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Master of Laws (LLM) Dissertation

**Labour brokers and workers’
rights: can they co-exist in South
Africa?**

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Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Abstract

South African trade unions, and some political organizations, have recently called for the banning of labour brokers, arguing that those employed through brokers have diminished rights. Employers' organizations, on the other hand, say that the existing legal framework adequately protects these workers, and that it is merely necessary to improve enforcement of the law.

This dissertation explores the difficulties faced by labour broker employees when they attempt to realize their rights through the Labour Relations Act (LRA). It shows how section 198 of the LRA, which regulates labour brokers, operates in practice to deprive brokers' employees of two of their constitutional rights: the right to employment security, and the right to bargain collectively with the employer. The existing legislation is therefore not adequate to protect these workers' rights. The dissertation also argues that an outright ban on labour brokers would probably not withstand constitutional challenge.

The dissertation describes the mechanisms by which labour broker employees are denied their rights under the LRA, and illustrates this description with reported and unreported decisions of the various labour tribunals. It goes on to propose and draft detailed amendments to the LRA, targeted at restoring the lost rights to labour broker employees.

The dissertation also suggests how Commissioners and Judges responsible for administering the LRA should approach cases involving broker employees under the existing legislation, in order to minimize rights violations experienced by these vulnerable workers.

Note

The research for this dissertation was completed on 31 July 2009.

On 25 and 26 August 2009, the Portfolio Committee on Labour hosted public hearings on labour brokering. The purpose of the hearings was to ‘look at the challenges the country is faced with, with regard to labour brokers which are not necessarily operating in accordance with labour law prescripts as employment agencies, and how Government can regulate labour brokering in South Africa.’¹

In September 2009 a discussion document on the topic of labour brokering was reportedly eventually considered at a meeting of the National Economic, Development and Labour Council (Nedlac). That discussion document has, at the time of submission of this dissertation, not been made public.

List of abbreviations used in this dissertation

ANC	African National Congress
CAPES	Confederation of Associations in the Private Employment Sector
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of South African Trade Unions
FEDUSA	Federation of Unions of South Africa
MEIBC	Metal and Engineering Industries Bargaining Council
NEDLAC	National Economic Development and Labour Council
SACP	South African Communist Party
SEIFSA	Steel and Engineering Industry Federation of South Africa
SWANLA	South West African Native Labour Association

¹ ‘Comment: Labour Brokering in South Africa’ published on the Parliamentary Monitoring Group website www.pmg.gov.za accessed 10 September 2009

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Introduction

There is a global tendency towards flexibility in the labour market and, not surprisingly, since such flexibility has an inevitably detrimental effect on employment security, a growing body of analysis of this phenomenon. Flexible practices include casualisation, externalisation, 'regulated flexibility' and outsourcing. The growing use by employers of labour brokers takes place in this context.

Although this dissertation is situated in the context of this body of analysis, it does not review these practices in general, but rather focuses solely on the phenomenon of labour broking. It considers in particular how employers' efforts to circumvent labour legislation, the text of the Labour Relations Act, and the decisions of the CCMA and Labour Court, interact in practice to deprive a growing number of South African workers of their labour rights.

The first chapter sets the context for the problem. Using two simple actual scenarios as examples, it shows how being employed through a labour broker, rather than directly by an enterprise, makes a world of difference when a worker is unfairly dismissed.

The second chapter describes the legislative framework for workers' rights in South Africa. Our history of racial capitalism, with its oppressive and exploitative treatment of workers, combines with the current climate of unemployment to make statutory protections of fundamental importance. South African labour law is special because it is the product of struggle and negotiation. It exemplifies the move away from the authoritarian approach characterizing apartheid-era labour relations, towards a more respectful dispensation, which preserves the dignity of every South African worker.

The South African Constitution provides that employees have the right to bargain collectively with the employer, so as to improve their conditions of employment. Everyone has the right to fair labour practices, which for employees encompasses employment security. However, section 198 of the Labour Relations Act, which governs labour brokers, undermines these rights for a growing number of South African workers.

Where workers are employed through a labour broker, a third party (the client) has influence and power in the traditional employment relationship. At the same time the law deems the broker, and not the client, to be the employer for the purposes of law. This deeming provision interacts with other provisions of the LRA to deny labour broker employees access both to collective bargaining and to employment security.

The third chapter describes and illustrates the practical problems that arise, as a result of section 198, for commissioners and judges tasked with administration of the LRA, and the fourth chapter describes and evaluates the responses of government, business and unions to the problem, especially in light of the recent banning by the Namibian parliament of the practice of labour broking in that country. Labour broking has in some quarters been decried as inhumane and akin to slavery, whilst employers' organisations representing labour brokers have insisted that it is just the unregulated 'bakkie brigade' that give the whole industry a bad name. Thus some call for the banning of brokers, whilst others insist that all that is required is better regulation and enforcement of existing laws. In response to the growing public interest, the Department of Labour has called for submissions and Nedlac (the National Economic Development and Labour Council) is currently considering the matter.

However this paper argues that, because the legislation is indeed deficient (as shown in Chapter Two), enforcement of the existing law will not solve the problem. At the same time, an outright ban on labour broking will probably not withstand Constitutional challenge in South Africa. This dissertation therefore proposes amendments to the LRA, which will have the effect of ensuring adequate protection of the endangered Constitutional rights.

A detailed proposed for amendment of five sections of the LRA is put forward in Chapter Five. Pending legislative amendment, commissioners and judges must administer the LRA in such a way as to minimise rights violations. Guidelines for such mindful application of the existing statutory provisions are thus suggested.

Chapter One: Setting the Scene

Euginia Mangali, a single mother of four, worked at the prestigious Cape Grace Hotel as a cleaner for weekly wages of R300. She was accused of having stolen US\$ 700 from a guest's room, and dismissed. Hotel records showed that Mangali had used her access card to enter the room and clean it on the day the guest reported the cash missing.²

In a subsequent arbitration,³ the Commissioner found that there was insufficient evidence linking Mangali to the alleged theft. The guest, having returned overseas, was unavailable, and his allegation could not be tested. It was possible that the allegation was false, made in pursuance of insurance fraud. It was equally possible that the guest had spent or lost the money, or that it had been stolen from him elsewhere. The mere allegation of a guest was insufficient grounds for depriving a vulnerable worker like Mangali of all access to a livelihood; given high levels of unemployment, she was likely to remain jobless: in fact the employer's evidence indicated that, once dismissed for theft, hotel employees will not be employed by any other hotel in the city due to the circulation of a blacklist.

Maki William Gqamani, a young man in his twenties, worked as a machine operator for the Cape Town Iron and Steel Company (CISCO). During his sixth year working for the employer, the negligence of a crane operator resulted in a heavy steel beam smashing into his face, severely injuring him. Gqamani underwent reconstructive surgery on his jaw and face, but was left with mild brain damage, making him unfit for machine operating. He was dismissed for incapacity.

In a challenge to his dismissal at the Metal and Engineering Industries Bargaining Council,⁴ Gqamani's representative successfully argued that the employer had been under a duty to accommodate Gqamani, all the more so because his injury was sustained

² The writer is a commissioner with personal knowledge of the two case studies presented in this chapter.

³ *Euginia Mangali v Rebserve Services (Pty) Ltd t/a B5 Specialist Services* CCMA case number WE 747-05, date of award 29 May 2005.

⁴ *Maki William Gqamani v Professional Employer Services (Pty) Ltd*, case number MEWC 925, heard at the Metal and Engineering Industries Bargaining Council on 10 February 2005.

during the course of his employment duties. Although he was no longer capable of machine operating, it was proven that Gqamani could successfully work under supervision as a general labourer. Gqamani's sister testified that, whereas he had previously supported his parents and siblings, there was now nobody working at home, and the entire family of six was plunged into crisis as the result of the loss of his job.

Both Mangali and Gqamani were found to have been unfairly dismissed. The Labour Relations Act⁵ (LRA) provides that reinstatement is the preferred remedy for unfair dismissal.⁶ This provision gives substance to the right not to be unfairly dismissed, which is an incident⁷ of the constitutional right to fair labour practices.⁸

However, neither Mangali nor Gqamani could be reinstated. The reason? Both were formally employed through labour brokers, or Temporary Employment Services (TESs), as they are defined in section 198 of the LRA.

Whilst Mangali was aware that she was a 'contract cleaner', having been recruited by Rebserve which placed her at the Cape Grace, Gqamani was unaware of the existence of his 'employer', Professional Employer Services (PES): although he readily admitted to his signature on a PES contract, he had thought nothing of the letterhead, having been recruited at the Cisco factory gate, and having been trained, and having at all times worked, under the supervision and control of Cisco staff. Although he was paid weekly, he was unaware that his payment emanated from PES, which was in turn paid by Cisco.

Section 198(1) of the LRA defines a Temporary Employment Service as:

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

Section 198(2) provides that the TES is deemed to be the employer of the employee.

When the Cape Grace Hotel received the complaint about Mangali, they informed Rebserve that they no longer wished it to place Mangali at their premises, in terms of

⁵ Labour Relations Act 66 of 1995.

⁶ Section 193(2) of the LRA states that 'The Labour Court or the Arbitrator must require the employer to reinstate or re-employ the employee' (subject to certain practical exceptions; emphasis added).

⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC).

⁸ Section 23(1) of the Constitution of South Africa, 1996.

their contract with Rebserve to provide cleaning staff. When Cisco found that Gqamani was no longer able to operate his machine, it informed PES that they no longer had any use for Gqamani's services, in terms of their contract with PES.

Both Rebserve and PES, in answering claims of unfair dismissal under the LRA, denied having dismissed their employees. Both pleaded that they themselves had not wished to terminate the employment relationship, but that they simply could no longer place the workers at those workplaces in the face of their client's rejection of them. Rebserve did not have the capacity to properly investigate the charge against Mangali,⁹ any more than could PES require Cisco to accommodate Gqamani's injury.

How were Mangali and Gqamani so arbitrarily deprived of the fair labour practice rights accorded to all other South African workers? The answer lies in the peculiar triangular relationship between the client, the worker and the TES, and the fact that the legislature chose to deem the TES, and not the client, to be the employer for purposes of labour law. Whilst the worker is in fact dismissed and is eligible for LRA protection, the terms of the contract between the TES and the client enable both to avoid responsibility. The employee can bring an unfair dismissal claim only against the 'employer' and resultant proceedings have no jurisdiction over the client.

Thus the LRA, whilst giving substance to the right not be unfairly dismissed through the s193 reinstatement requirement, simultaneously makes reinstatement for a significant class of workers impossible by deeming the TES (and not the client) to be the employer in s198(2). Was this intentional, and is it constitutionally sustainable in light of the s23 constitutional right to fair labour practices?

How can this situation be remedied to restore the intended protections of the LRA to Mangali, Gqamani and the thousands like them who are currently second-class employees with second-class rights?

⁹ Because it had no arrangement or rights to access the client's hotel for such a purpose.

Chapter Two: The Legislative Framework

The Context for and significance of labour legislation in South Africa

Apartheid has been characterised as a system of racism in the service of the exploitation of labour and has been given the label ‘racial capitalism’.¹⁰ Indigenous people, subjugated by colonists, were put to work under an elaborate system of racial laws, the ultimate aim of which was to deliver cheap labour to capital while dismantling indigenous social and economic systems so as to keep that labour under control. The history of apartheid in South Africa is to a large extent a history of the racial control of work, and therefore it is no accident that a significant part of the struggle against apartheid was undertaken by workers and in workplaces. The 1995 Labour Relations Act (LRA) heralded a new era in workplace relations, and gives substance to many of the new rights and freedoms which South African workers struggled for, including the rights to dignity, equality and fair labour practices.

South Africa’s black trade union movement emerged in the 1970s¹¹ and unions were, throughout the seventies and eighties, the only consistently legal organisations of the anti-apartheid struggle inside South Africa.¹² Unions’ concerns were not simply workplace issues: whilst defending workers from the often jack-boot management style of employers, trade union activists also involved themselves in many other aspects of community organization and political struggle. Trade unions spawned activist theatre, workers’ cooperatives,¹³ women’s groups, creches¹⁴ and political reading groups. Unionists were active in yard and block committees in the civics, which grew and

¹⁰ See, for example, Hein Marais *South Africa: Limits to Change, The Political Economy of Transformation* 1998, or S. Terreblanch *The TRC Findings on the Business Sector and the Phenomenon of Systematic Injustice* Mimeo, Department of Economics University of Stellenbosch 1998.

¹¹ For a basic general history, see for example Darcy du Toit, Dawie Bosch and others *Labour Relations Law, A Comprehensive Guide* 2003 pp13-16; John Grogan *Workplace Law* 2003 1.

¹² Other organizations and movements surfaced, but suffered frequent banning.

¹³ For example, the Sarmcol Workers Cooperative was formed in the wake of a mass dismissal of more than 1,000 workers at the BTR Sarmcol factory in Howick, KZN in 1985.

¹⁴ Union-sponsored crèche facilities ensured that women workers could participate in the leadership structures of trade unions; one such facility was the Khangelani Preschool in Alexandra township.

organized in the townships throughout the eighties.¹⁵ Many hundreds of thousands of working men and women were directly involved in the democratic processes of a comprehensive network of local union decision-making structures,¹⁶ which concerned themselves not only with labour rights but also with civil rights and social justice.

In the negotiations to draft the 1995 LRA, the link between social struggle and legal transformation was unusually apparent. The social process of drafting the new labour legislation was unprecedented.¹⁷ This was not a process abstracted from the social forces which had struggled over the rights given effect to in the LRA. The drafters of the new law were themselves protagonists of that struggle, and there was widespread consultation and debate during the drafting process.¹⁸

As Navsa J points out in the *Sidumo*¹⁹ judgement: ‘the rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organizations’. In referring to current labour rights as ‘hard-won’ Navsa J refers not only to the history of trade union struggles, but also to the drafting history of the Act.

This, then, is the social and historical significance of the labour rights embodied in the Constitution and in legislation. A more detailed description of these rights now follows.

The Legislative framework

This paper is concerned with two core Constitutional rights:

- Section 23(5) of the Constitution provides that ‘every trade union ... has the right to engage in collective bargaining’.

¹⁵ For an interesting example of the interaction between community legal advice office, trade union and civic organisation see the journal *Izwi Lase Township* (8 issues between 1982 and 1986) chronicling the formation and operation of the Alexandra Civic Association, available at <http://disa.nu.ac.za/journals/jourizexpand.htm> accessed 16 June 2009.

¹⁶ Membership of the largest trade union federation, Cosatu, was truly massive with over 2.7 million members in 1991 according to Ian Macun ‘South African unions: still growing?’ (1993) *South African Labour Bulletin* vol 17 no 4 at 48 available at <http://www.disa.ukzn.ac.za> accessed 9 September 2009.

¹⁷ For a general background see for example du Toit et al (n 12) at 26.

¹⁸ The writer was a participant in many of these processes prior to the finalisation of the legislation.

¹⁹ *Supra* (n 6).

- Section 23(1) of the Constitution provides that everyone has the right to ‘fair labour practices’.

One of the primary objectives of the LRA²⁰ is to give effect to the section 23 Constitutional rights.²¹ In giving substance to labour rights, the LRA, together with the Employment Equity Act,²² aims also to protect and promote the Constitutional dignity²³ and equality²⁴ rights of South African workers.

It is in light of the strong link between fairness in the LRA, and fairness, dignity and equality in the Constitution, that any limitation or obstruction of workers’ access to their rights must be viewed.

Content of the rights: (i) Collective Bargaining

Workers have the right to form and to join trade unions,²⁵ which have the right to engage in collective bargaining with the employer. As the overall scheme of the LRA is based on voluntarism, there is no duty on employers to bargain; therefore a trade union’s ability to exercise this right is accessed through exercising a bundle of organisational rights in sections 11 through 22 of the LRA.²⁶ The organisational rights available to trade unions include rights of access to the workplace, election of shop stewards, deduction of membership subscriptions from workers’ wages, and disclosure of information for bargaining purposes. These organisational rights are the key to the realisation of the workers’ rights to bargain collectively through their trade union, so as to affect their conditions of employment.

²⁰ Section 1 of the LRA provides that the purpose of the Act is to ‘advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act’ which include giving effect to the rights conferred by section 23 of the Constitution and promoting the effective resolution of labour disputes. Section 3 of the Act provides that any person applying it must interpret its provisions to give effect to its primary objects.

²¹ For a comprehensive discussion of the ambit of the section 23 right see Ian Currie and Johan de Waal’s *Bill of Rights Handbook* 2005 at 498-520.

²² Act 55 of 1998.

²³ Section 10 of the Constitution of South Africa, 1996.

²⁴ Section 9 of the Constitution of South Africa, 1996.

²⁵ Section 23(2) of the Constitution of South Africa 1996; see also sections 4 and 5 of the LRA dealing with freedom of association and protection of union membership.

²⁶ Chapter III of the LRA.

Content of the rights: (ii) Fair Labour Practices²⁷

The Court in *National Education Health and Allied Workers Union v University of Cape Town and Others*²⁸ found that the right to fair labour practices is incapable of precise definition. It is aimed at achieving a balance between the interests of employers and of employees, whilst bearing in mind the conflict of interests inherent in the employment relationship. The right is given meaning and content by the decisions of specialist labour tribunals, and by the jurisprudence generated under the 1956 LRA,²⁹ as well as the codification of rights in the 1995 LRA.³⁰

The right to fair labour practices has been held to encompass the right to security of employment: specifically the right not to be dismissed unfairly.³¹

The LRA specifically provides in section 185 that every employee has the right not to be unfairly dismissed. The Act defines some dismissals as automatically unfair,³² whilst others are unfair if the employer fails to show that it had a fair reason and followed a fair procedure in dismissing the employee.³³

The Act further provides for reinstatement as the primary remedy for unfair dismissal,³⁴ giving solid substance to the right not to be unfairly dismissed.³⁵

²⁷ South Africa was unique in constitutionalising this right and has now been followed by Malawi. See *Sidumo* (n 6) at [55] which refers to Cheadle et al *SA Constitutional Law: The Bill of Rights 2005* at 18-8 fn 32.

²⁸ 2003 (3) SA 1 (CC) (hereinafter referred to as *Nehawu*).

²⁹ Labour Relations Act 28 of 1956.

³⁰ *Nehawu* (n 26) at [32] and [33].

³¹ In *Sidumo* (n 6) at [55] Navsa J characterized security of employment as an essential component of the right to fair labour practices. This right is comprehensively regulated in the LRA. The bulk of the disputes referred to the CCMA and Bargaining Councils concern alleged unfair dismissals.

³² Section 187 of the LRA: these are dismissals effected in contravention of workers' basic rights or for discriminatory reasons.

³³ Section 188 of the LRA.

³⁴ Section 193(2) of the LRA.

³⁵ Reinstatement aims to undo the effects of an unfair dismissal by putting employees back in the positions they would have occupied but for the unfair dismissal. Reinstatement orders usually provide for reinstatement 'on the same terms and conditions as those that prevailed at the time of the dismissal, with no loss of service or benefits', and provide for payment of the full salary the employee would have earned during the period of dismissal. Where reinstatement is not desired or is impossible compensation may be awarded instead; the primacy of the remedy of reinstatement and its link to dignity are discussed below.

Section 198 of the LRA and how it limits Constitutional rights

The dissertation now turns to consider how LRA section 198 works in practice to limit workers' rights to fair labour practices by deeming the labour broker to be the (fictional) employer for the purposes of labour law. It shows how workers employed through labour brokers cannot effectively bargain collectively with their employer, how such workers are often unfairly dismissed when the broker/client contract fails, or when the client arbitrarily no longer wants them, and also how such workers cannot access the primary remedy of reinstatement when they have been unfairly dismissed. The section concludes with a description of the various ways in which the section opens the door to employers and brokers to exploit its provisions in order to circumvent labour legislation, even in relation to employees who are in reality occupying permanent positions.

The 'TES' or labour broking relationship explored

In terms of section 198 (1) of the LRA, a Temporary Employment Service is one which 'procures or provides' a worker to a client, and which also remunerates that worker.³⁶ A Temporary Employment Service, or TES, is popularly referred to as a labour broker, and the terms 'TES' and 'labour broker' are used interchangeably in this paper.

Section 198(2) provides that where an employee is employed through a TES, it is the TES which is, for the purposes of application of law, the employer, and not the client at whose premises the employee is working.

It is significant that nowhere in the definition is there any requirement that the service provided by a TES actually be temporary or, in fact, have any limitation as to time.

The triangular employment relationship

Section 198 legitimizes what Theron has described as a triangular employment relationship.³⁷ Two contracts are concluded by the TES: a service contract with the

³⁶ Although it is accepted that often the client will implement the remuneration of the worker, from monies provided by the TES.

³⁷ Jan Theron et al *Labour Broking and Temporary Employment Services: a report on trends and policy implications of the rise in triangular employment arrangements* (undated) Labour and Enterprise Project,

client (in terms of which the TES agrees to provide workers at a certain price), and an employment contract with the worker. From the point of view of the worker, the functions of the employer are split between the TES (which recruits and pays her) and the client (which provides the workplace, tools of work, day-to-day supervision, and often the training).

International law

The ILO has previously held the view that labour should not be a commodity,³⁸ nevertheless labour broking, and a concomitant reduction in workers' protections, is on the increase internationally.³⁹ ILO Convention 181 on Private Employment Agencies,⁴⁰ which has been ratified by 21 countries (not including South Africa), allows for the operation of Private Employment Agencies (which include what we term TESs or labour brokers), but provides a framework for the protection of Private Employment Agency workers. The framework provides that such workers should not be denied the basic protections such as freedom of association, collective bargaining and reasonable hours of work, but makes no mention of employment security.

Where legislation permits one employer to provide workers to a second employer, that legislation must make it quite clear exactly which party bears the employer's statutory duties towards the employee.

In South Africa, the legislative choice⁴¹ has been to deem the labour broker, and not the client, to be the employer. This deeming provision has profound (and probably unintended) ramifications for the realisation of workers' collective bargaining and

Institute of Development and Labour Law University of Cape Town at 5. But the Namibian's High Court has called this concept 'muddled theorising', see fn 147 at page 43 below.

³⁸ A Bezuidenhout et al 'Casualisation: can we meet it and beat it' *South African Labour Bulletin* 2005 Vol 30 No. 1.

³⁹ See E S Fourie 'Non Standard Workers: the South African context, International Law and Regulation by the European Union' *ISSN* 2008 Vol 4 at 1727-3781. Also see Paul Benjamin 'An Accident of History: who is (and who should be) an employee under South African Labour law' at 790-791 which refers to the ILO Meeting of Experts on Workers in Need of Protection: Basic Technical Document (Geneva 2000) at 4-6.

⁴⁰ Private Employment Agencies Convention C 181 1997 available at www.ilo.org accessed 21 July 2009.

⁴¹ Already in the 1956 LRA, and repeated in the 1995 LRA.

employment security rights under the LRA as outlined above and explored in detail below.

How section 198 works to limit fundamental rights

Limitation of fundamental rights: (i) Collective bargaining

Labour broker employees cannot bargain collectively because they cannot organise:⁴² they cannot organise because they cannot exercise the organisational rights accorded to trade unions that are ‘sufficiently representative of the employees employed by an employer in a workplace’.⁴³ ‘Workplace’ is defined as the ‘place or places where the employees of an employer work’,⁴⁴ and labour broker employees do not work at the workplace of their employer, but at that of the client. The language of the Chapter III provisions on organisational rights⁴⁵ assumes that workers work at the workplace of their employer.

Labour broker workers, of course, do not work at the employer’s workplace. They cannot bargain with their employer at that workplace. And even were a majority of workers employed by a particular broker to join one trade union, that union would be unable to claim representivity at ‘the workplace’ – both because the broker is likely to spread its employees amongst many different workplaces (as in the case of replacement or short-term add-on employees) and because, even where a semi-permanent workforce is provided for an outsourced function (such as cleaning services) they are unlikely to form more than a small minority of the total employees at that workplace.

Thus, whilst the legislation does not expressly exclude labour broker employees from organising, the (arguably unintended) practical effect of the ‘workplace’ definition is to prevent them from unionising to achieve bargaining rights.

Another factor that frustrates workers’ right to engage in collective bargaining with their employer in the labour broker sector is the fact that their terms and conditions of

⁴² See above at page 8 and footnotes 25-26.

⁴³ Section 11 of the LRA.

⁴⁴ Section 213 of the LRA.

⁴⁵ Sections 11-22 of Chapter III pertain to organisational rights.

employment are often not amenable to bargaining, having been determined in advance in terms of the contract between the TES and the client.

Research undertaken in 2005⁴⁶ revealed that, typically, ‘what the worker is paid is an essential term of the contract between the TES and the client’.⁴⁷ Hence, as Theron and Godfrey point out:

‘The notion that wages and minimum standards are amenable to a process of collective bargaining between a TES and its workers has no practical application, unless the client varies its contract with the TES. It will obviously not be easy to persuade the client to do so.’⁴⁸

Denying workers the ability to bargain collectively with the employer has serious consequences. Firstly, it constitutes a rights violation, removing the only defence workers have to their relative powerlessness in the face of market forces, which are particularly punishing in times of high unemployment.⁴⁹ Secondly, it builds in a structural tendency for labour brokers to ‘eliminate social protections’,⁵⁰ as TESs compete with each other for contracts with companies looking for the cheapest possible solution to their employment needs.

No collective bargaining leads to non-compliance with protective legislation

An incentive for businesses to use the services of labour brokers is the reduction of costs associated with compliance with labour legislation.⁵¹ TESs in fact market their services by promising to take care of these sometimes onerous responsibilities.⁵²

In addition, the competitive price at which a worker is offered to a business by a TES is in practice often achieved at the expense of the employee’s statutory rights:⁵³ many

⁴⁶ Theron (n 37) at 28.

⁴⁷ As Theron (ibid) points out, this is ‘obviously ... less than what permanent workers doing the same job [are] paid.’

⁴⁸ Theron (n 37) at page 28.

⁴⁹ South Africa’s official unemployment rate was 23.6% as at June 2009 according to the Quarterly Labour Force Survey (April to June 2009) available at www.statssa.gov.za accessed 13 September 2009. (These official figures are generally thought to be very conservative.)

⁵⁰ Where employees are deprived of the possibility of bargaining collectively, market forces operate alone: the price of labour drops and the conditions of that labour, in terms of benefits, deteriorates. As described above, Theron and Godfrey’s research indicates that one TES can usually only undercut another by neglecting to pay statutory monies such as overtime, leave or sick pay.

⁵¹ Theron et al (n 37) at 36.

⁵² Ibid.

employment contracts concluded between labour brokers and workers purport to exclude basic statutory provisions⁵⁴ such as those providing for notice, leave and severance pay.⁵⁵

Client-employers are also increasingly transferring permanent employees onto the books of labour brokers. The legislation was designed to cater for a situation of temporary work, but because it does not define ‘temporary’ and because it is not sufficiently tightly drafted, employers and brokers are exploiting the potential of its provisions to circumvent labour legislation (in particular the comprehensive protections against unfair dismissal, discussed below).

That unscrupulous brokers foist illegal contractual provisions on their employees is something that is neither required nor sanctioned by the section 198 provision recognising the triangular employment relationship.⁵⁶ But the fact of its statutory recognition does interact with market forces in a way that tends to encourage such practices, because structurally a broker must supply labour at a lower cost than that at which it is generally available to the employer. The availability of labour broker workers on terms more favourable to the employer is a direct consequence of these workers’ inability to exercise their bargaining rights.

Limitation of fundamental rights: (ii) Fair Labour Practices in the form of Employment Security

Fair labour practices in the form of employment security finds expression in two practical rights in the LRA: the section 185 right not to be unfairly dismissed, and the section 193 right to reinstatement as a primary remedy where a dismissal has been unfair (without which the section 185 right would be hollow indeed).

⁵³ Theron (n 37) page 30. See also the research report by the Namibian Labour Research and Resource Institute (LaRRI) ‘Labour Hire in Namibia: Current Practices and Effects’ (2006) available at www.larri.com.na accessed 5 August 2009, which confirms Theron’s findings in the context of the Namibian market.

⁵⁴ Contained mainly in the Basic Conditions of Employment Act 75 of 1997.

⁵⁵ Ibid.

⁵⁶ Obviously, these provisions are *pro non scripto*. However, many employees are unaware of their statutory rights, and are in any event hardly in a position to insist on them when being offered an employment contract. Also, enforcement of statutory rights must be attempted through the Department of Labour, which is neither simple nor guaranteed to achieve results.

Workers employed through a labour broker are generally denied both of these rights.

The section 185 right not to be unfairly dismissed

Firstly, labour broker employees are often denied the right not to be unfairly dismissed. A dismissal must be for a fair reason, and effected in terms of a fair procedure. In the case of a TES, dismissals typically take place at the instance of the client, as in the cases of Mangali and Gqamani discussed in Chapter One. The employer, being the TES, does not make the rules or supervise the employee, and has no access to the workplace. This makes it difficult for the TES to investigate a complaint against a worker, and to follow due process. Usually the client simply informs the TES that it no longer wants that particular worker: from the perspective of the TES, the reason for the dismissal is that the client no longer wants the worker.⁵⁷

Contracts generally provide that workers can be dismissed on the whim of the client ...

Labour brokers' contracts with their clients typically include 'take back' or 'substitution' clauses, in terms of which the client can require the replacement of any given employee for any reason. This relieves the client of the duty of disciplining an errant or poor performing worker. For instance, food retailer Spar's standard contract with its broker suppliers includes a standard clause (3) entitled 'Substitution of Labour', providing that:

- ‘3. should any hired labour, in the sole and absolute discretion of the Company, in any manner whatsoever
 - a) misconduct himself;
 - b) prove to be incompetent in carrying out the work for which he was hired;
 - c) be unsuitable for the purpose of the Company;
 - d) not possess the requisite skill, expertise or training to perform the work required by the Company;
 - e) refuse, fail or neglect to execute the work as stipulated by the Company (within reason);

⁵⁷ Whist in my view this cannot be a 'fair reason' for dismissal, adjudicators frequently accept the TES's protestations that it can hardly place a worker on the premises of a client who refuses to have him. However, see *Khumalo v ESG Recruitment CC Transportation (Mecha Trans)* [2008] JOL 21490 (MEIBC), where the arbitrator held that the LRA does not make provision for the cancellation of a contract by the client as a reason for dismissal, and that the dismissal was accordingly unfair.

- f) disrupt, interfere in, or otherwise affect any of the company's systems, operations or activities;
then ... the TES shall ... forthwith and without charge, substitute any such labour.'⁵⁸

Instead of themselves taking responsibility for disciplining or dismissing the temporary employee accused of misconduct or poor performance, many brokers make the employment contract with their employees conditional on the continued acceptance of the employee at the client's premises.

... and are often automatically terminated if the client cancels for any reason

The contract of employment that a labour broker concludes with its employee also typically provides for its 'automatic termination' in the event that the client 'cancels the contract for any reason'.

Lastly, many of these employment contracts stipulate that the employee agrees to work for undetermined or intermittent periods, as the broker deploys them at will. When the worker is not deployed, he is not paid. This, as Theron notes, 'envisages a relationship that endures notwithstanding periods of unemployment'.⁵⁹

Thus a labour broker employee's contract of employment is usually made conditional for its validity on the whim of a third party who has no contractual privity with, and therefore no reciprocal obligations towards, that employee.

Dismissals which arise when such contracts terminate are often, in terms of the contracts, perfectly lawful. However the resultant dismissals are not necessarily fair. In order to avoid the possibility of an unfair dismissal determination, brokers invariably argue that there has been no dismissal, and that the contract has merely terminated 'by operation of law'. This approach has, surprisingly, had some success in dismissal tribunals, as discussed in the next Chapter.⁶⁰

⁵⁸ Available in *Rini & 4 others v Spar & others* CCMA case file WE 1053-09 heard 20 May 2009.

⁵⁹ Theron (n 37) at 31.

⁶⁰ An employment contract providing that 'this contract shall terminate automatically if the manager for any reason whatsoever decides that he no longer wishes to continue to employ you. In this event, your assignment shall cease. This shall not constitute a dismissal: this contract will have terminated by operation of law' could hardly be said to be valid.

This 'at will' approach to employment law is one which prevails in the United States, where the legislative framework does not give employees the comprehensive employment security protections provided for in our Labour Relations Act. In the United States, however, social security systems are sophisticated and unemployment is low. Ignoring this fact, brokers frequently invoke the normalcy of 'at will' employment law in other jurisdictions, in defence of this aspect of their contracts of employment.

The Section 193 right to reinstatement as the primary remedy for unfair dismissal

Even where a dismissal is adjudged to have been unfair, a labour broker employee is denied the right to reinstatement. The employer party to the unfair dismissal proceedings is the TES, who lacks control over the client's workplace and is unable to give effect to an order of reinstatement. Reinstatement into the 'employ' of the TES is a hollow remedy, because the TES itself provides neither workplace nor income to the worker, both of these deriving from a client and not the TES.

The following chapter provides a brief survey of the key problem areas which arise for CCMA Commissioners and Labour Court judges when faced with administering the section 198(2) provision deeming a labour broker to be the employer of a worker, and offers some commentary.

Chapter Three: The practical difficulties of administering the LRA in light of section 198

The legislative fiction that it is the TES and not the client that is the employer for the purposes of labour law poses difficulties for Judges and Commissioners, who are tasked with administering a statute designed to facilitate quick, accessible, non-legalistic dispute resolution. This Chapter describes the four main problem areas which arise for adjudicators, and offers some commentary. These problem areas are: correcting the citation of the wrong employer, determining whether there has been a 'dismissal', evaluating fairness where the dismissal happened at the instance of the client, and fashioning an appropriate remedy.

Problem 1: correcting the citation of the wrong employer

Often workers refer disputes to the CCMA or Bargaining Council, citing the client as their employer. Such workers are often genuinely unaware that they are in fact employed by a TES. Like Maki Gqabani, they have often been recruited at the factory gate, receive their pay packet at the factory, and work alongside other factory employees. They have been subject to the client's supervisors and have been dismissed by the client's personnel. They are genuinely amazed when the client produces a copy of the employment contract in the name of a TES.⁶¹ Nevertheless, they have instituted proceedings against the wrong party.⁶²

⁶¹ Although employees may readily admit their signatures on such contracts, they have seldom been given a copy of their own, and have often simply not noted that the employer cited is different from the one who is in control of the workplace. Even where the involvement of a TES has been explained to them at the outset, such workers are usually unaware that the TES and not the client will be deemed to be the employer for the purposes of law, and what the implications of this are for the normal operation of rights.

⁶² The approach of the South African Courts (and more especially that of the CCMA) has often been to favour substance over form. However the Act is very clear that it is to be the TES and not the client who is the employer and the strict application of this arrangement has been confirmed in *LAD Brokers (Pty) Ltd v Mandla* (2001) 22 ILJ 1813 (LC).

In many cases (and despite the fact that Commissioners are empowered in terms of CCMA Rules and the Rules of many Bargaining Councils to *mero motu* substitute the wrongly cited employer for the correct one) their applications are dismissed. These workers must re-refer their dispute, and bear the costs of so doing.⁶³ In addition, as the new referral will by then be out of time, these employees must also now apply for condonation, and run the risk that this will not be granted.⁶⁴

Problem 2: determining whether there has been a ‘dismissal’

Argument one: there was no dismissal because the contract terminated ‘automatically’ or ‘by operation of law’

The innovation of many TES employment contracts is that they style themselves as ‘fixed term’ or ‘limited duration’ contracts, but fail to specify an objectively ascertainable term or duration of validity.⁶⁵ Instead, these contracts often provide for their ‘automatic’ termination on the happening of some future uncertain event. The event might be an objective one such as ‘the completion of the task for which the client requires the worker’ (although this task itself usually remains unspecified), or it might be a subjective one such as ‘when the client no longer wishes to make use of the services of the employee’.

TESs rely on such contractual terms to deny having dismissed their workers.⁶⁶ They argue that the employment relationship terminated automatically, ‘by operation of law’. This opens the door to TESs to summarily terminate workers in circumstances which would normally entitle those workers to due process.

⁶³ These costs, which include transport, photocopying, and charges for service by registered mail or fax, are not inconsiderable for an unemployed person.

⁶⁴ As the unfair dismissal must be referred within thirty days (LRA s191(1)(b)(i)) whereas the mistaken citation will usually only be discovered at the conciliation meeting (within thirty days of the initial referral). Employees can apply for condonation, however, and if they are properly advised to cite the proper reason, condonation will usually be granted.

⁶⁵ It is arguable whether such contracts do in fact constitute fixed term contracts.

⁶⁶ ‘Dismissal’ is defined in s186. s186(1)(a) provides that dismissal means that the employer ‘terminated a contract of employment’. This definition does not assist arbitrators faced with TES claims that they, as employer, did not terminate the contract – rather, the contract terminated on its own, or ‘by operation of law’. Employees bear the onus to show that they were dismissed, after which the onus shifts to the employer to show that the dismissal was fair: LRA s192.

a) Dismissal due to cancellation, or completion, of the service contract with the client

In *Khumalo v ESG Recruitment CC (Mecha Trans)*⁶⁷ the client cancelled its contract with the TES, which then argued that the employee had not been dismissed: his contract had terminated due to the cancellation. The Commissioner held that the LRA makes no provision for the cancellation of a labour broking contract by a client as a reason for dismissal, and that the dismissal was therefore unfair – a finding which sidestepped the employer’s contention that there was no dismissal to start with.

A decision which went the other way, however, is *Numsa & Others v SA Five Engineering (Pty) Ltd & Others*,⁶⁸ where Revelas J approved a dictum in *Dick v Cozens Recruitment Services*⁶⁹ that ‘the (fictional) employment between broker and employee must be deemed, both by operation of law and the intention of the parties, to be coincident with the period of the applicant’s employment on assignment.’⁷⁰

Revelas J declined to decide whether or not termination of the employment contract in such circumstances will constitute ‘dismissal’ for the purposes of the LRA, finding rather that ‘the dismissals (if any) ... were not unfair’.⁷¹

In this case the employees had denied that the work had come to an end. They claimed they had been targeted for dismissal because they had participated in protest action. The Court dismissed this argument as ‘a cynical attempt at establishing an ulterior motive’ for the dismissals.⁷² The Court also declined to enquire into the employer’s contested assessment that the work had come to an end,⁷³ despite the fact that the onus is on the employer to show that dismissal is for a fair reason. The Court appears to have

⁶⁷ [2008] JOL 21490 (MEIBC).

⁶⁸ [2007] JOL 19505 (LC).

⁶⁹ (2001) 22 ILJ 276 (CCMA).

⁷⁰ Ibid at 279.

⁷¹ *Numsa v SA Five* supra (n 76) at [45].

⁷² ibid at [33].

⁷³ ibid at [44].

disregarded or reversed the onus provision,⁷⁴ stating that ‘substantive unfairness was not proved in this matter’.⁷⁵

b) Dismissal at the instance of the client

The client itself may no longer wish to make use of the services of the employee for some reason that would usually entitle an employee to due process.⁷⁶ The TES then recalls the worker, and relies on the relevant term in the employment contract to argue that it has terminated automatically by operation of law (thus no dismissal has taken place). For example, in *Faeza April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group*;⁷⁷ *Viwe Tshangana v Adecco Recruitment Services*;⁷⁸ and *CUSA obo Moutlana v Adecco Recruitment Services*⁷⁹ Commissioners have considered themselves to be bound by the employment contract, and have upheld the employer’s submission that there was no dismissal.

An interesting question is whether CCMA Commissioners have the power to enquire into the validity of such ‘automatic termination’ contractual clauses, to determine whether they are *contra bonas mores*. In *Monakili v Peaceforce Security Cape CC*,⁸⁰ the Commissioner, relying in part on *Buthelezi and Others v Labour for Africa (Pty) Ltd*⁸¹ found that the CCMA indeed has such a power.

Expressing the view that Commissioners who upheld such ‘automatic termination’ clauses were unmindful of the right of every employee to fair labour practices, as well as the right not to be unfairly dismissed, Commissioner de Kock held that ‘any provision in a contract of employment that interferes with these rights must be struck down.’ He characterised such a clause in a contract of employment as an ‘attempt by the employer to opt out of the protection afforded to employees from being unfairly dismissed’ and

⁷⁴ Section 192 of the LRA provides that the employee must establish the existence of a ‘dismissal’, whereafter the onus shifts to the employer to show that the dismissal was fair.

⁷⁵ *Numsa v SA Five* (n 76) at [44].

⁷⁶ Such as suspected theft, for instance, or incapacity, or alleged rudeness to a supervisor.

⁷⁷ CCMA case number WE7270-05; date of award 30 September 2005.

⁷⁸ CCMA case number GAPT4948-05, date of award 21 September 2005.

⁷⁹ CCMA case number GAPT8664, date of award 24 March 2006.

⁸⁰ CCMA case number WE 14117-07, date of award 10 December 2007.

⁸¹ (1991) 12 *ILJ* 588 (IC).

found it to constitute a ‘breach of an employee’s constitutional right to fair labour practices’. He found himself ‘obliged to enquire into the validity of such a clause’. The clause was ‘invalid and *contra bonas mores* insofar as it is being relied upon to argue that an automatic termination occurred’.

The approach in *Monakili* has not yet been tested in the higher Courts.⁸² Bosch⁸³ argues that the CCMA does indeed have jurisdiction to enquire into such contractual clauses, and to disregard them if they are found to be invalid.⁸⁴ Following *Monakili* and Bosch, the commissioner in *Lebo Molusi v Ngisiza Bonke Manpower Services CC*⁸⁵ held that a labour broker employee, whose position had been made redundant by the client when she returned from maternity leave, had indeed been dismissed, despite the broker’s claim that her contract had ‘automatically’ expired.

However this approach, which is arguably the correct one, faces a new challenge since the Labour Court’s decision in December 2008 in the matter of *First National Bank Ltd (Westbank Divison) v Faizel Mooi NO & others* (‘FNB’)⁸⁶ apparently constrains commissioners’ powers when interpreting and applying contracts.

In this case, the employer had agreed to give a dismissed employee a Certificate of Service recording that he had resigned. The parties had signed an agreement to this effect, which contained a clause stating that the agreement was in full and final settlement of any claims that the employee might have against the employer.

The employee had then referred an unfair dismissal dispute to the CCMA. The application was late, and was therefore accompanied by an application for condonation. The employer opposed condonation, arguing that the employee had no prospects of success because the dispute had been fully and finally settled.

⁸² However in *First National Bank v Faizel Mooi and others* (Labour Court case number JR 1018/07, decided on 24 July 2008), Molahlehi J found that CCMA Commissioners do not have the power to rule on the interpretation or application of agreements between employers and employees – in this case, a settlement agreement.

⁸³ Craig Bosch ‘Contract as a barrier to ‘dismissal’: the plight of the labour broker’s employee’: (2008) 29 *ILJ* 813.

⁸⁴ Bosch (*ibid*) stresses however that not every such clause will be invalid and that each case must be evaluated on its own merits.

⁸⁵ CCMA case number GATW4136-09 date of award 13 May 2009.

⁸⁶ *First National Bank v Faizel Mooi and others* Labour Court case number JR 1018/07 decided on 24 July 2008.

The employee alleged that he entered into the settlement agreement on the basis of ‘*iustus error*’ because he thought that the only way he could get the Certificate of Service was by signing the agreement. He also alleged duress. Without having had sight of the settlement agreement, the Commissioner found that the employee entered into the agreement on the basis of *iustus error* and that the settlement did not amount to a compromise which ousted the jurisdiction of the CCMA because ‘it took away a lot and gave very little in return’ and because ‘neither side was conceding anything outside the statutory law’.

In reviewing this decision, Molahlehi J of the Labour Court held that:

‘The powers of the commissioners of the CCMA to rule on the interpretation and application of agreements is . . . confined to collective agreements in terms of s24 of the [LRA]. In order to have the agreement set aside the [employee] ought to have approached either the Civil Courts or this Court in terms of section 77 of the BCEA.’⁸⁷

In my view the commissioner committed a gross irregularity and exceeded his powers in finding that the agreement was invalid.’⁸⁸

Employers have, since December 2008, been relying on this decision to argue that commissioners universally lack the power to evaluate contractual provisions, that these provisions are binding and must be applied without question, and that workers wishing to challenge such provisions must instead approach the civil courts to have the contracts in question set aside. A CCMA practice note, however, advises that commissioners must in each case consider whether an agreement exists, and interpret and apply the agreement.⁸⁹

Discussion of the ratio of the *FNB* decision and its effect on commissioners’ approach to unconscionable clauses in contracts continues in Chapter Five.

⁸⁷ *FNB* (supra n 86) at para 16.

⁸⁸ *Ibid* at para 17.

⁸⁹ Which, it is submitted, is the correct approach, in light of s 24(8) of the LRA and especially in view of the fact that the *FNB* decision did not consider or overrule the various conflicting decisions of the higher courts.

Argument Two: the worker is not dismissed because he is still ‘on the books’, although unpaid and without work

In some instances the TES argues that, despite the fact that the worker was removed from the site by the client and has since been languishing at home with neither income nor employment, it has not dismissed the worker. Instead, argues the TES, the worker remains ‘on its books’, or in a ‘pool’, waiting ‘on standby’ for another assignment which may or may not materialize.

In both *Numsa obo Daki v Colven Associates Border CC*⁹⁰ and *Smith v Staffing Logistics*⁹¹ commissioners found that placing a worker on ‘standby’ or ‘in the pool’ after a client indicated it no longer wanted the worker on site constituted unfair dismissal. Compensation was awarded in both cases.

This approach has been criticised by Bosch,⁹² who argues that there is no reason why remaining in a pool, albeit without remuneration, should not constitute a valid employment relationship. However, Bosch’s approach would seem to be incorrect if regard is had to the LRA definition of ‘employee’:

‘employee’ means –

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
 - (b) any other person who in any manner assists in carrying on or conducting the business of an employer,
- and ‘employed’ and ‘employment’ have meanings corresponding to that of ‘employee’.⁹³

A worker who was working for the employer and receiving pay, but who is now neither working for (nor assisting), nor receiving any remuneration from, the employer, is arguably no longer an employee.

⁹⁰ [2006] 10 BALR 1078 (MEIBC).

⁹¹ [2005] 10 BALR 1078 (MEIBC).

⁹² Supra (n 74).

⁹³ Section 213 of the LRA.

Problem 3: evaluating fairness where the broker has no access to the client's workplace

Some commissioners have held that, where the client no longer wishes to make use of the employee's services due to some allegation of misconduct or poor performance, the TES as the deemed or fictional employer must discharge the employer's duty to dismiss the employee fairly. Thus the TES must investigate the allegations, must give the employee adequate support and an opportunity to improve if work performance is at issue, or must hold an enquiry at which the employee is invited to state a case in response to allegations of misconduct. Where the TES has failed to do this the dismissal has been held to be unfair.⁹⁴

The problem with this approach is that it is in truth often not possible for the TES to discharge the duties of an employer in respect of the employee. Since the employee is only present on the premises of the client by virtue of the contract between the TES and the client, the TES must remove the worker on the say-so of the client. The TES cannot and does not set the performance standards, nor can it counsel or support the poor performer once the client has rejected him.

Where the client has dismissed the worker for alleged misconduct, the TES may not have access to the workplace, or to witnesses, that would enable it to investigate the allegations. A necessary condition for a proper enquiry is the power to secure the presence of necessary witnesses; whilst tribunals such as the CCMA can subpoena witnesses and whilst ordinary employers can instruct relevant personnel to attend enquiries, a TES has no such power. A necessary condition for a proper enquiry is therefore absent.

Even were the TES able to secure the necessary level of cooperation from the client, it would nevertheless be unable to exercise the required discretion as to the appropriate disciplinary penalty; in the face of the client's refusal to continue to suffer the continued presence of the employee the TES may have no option but to remove the worker.

⁹⁴ *Mangali v Reberve* (n 2).

Cases illustrating this problem include *Solidarity obo Lehman v Securicor*⁹⁵ where the Commissioner found that although the TES had held a disciplinary enquiry, its decision to dismiss the worker was ‘strongly influenced’ by the fact that the client no longer wanted him. The dismissal was held to be unfair for this reason, and the worker was awarded compensation.

In *Diniso v Academia Cleaning Matters*⁹⁶ the Commissioner found that because workers enjoy statutory protection from unfair dismissal, the client/TES contract must make provision for the realisation of workers’ rights. It is however doubtful whether the CCMA has jurisdiction to enquire into or to pronounce upon the business contract between a TES and a client, its legitimate sphere of enquiry being the employment relationship between the worker and the employer.

Problem 4: fashioning a meaningful remedy for unfair dismissal

Where it is ultimately found that a dismissal was unfair, arbitrators are frequently unable to apply the preferred remedy of reinstatement.⁹⁷

The client controls the workplace attaching to the job and the salary. Because the client is not a party to the arbitration proceedings, a commissioner cannot reinstate the worker in the job from which he was unfairly dismissed. Reinstatement into a position with the TES itself is a hollow remedy, in that it often entails reinstatement into a position with no work and no salary. The material consequences of this in the prevailing socio-economic conditions are devastating for the worker.

Instead, where dismissals are found to have been unfair, commissioners order monetary compensation, commonly between 4 and 12 weeks’ remuneration.⁹⁸ As TES employees

⁹⁵ [2005] 2 BALR 227 (CCMA).

⁹⁶ CCMA case number WE 184-07, date of award 13 February 2007.

⁹⁷ It might be thought that this is a reasonable restriction on the remedy available to a temporary worker. If the work is by its nature short-term, it would be unreasonable to expect reinstatement into it. However, it must be recognized that temporary employment does not necessarily imply short-term employment. It implies only employment that is not permanent. To get an idea of the time-scale involved in temporary employment, it is instructive to note that the MEIBC Main Agreement makes provision for the automatic consolidation of temporary employees as permanent after six months of continuous work at a company as a temporary employee. Employees outside this sector do not even have that level of protection and it is not unusual for so-called temporary employment to persist for years.

are generally amongst the lowest paid, this compensation is usually a very low monetary amount.

In some cases commissioners have accepted that employees who have been dismissed at the instance of a third party – the client – ‘revert back’ to the TES, which, if it cannot place them elsewhere, should then be permitted or required to ‘retrench’ them (dismiss them for operational requirements). For instance, in *Jonas v Quest Staffing Solutions*⁹⁹ the commissioner held that when the client rejected the employee, the TES had a duty to place him elsewhere or alternatively to follow retrenchment procedures. He was awarded remuneration for the balance of his contract period.¹⁰⁰

An approach that seeks to order the broker to pay to the employee what he would have received were he to have been dismissed for operational requirements (that is, severance and notice pay, or the balance of the contract period if it was a fixed term contract) is arguably conceptually flawed. Although the inability of a broker to place a worker who has been rejected by a client does arguably constitute an ‘economic, technological, structural or similar’¹⁰¹ need of the employer, thus bringing any termination within the definition of an operational requirements dismissal, in fact the real reason for the dismissal is not operational requirements: it is the client’s perception that the employee was in some way inadequate. In other words, the real reason for dismissal was the employee’s alleged poor performance, or misconduct. The ‘retrenchment’ would thus be entirely occasioned by an allegation of misconduct or poor performance, and as such is probably a sham.

This sham is evidenced by the fact that meaningful consultation around the TES’s operational requirements (required in cases of dismissal for operational requirements)¹⁰² would involve an investigation of the situation which gave rise to it: which brings the parties back to the allegation made by the client against the worker in the first place and the real cause of the dismissal. In addition, fair retrenchment procedure, which is

⁹⁸ The CCMA does not have the power to award compensation in excess of an amount equivalent to twelve months remuneration, see section 193 of the LRA.

⁹⁹ [2003] 7 BALR 811 (CCMA).

¹⁰⁰ Which would of course have been impossible had the contract been open ended, as are many labour broker contracts.

¹⁰¹ The definition of operational requirements, section 213 of the LRA.

¹⁰² Section 189 of the LRA.

regulated by section 189 of the LRA, involves objective selection criteria, whereas in this instance the employee is pre-selected.

In any event, such an outcome would be inequitable for a worker who has actually been unfairly dismissed. An unfair dismissal determination carries with it the remedy of reinstatement, whereas an operational requirements dismissal entitles the worker only to notice and severance pay.

TESs frequently ignore compensation awards. An unemployed person is unlikely to be able to pay for the necessary taxi fares, postage and photocopying when attempting to enforce an arbitration award through the Labour Court, not to mention the Sheriff's fees (which not infrequently exceed the amount of the compensation order itself).¹⁰³

In conclusion on administration of the statute

Commissioners and Judges are charged with administering the LRA, which protects workers from unfair dismissal. The application of the law is, in general, straightforward. However, the statutory deeming of the TES as the 'employer' makes the application of unfair dismissal law very difficult. Commissioners are faced with dismissals by clients, who are not themselves party to the employment relationship. The 'employer', the TES, is not present in the workplace, does not supervise the employee, and has not set or applied workplace rules or standards governing the work. In these circumstances, commissioners acting as arbitrators find it difficult to exercise guardianship over the unfair dismissal jurisprudence, and to uphold and protect workers' Constitutional rights.

The result is that employees employed through a TES occupy a precarious position. They are deprived of the statutory protections available to regular employees. They are structurally subject to arbitrary dismissal by the client company that employs and controls them, without recourse to relief against that client company. Their remedies against the TES are limited by the frequent reluctance or inability of the CCMA,

¹⁰³ The Sheriff in Cape Town charges indigent workers R600 to enforce an arbitration award. In Mpumalanga the flat fee is R1500.

Bargaining Councils or Labour Court to find that there has been a dismissal in the first place.

Where it is found that they have been unfairly dismissed, such workers are uniformly deprived of the preferred remedy for unfair dismissal: reinstatement. Their security of employment is therefore severely compromised, and their access to justice is limited in comparison to those of their colleagues who have been directly employed by the same (client) employer rather than through a TES.

Chapter Four: The response of South African role players to the problem of labour brokers

Throughout the 1990s, concerns were expressed over the increasing casualisation and externalisation of the South African workforce. In 2004 the Department of Labour commissioned research into the changing nature of work, and what has come to be known as ‘atypical employment practices’ in South Africa. Atypical employment refers to the international trend away from the traditional mode of full time employment at an employer’s premises, towards non-standard patterns of employment encompassing part time work, home work, contract work, self-employment, informal sector work, seasonal, casual or piece rate work.¹⁰⁴ It is recognized that these employees are often unskilled, un-unionised and vulnerable to exploitation, especially because labour legislation has been designed with ‘typical’ employment models in mind.¹⁰⁵

The commissioned research was released and presented to the Minister of Labour in 2005.¹⁰⁶ It documented a rapid growth in labour brokers and showed that up to 25% of the workforce may be employed through brokers at any one time.¹⁰⁷ It also found that worker rights were being eroded where labour brokers were used, and where employees were required to work on a temporary, fixed term or limited duration basis.

The report made a number of recommendations, and the Minister accordingly referred the report and recommendations to the social partners, for their deliberations at Nedlac.¹⁰⁸ Here, the social partners were enjoined to negotiate proposed amendments to the law, aimed at regulating and restricting employers’ rights to use fixed term contracts and the services of labour brokers.

¹⁰⁴ E Mills 2004 *ILJ* 1203.

¹⁰⁵ For a more complete discussion of atypical employment see Fourie (supra n 39).

¹⁰⁶ Jan Theron Shane Godfrey and Peter Lewis *The Rise of Labour Broking and its Policy Implications* (Institute of Development and Labour Law, UCT) 2005.

¹⁰⁷ *Ibid* at page 10.

¹⁰⁸ Nedlac, the National Economic Development and Labour Council, comprises representatives of government, organised business, organised labour and organised community groupings. Nedlac resolves disputes between the social partners over issues of socio-economic policy in terms of s77 of the LRA. All labour legislation is debated at Nedlac.

These talks appeared to have been stalled for over four years. A report on SAFM radio on 8 July 2009 indicated that the discussion around labour broking and atypical employment was on the agenda at a special session of Nedlac scheduled for 10 July 2009, but it is unclear whether such a meeting actually took place.¹⁰⁹

This Chapter outlines the positions and activities of the different stakeholders in this ongoing engagement, and then goes on to evaluate their various positions.

Stakeholders' Views

ANC and Government Institutions

There are references to the issue of labour brokers being raised in the Parliamentary Monitoring Group from 2003 onwards. According to the records of the Group's deliberations,¹¹⁰ a member, Mr Mkhali, persistently raised the issue of labour brokers, but was told that the matter was under consideration at Nedlac. There is no record of it having actually been the subject of deliberations at Nedlac during this period, however.

During a 2007 briefing session, the CCMA was asked by the Department of Labour how it was dealing with the problem of labour brokers. The CCMA enigmatically replied that it was applying the law without problems.

Towards the end of 2008 the ANC launched its election manifesto, which included a call for 'decent work'. The ANC manifesto promised that it would:

'In order to avoid the exploitation of workers and ensure decent work for all workers, as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and outsourcing, address the problem of labour broking and prohibit certain abusive practices. Provisions will be introduced to facilitate unionization of workers and conclusion of sectoral collective agreements to cover vulnerable workers in these different legal relationships and ensure the right to permanent employment for affected

¹⁰⁹ As indicated in the Note to the Abstract, a discussion document on the topic of labour broking was reportedly eventually considered at a Nedlac meeting in September 2009. The discussion document has, however, not been made public.

¹¹⁰ Available at www.pmg.gov.za accessed 19 June 2009.

workers. Procurement policies and public incentives will include requirements to promote decent work.’¹¹¹

‘Decent work’ is a broad term coined by the ILO. According to the ILO website, ‘decent work sums up the aspirations of people in their working lives ... for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality.’ Decent work is said to be ‘central to efforts to reduce poverty, and is a means for achieving equitable, inclusive and sustainable development.’¹¹²

In November 2008, Labour Minister Membathisi Mdladlana was reported to have said that the ruling party would ‘ban labour brokers after it wins next year’s election’ and that ‘a vote for the ANC means exactly that’.¹¹³

As late as March 2009, in response to a question about a possible upcoming ban posed by MP Dreyer of the Democratic Alliance, Mdladlana told Parliament that labour legislation would be amended to put certain labour brokers out of business. Citing studies which showed that brokers did not create employment and that broker employees suffer from a fundamental lack of employment security, Mdladlana said that ‘labour brokers who ... act as intermediaries ... to evade labour legislation ... have a lot to worry about.’¹¹⁴

Kgalema Mothlanthe told the 2009 FEDUSA congress that labour broking was unacceptable ‘in its present form’.¹¹⁵

Mdladlana apparently eventually became frustrated with businesses’ successful efforts to stall the negotiation process at Nedlac. He reportedly met with ILO representatives in Geneva in June 2009, to ask for the ILO’s advice on reviving the Nedlac negotiations on the issue. Referring to the South African Constitution’s guarantee of the right to fair

¹¹¹ ‘Working together we can do more’ ANC election manifesto available at www.anc.org.za accessed 15 June 2009.

¹¹² www.ilo.org accessed 21 July 2009.

¹¹³ The Citizen Newspaper ‘Cosatu condemns labour brokers’ 9 December 2008 available at www.citizen.co.za accessed 19 June 2009.

¹¹⁴ ‘Government to ban labour brokers’ 12 March 2009 available at www.fin24.com accessed 19 June 2008.

¹¹⁵ UASA press release ‘SA Airways agrees to phase out labour brokers’ 10 March 2009 available at www.uasa.co.za accessed 20 June 2009.

labour practices for everyone, Mdladlana criticized those who accuse South Africa's labour laws of being inflexible just because employers cannot 'hire and fire at will'. 'We have problems with the "at will" part', he said. He denied that the problem was merely that the Department of Labour failed to monitor and enforce existing legislation, pointing out that the current framework leaves workers without recourse if they are unfairly dismissed.¹¹⁶

In an apparent attempt to appease the labour broking industry, ANC Secretary General Gwede Mantashe later called Mdladlana's comments 'reckless'.¹¹⁷ Both Jessie Duarte and Mantashe insist that the ANC's manifesto calls for regulation, and not banning, of labour brokers.

The employers

In 2007, the annual Steel and Engineering Industries Federation of South Africa (SEIFSA) report indicated that the labour contingent at Nedlac had relied on the Theron research to institute calls for the 'curtailment' of employment practices allowing the use of fixed term contracts and the services of labour brokers. The report promised that the employer bodies would 'strenuously reject' such proposals.¹¹⁸

By the end of 2008, SEIFSA triumphantly announced that the Nedlac negotiations had been successfully 'stalled' by the business lobby.¹¹⁹ Employer bodies, including SEIFSA and Business Unity South Africa (BUSA) indicated that they would 'continue to do everything possible to ensure that the current legal employment practices and processes are protected should the negotiation process be resumed after next year's national general elections.'¹²⁰

The Confederation of Associations in the Private Employment Sector (CAPES) represents the larger labour broking companies including Adecco, Kelly and Manpower.

¹¹⁶ 'Minister Declares War on Brokers' 13 June 2009 *The Pretoria News* at page 2, available at www.iol.co.za/general/news accessed 21 June 2009.

¹¹⁷ 'ANC Moderates the Tone' Financial Mail 5 June 2009 <http://free.financialmail.co.za> accessed 21 June 2009.

¹¹⁸ SEIFSA Executive Director's report to the SEIFSA AGM held on 12 October 2007 available at www.seifsa.co.za accessed 18 June 2009.

¹¹⁹ Ibid.

¹²⁰ Ibid.

CAPES' Chief Operating Officer, John Botha, has defended the labour broking system, saying that the industry employs approximately half a million South African workers on any given day, and that it provides essential access to the formal labour market.

CAPES' position is that the existing legislative framework is adequate to protect workers; the problem lies merely in its lack of enforcement by the Department of Labour. The legislation already provides for proper working hours, overtime pay, unemployment fund deductions, sick leave and other basic conditions of employment, but because of poor enforcement some unscrupulous labour brokers are giving the whole industry a bad name: 'a lot of the negative perceptions come from people who unfortunately are unregulated, the so-called "bakkie brigade" or the labour brokers of poor repute,' says Botha.¹²¹

CAPES believes that, because the government has an interest in dramatically reducing unemployment, the Department of Labour is 'open to a constructive partnership' with the labour brokers.¹²² 'We're saying, don't just outlaw these guys, help us to regulate the industry and let's partner with you. The point is, we all have a common objective: to create skills, to create employment ... it would be ridiculous to just eliminate one of those channels, the labour brokers.'¹²³

CAPES has proposed a statutory Private Employment Agency Council to license TESs and to investigate, and deregulate non-compliant TESs, as well as to administer a pension fund for those falling outside the scope of existing bargaining councils and sectoral determinations.¹²⁴

The employers also charge that Cosatu's call for a ban is premature and in bad faith, insisting that the matter is under consideration at Nedlac, the proper forum. They even suggest that it's a case of sour grapes, because the unions haven't the energy to undertake the onerous task of organising labour broker workers.

¹²¹ The Times Newspaper 'Ban Brokers, says Cosatu' 2 November 2008 available at www.thetimes.co.za accessed 19 June 2009.

¹²² Supra n 121.

¹²³ Supra n 121.

¹²⁴ 'To ban or not to ban' *Responsible Trade Unionism* 1st Quarter 2009 at p37 available at www.uasa.co.za/reports accessed 18 June 2009.

In response to Mdladlana's call for the banning of labour brokers, Adcorp's CEO accused the Minister of speaking in bad faith, suggesting that he was showing disregard for the process of negotiation at Nedlac.

Labour

COSATU

An economic policy summit was held between Cosatu, the SACP and ANC in October 2008. Two weeks later, Cosatu publicly called for an outright ban on labour broking, calling the practice 'an obstacle to securing our aims of creating decent work.'¹²⁵ The Minister of Labour's promise to ban labour brokers was welcomed by Cosatu, which issued a statement likening labour broking to 'human trafficking' which 'reduces workers to commodities that can be traded for profit, just as if they were meat or vegetables'.¹²⁶

However, Cosatu's approach has been strongly criticized by Eddie Webster of the Society, Work and Development Institute, based at the University of the Witwatersrand. Webster is of the opinion that some forms of subcontracting are legitimate, and that an outright ban on labour brokers could have unintended consequences (such as the permanent loss of thousands of jobs, as has reportedly been the consequence in Namibia).¹²⁷

FEDUSA

Not all trade unions support Cosatu's position. Leon Grobler, Chief Operating Officer of UASA, a FEDUSA affiliate, says 'if there are weaknesses in the system, regulate them, don't simply ban the brokers'.¹²⁸

UASA is 'engaged in deliberations' with CAPES concerning 'reinforcing more and better jobs and modernising labour markets to increase adaptability and employment'.¹²⁹

¹²⁵ 'Ban Brokers, says Cosatu' (supra n 121).

¹²⁶ 'Cosatu Condemns Labour Brokers' (supra n 113).

¹²⁷ 'ANC Moderates the Tone' (supra n 117).

¹²⁸ 'To ban or not to ban' (supra n 124)

The aim is to provide decent working conditions for temporary agency workers, and to promote South Africa's ratification of ILO Convention 181 on Private Employment Agencies.

UASA also claims to be in discussion with the International Trade Union Confederation ITUC concerning designing specifications for South Africa including an agreed number of contract extensions (also known as 'rollovers'), defining the notions of 'temporary' and 'permanent' employees, ensuring retrenchment benefits for temporary employees, and the regulation of 'take-back clauses' (in terms of which the broker is obliged to replace any worker if the client so requests).¹³⁰

A Memorandum of Understanding has been reached between UNI Global Union and CIETT Corporate members (large labour brokers with international operations including CAPES members Kelly Services, Adecco, Manpower, Olympia Flexgroup AG, Randstad and USG People) in terms of which the parties are to lobby for adoption of the ILO's Convention 181 on Private Employment Agencies.¹³¹

Despite its apparent support for the labour broking industry, UASA announced on 10 March 2009 that it had reached an agreement with South African Airways to 'phase out' the placement of temporary employees acquired through labour broker Quest at In-flight services into 'positions that can be defined as permanent employee positions in future'.¹³²

Evaluation of the debate on whether or not to ban labour brokers

What is the best response for South Africa? Should labour broking be banned outright? Or is it the case that the existing legal framework is adequate, requiring only better enforcement? If the existing framework is not adequate, would it be the best solution rather to improve that framework through a process of law reform? Lastly, to approach

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Supra n 40.

¹³² 'SA Airways agrees to phase out labour brokers' supra n 115.

the problem from another direction entirely, were the law to remain unchanged, would it withstand constitutional challenge as it stands?

The ban on labour brokers in Namibia

It was the outright ban on labour brokers in our neighbour Namibia that apparently fuelled the call for the banning of the practice in South Africa. This section describes the Namibian legislation and the response of the High Court there to a constitutional challenge to the banning.

South African labour broking firms had been increasingly active in Namibia since the late 1990s. The Labour Research and Resource Institute reported that labour hire, as it is known in Namibia, was impacting negatively on workers' rights.¹³³ The Namibian Parliament in 2007 rejected a Draft Bill proposing slight amendments to the labour hire provisions (which were then similar to those in the South African LRA) in favour of a prohibition of the practice of labour hire in the Republic of Namibia, finding the practice to be unacceptable under the Namibian Constitution.

Namibia's new Labour Act,¹³⁴ passed in 2007, provides in section 128 that 'no person may, for reward, employ any person with a view to making that person available to a third party to perform work for that third party'. The section goes on to exclude recruitment agencies from its scope, and to make contravention of the provision an offence attracting a fine and imprisonment. Apparently anticipating challenge, subsection (4) provides that 'in so far as this section interferes with the fundamental freedoms in article 21(1)(j) of the Namibian Constitution, it is enacted upon the authority of Sub-article 2 of that Article in that it is required in the interest of decency and morality.'

Africa Personnel Services (Pty) Ltd, a labour hire company, asked the High Court of Namibia to strike down section 128 of the Labour Act, relying on article 21 of the Namibian Constitution which provides that:

¹³³ Herbert Jauch 'Namibia's ban on labour hire in perspective' *The Namibian* 7 August 2007.

¹³⁴ Labour Act number 11 of 2007. See Herbert Jauch 'Namibia's New Labour Act (No 11 of 2007) from a labour perspective' *The Namibian* 18 January 2008 for a more extensive overview of the Act.

- (1) all persons shall have the right to :
- (j) ... carry on any ... trade or business.

In its decision in the matter of *Africa Personnel Services (Pty) Ltd v Government of Namibia and Others*,¹³⁵ the High Court found that the Article 21 right to carry on a trade or business is derogable, and that it can be limited in a democratic society.¹³⁶

Furthermore, not every trade is protected: the profession, trade or occupation must be lawful.¹³⁷ After a brief discussion of the common law categories *locatio conductio rei* (the letting or hiring of a thing, including a slave), *locatio conductio operis faciendi* (the independent contractor relationship), and *locatio conductio operari* (the letting and hiring of personal service for reward, as in the modern employee),¹³⁸ the court observed that the terms ‘employer’ and ‘employee’ are defined in Namibian legislation¹³⁹ but that the hiring of an employee to a third party, to whom the employee then renders personal service, is not part of the Namibian law of employment. Such a practice, says the court, ‘smacks of the hiring of a slave by his slave master to another person under *locatio conductio rei* in Roman Law.’¹⁴⁰

The four concurring Judges of the High Court held that, in order to enforce the article 21 right under the Namibian Constitution, the applicant had to establish a legal right to carry on that business or trade. Because labour hire had no basis in Namibian law, the applicant had no legal right to the protection of article 21.

Dismissing arguments that the Labour Advisory Council (LAC)¹⁴¹ had advocated regulating, as opposed to banning, labour hire, the court held that Parliament had chosen to ban, and not to regulate, labour hire. The Court would not interfere with this choice

¹³⁵ Case Number A 4 2008, and reported as *Van Wyk v Gowases and Another* (LC 40/2008) NALC 3 (18 December 2008).

¹³⁶ *Ibid*, at para 15.

¹³⁷ *Ibid*, at para 18.

¹³⁸ *Ibid* at para 23.

¹³⁹ *Ibid* at para 24: ‘employee’ is defined as ‘an individual, other than an independent contractor, who works for another person and who receives, or is entitled to receive, remuneration for that work ...’ and ‘employer’ is reciprocally defined as ‘any person ... who employs or provides work for an individual and who remunerates ... that individual ...’. This closely mirrors the definition of ‘employee’ in the LRA, which does not define ‘employer’ at all.

¹⁴⁰ *Africa Personnel Services* (supra n 135) at para 27.

¹⁴¹ A tripartite statutory body similar in nature to our NEDLAC (National Economic Development and Labour Advisory Council).

unless unconstitutional.¹⁴² In any event, held the Court, where an activity is unlawful, it makes no sense to control or regulate it.

The court also held that labour hire is untenable in part because there are no 'protectable, contractual reciprocal rights and duties' between the worker and the client, yet it is to the client that the worker renders personal service.¹⁴³ The court found the arrangement to be 'unknown, nay, offensive of, our law of contract of employment'.¹⁴⁴ It had no legal basis in Namibian law, and violated a fundamental principle of the ILO that 'labour is not a commodity'.¹⁴⁵

Interestingly, the notion of a 'triangular employment relationship'¹⁴⁶ was characterized by the court as 'muddled theorizing'. In the opinion of the court, to the extent that the phrase implied that this was actually a legitimate form of employment relationship, it was obfuscatory and legally irrelevant.¹⁴⁷

The court also noted that the Namibian Government's legal representative referred to similarities between modern labour hire, and the notorious apartheid-era SWANLA labour agency which commoditised labour and took away the dignity of the workers thus hired out.¹⁴⁸

Would a ban on labour brokers be upheld in South Africa?

I preface a consideration of this question by noting firstly that, despite strenuous resistance from labour broking companies (which is to be expected), outlawing labour broking is not as drastic as it may at first sound. It would indeed put labour broking

¹⁴² *Africa Personnel Services* (supra n 135) at para 37.

¹⁴³ *Ibid* at para 28.

¹⁴⁴ *Ibid* at para 29.

¹⁴⁵ *Ibid*.

¹⁴⁶ Mooted by Jan Theron (supra n 37) and adopted by the Labour Resource and Research Institute (LaRRI) in its 2006 report entitled *Labour Hire in Namibia: Current Practices and effects* (May 2006) at p8.

¹⁴⁷ *Ibid* at para 19.

¹⁴⁸ SWANLA was established in 1943 by the apartheid government in Namibia, with exclusive rights to recruit workers from Owamboland and Okavango to work in South African mines and other industries. SWANLA and its South African counterparts (including The Employment Bureau of Africa TEBA) were renowned for disrespecting African people, and for paying no attention to human rights. SWANLA was disbanded in 1972. See E. Ndeshi Namhila *Kaxumba kaNdola, Man and Myth* Basler Afrika 2005, and Luli Callinicos *Gold and Workers 1886-1924* (1982) Ravan Press Johannesburg.

firms out of business. However, nothing would prevent employers from continuing to employ workers temporarily to meet seasonal or fluctuating needs: under current legislation workers can be employed on fixed term, short term or limited duration contracts. Nor would employers be prevented from outsourcing either the recruitment of such personnel, or even the attendant administrative functions.

A legal firm wishing to temporarily replace a secretary, for instance, could contract a specialist contractor to recruit one, to manage her contract, and to terminate her fairly should this become necessary. In fact, many employers already outsource aspects of their operation (for instance, cleaning and security). It is also quite common for employers to outsource their disciplinary functions to employers' organisations, labour consultants, or to independent panels such as Tokiso Dispute Settlement,¹⁴⁹ so as not to have to develop specialised in-house skills for infrequent events. Even without section 198 of the LRA, employers can still outsource the recruitment and management of temporary personnel. The only difference is that responsibility for fair labour practices would remain with the employer, and not be shifted to a broker in respect of those temporary workers.

Nevertheless, many critics argue that banning labour broking would not withstand constitutional challenge in this country. In a paper delivered to the CCMA breakfast seminar in Cape Town in March 2009,¹⁵⁰ Craig Bosch argued that our law has legislatively recognised labour broking for some time.¹⁵¹ This view is echoed in an article on the subject appearing on the website of a leading commercial law firm, Webber Wentzel.¹⁵² The argument is that there is already a solid legal foundation in South African law legitimising labour broking, making it unlikely that a court could find the practice to be unlawful (as found in Namibia).

¹⁴⁹ Tokiso Dispute Settlement (Pty) Ltd, see www.tokiso.com (accessed 12 August 2009).

¹⁵⁰ Craig Bosch *An assessment of labour brokers in South Africa and reflections on the Namibian judgment*, paper delivered at a CCMA breakfast seminar on 27 March 2009, copy on file with the author.

¹⁵¹ Indeed, the 1956 Labour Relations Act also provided for the TES and not the client to be the employer for the purpose of law.

¹⁵² Greg Palmer 'Labour brokers under threat' published by Webber Wentzel 16 March 2009 and available at <http://www.polity.org.za> accessed 14 July 2009.

In addition, the Bill of Rights in the South African Constitution provides for the right, not to ‘carry on’ as in the Namibian constitution, but to *freely choose*¹⁵³ a trade or profession, making our right arguably a ‘broader’ right than the corresponding Namibian right.¹⁵⁴

In criticising the Namibian judgment, Bosch also points out that the Court failed to take into account ILO Convention 181 of 1997,¹⁵⁵ which expressly allows for the operation of what it terms Private Employment Agencies.¹⁵⁶ Although South Africa has not ratified Convention 181, international law nevertheless informs how our courts will interpret and apply the Constitution.¹⁵⁷

As both Palmer and Bosch point out, if a ban on labour brokers is challenged in terms of section 22 of the South African Constitution, the Courts would have to consider whether there are less restrictive means to achieve the objective of protecting workers’ rights.

Less restrictive means to achieve the objective of protecting workers’ rights

Those arguing that a ban would not withstand constitutional challenge point to the fact that there are less restrictive means to achieve the objective, including more effective enforcement of the law, better regulation of labour brokers, ratification of Convention 181 or, ultimately, reform of the LRA. These propositions are now considered in turn.

Regulate, don’t ban

The representatives of labour broking companies argue that the current legislative framework is adequate to protect workers, and that all that is necessary is efficient monitoring and enforcement of the law. They cite their efforts to establish a Council which will register and monitor brokers for compliance with existing legislation.

¹⁵³ Section 22 of the Constitution of South Africa, 1996.

¹⁵⁴ Bosch (supra n 150).

¹⁵⁵ Private Employment Agencies Convention C 181 1997 available at www.ilo.org accessed 21 July 2009.

¹⁵⁶ Defined to include what are referred to as labour brokers in this dissertation, as well as conventional recruitment agencies.

¹⁵⁷ Constitution of South Africa, 1996, at section 39.

Influenced by these protestations, Palmer argues that ‘the poor enforcement of existing regulations provides a bad reason for a ban’.

But regulating labour brokers will not solve the problem. As already shown, the LRA itself, as it now stands, deprives labour broker employees of two of their fundamental Constitutional rights: the right to bargain collectively, and the right to employment security (in the form of reinstatement where there has been an unfair dismissal). Restoring these crucial rights to workers requires nothing less than the reform of section 198 of the LRA. In other words, the current legislative framework is precisely not adequate to protect workers’ rights, and the employers’ lobby is in bad faith when it suggests that the failure actually lies with the Department of Labour, or with the trade unions, in failing to properly apply the existing, allegedly sufficient, legal regulatory framework. That large brokers moot the establishment of a Council and the monitoring of the so-called ‘bakkie brigade’ only reflects their own interest in keeping the competition under control.

Ratify ILO Convention 181

As outlined above, FEDUSA affiliate UASA’s approach includes a lobby for South Africa’s ratification of ILO Convention 181 on Private Employment Agencies. The Convention provides for the regulation of such agencies by those countries which have ratified it.

Convention 181 requires ratifying members to ensure that workers employed through Private Employment Agencies are not deprived of their rights to freedom of association and to bargain collectively to improve working conditions,¹⁵⁸ protects PEA workers from discrimination,¹⁵⁹ ensures their privacy¹⁶⁰ and outlaws child labour.¹⁶¹ Article 10 provides that there must be a mechanism for complaints and the investigation of alleged abuses, whilst article 11 requires ‘adequate measures’ to be taken in relation to social security, accident compensation, training, minimum wages and the like. Article 12

¹⁵⁸ Supra n 155, article 4.

¹⁵⁹ Article 5.

¹⁶⁰ Article 6.

¹⁶¹ Article 9.

provides for a ratifying country to distribute the various obligations between the PEA and the client.

The Convention is, however, silent on employment security.

On balance, the Convention adds little to South Africa's already excellent labour relations framework. The usefulness of its ratification, for brokers, lies in establishing beyond doubt their right to continued existence.

Law Reform

Whilst merely regulating labour brokers will not provide an adequate alternative means, less restrictive than an outright ban, to protect workers' rights, reform of the LRA may indeed do the trick.

Theron has previously suggested that 'workplace' be redefined to allow for organisational rights for employees of TESs, and has also suggested defining 'temporary' to mean a period of three to four months.¹⁶²

Bosch, in his paper, suggests joint and several liability of broker and client for unfair dismissal of employees, and echoes the call for an amendment to the definition of 'workplace' to enable the effective exercise of organisational rights.¹⁶³

Labour Minister Mdladlana, at the annual Labour Law Conference held in Johannesburg in August 2009, suggested that an amendment to the definition of 'employer' would partly address the problem of labour brokers.¹⁶⁴

This paper argues that law reform can indeed address the problem identified in Chapters 2 and 3 without banning brokers, and makes detailed proposals for effective amendments to the LRA in the next Chapter.

A related, and interesting, question is whether section 198 in its current form would itself survive constitutional challenge.

¹⁶² Theron supra n 37.

¹⁶³ Bosch supra n 150.

¹⁶⁴ Communication with Debbie Collier, August 2009.

Can the section 198 rights limitation be justified?

This dissertation has argued that the effect of the LRA's section 198(2) provision deeming the TES, and not the client, to be the employer, is to limit the right to fair labour practices for a section of the South African workforce.

Our Constitution does, however, provide, in section 36, for the limitation of rights in terms of a 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. The LRA is a law of general application, and so it remains to consider whether the section 198 rights limitation can be justified.

Section 198 does have a legitimate purpose. It is reasonable and necessary that employers be permitted some flexibility where they experience a need for genuinely temporary employees. The manufacturer with an unusually large once-off order, the office with a seriously ill receptionist (or one who is on maternity leave), and the factory that must relocate all its machinery due to a fire, all need to find suitably qualified temporary staff quickly and without the usual attendant administrative burdens of recruitment, tax calculations, and termination procedures.

Temporary staff can of course be recruited through a recruitment agency, and can be employed on a fixed-term contract. But the labour broker makes things even more efficient from the point of view of the employer: by taking on as many administrative and human resources functions as possible, the labour broker delivers a worker with the absolute minimum of attendant burdens. It is this efficiency which section 198 no doubt aims to facilitate.

The Memorandum to the LRA was silent as to the purpose of the section 198 provision,¹⁶⁵ which mirrors its corresponding provision in the 1956 Labour Relations Act. The purpose of the section is undoubtedly to relieve the client of administrative burdens associated with employing temporary workers, whilst assuring the continued protection of temporary workers. The section also removes uncertainty that could arise

¹⁶⁵ Theron (n 37) at 6 and fn 23.

as to which employer in the triangular relationship is to be the bearer of the employer's duties towards employees.

It is most unlikely that the purpose of the section 198(2) provision is to limit workers' fair labour practice rights. That the legislature intended that basic employment protections remain in place is suggested by the fact that both section 198(4) and other legislation expressly provide for the joint liability of the client where such protections are flouted.¹⁶⁶

Whilst it might be argued that the purpose of the provision was to deregulate a section of the labour market, removing from employers the entire burden of legislative protections for workers, this argument cannot be sustained. Such a radical step, reducing the protection of employees, would certainly have been the subject of debate between the social partners at Nedlac. In fact, Nedlac expressly rejected proposals to this effect made by Business SA during input to the 2002 LRA amendments.¹⁶⁷ Also, a policy so radically limiting rights would be made express by Parliament.¹⁶⁸

Should such a policy position be adopted at any point, the relative importance of increasing business competitiveness and efficiency would have to be balanced against the importance of the rights to employment security and collective bargaining. The rights limitations identified in this dissertation are the indirect, and, most probably, unintended consequence of the wording of section 198.¹⁶⁹

All workers in South Africa enjoy a Constitutional right to fair labour practices. No worker should be treated unfairly. No worker should lose his livelihood, however temporary, as the result of an employer's arbitrary or malicious actions. Mangali should not have been subjected to arbitrary dismissal on the basis of an untested allegation of dishonesty. Gqamani should not have been deprived of protection when,

¹⁶⁶ Section 198(4) provides for the joint and several liability of the client and the TES if the TES contravenes collective agreements, arbitration awards and other labour legislation. The Occupational Health and Safety Act 85 of 1993 stipulates that the client is considered to be the employer for the purpose of that Act, which compensates workers for injuries sustained at work.

¹⁶⁷ Theron (supra n 37).

¹⁶⁸ Legislation is never interpreted so as to limit a fundamental right unless the legislature has made its intention to so limit it, express.

¹⁶⁹ Although business has made out an argument for deregulation in certain sectors, these suggestions have to date been expressly rejected by Nedlac.

after six years, he was injured at work. Employers cannot be permitted to avoid compliance with labour legislation on a large scale, through the subterfuge of putting their employees onto the books of ‘temporary employment services’ which have not in fact recruited or provided those workers to them, and where the workers are not in fact fulfilling a temporary need of the employer. A 2006 ILO recommendation requires national policy to ‘combat disguised employment relationships’ which have the effect of ‘depriving workers of the protection they are due’.¹⁷⁰

Yet the LRA in its current form permits these rights violations. As businesses increasingly take advantage of the practical opportunities presented by the loophole, a growing proportion of the South African workforce finds itself without the ‘hard-won’¹⁷¹ protections fought over in the twenty years leading up to the proud negotiation of the 1995 LRA.¹⁷²

The limitation of rights is serious, and cannot be justified. It is argued below that by re-drafting the section, it will be possible to retain the legitimate purpose of section 198, whilst preventing its abuse.

¹⁷⁰ ILO R198 Recommendation concerning the employment relationship (2006) adopted 15 June 2006 GG 1 Dec 2006 No 29445 at pg 45 available at www.ilo.org accessed 21 July 2009.

¹⁷¹ Per Navsa J in *Sidumo* (n 6).

¹⁷² Theron (n 37) argues at 6 that ‘the legislation’s failure to address the anomalies that result from holding the TES to be the employer ... has encouraged the further growth of labour broking’.

Chapter Five: Proposed Legislative Amendments

In this chapter proposals are made for amendments to the LRA, which will remedy the problems identified in this dissertation. Also, the chapter makes recommendations for the proper administration of the statute by judges and commissioners, pending law reform.

Preliminary remarks

The proposed amendments are premised on the following suggested principles:

1. **Principle 1: Provision for genuine temporary requirements:** employers should be able easily to fill temporary vacancies or satisfy temporary work-load peaks, whilst outsourcing the HR function. They should also be able to outsource some of their operation.
2. **Principle 2: Protection of collective bargaining:** the LRA's provision of a framework to promote collective bargaining¹⁷³ should not be undermined.
3. **Principle 3: Protection of employment security:** there should be no opportunities for employers to avoid their statutory duties towards employees: in particular, there should be protection from arbitrary dismissal, and the primary remedy of reinstatement should remain available to unfairly dismissed employees where appropriate.¹⁷⁴

While considering options for legislative amendment, sight has not been lost of the following four facts under existing legislation:

1. employers can conclude short-term or fixed-duration (also known as limited duration) contracts with their employees;

¹⁷³ Section 1, dealing with the purpose of the LRA, provides as follows in subsection (c): 'to provide a framework within which employees and their trade unions, employers and employers' organisations can (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest ...'.

¹⁷⁴ This will be appropriate in the case of long-term, ongoing outsourced work such as that performed by Mangali. Obviously, it will not be appropriate to reinstate a worker who was engaged for a short-term project which is completed by the time of the arbitration.

2. employers can fairly dismiss workers for operational requirements provided they comply with the requirements of section 189 of the LRA;
3. employers can subcontract administrative functions to an external consultant – such as recruitment, administration of wages and statutory payments, and the disciplinary function.¹⁷⁵
4. employers can outsource work to independent contractors, and the provisions of section 198 are not necessary to facilitate this.

The problems that the amendments must address

1. Employees must have the right to bargain collectively with the employer

As described in Chapter 2, under present legislation, the collective bargaining rights of those employed by labour brokers are curtailed because they cannot access their organisational rights. This is due to the requirement of ‘sufficient’ representivity in section 11 read with the definition of ‘workplace’ in section 213 of the LRA.¹⁷⁶

2. Employees have the right to fair labour practices in the form of employment security

As described in Chapter 4, under the present legislation, judges and commissioners tasked with implementation of the LRA encounter the following problems when dealing with unfair dismissal claims by labour broker employees:

- Managing instances in which it appears that the employee has cited the wrong party.
- Deciding whether there has been a ‘dismissal’ in the face of the argument that the contract terminated on its own terms by operation of law (in terms of contractual clauses providing for automatic termination in the event that the client wants the employee removed, or on cancellation of the entire service contract by the client), or alternatively that there has been no dismissal because

¹⁷⁵ This function is already typically outsourced to an employer’s organisation, an independent panel such as Tokiso Dispute Resolution, or a labour consultant.

¹⁷⁶ This was comprehensively described and argued above at pages 13-14.

the worker remains ‘on the books’ without remuneration awaiting a further assignment.

- Evaluating fairness, where the labour broker lacks access to the client’s premises to investigate and evaluate any allegation of misconduct or incapacity
- Fashioning an appropriate remedy, where the statute provides for reinstatement as the primary remedy, yet the client at whose workplace the employee worked is not a party to the arbitration proceedings.

3. Section 198 should not be abused for improper purposes.

Attempts by employers to circumvent the LRA, by putting permanent workers onto the books of labour brokers, should be expressly prohibited.

Proposed Amendments

1. Proposed amendment to provide for the right to bargain collectively with the employer

In order to achieve the protection of collective bargaining rights (Principle 2), section 213 of the LRA should be amended to provide that

‘workplace’ means ‘the place or places where the employees of an employer work, or, where those employees work mostly at the premises of an employer’s clients, that employer’s principal place of business’.

The argument made by Theron and set out above¹⁷⁷ to the effect that collective bargaining is in any event rendered toothless by the TES/client contract, bears some qualification: in truth, the ability of every employer to bargain wages is curtailed by the market place. All employers study the potential effects of wage increases on the pricing structures of their goods and services, and resist wage increases that will have the effect of pricing them out of the market. There is no substantive difference between this

¹⁷⁷ At page 14 above.

approach and that of the labour broker which resists wage increases that will price it out of its market – the contracts it holds with its clients.¹⁷⁸

Therefore, provided outsourced employees can effectively unionise and exercise their organisational rights (which requires the legislative amendment proposed above), their collective bargaining rights will be salvaged notwithstanding the constraints presented by the labour broker's contract with the client.¹⁷⁹

In addition, collective agreements concluded in Bargaining Councils, and Sectoral Determinations made by the Minister, should take care to specify that the applicable minima apply to TES workers deployed in those sectors. The Minister, and parties to collective agreements, should also ensure that those job categories that are often outsourced (such as cleaning, gardening, maintenance, security etc) are included in the listed job categories in Agreements and Determinations, when specifying minimum wages.

2. Proposed amendments to provide for the right to employment security

All employees have the right to employment security (Principle 3). The LRA in its current form denies employment security to labour broker employees by making it difficult for them to claim reinstatement as a remedy for unfair dismissal. Labour broking companies are exploiting the legislation in order that they and their clients avoid their statutory obligation of fairness towards employees. These exploitative practices must be directly addressed and prohibited by the legislation.

The proposed amendments address, in order, the four problems encountered by judges and commissioners, as described in Chapter Two above.

¹⁷⁸ It is also interesting to compare the position of the TES with that of public sector employers; they also bargain in difficult circumstances in which their budget is often predetermined by local, provincial and national departments of finance in their budgets. Despite this, the National Department of Education, for example, collectively bargains with teachers' unions despite the fact that the Minister of Finance has already tabled his budget before Parliament.

¹⁷⁹ Whilst it might be argued that collective bargaining rights are by their very nature only exercisable by workers with sufficient permanence to meaningfully collectivise and organise so as to affect their conditions of employment, many broker employees spend years with the broker on different assignments. In addition, unionisation in the sector will mean better regulation and oversight.

Problem one: Citation of the wrong employer

Because CCMA and Bargaining Council rules provide for the joining and substitution of parties to disputes, this is one issue that does not require legislative amendment. It requires merely that commissioners utilise the Rules.¹⁸⁰

Problem two: Determining whether or not there has been a dismissal

In order to avoid abuse of the allegation that there was no dismissal because the contract terminated automatically, or by operation of law, the Act must be clarified to exclude unfair contractual provisions.

It is fair for an employment contract to be for an agreed fixed period that is clearly defined with reference to a specified date, specified period of time, or completion of a specified task. Such a fixed term contract will, upon the expiry of the period, terminate by operation of law. There will only be a dismissal if the employee can show, in terms of section 186(1)(b), that she reasonably expected that the employer would renew the contract on the same or similar terms.

Amendment to provide that it is a dismissal when the worker is terminated at the instance of the client, or when the client cancels the service contract.

It is not fair for the contract to provide that it will terminate ‘automatically’ if the client for any reason no longer wants the employee. It is also not fair for the contract to provide that it will terminate ‘automatically’ if the client cancels the main service contract with the employer.

In both of these scenarios, the employee has in truth been dismissed. It may nevertheless be possible for a labour broker to show that the dismissal was fair. If dismissal is at the instance of the client, the broker may be able to show that there was a fair reason related to conduct or capacity, or alternatively that its inability to place the employee constitutes an operational requirement. If dismissal was due to the client’s cancellation of the service contract, this would arguably constitute an operational

¹⁸⁰ CCMA Rule 26.

requirement. The labour broker will be able to show that the dismissal was fair if the provisions of section 189¹⁸¹ were observed.

Like every other employer faced with a failed commercial contract with a client or customer, the labour broker cannot rely on contractual clauses that purportedly automatically terminate employment contracts, but must consult with employees to avoid job losses, declare short time, or even commence retrenchments.

Therefore the Act should be amended to exclude the possibility of a labour broker relying on either of these scenarios to argue that an employee was not dismissed. This can be achieved in one of two alternative ways:

Section 186(1) could be amended to read:

Dismissal means that:

- (a) An employer has terminated a contract of employment with or without notice, **or the termination of that contract was triggered by an event which was unspecified or unknown at the time the contract was entered into;**

This would then provide that the happening constituted a dismissal. The fairness or otherwise of that dismissal would then be evaluated according to the usual principles.

Alternatively, section 198, which specifically deals with labour brokers, could be amended by the insertion of the following sub-section after sub-section (3):

(3A) Any term in a contract of employment between a temporary employment service and its employee that provides for its automatic termination in the event that -

- (a) The client no longer wanted the employee to work at its premises, or that**

- (b) The client cancelled the main service contract with the temporary employment service**

shall not be a valid term of that contract.

¹⁸¹ This section of the Act sets out the procedure to be followed when dismissing workers for operational requirements. In essence it requires there to be a 'joint meaningful consensus seeking process' in order that dismissals be avoided or their effect minimized.

The second proposal is more direct and clear, and is therefore to be preferred.

Amendment to provide that it is a dismissal when the employee is no longer working for the labour broker, notwithstanding that he is 'on the books'

That brokers claim that those who are on their books awaiting further assignment are still employees and have not been dismissed envisages an employment relationship that endures despite the fact that the employee is provided with neither work nor remuneration. As noted above this would appear to conflict with the definition of 'employee'. Nevertheless, as this is a common claim and as it is frequently upheld by judges and commissioners, the legislation must be amended to expressly provide that this situation constitutes dismissal.

Section 186(1) of the Act should be amended to include a new subsection (g) as follows:

Dismissal means that ...

(g) An employee of a labour broker has been removed from an assignment, and is no longer receiving remuneration.

Alternatively, a definition of the word 'employer' could be included in section 213 of the Act:

'Employer' means any person, including the state, who employs or provides work to an individual and who remunerates that individual'.

This second alternative would prevent a labour broker from claiming that a worker is still an employee notwithstanding that he is not receiving remuneration. It would not preclude the broker from denying that the employee was dismissed. The first suggested amendment is therefore to be preferred.

Problem Three: Evaluating the fairness of the dismissal

Judges and commissioners may be persuaded that it is difficult for a labour broker to properly investigate and discipline its employees, because it does not have access to the client's premises. Nevertheless, the constitutional rights of labour broker employees to fair labour practices must be upheld by legislation and tribunals. Labour brokers must

be required to adhere to the same standards of fairness when dismissing workers as all other employers. If this statutory duty is placed on labour brokers, they will be compelled to conclude contracts with their clients which provide for the necessary access and flexibility.

One way to achieve this would be to insert the following provision into section 198:

(4A) A temporary employment service must observe the provisions of sections 187, 188 and 189 of this Act, as well as the standards of fairness contained in the Code of Good Practice: Dismissals (schedule 8).

In addition, and in order to void the contractual 'automatic termination' clauses, section 188 could be amended to include a new subsection (3) as follows:

(3) The assertion by the client of a labour broker, or any other third party, that it no longer wants to have a particular employee on its premises shall not on its own constitute a fair reason for the dismissal of that employee by the employer.

A labour broker is then compelled to ensure that there is a fair reason, and that it follows a fair procedure, before dismissing an employee.

Problem four: Fashioning an effective remedy for unfair dismissal

Section 193 of the LRA provides that reinstatement or re-employment is the primary remedy for unfair dismissal, and with good reason: a compensation order, especially in a climate of low wages and high unemployment, cannot adequately substitute for a job. South African workers often support up to nine dependents, and the social ill-effects of such a bread-winner being unfairly unemployed are very serious.

However, arbitrators and judges cannot order reinstatement or re-employment of employees with the broker's client, because the client is not a party to the proceedings. Reinstatement with the broker itself is a hollow remedy because the broker's business is such that it can provide neither work nor income except through its clients. For this reason unfairly dismissed broker employees are given compensation despite the fact that

the Act prescribes that this remedy should only be resorted to under specified circumstances.¹⁸²

To resuscitate re-employment or reinstatement as the primary remedy where appropriate, section 193(1)(b) should be amended by the insertion of the following section (in bold):

193(1) If the Labour Court or an arbitrator ... finds that a dismissal is unfair, the Court or the arbitrator may –

(a) ...

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal, **which may include re-employment on the premises of a client of the employer provided that the client has been joined to the dispute [by the parties or by the Court or arbitrator.]**

Arbitrators and judges can then order re-employment with the same or another client, from any date.¹⁸³ The decision-maker can enquire as to suitable possibilities during the proceedings. Labour broker employees might become accustomed to referring their disputes against both client and broker, or the LRA dispute referral form 7-11 might be amended to require citation of both.

An alternative proposal is to include joint and several liability of the broker and the client for unfair dismissal. It is not clear however whether this liability would include liability for re-employment, and so the first proposal is to be preferred.

¹⁸² Which are that the employee does not wish to return to work, or that the circumstances are such that a renewed relationship would be intolerable, that it is not practicable to reinstate or re-employ, or that the dismissal was procedurally unfair only. Section 193(2) of the LRA.

¹⁸³ Most labour broker employees will have short service (provided 'temporary' is defined, as suggested in the following section), and so a provision for reinstatement is not necessary. The arbitrator can order re-employment from any date, which can entitle the employee to an appropriate amount of back-pay to compensate for any period of unemployment.

3. General Provision to prevent the abuse of section 198

Employers must be prohibited from placing their permanent staff ‘through the books’ of labour brokers, with the primary aim of avoiding their statutory duties of fairness towards those employees. Whilst judges and commissioners can find, as in *Khululekile Dyokhwe v Adecco Recruitment Services (Pty) Ltd and Mondipak*,¹⁸⁴ that section 198 does not apply in circumstances where the broker/client agreement is a sham, it would be better to expressly disallow this practice.

It has been suggested by Theron, Bosch and others that the word ‘temporary’ should be defined. Theron has suggested that ‘temporary’ should be limited to three or four months.¹⁸⁵ The employment security provisions in the Collective Agreement governing conditions in the Metal and Engineering Sector¹⁸⁶ limits the use of ‘labour broker’ workers to four-month contracts¹⁸⁷ and provides stringent conditions¹⁸⁸ for their use.¹⁸⁹

Section 198 of the LRA could be amended by the addition of a sub-section providing that ‘temporary’ means a period not exceeding four months. The section could also provide that an employee of a temporary employment service who works on the premises of a client for more than four months shall be deemed to have become the employee of that client.

This solution is not satisfactory, however, because some genuine temporary assignments may well last for more than four months. A rigid definition, or a provision making the employee automatically an employee of the client, will result in brokers and clients being forced to mechanically move workers around every four months. This would interfere with the efficient use of skills.

¹⁸⁴ CCMA case number WE 4323-09, date of award 8 July 2009.

¹⁸⁵ Theron supra n 37.

¹⁸⁶ Annexure A to the Consolidated Main Agreement in the Metal and Engineering Industries Bargaining Council, Government Notice R1041 published in Government Gazette 21462 of 3 October 2008.

¹⁸⁷ And to a maximum overall period of twelve months.

¹⁸⁸ Including having to register them with the bargaining council, and justifying the contract by showing that the employer has ‘secured additional work of a short-term nature’.

¹⁸⁹ Attempts to thwart this requirement by using successive 4-month contracts would be hit by the 12-month maximum provision. In addition, the limited duration contract would be invalid where the employer is unable to show a genuinely temporary or short-term increase in work-load. The consequence of invalidity of the written employment contract is that the worker, by virtue of performing work on the premises of the client, is an ordinary employee of the client.

It is preferable to amend section 198 to include a new sub-section 2A:

(2A) Despite subsections (1) and (2), a person who is a permanent employee of the client of a temporary employment service is not an employee of that temporary employment service, and his employer cannot channel his employment contract through a temporary employment service for the sole purpose of avoiding its statutory duties towards that employee.

Short-term measures pending legislative amendment

This dissertation proposes legislative amendments. However, law reform is often slow and it is likely that the statute in its present form will remain with us for some time. In the meantime, judges and commissioners should be alert to the potential circumvention of the rights of workers employed through brokers. Those tasked with applying the LRA can only uphold employee rights if they are thoughtful and aware. This section discusses some of the more difficult aspects of applying the law as it is, and suggests an interim approach.

Conscientious administration of the Labour Relations Act pending any legislative amendment

Section 3 of the labour Relations Act provides that:

- ‘Any person applying this Act must interpret its provisions –
- (a) to give effect to its primary objects;
 - (b) in compliance with the Constitution; and
 - (c) in compliance with the public international law obligations of the Republic.’

The primary objects of the Act as described in Section 1 include giving effect to the fundamental rights conferred by the Constitution, promoting ‘effective’ resolution of labour disputes, and providing a framework within which parties can ‘collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest’.

It follows that it must be the duty of judicial officers and arbitrating CCMA Commissioners to interpret and to apply the Act in such a way as to, as far as possible, prevent abuses which contravene these purposes.

As already suggested, some of the problems faced by the employees of labour brokers do not result directly from the legislation itself but rather from the exploitation by employers of insufficiently regulated areas.

The following four guidelines should help those tasked with applying the provisions of the Labour Relations Act in some of the more common difficult broker situations. The guidelines, discussed below, are that judges and commissioners should recognise disguised employment relationships, that they should not uncritically accept contractual provisions, that they should thoughtfully evaluate any claim that there has been no dismissal and that, where a dismissal was unfair, they should take extra care to fashion a meaningful remedy.

Guideline One: Recognise disguised employment relationships.

ILO Recommendation 198¹⁹⁰ provides that national policy should include measures to combat disguised employment relationships, which are defined as relationships where ‘the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee’ and where ‘contractual arrangements have the effect of depriving workers of the protection they are due.’¹⁹¹

Two recent decisions of the Labour Appeal Court dealt with disguised employment relationships. In both cases it was found that an intermediary employer was not the true employer, but was a mere vehicle enabling the employment of the employee. In each case the true employer was found to be the actual entity which had the use of the services of the employee.

In *State Information Technology Agency (Pty) Ltd v CCMA & others*,¹⁹² the employee could not legally be employed by the State Information Technology Agency (SITA)

¹⁹⁰ ILO R198 Recommendation on the Employment Relationship, 2006 (supra n 165) article 4.

¹⁹¹ R198 (supra n 165) article 4.

¹⁹² (2008) JOL 21836 (LAC).

because he had previously been retrenched, and a condition of that retrenchment was that he not be reemployed. When SITA subsequently needed his services, he entered into a 'contract of employment' with Inventus CC, through whom his services were rendered to SITA. When he was later dismissed, the court on appeal had to decide whether his employer was SITA, or Inventus CC. Davis JA held that his 'employment' by Inventus CC was nothing more than a 'stratagem' designed to circumvent the consequences of him being in reality an employee of the SITA. Applying the 'reality test', the court held that there was no doubt that the substance of the relationship was between the employee and SITA, and that any claim of unfair dismissal therefore lay against SITA and not against Inventus CC.

In *Denel v Gerber*,¹⁹³ Gerber worked for Denel but was remunerated through a separate company, Multicare Holdings CC. In terms of a contract between Multicare and Denel, Multicare rendered services to Denel, and Gerber was the person who would perform the work. The contract was later terminated. When Gerber claimed unfair dismissal, Denel said that she was not its employee but that of Multicare. Zondo JP of the Labour Appeal Court found that the parol evidence rule did not preclude it from looking beyond the contract concluded between Multicare and Denel: 'Any evidence that throws light on the true relationship of the parties is admissible and not excluded by the parol evidence rule.'¹⁹⁴ The court remarked that public policy could not allow contracts to be fashioned which had the effect of allowing employers to 'escape statutory obligations imposed on them for very good social reasons.'¹⁹⁵ The court found that Gerber was in reality an employee of Denel, because 'It is clear that in truth the respondent made over her capacity to produce to [Denel] and not to Multicare.'¹⁹⁶

Denel v Gerber is therefore authority for the proposition that an arbitrator must look beyond the contractual form of the relationship between the parties to a dispute, and to base the determination of the dispute on the reality of the relationship. In particular, an arbitrator must not allow a party to hide behind a disguised employment relationship in order to avoid or to circumvent its obligations in terms of the LRA.

¹⁹³ *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC).

¹⁹⁴ *Supra* n 193, from the headnote.

¹⁹⁵ *Ibid*, at para 199.

¹⁹⁶ *Ibid* at para 202.

However, neither the *SITA* nor the *Denel* case dealt with a labour broker situation. As has been shown, the problem with the LRA is that section 198(2) deems the broker to be the employer, regardless of the realities of the situation. This provision is widely exploited by labour brokers.¹⁹⁷

In *Khululekile Dyokhwe v Adecco Recruitment Services (Pty) Ltd and Mondipak*,¹⁹⁸ Mr Dyokhwe had been recruited by Mondipak but after two years was transferred to a labour broker, Adecco. Dyokhwe continued to work in the same position, but now under Adecco, for a further seven years. When in January 2009 his contract was abruptly terminated, Adecco denied dismissing him, saying that he was on their books awaiting further assignment.

The Commissioner first applied the ‘reality test’, as well as section 200A of the Labour Relations Act and the Code of Good Practice on Who is an Employee,¹⁹⁹ and found that in reality Dyokhwe was an employee of Mondipak, and not of the labour broker Adecco.

However, notwithstanding the realities, where an employee is employed through a labour broker, the Commissioner found that section 198(2) deems the broker to be the employer for the purposes of law. The Commissioner therefore considered whether section 198 applied to the relationship between Mondipak and Adecco, and found that the client-broker relationship was in reality a sham: the labour broking arrangement had no legitimate purpose and was *in fraudem legis*.

Because the contract between the broker and its client was nothing more than a stratagem designed to avoid the provisions of the Labour Relations Act (in particular Mondipak’s duty of fairness towards the worker Dyokhwe), section 198 did not apply

¹⁹⁷ For instance, in *Harwusa obo xzy v St Elmo’s Takeaways* CCMA case number WECT 8659-09 date of conciliation 4 May 2009, the employer, which faced economic difficulties but was reluctant to incur the expense of retrenching employees having over twenty years service, caused those unsophisticated employees to sign a one-month contract with a labour broker. The one-month contract came to an end, and was not renewed. When these long-standing employees referred a case against St Elmos to the CCMA, St Elmos argued firstly that it was not their employer, and secondly that there had been no dismissal because the contract had come to an end. This case was settled at conciliation; however it provides another example of a case in which the arrangement between the client-employer and the broker was in all probability *in fraudem legis* and therefore void.

¹⁹⁸ *Supra* n 184.

¹⁹⁹ GN 1774 of 2006.

and the broker Adecco was therefore not deemed to be the true employer. Mondipak was held liable for the dismissal of Mr Dyokhwe, which was held to be unfair.

It is suggested that judges and commissioners be wary of disguised employment relationships in the labour broking context. The first question to be determined in every instance is the identity of the true employer, because it is that employer that is the duty-bearer towards the employee.

The judge or commissioner should ask herself in every instance whether section 198 applies to the particular circumstances before her.

It is suggested that section 198 will not apply if:

(a) The broker is not a TES as defined

Section 198(1) defines a TES to be a person 'who, for reward, procures for or provides to a client others persons ...'. In *Laurence v Eximus and Staffing Direct*²⁰⁰ the employee was recruited, interviewed, appointed, trained and managed by Eximus, but was on her first day of work given a contract to sign in the name of labour broker Staffing Direct. Staffing Direct therefore did not 'procure' or 'provide' the employee to Eximus, and was not, in relation to Laurence, a TES as defined. Section 198(2) deeming the broker, and not the client-employer, to be the employer, did not apply, and, when the employee challenged her eventual dismissal, the commissioner found that the real employer was Eximus, stating that her notional employment by Staffing Direct was 'merely a convenience issue'.²⁰¹

(b) The contract between the TES and its 'client' is a sham designed to avoid labour legislation

Section 198(2) of the LRA deeming the broker, and not the client, to be the employer for the purposes of labour law, will not apply if the broking arrangement between the TES and the client does not serve a legitimate purpose (the genuine provision of fill-in labour where the client has a fluctuating or temporary need) and if it is not genuine – that is, if it is a sham, the sole purpose of which is to circumvent the LRA. One indication that an arrangement is not genuine is that workers occupying continuing positions are recruited

²⁰⁰ CCMA case number WE 5199-09 date of award 30 July 2008.

²⁰¹ Ibid at para 29.

by a company (as in Gqamani's case)²⁰² but their contracts are administered 'through' a labour broker,

Guideline Two: carefully evaluate prejudicial contractual provisions

A variety of contractual provisions between labour brokers and employees were described in Chapter 3. Many of these are provisions which purport to terminate contracts in ways which preclude any interpretation of such termination as dismissal.

As pointed out in that Chapter, the *FNB*²⁰³ judgment poses a potential challenge to the ability of commissioners to find, as in *Monakili*,²⁰⁴ that such clauses are *contra bonos mores* and therefore invalid.

However, commissioners confronted with employment contracts between labour brokers and their employees need not uncritically accept such contracts at face value.

Firstly, the rules of evidence require that the document be an original²⁰⁵ and that its authenticity be proven.²⁰⁶ Also, the parole evidence rule²⁰⁷ does not preclude a party from leading evidence to show that a document does not accurately reflect the actual consensus between the parties, or that it was never intended to be a binding contract.^{208,209}

Secondly, South African contract law follows the 'will theory', and not the 'declaration theory': the substantive intention of the parties to an agreement is what is determinative.²¹⁰

²⁰² Supra n 4.

²⁰³ Supra n 86.

²⁰⁴ Supra n 80.

²⁰⁵ PJ Schwikkard and SE van der Merwe *Principles of Evidence* 2ed Juta 2002 at 373.

²⁰⁶ Op cit at 375.

²⁰⁷ Which provides that, when a contract is reduced to writing, that writing is taken to be the exclusive memorial of the transaction, and that no evidence may be led to prove its terms other than the document itself, see *Union Government v Vianini Pipes (Pty) Ltd* 1941 AD 43 47.

²⁰⁸ *Denel v Gerber* (supra n 193).

²⁰⁹ See also *Michelle Drummer v Polaris Capital*,²⁰⁹ CCMA case number WE 16842-08, date of award 13/5/2009, where the Commissioner held that: 'in my view, First National Bank is authority for the proposition that commissioners do not have the power to set aside an existing agreement on the basis that it is invalid.'

²¹⁰ See, for example, van der Merwe et al *Contract: General Principles* 2 ed (2007) at page 19.

Thirdly, and notwithstanding the constraints imposed by valid contracts, an arbitrator is in addition required to look beyond the form of the contractual relationship, to determine the reality of the situation. In *Denel (Pty) Ltd v Gerber*²¹¹ the Labour Appeal Court found that, were an arbitrator to be confined to the contract itself:

‘parties could deprive it of jurisdiction by agreement, and elevate form above substance. This would be untenable. The label given by the parties to their relationship is of no assistance. Any evidence that throws light on the true relationship of the parties is admissible and not excluded by the parol evidence rule. The court a quo was accordingly correct when it decided to look beyond the contract and hear oral evidence.’²¹²

It is the contention of this dissertation, therefore that irrespective of the *First National Bank* decision, an arbitrator is required to:

- Examine any contract or agreement for the purposes of ascertaining:
 - Its authenticity
 - Its status as a representation of an actual consensus
 - Its status in relation to statutory rights
- Look beyond the words of the contract to ascertain the real nature of the employment relationship

Such investigation would be only appropriate in the circumstances. Most labour broker employees are unskilled, and many have had limited formal education. There are still many illiterate workers in South Africa. These workers form a group that is vulnerable to exploitation; they are therefore most in need of the protection of the statute. Whilst a labour broker employee may well understand that his employment status is less assured than if he were formally a permanent employee, he is less likely to understand the complex legal effect of his having been employed through a labour broker on his LRA rights. A person cannot waive a statutory right, unless in full knowledge of the right and its waiver,²¹³ and it is on that basis unlikely that labour broker employment contracts purporting to exclude basic statutory protections are valid.

²¹¹ Supra note 188.

²¹² I have quoted from the headnote which draws on paras 20-22 of Zondo JA’s judgment.

²¹³ *Mohamed v President of the RSA* 2001(3) SA 893 (CC); *Laws v Rutherford* 1924 AD 261.

Judges and commissioners must be alert to attempted rights violations where labour brokers rely on unfair contractual terms.

Guideline Three: carefully evaluate any claim on the part of the broker that there has been no dismissal.

Commissioners are required to determine cases in which the TES acknowledges that the employee no longer has work or an income but contends nevertheless that the employee has not been dismissed. There are two common arguments used to support this contention:

1. The contract has terminated ‘automatically’ or ‘by operation of law’;
2. The worker is still an employee because she remains on the books of the TES.

Contracts that are said to have terminated ‘automatically’

In such cases, the TES argues that the contract terminated ‘automatically’ or ‘by operation of law’, because of a term in the contract that provided for its termination based on some future uncertain event (such as the client no longer wanting to make use of the worker’s services).

It is arguable that there are contracts which terminate ‘automatically’ or ‘by operation of law’ but that this category only includes those which have clear and defined end points. Examples would include:

- Limited duration contracts in which the end date is actually agreed between the parties and recorded in the contract at the time it is signed²¹⁴
- Limited duration contracts in which the duration of the contract is determined by the completion of a task or set of tasks, suitably defined, agreed upon and recorded when the contract is signed.

Even in these cases, it is still open to an applicant to argue that he was dismissed in terms of the section 186(1)(b) definition of dismissal: that ‘an employee reasonably

²¹⁴ Testimony from workers indicates that copies of contracts are almost never supplied to them. It also appears that end-dates are often not filled in when the contract is signed. Usually, but not always, they are added later, when the broker wishes to dismiss the employee.

expected an employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it’.

However, in instances in which the contract is said to be determined by date, but the date is only inserted *ex post facto* when the broker wants the contract to end, or in which a task is said to have been completed but that task was not suitably defined in the contract, it is arguable that the contract is in fact not a fixed term contract at all. Where the contract is said to have terminated ‘automatically’ in circumstances that look like an unfair dismissal (for instance, the client accused the worker of misconduct, and asked for him to be removed from the site) then it is probable that the worker has indeed been dismissed by the employer TES.

A party cannot contract out of statutory rights. TES contracts often state that the contract will terminate automatically and that ‘such termination shall not be a retrenchment or a dismissal’. Nevertheless, it might indeed be a dismissal as defined in the LRA.

Workers who are said to be not dismissed because they are ‘on the books’

Where the broker denies dismissing the worker using the argument that she is still an employee because she remains ‘on the books’, the cases of *Numsa obo Daki v Colven Associates Border CC*²¹⁵ and *Smith v Staffing Logistics*²¹⁶ should be followed. As discussed in Chapter 4, ‘employee’ is defined as someone who ‘works’ for or ‘assists’ an employer and who ‘receives or is entitled to receive remuneration’. This definition clearly does not encompass someone who is sitting, unpaid, at home, waiting for an assignment that may never come.

²¹⁵ Supra n 90.

²¹⁶ Supra n 91.

Guideline Four: labour brokers must be held to the same standards of fairness as other employers

Whilst a labour broker might have difficulty in securing access to a client's workplace to properly investigate allegations against its employees, commissioners and judges must nevertheless uphold the statutory right of employees not to be unfairly dismissed.

Labour brokers must be held to the same standards of fairness when dismissing workers as all other employers.

Guideline Five: if a dismissal was unfair, fashion a meaningful remedy

In every case involving an unfair dismissal by a labour broker, the arbitrator must fashion a meaningful remedy, bearing in mind the primacy of reinstatement (which is the preferred remedy in terms of section 193 of the Act). All too often arbitrators award compensation, because reinstatement seems impractical. Whilst there is little to be gained by reinstating a worker into an assignment which is almost over, or into a 'pool' where he may wait for a long time for another assignment, a compensation order does little to combat the social ill effects of unemployment. Where the assignment was long-term, or even, in reality, of indeterminate length and akin to a permanent position, care must be taken to place the worker back in the situation he would have been in but for the unfair dismissal.

TESs often insist that the client no longer wants the employee and that they are therefore incapable of placing her. In such a case an arbitrator may well require an employer to prove, and not just to allege, that the client will no longer accept the worker back on its premises.

Also, diligent and detailed enquiries on the part of the arbitrator might in some instances reveal workable solutions. For instance, it may be possible to order the re-employment of a labour broker employee into a position which has been identified by the arbitrator, through proper questioning of the broker at arbitration, to be comparable in its value to the employee to the one from which he was unfairly dismissed – possibly just with another client.

In all instances, and in the final analysis, special care should be taken to protect the rights of these vulnerable workers. Where such a worker has been unfairly dismissed the decision maker must, as far as possible, place the employee back in the financial and social position he would have been in, but for the unfair dismissal.

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Conclusion

Labour broking is a growth industry. Its competitive advantage lies in its ability to offer employers labour that is both cheap and relatively unprotected. This niche market, exacerbated by competition within the labour broking market itself, creates a pressure on labour brokers to exploit weaknesses in the legal framework of the LRA.

The LRA's weaknesses that have been revealed through this social process lie in the areas of collective bargaining and protection against arbitrary dismissal. Employees of labour brokers are effectively deprived of collective bargaining rights, as well as being subject to precisely the type of arbitrary treatment by employers that the LRA was intended to prohibit. Exploitation of these weaknesses has become a key selling point for labour broking services. The legislative fiction deeming the labour broker to be the employer has provided employers with immunity as statutory tribunals such as the CCMA have struggled to address the real relations of employment.

This niche market is built on a limitation of constitutional rights that is both unintended and unjustifiable. The limitation runs directly counter to the central thrust of the LRA as the key piece of legislation enacting the constitutional right to fair labour practices. It therefore requires amendment.

This dissertation has proposed an amendment of the definition of 'workplace' (to include the principal place of business of a labour broker), to enable unions to organise and represent labour broker employees.

Proposals to protect employment security include:

- Amending section 186 (the definition of dismissal) to provide for additional circumstances in which an employee will be considered to have been dismissed;
- Amending section 188 (unfair dismissals) to explicitly provide that it is not a fair reason to dismiss a worker that the client does not want that worker;
- Amending section 193 (remedies for unfair dismissal) to allow an arbitrator to order re-employment with a client of a labour broker if the dismissal was unfair;

- Amending section 198 to provide that temporary employment services must observe the same standards of fairness in dismissal as other employers, and
- Amending section 213 to define 'employer', so as to clarify that being 'on the books' of a broker (without work or pay) does not constitute an employment relationship.

Pending legislative amendment, commissioners and judges must be circumspect in their application of section 198. Clauses that purport to tie workers' employment contracts to commercial relations between the employer and third parties should not be permitted to relieve employers of their duty to dismiss fairly, whether the reason for dismissal be operational requirements, conduct or capacity. Tribunals must be alive to the abuse by employers of contractual provisions which aim to circumvent legislation, and must not hesitate to declare such provisions invalid. Judges and commissioners should never lose sight of the overall scheme and purpose of the Labour Relations Act, in giving expression and substance to the rights of every South African worker to collectivise to improve terms and conditions of employment, and to enjoy basic security of employment.

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