Agency work in Namibia and South Africa: Legal comparison and appraisal of compliance with international norms

by

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Declaration of Originality

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Summary/Abstract

Namibia and South Africa are members of the International Labour Organisation and thus have to comply with the international labour norms on agency work as outlined in the ILO's Private Agency Employment Convention No. 181 of 1997. However, both countries have not signed the Convention. Despite the fact that both countries have not ratified the Convention, the Convention exerts an influence in their national law in view of their constitutional architecture.

Both Namibia and South Africa have recently been grappling with regulation of agency work. Namibia recently amended its legislation in order to unban agency work and regulate it whilst South Africa recently amended its regulatory framework to further regulate agency.

Since international norms exert an influence in both Namibia and South Africa the study firstly critically discusses the international norms on agency work.

Secondly, Namibia's assessment of compliance with international norms is embarked upon. It is concluded that in reality Namibia's regulatory framework is not consistent with international norms in that the user enterprise is regarded as an employer of agency workers. This policy decision is informed by the historically hostile view that Namibia has of agency work that saw Namibia legislatively ban agency work and such ban being confirmed by the High Court and subsequently reversed by the Supreme Court. Consequently, the Namibian government was forced to amend its regulatory framework, as such its regulatory framework is

nationalistic and still fixed on the common law contract of employment as a foundation for regulation of the employment relationship.

Thirdly, South Africa's assessment with international norms is also embarked upon. In general, South Africa's regulatory framework complies with international norms even though the regulatory framework has some shortcomings.

Lastly, the study compares both the regulatory frameworks of Namibia and South Africa.

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Abbreviations

AD	Appellate Division
ASSL	Annual Survey of South African Law
BCEA	Basic Conditions of Employment Act
BCLR	Butterworths Constitutional Law Report
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CLL	Contemporary Labour Law
CLLPJ	Comparative Labour Law & Policy Journal
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of South African Trade Unions
FEDUSA	Federation of Unions of South Africa
ILJ	Industrial Law Journal
ILJ(e)	Industrial Law Journal (England)
ILR	International Labour Review
IJHSS	International Journal of Humanities and Social Science
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
MJSS	Mediterranean Journal of Social Science
MLR	Modern Law Review
NACTU	National Council of Trade Unions
NASC	Namibian Supreme Court
NEDLAC	National Economic Development and Labour Council
NLJ	Namibian Law Journal
NPSWU	National Service Workers Union
PELJ	Potchestroom Electronic Law Journal
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
SSRN	Social Science Research Network

SWANLA	South West African Native Labour Association
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid Afrikaanse Reg
UASA	United Association of South Africa Union

CHAPTER 1

"He is the servant of one or the other, but not the servant of one and the other". Laugher v Pointer (1826) 5 B & C 547 at para 558, 208.

INTRODUCTION

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1. INTRODUCTION

Agency work or the triangular employment relationship has brought into sharp focus the regulation of the employment relationship.[1] Initially, the attitude against agency work at both international[2] and national level was the outright banning of agency work since it was seen as a form of modern day slavery. It was also viewed as a deliberate attempt to subvert or circumvent the then applicable labour or employment laws.[3] In South Africa there were strong and incessant calls in favour of banning agency work. However, government settled for comprehensive regulation. In Namibia agency work was legislatively banned but the ban was short-lived after it was overturned by their highest court.[4] Consequently, both South Africa and Namibia currently regulate agency work. To achieve this, both countries had to amend their regulatory frameworks to specifically regulate agency work.[5]

1.1 AIMS OF THE COMMON LAW AND INITIAL AIMS OF STATUTORY LABOUR LAW

The common law and statutory labour law was initially aimed at regulation of those in the conventional full time employment[6] relationship. However, modern day employment relationships have evolved as employers sought strategies to reduce labour costs.[7] Employers reduce labour costs by, amongst others, employing labour on a temporary basis or employing agency workers.[8] Consequently, "the standard employee is no longer full-time, male and employed by the same employer during normal working hours from Monday to Friday as was the case just a few decades ago."[9] Despite this fact "the starting point of the application of any principle of labour

[1] Van Eck "Revisiting Agency Work in Namibia and South Africa: Any Lessons from the Decent Work Agenda and the Flexicurity Approach?" (2014) 30 *The International Journal of Comparative Labour Law and Industrial Relations* 49.
[2] Van Eck "Regulated Flexibility and the Labour Relations Amendment Bill of" 2012 (2013) 46 *De Jure* 600 600.
[3] Botes "The History of Labour Hire in Namibia: A Lesson for South Africa" (2013) 16 *PELJ* 506 513.
[4] Van Eck "Temporary Employment Services (Labour Brokers) in South Africa and Namibia" (2010) 13 *PELJ* 107 108 – 109.
[5] Van Eck (2014) 59.
[6] Mayne "Part time and fixed-term workers" in *The Law at Work: A Practical Guide to Key Issues in Employment Law* (2003) by Sargeant and Williams "Beyond Labour's Parochiali: A Re-envisioning of the Discourse of Redistribution" in *Labour Law in an Era of Globalization* (2002) by Conaghan, Fischl and Klare (eds.) 94.
[7] Du Toit *et al* (2015) *Labour Relations Law: Comprehensive Guide* 6th ed. 94.
[8] McKay "*Employer Motivations for Using Agency* Labour" (2008) 37 *ILJ*(e) 296 296 – 299.
[9] Van Niekerk *et al Law@Work (2015)* 57.

law is the existence of an employment relationship constituted by an agreement concluded between an employer and an employee. As long as the creation of that relationship is dependent upon such an agreement, the contract of employment will continue to be the cornerstone of the edifice of labour law."[10] Consequently, whether one is a full time, part time or an agency worker, one has to enter into an employment contract.

1.2 OBLIGATIONS OF THE MEMBERS OF THE ILO: INCORPORATION AND COMPLIANCE

Both South Africa and Namibia are members of the International Labour Organisation (ILO) and therefore have to comply with international labour norms. Incorporation of ILO norms in national law is therefore critical for enforcement of the enacted international labour standards. However, as indicated by Van Niekerk[11] the international norms are not necessarily law but can be translated into law by Member States. Actual translation of international labour norms into national law and how they are actually translated into national law in different countries is much more important than the content of the norms.**[12]** International labour standards exert influence on national labour laws.[13] Even though international labour norms exert some influence in South African and Namibian laws these countries may elect not to ratify conventions enacted by the ILO.[14]

However, despite the challenges of translation or adoption of ILO conventions in South Africa[15] and Namibia, ILO conventions exert some influence in the labour laws of these countries.[16] Van Niekerk notes that there are at least four reasons why international labour standards exert considerable influence in South African labour law. Firstly, South Africa, as a member of the ILO, incurs particular obligations in so far as national law and practice are concerned, simply on account of its membership;

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[10] Wallis (1992*) Labour and Employment Law* 1 – 4 quoting Kahn-Freund "Legal Framework" in *The System of Industrial Relations in Great Britain* (1954) by Flanders and Clegg (eds.) 45. See also Venter (ed.) (2003) *Labour Relations in South Africa* Revised edition 148 and Grogan (2010) *Dismiss*al 2.

[11] Van Niekerk *et al (2015)* 57.

[12] Verified from the ILO website: http://www.ilo.org/public/english/standards/relm/country.htm. Accessed 20 October 2016.

[13] Van Niekerk "The International Labour Organisation (ILO) and South African labour law" (1996) 5 *CLL* 109 112 and 116.

[14] Van Eck (2014) 157, Van Eck (2010) 113 and 120, respectively.

[15] Dugard (2011*) International law: A South African perspective* 4th ed. 53 – 56.

[16] Erasmus "The Namibian Constitution and the Application of International Law" in *Namibia Constitutional and International Law Issues* (1991) by Van Wyk, Wiechers and Hill (eds.) 94**.**

Secondly, the 1995 Labour Relations Act (LRA) states that one of its purposes is to give effect to South Africa's obligations as a member state of the ILO;[17] Thirdly, the LRA requires anybody engaged in the interpretation of its provisions to do so consistent with South Africa's international law obligations;[18] Fourthly, South Africa has ratified some key ILO conventions and could also ratify a number of others. Van Jaarsveld *et al* also note that "the South African labour dispensation adheres as far as possible to the international labour conventions and standards, and takes note of it on a comparative basis, when formulating and interpreting labour law principles."[19]

Reason three outlined above by Van Niekerk is fully consistent with the dictates of section 39 of the Constitution which state that a court, tribunal or any forum "must consider international law" when interpreting the Bill of Rights and also section 233 which enjoins the courts to prefer any reasonable interpretation of legislation that is consistent with international law over any interpretation that is inconsistent with international law.[20] Thus, our Constitution is seen as "international law friendly" unlike our pre-constitutional democracy constitutions.[21] Moreover, the LRA which gives content to section 23 in section 3(b) states that it must, amongst others, be interpreted "in compliance with the Constitution."[22]

Similarly, one of the stated purposes of the preamble of the Namibian Labour Act is "giving effect, if possible, to the conventions and recommendations of the International Labour Organisation."[23] It follows on section 95(d), which states that "the state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at membership of the International Labour Organisation and where possible, adherence to and action in accordance with the international conventions and recommendations of the ILO."

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[17] Du Toit, Potgieter and Fouche (2014) *Bill of Rights Compendium* (2014) at 4B – 22(1); Also Christianson "Labour Relations" in *The Bill of Rights Handbook* 5th ed. (2007) by Currie and De Waal at 499 and Van Jaarsveld *et al* (2001) *Principles and Practice of Labour Law* 2-9.
[18] Section 3(c) of the LRA states that "any person applying this Act must interpret its provisions", amongst others "in compliance with the public international law obligations of the Republic."
[19] Van Jaarsved *et al* (2001) n 16 above 1 – 21.
[20] Section 233 (the Constitution).
[21] Keightley "Public International law and the final Constitution" (1996) *SAJHR* 405 409.
[22] Brassey (1999) *Commentary on the Labour Relations Act* A1 – 8. See also the case of *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) at para 13F-G.
[23] Preamble of the Namibian Labour Act 11 of 2007.

Since South Africa and Namibia are both members of the ILO[24] both these countries have to comply with the ILO standards including those that deal with triangular employment relationships. Also, both countries are constitutional democracies thus their constitutions as supreme law create or lay down the framework within which labour relations is regulated.[25] Thus "section 23, like section 27 in the interim constitution provides for a comprehensive regulation of labour matters."[26]

2 RESEARCH QUESTIONS

South Africa and Namibia are both members of the ILO. Their regulatory framework has to comply with the ILO norms. The question is to what extent does both countries' employment agency regulatory frameworks comply with ILO norms?

Further, since both countries are constitutional democracies which permit agency work despite national pressure to ban it, how do they regulate agency work within their individual jurisdictions?

3. IMPORTANCE OF THE STUDY

As South Africa and Namibia are members of the ILO it is important that their compliance with international norms be assessed to enable a proper review of their national frameworks and thus ensure improved protection to agency workers and a flexible environment for employers. Also, since the study compares the South African and Namibian regulatory framework there are lessons to be learnt by South Africa from Namibia and *vice versa*. These lessons will assist both countries in improving their regulatory frameworks for the benefit of both agency workers and agencies.

4. RESEARCH METHODOLOGY

In this study two research methods are adopted, namely analysis and comparative analysis. Subsequent to the analysis of the international framework, both the South African and Namibian national regulatory frameworks are critically discussed and compared. The international regulatory framework is critically analysed in order to distil the international norms. The Namibian and South African regulatory frameworks are analysed and assessed for compliance with international norms as

[24] Van Eck (2010) 118.
[25] Brassey "Labour Relations" in *The Constitutional Law of South Africa* (2010) by Chaskalson *et al* 30-2. In *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* (2000) (2) SA 674 at para 44.
[26] Devenish (1999) *A commentary on the South African Bill of Rights* 312.

prescribed by the international regulatory framework. Furthermore, a comparison between the two legal systems is undertaken.

Rittich and Mundlak submit that "comparison is both most illuminating and most easily performed between countries with common patterns of industrial and economic development".[27] South Africa and Namibia are cases in point.[28] Similarly, Moseneke DCJ has correctly observed that:

> "those who have followed the jurisprudence of our Constitutional Court or the Supreme Court of Appeal will know that there is hardly a judgment that is handed down without extensive references to comparative law provided it emanates from open and democratic societies. It is no exaggeration to observe that our decisions read like works of comparative constitutional law."[29]

As a result, Du Plessis has described Constitutional Court judges as "comparative law enthusiasts."[30]Comparative analysis will assist us in getting a better understanding of the challenge posed by agency work in South Africa and assist us in developing a better regulatory framework for the protection of employees who found themselves in triangular employment relationships and also for the proper or efficient regulation of employment agencies.[31] "International comparison must bring out and explain the differences and similarities of national industrial relations systems."[32]

5. LIMITATION OF THE STUDY

The study focuses only on the analysis of international norms and analysis and assessment of the national regulatory frameworks of South Africa and Namibia, because of their substantially similar legal architecture and socio-economic and political circumstances for compliance with international norms. The study will be instructive to other jurisdictions since the international norms are one and the same.

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[27] Rittich and Mundlak "The Challenge to Comparative Labor Law in a Globalized era" in *Comparative Labour Law* (2015) by Finkin and Mundlak (eds.) 100. In this regard see also Cryer *et al* (2011) *Research Methodologies in EU and International Law* 28.

[28] Van Eck (2014) 57.

[29] Moseneke "The Role of Comparative and Public International Law" (2010) *Advocate* 63 64. See also Cachalia *et al* (1994) *Fundamental rights in the New Constitution*.

[30] Du Plessis "Interpretation" in *Constitutional law of South Africa* Vol. 2 by Woolman *et al* (eds.) 2nd ed. (2008) 32 – 185.

[31] Cryer *et al* (2011) n 27 above 28 submits that "comparative law research is often carried out simply to better understand a particular area of law or a legal system."

[32] Schregle "Comparative Industrial Relations: Pitfalls and Potential" (1981) *ILR* 3 27.

6. ORGANISATION OF CHAPTERS

A critical discussion of the ILO convention on triangular relationships and the European Union's (EU) Temporary Agency Work Directive is embarked upon in Chapter 2. A critical discussion of international and EU labour norms on the triangular employment relationship is of utmost importance in order to fully understand the scope of the norms and thus to better incorporate the norms in the national sphere of South Africa and Namibia.[33] International labour standards are minimum standards designed to protect the interest of workers. Our Constitution allows us to "consider foreign law" in the interpretation of the Bill of Rights.[34]

Chapter 3 will focus on the assessment of compliance with standards outlined in the Private Agency Employment Convention No. 181 of 1997. Namibia is a member of the ILO.[35] It has to comply with the ILO standards including those that deals with triangular employment relationships.[36]

Chapter 4 will focus on South Africa's compliance with international norms on agency work. The Constitution permits our courts to consider foreign law.[37] Consequently, we will also assess whether the South African regulatory framework on agency work has been influenced by other non-binding but instructive regional international standards and trends on agency work, in particular the European Union's Temporary Agency Work Directive, 2008.

In Chapter 5 South African and Namibian regulation of agency work will be compared. Both countries are common law countries and the same common law applies.[38] Both countries are members of the ILO, and neither is a signatory to the ILO's Agency Convention 1997, and both have a modern Constitution containing a

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[33] To date the ILO has 187 Member States. The information is available at http://www.ilo.org/public/english/standards/relm/country.htm. Accessed on 15 October 2016.
[34] Section 39 of the Constitution of the Republic of South Africa, 1996.
[35] Van Eck (2010) 118.
[36] Blanpain (2014) *European Labour Law* 14th ed. 138 observed that "the preparation of international labour standards is governed by Article 14(2) of the ILO Constitution and Articles 38 and 39 of the Standing Orders of the Conference."
[37] Section 39(1)(c) states that when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.
[38] Hahlo and Kahn (1968) *The South African Legal System and its Background* 132.

Bill of Rights[39] which include the rights to equality, freedom of association and the right to engage freely in a trade or occupation.[40]

[39] Van Eck (2014) 49.
[40] Van Eck (2014). See also Van Eck (2010) 120.

CHAPTER 2

INTERNATIONAL REGULATORY NORMS

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1. INTRODUCTION

A critical discussion of international labour norms on the triangular employment relationship is of utmost importance in order to fully understand the scope of the norms and to assess their incorporation in the national spheres of South Africa and Namibia and for that matter in any country that is receptive of international law, and to assess compliance with these norms by both countries.[41]

Also, the European Union's (EU) Temporary Agency Work Directive, 2008 will be critically discussed. The EU is a regional structure with a stated purpose of ensuring economic, political and social integration. Its directives are not necessarily binding on South Africa but are extremely instructive. Our Constitution allows us to consider foreign law in the interpretation and application of the Bill of Rights.[42] The Constitutional Court has more frequently relied on legislation and case law of other

[41] To date the ILO has 187 Member States. The information is available at http://www.ilo.org/public/english/standards/relm/country.htm. Accessed on 15 October 2016.
[42] Section 39 of the Constitution of the Republic of South Africa, 1996.

countries than on international treaties and jurisprudence.[43] Our Courts also frequently rely on the jurisprudence of regional conventions and bodies.[44] The international or regional labour standards are minimum standards designed to protect the interests of workers. Going below the minimum standards constitutes a violation of those norms. However, national labour regulation which far exceeds those norms is permitted and generally desirable.[45]

2. ILO: INTERNATIONAL STANDARD SETTING

The ILO was established in 1919 as a specialised agency of the United Nations to promote social justice and labour rights by developing and adopting international labour standards.[46] The international labour standards are considered necessary to achieving fair competition and avoiding destructive competition amongst states which is viewed as the cause of World War 1.[47] The ILO's main method of operation is to agree on detailed conventions which outline labour standards on different aspects of labour law and the secondary method is to publish recommendations.[48]

According to Davies Member states may choose whether or not to ratify these conventions. Once a state has ratified a convention, the ILO monitors its compliance with the obligations it imposes."[49] Davies adds that under the ILO Constitution, conference has the responsibility to approve conventions and recommendations, the former having the status of treaties in international law when they come into effect,

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[43] Kweitel, *Singh, and Viljoen*. "*The Role and Impact of International and Foreign Law on the Adjudication in the Apex Courts of Brazil, India and South Africa" in Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) by Vilhena, Baxi, and Viljoen (eds.) 198.

[44] In *S v Makwanyane* 1995 (3) S.A 391.

[45] Ojeda-Aviles *Transnational Labour Law* (2015*)* 88 in this regard notes that despite the international minimum standards "it is frequent that national contents that are more favourable for workers are maintained."?

[46] Davies *Perspectives on Labour Law* (2004) 55. The ILO website, http://www.ilo.org/global/about-the-ilo/lang--en/index.htm.

[47] Hepple "*New Approaches to International Labour Regulation"* (1997*) 26 ILJ (e)* 353*.*

[48] Swepston "*International Labour Law" in comparative Labour Law and industrial Relations in Industrialized Market Economies 7th revised edition* (2015) 115 who noted that by ratification, a State undertakes to give effect to a convention. The ratification of ILO Conventions cannot be accompanied by reservation, an exception to general international practice.

[49] Davies *Perspectives on Labour* (2004) Law 55. The ILO website, http://www.ilo.org/global/about-the-ilo/lang--en/index.htm state that the ILO is the only tripartite U.N agency, since 1919 the ILO bring together government, employers and workers representatives of 187 member states, to set labour standards, develop policies and devise programmes promoting decent work for all woman and men. Accessed 19 October 2016. The ILO becomes a specialized agency of the UN in 1996. See also the ILO's Application of International Labour Standards 2010 (I): Report of the committee of Experts on the Application of Convention and Recommendation, Report lll (Part 1 A) 1.

creating binding obligations on those countries that ratify the convention in question."[50] The ILO approved the adoption of the Private Employment Agencies Conventions No 181 in 1997 to regulate triangular employment relationships which is the focus of this study.

3. ILO: FROM PROHIBITION TO REGULATION

Initially, the ILO out-rightly banned private agency work when it was formed in 1919.[51] The ILO has since shifted away from its 1919 formative position of banning agency work to regulation of this type of employment relationship to ensure better protection of agency workers and ensure decent work and social justice.[52] Hepple notes that international regulations were seen as presenting an obstacle to the neo-liberal agenda of weakening trade unions and 'deregulating' labour markets."[53] Cheadle notes, quite correctly, that "labour relations is (now) a highly regulated field"[54] and this is more so when it comes to agency workers and other vulnerable employees.[55]

4. ENFORCEMENT CHALLENGES

The ILO has a manifest weakness in enforcing its various conventions.[56] The first challenge in enforcement of the ILO Convention is that a state may choose whether to ratify or not. Consequently, a convention may be left unratified for a long period of time before sufficient members are garnered for it to become binding and again it binds only those countries that have ratified it.[57] In this regard Davies notes that

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[50] Collins, Ewing, MacColgan (2012) *Labour Law* 49.
[51] Van Eck (2014) 55 notes that in 1919 "only public employment agencies were authorized."
[52] Prassl The Concepts of the Employer (2014) 42, also noted that one of the earliest measures was to call for the a legal response to agency work, in the rather radical form of a complete prohibition of employment agencies .See also Nghiilshililwa (2009) 63 above 87 notes that the ILO called for the abolition of profit –driven employment agencies shortly after its founding in 1919 and Article 1 of the ILO Unemployment Recommendation of 28 Nov 1919 (No.1) The website of the ILO, www.ilo.org. Indicates that: the main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthens dialogue on work-related issues, Accessed 8 January 2017.
[53] Hepple **(**1997) 357**.**
[54] Cheadle, Davis and Haysom (2008) *South African Constitutional Law: The Bill of Rights*, 18-2 [Issue 1].
[55] Currently, most countries in the world enacted new legislation or amended existing ones to protect all types of vulnerable employees. In the Southern part of Africa countries that come to mind is South Africa and Namibia.
[56] Barenberg *"Toward a Democratic Model of Transnational Labour Monitoring*" in *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (2007) by Bercusson and Estlund 37. See also Davies (2004) 55.
[57] Van Niekerk A (1996) 112.

"[T]he ILO does not have powers of enforcement, such as the ability to levy fines against governments. All it can do is to persuade governments to comply. Since states are under no obligation to ratify ILO Conventions they could simply ignore it or withdraw ratification if they were in breach."[58] States are simply "required by the ILO Constitution to supply reports on the measures taken to give effect to ratified Conventions."[59]

5. PROBLEMS OF INCORPORATION INTO NATIONAL LAWS

Incorporation of ILO norms in national law is critical because that is actually where enforcement of the enacted international labour standards finds place. Most countries delay, fail or deliberately neglect to enact the necessary supplementary legislation to incorporate the conventions into their national legislation.[60] An unratified convention may, however, apply indirectly where it is used in the interpretation of national legislation in some countries as in South Africa and Namibia.[61] Both South Africa and Namibia are members of the ILO[62] and thus international labour standards exert some influence on their national labour laws[63] despite the fact that these countries have chosen not to ratify and legislatively adopt some conventions enacted by the ILO, including the Private Agency Employment Convention No 181 of 1997.[64]

The South African Constitution is seen as "international law friendly."[65] Section 233 enjoins the courts to prefer any reasonable interpretation of legislation that is consistent with international law over any interpretation that is inconsistent with

[58] Davies (2004) 58 – 59.
[59] Swepston (2001) 117.
[60] Florkowski (2006) above marked 45 that to become part of the fabric of local law, a treaty's contents must be legislatively enacted by the appropriate parliamentary body.
[61] Dugard (2011) 14 above 63. Section 233 of the Constitution provides that: "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with the international law over any alternative interpretation that is inconsistent with international law." What is important to note in this section is that the interpretation of legislation must be consistent with any international law that is binding and not binding on South Africa. See also, Du Toit *et al* (2015) n 7 above 76.
[62] Verified from the ILO website: http://www.ilo.org/public/english/standards/relm/country.htm. Accessed 20 October 2016.
[63] Van Niekerk (1996) 112 and 116, respectively, observed that "the interpretation of important ILO Conventions will acquire an increased significance as the new Labour Court and the Labour Appeal Court begin interpreting the 1995 LRA."
[64] Van Eck (2014) 57, Van Eck (2010) 113 and 120, respectively. See also Swepston (2001) who noted that "by ratification, a State undertakes to give effect to a Convention. The ratification of ILO Conventions cannot be accompanied by reservations, an exception to general international practice."
[65] Keightley "*Public International law and the final Constitution*" (1996) *SAJHR* 405 409.

international law.[66] Moreover the LRA which gives content to Section 23 in Section 3(b) states that it must, amongst others, be interpreted "in compliance with the Constitution."[67]

Similarly, one of the stated purposes of the preamble of the Namibian Labour Act is to give "effect, if possible, to the conventions and recommendations of the International Labour Organisation."[68] It follows on Section 95(d) of the Namibian Labour Act which provides that "the State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at membership of the International Labour Organisation." The Constitution of Namibia has no clause similar to section 39 and 233 of the South African Constitution. However, "its Article 144 provides that the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." it was therefore found to be "international law friendly".[69]

6. ILO POLICY SHIFT ON AGENCY WORK

(a) Some reasons spurring/compelling change

As mentioned in Chapter 1, the attitude towards agency work at both the international[70] and national level was the outright banning of agency work since it was seen as a form of modern day slavery.[71] Due to globalisation "having contributed to the emergence of new forms of precarious employment, as developed countries import workers to do work that cannot be exported"[72] and technological advancements the traditional employment relationship has become increasingly inappropriate and thus the world of work has changed. Contract and agency work is now an international trend,[73] and therefore, as Blanpain submits "temporary (agency) work has a full-fledged place in the labour market."[74]

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[66] Section 233 is seen by some academics as, simply, a codification of the common law presumption that a statute should not be interpreted in such a way as to violate international law.
[67] Brassey (1999) *Commentary on the Labour Relations Act* A1 – 8. See also the case of *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) at para 13F-G.
[68] Preamble of the Namibia Labour Act 11 of 2007.
[69] The concept or phrase was in fact coined by Erasmus when he remarked that "an outstanding feature of the Namibian Constitution is that it is 'international law friendly'. See Erasmus (1991) n 15 above 93.
[70] The ILO Unemployment Recommendation 1919 Article 1.
[71]Botes (2013) 513.
[72] Collins, Ewing and MacColgan (2012) Labour Law, Cambridge University Press 63 – 64.
[73] Coetzer "*Labour brokers a difficult scene" in Leadership*, 20 June 2013. See also Blanpain "*The Changing World of Work*" in *Comparative Labour Law and Industrial Relations in Industrialized Market*

Enterprises are increasingly engaging in outsourcing and externalisation of some of their non-core functions to other enterprises which can provide them better and more cheaply.[75] Modern day employment relationships have evolved as employers sought strategies of doing business and reducing costs, including labour costs.[76] Employers reduce labour costs by, amongst others, employing labour on a temporary basis or employing agency workers.[77] As a result, Hepple confirms that ILO was compelled to reconsider its policy directions on non-standard forms of employment, particularly on agency work."[78]

(b) Response of the ILO

Van Eck notes that the ILO "adopted the ILO *Declaration of Fundamental Principles and Rights at Work*; revised and integrated its international labour standards; and adopted its strategy by embracing the decent work agenda."[79]

He further notes that the objective of the decent agenda is fourfold. Firstly it balances the realisation of fundamental rights at work. Secondly, it promotes job creation. Thirdly, it promotes effective social protection for all, and fourthly, it encourages "tripartism" and social dialogue.[80] He also says that "in sum, the decent work agenda has shifted the ILO's attention from rights-based agenda to one which includes policies that could potentially create jobs and reduce poverty."[81] Consequently, the purpose of labour law is no longer job protection[82] but to ensure security of employment.

7. PRIVATE EMPLOYMENT AGENCIES CONVENTION, 1997

Within the context of its "decent work" agenda policy in 1997 the ILO adopted international standards by adopting the Private Employment Agencies Convention

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Economies (2001) 7th and revised edition 263 and Fudge, McCrystal and Sankaran (eds.) (2012) *Challenging the legal Boundaries of Work Regulation* 17.

[74] Blanpain (2014) 576.

[75] Blanpain "*The Changing World of Work*" in *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (2001) 7th and revised edition 266.

[76] Du Toit *et al* (2015) 94.

[77] McKay (2008) 296 – 299.

[78] Hepple "*New Approach to International Labour*" (1997) 26 *ILJ*(e) 357.

[79] Van Eck (2013) 602. See also Van Eck (2014) 52.

[80] Van Eck (2013) 602.

[81] Van Eck (2013) 602.See also Van Eck (2014) 52.

[82] Rojot "*Security of Employment and Employability*" in *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 7th revised edition (2001) Blanpain and Engels (eds.) 345.

No. 181 with a stated purpose to allow the operation of private employment agencies as well as protection of (agency) workers.[83] Article 2 states that "this Convention applies to all private employment agencies."[84]

The Convention recognises two types of employment agencies: the first one being where the agency becomes the employer of the agency worker.[85] In this instance the employment relationship is between the agency and the agency worker. The second type is where "services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom."[86]

After recognizing the two types of private agencies, the Convention directs that "measures shall be taken (by signatory States) to ensure that the workers recruited by private employment agencies providing the services referred to in Article 1 are not denied the right to freedom of association and the right to bargain collectively."[87] It also provides that in order to promote equality of opportunity and treatment in access to employment and to particular occupations, "a Member shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability." Ben Israel mentions that the "principle of equality and prohibition of discrimination in employment is based upon the legal and moral proposition that workers who are alike should be treated alike."[88] Both these provisions are designed to protect private agencies workers and Member States should comply with them.

[83] Article 2(3) of the Convention.
[84] Van Eck (2013) 603. See also Van Eck (2010) 116 who in another occasion remarked that: "one of aspect that is patently clear is that the ILO's Agencies Convention does not seek to ban labour broking, but the aim is to recognise the existence of labour brokers and to regulate this economic activity to ensure that workers so placed are not exploited."
[85] See Reynold "Protecting Agency Workers: Implied Contract or Legislation" (2006) 37 *ILJ*(e) 178-179 discussing ways in which an employee can relate to the agency and the end user enterprise in Britain.
[86] Article 1(a) of the Convention of the Private Agencies Convention, 1997.
[87] Article 4 of Private Employment Agencies Convention, 1997.
[88] Ben-Israel "Equality and Prohibition of Discrimination in Employment" in *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 7th and revised edition (2001) 365.

Many countries have amended their labour legislation or developed new ones in compliance with the Convention.[89]

8. SHORTCOMINGS OF THE CONVENTION

The Private Employment Agencies Convention, 1997 has some weaknesses.[90] Van Eck submits that "even though the instrument proscribes discrimination on the classical arbitrary grounds of discrimination in respect of "access to employment", it does not specify that there must be equal treatment in working conditions of agency workers and workers of the user undertaking. Furthermore, it does not make direct mention of the idea that agency work should normally be of a temporary nature[91] or that limits should be introduced in respect of the number of times that such appointments may be repeated.[92]

9. THE EUROPEAN UNION

The EU is a regional body which was established with the aim of providing its citizens, amongst others, an area of freedom, security and justice without internal frontiers in which free movement of persons, establishing an internal market and working for the development of Europe based on a balanced economy.

The EU has primary laws and secondary laws. Blanpain mentions that the "primary laws consists of the legal norms that are contained in the Treaties and accessory documents such as the protocols and accession treaties."[93] He also says that "[s]econdary law concerns the legal norms that derive from the above mentioned documents and which are contained in the decisions taken by the European institutions pursuant to the powers that the Treaties have conferred upon them."[94] It is immediately clear that unlike the ILO the EU is a multi-jurisdictional law-maker making supreme laws for its entire region. The ILO on the other hand has no power to legislate on behalf of Member States. Adopted conventions do not have the force of law unless legislatively incorporated into national law by Member States.[95]

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[89] For England see Wynn "Regulating Rogues? Employment Agency and Sections 15-18 of the Employment Act 2008" (2009) 38 *ILJ*(e) 64; for South Africa and Namibia see Van Eck "Revisiting Agency Work in Namibia and South Africa (2014) and Botes (2013) 506.
[90] Van Eck (2014) 55.
[91] Van Eck (2014) 55.
[92] Van Eck 2013 10.
[93] Blanpain (2014) 127.
[94] Blanpain (2014) 127.
[95] Florkowski (2006) 33.

10. THE EU POLICY SHIFT

The EU was no exception and was also faced with the challenges presented by globalisation, technological changes and increasing unemployment in the region. As a result the EU had to change its labour strategy if it had to appropriately respond to the above challenges.[96] As a response the EU adopted the "flexicurity" labour strategy in 2007 to "promote more and better jobs by combining flexibility and security for workers and companies."[97] Van Eck says that the "underpinnings of the strategy is to balance the protection of fundamental rights of workers, to establish flexibility in the labour market to enable employers to respond to changing market conditions."[98]

Although flexibility is generally desirable it has a downside for employees. As Blanpain puts it "flexibility is a major and probably lasting trend in our employment system. But workers have paid a price in higher job instability and more inconvenient working hours, including night work, weekend work, and long shifts with unwelcome consequences for the personal lives of many employees."[99] Further, flexibility has a negative impact on social security in that employees in short term and atypical employment are generally not entitled to pension contributions from the employer. Also, short term and atypical employees are not entitled to medical aid contributions.[100]

11. ADOPTION OF THE TEMPORARY AGENCY WORK DIRECTIVE, 2008

After lengthy debates, the EU finally adopted the Temporary Agency Work Directive, 2008. Blanpain submits that the delay in adopting the directive "had to do with the ideological differences relating to the role of the private sector on the labour market."[101] The Directive explicitly recognise temporary work agencies and their

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[96] Blanpain (2014) 153.
[97] Blanpain (2014) 304. Van Eck (2013) 2 above says that the term "flexicurity" is a combination of the words "flexibility" and "security".
[98] Van Eck (2013) 602.
[99] Blanpain (2001) 275.
[100] Davidov (2005) 57 for a discussion of the phrase "worker" as distinguished from the phrase "employee". See also Deakin "*The Changing Concept of the Employer in Labour Law"* (2001) 30 *ILJ* 72 for a discussion of the same phrases in his focused discussion of the concept of the employer.
[101] Blanpain (2014) 576.

roles in job creations or in dealing with unemployment and the need to provide protection to agency workers.[102]

Unlike in the ILO Convention, the Agency Directive provides that the agency becomes the employer and it does not apply where the agency acts as a matchmaker between the potential employee, job applicant, and the potential employer, user enterprise.[103] The Directive indicates that Member states can restrict the use of agency work but only in exceptional circumstances and by the end of 2011 restriction on agency work will only be tolerated if it can be "justified on grounds of [the] general interest of agency workers."[104]

Similar to the ILO Convention, the Directive provides for equal treatment between the agency workers and employees directly appointed by the user undertaking.[105] Blanpain submits that equal treatment is viewed as a fundamental social right by the EU.[106] Article 5(1) provides that the working conditions of agency workers shall be "at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."[107] Further, Article 6 indicates that the agency workers have a right to be informed of, and to apply for, vacant positions in the user enterprises.[108]

12. SHORTCOMING OF THE DIRECTIVE

According to Van Eck the major shortcoming of the Convention is that the equality principle can, permissibly, be circumvented in that it can be set aside by collective bargaining.[109] "As a result, as long as the employment relationship falls within the ambit of the collective agreement, a mere reference to the relevant collective

[102] Article 2 of the Temporary Agency Work Directive 104/EC of 2008. Van Eck (2014) 56 notes that the Directive has "the stated purpose of recognizing the role temporary work agencies can play and providing protection for agency workers."
[103] Article 3(1)(b) and (c) of the Agency Directive. Blanpain (2014) also noted that "the directive applies to workers with a contract of employment or employment relationship with a temporary-work agency who assigned to user undertakings to work temporarily under their supervision and direction."
[104] Article 4(1) and (2) of the Directive. See also Van Eck (2014) 56.
[105] Hepple "Agency Enforcement of Workplace Equality" in *Making Employment Rights Effective: Issues of Enforcement and Compliance* 2012 by Dickens (ed.) 49 – 65 for a discussion of workplace equality and non-discrimination in the workplace.
[106] Blanpain (2014) 605.
[107] Article 5(2) – (3) of the Directive. See also Van Eck (2014) 56. See also Blanpain (2014) 578.
[108] Article 6(1) of the Directive. See also Watson (2014) *EU Social and Employment Law* 252 also noted that temporary agency workers must be informed of vacant posts at the user undertaking.
[109] Van Eck (2014) 56. See also Waas "A *Quid Pro Quo* in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment – Lessons to be Learnt from European and German Labour Law" (2012) 34 *CLLPJ* 47 48.

agreement in the agency worker's contract of employment is sufficient to circumvent the equality principle."[110] Further, there is no evidence that the policy is a cure for unemployment because unemployment has been steadily rising since the 2008 financial crisis in the EU.[111]

13. CONCLUSION

Agency work is now permitted at both international and regional levels and flexibility by the ILO and flexicurity by the EU is seen as a solution to eliminate rigidities in the labour market and create jobs. Both organisations no longer see the purpose of labour as the protection employees' labour rights but now see labour law in a broad manner, as also an instrument that can be used to manipulate the labour market to ensure that the economy generates sufficient jobs for everyone and employees enjoy a certain level of protection.[112] Member countries of the ILO who have ratified the Convention imposed by the ILO have to comply with the Convention, and the EU Member States have to comply with the Directive as a law issued by it as a regional legislative body.

Although South Africa and Namibia have not ratified the Convention they take cognisance of it. South Africa has amended its labour laws in view of the Convention. Namibia banned and subsequently unbanned agency work in cognisance of the Convention. Consequently, it will be interesting to assess how both South Africa and Namibia sought to comply with the standards on agency work as spelt out in the Convention.

[110] Van Eck (2014) 56 – 57. See also Countouris and Horton "The Temporary Agency Work Directive: Another Broken Promise?" (2009) 34 *ILJ*(e) 329 and 332 – 333, respectively.
[111] Van Eck (2014) 59.
[112] Fredman "*Labour Law in Flux: The Changing Composition of the Workforce*" (1997) 26 *ILJ* 337 at 337 –338.

CHAPTER 3

ASSESSMENT OF COMPLIANCE BY THE NAMIBIAN REGULATORY FRAMEWORK WITH INTERNATIONAL STANDARDS ON EMPLOYMENT AGENCIES

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1. INTRODUCTION

As a member of the ILO[113] Namibia has to comply with ILO standards.[114] Although Namibia has not ratified the Private Agency Employment Convention No 181 of 1997[115] the Convention exerts some influence albeit indirectly in the interpretation of national statute and when referenced and relied on in judicial decisions.[116]

The architecture of Article 144 of the Namibian Constitution has been found to be conducive to the application of international law in Namibia. It provides that "the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." Consequently, reference to non-binding international law in the Supreme Court of Namibia is a regular occurrence.[117] Furthermore, the influence of the international labour standard is confirmed by the Namibian Labour Act, 1997. In its preamble the Act indicates that

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[113] Van Eck (2010) 118.

[114] Blanpain (2014) 138 observed that "the preparation of international labour standards is governed by Article 14(2) of the ILO Constitution and Articles 38 and 39 of the Standing Orders of the Conference."

[115] In *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* at para 99 the Supreme Court noted that "Namibia is a signatory to the Convention but has not ratified it to date."

[116] Dugard (2011) 48. See also *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* above at para 99 to 100 wherein the Supreme Court relied on the Convention even though it has not been ratified and thus it is not part of the law of Namibia.

[117] For instance, see *Africa Personnel Services (Pty) Ltd) v Government of the Republic of Namibia* at para 99 and 100 where the Supreme Court generously referred to the provisions of the ILO Private Agency Employment Convention No 181 of 1997 even though Namibia has not yet ratified it.

one of its purposes is "giving effect, if possible, to the conventions and recommendations of the International Labour Organisation."[118]

This Chapter undertakes an assessment of compliance with standards outlined in the Private Agency Employment Convention No. 181 of 1997 by Namibia. The Chapter further assess whether the Namibian regulatory framework on agency work has been influenced by other non-binding but instructive regional international standards and trends on agency work, in particular the European Union's Temporary Agency Work Directive, 2008.

2. BACKGROUND

Agency work or labour broking in Namibia should be understood within its historical context. This background was spelled out by the Supreme Court in *Africa Personnel Services v Government of the Republic of Namibia.* The Court mentioned that:

> "In Namibia, the expression labour hire is loaded with substantive and emotive content extending well beyond its ordinary meaning. Considered in its historical context, it evokes powerful and painful memories of the abusive contract labour system which was part of the obnoxious practices inspired by policies of racial discrimination."[119]

Pressure from the South West Africa People's Organisation (SWAPO), resulted in the contract labour system which was seen as perpetuating inhuman social and labour conditions, being completely banned by the General Law Amendment Proclamation of 1977. Despite deep seated animosity to the contract labour systems which was and is still equated with slavery[120] in the 1990s the system of hiring out employees was reinstated but this time in the form of labour hire.[121] However, Burger mentions that the "feeling was that labour hire was no different from the pre-independence contract labour system and continued to exploit unskilled workers for minimum remuneration."[122]

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[118] Preamble of the Namibia Labour Act 11 of 2007.
[119] *Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia*.
[120] Van Eck (2014) 60. See also Jauch "Labour Hire in Namibia: New Flexibility or a New Form of Slavery" 2000 LARRI Research Report 1 1.
[121] Botes (2013) 513. Burger "Issues of Labour Hire in Namibia: The Controversies and Possible New Regulations", LLB Dissertation, University of Namibia, 2010, viii notes that today's system of labour hire differs from the contract labour system.
[122] Burger (2010) 9.

The Labour Act which was promulgated in 1992 in collaboration with the Namibian Constitution governed all labour relations in Namibia. However, both were silent on the issue of labour hire thus leaving labour hire unregulated.[123] Botes notes that the first real attempt to regulate labour hire came in the form of the Proposed Guidelines for Labour Hire Employment and Operating Standards in 2000. "According to these guidelines the standard labour law rules as set out in labour law legislation were to have applied to labour hire, but many of the detailed questions regarding labour hire *per se* were not answered."[124]

In 2004 the Namibian Government drafted the Namibian Labour Act of 2004 in which labour hire was defined. However, it was still uncertain as to who the employer was as this matter was not dealt with by legislation.[125] Consequently, in the event of a dispute the agency workers did not know against whom they should proceed. The employees were also excluded from certain benefits such as maternity leave, sick leave, pension, protection against unfair dismissal, and minimum notice period.[126] Botes confirms that "the 2004 Act never took effect since members of parliament, Namibian employers and trade unions were unable to reach consensus on all aspects of the legislation."[127] Therefore, no solutions for labour hire were reached and it remained unregulated.[128]

3. BANNING OF LABOUR HIRE: NAMIBIAN LABOUR ACT

The Namibian government, after having had highly charged and emotive political debates abandoned the initial idea to regulate labour hire and decided to ban it outright in 2007 even though she was a member of the ILO and the Namibian Constitution which is aimed at "adherence to and action in accordance with the international Conventions and Recommendations of the ILO."[129] Section 128 of the Namibian Labour Act 2007 provided 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 the third party." The operation of a labour hire business was criminalised and punishable by a fine or imprisonment. This policy choice to ban labour hire was

[123] Burger (2010) 192 and Botes (2013) 514.
[124] Botes (2013) 514.
[125] Botes (2013) 514.
[126] Botes (2013) 515 – 516.
[127] Botes (2013) 516. See also Burger (2013) 192.
[128] Botes (2013) at 516.
[129] Article 95(d) of the Namibian Constitution. See also Van Eck (2010) 113.

informed by a grim past which was still fresh in the memories of ordinary Namibians[130] and the continued exploitation of both skilled and unskilled labour.[131]

Africa Personnel Services, one of the largest employment agencies in Namibia brought an application in the High Court [132] challenging the constitutionality of section 128 of the Namibian Labour Act, 2007. The High Court held that the common law contract of employment had only two parties to it and that there was no room for interposing a third party, who is the labour broker, into this relationship. It held further that any arrangements that interposes a third party is not employment. Consequently, the High Court held that there is no such thing as "triangular employment relationship in our law."[133] The High Court further held that labour broking was akin to slavery and it should be eradicated.

4. UNBANNING OF LABOUR HIRE: JUDGMENT OF THE SUPREME COURT

Africa Personnel Services[134] appealed the decision of the High Court, on the premise that its fundamental right to carry on any trade or business of its choice as outlined in section 21(1)(j) of the Constitution of Namibia has been violated.[135] The respondent government maintained its stand on banning labour hire. Ultimately, the Supreme Court found in favour of African Personnel Services, and thereby reversed the decision of the High Court. The Supreme Court criticised the judgment of the court a *quo* for failing to give regard to the proper interpretation and analysis of section 21(1)(j) read together with section 21(2) of the same Act.[136]

5. THE NAMIBIAN LABOUR ACT, 2007 AS AMENDED IN 2012

Following from the decision of the Supreme Court, Cabinet found itself in a stark position, that is to ban or impose strict regulation. The latter was seen as the most practical solution consistent with the ILO Recommendation 198 of 2006 that serves as a guide in guaranteeing protection to agency workers.[137]

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[130] Botes (2013) 516. See also Van Eck (2010) 112 – 113.
[131] Ncube, A critical analysis of the new Labour Act number 11 of 2007 in light of the law on labour brokerage Masters Dissertation, University of Namibia, 2013 60. Accessed 15 October 2016. Available at https://repository.unam.edu.na/bitstream/handle/11070/1700/Ncube_2015.pdf?...1.
[132] *Africa Personnel Services (PTY) Ltd v Government of the Republic of Namibia* (2008) NAHC 148.
[133] At para 19.
[134] *Africa Personnel Services (PTY) Ltd v Government of the Republic of South Africa* (2009) NASC BLLR 15.
[135] At Para at 18.
[136] At para 51.
[137] Burger (2010) 192.

The Employment Services Act, 2011 as amended by the Labour Amendment Act, 2012 recognises three types or categories of agency work, namely "services for matching offers", services consisting of engaging individuals with a view to placing them to work for an employer, which assigns their tasks and supervises the execution of those tasks" and lastly, "other services relating to job-seeking that do not set out to match specific offers of and applications for employment, such as providing of information."[138] The recognition of the categories is consistent with the ILO Convention. Further, the Employment Services Act, similar to Article 3 of the Convention, provides for the registrationship and licensing of the employment agencies.[139]

Although Namibia recognizes three categories of employment agencies the Namibia Labour Act regulates the first one only. The Act is silent on the second type of agency work. This is because the second type of agency work is not considered problematic in that no tripartite relation is created but a common law employment (binary) relationship remains intact.

The Namibian Labour Act categorically banned the first type of agency work[140] and specifically indicated that the Act "does not apply in the case of a person who offers services consisting of matching offers and applications for employment without that person becoming a party to the employment relationship that may arise."[141] In its amended form section 128 no longer makes any reference to matchmaking thus by implication permitting match-making without regulating it. Jauch noted that "this labour-only form of outsourcing forms part of a global trend towards more 'flexible' forms of employment, which are implemented by employers in the pursuit of higher profits."[142]

[138] Section 8 of the Labour Amendment Act No. 2 of 2012 amending Section 1 of the Employment Services Act No. 8 of 2011.
[139] Amongst others, the preamble states that purpose of the Act is "to provide for the licensure and regulation of private" and the entire Part is dedicated to the regulation of the licensing of employment agencies.
[140] Section 128(1) stated 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 the third party."
[141] Subsection 128(2).
[142] Jauch "Namibia's Labour Hire Debate in Perspective" 1 at 1. Available at http://www.labour.de/wp-content/uploads/2013/09/Labour-Hire-Background-Paper-2010.pdf. Accessed 14 September 2016.

Section 128(2) states that "for the purposes of this Act and any other law, an individual, except an independent contractor, whom a private employment agency places with a user enterprise, is an employee of the user enterprise, and the user enterprise is the employer of that employee." Van Eck submits that "it is clear that the definition of the first type of private employment agency seeks to protect workers under the 'supervision' of user undertakings."[143] His submission is correct in that the Namibian government and people still view this kind of agency work very suspiciously and were simply forced by the judicial decision of the highest court to unban it.[144]

The position adopted by the government as indicated in section 128(2) of the Namibia Labour Act is contrary to the ILO Private Employment Agencies Convention 1997 which indicates that the agency becomes the employer of the agency worker. Similarly, the EU Agency Directive 2008 provides that the agency becomes the employer but the Directive does not apply where the agency acts as a matchmaker between the job seeker and the user undertaking.[145] The position taken by the Namibian government that the user enterprise should be the employer of the agency worker is not consistent with international standards as indicated in the ILO Convention and in the regional position as expressed in the EU Agency Directive. As Van Eck notes "the Agency Directive 2008 provides that the agency becomes the employer and it does not apply to instances where the agency acts as matchmaker between job applicants and user undertakings."[146]

The provision that the user enterprise should become the employer of the agency worker may be in violation of Article 21(1)(j) of the Namibian Constitution. Van Eck submits that to sidestep a potential constitutional challenge similar to the one launched in *Africa Personnel Services* section 128 created an exception to the rule that the user enterprise must become the employer in respect of all agency workers.[147] Whether the application succeeded or not depends on the support of both the agency and the affected agency worker.[148] It appears that if one or both of them refuses to support the application the user undertaking remains the employer

[143] Van Eck (2014) 59-60.
[145] Article 3(1)(b) and (c) of the Agency Work Directive.
[146] Van Eck (2014) 56.
[147] Van Eck (2014) 60. See section 128(8).
[148] Van Eck (2014) 60.

of the agency worker. Therefore, this makes it difficult and time consuming to the user undertaking to apply for the exception in that the user undertaking has to convince both the agency and the affected agency worker to support the application. There appears to be a contradiction between section 128(8) and section 128(9)(a) which states that if the application for exemption is granted the user undertaking together with the employment agency are both deemed to be the employer of the placed employee. Now, what is the point of bringing a section 128(8) application if the user undertaking will still be deemed to be an employer of a placed employee in terms of section 128(9)(a)? Or put differently, in view of the deeming provision is there really an exception? Further, in terms of section 128(9)(b) "in case of a contravention of this section, the employee has the option to seek relief provided herein against either the private employment agency or the user enterprise or both."

This means that in Namibia there is no way in which the user undertaking will not incur responsibility *vis-a-vis* the agency worker. This sub-clause and the deeming one further indicate that the Namibian government does not want to de-link the agency worker from the user undertaking as it is still fixated on the traditional form of employment relationship. The fixation may in the future be constitutionally challenged successfully. As indicated, the fixation is inconsistent with both the ILO Agencies Convention 1997 and EU Agency Directive 2008 which indicates that the agency should be the employer of the placed employees.

The fixation of the Namibian government on traditional employment relations as reflected in the chosen regulatory framework prompted Van Eck to make the following further observations:

> "(1) First of all, policy-makers have not been persuaded by ILO or EU standards, which require that agencies become the employer in triangular relations. There is no resemblance to the EU Agency Directive 2008 which provides that restrictions on agency work will only be justified on grounds of general interest of agency workers.
>
> (2) Secondly, it may be argued that the latest amendments may be found to be unconstitutional. Since the 1990s, agencies have functioned on the basis of a model in which they acted as employers of agency workers. Such agencies are currently prohibited from being the

employer, and it is only possible for a user undertaking to apply for an exemption. This precludes agencies from initiating the process. Strategies are already being devised to seek loopholes in the Namibian model by placing managers at user undertakings to supervise agency workers to avoid the classification of agencies as private employment agencies." The above correct observation made by Van Eck indicates that regulation of agency work was forced by the judicial decision upon the Namibian government. Without this decision agency work would be banned in Namibia today. This is also indicated by the Namibian Cabinet's statement which indicated that the government is prepared to go as far as amending the Constitution in order to ban agency work.[149] It is therefore not surprising that the agency regulatory framework in Namibia is highly restrictive and appears not to be persuaded by both the international and regional standards. As a result of the extreme restrictiveness of the regulatory framework the Namibia Employers Federation (NEF) remarked that labour hire in Namibia has "effectively been banned."[150]

Although Namibia is a member of the ILO in view of its nationalistic regulation of agency work it will not in the near future sign the Private Employment Agencies Convention 1997 which to date it has not signed. However, despite this, similar to international and regional standards the Namibian regulatory framework specifically indicates that agency workers have a right to join a trade union and to be represented by a trade union in collective bargaining.[151] Also, the principle of equal treatment has been adopted in Namibia.[152] The principle prohibits both direct and indirect discrimination.[153] Van Eck notes that "even though the instrument proscribes discrimination on the classical arbitrary grounds of discrimination in respect of

[149] Cabinet of Namibia, Media Release from Cabinet Chambers, http://209.88.21.36/opencms/opencms/grnnet/MIB/modules/news_008.html (accessed 18 Mar.2013).
[150] Duddy, End of Labour Hire in Namibia, in The Namibian of 3 May 2012. Available at www.namibian.com.na/index.php?id=94710&page=archive-read. Accessed 20 November 2016.
[151] Section 128(3). See also Article 4 of the Convention. On the issue of collective bargaining see Ebisui Non-standard workers: Good practices of societal dialogue and collective bargaining, ILO Working Paper No. 36, 2012. Accessed 18 September 2016. Available at www.ilo.org.
[152] Section 5(2) (2).
(3) For the purpose of subsection (2) it is discrimination on grounds of sex to differentiate without justification in any employment decision between employees who do work of equal value, or between applicants for employment who seek work of equal value.
[153] Blanpain (2014) 609 and 613, respectively.

access to employment, it does not specify that there must be equal treatment in working conditions of agency workers and workers of the user undertaking."[154] In addition to adopting the equality principle similar to the international[155] and regional standards[156] the Namibian regulatory framework, unlike the international standard, requires equal treatment in working conditions.

In this regard section 128(4)(a) states that "a user enterprise must not employ an individual placed by a private employment agency on terms and conditions of employment that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value."[157]

Article 5(1) of the Agency Directive 2008 applies to exactly the "same job" and not to "similar work" as in the Namibian regulatory framework stated above. Consequently, the phrase "similar work" is broader than the phrase "same job". With regard to the principles of equal treatment Blanpain observed that "few principles received such an important and frequent backing in international legal instruments as the principle of equal treatment, also, in the field of employment. All international organisations who took initiatives in this are: the United Nations, the ILO especially, the Council of Europe and the EU."[158]

The phrases "work of equal value" and "similar work" are not defined in both the ILO Convention 1997 and Agency Directive 2008 and also in the Namibian Labour Act, 2007 and will thus be legal minefields. Further, section 128(4)(b) states that "a user enterprise must not differentiate in its employment policies and practices between employees placed by a private employment agency and its incumbent employees who perform the same or similar work or work of equal value."[159]

It should be noted that both these subsections are silent on whether the user enterprise may discriminate or differentiate between agency workers from different agencies. Even though the subsections are silent on this matter it is submitted that it

[154] Van Eck (2014) 55.
[155] Article 5 of the Convention.
[156] Article 5(1) of the Agency Directive 2008 states that the working conditions of agency workers shall be "at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."
[157] Section 128(4)(a).
[158] Blanpain (2014) 605.
[159] Section 128(4)(b).

is not possible to discriminate and differentiate since the section prohibits discrimination and differentiation as a matter of principle. Any contrary conclusion will make a mockery of the principle of equality stated in the section. Also, any form of discrimination and differentiation may be found to be in violation of Article 10 of the Namibian Constitution which lists all the traditional categories upon which people may not be discriminated against.[160] Since Article 10 lists all these categories the Namibian government felt that it is not necessary to list these categories all over again in section 128 of the Namibia Labour Act, 2007 as it is done in Article 5(1) of the Agencies Convention 1997. This is similar to the EU Directive 2008 since it does not list the traditional grounds of discrimination since such grounds are already listed in the Community Charter[161] and the EU Directive on Equal Treatment and Occupation of 2000.[162] Consequently, even though the traditional grounds of discrimination are not listed in the directive itself the equal treatment principle is retained as a fundamental social right in the EU.[163]

6. CONCLUSION

It is clear from the foregoing analysis that the regulation of agency work rather than banning it, was forced upon Namibia by a judicial decision. Consequently, the Namibian government developed a restrictive and nationalistic regulatory framework. This is why the Namibia Employers Federation (NEF) view the regulatory framework as akin to banning agency work and as a result some agencies devised strategies to try to circumvent the regulatory framework.[164]

Although the regulatory framework is to some extent consistent with international standards it is restrictive in approach.[165] As a result of the history of agency work in Namibia their government is still fixated on the traditional form of employment which

[160] Article 10 of the Namibian Constitution states that: (1)"All persons shall be equal before the law".
(2) "No persons may be discriminated against on the grounds of sex, race, colour, ethnic religion, creed or social or economic status."

[161] Article 15 of the Community Charter states that: Whereas, in order to ensure equal treatment, it is important to combat every form of discrimination, including discrimination on ground of sex, colour, race, opinions and beliefs, and whereas, in a spirit of solidarity, it is important to combat social exclusion.

[162] Available at www.aedh.eu/Council-Directive-2000-78-EC.html. Accessed 24 April 2017.

[163] Blanpain (2014) 605.

[164] Van Eck (2014) 68.

[165] Section 128(2) of the Namibia Labour Act 11 of 2007 as amended.

is based on the outdated Roman law[166] approach, which focuses only on the rights and duties of individual employees and employers as reflected in the contract of employment.[167]

Despite the outlined state of affairs, Namibia's membership of the ILO, the changing world of work, the preamble to the Namibian Labour Act, 2007,[168] the Namibian Constitution[169] and the regular reliance of the Namibian Supreme Court on ILO Conventions, including those that Namibia did not ratify (as demonstrated by the decision of the Supreme Court) in the latest *Africa Personnel Services* [170] judgment will ensure the gradual erosion of the common law contract of employment." In this regard Leighton and Wynn correctly observed that:

> "the legal test for classifying employment relationships as applied to temporary agency workers (temps), freelancers and other complex ways of working are flawed and inefficient, being based on outdated employment norms of the 19th century and a law of contract arguably intrinsically unsuited to the analysis of increasing diverse, complicated and dynamic employment relationships."[171]

Mbwaala argues that a sound regulatory approach can succeed in finding a balance between the interests of employers for greater flexibility and the workers' rights to achieve better protection in their employment conditions.[172] By virtue of its nationalistic and restrictive regulatory framework the Namibian government is of a different view.

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[166] Nghiishililwa (2009) 91.
[167] Grogan (2007) 10.
[168] Amongst others, the Namibian Labour Act 11 of 2007 states that it aims to "further a policy of labour relations conducive to economic growth, stability and productivity by giving effect, if possible, to the conventions and recommendations of the International Labour Organisation."
[169] See Chapter 11of the Namibian Constitution.
[170] *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* at para 108.
[171] Wyn and Leighton "*Will the employer please stand up? Agencies, client companies and the Employment status of ht Temporary Agencies Workers'(2006) 36 industrial Law Journal (e) 301.*
[172] Mbwaalala, Can labour law succeed in reconciling the rights and interests of labour broker employees and employers in South Africa and Namibia?, MPhil Mini Thesis, University of the Western Cape, 2013 3. Accessed 15 October 2016. Available at etd.uwc.ac.za/xmlui/bitstream/handle/11394/3006/Mbwaalala_MPHIL_2013.pdf?

CHAPTER 4

ASSESSMENT OF COMPLIANCE BY THE SOUTH AFRICAN REGULATORY FRAMEWORK WITH INTERNATIONAL STANDARDS ON EMPLOYMENT AGENCIES

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1. INTRODUCTION

South Africa is one of the founding members of the International Labour Organisation (ILO) founded in 1919.[173] Due to its apartheid policy South Africa withdrew from the ILO in 1964 and rejoined the ILO on 26 May 1994.[174] Although

[173] Du Toit *et al* (2015) 76. See also Van Eck (2013) 600 and Van Niekerk (1996) 112.
[174] Van Niekerk *et al* (2015) 22.

South Africa was not a member of the ILO for 30 years the ILO's standards had an indirect effect on South African labour law and practice.[175] South Africa has rejoined the ILO and consequently, the South African labour regulatory framework has to be compliant with ILO standards.[176]

2. HISTORICAL DEVELOPMENT OF AGENCY WORK IN SOUTH AFRICA

This chapter explores the historical development of labour law regulation regarding agency work. The concept of agency work, in terms of the ILO CONVENTION 1997 (No. 181) defines Agency work as "b) services consisting of employing workers with a view to making them available to a third party (the user enterprise) which assigns their tasks and supervises the execution of these tasks.

In terms of the EU. The South African labour regulation indicates that even before the constitutional era, there has been some measure of legislative amendments which sought to accord protection to vulnerable employees. In this instance, more focus is placed on agency work.

The development of Labour regulation in South Africa dates back to the Labour Relations Act, 28 of 1956 through to the Industrial Conciliation Act, 94 of 1979, and 95 of 1980, the Labour Relations Amendment Act 57 of 1981, the Labour Relations Act 51 of 1982, the Labour Relations Amendment Act 2 of 1983, the Employment Equity Amendment Act 47 of 2013, the Basic Conditions of Employment Amendment Act of 2013, and the Employment Services Act 4 of 2014. In South Africa, the concept of agency work was introduced for the first time in the Labour Relations amendment Act of 1983.

3. BACKGROUND

This study will focus on legislation and case law dealing with agency work up to the 2015 LRAA and beyond.

4. LEGISLATIVE DEVELOPMENT OF AGENCY WORK.

Section 1(3) of Labour Relations Act 28 of 1956 provided that Labour Brokers are deemed to be the employers of agency workers whom they placed to work with

[175] Van Niekerk (1996) 116.
[176] Cheadle "Regulated Flexibility: Revisiting the LRA and the BCEA" (2006) 27 *ILJ* 663 666.

clients. In terms of this deeming provision, any service rendered to the client or work performed for him shall be deemed to have been rendered to or performed for the labour broker and the worker concerned shall be deemed in respect of such service or work to be the employees of the labour broker. Therefore, the relationship which is recognised in this instance was that between employer and employee, and made no room for any other arrangement that existed between the employment agency and the agency worker.

In *Boumat v Vaughan*[177] the Court held that the workers of a labour broker are not regarded as employees of the clients for whom they physically work or of those whom they actually assist in the carrying on of their business. The Court further held that it is clear that sub section (3) was included in the Act to prevent the workers concerned from being the employees of such clients for the purpose of this Act.

In *Buthelezi and others v Labour for Africa (PTY) Ltd*[178] the Court held that termination of employment for non - disciplinary reasons must be in accordance with legislation and any attempts to contract out of these requirements were void and constituted an unfair labour practice. The Court further held that the employment contract between an employment agency and an agency worker did not terminate automatically when the contract between the *employment* agency and the client came to an end.

Section 63 of the Labour Relations Act 28 of 1956 prohibited the conduct of a labour broker's business without registration with the Department of Manpower. The Labour Relations Amendment Act 2 of 1983 amended the 1956 Labour Relations Act. The said Act excluded Africans and therefore created a dual system of regulation of African and white employees. Du Toit et al state that "for the first time, the amended act abolished the dual system according to which African Workers were ignored, while plant level bargaining by the new, unregistered unions was unregulated.[179] According to Brant,[180]the Guidance and placement act 62 of 1981 applied to personnel consultants but that it specifically excluded the regulation of agency work.

[177] *Boumat Ltd v Vaughan* (1992) 13 *ILJ* 934 (LAC).
[178] *Buthelezi and others v Labour for Africa (Pty) Ltd (1991) 12 ILJ* 588 (IC) 596.
[179] Du Toit et al (2015) 6 - 11.
[180] Brand *ILJ* (1981) 246.

Brassey and Cheadle state that "the reason that agency workers were often excluded from statutory protection was that employment agencies would ensure they fall outside the statutory wage regulating measures and would often structure the relationship in such a way so that agency workers were classified as independent contractors.[181] Benjamin explained that justification given for enacting the amendment was that employment agencies were restructuring employment relationships to prevent these workers receiving protection of statutory wage regulating measures and other minimum conditions of employment.[182]

In this amendment Act, Labour brokers, as they are referred to in the amendment, were deemed to be the employers of individuals whom they placed to work with their clients, provided that they were responsible for paying their remuneration. Further, Labour brokers were required to register with the Department of Labour. In *Khumalo v ESG Recruitment CC (Mecha Trans)* [183] the applicant referred a dispute regarding the unfair dismissal to the Bargaining Council. She had concluded a contract of employment with a temporary employment service, in terms of which she was employed for the duration that her services would be required by the employer's client. The client had indicated that the worker had no right of renewal after the termination date. There was however no termination date specified. Her employment contract was subsequently terminated on 24 hour notice on instruction of the client. In arriving at the award, the arbitrator made reference to the Bill of Rights, which states that “everyone has the right to fair labour practices.” It was ruled that a contract of employment may not diminish an employee's right granted by the LRA, BCEA or any other law. It was therefore ruled that the dismissal was both substantially and procedurally unfair.

Further developments of legislative framework was the Labour Relations Act 66 of 1995. This act retained the formulation that the labour broker was the employer of persons it placed with clients as employees if it assumed responsibility for remunerating these employees.

[181] Brassey and Cheadle *ILJ (1983) 36 - 37.*
[182] Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 2.
[183] 2008 (29) *ILJ* (BCA) 1331.

Further amendments were brought about by the Labour Relations Act, of 1996. Section 198 (1), and (2) reiterated the position of the 1956 and the 1995 Acts. However section 198(3) provided that a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.

Section 198(4) brought a new dimension in terms of which the client is held jointly liable for breaches of statutory basic conditions of employment and minimum wages, collective agreements, and arbitration awards.

Section 198 of the LRA had shortcomings, which became apparent in some legal disputes. Firstly, agency workers found it difficult to identify the employer. Secondly, employers externalise permanent employees to an employment agency in order to avoid employer obligations. Thirdly, the employment agency was responsible for unfair dismissal and unfair labour practises without the client being jointly and severally liable.

LAD Brokers (PTY) Ltd v Mandla[184] is practical example of the difficulty of identifying the employer. The Respondent was an employee of an employment agency, which provided him with an independent contractor agreement with a client. The employment agency paid the salary of the respondent. The client of the employment agency terminated the respondent's contract. The employment agency argued in appeal that the client had an employment relationship with the respondent, thereby escaping liability for unfair dismissal. The client also denied liability for employment of the respondent. The Labour Appeal Court found that the employee was not an independent contractor. The court further held that the respondent was the employee of the employment agency, and that the dismissal constituted an unfair labour practice. In *National Union of Mineworkers and Others v Abancedisi Labour,*[185] an employer established an employment agency, (Abancedisi), which agency took over all its employees and caused them to sign new contracts with it, and therefore provided the employees to the employer, who then became the client of Abancedisi. Subsequently a strike action ensued at the client premises. The client required all

[184] (2001) 9 BLLR 993 (LAC).
[185] (2013) ZASCA 143.

agency workers to sign a code of conduct. Those who refused to sign the new employment contract were denied entry and replaced with new workers.

The agency workers referred the dispute to the Labour Court. The employment agency opposed the application and contended that the application was premature as the agency workers were still on its payroll. The court held that Numsa failed to prove that the agency workers have been dismissed.

in *Nape v INTCS Corporate Solutions (Pty) Ltd*[186]an agency worker was found guilty of sending an offensive email to a colleague. The employment agency subjected the agency worker to discipline and meted out a punishment of a final written warning. The client of the employment agency refused to permit the agency worker to its premises. The employment agency retrenched the agency worker on the basis that it has no alternative but to do so in terms of the arrangement with the client. This is yet another illustration of the abuse of the current law by employment agencies and the clients, which placed agency workers in a vulnerable position. There is a plethora of case law which provide cogent evidence of the problems encountered by agency workers in the triangular employment relationship. Agency workers are in the weakest position and are most vulnerable. In *Khululekile Dyokwe v Coen De Kock and Three Others*[187] an employee, who had been in full time employment was transferred to an employment agency which had a contract with the client. Subsequently, the client dismissed the employee. Inquiring from the employment agency as to why he has been dismissed, he was informed that it is because he was too old. The case of *SA Post Office v Mampuele*[188] is authority for the principle that parties may not contract out of the requirements for fair dismissal as provided for by the LRA. These observations created the need for legislative overhaul of agency work. Fierce debates took place between relevant stakeholders regarding the changing of regulations on agency workers.[189] Bosch[190] stated that the amendments were a careful attempt to balance the interests, something which is the essence of our labour law.

[186] (2010) 8 BLLR 852 (LC)
[187] (2012) 33 *ILJ* 240 (LC). See also *Smith v Staffing Logistics* 2005 (26) *ILJ* 2097 (BCA) 2009; April Workforce Group Holdingst/a The Workforce Group 2005 26 ILJ 2224 (CCMA).
[188] (2009) 30 *ILJ* 664 (LC).
[189] Benjamin *ILJ* (2016) 31-32.
[190] Bosch *ILJ* (2013) 1631.

5. THE LABOUR RELATIONS ACT AS AMENDMENT IN 2015

The official policy of the ANC remained that agency work should be regulated to avoid the abuse of workers. Fierce debates took place between stakeholders, which culminated in the drafting of the Regulatory Impact Assessment on the Department of Labour's proposed new labour laws. The issue of agency work needed more reform to accord security of employment and address the needs of temporary employment services without the need to ban agency work. The Labour Relations Act was amended in 2014 but came into effect on the 1st January 2015 to, amongst others, provide a more detailed regulatory framework of employment agencies and provide more protection to certain agency workers. The amendment was made despite persistent calls by major labour unions to ban employment agencies because, as they submitted, they exploited employees.[191]

Consequently, it can be argued convincingly that labour regulation no longer focuses on the protection of employees who are in traditional forms of employment. Amongst others, in the amendments, a new definition of employer was provided.[192] Agencies are no longer deemed to be employers but clients are confirmed as employers of lower earning agency workers.[193] The temporary employment services and the client are now jointly and severally liable,[194] agency workers are by law now entitled to particulars of employment,[195] by law terms and conditions of employment between agency works and workers employed directly by the client are to be equal.[196] Lastly, the Labour Relations Act as amended provides more protection to employees earning below a stipulated earning threshold. [197] These matters are discussed below.

5.1 DEFINITION OF TEMPORARY EMPLOYMENT SERVICE

Section 198(1) of the Labour Relations 1995 defines “temporary employment service” as meaning “any person who, for reward, procures for or provides to a client other persons who perform work for the client; and who are remunerated by the temporary employment service.”

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[191] Van Eck (2013) 600. Also Van Eck (2010) 107.
[192] Section 198(1).
[193] Section 198(2).
[194] Section 198(4).
[195] Section 198(4B)(a).
[196] Section 198(4C).
[197] Section 198A. See also *Refilwe Esau Mphirime v Value Logistics Ltd and Another.*

The definition of the ILO's Private Employment Agencies Convention, 1997 contains three types of employment agencies.[198] The definition in the LRA is consistent with the second type of employment agency as defined in the Convention in that the employment agency is regarded as the employer and the agency worker is considered to be the employee of the agency. The EU Temporary Agency Work Directive 2008 also "provides that the agency becomes the employer."[199]

As will be seen below this definition of a temporary employment service is consistent with the statutory determination of who is the employer and employee in the triangular relationship in terms of section 198(2). However, for agency workers working for more than three months for the user undertaking and earning less than the prescribed threshold is "deemed" to be an employee of the user undertaking and the user enterprise is deemed to be his or her employer.[200]

The services provided by the agency worker to the client may be for a long duration. Where the agency worker provides his labour for a long time to the user undertaking and the terms and conditions of employment are not the same as those employees who are directly appointed by the user undertaking enterprise this disadvantages the agency workers and leads to their exploitation. Unlike the ILO Convention, Article 1(1) of the EU Agency Directive provides that the "Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction."

The Convention defines private employment agency as (a) "services for matching offers of and applications for employment", (b) "services consisting of employing workers with a view to making them available to a third party", and (c) "other services relating to job-seeking." The Labour Relations Act's definition above is consistent with (b) above and no reference to matchmaking (a) and other services relating to agency work (c) is included in the definition. This is because (b) is the one that creates a triangular relationship.

[198] Article 1 of the Convention.
[199] Van Eck (2014) 56.
[200] Section 198(A)(1)(2) and (3).

5.2 THE EMPLOYER OF AGENCY WORKERS

Section 198(2) states that "a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment services is that person's employer." In this regard McGregor and Budeli remarked that "section 198 of the LRA seeks to address the uncertainties regarding the identity of the employer in these circumstances."[201]

Despite this exclusion the agencies were able to by-pass the deeming provision and structured their relationship with the user undertaking in such a way that affected individuals found themselves to be independent contractors. Fortunately, the current section 198(3) has put it beyond doubt that an "independent contractor is not an employee of a temporary employment agency, nor is the temporary employment service the employer of that person".[202]

Brassey and Cheadle submitted that the confusion as to who is the employer was caused by employment agencies themselves who structured their relationships with the agency workers in such a way that the workers appeared to be independent contractors.[203]

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[201] MacGregor and Budeli "Labour Law" (2010*) ASSL* 775 801. Before the amendment, agency employees had a challenge identifying their true employer with disastrous consequences as they often brought an action against the wrong employer and on that basis their actions would be dismissed. This meant that they now have to bring the same action again against the correct or true employer. This uncertainty was very costly and time consuming and was inimical to the principle that labour disputes must be speedily resolved. See the following cases *Mulder v Special Investigating Unit (2012)* 33 *ILJ* 1508 (CCMA) where the employee alleged that he was the employee of the client but the CCMA found otherwise; *Chirowamhangu v Ramfab Fabrication (Pty) Ltd* (2012) 33 *ILJ* 3002 (BCA) where the employee was interviewed and appointed by Ramfab and later notified that he would be paid by a labour broker, was held to an employee of Ramfab and in *Dyokhe v De Kock* (2012) 33 *ILJ* 2401 (LC) after having worked for Mondi for two years the applicant required to sign a document with Adeco, a labour broker, to the effect that he would be employed by them. The court held that the true employer is the original employer, Mondi.

[202]See the following cases *Colonial Mutual Life Assurance Society v Macdonald* 1931 AD 412 and *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

[203] See *Le Roux "Commercial v Employment Relationships*" (2003) 13 *CLL* 19 24 discusses two, cases, namely, *Bezer v Cruises International CC* [2003] 6 BLLR 535 (LC) and *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 8 BLLR 811 (LC) where the court had to deal with instances of LRA avoidance or contracting out of the LRA to avoid statutory employer obligations *vis-à-vis* employees.

5.3 LIABILITY FOR VIOLATION OF EMPLOYMENT RIGHTS OF AGENCY WORKERS

Section 198(4) provides that both the temporary employment service and the client are jointly and severally liable if the temporary employment service contravenes either the collective agreement, a binding arbitration award, the Basic Conditions of Employment Act or a sectoral determination in terms of the Basic Conditions of Employment Act.

Section 198(4) further provides for joint and several liability of the labour broker and the client only where "terms and conditions of employment" prescribed by statute, collective agreement or arbitration award are contravened. Consequently, there will be no joint vicarious liability and only the agency will be liable for the action of the agency worker where a third party is harmed. [204] Harvey confirms that "[a]lthough the client is jointly and severally liable for the violation of the statute, collective agreement and arbitration award the client is however not jointly liable for the unfair dismissal of an agency employee."[205]

Since 2015 the Labour Relations Act has cleared the confusion on whom the action has to be brought by the agency worker when he or she applies for redress for violation of his or her employment rights.[206] Section 198(4A) provides that if the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A (3) (b) the employee has two options. He or she may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client.[207]

Harvey notes that the Labour Relations Act "provides for reinstatement as a remedy for unfair dismissal" and that the "Labour Appeal Court has held that reinstatement

[204] For case dealing with vicarious liability see *F v Minister of Safety and Security* (2012) 33 *ILJ* 93 (CC); *Minister of Safety and Security v F* (2011) 32 *ILJ* 1856 (SCA) and *Minister of Defence v Von Benecke* (2013) 34 *ILJ* 275 (SCA). For the discussion of the first two cases see Calitz and Garbers "Labour Law" (2012) *ASSL* 534 578 – 580 and for the last case see Grogan "Labour Law" (2013) *ASSL* 716 721. See also Mischke and Beukes "Vicarious Liability: When is the Employer Liable for Wrongful acts of the employees?" (2002) 12 *CLL* 11.
[205] Harvey (2011) 320 above 106. See also Aletter and Van Eck (2016) n 314 above 296.
[206] Harvey (2011) 320 above 108.
[207] Section 198(4A)(a).

(or re-employment) is the primary remedy"[208] and for this practical dismissal the agency worker has no remedy.[209]

5.4 PROVISION OF PARTICULARS OF EMPLOYMENT

Despite the fact that both the employment agency and the client are jointly and severally liable for the contravention of the terms and conditions of employment as prescribed by statute, collective agreement, sectoral determination or arbitration award[210] only the employment agency is obliged to provide the agency worker with particulars of employment that complies with section 29 of the Basic Conditions of Employment Act, when the employee commences employment in terms of section 198(4B)(a) of the Labour Relations Act.[211]

Aletter and Van Eck state that "Section 29 of the Basic Conditions of Employment Act is directed towards all employers."[212] Since by a legal fiction the client enterprise is not an employer of the agency worker it is not obliged to comply with section 29. Section 198(4B)(b) makes the provision of subsection (4B)(a) retrospective after three months of commencement of the Labour Relations Amendment, 2014.

5.5 EQUALITY OF TERMS AND CONDITIONS OF EMPLOYMENT

Section 198 (4C) therefore ensures that the terms and conditions of employment of both the agency worker and the worker directly appointed by the user undertaking are the same in this regard. This is an area where agency workers suffered most severely and this affected their social well-being. Aletter and Van Eck view this amendment as a "significant development" which bolsters the protection of agency workers.[213] Section 198(4C) ultimately ensures equality of treatment between the employment agency workers and the workers directly employed by the client

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[208] Harvey (2011) 103; Botes (2013) 525 and Norton "Remedies for unfair labour practices: Compensation and other remedies for an employer's unfair actions" (2006) 16 *CLL* 56. See also the following cases: *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others* (2008) 29 *ILJ* 2507 (CC) at para 36, and *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC) and *Hoffmann v South African Airways* (2000) 12 BLLR 1365 (CC).

[209] The Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town* at para 42 held that the right to fair labour practices encompasses security of employment specifically the right not to be dismissed unfairly. See also *Sidumo v Rustenburg Platinum Mines Ltd* at para 55.

[210] Section 198(4) of the Labour Relations Act, 1995 as amended in 2014.

[211] Section 198(4B)(a) of the Labour Relations Act, 1995 as amended in 2014.

[212] Aletter and Van Eck (2016) 291. Aletter and Van Eck *"Employment Agencies: Are South Africa's Recent Legislative Amendments compliant with the International Labour Organisation Standard" (*2016) 289 SA MERC LJ.

[213] Aletter and Van Eck (2016) 291.

enterprise. Article 5 of the Private Employment Agencies Convention 1997[214] simply provides that Member States should ensure "equality of opportunity and treatment in access to employment" and prohibits discrimination on classical grounds.[215] Whist equality is of key importance, it is submitted that Article 5 does not adequately address this need and merely provides for the bare minimum regarding equality in the workplace."[216]

The EU deals with race and ethnic discrimination,[217] discrimination between men and women in the workplace[218] and a directive to ensure equal treatment in employment and occupation.[219] It is therefore cold comfort for agency workers that Article 4 of the Convention directs Member States to introduce measures to ensure that agency workers right to freedom of association and their right to engage in collective bargaining are protected. The right to collective bargaining, although important, does not guarantee agency workers that user undertakings will agree to equal treatment. Equal treatment is costly. One of the primary reasons why employers resort to agency workers is precisely to avoid employee costs.

Consequently, it would have been better for the ILO Convention to have a norm similar to the EU Agency Directive that provides that the working conditions of agency workers shall be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.[220] Van Eck views the principle of equal treatment stipulated in Article 5(1) as the "main protection" provided by the Agency Directive.[221] He is absolutely correct in that sentiments that call for banning of agency work are based on the glaring unequal treatment of agency workers and their subsequent discrimination and exploitation. However, Van Eck noted that "there are problems associated with the implementation of the equal treatment provision in the EU as "Bernd Waas alludes to the fact that the equal treatment principle can be

[214] Article 5(1).
[215] See also Article 5(1) above.
[216] Aletter and Van Eck (2016) 303.
[217] EU Directive on Racial Equality Directive, 2000/43/EC(6) of 29 June 2000.
[218] EU Directive on Equal Treatment Directive, 2006/54/EC of 5 July 2006.
[219] EU Directive on Employment Equality Directive, 2000/78/EC of 27 November 2000. All the above three Directives available at http://eur-lex.europa.eu/legal content/EN/ALL/?uri=CELEX%3A32008L0104. Accessed 24 June 2017.
[220] Van Eck (2014) 56. See also Article 5(1) of the Agency Directive 2008.
[221] Van Eck (2014) 56.

set aside by collective bargaining."[222] Indeed, it would have been better if setting aside of this fundamental principle was not allowed because once it is set aside the situation before, status quo of discrimination, is retained for the agency workers who falls under the collective agreement. Unequal treatment is the fountain of objections to agency work.

Section 198(A)(5) provides for equal treatment of deemed employees with employees of the client where the employees are performing same or similar work. This amendment therefore sought to remove any kind of discrimination in this regard. This provision was implemented in *United Chemical Industries Mining Electrical State Health and Allied Workers Union o.b.o Mbombo/Primeserve and another (2017).*[223] Wherein it was stated that.

> "Article 6 of the Agency Directive 2008 further safeguards the right of agency workers to be informed of, and to apply for, vacant positions in the user undertakings."[224]

5.6 REGISTRATION OF EMPLOYMENT AGENCIES

In terms of section 198(4)(F) of the Labour Relations Act, 1996 employment agencies must register to operate as such.[225] The section states that "[n]o person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation, and the fact that a temporary employment service is not registered will not constitute a defence to any claim instituted in terms of this section or 198A." No entity can by-pass the provisions of the Labour Relations Act when dealing with employment agencies by simply failing to register as a temporary employment service.[226] Registration of agencies is consistent with the ILO's Private Agencies Convention 1997 which provides for a system of licensing or certification of employment agencies.[227] Unfortunately, the EU Agency Directive does not contain a similar provision.

[222] Van Eck (2014) 56.
[223] (2017) 2 BALR 135 (NBCRFLI).
[223] Van Eck (2014) 56.
[223] Calitz and Garbers (2012) 538.
[223] Van Niekerk *et al* (2015) 73. See also Calitz and Garbers (2012) 538.
[223] Article 3(2) of the Convention.

5.7 CHARGING OF FEES

Employment agencies charge fees for their services to agency workers and work seekers. and thus increasing exploitation of both. The Labour Relations Act does not regulate or prohibit the charging of fees to job seekers or agency workers. The charging of fees is prohibited by the Employment Services Act. Section 15(1) of the Act states that "no person may charge a fee to any work seeker for providing employment services to that work seeker."

Any agreement that is contrary to section 15 is null and void. The prohibition of charging of fees is consistent with Article 7 of the ILO's Private Employment Agencies Convention 1997 which states that "private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers." Similarly, Article 6(3) of the EU Agency Directive provides that "Temporary-work agencies shall not charge workers any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or an employment relationship with a user undertaking after carrying out an assignment in that undertaking."

5.8 PROTECTION OF EMPLOYEES EARNING BELOW EARNINGS THRESHOLD

Section 198A is designed to protect employees who are earning below a certain statutorily determined threshold. It defines temporary service as meaning work for a client by an employee, for a period "not exceeding three months". It is immediately clear that the meaning of "temporary service" is different from the one provided in section 198(1) in that a temporary service is limited to a period not exceeding 3 months. Further; it is a service that is rendered as a substitute for an employee of the client who is temporarily absent. However, the period of absence is not limited here. It should also have been limited in that the period may be a long temporary period and for any category of work and for any period of time. However, despite the above observation Aletter and Van Eck are of the view that "there can be no doubt that lower earning agency workers do receive more protection after the amendments and this is welcomed." [228]

[228] Aletter and Van Eck (2016) *"Employment Agencies: Are South Africa's Recent Legislative Amendments compliant with the International Labour Organisation Standard" (*2016) 289 SA MERC LJ at 293.

The authors also say that “they are not only protected in respect of their right to equal treatment in terms of the EEA and equal treatment in terms of the LRA of 1995, but also in respect of not being kept in precarious positions for indefinite periods. Despite this, it is regrettable that policy makers have decided to fall back on the deeming position of the previous era, which may give rise to interpretational problems. In respect of improving the plight of agency workers in general, the same however, cannot be said of higher earning employees as their situation remains essentially the same as before the introduction of the amendments.”[229]

6. CASE LAW DEALING WITH THE LEGISLATIVE CHANGES AFTER THE 2015 AMENDMENT

Following the latest legislative changes, interpretative challenges surfaced regarding some uncertainties on the deeming provisions of section 198.

In *Refilwe Esau Mphirime v Value Logistics Ltd and Another*,[230] an employee had been appointed on a year contract at a monthly income of less than the threshold of R205 433.30. He was not replacing an employee who was on temporary employment. The employee was given a one week's notice of termination of his employment. The Arbitrator at the Bargaining Council stated that the person whose services have been procured is the employee of the TES or employment agency, and the TES is that person's employer. It was further held that the TES is the bearer when it comes to the duties and obligations towards an employee for purposes of the LRA. The Arbitrator however noted that section 198(4) of the LRA, which regulates joint and several liability are limited to transgressions of the BCEA.

Section 198A(3)(b) of the LRA provides that an employee who is not performing temporary work for the client is deemed to be the employee of that client and the client is deemed to employer. on construction of the provision, the arbitrator came to the conclusion that the wording is clear and unambiguous. It was held that once the agency worker is no longer performing a temporary service the client is deemed to

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[229] Aletter and Van Eck (2016) 293. See also Van Eck (2013) 2 above 606 who in the same vein in other words, the same level of protection (some would say lack of protection) applies to all employees earning above the threshold amount.
[230] (2015) 36 *ILJ* 2433 (BCA).

be the employer in terms of the LRA and therefore has responsibilities under the LRA.

Assign Services(Pty) Ltd v Krost and Racking (Pty) Ltd,[231] brings some fierce legal debates on the proper interpretation of section 198A(3)(b)(i) of the LRA, as amended by the 2014 LRA amendment. The thrust of section 198A is to protect the vulnerable employees from being abused by the TES. As the Court held in the *Assign Services* case above, the protection is a measure to ensure that these type of employees are not treated differently from employees employed directly by the client. It was held further that the purpose of these protections in the context of section 198A is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client.

In crisp, the facts of the matter are that the client received feedback that the agency workers placed by the employment agency were inclined to assert their right to being employed exclusively by the client. The agency workers with the client had been placed to the client for a period of more than three months. A dispute ensued between the employment agency and the client as to who is the employer of the placed employees. The employment agency held the view that the agency workers were its employees and further that in terms of the deeming provisions of section 198, were also employees of the client for purposes of the LRA.

This dispute served at the CCMA as a stated case in terms of section 198D of the LRA, on the basis that the facts surrounding the employability and the duration of employees were not in dispute. Assign Services held the view that it remained the employer of the placed employees for all purposes, and that they are also deemed to be employees of the client. This was referred to as the dual employment position.

The trade union representing the employees, on the other hand, contended that in terms of the deeming provisions, the placed workers are deemed to be employees of the client for purposes of the LRA. On the contrary, the client's position was to abide by the position of the Commissioner. The Commissioner ruled that the placed workers are the sole employees of the client once the threshold of three months has elapsed.

[231] (2015) (11) BLLR 1106 (LC) at para 2 - 4.

The client, Assign Services, took the Award of the Commissioner on review to the Labour Court on the basis that the Commissioner committed a materiaI error of law and a gross irregularity, that the award was unreasonable. The Labour Court ruled that the award of the Commissioner was susceptible to being set aside on the basis that the Commissioner had committed a material error of law in reaching the conclusion he did. The Labour Court therefore found that nothing in the deeming provisions can be found to invalidate the contract of employment between TES and workers or derogate from its terms and they remain firmly in place. The Court further held that there was no reason why the TES should be relieved of its statutory rights and obligations towards the placed workers because the client had acquired a dual set of such rights and obligations. The court therefore held that the relationship between the TES and workers, on the one hand, and the workers and the client, on the other hand, operated in parallel in terms of section 198A(3)(b).

This matter was taken for Appeal to the Labour Appeal Court. At the said Appeal Court, Numsa, the workers' representative trade union, argued that the Labour Court erred in holding that the Commissioner committed an error in finding that the employment agency continued to be the employer of the placed workers. They further argued that once section 198A (3)(b) of the LRA is triggered, the client is the only employer of the workers for the purpose of the LRA was correct.

On behalf of the client, it was argued that the Labour Court correctly found that the commissioner's interpretation of the deeming provisions was wrong. It was argued that the Court a *quo's* construction is to leave the bond between the TES and the placed workers intact.

The Labour Appeal Court[232] held that in order to ascertain the employer of the placed worker in that position for the purpose of the LRA, one is enjoined to resort to the provisions of section 198A(3)(b). The Court held that such a worker is deemed to be the employee of the client and the client deemed to be the employer of the worker. The Court further held that it would make no sense to retain the TES in the

[232] *Numsa v Assign Services (Pty)Ltd and krost shelving and Racking (Pty) Ltd (2017)* 38 *ILJ* 1978 (LAC). In arriving at that position the Court analysed the sole employer interpretation and held that the sole employer interpretation is consonant with the main thrust of the Amendment to section 198 and 198A, which is outlined in the Explanatory Memorandum accompanying the LRA Amendment Bill. The Amendment Bill stated the purpose of the amendment as being to address more effectively certain problems and abusive practices associated with temporary employment services.

employment equation for an indefinite period if the client has assumed all the responsibilities that the TES had before the expiration of the three - month period.

The Labour Appeal Court further held[233] that the plain language of section 198A(3)(b) of the LRA, interpreted in context unambiguously support the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers.

The Labour Appeal Court further held[234] that the Labour Court misdirected itself in the interpretation of section 198 of the LRA. The Labour Appeal Court therefore held that the award of the commissioner is not susceptible to review. The legal position, in terms of the Labour Appeal Court ruling, is that once section 198A (3) (b) has been triggered, the client become the employer of the agency work. In terms of this ruling, the uncertainty between client and sole employer has been cleared, and the client will be the sole employer of the agency worker.

Pecton Outsourcing Solutions CC v Pillemer NO and others,[235] dealt with automatic termination of contracts. The agency workers signed a fixed term contract of employment with the employment agency. The contracts of the workers were linked to the service agreement between the employment agency and the client. The client terminated the service agreement with the employment agency. The employment agency also gave agency workers notice of termination. At the CCMA, the Commissioner found that the agency workers' dismissal was procedurally unfair and awarded the agency workers compensation. The employment agency referred the matter for review to the Labour Court. The view of the Judge was that the correct approach is to examine whether the underlying cause for the dismissal of the agency worker was due to misconduct, incapacity, operational requirements or no reason at all. The Court held that courts should recognise the content of the reason for dismissal than the form of the contractual device covering it. This dictum brings a further approach to the construction of section 198. It is submitted that this approach of content than form is more preferable and would lead to demystifying the issues of interpretation of section 198.

[233] (2017) 38 *ILJ* 1978 (LAC) para 46.
[234] (2017) 38 *ILJ* 1978 (LAC) para 47.
[235] (2016) 37 *ILJ 693* (LC).

7. CONCLUSION

Most of the international and regional norms have been incorporated into the South African amended regulatory framework. Therefore, despite the shortcomings identified by Van Eck and Aletter in general, South African law complies with both international and regional norms in that the employment agency is recognised as the employer. Improved protective measures are currently being extended to low paid agency workers.[236] The amendment to section 198 with the introduction of the minimum threshold of three months for employees earning below R205, 433.30 was addressed the issue of production to valuable employees against abuse by employment agencies.

What cames out of the discussion of case law following the promulgation of the 2015 LRA is that a further confusion is breeding in relation to the arrangement of sole and dual employment in the interpretation of the deeming provisions of section 198.

The award of the CCMA in the *Assign Services case* favours a construction that once section 198 (3)(b) has been triggered, the client is the employer of the placed worker. On the contrary, the Labour Court favoured the dual employment approach. Aletter and Van Eck contend that:

> " the main conclusions of the Labour Court are, incense, that the contract of employment remains in place with the employment agency beyond the three month period and that two employment relationships are established after the three month duration for the purpose of the LRA of 1995".[237]

A retention of the dual employment approach would, in my view, defeat the very purpose of legislative amendments introduced by section 198A (3)(b), and would still leave uncertainty as to who is the employer of the agency worker. Therefore, the agency workers earning below the threshold would still be vulnerable and open to abuse by employment agencies and their clients. Should the judgment of the Labour Court be the proper interpretation of section 198A (3)(b),this would create further confusion and leave agency workers vulnerable.

[236] Van Eck (2014) 65.
[237] Aletter and Van Eck (2016) 295.

The Labour Appeal Court has cleared the midst by holding that once section 198A (3)(b) has been triggered, the client becomes the employer of the agency worker. The Court further held that there is no room for dual employment in terms of section 198A (3)(b).

CHAPTER 5

COMPARATIVE ANALYSIS OF THE NAMIBIAN AND SOUTH AFRICAN REGULATORY FRAMEWORK

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1. INTRODUCTION

There are a number of similarities and differences between Namibia and South Africa which warrants a comparative analysis of their regulatory frameworks on agency work.[238] Both countries are members of the ILO who have not adopted the ILO Agency Convention, 1997 and function under a supreme Constitution that guarantees the right to freedom of occupation, trade and profession.[239] Although these two countries have not signed the ILO Agency Convention, 1997 their constitutional architectures do allow courts to make reference to non-binding and binding international law as. As result their courts regularly engage in comparative analysis. Their courts freely make reference to non-binding international law and constantly make reference to foreign law in the course of their judgements.[240]

Both countries grappled with the question of how best to deal with labour broking and recently enacted pieces of legislation to deal with labour broking or agency

[238] Burger (2010) vii.
[239] Van Eck (2010) 120.
[240] In South Africa see *S v Makwanyane* and in Namibia see *Africa Personnel Services v Government of the Republic of Namibia*.

work.[241] Before they enacted their pieces of legislation to deal with agency work both countries requested the assistance of ILO experts.[242] Both are common law countries and thus their employment law is based on the common law of contract.[243]

Both countries have strong labour unions which advocated the complete ban of agency work as it was viewed to be extremely exploitative.[244] The major difference between the two countries is that Namibia initially banned agency work whilst South Africa permitted it without much regulation.[245] The different policy decisions on agency work by both Namibia and South Africa were informed by the attitude of respective governments to agency work. Namibia subsequently enacted a piece of legislation that permits and strictly regulates agency work[246] whilst South Africa amended its existing legislation to further regulate agency work and enacted another piece of legislation that specifically regulates the registration of agencies despite incessant union pressure to ban, outright, agency work.[247]

2. THE POSITION OF THE NAMIBIAN AND SOUTH AFRICAN GOVERNMENTS TO AGENCY WORK

The regulatory framework on agency work in Namibia is informed by the political and socio-economic history which shaped the attitude of both the government, unions and the court against agency work in that country.[248]

In South Africa agency work was permitted without regulation.[249] The first statutory regulation of employment occurred in 1982.[250] In 1982, the previous Labour Relations Act 1956 (LRA 1956) was amended to define an agency.[251]" The amendment deemed the employment agency to be the employer of the agency worker.[252] "The 1982 legislation also contained a legal requirement for employment

[241] For Namibia see the amended Namibia Labour Act 11 2007 and for South Africa see the Labour Relations Amendment Act, 2014.
[242] Burger (2010). See also Botes (2013) 521.
[243] Van Eck (2014). See also Nghiishililwa (2009) 90.
[244] Burger (2010) ix. For the position in South Africa see Van Eck (2010) 107.
[245] Van Niekerk *et al* (2015) 68.
[246] Labour Amendment Act 2 of 2012 amending the Namibia Labour Act 11 of 2007 and also enacted the Employment Services Act 8 of 2011.
[247] Labour Relations Amendment Act 6 of 2014 and Employment Services Act 4 of 2014.
[248] Botes (2013) 506.
[249] Van Eck (2014) 61.
[250] Aletter and Van Eck (2016) 287.
[251] Van Eck (2014) 61.
[252] Section 1(3) of the Labour Relations Act 1956 (Act No. 28 of 1956).

agencies to register with the Department of Labour and provided that the client's premises were deemed to be the place of work of the workers."[253] The classification of agencies as employers and the requirement of registration indicates that the South African regulatory framework was far ahead of similar international norms or standards.[254]

In the 1990s serious concerns were raised about increasing casualisation and externalisation of the South African workforce.[255] Unlike the Namibian government, the South African government did not take steps to ban casualisation and externalisation.

The South African government's attitude towards agency was and is not hostile but was more temperate and calculated despite the fact that there was a strong and incessant lobbying by unions for the government to ban agency work.[256]

3. DEFINITION OF AGENCY WORK

The Namibian Labour Act, 2007, as amend in 2012 does not provide a definition of labour hire or agency work. The Act simply indicates that independent contractors are not and cannot be agency workers and agencies are not employers of agency workers but user enterprises are considered as such.[257]

Unlike the Namibian Labour Act 2007 section 198(1) of the Labour Relations Act as amended in 2015 defines a temporary employment services as "any person who, for reward, procures for or provides to a client other persons (a) who perform work for the client; and (b) who are remunerated by the temporary employment service."
This definition is consistent with the definition provided in the ILO Agencies Convention, 1997 and the EU Private Agencies Directive, 2008.[258]

The Namibian government deliberately failed to provide a definition because such definition would not be consistent with section 128(2) of the Namibian Labour Act wherein it is indicated that the user enterprise is the employer and not the agency.

[253] Aletter and Van Eck (2016) 289.
[254] The ILO regulated these matters from 1997 onwards with the adoption of the Private Employment Agencies Convention 1997.
[255] Van Niekerk *et al* (2015) 63.
[256] Van Eck (2010) 4 at 107.
[257] Botes (2013) 521 – 522.
[258] Van Niekerk *et al* (2015) 69.

Similar to the Namibian Labour Act the Labour Relations Act in section 198(3) confirms that "a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person."

Both the Namibian and South African regulatory framework do not indicate that agency work should generally be of a short duration.[259] No guidance can be derived from the international norms since "neither the Convention, 1997 (No. 181) nor the Recommendation 1997 (No. 188) (and for that matter the Guide to Private Employment Agencies, 2007) contain any guidance pertaining to the limits on the duration of placement with clients."[260]

4. THE EMPLOYER OF AN AGENCY WORKER

Section 128(2) of the Namibian Labour Act, 2007 as amended in 2012[261] provides that "an independent contractor, whom a private employment agency places with a user enterprise, is an employee of the user enterprise, and the user enterprise is the employer of that employee."

This position is patently inconsistent with the ILO's Agency Convention 1997 and the EU Agencies Directive of 2008 which indicates that the agency is the employer of the agency worker and not the user enterprise. Consistent with international norms section 198 of the Labour Relations, Act as amended in 2015 provides that "a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer."

The Namibian provision that the user enterprise should become the employer of the agency worker may be in violation of Article 21(1)(j) of the Namibian Constitution which states that "all persons shall have the right to practise any profession, or carry on any occupation, trade or business."

It is, however, not clear whether the agencies can successfully bring an action against the government on the basis that section 128(2) states that "all persons shall

[259] Harvey (2011) 106. See also Van Eck (2013) 605.
[260] Aletter and Van Eck (2016) 307.
[261] Labour Amendment Act 2 of 2012.

have the right to practise any profession, or carry on any occupation, trade or business" simply because they are not regarded as the employers of the people that they make available to the user enterprises. Van Eck is of the view that "it may be argued that the latest amendments may be found to be unconstitutional."[262]
The policy position of the Namibian government has led Van Eck to conclude that Namibian "policy-makers have not been persuaded by ILO or EU standards, which require that agencies become the employer in triangular relations."[263]

However, in South Africa, an exception is made to lower earning agency workers. Agency workers earning below a stipulated earnings threshold and employed for a period of less than three months are presumed to be employees of the user enterprise.[264] Consequently, the rule or principle that the agency is the employer of agency workers is made flexible in order to provided added protection to lower earning agency workers.

5. PRESUMPTION AS TO WHO IS AN EMPLOYEE

In terms of section 128(A) of the amended Labour Act 2015, a person who works for renders services to any person is presumed to be an employee of that person regardless of the form of the contractor designation of the individual."

Consequently, it means that the agency workers are presumed to be employees of the user enterprise regardless of the fact that they may have signed a contract with the agency or irrespective of the agency employees' designation if one or more of the factors are present.

In terms of section 198A (2) of the LRA the presumption as to who is an employee is restricted to employees earning below a determined threshold (which is R205 433.30 p.a) and appointed for a period not exceeding three months.[265] In terms of section 198A(1) an employee provides temporary service if the duration of that employment is less than three months. In terms of section 198A(3) (b) "an employee not performing such temporary service for the client is deemed to be the employee of

[262] Van Eck (2010) 112.
[263] Van Eck (2010) 116.
[264] Aletter and Van Eck (2016) 288.
[265] Section 198A of the Labour Relations Act 66 of 1995.

that client and the client is deemed to be the employer; and subject to the provisions of section 198B, employed on an indefinite basis by the client."

Further, in terms of section 198A(5) an employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment. There can be no doubt that lower earning agency workers do receive more protection after the amendments and this is welcomed. They are not only protected in respect of their right to equality in terms of the EEA and equal treatment in terms of the LRA of 1995, but also in respect of not being kept in precarious positions for indefinite periods.[266]

Unlike in Namibia, the South African Government did not consider it necessary to make other categories of vulnerable workers employees of agencies. The Namibian government focuses on protecting the individual so that he or she is not exploited whilst the South African government focuses on the category of work so that that category of work is not exploitative to a person who finds himself or herself performing such work.

6. RESPONSIBILITY FOR THE VIOLATION OF THE EMPLOYMENT RIGHTS

The policy position in Namibia on this question is far more complicated. Section 128(8) of the Namibia Labour Act 1997 states that where the Minister is satisfied that the rights of the agency worker are adequately protected he or she may, on application by the user enterprise, grant an exemption from section 128(2).[267] By implication section 128(8) suggests that since the user enterprise is declared to be the employer of the agency worker it follows that it is responsible for the violation of the rights of the agency worker, including unfair dismissal. In reality, in view of section 128(2) it appears to be a misnomer to refer to the person made available by the agency to the user enterprise as an "agency worker" because that worker is in a binary relationship with the user enterprise similar to a common law employment relationship.

Consequently, it follows that, it is a misnomer to refer to an exemption or an application for exemption because the user enterprise is not really being exempted

[266] Aletter and Van Eck (2016) 293.
[267] Section128(8).

but rather made jointly and severally liable with the agency for violation of the employment rights of the agency worker.

In South Africa section 198(4) of the Labour Relations Act states that "[t]he temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes a collective agreement concluded in a bargaining council that regulates terms and conditions of employment; a binding arbitration award that regulates terms and conditions of employment; the Basic Conditions of Employment Act; or a sectoral determination made in terms of the Basic Conditions of Employment Act." Van Eck correctly observed that "in what appears to be a glaring omission, the section does not extend shared responsibility of some of the most significant protections offered by the LRA, such as protection against unfair dismissal and unfair labour practices perpetrated by the client against its workers."[268] Further, in terms of section 198(4A)(a)(b)(c) the employee may institute proceedings against either the temporary employment service or the user enterprise or both, and the labour inspector acting in terms of Basic Conditions of Employment Act may secure and enforce compliance by either or both, and lastly, any order or award made against a temporary employment service or client may be enforced against either. The enforcement of the order or arbitration award against the entity that was not part of the proceedings appears unfair.

7. EQUALITY OF TREATMENT

Section 128(4) of the Namibian Labour Act as amended states that "a user enterprise must not employ an individual placed by a private employment agency on terms and conditions of employment that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value."

Consequently, "the employees (agency workers) will be entitled to receive all the rights and benefits of a standard/typical employee."[269] This section is bolstered by section 26(2)(a)(i) of the Namibian Employment Services Act, 2011 which states that "a private employment agency may not place an individual with an employer or a

[268] Van Eck (2010) 109. See also Van Eck (2013) 605. Harvey (2011) 107.
[269] Botes (2013) 522.

prospective employer unless the employer or prospective employer undertakes to ensure that every individual is employed on terms and conditions not less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value." Both these sections mean "that these employees (agency workers) may no longer be distinguished from the mainstream employees of the client, but should instead be treated equally."[270]

Further, subsection 26(2)(a)(ii)(iii) provides that the private employment agency must ensure that the prospective employer undertakes to ensure that the agency worker is employed on the same terms and condition not less favourable than those provided for in a collective agreement applicable in that industry or those prevailing for similar work in the industry and region in which the employees are employed or those prevailing in the nearest appropriate region, if similar work is not performed in the region where the employee is employed.

Section 26(2)(b) and (c) additionally provides that a private employment agency may not place an individual with an employer or a prospective employer during or in contemplation of a strike or lockout at the facilities of the employer or prospective employer; or within six months after the employer or prospective employer has dismissed employees in terms of section 34 of the Namibian Labour Act, 2007.
The issue of equality in South African law is regulated by section 198(4C) of the Labour Relations Act, 1995 which simply states that "[a]n employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services."

Consequently, Van Eck submitted that "there is no obligation on TESs to provide agency workers with equal conditions of service (especially equal pay for similar work) compared to workers who are in the employ of clients doing essentially the same work. This has resulted in a situation in terms of which agency workers are being exploited."[271] Indeed, Van Eck is correct in that there may be instances where the user enterprise is not covered by a sectoral determination or bound by a

[270] Botes (2013) 522.
[271] Van Eck (2013) 606.

collective agreement. Or worse, those two instruments may not provide for conditions which are the same as those of the user enterprise.

In both Namibian and South African law there is no provision that gives the agency workers a right to apply to be informed and to apply for any job in the user enterprise and creates a corresponding obligation on the user enterprise to inform agency workers of existence of job opportunities in its place of work. Van Niekerk *et al* noted that "often the agreement between a TES and the client precludes the TES employee from applying for vacancies at the client."[272] Indeed, a provision should have been included in the legislation declaring such agreements null and void. Van Eck also shares the view that any clause prohibiting agency employees from concluding contracts with client after the assignment, should be declared void.[273]

The ILO Private Employment Agencies Convention, 1997 does not contain a similar provision. However, the provision is contained in Article 15 of the Private Employment Agencies Recommendation, 1997. In this regard Aletter and Van Eck observed that "Article 15 provides that employment agencies should not prevent the user enterprise from hiring an employee of the agency assigned to it, restrict the occupational mobility of an employee', or impose penalties on an employee accepting employment in another enterprise."[274]

With regard to employees earning below a determined earnings threshold the Labour Relations Act follows a different approach, an approach that is similar to that of section 128(4) of the Namibian Labour Act in that section 198A(5) provides that "an employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment."

From the reading of both section 198(4C) and 198A(5) it is clear that differentiation is allowed with regard to higher earning agency workers but absolutely not allowed for lower earning agency workers.

[272] Van Niekerk *et al* (2015) 71.
[273] Van Eck (2013) 607.
[274] Aletter and Van Eck (2016) 305.

8. PROVISION OF PARTICULARS OF EMPLOYMENT

Only the employment agency is obliged to provide the agency worker with particulars of employment "that complies with section 29 of the Basic Conditions of Employment Act, when the employee commences employment in terms of section 198(4B)(a) of the Labour Relations Act."[275]

The obligation on the agency to provide particulars of employment is consistent with the determination, "statutory status"[276] or "legal fiction"[277] in section 198(2) that "a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer."[278] Further, the requirement that the employment agency provides employment particulars that comply with section 29 of the Basic Conditions of Employment Act is consistent with Article 12 of the Convention, 1997 which requires member states to allocate employer responsibilities. [279] However, the Convention "does not specify whether the responsibilities should lie with either the employment agency or the client."[280] Section 29 of the Basic Conditions of Employment Act is directed towards all employers.[281]

9. CHARGING OF FEES TO AGENCY WORKERS

The international norms prohibit the charging of fees by employment agencies for services rendered to the prospective agency worker. Similarly, section 24(1) and 1A of the Namibian Employment Services Act proscribes the charging of fees directly or indirectly.

Any person or entity which fails to comply with the above clauses commits an offence and may be liable to a fine or imprisoned.[282] The Namibian provision is a better provision as it exceeds the international norms in that it even prevents the user enterprise from charging any fees to the agency worker. The international norms only prohibit the private employment agencies from charging fees. For

[275] Section 198(4B)(a) of the Labour Relations Act 66 of 1995, as amended in 2014.
[276] Harvey (2011) 105.
[277] Harvey (2011) 101. See also Calitz and Garbers (2013) 560.
[278]198(4B)(a).
[279] Article 12.
[280] Aletter and Van Eck (2016) 304.
[281] Aletter and Van Eck (2016) 291.
[282] Section 24(2) of the Employment Services Act 8 of 2011.

instance, Article 7 of the ILO's Private Employment Agencies Convention 1997 simply states that "private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers." Similarly, Article 6(3) of the EU Agency Directive has that provision.

Similarly, in South African law the charging of fees is prohibited by section 15(1)[283] of the employment services Act. section 15(5) thereof requires the commercial agreement between the agency and the user enterprise to specify the remuneration of the placed agency employee and the fee that will be paid by the user enterprise to the agency for the placement of the employee.[284]

Any agreement concluded with an employee that is contrary to section 15 is considered null and void.[285] Perhaps the commercial agreement concluded between the agency and the user enterprise that is contrary to section 15(5) should also have been declared null and void.

10. REGISTRATION OF EMPLOYMENT AGENCIES

Section 19 of the Namibian Employment Services Act prohibits any person to operate or conduct the business of an employment agency without the necessary licence. Anyone who operates without such a licence commits an offence and may be fined or imprisoned. Similarly, in South Africa in terms of Section 198(4)(f) of the Labour Relations Act, 1995 employment agencies must register to operate as such.[286]

Consequently, no entity can by-pass the provisions of the Labour Relations Act when dealing with employment agencies by simply failing to register as a temporary employment service. The legislation referred to in section 198(4)(F) is the Employment Services Act, 2014.[287]

11. CONCLUSION

Although there are a number of significant similarities between South Africa and Namibia these countries chose to regulate agency work differently. Inconsistent with

[283] Section 15(1) of the Employment Services Act 4 of 2014
[284] Section 15(5) of the Employment Services Act 4 of 2014.
[285] Section 15(6) of the Employment Services Act 4 of 2014.
[286] Calitz and Garbers *"Labour Law"* (2012) 538.
[287] Van Niekerk *et al* (2015) 73. See also Calitz and Garbers (2012) 538.

international norms Namibia regards the user enterprise as the employer of agency workers[288] whilst consistent with international norms South Africa regards the agencies as employers of agency workers.[289]

South Africa on the other hand had a moderate and open minded view of agency work. Consequently, despite incessant pressure from the South African government was able to weather the storm and chose regulation of agency work rather than to ban it. As a result, its regulatory framework is largely consistent with international norms even though in certain respects it has some shortcomings, which are, fortunately, fixable. On the other hand, it can be said that in Namibia there is no agency work, as the employer organisation argued, in that the user enterprise is regarded as the employer.[290]

However, in certain instances the Namibian regulatory framework is consistent with international norms by adopting principles such as the non-discrimination and equality principle. South Africa also adopted the same principles.
Although in both Namibia and South Africa the ILO was involved in assisting or reviewing the existing regulatory framework Namibia appears not to have been persuaded by ILO international norms as confirmed by its current regulatory framework.[291] However, South Africa has been greatly influenced by the ILO labour standards since its regulatory framework is generally consistent with the ILO norms.[292]

Consequently, similar to the ILO the South African regulatory framework is no longer only rights based and thus focusing on providing protection to the weaker party in the employment relationship but focuses on techniques in providing protection to employees and flexibility to both employees and employers with respect to types of employment and the manner and duration of employing a workforces suitable for business requirements.[293]

[288] Botes (2013) 521.
[289] Van Eck (2014) 62.
[290] Van Eck (2010) 68
[291] Van Eck (2014) 60
[292] Van Eck (2014) 62.
[293] Van Eck (2013) 602.

CHAPTER 6

CONCLUDING REMARKS

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1. INTRODUCTION

From the preceding discussions it is clear that despite severe pressure on the South African government to ban agency work the government did not succumb. The government chose to rather regulate the employment agency industry to afford the agency worker more protection. However, in Namibia regulation was not freely opted by the government but was forced upon it by the judicial decision of its highest court.

In both countries agency work was found to be exploitative to individuals who found themselves employed as agency workers since these workers were and are not remunerated the same way with typical employees, their working conditions were and are terrible and they received little or no benefits at all, such as medical aid, pension, etc. Consequently, the inequality between agency workers and workers directly employed by the client or user enterprise is the fountain of all the objections to agency work. Therefore, addressing inequality between agency workers and client or user enterprise employees will go a long way in addressing the objection to agency work and thus make it acceptable to objecting lobbyist.

2. PROVISION OF PARTICUALRS OF EMPLOYMENT

Generally, agency workers were not provided with particulars of employment like typical employees. This made it difficult to prove who their employer is in particular in case of disputes. Now the law requires that agency workers be also provided with particulars of employment. The fact that employment agencies are provided to provide employees with particulars of employment provides much needed clarity

regarding the question of whether the employment agency or the client is in fact the employer.[294]

In Namibia there is no corresponding requirement since the client and not the employment agency is regarded as the employer. Consequently, Namibian regulatory framework is not consistent with Article 12 of the Private Employment Agencies Convention 1997 which requires member states to allocate employment responsibilities.

In view of the principle of equality section 198(4B)(a) of the Labour Relations Act, 1995 should have been amended to require provision of similar particulars of employment similar to those of employees of the client.

It should be noted that "TES or brokers" were and "are increasingly criticised by organised labour, as agency workers are exploited in that they often are employed at lower wages that permanent employees, do not receive the same benefits as the latter."[295] Also, the duration of agency work should be regulated at both the international and national level. Lastly, both agencies and user undertakings should be equally liable for violation of the employment of all the rights of the agency workers.

3. PRINCIPLE OF EQUALITY

Both the regulatory framework of Namibia and South Africa acknowledge the importance of equality in the terms and conditions of employment. Aletter and Van Eck noted that "equality is of key importance"[296] and lack of it is primary source of the criticisms against agency work.[297] Van Eck views the principle of equal treatment stipulated in Article 5(1) of the EU Agency Directive 2008 as the "main protection"[298] provided by this directive. In this regard Blanpain observed that "few principles received such an important and frequent backing in international legal instruments as the principle of equal treatment."[299] It is correct that this is the most important principle which any national regulatory framework should concentrate on in order to

[294] Van Niekerk *et al* (2015) 71.
[295] MacGregor and Budeli (2010) 801.
[296] Aletter and Van Eck (2016) 303.
[297] MacGregor and Budeli (2010) 801.
[298] Van Eck (2014) 56.
[299] Blanpain (2014) 605.

provide protection to agency workers and thus eliminate or reduce exploitation of these workers.

The Namibian regulatory provision on equal treatment appears to be a better provision than the South African one in that it states that "a user enterprise must not employ an individual placed by a private employment agency on terms and conditions of employment that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value."[300] This section is strengthened by section 26(2)(c)(i) of the Namibian Employment Services Act, 2011.

The South African provision that attempts to ensure equality of terms and conditions is porous as it simply states that an agency worker should not be employed by the temporary employment service on terms and conditions of employment which are not permitted by the Labour Relations Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services.[301]

4. DURATION OF AGENCY WORK

Generally, agency work should be for a shorter duration[302] and be a stepping stone to more permanent form of employment.[303] However, there is no regulation both at the international and national level on the duration of agency work. The ILO Convention does not make direct mention of the idea that agency work should normally be of a temporary nature.

5. LIABILITY FOR VIOLATION OF EMPLOYMENT RIGHTS

Although the client is jointly and severally liable for the violation of the statute, collective agreement and arbitration award the client is however not jointly liable for the unfair dismissal of an agency employee in South African law.[304] As MacGregor and Budeli puts it "the section does not extend shared responsibility to the critical

[300] Section 128(4) of the Namibia Labour Act 11 of 2007.
[301] Section 198(4C)
[302] Van Eck (2014) 55.
[303] Aletter and Van Eck (2016) 185.
[304] Section 198(4). See also Harvey (2011) n 320 above 106. See also Aletter and Van Eck (2016) 296

areas of unfair dismissals and unfair labour practices."[305] This is another shortcoming which should also be addressed going forward since as the regulatory framework stands, a client can, for spurious reasons, remove or request the agency worker to be removed from its workplace.

[305] MacGregor and Budeli (2010) 801.

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