’, recognises the ‘role which private employment agencies may play in a well-functioning labour market’ and emphasizes ‘the need to protect workers against abuses’.<sup>291</sup>

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<sup>290</sup> *Supra*, at 91.

<sup>291</sup> Private Employment Agencies Convention, 181 of 1997, *ibid*, Preamble.

## CHAPTER 4: REGULATORY OPTIONS FOR THE PROTECTION OF LABOUR BROKER EMPLOYEES

Innovative regulation, as opposed to total prohibition or deregulation, has been identified in Chapter 3 as the preferred option for protecting labour broker employees against the abuses identified in the Report of the Portfolio Committee.<sup>292</sup> The next step would be to explore different regulatory options for the protection of labour broker employees. The regulatory measures proposed by the DOL<sup>293</sup> in the Discussion Document<sup>294</sup> are a good starting point. The DOL submitted the Discussion Document to NEDLAC in 2009 for discussion. Regulatory measures in foreign jurisdictions may also provide South Africa with a model for protecting labour broker employees. As mentioned in Chapter 2, the development of labour broker regulation in the Netherlands is of high comparative value to South Africa.

### 4.1 Registration of Labour Brokers

The registration of labour brokers subject to certain minimum requirements is recommended in the Discussion Document.<sup>295</sup> It is also recommended that a client who contracts with an unregistered labour broker should be fully liable as employer. It is furthermore recommended that the Minister of Labour should have the regulatory power to, after consultation with the Employment Conditions Commission<sup>296</sup>, prohibit labour broking in specific sectors of the economy and establish a participative governance structure for the labour broking industry.

The Discussion Document's recommendations are in line with Convention 181, which requires member countries to determine the conditions governing the operation of labour brokers in accordance with a system of licensing or certification, except where

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<sup>292</sup> Report of the Portfolio Committee, *ibid*, 73-75.

<sup>293</sup> Department of Labour.

<sup>294</sup> Decent work and non-standard employees: options for legislative reform in South Africa – a discussion document, *ibid*.

<sup>295</sup> *Ibid*, 13.

<sup>296</sup> Established in terms of Section 59(1) of the Basic Conditions of Employment Act, 75 of 1997 (as amended).

they are otherwise regulated or determined by appropriate national law and practice.<sup>297</sup> Convention 181 also allows member countries to prohibit labour brokers from operating in respect of certain categories of workers or branches of economic activity and to exclude workers in certain branches of economic activity, or parts thereof, from the scope of the convention or from certain of its provisions, provided that adequate protection is otherwise assured for the workers concerned.<sup>298</sup>

As mentioned in Chapter 2 the labour broker concept was introduced into South African labour law by the Labour Relations Act of 1983 (1983 LRA).<sup>299</sup> In terms of the 1983 LRA no labour broker could conduct business after 3 months of the Act coming into effect if it was not registered in the manner prescribed by the Act.<sup>300</sup> The 1983 LRA was repealed by the Labour Relation Act of 1995 (LRA).<sup>301</sup> When the 1983 LRA was repealed, the requirement for labour brokers to register was also dropped and the LRA does not contain a similar requirement.

A statute enacted in 1998, the SDA,<sup>302</sup> did however re-introduce the requirement for labour brokers to register. In terms of the SDA a labour broker must apply for registration to the DOL in the *prescribed manner* and the DOL must register the applicant if it is satisfied that the *prescribed criteria* have been met.<sup>303</sup> In 2000 the Minister of Labour elaborated on the prescribed manner for registration by issuing regulations in terms of section 36 of the SDA (hereinafter referred to as the '2000 regulations').<sup>304</sup> The 2000 regulations prescribe, amongst other, the format for application to the DOL and the format for the registration certificate to be issued by the DOL.<sup>305</sup> In terms of the 2000 regulations the labour broker must display the registration

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<sup>297</sup> Convention 181, *ibid*, Article 3(2).

<sup>298</sup> *Ibid*, Article 2(4)(a)-(b).

<sup>299</sup> Labour Relations Amendment Act 2 of 1983, which amended the Labour Relations Act 28 of 1956.

<sup>300</sup> *Ibid*, Section 63(1).

<sup>301</sup> Labour Relations Act 66 of 1995 (as amended).

<sup>302</sup> Skills Development Act 97 of 1998 (as amended).

<sup>303</sup> *Ibid*, Sections 24(1)-(2).

<sup>304</sup> Regulations with regard to private employment agencies, *ibid*.

<sup>305</sup> *Ibid*, Section 5(1)-(2).

certificate issued by the DOL in a conspicuous place.<sup>306</sup> Furthermore, the 2000 regulations prohibit the owner or manager of a labour broker from allowing any other person to conduct such business on his/her behalf without the prior written approval of the DOL.<sup>307</sup>

In 2007 the Minister of Labour elaborated on the prescribed criteria for registration by publishing draft regulations for public comment (hereinafter referred to as the '2007 regulations').<sup>308</sup> The 2007 regulations stipulate that when labour brokers apply for registration they must provide the DOL with proof of the following: that the company is registered as an entity in terms of the relevant legislation; that the entity is registered with the South African Revenue Services for employees' tax, skills development levy, unemployment insurance fund contributions and/or VAT, where applicable; that the entity is registered with a bargaining council, where applicable; that the entity is registering at its lowest level or stand alone level of organisational structure.<sup>309</sup> The labour broker must furthermore show that, where applicable, it complies with the following legislation: SDA; Skills Development Levies Act, 9 of 1999; Unemployment Insurance Act, 63 of 2001; Basic Conditions of Employment Act, 75 of 1997 (hereinafter referred to as the 'BCEA'); LRA; Employment Equity Act, 55 of 1998 (hereinafter referred to as the 'EEA'); Compensation for Occupational Injuries and Diseases Act, 130 of 1993; Occupational Health and Safety Act, 85 of 1993; and the Unemployment Insurance Contributions Act, 2 of 2002.

The 2007 regulations have however never been issued and remain a draft. Although the 2000 regulations have been issued, they are silent on the prescribed criteria for the registration of labour brokers. Although the 2000 regulations prohibit the owner or manager of a labour broker from allowing any other person to conduct such business on his/her behalf without the prior written approval of the DOL, research shows that this does happen in practice.<sup>310</sup> The setting up of 'shell labour' brokers is

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<sup>306</sup> *Ibid*, Section 5(3).

<sup>307</sup> *Ibid*, Section 5(11).

<sup>308</sup> Regulations with regard to employment services, *ibid*.

<sup>309</sup> *Ibid*, Section 2(2).

<sup>310</sup> Discussion Document, *ibid*, 12-13.

common practice in the agricultural industry and farmers often utilise employees or former employees as ‘informal recruiters’ to obtain seasonal labour. If the farmer pays a fee (no matter how small) to the ‘recruiting’ individual and uses him/her as a conduit to pay the other employees, he/she becomes a temporary employment service and the farmer is not the employer. This allows for the exploitation of workers by farmers.

#### **4.2 Measures to include labour broker employees in collective bargaining**

Regulations on labour broking in the Netherlands evolved from prohibition, to strict government control and a system of licensing, to regulation by collective bargaining.<sup>311</sup> In 1975, the official ban on labour brokers was replaced by a system of licensing. A labour broker needed a government permit to operate. Although labour broking grew in popularity, their legal position remained uncertain. The stance of labour brokers was that their workers are not working on the basis of employment contracts. During the 1980s, the general trade unions managed to reach a nation-wide collective agreement for labour broker employees with the ABU (Dutch Association of Temporary Work Agencies) and Dutch courts started to accept the notion that labour broker employees are working on the legal basis of an employment contract. The ABU changed its previous position in a 1996 agreement with the unions and accepted the principle that their workers are working on the basis of employment contracts. In exchange, the unions accepted labour brokers as normal employers who, as such, do not require specific government supervision. Because of this agreement, the permit system was abolished on 1 July 1998 with the enactment of the Act on Allocation of Workers by Intermediaries (hereinafter referred to as the ‘1998 Act’). Labour Brokers are now free to operate like any other company. Only two restrictions remained in the 1998 Act. The first restriction is that labour broker employees may not be used to undermine a strike. The second restriction is that the wage of a labour broker employee should be the same as that of a worker who does the same work as an employee of the company where the work is done. However, the latter rule may be set aside by collective agreement (either that of the hiring company or that of the labour broker). Collective bargaining has

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<sup>311</sup> See reference to this in G. Heerma van Voss, The Flexibility and Security Act: Discussion Paper, *ibid*, 11-13.

therefore, to a large extent, replaced legislation as a method of regulating labour broking in The Netherlands.

As mentioned above, collective agreements have certain advantages over legislation as a method of regulation.<sup>312</sup> The agreements can be designed for the exact circumstances of the business and can create their own effective and inexpensive non-judicial enforcement mechanisms such as arbitration or grievance procedures. It was also the aim of the Minister of Labour to harness the benefits of collective agreements as a method of regulation when he introduced the notion of regulated flexibility in the LRA and BCEA.<sup>313</sup> According to Cheadle, the limits on the variations which were introduced during the negotiations over the BCEA have however blunted the impact of regulated flexibility and undermined collective bargaining.<sup>314</sup>

Collective bargaining in South Africa is furthermore undermined by labour broker employees' lack of bargaining power. As mentioned above, this can largely be attributed to the structure of the LRA, in particular the LRA's definition of workplace. The LRA defines workplace as '... the place or places where the employees of an employer work. ...'.<sup>315</sup> This definition is based on the old-world paradigm of a bilateral relationship between a single employer and employees who work at a fixed workplace. It does not sufficiently accommodate the complexities of the tri-partite employment relationship and employees who move between workplaces. Currently trade unions earn enforceable organizational rights when they meet the threshold prescribed for each right. These thresholds are expressed as the number of union members as a percentage of the total number of employees in the workplace. Should a trade union attain the prescribed threshold in respect of directly employed employees in a workplace, this does not mean that they have attained the threshold in respect of labour broker employees, who may work at the same workplace but for a different employer, the labour broker. The number of labour broker employees at a workplace constantly varies and labour broker employees often move between workplaces. These regulatory

<sup>312</sup> See reference to this in H. Collins, 'Justifications and techniques of legal regulation of the employment relation', *ibid*, 22.

<sup>313</sup> H. Cheadle, 'Regulated Flexibility: revisiting the LRA and the BCEA', *ibid*, 668-670.

<sup>314</sup> *ibid*

<sup>315</sup> LRA, Section 213.

challenges make it very difficult for trade unions to organise labour broker employees and for labour broker employees to exercise their rights to obtain organizational rights and engage in collective bargaining.

It is therefore recommended in the Discussion Document that the definition of 'workplace' must be amended to take into account the nature of labour broking.<sup>316</sup> Legislative amendments to enable labour broker employees to gain organizational rights and engage in collective bargaining with the labour broker and the client for whom they work are also recommended in the Discussion Document.<sup>317</sup> The Discussion Document further recommends that sectoral determinations should provide for trade unions that meet representativity thresholds to obtain organizational rights at workplaces within the sector.

### **4.3 Measures to increase the job security of labour broker employees**

As mentioned above, the LRA prohibits unfair labour practices and unfair dismissals and allows employees to refer such disputes to the CCMA and/or Labour Court.<sup>318</sup> The LRA however specifically designates labour broker employees as the employees of the labour broker and not the client.<sup>319</sup> The LRA provides protection to labour broker employees in respect of breaches of their terms and conditions of employment by holding the client and the labour broker jointly and severally liable.<sup>320</sup> The LRA however does not extend similar protection to labour broker employees in respect of unfair labour practices and unfair dismissal. The consequences of joint and several liability, as provided by the LRA, is that if a labour broker fails to pay amounts owing to its employees, the client for whom the employees work is liable to make those payments. However, the client's liability is a default liability: the client cannot be sued directly in the CCMA or Labour Court because it is not the employer.<sup>321</sup> As such the labour broker

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<sup>316</sup> Discussion Document, *ibid*, 24.

<sup>317</sup> *Ibid*, 26.

<sup>318</sup> LRA, Sections 186-195.

<sup>319</sup> LRA, Section 198(2).

<sup>320</sup> *Ibid*, Section 198(4).

<sup>321</sup> Discussion Document, *ibid*, 5-6.

employee can only proceed against the client if it has obtained a judgement or order against the labour broker which the labour broker declines to pay. This makes it very difficult for labour broker employees to enforce their constitutional right to fair labour practices.<sup>322</sup>

The Discussion Document recommends that the joint and several liability of the client and the labour broker should be extended to breach of all legislation, including the LRA.<sup>323</sup> If this is done, the client and labour broker would also be jointly and severally liable for unfair labour practices committed against labour broker employees and the unfair dismissal of labour broker employees. It is furthermore recommended in the Discussion Document that the labour broker employee should be able to directly enforce his or her rights against either the labour broker or the client.

Cheadle argues that, in addition to the limits on variations which were introduced during the negotiations over the BCEA, the impact of regulated flexibility has been blunted by the over-regulation of pre-dismissal hearings during the probation period.<sup>324</sup> According to Cheadle, the CCMA should have developed less stringent standards for the fair treatment of a probationary employee, but it did not. And if an employer is unable to dismiss an employee who proves to be unsuitable with relative ease during probation, the purpose of probation is undermined and this may become a barrier to permanent employment and encourage labour broking.<sup>325</sup> The solution proposed by Cheadle lies in the approach taken in other jurisdictions, namely that the ordinary unfair dismissal protections (i.e. other than automatically unfair dismissals) do not apply to employees with less than a stipulated period of service.<sup>326</sup> In Great Britain, employees only become eligible to many employment rights, including the right not to be unfairly dismissed, after one year of continuous service.<sup>327</sup>

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<sup>322</sup> South African Constitution, Section 23(1).

<sup>323</sup> Discussion Document, *ibid*, 15.

<sup>324</sup> H. Cheadle, 'Regulated Flexibility: revisiting the LRA and the BCEA', *ibid*, 670.

<sup>325</sup> *Ibid*, 678-679.

<sup>326</sup> *Ibid*, 680.

<sup>327</sup> See reference to this in S. Corby & I. Newall, Unfair dismissal in South Africa: comparative perspectives from Great Britain and New Zealand, unpublished paper delivered at the 12<sup>th</sup> Annual Labour Law Conference 30 June – 2 July 1999 Durban SA, 9.

In line with Cheadle's reasoning, it is recommended in the Discussion Document that probation should be regulated by legislation specifying a qualifying period during which ordinary unfair dismissal protections should not apply to new employees.<sup>328</sup> During this period employees would be protected against automatically unfair dismissals only. It is recommended in the Discussion Document that the qualifying period should be 6 months, with scope for variation to cater for the needs of particular sectors or professions.

As mentioned above, although the LRA protects labour broker employees against unfair dismissal, the nature of the contract between the client and the labour broker and the nature of the contract between the labour broker and the labour broker employee undermine the enforcement of such statutory protection. The so-called service provider agreement between the client and the labour broker is a commercial contract. To circumvent the tedious dismissal procedures as prescribed in the LRA, many clients stipulate in their service provider agreements with labour brokers that they reserve the right of admission to their respective premises and that labour broker employees must be removed from their property when labour brokers are called upon to do so. Recently however, the Labour Court, in the Nape case, extended protection to labour broker employees in cases where the client demands that a labour broker removes a labour broker employee from its premises in terms of a contractual provision and where no fair grounds exist for such removal.<sup>329</sup>

Although a measure of protection is afforded to labour broker employees against the excesses of the commercial agreement between the client and the labour broker, they still are insufficiently protected against exploitation resulting from the nature of their employment contract with the labour broker. As mentioned above, the contract of employment between the labour broker and the labour broker employee is normally an on-call contract with no guaranteed minimum number of working hours. In terms of this contract, labour broker employees are called upon when they are needed and paid an hourly wage for every hour that they work, with no guaranteed minimum number of working hours. Even if the contract is not a fixed term contract with a determinable

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<sup>328</sup> Discussion Document, *ibid*, 21.

<sup>329</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* (JR617/07) [2010] ZALC 33 (10 March 2010).

termination date, it has been held in the CCMA that the duration of such contract coincides with the period of *de facto* employment with the client.<sup>330</sup> The end of the assignment with the client would therefore mean the end of the employment contract with the labour broker. As mentioned above, the labour broker does not even have to bother with dismissing the labour broker employee; all it has to do is to stop providing work to such employee.

Various measures are proposed in the Discussion Document to protect labour broker employees against exploitation resulting from the nature of their employment contract with the labour broker.<sup>331</sup> Firstly, it is recommended that labour broker employees should remain employees of the labour broker during periods when they are not placed by the labour broker. Secondly, it is recommended that all employment contracts concluded with employees below a defined earnings threshold should be presumed to be of indefinite duration unless the employer can justify, on operational grounds, why the contract was concluded for a fixed term. It is further recommended in the Discussion Document that labour broker employees placed with a client for work of indefinite duration should have unfair dismissal protection in respect of the termination of their services by the client.

As mentioned above, in the Netherlands, the level of job security afforded to employees is linked to the duration of the employment relationship, irrespective of the nature of the employment contract. At the beginning of any employment relationship, flexibility is allowed, but the longer it lasts, the more job security the employee is entitled to. This principle also applies to labour broker employees who work in terms of an on-call contract with no guaranteed minimum number of working hours. In *Agfa v Schoolderman*<sup>332</sup> (hereinafter referred to as the 'Agfa case'), the Dutch Supreme Court found that even if an employee works in terms of an on-call contract with no guaranteed minimum number of working hours, but works according to a regular pattern, he/she is entitled to work the average amount of working hours for the preceding period.

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<sup>330</sup> *Dick v Cozens Recruitment Services* (2001) 22 ILJ 276 (CCMA).

<sup>331</sup> Discussion Document, *ibid*, 20-21.

<sup>332</sup> Dutch Supreme Court 8 April 1994, *Nederlandse Jurisprudentie* (Dutch Case-law) 1994, no. 794 (*Agfa-Gevaert vs. Schoolderman*).

The Act on Flexibility and Security of 1 January 1999 (hereinafter referred to as the '1999 Act') introduced certain presumptions into the Dutch Civil Code.<sup>333</sup> Article 7:610b of the Dutch Civil Code states that if the employment contract runs for longer than 3 months, the contracted work in any month is presumed to amount to the average number of working hours per month for the preceding 3 months. It is however possible for the employer to contract out of this presumption by agreement with the employee, for instance in the case of temporary and seasonal work. The employer may however only contract out of this presumption during the first 6 months of the contract, unless the applicable collective agreement allows doing so for a longer period (article 7:628 Civil Code).

A phase approach is prescribed in the collective agreement between the ABU (Dutch Association of Temporary Work Agencies) and major trade unions (hereinafter referred to as the 'Collective Agreement').<sup>334</sup> The phase approach is based on the principle that the further the labour broker employee advances in the phases, the more rights he/she obtains, thus the more permanent the relationship between the labour broker employee and the labour broker becomes. In terms of the Collective Agreement, labour broker employees would move through the following 3 phases: phase A (lasting for 78 weeks), phase B (lasting for 2 years and/or 8 contracts) and phase C (lasting for an indefinite period).

The labour broker employee is in phase A for as long as he/she has not yet worked for the same labour broker for a span of 78 weeks.<sup>335</sup> Every week the labour broker employee works counts towards the accumulation of the 78 weeks and the number of working hours he/she works is not relevant. The labour broker and labour broker employee may enter into an unlimited number of consecutive employment contracts during this phase. During phase A, the on-call clause may be included in the employment contract between the labour broker and the labour broker employee. Should the on-call clause be included in the employment contract, the employment

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<sup>333</sup> See reference to this in G. Heerma van Voss, *The Flexibility and Security Act: Discussion Paper*, *ibid*, 10.

<sup>334</sup> A summary of the CLA for temporary employees 2009-2014, available at: <http://www.abu.nl/abu2/?fileid=13956> (accessed on 20 July 2010).

<sup>335</sup> *Ibid*, 2-3.

contract will end automatically if the client terminates the assignment. The labour broker must however give the labour broker employee the prescribed minimum period of notice of such termination. Should the labour broker fail to do so, it must pay to the labour broker employee wages in lieu of notice. During phase A, the employment contract may also be terminated if the labour broker employee is unable to work due to illness or injury. In this case the prescribed minimum notice period would not apply.

Phase B begins if the labour broker employee continuously works for the same labour broker until the completion of phase A, or if the labour broker employee is again employed by the same labour broker within 26 weeks after the completion of phase A.<sup>336</sup> Phase B takes a maximum of 2 years or 8 contracts. This means that 8 labour broker contracts for a certain period can be signed consecutively in this phase. When the 9<sup>th</sup> contract is signed the labour broker employee will proceed to phase C. During phase B, the on-call clause can no longer be included in the employment contract between the labour broker and the labour broker employee and the labour broker employee will be working in terms of a fixed term contract. During phase B, the employment contract therefore expires on the termination date agreed upon or at the end of the project. The employment contract does not end if the client terminates the assignment. Should the client terminate the assignment, the labour broker must try to find suitable replacement work for the labour broker employee. The labour broker employee is entitled to part of his/her wages until the labour broker manages to obtain suitable replacement work. To terminate the employment contract before the termination date, the labour broker must either seek the permission of the UWV WERKbedrijf (Employment Insurance Agency Implementing Company) or apply to the relevant sub-district court to dissolve the employment contract.

Phase C begins if the labour broker employee continues working for the same labour broker immediately after completing phase B or if the he/she is employed again by the same labour broker within 13 weeks after completing phase B.<sup>337</sup> In phase C the labour broker employee always works in terms of an indefinite contract. Similar to phase B, the on-call clause can no longer be included in the contract. Similar to phase

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<sup>336</sup> Collective Agreement, *ibid*, 3-5.

<sup>337</sup> Collective Agreement, *ibid*, 5-7.

B, if the client terminates the assignment, the labour broker contract continues to exist and the labour broker must continue to pay part of the wages until suitable replacement work can be found. Before the labour broker can terminate an employment contract it must either seek the permission of the UWV WERKbedrijf (Employment Insurance Agency Implementing Company) or apply to the relevant sub-district court to dissolve the employment contract. When the labour broker employee turns 65 the indefinite contract is automatically terminated.

#### **4.4 Measures to improve the conditions of employment of labour broker employees**

As mentioned above, research commissioned by the DOL shows that it is common practice in South Africa for labour broker employees to be paid less than employees directly employed by the client, even if they perform precisely the same job.<sup>338</sup> This occurs even though the EEA prohibits unfair discrimination. Although the EEA prohibits unfair discrimination in the workplace, it places no obligation on the client to pay similar wages to employees engaged through a labour broker, even if they perform precisely the same job as directly employed employees. This is in contrast to a number of countries (Australia, Belgium, France, Italy, Luxembourg, The Netherlands, Portugal and Spain), which have laws guaranteeing that labour broker employees enjoy the same pay and conditions as directly employed employees working in the same host organisation.<sup>339</sup> Unlike these countries, South Africa does not have separate equal pay for equal work protection and labour broker employees are forced to challenge inequity in conditions of employment under the head of unfair discrimination.<sup>340</sup> In such cases the onus of proof falls on the labour broker employee to show that he/she has been discriminated against on one or more of the listed constitutional grounds<sup>341</sup>, or an

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<sup>338</sup> See reference to this in the Discussion Document, *ibid*, 21.

<sup>339</sup> See reference to this in 2009 APS case, *supra*, at 114.

<sup>340</sup> Discussion Document, *ibid*, 22.

<sup>341</sup> According to Section 6 of the EEA the grounds include race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

analogous ground. In *Harksen v Lane NO* the Constitutional Court described analogous grounds as ‘attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner’.<sup>342</sup> It is very difficult for individual labour broker employees to discharge this onus of proof, because they are, in most cases, not represented by trade unions and do not have the financial resources to litigate on their own.

On account of the abovementioned state of affairs, South Africa has been criticised by the ILO for not giving effect to Convention 100, which it has ratified.<sup>343</sup> Convention 100 places an obligation on member countries to ensure that the principle of equal remuneration for men and women workers who perform work of equal value is applied to *all workers*.<sup>344</sup> Differential rates may only be paid if such differences can be justified on the basis of objective appraisals of jobs.<sup>345</sup> In terms of another ratified convention, Convention 111, South Africa also undertook to eliminate discrimination in respect of employment and occupation.<sup>346</sup> The terms ‘employment’ and ‘occupation’ include terms and conditions of employment.<sup>347</sup> South Africa is clearly in breach of its obligations under Conventions 100 and 111, because, as mentioned above, research shows that workers performing the same job in the same organisation are paid differently.<sup>348</sup> The Discussion Document therefore recommends that the anti-discrimination provisions of the EEA should be amended to provide an effective remedy for unfair discrimination in wages and working conditions on the basis of the contractual arrangements in terms of which employees are engaged.<sup>349</sup>

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<sup>342</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC), at 46.

<sup>343</sup> See reference to this in the Discussion Document, *ibid*, 22.

<sup>344</sup> Equal Remuneration Convention 100 of 1951, Article 2(1).

<sup>345</sup> *Ibid*, Article 3.

<sup>346</sup> Discrimination (Employment and Occupation) Convention 111 of 1958, Article 2.

<sup>347</sup> *Ibid*, Article 1(3).

<sup>348</sup> See reference to this in the Discussion Document, *ibid*, 21.

<sup>349</sup> *Ibid*, 23.

The BCEA allows the Minister to establish basic conditions of employment for employees in a particular sector and area by making sectoral determinations.<sup>350</sup> Labour broker employees very often depend on sectoral determinations to provide them with basic conditions of employment, in particular minimum wages, because, as shown above, they are not sufficiently protected by legislation and they do not have the same collective bargaining power as their directly employed co-workers. Many labour broker employees unfortunately fall outside the protective scope of a sectoral determination, because they frequently move between workplaces and sectors.<sup>351</sup>

In terms of the LRA, a bargaining council may request the Minister of Labour to extend a collective agreement concluded in the bargaining council to any non-parties within its registered scope.<sup>352</sup> The Minister may only extend such collective agreement when requested to do so by the bargaining council and does not have the power to do so on his/her own initiative. Labour broker employees who fall within the registered scope of a bargaining council will therefore most likely not be protected if the bargaining council has not requested the Minister to extend collective agreements to non-parties.<sup>353</sup> In response to this, the Discussion Document recommends that the Minister of Labour should be able to enact a sectoral determination applicable to low-skill workers not covered by any other sectoral determination or bargaining council agreement.<sup>354</sup> In addition, the Discussion Document recommends that the Minister should be able to enact a sectoral determination applying to employees within the registered scope of a bargaining council but not covered by a bargaining council agreement.

As mentioned above, the Netherlands, may provide South Africa with a model for effectively protecting labour broker employees. As a member of the European Union, the Netherlands is subject to the European Framework Agreement on Part-Time Work (hereinafter referred to as 'Directive 97/81/EC'). Directive 97/81/EC stipulates that, in respect of employment conditions, part-time workers shall not be treated in a less

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<sup>350</sup> BCEA, Section 51.

<sup>351</sup> Discussion Document, *ibid*, 25.

<sup>352</sup> LRA, Section 32(1).

<sup>353</sup> Discussion Document, *ibid*, 25.

<sup>354</sup> *Ibid*, 26.

favourable manner than comparable full-time workers solely because they work part-time unless different treatment is justified on objective grounds.<sup>355</sup> It also stipulates that, where appropriate, the principle of *pro rata temporis* shall apply.<sup>356</sup> Three years before Directive 97/81/EC was issued, the Dutch Supreme Court, in the Agfa case<sup>357</sup>, had in fact already accepted that the principle of equal pay for equal work under equal conditions apply to part-time workers, unless the difference in payment can be justified on objective grounds. In the Netherlands therefore, labour broker employees may work on a part-time basis and be paid only for the hours they have worked, but their hourly rate may not be less than the hourly rate of full-time employees, except where such difference in pay can be justified on objective grounds.

Even if the principle of equal pay for equal work under equal conditions is enforced in South Africa, labour broker employees may still not enjoy the benefit. Should labour broker employees become entitled to higher hourly rates of pay, their number of hours may simply be reduced. This is possible if they are working in terms of an on-call contract with no guaranteed minimum number of working hours. The reduction of working hours when labour broker employees become entitled to higher hourly rates of payment has in fact been identified as a bad and abusive practice in the Report of the Portfolio Committee.<sup>358</sup> In this regard the protection afforded to labour broker employees in the Netherlands, as discussed below, may serve as a model for the protection of labour broker employees in South Africa.

As mentioned above, the Dutch Supreme Court held, in the Agfa case<sup>359</sup>, that even if an employee works in terms of an on-call contract with no guaranteed minimum number of working hours, but works according to a regular pattern, he/she is entitled to work the average amount of working hours for the preceding period. The 1999 Act also

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<sup>355</sup> Framework Agreement on Part-Time Work concluded on 6 June 1997 between the Union of Industrial and Employer's Confederations of Europe, the European Trade Union Confederation and the European Centre of Enterprises with Public Participation, Clause 4(1).

<sup>356</sup> *Ibid*, Clause 4(2).

<sup>357</sup> Agfa case, *supra*.

<sup>358</sup> Report of the Portfolio Committee, *ibid*, 73-75.

<sup>359</sup> Agfa case, *supra*.

introduced certain presumptions to the Dutch Civil Code to protect labour broker employees who work in terms of an on-call contract with no guaranteed minimum number of working hours. Article 7:628a of the Civil Code stipulates that the labour broker must pay the labour broker employee a minimum of 3 working hours per call.<sup>360</sup> This applies to cases where the labour broker employee works less than 15 hours per week and where the employment contract does not specify the exact working hours or the amount of working hours. For example, if the employment contract stipulates that a worker must work from Monday to Friday, 09h00 to 11h00 each day, the rule is not applicable. In this case, the worker works for less than 15 hours each week, but the exact hours are determinable. But if the contract is silent on the exact hours or the amount of hours to be worked, the worker must be paid for 3 hours every time he/she works. The purpose of this is to prevent workers sitting near the telephone the whole day, waiting to be called for just 1 hour of work and having to travel to work for such a short period of time.

To protect labour broker employees, the Collective Agreement between the ABU (Dutch Association of Temporary Work Agencies) and major trade unions stipulates how a labour broker employee's hourly wage must be calculated by classifying the employee in 1 of 9 position groups and applying a salary table and a structured system of increases.<sup>361</sup> The Collective Agreement furthermore stipulates that if a labour broker employee has worked at the same client for 26 weeks, then the labour broker must apply the client's rate of remuneration for the relevant job, as it applies to the directly employed employees.<sup>362</sup> The labour broker may also opt to apply the client's rate of remuneration from the first day the labour broker employee works at the client.

As mentioned above, the Collective Agreement protects the job security of labour broker employees in terms of a phase approach. The phase approach also applies to the protection of the conditions of employment of labour broker employees. The further the labour broker employee advances in the phases, the more rights he/she would obtain and the more obligations the labour broker would have in respect of him/her. In

<sup>360</sup> G. Heerma van Voss, *The Flexibility and Security Act: Discussion Paper*, *ibid*, 10.

<sup>361</sup> Collective Agreement, *ibid*, 6.

<sup>362</sup> *Ibid*, 8.

terms of this approach, labour broker employees in phase A will only receive payment for the hours they have actually worked.<sup>363</sup> If they work on an on-call basis, they are also entitled to the pro-rata accumulation of reserves for every hour that they work. They are entitled to accumulate reserves for, amongst others, the following: paid holiday leave (24 days per annum); holiday bonus (8% of wages) and extraordinary/special leave (0.6% of wages). Labour broker employees in phases B and C, on the other hand, are not only entitled to payment for the hours they work, but also for the hours they do not work, whilst the contract is still in force. For example, they are still entitled to payment if they are sick or if the labour broker temporarily does not have any work for them.<sup>364</sup> Labour broker employees in phases B and C are furthermore entitled to have their wages continued to be paid during holidays, short absence, extraordinary leave and generally recognised holidays.

#### **4.5 Conclusion**

The DOL, in its Discussion Document, makes amongst others the following recommendations: the registration of labour brokers subject to minimum criteria, the amendment of the statutory definition of workplace, the extension of joint and several liability to cases of unfair labour practices and unfair dismissal and the amendment of the anti-discrimination provisions of the EEA. But, if implemented, would these recommendations curb the bad and abusive practices as identified in the Report of the Portfolio Committee? Do they have regard for South Africa's pressing socio-economic needs and do they maintain the balance between the need to protect vulnerable labour broker employees and the need to grow the economy and create employment? To answer these questions, the DOL's recommendations are critiqued in the next chapter. The possibility of South Africa borrowing ideas from Dutch law and collective agreements to supplement the DOL's recommendations and address any shortcomings is also explored in the next chapter.

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<sup>363</sup> *Ibid.*, 9.

<sup>364</sup> *Ibid.*

## CHAPTER 5: CONCLUSION

In this chapter the findings of the preceding chapters are firstly summarized. Secondly, the recommendations of the Department of Labour (DOL) in its Discussion Document are critiqued and the possibility of South Africa borrowing ideas from the Dutch model of protecting labour broker employees is explored. Thirdly, recommendations are made on how to protect the employees of labour brokers in South Africa.

### 5.1 Summary of findings

The Bill of Rights in the South African Constitution provides a suite of labour rights to labour broker employees and binds the legislature, judiciary and executive. The ILO's constitution and ratified conventions, such as Conventions 87, 98, 100 and 111, also afford direct protection to labour broker employees. In addition, unratified conventions, such as Convention 181 and 158, provide indirect protection to labour broker employees.

Notwithstanding the abovementioned protection, the Report of the Portfolio Committee identified a number of bad and abusive practices perpetrated against labour broker employees. The nature and extent of these practices support the argument of the respondents in the 2008 APS case that modern day labour broking shares certain attributes with the apartheid-era SWANLA system.<sup>365</sup> Although labour broker employees, nowadays, enjoy vastly improved political and labour rights, the impact of modern day labour broking and the SWANLA system on them are similar due to South Africa's socio-economic circumstances. Workers, nowadays, are just as vulnerable as they were during the apartheid era, because of, amongst others, inadequate skills and a high rate of unemployment. How to protect vulnerable labour broker employees, without inhibiting employment creation and economic growth, is the challenge facing the South African government, and by extension its labour regulation framework.

Although South Africa's current legislative framework and common law, in theory at least, give effect to the South African Constitution,<sup>365</sup> the ILO constitution and ILO

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<sup>365</sup> 2008 APS case, *supra*, at 3.

conventions, the bad and abusive practices perpetrated against labour broker employees, as identified in the Report of the Portfolio Committee, suggest that they are ineffective in practice. A number of areas of insufficient or ineffective regulation (referred to as 'loopholes' in common parlance) allow for the abuse of labour broker employees. Loopholes are, amongst others, the following: the unfair dismissal protection afforded by the LRA is rendered ineffective by the fact the only the labour broker, as employer, is held liable for the unfair dismissal of labour broker employees. Secondly, trade unions find it difficult to meet the membership thresholds for organisational rights as stipulated in the LRA, because labour broker employees often move between workplaces. Furthermore, the joint and several liability imposed on the labour broker and client for breaches of the BCEA is rendered ineffective by the fact that it is only a default liability and labour broker employees are paid less than the directly employed employees of the client for doing the same job, because the EEA only affords a general right not to be unfairly discriminated against and the onus rests on the labour broker employee to show that the difference in pay is based on a listed or analogous ground.

South Africa's common law recognises the tripartite labour broking employment relationship and protects labour broker employees in circumstances where the client demands that a labour broker employee be removed from its premises in terms of the commercial agreement between the client and the labour broker, and where no fair grounds exist for such removal. The common law, however, does allow a labour broker, who has entered into an on-call employment contract with a labour broker employee which does not guarantee a minimum number of working hours, to simply stop giving the labour broker employee any further assignments. Although the labour broker employee is technically not dismissed, this has the same effect as dismissal.

In 1996, the South African government, in the Green Paper which it submitted to NEDLAC for discussion, already expressed its concern about the ineffective protection of labour broker employees. The ANC reiterated this concern in the 2009 Election Manifesto. It therefore comes as no surprise that in July 2009, soon after the ANC won the 2009 general elections, Minister Mdladlana submitted the Discussion Document to NEDLAC, which contains the DOL's recommendations regarding legislative

amendments to effectively protect labour broker employees. Although there seems to be a relative certainty that South Africa's labour legislation will be amended, it is still not clear what form these amendments will take. In this regard, there seems to be opposing views within the governing alliance. The ANC seems to prefer a regulatory solution, whilst COSATU maintains its call for a complete ban of labour broking.

Although the debate around prohibition and regulation of labour broking continues unabated behind closed doors in South African government circles, this debate has already been settled in Namibia. Based on the judgment of the Namibian Supreme Court in the 2009 APS case, it can be concluded that an attempt by the South African legislature to prohibit labour broking would most likely not pass the constitutionality test. In the light of South Africa's socio-economic circumstances, prohibition is also not practical, because it disregards the possible benefits of labour broking, such as increased flexibility of the labour market, which may stimulate employment creation. Furthermore, regulation and not prohibition is endorsed by the ILO in the form of Convention 181, which has been ratified by many constitutional democracies but not South Africa. Convention 181 provides a model for regulation and strikes a balance between the opposing needs of employers and employees. As it had done in the past, South Africa may once more have to look to international and foreign law to find the answer for a pressing legal question at home.

Although regulation seems to be the more sensible option for protecting labour broker employees against the bad and abusive practices as identified in the Report of the Portfolio Committee, some would argue that the South African labour market is already too regulated and that further regulation would inhibit employment creation. Such arguments have however been dismissed as simplistic. Although South Africa's labour market is perceived to be highly regulated, a comparison to other OECD countries clearly shows that this is in fact not the case. Research commissioned by the ILO furthermore shows that there is no rational connection between labour market regulation and the increase or decrease of employment. A completely deregulated labour market is also a contradiction in terms, because all markets are based on and constituted by a structure of legal rules.

Although extensive regulation of the labour market can be justified, this does not mean that the legislature should simply enact more legislation using the same traditional regulation techniques as current legislation. Traditional regulation techniques are premised on either the private law model of an individual right protected by a liability rule or the criminal law model of enforcement mechanisms with inspectors and prosecutions through the courts. The bad and abusive practices as identified in the Report of the Portfolio Committee show that traditional regulation techniques do not effectively protect employees of labour brokers in South Africa. The situation calls for more innovative regulation techniques such as promoting self-regulation, providing incentives for compliance with standards and encouraging the disclosure of information through external audit requirements. These techniques are already used successfully in the BBBEEA and this Act may serve as a model for future labour legislation. South Africa's socio-economic circumstances furthermore require that labour legislation should be designed with economic policy goals in mind.

## **5.2 Critique of the Department of Labour's recommendations**

Although the DOL's recommendation in the Discussion Document to enforce the registration of labour brokers subject to minimum criteria would limit opportunities for clients and labour brokers to deprive labour broker employees of labour law protection, the DOL's ability to enforce such a statutory requirement is questioned. This view is supported by the fact that even though the SDA has since 1998 required labour brokers to register, minimum criteria for registration have never been finalised. The recommendation in the Discussion Document that a client, who contracts with an unregistered labour broker, should be fully liable as employer may assist with implementation by incentivising compliance and promoting self-regulation. A similar regulation technique is successfully used by the BBBEEA. In contrast to the promotion of self-regulation, the recommendation in the Discussion Document to empower the Minister of Labour to prohibit labour broking in specific sectors of the economy, after consultation with the Employment Conditions Commission, may lead to arbitrary and intrusive administrative action that would be difficult to enforce, particularly in light of the fact that labour broker employees often move between sectors.

Even though collective bargaining has certain advantages over legislation as a means of regulating labour broking, it is only a viable option if labour broker employees are able to effectively exercise their collective bargaining power. To effectively exercise their collective bargaining power, labour broker employees must be well represented by trade unions. In South Africa labour broker employees are unfortunately not represented by established trade unions.<sup>366</sup> Although the DOL, in the Discussion Document, recommends legislative amendments to address this situation, it does not propose any specific amendments. For example, the DOL mentions that the LRA's current definition of workplace needs to be amended, but does not provide an alternative definition. Extending the organisational rights of trade unions which meet representativity thresholds in respect of employees directly employed by the client to all employees employed at the workplace, including labour broker employees, through a sectoral determination seems to be the only practical solution for levelling the collective bargaining playing field.

Although the DOL's recommendations in the Discussion Document to extend the joint and several liability of the client and the labour broker to breaches of the LRA, to allow labour broker employees to directly enforce their rights against either the client or the labour broker and to limit the use of fixed term contracts to when it is objectively justifiable have the potential of increasing the job security of labour broker employees, they would not increase the job security of all labour broker employees. For example, even if the DOL's recommendations are implemented, labour broker employees employed in terms of an on-call contract with no guaranteed minimum number of working hours would remain vulnerable. Labour brokers would still be under no obligation to provide these employees with work. Instead of dismissing these employees, labour brokers could still simply stop providing them with work, which would have the same effect as dismissal. Even though the DOL recommends that labour broker employees should remain employees of the labour broker during periods when they are not placed by the labour broker, labour brokers would still be under no

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<sup>366</sup> See reference to this in J. Theron, 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship', *ibid*, 646.

obligation to provide labour broker employees with work or remunerate them during such periods.

Dutch legislation and collective agreements, as discussed above, may be used to supplement the DOL's recommendations and address the shortcomings. In the Netherlands, the 1999 Act protects on-call labour broker employees by way of presumption. If the employment contract runs for longer than 3 months, the contracted work in any month is presumed to amount to the average number of working hours per month for the preceding 3 months. The Collective Agreement regulates the job security of labour broker employees in terms of a phase approach. The phase approach is based on the principle that the further the labour broker employee advances in the phases, the more rights he/she obtains, thus the more permanent the relationship between the labour broker employee and the labour broker becomes. The use of on-call employment contracts is only allowed during the first 78 weeks of employment (phase A). Should the client terminate the assignment during phases B or C, the labour broker must endeavour to find suitable replacement work for the labour broker employee. The labour broker employee is entitled to part of his/her wages until the labour broker manages to find suitable replacement work.

It is submitted that if implemented, the DOL's recommendation in the Discussion Document that the anti-discrimination provisions of the EEA should be amended to provide labour broker employees with an effective remedy against unfair discrimination in wages and working conditions based on their contractual status would improve the conditions of employment of labour broker employees. If such amendment could take on the form of separate equal pay for work of equal value protection, this would also temper the ILO's criticism of South Africa for not giving effect to Convention 100. This recommendation, however, lacks clarity and fails to propose any specific amendments to the EEA. Even if a remedy is provided for in the EEA, labour broker employees may not be able to enjoy the benefit thereof, because of their inability to litigate due to limited financial means and the fact that they are not represented by established trade unions. Any amendment to the EEA must also allow for deviation to the general rule in cases where such deviation can be objectively justified, for example a difference in length of service should be sufficient to justify a difference in pay. Failure to do this may cause

inflexibility in the labour market. The degree to which parties could contract out of such a general rule by means of collective bargaining must also be clearly determined. Failure to this may undermine collective bargaining. The DOL's recommendations that the Minister of Labour should be able to enact a sectoral determination applicable to low-skill workers not covered by any other sectoral determination or bargaining council agreement and that the Minister should be able to enact a sectoral determination applying to employees within the registered scope of a bargaining council, but not covered by a bargaining council agreement, are much clearer and easier to implement. Notwithstanding all of the DOL's recommendations, labour broker employees employed in terms of an on-call contract with no guaranteed minimum number of working hours may still not enjoy the benefit of equal pay for work of equal value protection. Should such employees become entitled to higher hourly rates of pay, their number of working hours may simply be reduced.

Once more, the Dutch system may be used as model to supplement the DOL's recommendations and address the shortcomings. Although, in the Netherlands, on-call employment contracts are allowed during the first 78 weeks of employment (phase A), the Dutch Supreme Court has held that the hourly rate of part-time employees may not be less than the hourly rate of full-time employees, unless the difference in pay can be justified on objective grounds. In addition to the 3-month averaging presumption introduced by the 1999 Act, the Dutch Civil Code stipulates that the labour broker must pay the labour broker employee a minimum of 3 working hours per call. This requirement applies to cases where the labour broker employee works less than 15 hours per week and where the employment contract does not specify the exact working hours or the amount of working hours. The Collective Agreement stipulates that if a labour broker employee has worked at the same client for 26 weeks, then the labour broker must apply the client's rate of remuneration for the relevant job, as it applies to the directly employed employees. The Collective Agreement furthermore stipulates how a labour broker employee's hourly wage must be calculated by classifying the employee in 1 of 9 position groups and applying a salary table and a structured system of increases. The phase approach also applies to the protection of the conditions of employment of labour broker employees. The further the labour broker employee

advances in the phases, the more rights he/she would obtain and the more obligations the labour broker would have in respect of him/her. In terms of this approach, labour broker employees in phase A will only receive payment for the hours they have actually worked. Labour broker employees in phases B and C, on the other hand, are not only entitled to payment for the hours they work, but also for the hours they do not work, whilst the contract is still in force. For example, they are still entitled to payment if they are sick or if the labour broker temporarily does not have any work for them. Labour broker employees in phases B and C are furthermore entitled to have their wages continued to be paid during holidays, short absence, extraordinary leave and generally recognised holidays.

### 5.3 Recommendations

As mentioned in Chapter 2, the South African legislature has not ratified Conventions 181 and 158. Although the South African Constitution attaches legal significance to international law, which includes unratified ILO Conventions, Conventions 181 and 158 do not directly bind South Africa's executive, legislature and judiciary. The ratification of Conventions 181 and 158 by the South African legislature would create legal certainty and a framework within which the labour broker phenomenon can be effectively managed. In this regard South Africa is out of step with other constitutional democracies and it is recommended that the South African legislature ratify Conventions 181 and 158.

As mentioned in Chapters 2 and 4, although the SDA has since 1998 required labour brokers to register, minimum criteria for registration have never been finalised. Although the reasons for this failure to implement the requirement have not been ascertained, recent utterances by Minister Mdladlana in the media suggest that a contributing factor may be a lack of resources on the part of the DOL to enforce such regulation. According to Minister Mdladlana the DOL is struggling to fill about 400 vacant posts for labour inspectors.<sup>367</sup> As mentioned in Chapter 3, traditional regulatory techniques, such as legislated enforcement mechanisms with inspectors and

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<sup>367</sup> X. Mbanjwa, 'Equity or prison, bosses warned', *Cape Times* (29 September 2010), 1.

prosecutions through the courts, tend to be resource-intensive and time-consuming. Successful enforcement therefore depends on innovative regulation techniques, such as those used by the BBEEA. The DOL's recommendations that labour brokers should register, subject to minimum criteria, and that a client, who contracts with an unregistered labour broker, should be fully liable as employer are supported. The presumption that a client who contracts with an unregistered labour broker would be fully liable as employer, would promote self-regulation. It is furthermore recommended that the legislature base future labour legislation on the BBEE model, or even dove-tail it with the BBEEA by adding compliance to labour legislation as an indicator to measure broad-based black economic empowerment.

As mentioned in Chapter 3, collective bargaining provides another alternative to traditional regulation techniques. It can be gathered from the Dutch model that collective bargaining, as a form of self-regulation, is a more effective method to regulate labour broking than legislated enforcement mechanisms with inspectors and prosecutions through the courts. Collective bargaining holds the potential of striking a balance between the need of labour broker employees for protection and the need of employers for a flexible labour market. Collective bargaining, however, is a voluntary process and can only take place within an enabling environment. The essential ingredients of such an enabling environment are a balance of power and the freedom to vary standards. In South Africa neither of these ingredients is unfortunately present in sufficient quantities. There is no balance of power, because labour broker employees are not represented by established trade unions and cannot exercise collective bargaining power. Collective bargaining is also restricted by the limits on the variations which were introduced during the negotiations over the BCEA. An intervention is called for to remedy the situation and level the playing field for collective bargaining in South Africa.

The DOL's recommendation to afford the Minister the power to extend the organisational rights of trade unions, which already meet the representation thresholds at the workplace in respect of the employees directly employed by the client, to all employees employed at the workplace, including labour broker employees, through a sectoral determination is therefore supported. It is furthermore recommended that the legislature should relax the limits which the BCEA places on the variation of standards.

As mentioned in Chapter 2, the labour broker and client are currently jointly and severally liable for breach of the BCEA, but not the LRA. This liability is furthermore a default liability, which means that the aggrieved labour broker employee cannot sue the client directly in the CCMA or Labour Court. The labour broker employee may only proceed against the client if he/she has obtained a judgement or order against the labour broker, which the labour broker then declines or fails to pay. This makes it very difficult for labour broker employees to enforce their constitutional and statutory labour rights and offers an explanation as to why there is such a gap between the theoretical and practical protection of labour broker employees. The DOL's recommendations to extend the joint and several liability of the client and the labour broker to breaches of the LRA and to allow labour broker employees to directly enforce their rights against either the client or the labour broker is therefore strongly supported.

The DOL's recommendations, however, only offer part of the solution, because labour broker employees employed in terms of an on-call contract with no guaranteed minimum number of working hours would remain vulnerable. Instead of dismissing these employees labour brokers would still be able to merely stop providing work to them, which would have the same effect as dismissal. Even if the DOL's recommendation that labour broker employees should remain employees of the labour broker during periods when they are not placed by the labour broker is implemented, labour brokers would still be under no obligation to provide labour broker employees with work or remunerate them during such periods. It is therefore recommended that the South African legislature supplement the DOL's recommendations by borrowing the following ideas from Dutch legislation and collective agreements: the presumption that if the employment contract runs for longer than 3 months, the contracted work in any month is presumed to amount to the average number of working hours per month for the preceding 3 months, and the limit placed on the use of on-call contracts, by only allowing it during the first 78 weeks of employment.

As mentioned in Chapter 2, South Africa does not have separate equal pay for work of equal value protection and such claims must be brought under the head of unfair discrimination. It is very difficult for individual labour broker employees to discharge this onus of proof, because they are, in most cases, not represented by

established trade unions and do not have the financial resources to litigate on their own. This explains why, in South Africa, labour broker employees are paid less for doing the same job than employees directly employed by the client. The DOL's recommendation to introduce equal pay for work of equal value protection by including contractual status as a listed ground for unfair discrimination is therefore not supported, because the onus of proof would remain on the labour broker employee to show that he/she has been discriminated against on the grounds of his/her contractual status. The concerns have also been raised that the introduction of such protection would reduce the flexibility of the labour market and inhibit collective bargaining; consequences that South Africa can ill afford.

It is therefore recommended that the South African legislature amend the BCEA, rather than the EEA, to place a joint and several obligation on the labour broker and client to apply the client's rate of remuneration for the relevant job to labour broker employees. To maintain flexibility it is recommended that this obligation only becomes applicable when a labour broker employee has worked at the same client for a certain period of time. Labour broker employees who have not worked at the same client for the specified period of time would be protected by the minimum wage regulation. The DOL's recommendations that the Minister of Labour should be empowered to enact sectoral determinations applicable to low-skill workers not covered by any other sectoral determination or bargaining council agreement and enact sectoral determinations which apply to employees within the registered scope of a bargaining council, but not covered by a bargaining council agreement, is therefore supported. To maintain flexibility it is also recommended that exceptions to the general rule that the client must apply its rate of remuneration for the relevant job to labour broker employees are allowed in cases where it can be justified on objective grounds. Examples of objective grounds for exception would be length of service and the objective appraisal of the work to be performed. To promote collective bargaining, it is furthermore recommended that parties be allowed to contract out of this obligation by collective agreement.

Concern has furthermore been raised that even if equal pay for work of equal value protection is introduced by legislation, labour broker employees employed in terms of on-call contracts with no guaranteed minimum number of working hours may

still not enjoy the benefit thereof. Should such employees become entitled to higher hourly rates of pay, labour brokers may simply reduce their number of working hours. To ensure effective protection for such employees, it is recommended that the South African legislature supplement the DOL's recommendations by borrowing the idea from Dutch legislation that the labour broker must pay the labour broker employee a minimum of 3 working hours per call in cases where the labour broker employee works less than 15 hours per week and where the employment contract does not specify the exact working hours or the amount of working hours.

In summary, the thesis contributes to establishing a legal framework for the protection of employees of labour brokers in South Africa in a number of ways. The thesis firstly determines why the bad and abusive practices as identified in the Report of the Portfolio Committee are occurring and identifies a number of loopholes in the current legal framework that allow the abuse of labour broker employees. Secondly, the thesis examines the debate around either prohibition or regulation being the most suitable option for curbing the bad and abusive practices. Thirdly, the thesis explores the DOL's recommendations and foreign examples of regulation. Finally, the thesis critiques the DOL's recommendations and suggests ways in which they could be amended or supplemented to effectively close the loopholes and provide practical legal solutions for the protection of labour broker employees in South Africa, whilst maintaining a balance between labour broker employees' need for protection and employers' need for labour market flexibility.

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