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Would an outright ban on labour brokers leave a sour taste in the wine farmer's mouth?



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Abstract.

In this dissertation I will assess the impact that an outright ban on labour brokers would have on the agricultural sector in the Western Cape, and more specifically on the wine farms in this region. By utilising both existing, and original research, I will examine how the existing definitions of ‘decent work’ compare with the reality of workers’ lives within this sector, bearing in mind the somewhat unique working relationship that exists between these farmers and their workers¹. Special attention to the regulatory frameworks that our current legislation, particularly section 198 of the LRA,² section 82 of the BCEA,³ the SDA⁴ and COIDA⁵ provide for in terms of regulating and enforcing standards within the labour broking industry, and an overview of the current labour economics within this sector will help us to understand how the ‘price of this labour’ (wages) is determined, and what degree of social security is provided for these workers. This will in turn allow us to explore the legitimacy of claims that labour broking substitutes and subverts the supply of decent jobs, ‘de-skills’ the workforce, denies them their constitutional right to collective bargaining⁶ and ultimately undermines their entire social security entitlement.

Careful consideration of all this information will then allow us to take a firm position on what the impact on the Western Cape agricultural sector would be if an outright ban on labour broking was imposed, whilst also allowing us to plot a potential way forward.

¹ Primarily as a result of their historical interdependency on one another and the inequality in bargaining power that has always characterised this relationship.

² Labour Relations Act 66 of 1995.

³ Basic Conditions of Employment Act 75 of 1997.

⁴ Skills Development Act 97 of 1998.

⁵ Compensation for Occupational Injury and Diseases Act 130 of 1993.

⁶ Section 22 of the Bill of Rights in the South African Constitution. (1996).

Section 1: An introduction to the changing face of work.

The provision of ‘decent work’⁷ is fast becoming the holy grail of sustainable socio-economic development frameworks around the world. Labour law legislators and governmental departments across the globe continue to grapple with the inherently dichotomous stand-off that exists between the economic viability of providing a skilled, motivated and flexible workforce, and the undeniable costs linked to the provision of a social justice and security system that can effectively protect this workforce.

Right now in South Africa we have both, the Minister of Labour,⁸ and the countries’ largest trade union⁹ calling for an outright ban on labour broking because they believe that this form of triangulated employment is based purely on commercial greed, and has turned the provision of labour into ‘a form of human trafficking’.¹⁰

When the spotlight is turned onto the agricultural sector, some interesting facts emerge. Whilst the income earned from agricultural activity only accounts for about 4% of South Africa’s Gross Domestic Product (GDP), it does account for some 10% of the countries’ total reported employment.¹¹ Approximately 57 000 large scale commercial farming enterprises employ in excess of 1 million permanent labourers, whilst another 240 000 small scale farmers provide a livelihood to around 1 million family members, and

⁷ As defined by the International Labour Organization’s Decent Work Agenda published in July 2006.

⁸ Mr. Membathisi Mdadlana.

⁹ Congress of South African Trade Unions. (COSATU)

¹⁰ Minister of Labour’s reaction to Department of Labour research (2009) that employees engaged by labour brokers were paid significantly less than permanently employed employees, in spite of the fact that they were all doing the same work.

¹¹ www.OCED.org (Review of Agricultural policies – South Africa. April 2006.)

‘occasional employment’¹² to another 500 000 people. In addition to that, there are an estimated 3 million subsistence farming operations spread throughout the country.¹³

South Africa’s wine industry is concentrated in the Western Cape and has over 3 800 farmers producing grapes. In global production terms this makes us the 7th biggest producers of certified wine, albeit that we only produce about 3, 6% of the world’s wine.¹⁴ (Whilst we produce just over 1 billion litres of wine, the French produce in excess of 5,34 billion litres – And our modest consumption of just 7,5 litres per capita is dwarfed by the Gaul’s consistent per capita figure of 53,9 litres.)¹⁵

The wine and fruit industry in the Western Cape employs around 200 000 people, of which approximately 60% are seasonal (not full-time or permanent) workers.¹⁶ Our participation within global markets demands that our products are internationally competitive, and that, combined with the ever increasing mechanisation on our farms has led to a larger and larger demand for flexible workforces. This growing trend in casualisation has seen a comparative increase in the number of registered labour brokers. (This is evidenced by the fact that in 1996 there were just over 50 registered labour brokers, and just 8 years later that number had risen to over 200.)¹⁷

Labour brokers undoubtedly play an integral role within the Western Cape agricultural labour market. But before we can accurately quantify the extent of their influence we need to understand how they evolved within the overall labour force demand framework.

¹² This term describes work done on a largely unregulated, sporadic and part-time basis.

¹³ www.sirtewaterandenergy.org (National Investment Brief – South Africa. December 2008.)

¹⁴ www.sawis.co.za (S.A. Wine Industry Statistics – 2009.)

¹⁵ Ibid.

¹⁶ www.OCED.org

¹⁷ Theron, J et al. (2005) The rise of labour broking and it’s policy implications. Development and Labour Law Monographs 1/2005, Institute of Development and Labour Law, University of Cape Town.

Section 2: ‘Decent Work’ - What is it, and how does it fit into the typical agricultural workers context?

By definition, farming’s seasonal workloads demand the utilisation of seasonal labour.

The protection of agricultural workers rights, and their ability to defend themselves against unfair labour practices, have been specifically addressed by the International Labour Organisation (ILO) for over eighty years now – ever since they first published their Right of Association (Agricultural) Convention (No 11) in 1921. Thereafter individual conventions relating to farm workers rights to sickness insurance,¹⁸ old age insurance,¹⁹ minimum wages,²⁰ holidays with pay,²¹ and health and safety²² guarantees have all been published.

Over the past twenty years there has been an enormous groundswell of economic and social change throughout the world. This globalisation has significantly altered the nature of work and the relationships binding employees and their employers. The consequent casualisation of labour has dramatically affected the access that employees have to social security, essentially making workers more vulnerable and employers less

¹⁸ Sickness Insurance Convention 1927 (No 25).

¹⁹ Old Age Insurance Convention 1933 (No 36).

²⁰ Minimum Wage Fixing Machinery Convention 1951 (No 99).

²¹ Holidays with Pay Convention 1952 (No 101).

²² Safety and Health in Agriculture Convention 2001 (184).

accountable. The ILO's response to this has been to publish the Private Employment Agencies Convention²³ and the Decent Work Agenda.²⁴

Our own labour legislation in South Africa has made quantum leaps in terms of redressing previously entrenched racial discrimination, and has also developed dedicated legislation pertaining to the triangulated employment relationships²⁵ that have evolved from the aforementioned casualisation. It is amongst these casual, informal, seasonal, short term, part-time, sub-contracted and outsourced forms of 'atypical' employees that the labour broking industry has evolved, into the estimated 500 000 strong, R26 billion industry²⁶ that is today.

The question that remains is how much protection does our current legislation offer to these atypical workers, and our seasonal farm worker, in particular?

²³ Convention 181 of 1997, which controversially sanctions the fact that a labour broker is entitled to offer lesser social protection to his/her employees than that provided for in a standard employment relationship. It should be noted that South Africa has not ratified this particular Convention.

²⁴ Announced in 2007, it requires that work is productive, delivers a fair income, and provides security in the work place, social protection, better opportunities for personal development, freedom of association and equal opportunity for all men and women. (Ref: www.ilo.org.)

²⁵ Specifically section 198 of the LRA, and section 82 of the BCEA.

²⁶ www.naledi.org (Research working report – July 2009.)

Section 3: Labour brokers within the South African labour context.

In spite of the fact that section 24(1) of the Skills and Development Act (97 of 1998) requires that, *‘Any person who wishes to provide employment services for gain must apply for registration as a private employment services agency to the Director-General in the prescribed manner.’* no one really appears to know just how many active labour brokers there are, nor how many people are employed by these brokers. In the small Boland town of Grabouw it is estimated that up to 150, mostly unregistered, (‘bakkie brigade’) labour brokers are in operation on a daily basis.²⁷

We need to understand how labour broking evolved in South Africa.

Ever since the discovery of gold and diamonds in South Africa there was a need to manage large scale work forces. By 1913²⁸ the State had already shown that they were willing to create legislation that would allow for the mining houses to secure cheap labour. The similarly heavy handed response by General Smut’s government to a mineworker strike in 1922 further endorsed the view that labour was essentially there for the benefit of the employers.

Even though labour brokers had become a firmly established part of the labour market during the first half of the 1900’s, it wasn’t until the 1983 amendments to the definition of an employee in the LRA²⁹ that ‘labour brokers’ were legally defined as the employers of any workers that they had placed at their Clients premises. (Based on the proviso that

²⁷ www.crls.org.za Briefing Paper: Going for Broke: A case study of labour brokerage on fruit farms in Grabouw. (2008)

²⁸ Native Land Act. (27 of 1913.)

²⁹ Labour Relations Amendment Act 2 of 1983.

the broker was the one that paid the worker his/her remuneration.) By 1995 the LRA (Act 66 of 1995) had renamed these labour brokers, 'temporary employment services' (TES's). This legitimized triangular employment relationship was carefully structured to create an equitable balance between the flexibility that modern economies demanded of employment relationships, whilst still providing an acceptable level of social security. Having said that, it still clearly 'commodified' the workers contribution. These TES's were still defined as the workers employer, however the Clients were now made jointly and severally liable for breaches of the BCEA³⁰, any sectoral determinations, collective agreements and arbitration awards. Unfortunately this joint liability never included any protection against unfair dismissal. It was also somewhat self defeating in that any legal proceedings in the Labour Court, and CCMA,³¹ remained restricted to 'employees' and 'employers' alone. This procedural restriction clearly stopped any workers from taking legal action against their Clients, since these Clients were not deemed to be their employers.³² Consequently the workers vulnerability to being summararily withdrawn from the Clients workforce, as well as their inherent lack of social security provision remained in place.

This development of a two tier labour market was formally introduced by the South African Foundation in 1996. It was suggested that the first tier be made up of all those people employed in the formal sector. In other words, it would include all those people that had a standard employment contract which provided them with comprehensive employment condition guarantees, protection against unfair labour practices and significant social security benefits including sick/maternity leave, compensation for injuries, severance pay, unemployment insurance and provident fund membership.

³⁰ Basic Conditions of Employment Act 75 of 1997.

³¹ Commission for Conciliation Mediation and Arbitration. Established 1996.

³² *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* (2005) 26 ILJ 2224 (CCMA). The CCMA was found to have no inherent, or given, power to declare contractual terms invalid.

The second tier of worker was created to absorb all those people who could not find jobs in the formal sector, and had been forced into accepting work in the informal sector. This informal sector however, contained no regulatory frameworks, or employee protection whatsoever, and was consequently characterised by exploitation and abuse. Based on the fact that the cost of employing people in this first tier was too high to be financially viable across the entire labour force, it was proposed that these second tier workers should ‘*operate under an amended legal regime.*’³³ This amended regime would allow employers to escape the costs associated with first tier employee protection and rights, whilst still affording these previously unprotected informal workers some degree of fundamental working condition standards and basic protections. Those legislators that were initially opposed to the idea of having two different bodies of labour law, had to concede that the overall benefits available from even an amended set of legal rights would provide people working in the informal sector with a significantly enhanced status. Temporary employment services (TES’s) were developed specifically to launch and sustain this two tier labour market.

The Skills Development Act (SDA) currently defines labour brokers as ‘private employment service agencies’ and requires them to register as employers with the South African Revenue Services, Unemployment Insurance Fund, the Workman’s Compensation Fund, Sectoral Education and Training Authorities and Bargaining Councils.

The Employment Equity Act (55 of 1998) requires that the Client and the labour broker (now legally renamed a TES), be jointly and severally liable for any acts of unfair discrimination. The other key aspect of this particular piece of legislation that is worth

³³ This SAF Report (1996) suggested that these amended rules include, ‘a bargaining process where rules concerning strikes, lock outs etc influence the level at which parties are eventually prepared to settle’, non wage costs such as medical and provident fund provisions, job-security provisions and the costs of industrial action. (p 102 – 103.)

noting here, is that any affirmative action appointee who is placed at a Client for a period exceeding 3 months can also look to the Client as his/her employer.

The Client is also the employer when it comes to compliance under the Occupational Health and Safety Act (85 of 1993), but is exempt from 'employer responsibility' when issues arise pertaining to the Compensation for Occupational Injuries and Diseases Act (130 of 1993).³⁴

Then, in 2002, amendments to the LRA (Sec 200 A) and the BCEA (Sec 82 A) introduced a rebuttable presumption that re-defined the employee/employer relationship even further. Eg: If a person worked for more than 40 hours per month for the same Client, or was economically dependant on the Client, or if the Client provided the workers 'tools of the trade', it could be deemed that the worker was entitled to employee rights. This effectively stopped TES's and Clients from trying to pass off employees as independent contractors.³⁵

If all these disparate definitions of an 'employee' leave you a little confused, then just imagine how confused the majority of semi-literate seasonal grape pickers are.

³⁴ *Crown Chickens (Pty) Ltd. t/a Rockland Poultry v Rieck* (2007) 2 SA 118 (SCA)

³⁵ *LAD Brokers (Pty) Ltd v Mandla* (2001) 22 ILJ 1813 (LAC).

Section 4: A look at the historical development of the labour broker / farm worker relationship.

Throughout Africa's history, colonisation has resulted in the indigenous people being dispossessed of their land and forced into, what can best be described as, paternalistic relationships with the new land owner. Apartheid in South Africa further expanded this systematic displacement of people and entrenched the gross inequality in bargaining power between the farm worker and the farm owner. Farm workers who had often previously been farmers and landowners themselves were turned into labour tenants.

Fifteen years into post-apartheid South Africa it is indeed sad to see that this gross inequality between farmers and their workers has effectively been replaced by a similarly disproportionate relationship between the 'bakkie broker' and his workers. These brokers' ability to withdraw any worker from his team, without any prior notice leaves the workers entirely dependent on the broker. In addition to that, the lack of any contractual obligations, in respect of payment on rainy days or public holidays, UIF registration, or medical support, and the fact that the workers are often reliant on the brokers transport to get to work, has simply re-created the grossly unfair and inhumane working conditions that all of our post apartheid labour legislation development has endeavored to eradicate.

Section 5: A profile of the role that labour brokers currently play in the agricultural sector of the Western Cape.

(5.1) Market overview.

There are two distinctly different ways that a farmer can go about utilising the services of labour brokers to provide part-time or seasonal workers.

Established companies such as The Workforce Group, Industaff Solutions, Umkhonto Labour Holdings and the Grabouw Labour Bureau are all specialist labour broking companies that are run in strict accordance with all the legal guidelines detailed in our current labour law legislation.³⁶ Each of these companies is registered as a Temporary Employment Service provider, and all of their workers are registered for Unemployment Insurance and Workmen's Compensation. These labour brokers sign written contracts with each farmer that they work with, which includes details of the wages to be paid to each worker as well as the administrative fee that they charge for the effective administration of their employees. The duration of each contract is also clearly specified, and is usually based on a weekly/monthly end-date, or alternatively linked to the completion of a specific task. In some instances an on-site foreman, or supervisor, is included to streamline the day to day management and control of these seasonal employees. Productivity bonuses are also often an integral part of these contracts. Weekly timesheets are submitted to the Client (farmer) which reconciles the work completed by each employee during that week, including any overtime payments due, and the deductions required to pay their UIF and Workmen's Compensation subscriptions. Throughout the duration of any contract the farmer will also ensure that ablution facilities and a rest/eating area is provided for these employees.

³⁶ LRA, BCEA, EEA, SDA and COIDA.

Unfortunately, due to a lack of reporting and enforcement of regulations pertaining to the registration of TES's it is impossible to accurately gauge exactly what share of the 'labour broking market' these established companies control. However, since it does appear that their preferred usage is amongst the larger farms (in excess of 80ha) it can be fairly conservatively estimated that the majority of farm owners are still utilising the services of the 'bakkie brigade'³⁷ labour brokers. (A detailed description of how this 'bakkie brigade' operates is included in the published research discussed below.)

(5.2) A review of published, and original, research regarding labour brokers in the Western Cape agricultural sector.

The Centre for Rural Legal Studies have recently released the results of their 2007/2008 research aimed at 'developing a greater understanding of the specific experiences of farm workers in relation to labour brokers.'³⁸ This involved sectoral consultations with key role players (trade unions and farm worker civil society organizations), structured interviews with farm workers (both permanent and part-time employees), labour brokers, farmers, and NGO representatives.

An overall perspective of their findings paints a fairly gloomy picture of non compliance and exploitation.

³⁷ In the majority of instances these labour brokers are ex farm workers (foreman or supervisors) who have been retrenched and now live in informal settlements, and provide a service to farms within a 30 to 50 km radius. (www.crls.org.za carries details of the research sample used to establish this profile.)

³⁸ Briefing Paper: Going for Broke: A case study of labour brokerage on fruit farms in Grabouw. (Available on www.crls.org.za.)

The 12 labour brokers interviewed in their survey were all ‘bakkie brigade’ brokers. In other words they were all unregistered. None of them had any post school education or training. They had all previously been permanent farm workers themselves, but now lived in poor conditions in a nearby settlement, and said that they were barely making a living.

Workers placed by these brokers are quoted³⁹ as saying that, ‘... *at the end of the week I come home with just R30.00 We travel on overcrowded bakkies and I once fell off the bakkie We have no written contracts....we have no guarantee regarding the minimum wage to be paid.*”

This research, in spite of its obvious skew towards unregistered labour brokers, was however able to identify two very interesting demographics that have developed within this sector of the labour broking environment.

(1) Almost 40% of these workers are women. This trend towards the ‘feminisation of labour’⁴⁰ has been growing steadily within the agricultural sector because it is all too easy to offer unskilled work, only required on an irregular basis, to someone that will traditionally be prepared to accept a lesser wage. This entrenched gender difference in earning is still a very real part of poverty stricken family dynamics in the agricultural sector. All their household and childcare work is seen as unpaid labour, and coupled with the bias that exists in their access to skills training they are prepared to work for less just to ensure that the household gets a little extra money.

³⁹ Ibid.

⁴⁰ Ibid p7.

(2) An alarming 8% of workers supplied by the 'bakkie brigade' are children. Just as the abovementioned gender discrimination with regards to wages still exists on farms, so does the incidence of utilising child labour also persist. Children below the age of 18 often abandon school, and are then encouraged to add some money to the household earnings. In commercial farming conditions they may well encounter hazardous working conditions, long hours and the inevitable physical or verbal abuse from older workers. Unscrupulous labour brokers are consequently complicit in this exploitation and therefore require far stricter control measures imposed upon them.

This research also confirmed another very disturbing development that has evolved along with the use of 'bakkie brigade' labour brokers, in that the historical power imbalances that underpinned the apartheid era worker-farmer relationships have been perpetuated in this broker-farmer relationship. The over supply of readily available unskilled labour on the brokers side, and the farmer's ability to summarily dismiss any temporary worker has unfortunately, clinically undermined all of the upliftment ideals contained in our current labour legislation.

My own original research⁴¹ whilst preparing this paper, involved face to face interviews with five labour brokers (three of whom were well established, registered labour broking firms, and two 'bakkie brigade' operators), thirty one workers from across this spectrum of brokers, three viticultural consultants, three wine farm owners and two labour law consultants based in Cape Town and Stellenbosch.

Predictably, an enormous chasm exists between the services and benefits that the established brokers offer their employees, and the way in which the 'bakkie brigade' brokers exploit and abuse those people that work for them. The established brokers

⁴¹ See attached Employer data sheet, Employee data sheet and Research Findings documents that summarise how this research information was obtained, and what the headline findings were.

prefer to utilise a fixed term (one week, two week, one month etc.) or project based (planting two hectares of poles, pruning three hectares of Cabernet etc.), description as the basis for each contract. As discussed in section 5(1) all the necessary employee registrations are put in place and the broker and clients joint liabilities are identified and agreed upon. Whilst this adherence to all the current legal requirements substantially increases these employees employment security, this research still identified a number of crucial areas that need to be addressed. These include the lack of accumulated paid leave privileges and maternity benefits, the continued threat of summary dismissal, and the absence of both an effective collective bargaining structure, as well as a longer term social security programme. The provision of free housing, water and electricity to permanently employed farm workers (who live on the farm) was one of the key differentiators (and leverage providers) that distinguished this sector of employees from most others. Unfortunately the number of workers living on farms has steadily decreased over the past 10 years. (A detailed explanation for this dynamic is provided in section 7(3).)

My own findings in terms of how ‘bakkie brigade’ brokers operate, and the litany of complaints that their workers have, was mirrored by the findings of the research published by the Centre for Rural Legal Studies. (viz a viz: There is on-going gender discrimination, no minimum wage guarantee, and no sick pay / rainy day / severance / accumulated leave or maternity pay. None of the workers are registered for UIF or Workmen’s Compensation either.) The over riding sentiment amongst all the people who worked for this ‘bakkie brigade’ was one of desperation – whilst they knew that they were getting a ‘raw deal’ they also knew that any number of their unemployed neighbours would jump at the chance to replace them.

Section 6: An overview of the farmer's role in managing seasonal or part-time labour requirements.

During the cold wet winters, whilst the vines are growing, the farmers will always need far fewer workers than when harvest time comes round early in the New Year and a frantic rush ensues to pick everything before it starts to go rotten. Immediately post harvest its quiet again for a couple of months until the pruning season arrives, and then once again there's a limited window period during which all the pruning has to be completed.

These seasonal fluctuations in any farmer's labour requirements are a reality, and are precisely the reason why the casualisation of labour has become such a growing trend in the agricultural sectors of countries across the world. Casualisation allows for the requisite workforce flexibility, and simultaneously alleviates the farmer from some of the more onerous legal obligations that most standard contracts of employment would bind them. (Whilst also providing a quantifiable cost saving in most cases.)

Unfortunately it has also become the accepted norm in most countries that part-time workers are paid an hourly, or piece-meal,⁴² rate but are excluded from the extended range of benefits and social security privileges normally afforded to permanent employees - hence their vulnerability to summary dismissal, lack of compensation for injury and no prospect of leave pay.

⁴² Piece-meal refers to payment that is related directly to work performance – e.g. being paid per basket of grapes picked, or per row of vines pruned.

A large number of farmers also believe that migrant labourers⁴³ are preferable to local labourers since they do not have established networks within the local area, and are generally less assertive when it comes to demanding specific working conditions and/or rights. This lack of collective bargaining power undermines all workers in South Africa's agricultural sector.

However, the pivotal role played by most farmers within this labour broking scenario is that they simply abdicate all responsibility for the protection of their part-time workers rights. Even the local research undertaken by the Woman on Farms Project⁴⁴ highlighted the fact that '*farmers agree that massive potential exists for the abuse of workers.*'⁴⁵ Most farmers unfortunately just turn a blind eye to this on-going exploitation and thereby exacerbate the problem.

The obvious question therefore is whether or not a system can be successfully implemented that enforces both stricter controls and joint liability. Or do we simply ban labour brokers outright? The following analysis of the key issues surrounding this debate should help us in finding a way to resolve this 'regulation versus banning' dilemma.

⁴³ The United Nations definition of migrant labourers includes anyone working outside the borders of their home country, as well as anyone who has moved within the borders of their country to pursue work, such as seasonal work.

⁴⁴ See details on www.wfp.org.za.

⁴⁵ www.crls.org.za Briefing Paper: Going for Broke. (2008) p37.

Section 7: ‘There are some really important questions that need to be asked, and answered, before banning labour brokers.’⁴⁶

(7.1) Does labour broking substitute and subvert the supply of decent jobs?

On the one end of the scale, labour broking has been likened to ‘...*a social ill. It’s the same as HIV and Aids or crime and corruption. It’s an arrangement made to take advantage of the weak and the most vulnerable in society.*’⁴⁷

And then on the other end of the same scale, the ILO believe that labour broking can be an important service when properly regulated,⁴⁸ and that private employment agencies play an important role in the functioning of contemporary labour markets.⁴⁹

The reality is that temporary workers are amongst the worst casualties of the current economic crisis as employers have been forced to make massive reductions to their permanent staff complements (almost 1 million permanent jobs have been lost in South Africa since January this year)⁵⁰ in order to reduce their operating costs, thereby dramatically swelling the ranks of temporary workers. But cutting costs is just the first step to their staying in business. The next step demands that the work they need done, is done properly. Whether it’s a farmer that needs crop spraying done, or a manufacturing plant that can only afford to run three days a week, these are

⁴⁶ Quote from Mr Aidan Morton, viticulturist at Tokara winery, during an interview, 21 December 2009.

⁴⁷ COSATU leader, Zwelinzima Vavi speaking on the second day of public hearings at Parliament. Reported in *Cape Argus* on 10 November 2009.

⁴⁸ ILO Private Employment Agencies Convention 181. (1997).

⁴⁹ Ibid.

⁵⁰ Rob Davis, Minister of Trade and Industry. Reported in *Business Report*, 2 November 2009.

all jobs that have to be done carefully and efficiently. They are decent work by any definition, and the workers tasked with doing this work are deserving of safe working environments, decent conditions and strictly enforced codes of conduct.

Interestingly, our own South African Police Services justifies spending R121 million per year paying private security guards to watch over their police stations⁵¹, because they have established that this outsourced labour supply is not only cheaper and less onerous to administer, but also frees up the trained police personnel to do their work.

The reality therefore, is that there will always be a demand for outsourced, part-time, or seasonal, employees – the challenge is to find a way of effectively protecting these employees. Temporary work opportunities also undoubtedly serve as a stepping stone into first-time employment, and consequently need to become an integral part of any job creation strategy. This need for ‘regulated flexibility’⁵² has been widely acknowledged by both business and government, and is said to have informed all parties during the development of both the LRA and BCEA.

Unfortunately, most atypical employment contracts, in their current form, are unable to offer the same level of socio-economic support and protection against unfair labour practices, that permanent or fulltime employment contracts can - and the increasing incidence of ‘permanent temps’⁵³ is strong evidence that unscrupulous labour brokers

⁵¹ Confirmed in Parliament by then Minister of Safety and Security, Mr. Nathi Mthethwa. Reported in *Business Day* on 28 August 2009.

⁵² Cheadle, H. ‘Regulating flexibility. Revisiting the LRA and BCEA.’ DPRU (Working paper 06/109.)

⁵³ Temporary or part-time workers who have their contracts repeatedly renewed, or are simply never advised of when their specific job will come to an end. There are many instances where these ‘temps’ end up working for the same client for years on end, without receiving any of the social security, leave pay and/or incentives offered to permanent employees.

will manipulate this system in order to satisfy their own profit motives. These workers find themselves in a situation where the broker and client simply extend, or renew, the workers contract for an indefinite period. This is nothing more than a crude and blatant attempt at exploiting the specific legal protection offered in section 198 of the LRA, and an attempt at evading compliance with the full ambit of the LRA.

As opposed to the kneejerk reaction of simply banning labour brokers, the more challenging task facing our current government is to structure a formal policy on 'decent work' job creation. We have to find a way to turn around the '*jobless economic growth and increasing economic marginalisation of the poor*'⁵⁴ that has characterised the past 10 years of our economic performance. The fact is that almost seventy five percent of our unemployed people are under the age of 35⁵⁵. This means that improved skills development programmes aimed at both employed, and unemployed, workers is clearly the most constructive way that the labour movement will be able to strengthen its bargaining power. This way some of the 13,4 million people who currently receive monthly social grants will have a more realistic chance of finding 'decent work' employment.⁵⁶

⁵⁴ Paper prepared by Dr. Zoleka Ndayi, entitled, 'Global economy prohibits development state take off.' (November 2009.) Published in *Business Report*.

⁵⁵ Labour Force Survey – September 2005. (p 39).

⁵⁶ Statistic quoted by Stanlib Chief Economist, Kevin Lings. Reported in *Business Report*, 5 November 2009.

(7.2) Does labour broking deny workers their constitutional right to collective bargaining?

The Bill of Rights contained in our Constitution dedicates section 23 to the protection of labour relationships, and includes in section 23 (2) *that every worker has the right to (a) form and join a trade union, (b) to participate in the activities and programmes of a trade union; and (c) to strike.*

South Africa has also ratified a number of key ILO Conventions that deal specifically with rights to collective bargaining for workers who are employed beyond the boundaries of standard employment contracts;

- Convention 87 of 1948,⁵⁷ which guarantees the rights of workers and employees, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorisation.

- Plus, Convention 98 of 1949, which gives workers the Right to Organise and Collective Bargaining.

- As well as confirmation of the Freedom of Association of the Governing Body of the ILO that the criteria for determining collective rights is not based on the existence of an employment relationship, and that self-employed workers should also enjoy the right to organize.⁵⁸

⁵⁷ Convention concerning Freedom of Association and Protection of the Right to Organise.

⁵⁸ Paper entitled, Informal work and Labour rights, delivered by Paul Benjamin at 2008 Conference: The Regulatory environment and its impact on the nature and level of economic growth and development in South Africa.

We have clear evidence that the potent combination of an ever increasing trend towards casualisation and externalisation of our labour markets on the one hand, complemented with the installation of what can be accurately described as protectionist labour legislation on the other hand, has undeniably bolstered the rise in labour broking in South Africa. In fact, over 70% of all registered labour broking businesses were only established after 1996.⁵⁹ (Spurring the belief that the LRA – section 198 in particular - in fact provided the stimulus for the growth of an industry that allowed workers services to be negotiated on a purely commercial basis.)

Ironically, even the current government (whose tripartite alliance partners are the most vocal and vociferous supporters of an outright ban on labour brokers) have admitted to utilising the services of labour brokers to the tune of nearly R124 million during the past financial year. In fact, government departments across the country have hired 510 employees from labour brokers in order to assist with various projects, and fill gaps arising from permanent employees who were on maternity or sick leave.⁶⁰

It has been repeatedly estimated that this R26 billion a year industry contributed more than R3, 5 billion in taxes during 2008,⁶¹ and has more than 500 000 registered members.

⁵⁹ Statistic provided by CAPES. (Confederation of Associations in the Private Employment Sector.)

⁶⁰ These figures were confirmed by a number of Departments, including those of Justice, Agriculture, Health, Social Development and Transport, in written replies to parliamentary questions regarding the use of labour brokers. Reported on www.iol.co.za – *Big state use of labour brokers* – 19 October 2009.

⁶¹ These figures were confirmed during the Parliamentary Portfolio Committee (PPC) hearings, held on 25 and 26 August 2009. Reported by the Association of Personnel Service Organisations (APSO) on 11 October 2009.

The counterbalance to this well documented growth is that there is a real concern regarding the marked decline in trade union membership in South Africa over the past 18 months. The National Union of Mineworkers (NUM) lost 48 000 members (and R2 million in monthly subscription fees) between December 2008 and June 2009. The National Union of Mine Workers (NUMSA) has acknowledged the loss of 60 000 members over the past year, and COSATU's clothing and textile affiliate, SACTWU has seen 25 000 members disappear during a similar period.⁶² Renowned sociologist, Professor Sakhela Buhlungu, author of *Trade Unions and Democracy: COSATU Workers Political Attitudes in South Africa* (HSRC Press, 2006), believes that COSATU's narrow focus on the public sector is the primary reason for this decline in paid up membership. He believes that the retail sector, services environment (e.g.: tour operators), hospitality industry (e.g.: waitrons), domestic workers and farm workers in particular are all categories of workers that COSATU has effectively ignored.⁶³

Trade unions, on the other hand, will rightfully argue that although the labour broker is the employer, he/she is seldom at the place of employment and it is consequently extremely difficult to centralise any collective action. On top of that the broker's ability to effect summary dismissals undermines the workers ability to establish bargaining councils, and thereby further entrenches the inequality in bargaining power between the broker and the workers.

The effective implementation therefore of a comprehensive registration requirement for labour brokers would surely alleviate some of these communication problems

⁶² All these figures were confirmed by COSATU President Sdumo Dlamini in an interview with the *Mail and Guardian* on 26 September 2009.

⁶³ Reported in the *Daily News*, 18 September 2009.

between the union officials and temporary workers, and consequently make it a lot easier for these workers to effect their constitutional right to collective bargaining. They are, after all, entitled to it, they deserve it, and it would undoubtedly further underpin their right to fair labour practices.

(7.3) Do labour brokers erode the base of permanent employees?

Unemployment figures are notoriously difficult to accurately quantify. The narrow definition for unemployed people includes those members of the ‘economically active population’⁶⁴ that have not worked for seven days prior to any survey, plus those that want to work and are available to start work immediately, as well as all those that have taken active steps to look for work or start some form of self employment. The broader definition of unemployment includes all the people described above, as well as all those discouraged work seekers who are no longer looking for work. Getting accurate figures for these disparate groups of people spread out all over the country is extremely difficult.

Despite some intense debates and disagreements, it is now fairly widely accepted that we have an ever increasing unemployment problem in South Africa. During the first decade of post apartheid governance (1995 to 2002) the official unemployment rate increased from 18% to 31%. (And when including the broader definition outlined above, this figure rose to in excess of 40%.)⁶⁵ Throughout this period whilst the

⁶⁴ All those people between the ages of 15 and 65 who are willing and able to work.

⁶⁵ Bhorat, H. Ravi Kanbur, S.M. *Poverty and Policy in Post Apartheid South Africa*. HSRC Publications. (2006) p145.

general economy was growing, this growth was just not able to create sufficient job opportunities for all the new job seekers coming into the market each year, and so the term ‘jobless growth’ was coined.

We do need however to bear in mind that all these figures excluded any reference to the informal sector. (Or ‘second economy’ as Thabo Mbeki preferred to call it.) This ever expanding group of marginalised people, of which the vast majority provides fairly labour intensive services to small scale unregulated businesses, made little contribution to the countries G.D.P. and remain extremely difficult to monitor.

The growing need for flexibility in the workforce, coupled with a growing ambit of new labour legislation⁶⁶ saw the rise in casualisation, temporary work and fixed term contracts in place of permanent employment. (This was, and remains, a global trend.) Labour broking is a primary example of this attempt by employers to both gain flexibility, and reduce the administrative burdens associated with managing permanent employees. Not surprisingly, labour broking is often accused of replacing secure jobs with temporary and casual forms of employment.

The current Labour Minister Membathisi Mdladlana, is even more forthright and has been quoted as saying that labour broking is, ‘...*is an extreme form of free market capitalism which reduces workers to commodities that can be traded for profit as if they were meat or vegetables.*’⁶⁷

⁶⁶ Including specifically the Labour Relations Act (66 of 1995), Basic Conditions of Employment Act (75 of 1997), Employment Equity Act (55 of 1998) and the Skills Development Act (97 of 1998).

⁶⁷ Reported on www.apso.co.za - Workers against labour brokers – COSATU’s protest plans. Accessed on 6 November 2009.

A somewhat less emotive response might be that labour brokers simply allow prospective employees to interact with prospective employers across both the private and public sector. Whether they are highly skilled IT specialists, or unskilled grape pickers, they allow employers to cope with seasonal fluctuations and/or unexpected workload demands, whilst allowing people who are not working, to demonstrate their skills.

The overriding issue at hand is to try and determine whether or not current sections of our labour legislation need to be adapted, or completely overhauled, in order to both acknowledge this expanding informal workforce, whilst simultaneously providing it with appropriate social security benefits.

It is however very important to remember that even well meaning and carefully thought out legislation can result in unexpected and socially-economically disastrous consequences. A recent example in our own agricultural sector is worth noting.

The Extension of Security of Tenure Act 62 of 1997⁶⁸ was specifically designed to prevent farm workers, and their wives and children, from being unfairly or arbitrarily evicted from their homes. Amongst other proviso, this Act required the farmer to obtain a lawful court order before effecting any eviction. It also gave woman occupiers the same rights as men occupiers⁶⁹, and included specific rights for long term occupiers. (i.e. Workers over the age of 60 with more than 10 years service, or those who became disabled during their employment were entitled to stay in their

⁶⁸ Commonly referred to as ESTA.

⁶⁹ Precedent was established when the Land Claims Court found that Mary Hanekom, and her family, were entitled to stay on in the house on the farm, after her husband had been fired by the farmer. (Note: Mary Hanekom was still a full time employee on the farm.) Ref: *Conradie v Hanekom & another* (1999) (4) SA 491 (LCC).

house for the rest of their life.) This legislation was clearly intended to protect an extremely marginal and vulnerable sector of society. However, the farmer's instinctual reaction was to feel threatened, and so they simply stopped replacing any permanent workers who get dismissed. (Anecdotal evidence suggests that many farmers have in fact demolished these houses each time that they have managed to dismiss and evict the occupier.) The nett result has seen nearly one million people evicted from farms between 1993 and 2004.⁷⁰ That was clearly not the intended consequence.

The question we need to investigate is, how much has our new Labour Relations Act (Act 66 of 1995), and section 198 (temporary employment service provisions) of this Act in particular, affected recruitment and employment patterns amongst South Africa's farmers. Has it indeed been the unintended stimulus for these employers to reduce the number of 'permanent' workers that they employ, and replace them with 'non permanent' workers?

The answer is an unequivocal 'Yes'. There are significantly less farm workers living and working on farms. In fact some 247 000 permanent jobs have been lost on commercial farms since 1990.⁷¹ Unfortunately, accurate figures pertaining to seasonal and temporary workers are notoriously difficult to ascertain, but the fact that our agricultural output has expanded so dramatically (exports have risen from \$1,7 billion to over \$3,5 billion from 1992 to 2004)⁷² is tangible proof that there is an ever growing number of labour brokers servicing the labour requirements of farms across the country.

⁷⁰ Survey conducted by Nkuzi Development Association and Social Surveys Africa – see www.wsws.org.

⁷¹ Tangerman, S. *OCED Review of Agricultural Policies. – South Africa*. OCED Publishing (2006) p52.

⁷² Ibid p59.

Our existing labour law rightfully places fairly onerous demands on employers when it comes to the dismissal of an employee, (as defined in sections 186 to 197B of the LRA) which in turn does make some employers reluctant to employ permanent employees. Labour broking clearly eases these restrictions. Testimony to this assertion is that the number of registered ‘temporary employment services’ has tripled since 1996.⁷³

The focus of this debate should perhaps not be centered on what has happened to the number of ‘permanent’ employees we have in South Africa, but rather what opportunities are being created for those people without employment. Elias Monage, President of CAPES,⁷⁴ believes that the TES industry is perfectly positioned to provide employment security over job security. He says that they have records which show that anything between 15% and 32% of the 500 000 temporary workers employed on any one day of the year manage to secure permanent employment each year.⁷⁵ He consequently believes that the TES industry is in fact a channel for the unemployed into the formal labour market. That may well be true in the commercial and industrial sectors, but there is no evidence whatsoever that this dynamic exists in the agricultural sector. (As evidenced by the OCED research mentioned above.)

Access to flexible labour is a given component throughout global economies and the TES industry is growing consistently in both developing countries (India, Brazil and Mexico), as well as those highly cyclical commodity producing countries like

⁷³www.polity.org.za quote from article authored by Greg Palmer (Webber Wentzel & Associates) on 16 March 2009.

⁷⁴Confederation of Associations in the Private Employment Sector.

⁷⁵Extracted from a paper delivered by Mr. E. Monage, and entitled, ‘Call for ban on temporary employment services / labour brokers threatens 500 000 workers.’ Available on www.capes.org.za

Canada, Australia and New Zealand⁷⁶. South Africa's agricultural sector is one of these highly cyclical commodity producing sectors and is unsurprisingly also seeing the continued growth of Temporary Employment Services.

(7.4) Would an outright ban on labour brokers be unconstitutional?

In order to thoroughly evaluate this assertion we need to focus our attention on four key sections of the Constitution – namely Sections 9, 22, 23 and 36.

Section 22 of our Constitution guarantees that *'every citizen has the right to choose their trade, occupation or profession freely'* which clearly makes it unconstitutional to ban labour broking in its entirety. *(This assertion is based on the belief that labour brokers are legitimately entitled to 'citizens' rights.)*

Section 23 of the Constitution in turn guarantees everyone's right to fair labour practices, and includes workers rights to join trade unions, participate in strikes and engage in collective bargaining. It's important to note that the definition of 'workers' in this section of the Constitution has been given a broader context than the standard employee definition,⁷⁷ to the extent that it can even cover members of the S.A. Defence Force⁷⁸. In section 7(2) of this essay we indicated how frustrated the existing unions are at their inability to engage the estimated 500 000 temporary workers being employed by labour brokers. The reality therefore, is that these temporary workers

⁷⁶ Quote from Mr. J. Botha, Chief Operations Officer of CAPES, made on 3 September 2009, and available on www.skillsportal.co.za. (Over-engineering of S.A.'s labour broking laws.)

⁷⁷ Any person excluding an independent contractor, that works for another person or for the State and receives, or is entitled to receive, any remuneration, and any other person who in any manner assists in carrying on or conducting the business of an employer.

⁷⁸ *SA National Defence Union v Minister of Defence & Another* (1999) 20 ILJ 2265 (CC).

are not receiving the constitutional level of legal protection provided for them in section 23 (2).

Section 9 of the Constitution deals with equality, and specifically with the fact that *'Everyone is equal before the law and has the right to equal protection and benefit from the law.'*⁷⁹ Included in this section is the fact that *'Equality includes the full and equal enjoyment of all rights and freedom.'*⁸⁰ Seasonal grape pickers, employed by labour brokers, do not enjoy the same level of legal protection, job security or range of social security benefits that permanent workers on the same farm do. This is evidenced by the fact that they can be summararily dismissed, are often paid less and seldom receive any medical or leave pay benefits.⁸¹

That brings us to section 36 of the Constitution which deals with the limitation of rights, and requires that all rights contained in the Bill of Rights can only be limited if such *'limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and less restrictive means to achieve this purpose.'* The constitutionality test for an outright ban on labour broking would therefore require

⁷⁹ Section 9 (1) of the Constitution. Chapter 2 – Bill of Rights. (1996).

⁸⁰ Ibid. Section 9 (2).

⁸¹ Patrick Craven as spokesperson for COSATU, quoted in *Mail & Guardian* Online – 10 April 2009.

(Also included in a Department of Labour research project circulated in 2004.)

that it could be justified as not being unduly invasive of the rights of those operating in the sector to continue to practice their profession.⁸²

In other words, it would have to be conclusively proven that the level and nature of abuses associated with labour broking could not be effectively reduced or managed through the enforcement of a regulatory framework.

Which simply stated means that an outright ban on labour broking would indeed be unconstitutional, unless regulation had been effectively implemented, and failed?

(7.5) Does labour broking ‘de-skill’ and ‘de-motivate’ the workforce?

The ILO has become the worldwide guardian of the fundamental principle that ‘*labour is not a commodity.*’ In June 2009 the ILO adopted a Global Jobs Pact that essentially, ‘*calls on governments and organizations representing workers and employers to work together to collectively tackle the global crisis through policies in line with the ILO’s Decent Work Agenda.*’⁸³ Government investment in special employment programmes, the broadening of social protection and the establishment of minimum wage levels were all highlighted as key poverty reduction strategies.

⁸² Benjamin, P. Preliminary draft for presentation to “Regulating Decent Work’ Conference, Geneva 6 to 8 July 2009. Paper entitled, ‘*Untangling the triangle: The regulatory challenges of triangular employment.*’

⁸³ Press release published on www.ilo.org – 19 June 2009.

The protection of people in employment is clearly the foundation that these programs need to be built upon. The ILO's Private Employment Agencies Convention,⁸⁴ which includes all those people involved in triangulated employment services, are consequently an integral part of this definition of employment.

It is interesting then to take a quick look back at how the Namibian government (who ratified both ILO Conventions 138⁸⁵ and 182⁸⁶), utilized the ILO's '*labour is not a commodity*' principle to help justify the outright banning of their labour broking industry - notwithstanding any reference to ILO Convention 181.

In December 2008 the Namibian High Court delivered a judgment effectively outlawing the entire labour broking industry. They argued that labour hire had no legal basis in Namibia since the common law principles in a contract of employment did not allow for any 'contractual privity of a third party labour broker.'⁸⁷ Whilst the Applicant, Africa Personnel Services (Pty) Ltd. argued that labour hire was 'part of a global trend towards more flexible forms of employment' and that section 128 (1) of their Labour Act should be struck down as unconstitutional. (Their current Labour Act, section 128 (1) states 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.*')

⁸⁴ ILO Convention 181 of 1997.

⁸⁵ ILO Convention concerning the minimum age for admission to employment.

⁸⁶ ILO Convention concerning the elimination of child labour.

⁸⁷ Article entitled, "Labour brokers under threat." www.poilty.org.za 16 March 2009.

Judge Parker responded in his judgment by saying that ‘*there is no such thing as “triangular employment relationships” in our law.*’ He said that he believed that the characterization of labour hire as a form of employment was ‘*obfuscatory*’ and had ‘*no relevance in law.*’⁸⁸In paragraph 29 of his judgment, Judge Parker describes third party profiteering from a commercial contract for the supply of human labour as ‘*offensive*’ and adds that it ‘*violates a fundamental principle on which the ILO is based, namely that labour is not a commodity.*’

A defence like this, based on ILO principles, unfortunately ignores the content, and intent, of ILO Convention 181 (1997)⁸⁹ which unequivocally states that ‘*private employment agencies play an important role in the functioning of contemporary labour markets and that labour broking can be an important service when properly regulated.*’⁹⁰

Labour brokers are required to supply workers with specific skills sets, whether it’s for work on a construction site or seasonal farm work. These workers skills need to monitored and managed in order for the broker to be sure that his/her team is capable of completing the prescribed workload. This pressure to meet specific workload targets is also what keeps the workers motivation levels high, as opposed to the ‘sheltered employment syndrome’ that prevails amongst many permanently employed (and often highly unionised) workers.

It’s logical therefore to assume that every temporary worker needs to maintain and continually develop their skills base in order to sustain their commercial value. The

⁸⁸ Quoted from paragraph 20 of the Namibian High Court judgment in the matter between *African Personnel Services (Pty) Ltd v Government of Namibia* – Case No: A 4/2008.

⁸⁹ Private Employment Agencies Convention. (1997).

⁹⁰ Mr N. Van Vuuren, Director of ILO – quoted in *Business Report*, 10 November 2009.

fact that human labour is being sold on the basis of a commercial contract (as opposed to a simplified bilateral contract of employment) is an ethical issue and a consequence of externalisation. Varying levels of legal protection have been created for these workers across the globe by both, their national governments, and the ILO. *‘Poor enforcement of existing regulations is a bad reason for justifying an outright industry ban.’*⁹¹

University of Cape Town

⁹¹ Quote from Mr. G. Palmer on the Webber Wentzel website (www.webberwentzel.com). Accessed on 17 December 2009.

Section 8: “Do we reward entrepreneurship, or do we go ahead and commit commercial suicide?”⁹²

The case for an outright ban of labour brokers in the winelands.

An instinctive reaction to support an outright ban on labour brokers is understandable when one considers the widely reported levels of exploitation against farm workers, the gender and wage discrimination practices that are still evident⁹³ on some farms, and the traceable lack of skills development⁹⁴ that is afforded to so many workers within this sector.

As detailed earlier in this paper, the simple fact that most farms have seasonal crops dictates that they have seasonal labour requirements. Consequently, the externalisation of the labour force in the agricultural sector is extremely well developed and essentially an integral part of the way in which this sector operates. Unfortunately, fluctuating global demand for our local agricultural commodities (wine, fruit and flowers in particular), has resulted in variable pricing and smaller profit margins for our producers. The farmer’s immediate reaction to these tighter margins is to find an area where overheads can be reduced, and labour costs are unfortunately one of the easiest (and biggest) costs that can be managed. Labour brokers do undoubtedly reduce overall labour costs on a farm, as well as a host of administrative burdens for the farmers. In section 5 we outlined the differences between the registered labour brokers and the ‘bakkie brigade’ brokers that service this agricultural sector, and illustrated the marked

⁹² Quote from wine farm owner, Mr. R. Myers, during a face to face interview on 17 December 2009.

⁹³ Formal finding in 2007/08 joint research project undertaken by Woman on Farms and the Centre for Rural Legal Studies, entitled ‘Going for Broke.’ Full report available on www.crls.org.za.

⁹⁴ Ibid.

difference between the wages, working conditions and social security benefits available to workers employed by these brokers. It is crucial therefore, that any debate on labour broking take cognisance of these significant variations, to ensure that the frequently publicised ‘bakkie brigade’ transgressions are not assumed to be the normative standard for the entire labour broking industry. This assumption is entirely incorrect, and the broadly based responsibility and legal compliance shown by the registered labour brokers should always inform any opinion on this debate.

COSATU president, Sudumo Dlamini, unfortunately believes that all labour brokers are, ‘*merciless and ungodly*’⁹⁵ and has even described them as criminals who specialize in exploiting workers.⁹⁶

Patrick Craven, National spokesman for COSATU, has preferred to focus his demands for an outright ban on labour brokers around COSATU’s shared vision for the creation of, ‘*...quality jobs ... to ensure that the millions of unemployed are able to work in conditions of decent work*’⁹⁷ and the ANC’s 2009 election manifesto that listed one of it’s top five priorities as being, ‘*the creation of decent work and sustainable livelihoods*’ and the need to ‘*address the problem of labour broking.*’

The Minister of Labour, Membathisi Mdladlana, has correctly drawn attention to the importance of two very important issues: Firstly, the workers protection from unfair dismissal, and secondly the permanence of their employment relationships. There is some logic in the argument that brokers contract people out of employment relationships

⁹⁵ Mr. Dlamini was speaking at the labour broking seminar jointly organised by the Chris Hani Institute and the Young Communist League (YCL) held in Johannesburg during October 2009.

⁹⁶ Ibid.

⁹⁷ Included in the resolutions taken at the 2006 Ninth COSATU National Congress, on Jobs and Poverty Campaign.’

and consequently undermine the workers protection. However, there does not appear to be any peer reviewed research, or jurisprudence, that provides concrete proof that labour brokers are in fact guilty of an ever increasing number of exploitative transgressions of the law. Almost all argument in this regard is based on anecdotal evidence which is simply too emotive, and statistically insignificant. Globally this externalisation of labour force markets has evolved and grown in tandem with the economic demands of business for increased flexibility. And consequently the permanence of employment relationships has had to be diluted in order to accommodate this demand for flexibility.

COSATU believe that this continued externalisation has seen, '*a massive deterioration of workers' remuneration and benefits, rights at the workplace and income security.*'⁹⁸

And because our current legislation allows brokers to repeatedly renew workers contracts without any long term commitment, the phenomenon of 'permanent temps' certainly adds some credence to this argument.

The socio-economic and bargaining power inequalities that have traditionally underpinned employment relationships in the agricultural sector in South Africa also encourage one to view any atypical employment in the industry as another avenue for continued exploitation of these workers. Our Constitution⁹⁹ makes every effort to right this historical imbalance by affirming the 'democratic values of human dignity, equality and freedom.' In sections 9 (1) and 9 (2) it further defines this right to equality by saying that, '*everyone is equal before the law and has the right to equal protection and benefit from the law*' and that '*equality includes the full and equal enjoyments of all rights and freedoms.*' This is probably one of the most cogent arguments against labour brokers, since the reality is that a large number of farm workers who are currently employed by

⁹⁸ COSATU press release issued by Patrick Craven on 26 August 2009. Available on www.cosatu.org.za.

⁹⁹ Section 7 (1).

labour brokers do not receive the same rights or legal protection afforded to permanent workers employed on the same farm.¹⁰⁰ As discussed in section 3 of this dissertation, a two tier labour market is well established in South Africa. Seasonal and part time farm workers fall squarely into the second tier of this market and are forced to ‘operate under an amended legal regime.’¹⁰¹

The continued call for an outright ban on labour broking appears to be based on the premise that despite sufficient time¹⁰² and effort being given to proving that this two tier labour system can be effectively regulated, the system has proved to be inadequate. Large numbers of workers remain vulnerable and too many employers are allowed to evade the legal, and ethical, responsibilities attached to responsible employment.

Proponents of the banning option also believe that most temporary jobs, currently being filled by labour brokers, existed previously as permanent jobs. This view is clearly inaccurate, when one considers the variations in demand for labour across major industries such as the information technology sector, the construction and manufacturing sector, and the agricultural industries’ seasonal crop demands.

¹⁰⁰ Seasonal or part-time labourers generally earn less, have less protection against unfair dismissals and do not receive the same degree of social security benefits (housing, water and electricity) that the permanent workers receive. Details included in research paper: Going for Broke: A case study of labour brokerage on fruit farms in Grabouw. Available on www.crls.org.za.

¹⁰¹ South African Foundation Report (SAF: 1996: 102 – 103.) which aimed at reducing the cost of labour by restricting workers rights to collective bargaining, strike action, medical provision and provident fund benefits.

¹⁰² The first amendment to our labour legislation that gave to credence to labour broking was made in 1993.

The well documented reality that the nature of work¹⁰³, and the way in which people work, has fundamentally changed across the globe is undoubtedly the key driver which militates against a call for the outright banning of labour broking.

However, those relatively unskilled and semi-literate people who are currently being placed on farms by labour brokers would certainly find it significantly more difficult to secure any form of other employment if they had no access to labour brokers. On top of that, the lack of unionisation in the agricultural sector further reduces their bargaining power, and consequently it can be reasonably assumed that any outright ban on labour brokers would lead to an expanded 'underground network' of brokers.

¹⁰³ ILO Convention 181.

Section 9: “If we want to curb the current levels of exploitation, then we must find a way to enforce regulations that won’t result in job losses.”¹⁰⁴

Analysing the alternative to an outright ban on labour brokers in the agricultural sector.

There are a number of potential consequences that might flow directly from an outright ban on labour broking; including drawn out court challenges, significant job losses, (within the formal market, whilst the unregulated and exploitative informal job markets will expand), the potential for the labour hire industry to go ‘underground’, and concern from foreign investors that South Africa is out of synch with global labour force dynamics.

The unconstitutionality of a blanket ban has already been discussed in section 7(4). Whilst far from settled, it would appear that the limitation clause¹⁰⁵ contained in our Constitution would probably lead our legislators down the path of looking at amending certain sections of the existing legislation, whilst simultaneously installing systems that demand far stricter enforcement of this beefed up ‘temporary employment service’ regulatory framework.

‘I personally believe that an outright ban on labour broking would further undermine workers rights, and drive employers, particularly those in the agricultural sector, to

¹⁰⁴ Quote from winery owner, Mr. Alex Dale, during a face to face interview on 18 December 2009.

¹⁰⁵ Section 36 of the Constitution (1996).

*contract with independent contractors. That would mean the end of any joint and several liability, a dramatic increase in the marginalisation, fragmentation, and de-unionisation of these workers – and effectively render their protection almost impossible.*¹⁰⁶

Stricter registration procedures for all labour brokers, clarity regarding the definition of who the employer is, protection for these vulnerable workers from unfair dismissal, the extension of specific social benefits such as sick leave and unemployment grants, the elimination of wage discrimination and the effective implementation of a collective bargaining structure within this sector are therefore all key regulatory changes that could be introduced in order to significantly improve these workers lives without having to resort to an outright banning order.

(9.1) Let's begin by looking at how to install stricter registration procedures.

The requirement that all labour brokers register their business should not be hidden away in section 24 of the Skills Development Act, but rather included in an amended version of section 198 of the Labour Relations Act. Registration of the business within a State defined institution (Director-General / Department of Labour) also needs to be supplemented with compulsory registration at the South African Revenue Service. (Including owner's personal Income Tax registration, as well as registration for Value Added Tax and Pay as You Earn.) Registration at the Department of Labour should also include a compulsory training course that ensures each labour broker has the appropriate business management skills, and is fully conversant with the administrative requirements of registering each of their own workers with the Unemployment Insurance Fund and Workmen's Compensation. This program also has to include training each broker in terms of his/her required compliance with all the conditions laid out in the Compensation for Occupational Injuries and Diseases

¹⁰⁶ Quote from Mr. Jeremy Chennells (Director of Chennells Brummers & Associates) during a face to face interview on 29 December 2009.

Act¹⁰⁷, Occupational Health and Safety Act¹⁰⁸, Employment Equity Act¹⁰⁹ and the Skills Development Act¹¹⁰.

Every broker should be required to present a certified copy of this registration to every farmer that he contracts with. The onus should rest with the farmer to demand to see this registration before allowing the broker to supply any labour. Thereafter joint and several liability will exist between the farmer and the broker to uphold all employment conditions specified in the LRA and BCEA. Routine and strict enforcement of this registration process by a nominated representative from the Department of Labour is essential to ensure that all the workers on any farm, on any given day, are protected, and that whatever specific performance is required in terms of COIDA, the EEA, SDA and OHSA is also forthcoming. This way we will have interwoven all our own existing legislation into a mechanism that not only delivers on the requirements of the ILO's Convention 181, but also on the provisions set out in the globally accepted Decent Work Agenda.

(9.2) Clarity regarding the definition of who the employer is, and how that will protect workers against unfair dismissal.

Seasonal or temporary farm workers supplied via a labour broking service will typically have one person (the farmer) exert control over all the work they are required to do, as well as the manner in which this work has to be done – whilst another person (the broker) will source this work for them, transport them to and from this job, and then pay them at the end of the week. Real problems arise when one or other party is expected to take responsibility for unfair labour practices or personal injury. Notwithstanding the fact that the farmer imposes all the day to day

¹⁰⁷ COIDA – Act 130 of 1993.

¹⁰⁸ OHSA – Act 85 of 1993.

¹⁰⁹ EEA – Act 55 of 1998.

¹¹⁰ SDA – Act 97 of 1998.

discipline and management of the workers performance, any perceived unfair labour practice has to be brought to the attention of the broker since he/she is deemed to be the legal employer¹¹¹. The broker's contract with the farmer is a purely commercial contract, and is measured only in terms of the amount of work that has to be completed, rather than the manner in which these workers should be treated. It is consequently not in the brokers interest to disrupt his/her relatively large commercial contract for the sake of protecting a single workers interests. It is far easier to simply 'replace'¹¹² a worker. The continually growing unemployment rate and widespread lack of literacy skills amongst farm workers makes this group exceptionally vulnerable to exploitation and abuse by brokers and farmers alike. However, within unionised structures, or sectors with bargaining councils, these sort of indiscriminate dismissals are not tolerated.¹¹³ Even under our current legislation the broker is bound to comply with his/her obligations as an employer, and will be forced to pay compensation in the event of an unfair dismissal.¹¹⁴

However, until section 198 of the LRA is expanded to define exactly what 'temporary' means in terms of the length of time that a workers' services can be hired out it will remain impossible to collectively organise and/or protect against unfair dismissal.

Paul Benjamin, drafter of the Department of Labours discussion document on labour broking, suggests that a distinction be drawn between temporary workers based on the length of their assignment. He believes that those employees who work for a

¹¹¹ Section 198 (2) of the LRA.

¹¹² Brokers invariably get away with summary dismissals by placing the blame on the Client, and convincing the worker that he/she will soon be placed at another work place.

¹¹³ *Smith v Staffing Logistics* (2005 10 BALR 1078).

¹¹⁴ *NUMSA obo Mahlangu and others v Abancedisi Labour Services CC* (2006 1 BALR 29).

number of different employers for short spells of time should remain employees of the broker. However those employees who find themselves spending an extended time at one place of work are not employees of the broker anymore, but should be seen as employees of the Client. The imposition of simple time frame parameter like this would certainly go a long way towards providing clarity on who the employer is, and consequently provide the employees with significantly improved protection against unfair labour practices.

(9.3) The provision of social security benefits to seasonal and temporary farm workers.

In the formal sector, particularly amongst the larger employers, unionised workers have been contracted in to health insurance, provident and retirement funds. They have also contributed to the statutory Unemployment Insurance Fund and Workmen's Compensation Fund. All these contributions to social security funds have culminated in a fairly significant cost to the employer. These costs (often referred to as a 'social wage') and the protective legislation around unfair labour practices are most often the reason given by employers for reducing their permanent work force, and relying on sub-contractors and labour brokers.

The current Unemployment Insurance Act (32 of 2003) was designed specifically to cater for maternity, illness and unemployment benefits. Unfortunately however, only employees in the formal sector are able to access any of these benefits. Even its updated version was criticised by the Taylor Committee in 2003 for '*catering to the limited requirements of a historically privileged workforce not seriously threatened by unemployment.*'¹¹⁵

¹¹⁵ The Taylor Committee on Comprehensive Social Security for South Africa was a submission made by IDASA (Independent Democratic Alternative for South Africa) to the Social Development Portfolio Committee on 9 June 2003.

Before an effective social security safety net can be established it will have to be structured in a way that it includes people who are self employed, people who are in between jobs, people who have resigned from their job in order to study or undergo further skills training and those people who have moved from the formal sector of employment into the informal sector. In this way farm workers who are retrenched and forced into the informal sector will be able to receive some form of unemployment and maternity benefit. So too will farm workers who resign and set up their own small business, as well as seasonal farm workers who work for a labour broker. Similarly, health and safety benefits accruing from the Occupational Health and Safety Act (85 of 1993) would probably only become effective for temporary workers in the agricultural sector if the farmer were too designated as their employer.

(9.4) The elimination of wage discrimination.

Global trends in labour force markets have seen the acceleration of externalisation¹¹⁶, which is often referred to as the ‘commodification’¹¹⁷ of employment contracts.

The primary characteristic that sets these atypical forms of employment apart is its inherent flexibility. The challenge facing labour law legislators has been to find a framework that can both protect the workers, whilst not impacting on the desired levels of flexibility. Our own Constitution (sections 9, 10, 13, 18, 22, and 23), LRA (sections 198 and 200A) and BCEA (sections 82 and 83A) reflect serious intent by legislators to create, and regulate, atypical forms of employment. This progressive approach to labour legislation has inevitably encouraged some employers to disguise, or camouflage, their working conditions in order to reduce their overall labour cost, whilst being able to also avoid some of the more restrictive laws and collective

¹¹⁶ Sub-contracting, outsourcing, homeworking, TES’s and franchising are all examples of externalization.

¹¹⁷ Contract between two parties where the supply of human labour is given a commercial value.

bargaining restraints that may have been present in their sector. Invariably it is the unskilled and atypical workers that are most affected¹¹⁸ by the abuse of this very well intentioned 'employment flexibility'. Unfortunately it is most often the workers wage packet that feels the brunt of this discrimination.

The EEA is the guardian of our right to protection from any form of discrimination. Section 6 (1) of the EEA virtually mirrors what is contained in section 9 (3) of the Constitution, but adds political opinion, family responsibility and HIV status to the listed grounds that may not be used as forms of discrimination.

Workers who have access to trade union representation, and collective bargaining mechanisms, will consequently be able to ensure that wage and gender discrimination is effectively regulated, and controlled, within the legal rights framework that already exists.

¹¹⁸ Mills, S.W 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility.' (2004) *ILJ* 1204.

Section 10: Conclusion – The way forward.

In it's current incarnation, TES's have two very distinct realities. On the one hand they have clearly benefitted employers by providing them with both flexibility, and a distinctly weakened quotient of collective bargaining to have to deal with. And, on the other hand, they have created a mechanism that is purely a survival strategy for tens of thousands of unemployed workers.

However, in spite of all the abusive and exploitative practices that a large number of labour brokers¹¹⁹ in the winelands currently get away with, I am still of the firm opinion that specific legislation changes, and effective enforcement of these changes, would be preferable to an outright ban on labour broking. My own research (see section 5) clearly indicated that the vast majority of registered labour brokers currently operating within this sector are legally compliant and willing to co-regulate with both national and local government as well as legitimate trade unions. The seasonal (and relatively low-skilled) nature of agricultural work will also always provide for 'temporary' work opportunities and hence the need for effective regulation.

However, in order to ensure that these distinctly vulnerable workers are offered more employment and social benefit protection, whilst simultaneously not putting unreasonable financial and administrative demands on the farmers and the brokers, we would need to make some fundamental legislative changes, and ensure that regulatory frameworks are put into place.

¹¹⁹ The 'bakkie brigade' in particular.

There are essentially just three specific areas that need to be addressed.

Firstly, a regulatory framework needs to be developed that can effectively register and manage labour brokers. Secondly, there have to be some specific changes made to our existing legislation in order to create an enforcement mechanism that would allow for the effective management of labour brokers. And finally, the joint and several liability between the farmers and labour brokers for their workers employment conditions will have to be expanded to include issues around unfair labour practices and unfair dismissals. This would naturally include issues such as, equal wages and anti-discrimination measures, plus 'temporary' workers right to collective bargaining and membership of a trade union.

(10.1) The effective registration and management of all labour brokers:

Labour brokers should only be given an official registration certificate from the National Department of Labour once they have supplied their company registration documents, SARS details and VAT certificate (where applicable). In addition to these administrative requirements, their registration should also be preceded by the successful completion of a 5 day training program that ensures that each broker has a working knowledge of the labour law pertaining to temporary employment services. Every broker should be issued with a standard DOL¹²⁰ contract that specifies all the details pertaining to any labour placement they wish to make. This contract would include details of exactly what each worker will be paid, when this payment will occur, and details of any deductions that may be effected. It should also specify the commission, or management fee, that the broker is entitled to.

¹²⁰ Department of Labour.

A monthly summary of all their placements over the past thirty days should be submitted to a specifically appointed Labour Inspector at their local municipality. This employee information should include exactly how many days each worker was employed, what their daily wage was, as well as their UIF and Workmen's Compensation registration details. These Inspectors would be required to carry out random, and on-going, checks on all the farms in their allocated area, and each Inspector would be empowered to issue summons against both the farmer, and the labour broker, in the event of any irregularities being uncovered.

(10.2) Proposed legislative amendments.

The definition of who the employer is, the potential imposition of a time limit on temporary worker assignments, the elimination of wage and gender discrimination, and a mechanism that will allow for the effective enforcement of labour brokers duties all need to be effected via legislative changes.

The current confusion (as outlined in section 3 of this paper) regarding the definition of who the employer in a temporary employment service (TES) is, needs to be cleared up. The current references in COIDA, the EEA, the OHSA and the SDA need to be reworked so that they are consistent with what is contained in the LRA¹²¹ and the BCEA¹²². Joint and several liabilities regarding conditions of employment, unfair labour practices and unfair dismissals also need to be maintained between the broker and the farmer.

¹²¹ Section 198 (2).

¹²² Section 82 (1).

The EEA's unfair discrimination definitions need to include the fact that an employee of a TES cannot be paid less than the Client's employee whilst doing the same work. Section 57 (1) of the EEA¹²³ is also arguably the simplest way forward when it comes to differentiating between what constitutes 'temporary' or 'permanent' employment. The adoption of a reasonable time limit on temporary work assignments will eradicate the 'permanent temps' syndrome and provide a solid base for building a symbiotic bridge between the formal, and informal labour markets.

The suggestion in 10:1 above regarding labour brokers being required to ensure that they are DOL registered, have completed the required training and committed to the monthly reporting duties will also need to be detailed in amended legislation.

The State has already shown its willingness to intervene in sectors which are not well organised, or in sectors where collective power and unionisation is difficult, such as the agricultural sector. Their Employment Conditions Commission published in 2001 led directly to the March 2003 introduction of a new minimum wage for agricultural workers.¹²⁴ By 2008, despite the announcement of a second minimum wage determination,¹²⁵ there was still an unacceptably large wage gap between permanent and seasonal agricultural workers.

Additional legislative changes will therefore also have to include details on how the enforcement of labour broker's expanded responsibilities will be effected - as well as details regarding the potential imposition of substantial fines, effective de-registration

¹²³ '.... a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where the person's employment with the client is of an indefinite duration or for a period of three months or longer.'

¹²⁴ Sectoral Determination 8: Government Notice No 24114. (2 December 2002.)

¹²⁵ Sectoral Determination 13: Government Notice No 8401. (17 February 2006.)

and perhaps, even imprisonment sanctions that could be imposed on brokers who attempt to evade the new responsibilities that they have in terms of providing 'decent work' to their employees.

(10.3) Joint liability between both the farmers and the labour brokers.

Employment security is probably the key issue that divides permanent farm workers from the temporary workers. As we have indicated throughout this paper, legal loopholes allow temporary workers (often on indefinite assignments) to receive substantially less protection against unfair labour practices, and this situation has to be remedied.

It is crucial therefore that every farmer be made aware that they are only entitled to contract with officially registered labour brokers. This would mean that the farmer would have to complete the standard DOL contract outlined above, and assume responsibility for checking that the broker has registered each worker for both UIF and Workmen's Compensation. The farmer would then be obliged to issue each worker with a code of conduct information sheet that explains exactly what hours of work and level of performance is expected, as well as a summary on how any complaints or grievances will be dealt with. This will include how any unfair labour practice issues will be dealt with, wage or gender discrimination concerns, restriction of access to collective bargaining rights, as well as concerns over dismissal procedures.

Farm workers, whether they are on a one month assignment, or have a 15 year history of living on the farm, all deserve to enjoy the same level of legal protection, and access to basic socio-economic benefits. This will never be achieved whilst 'bakkie brigade' labour brokers are allowed to continue operating.

The effective registration, control and management of labour brokers will undoubtedly be a difficult task, but its inherent benefits will far outweigh the cumulative damage that an outright banning order will precipitate. A group of local farmers have already instituted a system that will hopefully prove this assertion.

*'At Fruit SA we decided to try and take a collaborative, rather than combative, approach.'*¹²⁶ In order to stop *'vulnerable workers from becoming even more vulnerable'*¹²⁷ all the citrus, deciduous and fresh produce farmers in the Hex Valley and Kouebokkeveld sat down with the labour brokers in these areas and agreed upon a broadly based code of conduct. Independent privatised monitors were trained and installed to ensure compliance from both the brokers and the farmers. Both parties also agreed to independent arbitration in the event of a dispute.

(With a picking season looming, this is one triangulated group of employees, employers and brokers that could, before the end of 2010, provide some qualitative direction on the way forward for labour broking in the agricultural sector.)

¹²⁶ Quote from Colleen Chennells, Director of Fruit South Africa, during a face to face interview on 29 December 2009.

¹²⁷ Ibid.

Final thought.

The effective enforcement of some of the suggestions made in this dissertation will undoubtedly allow our existing legislation to provide sustainable protection for the rights and freedom of all South African workers involved in atypical employment relationships.

Simply banning labour brokers would be a clear indictment of the government's failure to find constructive ways of dealing with the current unemployment crisis, and *'instead of creating jobs, it will destroy millions by criminalising temporary work.'*¹²⁸

My belief therefore, is that any outright banning action on labour broking will not only leave the wine farmers with a distinctly sour taste in their mouths, but will also clearly illustrate our failure to protect one of South Africa's most valuable assets – its working class.

¹²⁸ Democratic Alliance leader, Helen Zille, quoted in the *Cape Times* on 11 December 2009.

Employee Data Sheet.

Personal information.

Name: _____

Address: _____

Gender: _____ Age: _____

Job description: _____

Employment history.

No of year's service: Permanent: _____ Seasonal: _____

Employment and work conditions information.

Supervision on site.	
Hours of work.	
Meal intervals.	
Paid overtime.	
Sick leave.	
Maternity leave.	
Compassionate leave.	
Receipt of pay slip.	
UIF membership.	
Workmen's Compensation.	
Provident fund.	
Housing benefits.	
'Other' deductions.	
Notice period.	
Disciplinary code/process.	
Trade Union membership.	

Overall comments: _____

Employer Data Sheet.

Company information.

Business name: _____

Address: _____

Company Reg: Yes:_____ No:_____ VAT Reg: Yes:_____ No:_____

Services offered: _____

Company history.

No of year's: _____ No of employees: _____

Farm Workers: Employment and remuneration information.

Supervision on site.	
Hours of work.	
Meal intervals.	
Paid overtime.	
Sick leave.	
Maternity leave.	
Compassionate leave.	
Receipt of pay slip.	
UIF membership.	
Workmen's Compensation.	
Provident fund.	
Housing benefits.	
'Other' deductions.	
Notice period.	
Disciplinary code/process.	
Trade Union membership.	

Overall comments: _____

Overview of independent research findings.

Introduction.

I interviewed five labour brokers, approximately thirty workers, three wine farm owners, three viticulturists and two labour law consultants who deal specifically in the agricultural sector.

Headline findings: Labour Brokers.

I conducted face to face interviews with five (5) separate labour broking entities. Three of them were well established labour brokers that have in excess of 150 farm workers on their payroll at any one time. The other two were private ‘independents’ that ran their own business’s and employed anything between ten (10) and fifty (50) farm workers at a time. (Copies of the interview guides are attached.)

The three established brokers were all VAT registered companies. The two ‘independents’ were both examples of the ‘bakkie brigade’ – in other words, they were both unregistered (both in their private or business capacity as tax payers), private individuals who owned their own transport and had some previous experience of working on farms. They lived in informal settlements, and sourced all their workers from similar settlements within a distance of no more than 2 or 3 kilometers.

Established Brokers: All three companies (The Workforce Group, Industaff Solutions and Grabouw Labour Bureau) were 100% compliant with current labour law requirements. Every worker was registered for UIF and paid above the minimum wage. The farmer (Client) was presented with weekly time sheets that indicated each workers hours of work, productivity and ‘take home’ wage. On –site health and safety regulations were in place, and ablution facilities were always provided for their workers. They had all retained in excess of 80% of their workforce over the past year, and each was growing their worker base by between 10% and 23%.

Independent brokers: Both ‘bakkie brigade’ brokers were coloured males with only secondary school education. Neither of them had registered their business. They simply offered part time work to people who lived in the same informal settlements that they lived in, and provided no guarantee to these people other than that they would receive R60.00 for each full day that they worked.

Headline findings: Workers.

Workers with the established brokers: Most of these workers had fixed term contracts. These contracts varied in length from one week to three months, and each was task specific. The workers interviewed were generally happy with their situation, but there was still a marked resentment that the ‘permanents’ whom they worked alongside, still received more benefits. (eg: child care, housing, water, electricity, sick leave, maternity benefits, farm shop savings and better medical care.) Interestingly, provident funds and pensions were not regarded as particularly important. It appears that they generally believe that the State, and their own children, will always look after them later in life.

Workers with the ‘bakkie brigade’: Without exception these workers all said that they accepted this form of employment only because they had absolutely no other options available to them. They were extremely jealous of their permanent counterparts, and highlighted wage discrimination as their primary concern. Overall the findings amongst this group were in line with the Centre for Rural Legal Studies’ recently published research, ‘Going for Broke: A case study of labour brokerage on fruit farms in Grabouw.’

Headline findings: Wine farm owners.

All three farmers utilised the services of labour brokers and agreed that effective regulation of these brokers was essential. *“I’ve got enough problems just growing and selling this fruit that I don’t need my workers to add to my problems”* probably sums up the common motivation amongst these farmers to support labour brokers. Because each farmer employs a certain number of permanent employees, who are housed on the farm, each was relatively ‘au fait’ with current labour law. They all preferred the broking service to provide a foreman/supervisor with their temporary work crew so that the day to day control and discipline of these workers was easier to manage. They also all confirmed that the overall ‘cost to the farm’ of their permanent workers exceeded what they paid their temporary workers. (This was however, due to the housing, sick leave, maternity, provident fund and child care benefits that these permanents received in addition to their daily wage.) Whilst the farmer’s seasonal workload demanded that they have flexibility in their workforce management, they were interestingly enough not really aware of the inherent differences between a labour broker and an independent contractor. Whenever the issue of joint and several liability was raised they unanimously assumed that the broker bore all that sort of responsibility. (And unsurprisingly, they all hoped that any enhanced regulation of brokers in the future wouldn’t alter this status quo too much.)

Headline findings: Viticulturists.

I interviewed three viticulturists who all act as consultants to various farms, but are each responsible for the quality of work that is done on the farms. These consultants advise on the day to day work required on each farm, as well as future plantings and the longer term development of the farm. They consequently have an enormous interest in the labour function of the farm. Two of these consultants (Chris Keet and Bob Hobson) were agreed that stricter enforcement of seasonal workers rights and tighter controls on the ‘bakkie brigade’ brokers was essential. The third viticulturist, Aidan Morton, was an avid supporter for an outright ban on all labour brokers and independent labour contractors. He had all six farms that he consulted to, in agreement that

‘fixed term contracts’ be offered by the individual farmer to each individual worker. These temporary workers were only employed if they had an ID book, a bank account (all remuneration was done via EFT payments), and a means of getting to and from the farm every day. The farm manager/foreman then ran a very simple payroll software system that kept track of the hours worked, payment due and time still to run on their contract. (eg: pruning contracts might be anything up to three months in duration whilst planting or canopy specific work was often done on a week to week basis.) He assured me that each farm had very quickly built up a strong core of reliable and capable workers, so whilst there was an increased ‘admin’ burden for each farmer, the quality of the work done on the farm was far superior to what ‘casuals’ had ever done.

Headline findings: Labour law consultants.

Without hesitation, both practitioners were against the banning option. They agreed that the ‘nature of work’ has fundamentally changed and that specific sets of rules were required for specific types of employment. They believed that banning labour brokers would simply lead to further casualisation within the workforce, increased marginalisation and further fragmentation of the workers ability to negotiate. The consequent reliance on independent contractors would see workers rights diminished even further. They agreed that the ability of the State to provide legal protection for these rights clearly demanded stricter controls and enforcement. Both were agreed that the current legislation, whilst of noble intention, needed to be expanded in order to address issues such as wage discrimination and protection against unfair dismissal.

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