

Critical Analysis of labour brokers: Should they be regulated or banned in  
South Africa

by

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## TABLE OF CONTENTS

### Chapter One

#### Introduction

1	Introduction	1
2	What is Labour Broking?	2
3	Research Objectives	3
4	Methodology	3
5	Chapter Review	3

### Chapter Two

#### International Labour Organisation (ILO)

1	Introduction	5
2	Historical Background	6
3	Structure of the ILO	6
4	ILO Standards	7
4.1	Unemployment Convention 1919	8
4.2	Fee-Charging Employment Agencies Convention 1933	9
4.3	Fee-Charging Employment Agencies Convention 1949	10
4.4	Homework Convention 1996	11
4.5	Private Employment Agencies Convention 1997	12
4.6	Private Employment Agencies Recommendation 1997	15
5	Application and Relevance of ILO Standards in SA	15
6	Effectiveness of the ILO	16
7	Conclusion	17

## Chapter Three

### Labour Broking in South Africa

1	Introduction	18
2	Historical Background	19
3	Wiehahn Commission	20
4	Labour Relations Amendment Act 2 of 1983	21
5	Constitution of South Africa Act 108 of 1996	23
6	Labour Relations Act (LRA) 66 of 1995	24
7	Basic Conditions of Employment Act (BCEA) 75 of 1997	26
8	Employment Equity Act (EEA) 55 of 1998	26
9	Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993	26
10	Skills Development Act (SDA) 97 of 1998	27
11	How Labour Broking is Constructed?	27
12	Conclusion	28

## Chapter Four

### Reasons For and Against Banning

1	Introduction	29
2	Job Creation	30
3	Cutting Costs	31
4	Conversion from Temporary Employment to Permanent Employment	32
5	Flexibility	33
6	Skills	33
7	Fringe Benefits	34
8	Trade Union Membership	35
9	Discipline and Control	36
10	Problems of Identifying the Employer	37
11	Difficulty in Determining Dismissal and the Reason for Dismissal	38
12	Conclusion	39

## Chapter Five

### An Analysis of the Position of Labour Brokers in Namibia

1	Introduction	40
2	Background	41
3	Labour Hire Under the Contract of Labour System	42
4	Constitution	44
5	Labour Relations Act 6 of 1992	44
6	Labour Bill of 2007	46
7	Labour Act 11 of 2007	47
8	<i>Africa Personnel Services v Government of Namibia</i>	48
9	Conclusion	49

## Chapter Six

### Labour Broking in the Netherlands

1	Introduction	51
2	Background	53
3	Temporary Agency Work Act of 1965	54
4	Employee Placement Act of 1991	54
5	Act on the Allocation of Employees by Intermediaries (WADDI) Act of 1998	55
6	Flexibility and Security Act of 1999	56
7	Civil Code of 1999	57
8	Collective Labour Agreements	58
9	Conclusion	61

## Chapter Seven

### Conclusion

1	Introduction	62
2	Ratification of Convention 181 and the Drafting of New Legislation	62
3	Amendments to the LRA and BCEA	63
4	Registration and Licensing	64
5	Creation of a Statutory Body	64
6	Fringe Benefits	64

## Chapter One

### Introduction

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1	Introduction	1
2	What is Labour Broking?	2
3	Research Objectives	3
4	Methodology	3
5	Chapter Review	3

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#### 1 Introduction

On the 22nd of May 2009 the Minister of Labour<sup>1</sup> viciously slammed labour brokers while sparking a controversial, but intriguing debate on the banning of labour brokers in South Africa. In his speech<sup>2</sup> he argued that:

“it is a myth that labour broking adds value to economic growth and created jobs. The system is a form of human trafficking. Companies sell workers, labour to the highest bidder while paying them minimum wages, without making essential deductions for among other things like the Unemployment Insurance fund, pensions and tax. The agenda of labour broking is pro-employer and anti trade union.”<sup>3</sup>

The Minister’s speech was delivered with great emotion and sparked debates countrywide as to the actual position of labour brokers in South Africa. One tends to wonder if the Minister is actually justified in demanding the banning of labour brokers in the midst of rapid increases in poverty internationally. Global poverty and unemployment are rapidly growing, with statistics showing that, one in four people in the developing world lived on less than \$1.25 a day in 2005.<sup>4</sup> The Director of the ILO stated that, the principle route out of poverty requires the corporate harnessing of governments, employers and workers,

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<sup>1</sup> Membathisi Mdlalana.

<sup>2</sup> Addressing a meeting of the Motor Transport Workers Union (MTWU) on 2009/05/23.

<sup>3</sup> [www.news24.com/SouthAfrica/News/Mdlalana-slams-labour-brokers-20090523](http://www.news24.com/SouthAfrica/News/Mdlalana-slams-labour-brokers-20090523) accessed on 2009/05/26.

<sup>4</sup> World Bank “Poverty Data; A Supplement to World Development Indicators 2008” [www.iceh.org.uk/display/WEB/Poverty+data.+A+supplement+to+world+development+indicators+2008](http://www.iceh.org.uk/display/WEB/Poverty+data.+A+supplement+to+world+development+indicators+2008) accessed on 2010/07/23.

working together to bring progress and hope to societies.<sup>5</sup> The complete banning of labour brokers could have dire repercussions for the 500 000 “assignees” placed daily by brokers.<sup>6</sup> South Africa is on the point of law reform on the aspect of labour brokers and this has thus sparked my interest for the topic.

In this research document the position of labour brokers is analysed, while criticising the perception that labour brokers should be banned. The researcher is of the opinion that labour brokers should be regulated rather than a strict ban on them, as this undermines the right to freedom of trade and occupation,<sup>7</sup> while further contributing to poverty and unemployment.

## 2 What is Labour Broking?

A labour broker is commonly or interchangeably referred to as a temporary employment agent, or a temporary employment service (TES). Labour broking is evident when a broker places a person’s (the workers) services at the disposal of a client under whose direction the person works, in circumstances where the broker pays the employee.<sup>8</sup> The broker assumes the responsibilities of administering the payroll of workers placed in this manner.<sup>9</sup> Labour brokers are also viewed as intermediaries, as they generally procure persons to do work for the client.<sup>10</sup> In this research the term “labour brokers” is used.

## 3 Research Objectives

The banning of labour brokers could have a dire effect on a lot of aspects such as the economy, infrastructure, poverty and the world of work. The purpose of this piece of work is to highlight the good and bad of labour

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<sup>5</sup> Somavia “Working Out of Poverty” *International Labour Conference 91<sup>st</sup> Session (2003) Geneva* 92.

<sup>6</sup> Musgrave [www.blog.expresspros.co.za/expresssa/2009/08/labour-broking-industry-overhaul-promised.html](http://www.blog.expresspros.co.za/expresssa/2009/08/labour-broking-industry-overhaul-promised.html) accessed on the 2010/03/03.

<sup>7</sup> Section 22 of the Constitution of South Africa Act 108 of 1996.

<sup>8</sup> Van Niekerk, Chritianson, Mc Gregor, Smit, Van Eck *Law@Work* (2008) 71.

<sup>9</sup> Van Niekerk, *et al* 72.

<sup>10</sup> Theron “Labour Recruitment and the Services Sector: Is the Legislative Framework Adequate?” (2003) *Services SETA Research Journal* 14.

brokers, with the intention of discouraging policy makers from banning labour brokers and rather encouraging a system of regulation.

#### 4 Methodology

Current South African legislation will form the foundation of this dissertation, while ILO conventions and other international instruments will be referred to. The works of various authors including the works of Theron, Kallerberg, Jauch and other authors will stand as a point of reference. The approach undertaken is that of a critical legal study with a comparative into the regulation of labour brokers in Namibia and the Netherlands.

#### 5 Chapter Review

This research document comprises of seven chapters. Chapter two is an exposure into international instruments drafted by the ILO. The ILO has been influential in the regulation of labour brokers and has adopted several conventions in that regard. South Africa is also a member of the ILO and it is important to consider international law when deciding to either ban or regulate the industry. Chapter three will look at the history of labour brokers, the Constitution, and current legislation that regulates labour brokers in South Africa. One of the reasons for the ban of labour brokers is the fact that South African legislation does not adequately protect employees thereby allowing abuse of the system by unscrupulous brokers and clients. It is submitted that new legislation that specifically addresses labour brokers should be enacted or the current legislation should be amended to provide greater security to employees.

Chapter four addresses the reasons as to why some trade unions, are advocating for the ban of labour brokers. Amongst some of these reasons are the lack of job security and the inability of brokers to provide fringe benefits. This chapter will also address reasons against banning of labour brokers. Some of these reasons are the cutting of costs and job flexibility. Chapter five will deal with labour brokers in Namibia and how they are regulated. South Africa can learn from Namibia's experience, as Namibia banned labour



brokers in 2007 and then later legalised them after the ban was declared unconstitutional and a breach of the right to freedom of association. Chapter six addresses labour brokers in the Netherlands. South Africa and the Netherlands are not necessarily on the same footing in terms of development but South Africa has something to learn from the way the Netherlands has regulated the industry. The final chapter is the conclusion that rounds up the dissertation with a few recommendations such as the drafting of new legislation and the creation of a statutory body to regulate the industry.

## Chapter Two

### International Labour Organisation (ILO)

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1	Introduction	5
2	Historical Background	6
3	Structure of the ILO	6
4	ILO Standards	7
4.1	Unemployment Convention 1919	8
4.2	Fee-Charging Employment Agencies Convention 1933	9
4.3	Fee-Charging Employment Agencies Convention 1949	10
4.4	Homework Convention 1996	11
4.5	Private Employment Agencies Convention 1997	12
4.6	Private Employment Agencies Recommendation 1997	15
5	Application and Relevance of ILO Standards in SA	15
6	Effectiveness of the ILO	16
7	Conclusion	17

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#### 1 Introduction

Labour brokers are a common phenomenon world wide. Some countries have chosen to regulate them well,<sup>11</sup> while in other countries,<sup>12</sup> they have become a contentious issue with the desire to ban them completely. Reasons for such banning are that they do not protect the employee, but actually abuse an already disadvantaged employee. What is interesting to note is the fact that labour brokers have been recognised and commended by the ILO, which is an organisation solely committed to establishing employment standards that benefit its members. This chapter deals with the ILO (as South Africa is a member of the ILO), its structure and the influence it has had on labour brokers.

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<sup>11</sup> Such as the Netherlands which regulates through collective agreements, the United Kingdom, and Germany.

<sup>12</sup> South Africa and Namibia.

## 2 Historical Background

The ILO was established by the Treaty Versailles in 1919.<sup>13</sup> The Treaty of Versailles was an agreement that was negotiated by the victorious allied nations (Britain, France, and America) with the defeated central powers (Germany) to end World War 1.<sup>14</sup> This Treaty is of great importance to the international community as it brought about the conception of the ILO. After the first World War the United Nations replaced the League of Nations and the ILO became the UN's first specialised agency resulting in all of the League of Nations, members becoming founder members of the ILO.<sup>15</sup>

The ILO can be defined as a body committed to address the issues of social justice in its member states. It is said to regulate the quality of labour relations worldwide.<sup>16</sup> One of its aims to make an impact on the world of work by regulating matters such as working and living conditions,<sup>17</sup> hours of work, the prevention of unemployment, the organisation of vocational and technical education, and also the position of labour brokers.<sup>18</sup>

## 3 Structure of the ILO

The ILO head office is seated in Geneva and it functions through three main organs,<sup>19</sup> namely the International Labour Conference, the Governing Body and the International Labour Office. These organs have different functions, but ultimately have the goal of establishing international standards in the world of work.

The International Labour Conference is the supreme organ of the ILO.<sup>20</sup> It is the highest policy making body of the ILO and meets annually in Geneva.<sup>21</sup>

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<sup>13</sup> Van Niekerk, *et al* (2008) 19.

<sup>14</sup> [www.answers.com/topic/treaty-of-versailles-2](http://www.answers.com/topic/treaty-of-versailles-2) accessed on 2010/05/20.

<sup>15</sup> Van Niekerk *et al* (2008) 20.

<sup>16</sup> Venter, Levy, Conradie, Holtzhausen *Labour Relations in South Africa* (2009) 58.

<sup>17</sup> Doctor "Statistical Work of the International Labour Organisation" (1960) *Indian Journal of Statistics* 55.

<sup>18</sup> Preamble of the ILO Constitution.

<sup>19</sup> Article 2 of the ILO Constitution.

<sup>20</sup> Wiskeren "The Standard Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience" (2005) *International Labour Review* 255.

The Governing Body is the executive arm of the ILO that determines matters on the agenda of the Conference,<sup>22</sup> makes decisions on policy issues, and budgetary matters.<sup>23</sup> Lastly the International Labour Office is the body classified as the bureaucracy of the ILO, as it performs the day to day functioning of the ILO.<sup>24</sup> Some functions of the ILO Office are the collection and distribution of information on all subjects relating to labour,<sup>25</sup> preparing documents on the various items on the agenda for the meetings of the Conference,<sup>26</sup> and the carrying out duties in connection with the effective observance of conventions.<sup>27</sup>

#### 4 ILO Standards

ILO standards are entrenched within different instruments such as conventions, recommendations, declarations, and codes of practise. In this dissertation I will only refer to conventions and recommendations as they are of more importance to the argument at hand.

Conventions are considered as the strongest types of instruments,<sup>28</sup> but are not automatically binding, not even on those member states that voted in favour of the adoption of the convention. They only become binding upon ratification by the member states. Ratification is submission to the ILO's supervisory bodies including the complaints procedures established by the ILO committee.<sup>29</sup> The ILO has drafted important conventions such as the Private Employment Agencies Convention,<sup>30</sup> which is exclusively committed to the regulation of labour brokers in ILO member states.

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<sup>21</sup> Delegations to this conference comprise 2 government representatives, 1 worker and 1 employer representatives.

<sup>22</sup> It comprises 56 members, 28 from governments, 14 employer and 14 worker representatives.

<sup>23</sup> Van Niekerk *et al* 21.

<sup>24</sup> *Idem* 20.

<sup>25</sup> Article 10 of the ILO Constitution.

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

<sup>27</sup> *Supra.*

<sup>28</sup> Cindy "Comparison of International and the US Employment Termination Procedures: How far have we come? A Step in the Right Direction" (1993) *Syracuse Journal of International Law and Commerce* 180.

<sup>29</sup> Van Niekerk *et al* 21.

<sup>30</sup> 181 of 1997.

Recommendations are not capable of ratification and are not binding on member states. They provide guidelines on how a particular matter may be regulated. They are only suggestions for appropriate behaviour.<sup>31</sup> One such example of a recommendation dealing with labour brokers is the Employment Relationship Recommendation of 2006.

The ILO has played a significant role on the topic of labour brokers.<sup>32</sup> It is therefore important to discuss the different conventions and recommendations that have been drafted by the international community pertaining to this industry. Such conventions help us with a clearer perspective on how to deal with this industry as no man is an island.

#### 4.1 Unemployment Convention 1919

This Convention was adopted at the end of World War 1. Parties to the Treaty of Versailles desired to alleviate unemployment,<sup>33</sup> as they had faced dire consequences as a result of the wretched war. This Convention was then adopted to solve the prevalent problems of the day and becomes relevant to the discussion of labour brokers as the principle of “free placement services” for workers and employers, was first established as a standard for employment.

Article 2(1) stipulates that each member that ratifies this Convention shall establish a system of free public employment agencies (labour brokers) under the control of a central authority. Article 2(2) states that where both private and public free labour brokers exist, steps shall be taken to coordinate the operations of such brokers on a large scale.

The onus was therefore on the state to co-ordinate the operations of such brokers at a national level. The Convention identifies public and private labour brokers. The issue of control is dealt with under a central authority and this served as a regulatory mechanism. The thinking of the drafters of this

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<sup>31</sup> Cindy (1993) 180.

<sup>32</sup> Various conventions such as Convention 181 have been drafted to help regulate the industry.

<sup>33</sup> Van Daele “The International Labour Organisation (ILO) in Past, and Present Research” (2008) *International Review of Social History* 487.

Convention was to curb unemployment and they recognised that public free of charge brokers, were an important way for job creation. The fact that the Convention refers to “free” means the drafters never had the intention that brokers be created for profit. This Convention is important to us as it was the first time that an intermediary was identified as pivotal role player in the regulation of labour matters.

#### 4.2 Fee-Charging Employment Agencies Convention 1933<sup>34</sup>

This Convention identified firstly fee-charging brokers, conducted with a view of profit, and secondly fee-charging brokers not conducted with the view to make profit, with an intention to act as an intermediary.<sup>35</sup> This Convention went on to ban fee-charging brokers conducted with a view of profit, within a period of three years from the coming into force of this Convention.<sup>36</sup> During the period preceding the abolition no new fee-charging brokers with a view of profit were to be established. Article 3 allowed for exceptions to the ban and some of the exceptions were, for brokers catering for categories of workers exactly defined by national laws, and special conditions justifying such an exception.

The fee-charging brokers allowed by exception had to reformulate their activities with certain requirements such as, supervision by the competent authority, and the possession of a yearly licence renewable at the discretion of the competent authority. Fee-charging brokers not conducted for profit also had to comply with certain provisions such as authorisation from a competent authority and were also subject to the supervision of the said authority. Brokers were not allowed to make charges in excess of the scale of charges fixed by the competent authority.

This Convention is important for the very reason that it clearly defined and spelt out the role of labour brokers. Their role is to place workers with an client. It also stipulated the difference between those brokers conducted for

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<sup>34</sup> This Convention was shelved when a new revised Convention was adopted, which was the Fee-Charging Employment Agencies Convention of 1949.

<sup>35</sup> Article 1 of the Convention.

<sup>36</sup> Article 2.

profit and those not for profit. Those not for profit had to charge regulated fees, while brokers conducted for profit had to be abolished within a period of 3 years of the adoption of the Convention.

It is presumed that the ILO had already identified a potential problem of labour brokers conducted with a view for profit, and decided to ban them completely. Regulation by licensing and fees determinable by a competent authority can be used as evidence of such fact. The aim of this abolishment can also be presumed as the desire to avoid workers having to pay a fee for their placement. The Convention seems to display a good regulatory system of licensing and the use of a competent authority to regulate the brokers conducted not for profit. The abolishment of the fee-charging brokers with a view of profit may however be considered as an over regulation and an infringement on the freedom to trade and occupation. This Convention was rightly revised in 1949 as it undermined flexibility in the labour market. Very few countries ratified this Convention.<sup>37</sup>

#### 4.3 Fee-Charging Employment Agencies Convention 1949

This Convention revised the 1933 Fee-Charging Convention. The expression fee-charging employment agency meant labour brokers conducted for profit and also those not conducted for profit.

This Convention differed from the 1933 Convention as it gave its member states the option to either abolish the fee-charging brokers conducted with a view of profit, or provide for their regulation.<sup>38</sup> If a member state opted to abolish brokers with a view to profit, they had to do so within a limited time, and also determined by a competent authority. Such brokers could not be abolished until a public employment service had been established.<sup>39</sup> Preceding the abolition, fee-charging brokers conducted with a view to profit had to be supervised by a competent authority and were expected to charge fees and expenses on a scale submitted to and approved by the competent

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<sup>37</sup> Benjamin “Untangling The Triangle: The Regulatory Challenges of Triangular Employment” (2009) *Preliminary Draft for Presentation to Regulating Decent Work Conference in Geneva* 11.

<sup>38</sup> Article 2.

<sup>39</sup> Article 3.

authority.<sup>40</sup> Such supervision was directed towards the elimination of all abuses connected with the operations of fee-charging brokers with a view for profit.<sup>41</sup>

If a member state decided to regulate, then such brokers had to be under the supervision of the competent authority. They had to be in possession of a yearly license renewable at the discretion of the competent authority, while being expected to charge fees and expenses on a scale submitted to and approved by the competent authority.<sup>42</sup> This competent authority also had a duty to satisfy itself that non fee-charging brokers carry on their operations in a gratuitous manner.<sup>43</sup> According to findings by the ILO, the application of this Convention gave rise to problems regarding the placement of performers and domestic workers.<sup>44</sup> The fact that member states were now being given the option to regulate fee-placement brokers was a positive step in the right direction. Abolishment or banning of brokers is not necessarily the best way, and history has already proved this. If a member state did decide to abolish they were still obliged to set up a public employment agency. This proves the fact that intermediaries have an enormous part to play in labour matters but there needs to be some form of supervision.

#### 4.4 Homework Convention 1996

Article 1 of this Convention describes a home worker as someone who provides a product or service in his or her home or other premises of his choice, other than the workplace of the employer, for a fee irrespective of who provides the equipment. Home workers are ostensibly self employed but frequently work to the order of a client, via an intermediary.<sup>45</sup> These workers therefore qualify in the discussion of labour brokers as they are given instructions via a third party.

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<sup>40</sup> Article 4.

<sup>41</sup> Article 4(2).

<sup>42</sup> Article 10.

<sup>43</sup> Article 12.

<sup>44</sup> International Labour Organisation “Private Employment Agencies Temporary Agency Workers and their Contribution To The Labour Market” (2009) *Issues Paper for Discussion at the Workshop to Promote the Ratification of The Private Employment Agencies Convention 1997 no181 4*.

<sup>45</sup> Theron “The Shift to Services and Triangular Employment” (2008) *ILJ* 20.



Article 4 encourages the equality of treatment in relation to the home workers right to establish or join organisations of their own choosing and to participate in such activities, protection against discrimination in employment and occupation, protection in the field of occupational safety and health, remuneration, statutory social security protection and access to training. Once again the importance of the right to join organisations and protection in the field of occupational safety and health is observed. The onus is largely on state members to grant the platform for availability of such protection.

Article 8 states where the use of intermediaries in Homework is permitted, the respective responsibilities of employers and intermediaries shall be determined by laws and regulations or by court decisions in accordance with national practise. Flexibility is granted to the states in order to accommodate personal circumstances and with particular reference to South Africa the onus is on the state to draw up laws that adequately deal with the issue.

#### 4.5 The Private Employment Agencies Convention of 1997

One of the purposes of the Convention is to allow for the operation of labour brokers as well as the protection of workers using their services, within the framework of its provisions.<sup>46</sup> The ILO's position is not necessarily on the viewpoint of banning but rather on the viewpoint of the importance of flexibility in the functioning of labour markets.

This Convention came into force in May 2000 and by July 2009 only 21 countries had ratified it. Ratification is relatively low may be as a result of the fact that the Convention has not been the object of a promotional campaign.<sup>47</sup> Article 1<sup>48</sup> defines a labour broker as being any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services, services consisting of employing workers with a view to making them available to a third party, who maybe a natural or legal person. The worker is the job seeker.

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<sup>46</sup> Article 2.

<sup>47</sup> International Labour Organisation (2009) 5.

<sup>48</sup> Convention 181.

Article 3 states that the legal status of labour brokers shall be determined in accordance with national law and practise, after consulting the most representative organisations of employers and workers. Flexibility is granted to member states to determine the status of brokers and this is a positive step as it takes into account the circumstances whether they are financial, environmental, historical, factors of the different member states. There is therefore a duty on South Africa to determine the status that they give to such employers and international law has accorded such platform. Workers and employers are fundamental role players in determining the national laws and practise. It is submitted that the Minister of Labour was erroneous in his conduct, as he announced the banning of labour brokers without even consulting the relevant role players. Proper consultation should have taken place before announcing a ban.

Article 4 states that workers recruited by the labour brokers should not be denied the right to collective bargaining and freedom of association. Evidence of the importance of the right of freedom of association and collective bargaining is clear and state members have a positive duty to make sure that employees have access to such procedures. State members should make sure that such rights are not violated. With the manner in which labour brokers conduct themselves it is a bit difficult to actually enforce the duty to collective bargaining and freedom of association. The worker is not in a position to bargain with the client about the conditions of employment as the employer is actually the labour broker. The state however has an obligation to investigate and observe how such a problem can be averted. It cannot be solved simply by banning labour brokers but the government should be in a position to enact legislation that pertains to that particular industry, and that specifically addresses such concerns.

Article 11 obliges members in accordance with national law and practise, to take the necessary measures to ensure adequate protection in relation to “minimum wages, working time and other working conditions, statutory social benefits, access to training, occupational safety and health, compensation in case of occupational accidents or diseases.” Some of the reasons stated for the banning of labour brokers were the fact that such workers do not have

access to the process of collective bargaining and there is exploitation in the compensation in case of occupational accidents and diseases. The Convention caters for such scenarios but the onus solely lies with the member states to comply with such obligations.

Theron argues that Convention 181 must be given some impetus to the development of labour broking.<sup>49</sup> The Convention proposes some control over such brokers by requiring a system of registration, or licensing by national governments.<sup>50</sup> He states that “Convention 181 balances enterprises needs for flexibility to expand or reduce their workforce with worker’s needs of employment stability and decent conditions of work.”<sup>51</sup> Judging from this Convention, the ILO has put obligations on member states to make sure labour brokers are effectively conducted. The onus is on the government to regulate the system in terms of its national laws in order for all role players to benefit. It is the researcher’s contention that it would be for the good of all role players if the industry was rather tolerated than exterminated.

This instrument can serve an important role in helping South Africa in its debate of banning or regulating labour brokers. South Africa should rather put in force a system of licensing and registration. The LRA has not placed emphasis on the requirement that labour brokers must register. A provision to register in terms of the Skills Development Act is not adequate enough to address the issue of labour brokers.<sup>52</sup> The Skills Development Act appears to regulate activities and practices such as the fee that work seekers are charged rather, than to regulate the employment practises.<sup>53</sup>

South Africa has not ratified this Convention but according to The ILO’s implementation of Convention 181, countries are encouraged to ratify Convention 181 as its “implementation can be an engine for job creation, structural growth, and improved efficiency of national labour markets, better

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<sup>49</sup> Theron “Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship” (2005) *ILJ* 623.

<sup>50</sup> *Ibid.*

<sup>51</sup> ILO (2009) 1.

<sup>52</sup> Theron (2005) 624.

<sup>53</sup> *Ibid.*

matching of supply and demand for workers, higher labour participation rates and increased diversity.”<sup>54</sup>

#### 4.6 Private Employment Agencies Recommendation 1997

The provisions of this recommendation supplement those in Convention 181 and should be applied in conjunction with this Convention. This recommendation encourages members to adopt all necessary and appropriate measures to prevent and to eliminate unethical practises by labour brokers. The use of a written contract of employment specifying their terms and conditions of employment is alluded to. Labour brokers are encouraged to promote equality and afford workers proper training. Such guidelines are there to prevent the abuse of workers as they grant them the liberties and freedoms that normal employees would normally have.

### 5 Application and Relevance of ILO Standards in South Africa

South Africa was one of the founding members of the ILO in 1919. Its membership was terminated in 1964 when the South African government withdrew when apartheid became an argumentative issue at the ILO.<sup>55</sup> South Africa rejoined the ILO after it became a democratic state in 1994.<sup>56</sup> During the apartheid regime, the ILO played a major role in calling the release of trade union leaders imprisoned during the 1986 emergency. They were useful as an instrument of moral and political pressure.<sup>57</sup>

The Constitution of South Africa which is the supreme law of the land accords importance to the relevance of the application of international law.<sup>58</sup> Section 39,<sup>59</sup> states that “when interpreting the Bill Of Rights a court, tribunal or forum must consider international law.” Section 1b<sup>60</sup> further extends specific recognition to international law, by virtue of its membership in the ILO. South

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<sup>54</sup> [www.ilo.org/public/libdoc/ilo/2007/107B09\\_296\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2007/107B09_296_engl.pdf) accessed on 2010/06/23.

<sup>55</sup> Smit “Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995” *PHD thesis 2010 University of Pretoria* 41.

<sup>56</sup> *Ibid.*

<sup>57</sup> Smith and Horton “The Southern View on the ILO’s Effectiveness” (2002) *Global Social Policy* 384.

<sup>58</sup> Section 233 of the Constitution.

<sup>59</sup> *Ibid.*

<sup>60</sup> Labour Relations Act 66 of 1995.

Africa is therefore expected to give effect to obligations incurred by the Republic as a member state of the ILO.<sup>61</sup> Courts in South Africa have shown that they will interpret legislation in line with international law.<sup>62</sup> South Africa should first take into account ILO standards before it decides to ban labour brokers. Advocates for the ban on brokers have not taken into account the position of labour brokers in the ILO's perspective and they are urged to do so urgently.

## 6 Effectiveness of the ILO

The ILO is however, facing certain challenges, such as a lack of proper implementation and insufficient resources in some countries, which has led to poor implementation of Conventions. Governments of developing countries agree to the drafting of new Conventions and then ratify them. After a few years when reports on compliance with standards are made, fault with legislation and practise is found.<sup>63</sup> The ILO's purposes can never actually be accomplished if member states do not fully implement the standards set. Many existing ILO standards have become irrelevant and obsolete as a result of the change in the times and technology. The ILO has a danger of becoming irrelevant to industrial labour practises.<sup>64</sup>

According to a report made by the ILO, some challenges that can be faced by member states in regard to labour brokers are, continuing to ensure that national regulation is based on the right balance between the need for flexibility in the labour market while also ensuring the right of protection for workers.<sup>65</sup> Another challenge is in assisting in the transition of temporary workers displaced from user enterprises into other jobs as quickly as possible.

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<sup>61</sup> In the *S v Makwanyane* (1995) 3 SA 391 (CC) the court stated that South Africa has a duty to comply with conventions that they have not even ratified.

<sup>62</sup> In *NUMSA v BaderBop* (2003) ILJ 305 (CC) the court had to consider the right of minority trade unions to strike in support of a demand that the employer recognise the unions shop stewards. The court made reference to section 39(1) of the Constitution that relates to important sources of international law which are conventions and recommendations of the ILO. The court then relied on the Convention on the Right to Organise and Collective Bargaining and based its decision on the interpretation of that Convention.

<sup>63</sup> Wisskirchen (2005) 256.

<sup>64</sup> *Ibid.*

<sup>65</sup> ILO Guide To Private Employment Agencies: Regulation, Monitoring, and Enforcement (2007) 48.

## 7 Conclusion

The ILO has been one of the most successful multilateral agencies in fulfilling its mandate. According to one of its perceptions, the ILO has a distinct role to play in mitigating the adverse social effects of the global economic crisis.<sup>66</sup> Employment creation is already the first political priority worldwide; it must also become the first economic priority worldwide.<sup>67</sup> Without productive employment the goals of decent living standards, social and economic development and personal fulfilment remain illusory. The ILO is therefore a good point of reference to determine the manner in which to deal with labour brokers. The ILO gives member states the capacity to determine how they should operate. The ILO has taken the position that for the purpose of market flexibility it is better to actually regulate the industry than to ban it. South Africa should adopt this position as it will help in curbing the ever increasing unemployment rates in the country.

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<sup>66</sup> ILO Pamphlet 21.

<sup>67</sup> *Ibid.*

## Chapter Three

### Labour Broking in South Africa

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1	Introduction	18
2	Historical Background	19
3	Wiehahn Commission	20
4	Labour Relations Amendment Act 2 of 1983	21
5	Constitution of South Africa Act 108 of 1996	23
6	Labour Relations Act (LRA) 66 of 1995	24
7	Basic Conditions of Employment Act (BCEA) 75 of 1997	26
8	Employment Equity Act (EEA) 55 of 1998	26
9	Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993	26
10	Skills Development Act (SDA) 97 of 1998	27
11	How Labour Broking is Constructed?	27
12	Conclusion	28

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#### 1 Introduction

Labour broking is a phenomenon that is not new to the South African legal system. Its form or structure can be traced back to the late 19<sup>th</sup> century, when minerals were first discovered in South Africa. Its structure has been modified, but it has significantly retained the same objective and purpose, to provide persons to a client for a reward. This chapter deals with the development of labour brokers in South Africa. An exposure into the Wiehahn Commission, the Constitution and other legislation that has had an effect on the development of labour brokers, will form the crux of this chapter.

## 2 Historical Background

South Africa was colonized by the Dutch and the first Dutch traders to land in South Africa arrived in 1652.<sup>68</sup> The country is rich in gold, chromium, platinum, copper and salt.<sup>69</sup> It resembles a developed country,<sup>70</sup> although the economy faces a number of challenges, such as high levels of poverty and unemployment.<sup>71</sup> As mentioned earlier, with the discovery of minerals, the issue of migrant workers became a key element of the labour movement in South Africa. Apartheid<sup>72</sup> laws discriminated against workers leaving permanent psychological scars on those that were affected. Venter *et al* mention that by protecting the interests of the white minority at the expense of the black majority, the apartheid government sought to divide the nation along racial lines.<sup>73</sup> Black workers were considered as second class citizens in all spheres of life.<sup>74</sup>

Workers were recruited by a broker, from the so called homelands, or elsewhere in Southern Africa, thereon they had to conclude fixed term contracts.<sup>75</sup> These brokers had to operate in close conjunction with the employers that utilized the labour. The establishment of brokers was based on either organized businesses or individual companies. In a lot of cases the brokers were employed by the employers for whom they were recruiting for.<sup>76</sup> In this case it was evident that the employer, was the employer of the recruited members, and the notion of the employer being the broker was not prevalent. Two organizations ensured the supply of labour in the mines and these were, the Witwatersrand Native Labour Association (WNLA); which got labour from Southern Africa while the Native Recruitment Corporation (NRC) provided labour from the domestic market.<sup>77</sup>

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<sup>68</sup> [www.cia.gov/library/publications/the-world-factbook/geos/sf.html](http://www.cia.gov/library/publications/the-world-factbook/geos/sf.html) accessed 2010/09/18

<sup>69</sup> *Ibid.*

<sup>70</sup> [www.travelstate.gov/travel/cis\\_pa\\_tw/cis/cis\\_/008.html](http://www.travelstate.gov/travel/cis_pa_tw/cis/cis_/008.html) accessed 2010/09/19.

<sup>71</sup> Venter, Levy, Conradie, Holtzhausen *Labour Relations in South Africa* (2009) 554.

<sup>72</sup> A political system which gave preference to those of European origin.

<sup>73</sup> Venter *et al* (2009) 37.

<sup>74</sup> *Ibid.*

<sup>75</sup> Theron, Godfrey, Lewis "The Rise of Labour Broking and its Policy Implications" (2005) *Development and Labour Law Monograph University of Cape Town* 4.

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

<sup>77</sup> See power point presentation slides presented at Wits University at [www.uamp.wits.ac.za/selss/downloads/2005hrm\\_IIB lec4\\_2005](http://www.uamp.wits.ac.za/selss/downloads/2005hrm_IIB lec4_2005) last accessed 2010/04/16.



The international labour market influenced the development of labour brokers through the development of the “Temporary Help Agency.” These brokers supplied the need for temporary work in administrative and clerical positions.<sup>78</sup> Manpower opened its first office in South Africa in the late 1960s, while Kelly -Girl was established during the same period.<sup>79</sup> These brokers helped with the supply of temporary workers to clients and also the placement of persons in permanent jobs. The Labour Relations Act of 1956 did not address the matter of labour brokers and the uncertainty about the legal status of brokers was clearly a critical constraint in their growth.<sup>80</sup>

### 3 Wiehahn Commission

In 1973 widespread strikes by black workers over wages which were declining rapidly, in the face of rising inflation erupted.<sup>81</sup> The labour industry was brought to a near standstill, and these events dramatically underlined the change in legislation.<sup>82</sup> In 1977 the Wiehahn Commission was setup, upon request by the government to study labour laws and give recommendations. The urge for such an enquiry was brought about by the pressure posed by unions on the government wanting to do away with discriminatory laws. Opposition to the racially exclusive labour relations system and the repressive apartheid regime was expressed in the form of massive strikes that crippled the employer.<sup>83</sup>

The Commission made certain recommendations namely that:

- trade union rights should be granted to black workers;
- provisions for legislation pertaining to unfair labour practices should be enacted;
- a national Manpower Commission should be instituted;
- the introduction of minimum standards of employment and

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<sup>78</sup> Women were appointed to these positions as opposed to permanent positions that were given to males. Workers were mainly white.

<sup>79</sup> Theron *et al* 2005 630.

<sup>80</sup> Theron “The Shift of Services and Triangular Employment” (2008) *ILJ* 7.

<sup>81</sup> Finnemore *Introduction to Labour Relations in South Africa* (1999) 29.

<sup>82</sup> *Ibid.*

<sup>83</sup> Vettori “Alternative Means to Regulate the Employment Relationship in the Changing World of Work” *LLD thesis 2005 University of Pretoria* 4.

- freedom of association irrespective of race and status.

The Commission basically recommended a major revamp of labour legislation. Some authors believe that,<sup>84</sup> “the Wiehahn recommendations served as a mere frame of reference for conflict handling whereby employers tried to restrict conflict and the government of the day tried to buy time,” but these recommendations can be viewed as an essential period in the transformation of South African labour law. Most of the Commission’s recommendations were adhered to and led to the abolition of most discriminatory aspects of the legislation. Black workers were recognized under the formal definition of what constituted an employee, and there was the creation of an Industrial Court for specialized labour disputes to replace the Industrial Tribunal.<sup>85</sup> Shafer criticizes the Wiehahn recommendations and states that it was merely an attempt by the South African government to create the impression that apartheid was dying when in actual fact it was taking on a new form.<sup>86</sup>

From the Wiehahn Commissions conduct, one can see the paradigm shift in employment relations in South Africa. From it being a rigid and inflexible system to one which tries to uphold the rights of employees irrespective of race. With relevance to labour brokers, the Commission considered the activities of a new type of placement service where undertakings lease the services of persons in their employment to other persons the latter being clients of those undertakings, and this resulted in the inclusion of labour brokers in the Amendments that followed.<sup>87</sup>

#### 4 Labour Relations Amendment Act 2 of 1983

The height of the struggle against apartheid was experienced during the eighties. This period was innovative, in the progression of labour brokers, as

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<sup>84</sup> Isabirye “The Paradigm Shift in Employment Relations Management” (2007) [www.ujdigispace.uj.ac.za:8080/dspace/bitstream/10210/108/4/CHAPTER3second.pdf](http://www.ujdigispace.uj.ac.za:8080/dspace/bitstream/10210/108/4/CHAPTER3second.pdf) accessed 2010/04/02

<sup>85</sup> Venter *et al* (2009) 46.

<sup>86</sup> Shafer “Wiehahn Report and the Industrial Conciliation Act: A New Attack on the Trade Union Movement in South Africa” (1979) *report published for the United Nations* 9

<sup>87</sup> Van Der Riet “Labour Brokers –The Future” *paper presented on 2010/03/23 at a SASLAW meeting in Johannesburg* 4.

an express provision on labour brokers was introduced for the first time, in the amendment of the Labour Relations Act of 1956.<sup>88</sup> During this period, brokers supplied skilled workers to the manufacturing industry and Benjamin presumes that this was one of the reasons for the introduction of the provision on labour brokers in South African legislation.<sup>89</sup> Theron alleges that it would be incorrect to say that labour broking emerged as a secondary outcome of the generalized process of labour market restructuring, but states that the industry has been an “active institutional presence” in the restructuring process itself.<sup>90</sup>

The Labour Relations Amendment Act<sup>91</sup> introduced the definition of a labour broker, which is similar to the definition that is currently in the Labour Relations Act of 1995. The labour broker was described as a person who for a reward procured persons for a client. Labour brokers were “deemed” to be the employers of individuals they placed with the clients, provided they were the ones responsible for paying their remuneration.<sup>92</sup> The deeming approach clarified the question as to who was the employer but, came with abuse problems by the “fly-by- night” labour brokers, the so called “bakkie brigade.”<sup>93</sup> Benjamin alleges that the following scenario’ became prevalent, at one stage or another, employees would not be paid and would approach the client for payment. The client would refuse to pay the employees stating that the broker has the responsibility to pay out remuneration, as the client would have truthfully given the broker the money. The employee would then try approach the broker and find that the broker has already changed contact details and is no longer available.<sup>94</sup> Labour brokers were required to register with the department, and it was a crime to participate in labour broking without being registered.<sup>95</sup>

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<sup>88</sup> Benjamin (2009) 2.

<sup>89</sup> Brassey and Cheadle “Labour Relations Amendment Act of 1983” (1983) *ILJ* 36 -37.

<sup>90</sup> Theron (2008) 7.

<sup>91</sup> Act 2 of 1983.

<sup>92</sup> Section 1 of Act 28 of 1956 as amended by Act 2 of 1983.

<sup>93</sup> Benjamin (2009) 2.

<sup>94</sup> See power point presentation slides presented at Wits University at

[www.uamp.wits.ac.za/selss/downloads/2005hrm\\_IIB lec4\\_2005](http://www.uamp.wits.ac.za/selss/downloads/2005hrm_IIB lec4_2005) last accessed 2010/04/16. .

<sup>95</sup> Section 63.

This legislation meant that there was no obligation to comply with labour legislation on the part of the client. The only recourse workers had was against the labour broker and this brought with it some complexities.<sup>96</sup> A client could disregard essential principles like occupational safety, and the worker would have no recourse against such abuse. The only available recourse was against the broker but the broker was however not present on the premises of the client. This Act shows the development of labour brokers and the desire of fruitful measures on their regulation. The system was somehow flawed but it was a step towards the right direction. Between 1983 and 1990 labour broking rapidly increased as they provided “scab labour,” during strikes.<sup>97</sup>

## 5 Constitution of South Africa Act 108 of 1996<sup>98</sup>

In 1994 South Africa gained its independence and apartheid laws were abolished. The introduction of new labour laws ushered in a new system of industrial relations, and stronger regulation to address the inequalities brought about by the apartheid regime.<sup>99</sup> A study was done into the labour legislation and this served as a transition period in which new labour legislation such as the Labour Relations Act 66 of 1995 were enacted.

The Constitution is the supreme law of the land, meaning all legislation enacted should be interpreted in terms of its’ provisions and taking into consideration international law.<sup>100</sup> The Constitution permits the granting of labour rights,<sup>101</sup> but with the use of labour broking some of these rights seem to be infringed. Among the reasons for advocating for the ban of labour brokers, is the fact that it does not readily allow for certain rights such as the right to collective bargaining or trade union participation.

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<sup>96</sup> Van Der Riet (2010).

<sup>97</sup> See *Buthlezi and Another v Labour for Africa* (1989) ILJ 867 (IC).

<sup>98</sup> Act 108 of 1996.

<sup>99</sup> Clarke “Ten Years of Labour Market Reform in South Africa: Real Gains for Workers” (2004) *Canadian Journal of African Studies* 558.

<sup>100</sup> Section 233 of the Constitution.

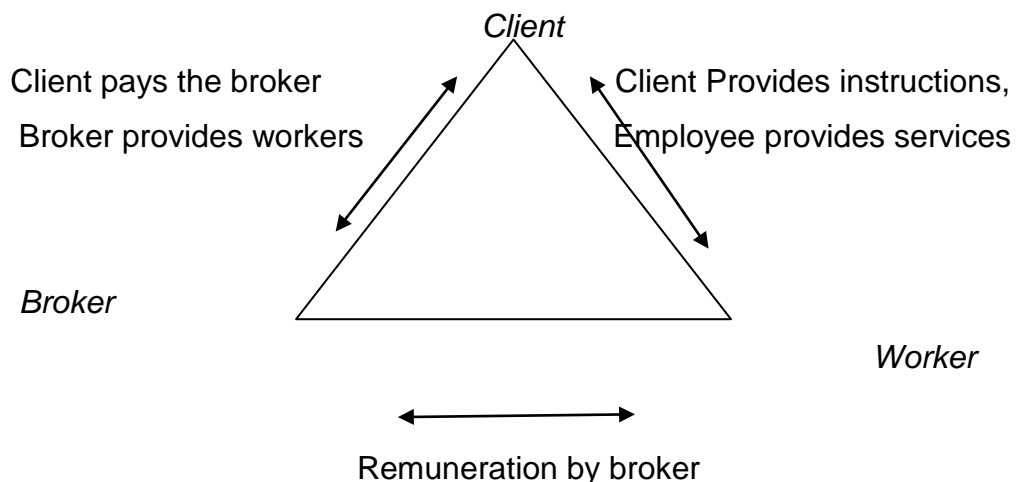
<sup>101</sup> Section 23(1) allows everyone the right to fair labour practices .Every worker has the right to join and participate in trade union activities, and also to right to strike. Every trade union and employer’s organisation has the right to engage in collective bargaining.

## 6 The Labour Relations Act (LRA) 66 of 1995

This LRA was enacted in a new political dispensation which gave preference to international standards and the newly enacted Constitution. Section 198,<sup>102</sup> of the LRA regulates labour brokers and they are referred to as temporary employment services (TES).<sup>103</sup> According to this section labour broker means any person who, for a reward, procures for or provides to a client other persons who render services to, or perform work for, the client and who are remunerated by the broker<sup>104</sup>

A person whose services have been procured for or provided to a client by the broker is the employee of that broker and the broker is that person's employer.<sup>105</sup> If there is doubt about whether a person is hired as an employee by the broker the normal tests to determine whether there is an employment relationship apply.<sup>106</sup> Independent contractors are, however, not considered as being employees of the broker.<sup>107</sup> The LRA gave certainty to who is actually the employer in this triangular relationship, but case law is evidence that workers experience problems when trying to identify the employer.<sup>108</sup>

The labour broking structure can be envisaged in the following diagram.



<sup>102</sup> *Ibid.*

<sup>103</sup> There are also other forms of triangular employment such as franchising, in which the franchisor licenses a franchisee to operate a business under the franchisor's trademark or brand and the franchisee in turn employs workers to assist him or her. See Theron "Intermediary or Employer? Labour brokers and the Triangular Relationship" (2005) *ILJ* 619.

<sup>104</sup> 198(1) see also Grogan *Workplace Law* (2009) 25.

<sup>105</sup> 198(2).

<sup>106</sup> Grogan *Dismissal, Discrimination and Unfair Labour Practises* (2007) 26.

<sup>107</sup> 198(3).

<sup>108</sup> *April Workforce Group Holdings (pty LTD t/a* (2005) *ILJ* 224 CCMA. see Theron (2005) 635.

Section 198(4) regulates the issue of liability. It states that the broker and the client are jointly and severally liable in respect of any contraventions pertaining to a collective agreement concluded in a bargaining council that regulates terms and conditions of employment. Joint and several liabilities are also prevalent in the case of a contravention of a binding arbitration award that regulates terms and conditions of employment. Contraventions of the Basic Conditions of Employment Act, or the Wage Act are also cases of when joint and several liabilities will result. The broker and the client are responsible for ensuring that the relevant provisions of such instruments are complied with.<sup>109</sup> Section 198(4) was however not included in the Labour Relations Amendment Act of 1983, and this section prevented the loophole that arose after the 1983 amendments. If the broker failed to pay a worker, the worker had recourse against both the broker and the client. This serves as a safety net for workers who are usually at a disadvantage. This also encourages responsible contracting as one would not like to be liable for another's problem.<sup>110</sup>

In the amendment of the Labour Relations Act of 1956, the broker was required to register. Such requirement was not however upheld by the new Act and the broker is not required to register. The LRA is criticized for its inability to extend shared responsibility in cases of unfair dismissals and unfair labour practices, perpetrated by the client against the workers.<sup>111</sup> If a client terminates a contract with the broker, the broker is obliged to dismiss the employee, and the problem then arises as it becomes difficult to determine what would constitute an unfair labour practice or even an unfair dismissal. A dispute cannot be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) as the termination of this contract does not constitute dismissal.<sup>112</sup> Our legislation needs to be amended in order to provide for joint and several liabilities in the case of unfair dismissals and unfair labour practices.

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<sup>109</sup> Dutoit, (D)Bosch, Woolfrey, Godfrey, Cooper, Giles, (C)Bosch, Rossouw *Labour Relations Law: A Comprehensive Guide* (2006) 82.

<sup>110</sup> Benjamin (2009) 3.

<sup>111</sup> Van Eck "Temporary Employment Services (Labour Brokers) In South Africa" (2010) *PELJ* 204.

<sup>112</sup> *Ibid.*

## 7 Basic Conditions of Employment Act (BCEA) 75 of 1997

The BCEA, gives effect to and regulates the right to fair labour practices. It establishes basic conditions of employment, regulates sick leave, maternity leave and hours of work. It contains the same provisions pertaining to labour brokers as those in the LRA. It refers to a person whose services have been procured for a client, by the broker, making the broker the employer.<sup>113</sup> Joint and several liabilities similar as those found in the LRA are also accommodated in this section. The BCEA does not seem to add more value to the discussion on labour brokers, as it merely repeats what we already know from the LRA.

## 8 Employment Equity Act (EEA) 55 of 1998

The EEA promotes equal and fair treatment in employment, through the elimination of unfair discrimination. It stipulates that a person who has been procured by the broker is deemed to be an employee of the client if that person's service has been utilized for longer than 3 months.<sup>114</sup> There is joint and several liabilities for unfair discrimination by the broker on the express or implied instructions of the client.<sup>115</sup> There are however two exceptions to when the broker is considered as the employer namely for the purposes of affirmative action and a person who is placed with a client for an indefinite period or for longer than 3 months making the client the employer for purposes of compliance with health and safety measures.<sup>116</sup>

## 9 Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993

COIDA is legislation that was enacted with the purpose of providing compensation for disablement caused by occupational injuries or diseases sustained or contracted by an employee in the course of employment. COIDA

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<sup>113</sup> Section 82.

<sup>114</sup> Section 57(1).

<sup>115</sup> *Ibid.*

<sup>116</sup> Section 57(2).

defines the term employer to include the labour broker.<sup>117</sup> In terms of this Act a broker is obliged to register as the employer of any workers it provides to the client. It is also under obligation to report any mishaps or accidents at work. The client is not liable in terms of COIDA unless it pays the worker concerned.<sup>118</sup> This clause should have been drafted in such a manner as to hold the client liable for any accidents at the work place. The broker does not usually know what is happening at the workplace, as the worker is supervised and instructed at the client's premises. The broker should however make sure that the client complies with statutory requirements pertaining to health and safety.

## 10 The Skills Development Act (SDA) 97 of 1998

SDA is there to provide for the development of skills of the South African workforce in order to improve the quality of life. The SDA does not expressly refer to the broker but one can assume from the wording that the broker is included. It stipulates that any person who wishes to provide services for gain must apply for registration.<sup>119</sup> Employment services mentioned in this provision includes a wide range of services from training and education, to career advice. In practice however such obligations are not necessarily followed. The object of registering services for gain in terms of the SDA appears to be the regulation of certain activities, such as fee charges for work seekers.<sup>120</sup> The Department of Labour is accused of having done little to actually implement the system of registration.<sup>121</sup>

## 11 How the Labour Broking is Constructed?

Usually persons who approach the broker are asked to fill out an application form. This form contains personal details, marital status, contact details, and banking details.<sup>122</sup> Hiring only takes place when the client consents to the

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<sup>117</sup> “Who against payment provides a person to a client for the rendering of a service or the performance of work.”

<sup>118</sup> Section 56(1).

<sup>119</sup> Section 24 of SDA.

<sup>120</sup> Theron *et al* (2005) 35.

<sup>121</sup> *Ibid.*

<sup>122</sup> Theron (2008) 628.



placement of the worker concerned. The client and the broker agree on certain terms and conclude a commercial contract, with stipulations on the amount that will be remunerated to the worker.<sup>123</sup> The terms of the commercial contract are not however disclosed to the employee although the matters regulated in the contract affect the employee. The contract also determines how workers are going to be supervised and disciplined.<sup>124</sup>

## 12 Conclusion

South Africa has not ratified Convention 181 of the ILO, which regulates labour brokers.<sup>125</sup> South Africa recognizes brokers but their regulation is inadequate. The broker is regulated in terms of the LRA, BCEA and other legislation but this legislation is insufficient to address the issue of unfair dismissals and unfair labour practices. Registration is also not a requirement in terms of the LRA. Before policy makers decide to ban labour brokers they should at least try and regulate the industry upon failure, they can then consider banning the industry. More research needs to be conducted in order to observe the manner in which to regulate the industry.

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Idem 630.*

<sup>125</sup> Private Employment Agencies Convention 181 of 1997.

## Chapter Four

### Reasons For and Against Banning

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1	Introduction	29
2	Job Creation	30
3	Cutting Costs	31
4	Conversion from Temporary to Permanent Employment	32
5	Flexibility	33
6	Skills	33
7	Fringe Benefits	34
8	Trade Union Membership	35
9	Discipline and Control	36
10	Problems of Identifying the Employer	37
11	Difficulty in Determining Dismissal and the Reason for Dismissal	38
12	Conclusion	39

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#### 1 Introduction

Reasons that have been brought forward for the banning are that, the industry is a form of human trafficking where an employee is sold to a client and is not accorded basic statutory rights that an employee should be awarded. On the other hand those that are against the banning state that labour brokers are important, as they contribute to a flexible job market while creating employment in an already impoverished nation. In this chapter I will deal with the reasons for and against the banning of labour brokers.

## 2 Job Creation

Labour brokers create opportunities for disadvantaged and diverse groups entrance into the labour market.<sup>126</sup> It is not easy to get a job in South Africa especially when job creation has been out stripped by job shedding.<sup>127</sup> Unemployment has economic as well as social consequences.<sup>128</sup> It reduces economic well being, lowers output, and erodes human capital.<sup>129</sup> On the social side it can cause social exclusion, deterioration in family life, and fosters grievance and cynicism which may be responsible for the supposed risk between unemployment and crime.<sup>130</sup> Labour brokers help married women,<sup>131</sup> trying to reconcile their occupations and family responsibilities or new unskilled entrants into the labour market.<sup>132</sup> Some people actually choose not to take up permanent positions of employment and prefer temporary work as it caters for their desires and needs. New entrants into the labour market usually do not have prior experience and the utilization of brokers, makes it easier for the employee to obtain employment while getting some sort of experience. This therefore makes labour brokers an attractive option when seeking employment.

Labour brokers provide short term employment for those people who can also be referred to as “nomadic workers” who enjoy a change of working environment from time to time,<sup>133</sup> and who are actually not interested in permanent employment. They also provide employment for those that cannot find alternative employment options. In a study conducted on farm workers, 89% indicated that it was out of lack of alternative employment options that

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<sup>126</sup> Landelahni Recruitment “Banning Labour Brokers Could Damage the Economy” (2009) *Civil Engineering* 40.

<sup>127</sup> Clarke (2004) 566.

<sup>128</sup> Kingdon and Knight “Are searching and Non searching Unemployment Distinct States when Unemployment is High? The Case of South Africa” (2000) *Research Paper by the Centre for the Study of African Economics at the University of Oxford* 1.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Supra.*

<sup>131</sup> In a study done in Spain the percentage of women in temporary work was 37% while it was 30% for males. Amuedo- Dorantes “Work Transitions Into and Out of Involuntary Temporary Employment in a Segmented Market” (2000) *Industrial Labour Relations Review* 313.

<sup>132</sup> Bronstein “Temporary Work in Western Europe: Threat or Complement to Permanent Employment” (1991) *International Labour Review* 293.

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

they used labour brokers.<sup>134</sup> The banning of labour brokers should be considered carefully. COSATU in its submission on labour broking<sup>135</sup> emphasised that:

“there is an urgent need to correct the erroneous notions that labour brokers create jobs as advanced by the Confederation of Associations in the Private Employment Sector (CAPES). On the contrary they only act as intermediaries to access jobs that already exist and which in many cases would have existed previously as permanent full time jobs.”

According to CAPES since 2000, labour brokers have introduced 3, 5 million temporary, part-time and contract employees into the South African labour force.<sup>136</sup> Evidently if this statement is true, labour brokers have a major part to play in order to alleviate the countries unemployment crisis. When one looks at the definition of a labour broker,<sup>137</sup> it is evident that the job is actually with the client and the broker only works as an intermediary by getting the employees to the client. One cannot simply state that just because labour brokers act as an intermediaries they are actually not creating jobs and should be banned. According to Peck and Theodore, the broker represents and somehow reconciles the interest of two clients responding to market pressures and engineers solutions for both of them.<sup>138</sup> Their role is significant in that they connect the relevant parties together.

### 3 Cutting Costs

Labour brokers can be used in an effort to cut costs. The sector supports companies in the face of global competitive pressure, allowing them to adapt their cost base and staffing levels.<sup>139</sup> When labour markets are slack it is easy for companies to form in house on call worker pools to hire temporary workers

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<sup>134</sup> Women on farms and Centre for Rural Legal Studies “Going for Broke: A Case study of Labour Brokerage on Fruit Farms in Grabouw” (2009) *Published by the Centre for Rural Legal studies, Stellenbosh* 35.

<sup>135</sup> Presented to the Portfolio Committee on Labour 2009/08/26.

<sup>136</sup> Botha “Unions War against Labour Brokers Lacks Research and Facts” (2009) *Management Today* 28.

<sup>137</sup> Section 198 of the LRA provides that a labour broker is any person who for reward procures for or provides to a client other persons who render services for the client and who are remunerated by the broker.

<sup>138</sup> Peck and Theodore “Tempted Out? Industry Rhetoric, Labour Regulation and Economic Restructuring in the Temporary Staffing Business” (2002) *Economic and Industrial Democracy* 149.

<sup>139</sup> Landelahni Recruitment (2009) 40.

directly.<sup>140</sup> When the labour market tightens it is difficult for employers to find workers willing to accept temporary work or unpredictable hours of work. Labour brokers pool jobs across companies, while offering workers better selection of schedules even if the specific assignments are temporary.<sup>141</sup>

Labour brokers help with the reduction of administration costs that are associated with the recruiting of workers.<sup>142</sup> Clients appreciate the speed and efficiency that labour broker's exhibit. The fact that they assume responsibility for staff selection and admin of often complex tasks which are burdensome for short term recruitment makes the labour brokers more attractive to employers.<sup>143</sup> Organizations may also be able to reduce training costs through the use of brokers.<sup>144</sup> In some instances training to raise skill is limited as workers who do low skill jobs, without career potential actually do not need training.<sup>145</sup> Clients should be given the right to choose how they want to recruit workers and the freedom to approach a broker should be enforced. If a company feels that they need to reduce costs and they desire temporary workers, they should be allowed that platform but there is a positive duty on the government to make sure that there is proper legislation regulating the process and compliance.

#### 4 Conversion from Temporary Employment to Permanent Employment

Labour brokers facilitate for temporary workers to eventually take up positions as permanent workers. They are involved in the screening of employees and making them available to the employer.<sup>146</sup> In a research done by Houseman *et al* , hospitals said they could not fill vacancies fast enough and that they had to use temporary workers to fill in while they tried to recruit permanent employees or on call workers.<sup>147</sup> South African legislation stipulates that after

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<sup>140</sup> Houseman, Kallerberg, Erickcek "The Role of Temporary Agency Employment in Tight Labour Markets" (2003) *Industrial and Labour Relations Review* 107.

<sup>141</sup> *Ibid.*

<sup>142</sup> Von Hippel, Mangum, Greenberger, Heneman, and Skoglund "Temporary Employment: Can Organizations and Employees Both Win?" (1997) *Academy of Management Executive* 94.

<sup>143</sup> Bronstein (1991) 295.

<sup>144</sup> Kallerberg "Non standard Employment Relations" (2000) *Annual Review of Sociology* 347. This article reports that 62% of labour brokers trained clerical temps in the use of office software.

<sup>145</sup> Nollen "Negative aspects of Temporary Employment" (1996) *Journal of Labour Research* 575.

<sup>146</sup> Bronstein (1991) 296.

<sup>147</sup> Houseman *et al* (2003) 108.

3 months of utilization of services by a client, that worker is deemed to be the employee of the client.<sup>148</sup> This legislation is not very helpful as it does not adequately address the manner in which the relationship will change.

## 5 Flexibility

Labour brokers enable employer's to adjust quickly to staffing levels in fluctuating levels of production.<sup>149</sup> Labour brokers allow companies the platform to greater flexibility in distributing their workforce. Labour input can be adjusted by moving temporary employees to different parts of the organization to meet current demands.<sup>150</sup> Such a strategy might not be feasible with permanent employees because the changes in job descriptions may be considered as a breach of contract. As a result of the fact that temporary employers have exposure to multiple work environments it is perceived that they are more adaptable to change. Employees can work at a company without making a commitment to that company. They therefore constitute modern "reserve labour armies" that help employers solve problems associated with understaffing as well as over staffing, and cater for positions with expensive full time workers who may not be utilized in the future.<sup>151</sup>

## 6 Skills

Labour brokers provide clients with a vast number of employees ranging from the highly to the lowly skilled. Some tasks require an expertise not available within the firm and an employer could utilize the services provided by a labour broker to gain access to such workers for short periods of time.<sup>152</sup> Infrastructural projects currently running in the country in electricity, rail, and roads rely on highly skilled technicians. No business can expect to thrive in an increasingly competitive market if it is expected to retain these expensive

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<sup>148</sup> Section 57(1) of Employment Equity Act.

<sup>149</sup> Bronstein (1991) 297.

<sup>150</sup> Von Hippel *et al* (1997) 95.

<sup>151</sup> Kallerberg (2000) 347.

<sup>152</sup> Hutchinson and Le Roux "Temporary Employment Services and the LRA" (2000) *Contemporary Labour Law* 52.

skills on a permanent basis.<sup>153</sup> The use of labour brokers has been noteworthy in this regard.

In a research conducted in North Carolina,<sup>154</sup> hospitals said they used labour brokers to obtain workers for relatively low skill, clinical occupations such as nursing assistances. Workers would watch extremely ill patients and call for assistance when necessary. Brokers would help to satisfy peaks in demand and to avoid over staffing at other times. The lower wages in this regard are as a result of these low skill occupations. When trying to cut costs the employer cannot be expected to pay high wages in circumstances where there is a lack of skill and education.

## 7 Fringe Benefits

It is unfortunate to say that temporary workers seldom receive fringe benefits such as paid vacations, and health insurance.<sup>155</sup> Few receive them as their length of service disregards them of the eligibility to get them. Fringe benefits are largely fixed costs that are extremely expensive and are incurred per worker and not per hour worked.<sup>156</sup> Employers keen to increase their workforce flexibility and minimize labour costs in the face of volatile markets will usually, convert as many labour costs by terminating contracts of permanent workers to the use of temporary employees.<sup>157</sup> Fringe benefits can detract from the objective of increasing workforce flexibility and clients do away with fringe benefits.<sup>158</sup> Fringe benefits are also viewed as gratuitous conduct for faithful service to an employer, and the case of temporary workers becomes contentious as these workers serve the client for a temporary duration.<sup>159</sup>

If a contract is only for 3 months then the question arises as to whether there really is a need for the employee to be given paid leave. The worker will be

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<sup>153</sup> Landelahni Recruitment (2009) 40.

<sup>154</sup> Houseman (2003) 113.

<sup>155</sup> Nollen (1996) 574.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

without employment soon. Benefits such as health insurance are imperative for any human being but it is difficult to determine how such benefits can be given to a person who is only present temporarily. Should there be health insurance just for the term of employment, who should pay for it, the client or the broker? This employment structure should not be treated like any other employment contract but legislators should actually provide for policy that exclusively deals with them. One size does not fit all, and the current labour legislation is inadequate to fit the triangular relationship. Policy needs to be implemented that specifically addresses the labour brokers in respect to fringe benefits.

It has been observed that labour brokers in the agricultural sector have compromised health and safety conditions for casual workers as they do not undergo the necessary training on how to use dangerous machinery and or chemicals like pesticides.<sup>160</sup> It is not fair on the part of a worker, that they suffer damage as result of lack of training by the brokers. Legislation should be put in place to actually close such loopholes. A huge burden is placed on the government and it cannot run away from its responsibilities simply by banning labour brokers.

## 8 Trade Union Membership

Temporary workers do not make any demands and rarely join trade unions as they are “nomadic” in nature, thus risking them to exploitation or the assignment to dangerous or unpleasant tasks.<sup>161</sup> Detachment of employees from employers makes it difficult for unions to organize, while the existence of multiple employers provides them with leverage against unions.<sup>162</sup> In South Africa the question as to whether a union qualifies for organizational rights,<sup>163</sup>

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<sup>160</sup> Women on Farms Project, and the Centre for Rural Studies “Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw” (2009) *published by the Centre for Rural Legal Studies, Stellenbosh* 14.

<sup>161</sup> Bronstein (1991) 293.

<sup>162</sup> Kallerberg (2000) 347.

<sup>163</sup> The LRA provides for the following organizational rights, the right to trade union representatives, trade union access to the workplace, deduction of trade union subscriptions, leave for trade union activities and disclosure of information.



must be determined on the basis of its membership at the workplace.<sup>164</sup> Workplace being the place where the employees of an employer work. The employee is on the premises of a client but legislation stipulates that the employer is the labour broker. The labour broker is scarcely in a position to grant a trade union rights' to access to the clients workplace. The labour broker is also not in a position to be able to disclose certain information to the workers and this therefore undermines the constitutional right of every employee to participate in trade union activities. Permanent employees of a client could have membership of a particular trade union and one questions whether a temporary worker can join such a trade union.

Trade unions usually bargain for wages and basically better conditions of employment for the worker. This is however contrary to the nature and the manner of the labour broking contract. Wages paid are determined by a commercial contract between the employer and the client. The employee has no say in determining wage increments and is only assigned for specific short duration periods. It would therefore be a waste of time to actually look into all the conditions for employment as the contract is for a limited duration of time. Such a challenge does not however warrant a complete ban of labour brokers. Trade unions should be given the right to peruse employment contracts and the platform to challenge current client practices in order to assist workers.

## 9 Discipline and Control

Discipline and control cannot be managed properly as the labour broker is not there to over see what is going on at the workplace. The labour broker is the employer but the workers are actually not based on the employer's premises. Confusion comes in as to which disciplinary rules and procedures are going to be used, is it the labour broker's rules or the clients, or even both?<sup>165</sup> It is unclear how the employee is expected to comply with two sets of procedures

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<sup>164</sup> Theron ,Godfrey, Lewis "The Rise of Labour Broking and its Policy Implications" (2005) *Development and Labour Monograph Series* 33.

<sup>165</sup> Theron "Intermediary or Employer? Labour Brokers and the Triangular Relationship" (2005) *ILJ* 632.

and by implication two standards of conduct or performance.<sup>166</sup> This is not fair on the worker as there needs to be some sort of clarity and certainty on their part. Clients and brokers need to agree on a system that works for both of them with the employee in mind. A worker should be made aware of whom they work for and the relationship should be defined clearly. Clarity as to who disciplines and gives instructions should be the mandate of the labour broker, and by enacting legislation to that effect, such problems are regulated.

## 10 Problems of Identifying the Employer

The Labour Relations Act has put the provision that the employer in the triangular relationship is the labour broker itself.<sup>167</sup> Case law has reflected that employees do not actually know who the employer is as they are under the impression that the employer is the client to whom they provide services for. The *April Workforce Group Holdings*<sup>168</sup> case is a good example to illustrate this problem. In this case an employee was employed by a broker in terms of a “limited duration contract.” It was a 6 month contract that would be terminated earlier should the client for any reason whatsoever advise the employer that it no longer wished for the employee’s services. Five months later the worker was dismissed, and the employee went to the CCMA and claimed dismissal. The application failed as she was unable to show dismissal in terms of section 186 as the worker had cited the wrong employer. The client and the employer are not jointly liable in the case of dismissal and the client was the one who dismissed the employee, therefore no dismissal took place as legislation reiterates that only an employer can dismiss an employee.

If a party fails to identify the correct employer then there can be dire consequences, (financial, time and psychological effect) for that employee. According to Theron,<sup>169</sup> 61% of cases analysed in a study by SETA, the arbitrator dismissed the applications because they had failed to establish an employment relationship with the party cited.<sup>170</sup> Employees need to be aware

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<sup>166</sup> Theron (2005) 30.

<sup>167</sup> Section 198(2).

<sup>168</sup> 2005 26 *ILJ* 224 (CCMA).

<sup>169</sup> Theron (2005) 635.

<sup>170</sup> In *Bhandi v Kelly Girl Temp Services* GA 952 14 April 1997 (Unreported case). A secretary had been placed with an employer for a considerable period and had reason to believe she was to be

of who is actually the employer and the brokers have a positive duty to make the employees aware.

## 11 Difficulty in Determining Dismissal and the Reason for Dismissal

The Labour Relations Act specifies 6 forms of dismissal.<sup>171</sup> Termination is done by the labour broker as this is the employer, but the question that arises is whether termination by the client necessarily or automatically means termination by the broker?<sup>172</sup> Is there a positive duty on the broker to provide alternative employment for the employee? Case law has not given a clear picture but has further confused us as to what should be done in that respect.<sup>173</sup> Where a dismissal has been established an employer must prove reason for dismissal was fair, and compliance with procedural fairness should be established.

Where the broker has relied on the termination of the contract by the client the broker will have difficulty in identifying the reason for termination. A client who feels that a worker of a labour broker is not competent to do the job or who suspects him or her of being guilty of misconduct, needs not consult the worker or even afford the worker a fair hearing.<sup>174</sup> The right not to be unfairly dismissed is compromised and leaves temporary workers at a further disadvantage. This should not however be the reason to ban labour brokers.

Legislation should hold the client and the broker jointly and severally liable in cases of dismissal. In that way workers cannot, and will not be dismissed on trivial grounds thus making it easier to determine the reason for dismissal. Bosch suggests that where an employer effectively brings an employee's

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permanently employed by the client. The secretary questioned her salary and the contract was terminated. The employee cited the client as employer and the arbitrator ruled that she was required to commence proceedings afresh as she had cited the wrong party.

<sup>171</sup> Dismissal means that an employer has terminated an employment contact without notice, an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms, an employer refused to allow an employee to resume work after she took maternity leave, etc.

<sup>172</sup> Theron (2005) 639-640.

<sup>173</sup> In *Dicks v Cozens Recruitment Services* (2001) ILJ 276 (CCMA) the arbitrator stated that there was no intention by the broker to supply the employee with actual employment other than through the broker's client. In *Stellenberg v ABC Recruitment Pty Ltd* GA 1622 (1997) the arbitrator stated that the termination did not mean their employment relationship with the labour broker is terminated.

<sup>174</sup> Hutchinson and Le Roux (2000) 53.

employment to an end due to misconduct or incapacity or the employer's operational requirements that should be regarded as a dismissal despite the terms of the agreement.<sup>175</sup>

## 12 Conclusion

Flexibility of business is crucial in the age of the economy,<sup>176</sup> but that does not mean flexibility should be granted at the expense of the rights of workers. The labour broker mediates employers and workers access to information about one another. They locate themselves at a pivotal point in the stream of the labour market.<sup>177</sup> Proper regulation is lacking as there are loopholes in our legislation pertaining to the instance of dismissal. The onus is therefore on the government to address the manner in which labour brokers conduct themselves and in doing so, should consult other jurisdictions to get a perspective on how other countries have handled this sector.

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<sup>175</sup> Bosch "Contract as a Barrier to "Dismissal: The Plight of the Labour Broker's Employee" 2008 *ILJ* 839.

<sup>176</sup> Davidov "Joint Employer Status in Triangular Employment Relationships" (2004) *British Journal of Industrial Relations* 1.

<sup>177</sup> Ofstead "Temporary Help Firms as Entrepreneurial Actors" (1999) *Sociological Forum* 290.

## Chapter Five

### An Analysis of the Position of Labour Brokers in Namibia

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1	Introduction	40
2	Background	41
3	Labour Hire Under the Contract of Labour System	42
4	Constitution of the Republic of Namibia 1990	44
5	Labour Relations Act 6 of 1992	44
6	Labour Bill of 2007	46
7	Labour Act 11 of 2007	47
8	<i>Africa Personnel Services v Government of the Republic of Namibia</i>	48
9	Conclusion	49

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#### 1 Introduction

The general attitude on labour brokers has been shifting towards proper regulation of the industry as portrayed by ILO standards.<sup>178</sup> Their contribution to society has however been scrutinised by some countries,<sup>179</sup> and in most the position is still uncertain. Experience is the best teacher and this research would not be complete without an analysis of the regulation of labour brokers in other jurisdictions. This chapter gives an overview of labour brokers in Namibia. Namibia is an African country that has provided us with a landmark case dealing with the banning of labour brokers. Labour brokers were originally recognised, later banned but such ban did not prevail as the legislation that had been drafted to render such services as illegal, was struck out as unconstitutional. The Namibian Constitution provides that the state should comply with conventions and recommendations of the ILO,<sup>180</sup> but Namibia has unfortunately not ratified the Private Employment Agencies Convention.<sup>181</sup>

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<sup>178</sup> The Private Employment Agencies Act 181 of 1997.

<sup>179</sup> South Africa, Namibia.

<sup>180</sup> Article 95(d) of the Namibian Constitution.

<sup>181</sup> 181 of 1997 (ILO's Agencies Convention).

## 2 Background

Namibia is a country with an estimated population of around 2.1million (2008).<sup>182</sup> It harbours natural resources such as diamonds, uranium, zinc, gold, and copper. Namibia's gross domestic product GDP per capita is relatively high among developing countries but obscures one of the most unequal income distributors on the African continent.<sup>183</sup> Jauch<sup>184</sup> describes it as "one of the countries with the highest levels of income inequality, and it is not known for taking radical steps to confront exploitation." The country's largest trade union, the National Union of Namibian Workers (NUNW) is said to have remained affiliated with the ruling party despite the increasingly conservative economic policies implemented by the Namibian government.<sup>185</sup> Jauch argues that such affiliation will undermine the independence of the labour movement and may wipe out prospects for trade unions in Namibia.<sup>186</sup> Quantity and quality of social services available to black and white rural and urban communities is parallel to the sharp disparities in income.<sup>187</sup>

Labour broking in Namibia is referred to as labour hire. Labour brokers in Namibia supply labour to 3rd parties (client companies) with whom they have a commercial contract.<sup>188</sup> Their services are used when employers are trying to cope with peaks in demand, reducing costs, avoiding industrial relations problems, greater flexibility as well as avoiding retrenchment problems.<sup>189</sup> Jauch claims that the ability to obtain and dismiss workers at will, in line with company requirements seems to be the main reason for using labour brokers. It allows client companies the ability to convert labour into a commodity that can be ordered and disposed of without any social responsibility towards workers.<sup>190</sup> The negative side of labour brokers in Namibia has been the job

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<sup>182</sup> [www.state.gov/r/pa/ei/bgn/5472.htm](http://www.state.gov/r/pa/ei/bgn/5472.htm) US country report on Namibia accessed on the 2010/08/17

<sup>183</sup> *Ibid.*

<sup>184</sup> Jauch "Confronting Outsourcing Head On? Namibia's Ban on Labour hire" (2009) *paper prepared by the Labour Resource and Research Institute (LaRRI) for the International Labour Research and Information Group 1.*

<sup>185</sup> Jauch "Labour Hire in Namibia: Important Lessons for South Africa" (2002) *South African Labour Bulletin 22.*

<sup>186</sup> *Ibid.*

<sup>187</sup> Klerck "Industrial Relations in Namibia since Independence: Between Neo- Liberalism and Neo- Corporatism" (2008) *Employee Relations 361.*

<sup>188</sup> *Ibid.*

<sup>189</sup> Klerck (2008) 365.

<sup>190</sup> Jauch (2002) 27.

insecurity, low wages, substandard working conditions, limited training and skills development.

The issue of labour broking in Namibia is an emotional and sometimes upsetting issue as the matter evokes powerful and painful memories of the abusive contract labour system. The contract labour system was a form of labour broking that exploited black labourers while inspiring policies of racial discrimination.

### 3 Labour Hire Under the Contract Labour System

Originally Namibia was occupied by the UK in 1878 and then by Germany in 1883.<sup>191</sup> German administration ended during World War 1 following South Africa's occupation in 1915.<sup>192</sup> In 1920 South Africa undertook administration of South West Africa under the terms of the League of Nations mandate, of full power and legislation over the territory.<sup>193</sup> Throughout the 1920s and into the 1930's the Afrikaner nationalists ruling South Africa were faced with a dilemma in their policy on Namibia.<sup>194</sup> On the one hand they needed to support the diamond industry's needs for vast numbers of able bodied workers, as it was the diamond revenues that filled the treasury. On the other hand new white settlers in Namibia demanded their own labour force for their farms.<sup>195</sup>

Lack of commercial infrastructure, poverty and large scale unemployment prevailing in the then northern reserves compelled native Namibians to try find employment elsewhere in the South West Africa.<sup>196</sup> The only employment option available was via the contract labour system. South West Africa Native Labour Association (SWANLA) was an amalgamation of employment recruitment and placement agencies.<sup>197</sup> Once you offered yourself for

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<sup>191</sup> [www.state.gov/r/pa/ei/bgn/5472.htm](http://www.state.gov/r/pa/ei/bgn/5472.htm) US country Report on Namibia accessed on the 2010/08/17.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> Cooper "The Institutionalization of Contract Labour in Namibia" (1999) *Journal of Southern African Studies* 127.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Africa Personnel Services (Pty) LTD v The Government of the Republic of Namibia and Others* case no SA 51 / 2008.

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

recruitment to SWANLA one was classified on health and physical fitness. The labourer would be registered with the authorities for the purposes of security having been given an official permit to work in proclaimed areas. Contracts would be signed at a minimum wage for a period of up to 2 years at a time without leave.<sup>198</sup> It was a crime punishable by imprisonment for a labourer to refuse or neglect to obey any lawful command of their employers, or to absent themselves from the workplace without leave or lawful cause.<sup>199</sup> According to Jauch and Karuuombe, “no black was supposed to be called a worker; blacks were only helpers of workers who were whites. As a result the helpers could not speak about work issues.”<sup>200</sup> Black workers could not take recourse to the law mainly because of the discriminatory laws at the time.

Labourers were forced to move around with passes and most were employed as domestic workers, farm labourers, herders, miners, fisherman, or anything unskilled. Employees worked in squalid conditions, while the education they received was so basic so as to ensure that the labourer remains a servant for the master.<sup>201</sup> The contract of labour system offended dignity infringed liberty, denied people equality and deprived labourers the ability to develop their capacity and abilities as human beings.<sup>202</sup> The contract of labour system left a deep scar on the Namibian psyche.

Labour broking has been likened to the contract of labour system, as the employment relationship is developed between the broker and the workforce. The client is not obliged to negotiate with workers for any change especially the improvement in employment. The client is not required to negotiate wages, to apply for medical aid, nor sick leave or severance pay. Labour broking has also been likened to the sale of human beings at a profit by the broker, to user companies. Such practises left most black workers vulnerable and disgruntled. The contract of labour allowed for workers or employees to get rid of workers who they regarded as trouble makers, inefficient or unfit.

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<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*

<sup>200</sup> Jauch and Karuuombe “The State of Union Organisation in Namibia” (2002) *paper prepared for the African Labour Research Network* 8.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*



Such practises are also evident in current cases of labour broking, but this does not warrant a complete ban on them.

In 1990 Namibia gained independence and this led to the abolishment of the contract labour system. The tragic history affected the manner in which labour has been regulated in the Constitution and in the different legislative documents enacted.

#### 4 Constitution of the Republic of Namibia 1990

At independence Namibian workers expected the new government to introduce a new Constitution and a Labour Act to replace the oppressive colonial legislation and its practises. Article 9 of the Constitution abolished any form of slavery and forced labour. By doing so it did away with the oppressive and repressive ways of the contract of labour system. Article 21(1)(j) entrenched the freedom to practise any profession or carry on any occupation, trade or business. This provision together with the Labour Act emancipated black people from the oppressive contract of labour system. Klerck alleges that labour brokers increased during this period as a result of the fact that employers tried to evade their post independence statutory obligations by seeking new sources of labour, to take over the burden so long carried by the contract of labour system which provided flexible low cost labour.<sup>203</sup> In 1992 the new Labour Relations Act was enacted.

#### 5 Labour Relations Act 6 of 1992

This Act regulated amongst other issues the maximum working hours from 46 to 45 hours a week,<sup>204</sup> overtime, work on Sundays and public holidays. In Article 39 annual leave was regulated and an employer was obliged to grant an employee at least 24 consecutive days leave of absence on full remuneration in respect of each period of 12 consecutive months for which the employee is employed by him or her. Working conditions for farm and domestic workers who reside at the place of employment were improved,

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<sup>203</sup> Klerck "Rise of Temporary Employment Industry in Namibia: A Regulatory Fix" (2009) *Journal of Contemporary African Studies* 90.

<sup>204</sup> Jauch (2002) 11.

including sanitary, and water facilities. For a person to be dismissed one had to comply with substantive and procedural fairness.

This piece of legislation did not however specifically regulate the issue of labour broking, but as put forward by Benjamin,<sup>205</sup> “labour brokers appear to have adopted the South African model in terms of which they conclude an employment contract with the employees and then place them with their clients.” The Labour Act of 1992 was said to have been written in legalistic terminology that made it hard and difficult to understand, without legal background.<sup>206</sup> In 2002 the issue of brokers invoked worker demonstrations and a petition to the government was posed. The reason for this was that, brokers posed a particular problem for trade unions and workers.<sup>207</sup> Workers were not covered by collective agreements and were extremely vulnerable. The desire to ban such services was prevalent and certain proposals and guidelines for labour brokers were encouraged. Registration of brokers, the obligation to set up training for workers, minimum wages and the registration of workers by the brokers, were some of the suggestions made to regulate labour brokerage. Labour brokers were also required to maintain the health, safety and welfare of the workers.<sup>208</sup>

The guidelines were silent on the question of permissible fees that labour brokers could charge, and the period for which the employee could be treated as a casual worker was not determined.<sup>209</sup> Problems of monitoring and enforcing the proposals were some of the challenges faced in the enforcement of these provisions. The proposed regulations were unlikely to resolve the fundamental conflict regarding the operations of labour brokers.<sup>210</sup> In 2007 a Bill was proposed which had the effect of regulating labour broking.

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<sup>205</sup> Benjamin (2009) 7.

<sup>206</sup> Mwilima “International Labour Organisation: The Role of Trade Unions on Rural Youth Employment Initiatives in Africa: Namibia Country Paper” (2006) *paper presented for the Labour Resource and Research Institute (LaRRI)* 20.

<sup>207</sup> Jauch (2002) 28.

<sup>208</sup> *Ibid.*

<sup>209</sup> Jauch “Namibia’s Labour Hire Debate in Perspective” (2010) *prepared for the Freidrich Ebert Stiftung (FES)* 6.

<sup>210</sup> *Ibid.*

## 6 Labour Bill of 2007

This Bill sought to regulate labour brokers. Section 128 regarded labour brokers as persons who for a reward procured to a client, individuals to render services to a client but were remunerated by the broker or the client. For the purposes of this Act, the employer of the worker was the broker.<sup>211</sup> The client and the broker were jointly and severally liable for contraventions of sections 2 through to 6 of the Labour Act.<sup>212</sup> Joint and several liability was also accorded for contraventions of collective agreements, the contract of employment, or a binding arbitration award that regulates terms and conditions of employment.<sup>213</sup> An employee aggrieved by a contravention referred to in subsection 128(3) could refer a dispute or seek enforcement of an arbitration award against the labour broker or the client or both in accordance. Section 128(5) stipulated that a labour broker could not offer to persons whom it procures or provides to a client for employment, conditions of employment which are less favourable than those provided in this Act. An employee was considered an employee even when work was unavailable.<sup>214</sup> Contraventions of this section would warrant a fine or even imprisonment.<sup>215</sup>

This Bill was evidence of the desire to regulate labour broking. The labour broker had to make sure that the employees did not suffer from conditions which were less favourable than those provided in the Act. This Bill seems to have brought about protective measures for the employees. Joint and several liabilities were founded in cases of dismissal but the same is not present in South Africa. The Bill also stipulates that the worker is still an employee even though there is no work available. With regard to the situation in South Africa such a clause is not present. The worker is considered as unemployed once the period of employment is terminated. The Bill seemed to protect the employee a little more than what the current South African legislation has advocated. Section 128 of the Labour Bill was however amended and it became section 128 of the Labour Act of 2007

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<sup>211</sup> Section 128(2).

<sup>212</sup> 2007.

<sup>213</sup> Section 128(3).

<sup>214</sup> Section 128(6).

<sup>215</sup> Section 128(7).

## 7 Labour Act 11 of 2007

This Labour Act amended section 128 of the Labour Bill that regulated labour broking and led to the ban of labour broking. The amended version read as follows:

- (1) “no person may for reward, employ any person with a view to making that person available to a third party to perform work for the third party.
- (2) subsection (1) does not apply in the case of a person who offers services consisting of matching offers of applications for employment without that person becoming a party to the employment relationship that may arise there from
- (3) any person who contravenes or fails to comply with this action commits an offence and is liable on conviction to a fine not exceeding N\$ 80 000 or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment
- (4) insofar as this section interferes with the fundamental freedoms in article 21(1)(j) of the Namibian Constitution it is enacted upon the authority of sub article (2) of that article in that it is required in the interest of decency and morality.”

In the global context, the nature and structure of work are progressively changing, most significantly towards the regulation of labour brokers. This prohibition of brokers sparked many debates not only in Namibia but the international community at large. In *Africa Personnel* it was held that:

“Emerging from a century of discriminatory employment practises and still seeking to redress the socio economic imbalances left in the wake therefore the Act was an important instrument through which the legislature sought to give effect to (its) constitutional commitment to promote and maintain the welfare of the people of Namibia, and to further a policy of labour relations conducive to economic growth, stability, and productivity.”<sup>216</sup>

The policy makers in Namibia believed they were acting in the best interests of their society, but this was an emotional decision that lacked proper thought as to the consequences of such a decision. The effect of this prohibition led to the famous *Africa Personnel* case<sup>217</sup> that sparked a rippling desire amongst some South African’s to ban labour brokers.

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<sup>216</sup> Paragraph 5 of *Africa Personnel*.

<sup>217</sup> *Ibid.*

8 *Africa Personnel Services v The Government of the Republic of Namibia*<sup>218</sup>

This case dealt with the constitutionality of sec 128 of the Labour Act,<sup>219</sup> which prohibited labour broking. The contract labour system inspired policies of racial discrimination, segregation and repression and it was against this historical background that led to the ban of labour broking. Labour broking is presumed to be similar to the contract labour system.

Africa Personnel is a company that provides employment services to its clients on the one hand, and on the other hand has employment agreements with its employees who work for the clients.<sup>220</sup> The broker sought to have section 128 constitutionally reviewed and took the matter to the High Court. The basis of the appellants challenge was the infringement of the fundamental freedom to carry on any trade or business entrenched in article 21(1) (j) of the Constitution.

The High Court dismissed the application and the reasons for this were that “labour hire has no basis at all in the Namibian law and therefore it is not lawful.” The court noted that labour broking was not known in the classical setting of letting and hiring of work and services in Roman times.<sup>221</sup> During the Romanic era most services were rendered either by slaves or other persons who as a result of their status, were required to render services to others. Consequently the common law knows only one labour contract, that of the rendering of personal services by the servant to the master.<sup>222</sup> It had only two parties to it and there was no room for an interposing third party.<sup>223</sup> The court further stated that statute had not changed this position as labour broking creates an unacceptable interposition of a third party (the labour brokers client) in the employer-employee relationship which had no basis in

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<sup>218</sup> Case no SA 51/2008.

<sup>219</sup> 11 of 2007.

<sup>220</sup> *Ibid.*

<sup>221</sup> Nghilshililwa “The Banning of Labour Hire in Namibia: How Realistic is it? (2009) *Namibia Law Journal* 87.

<sup>222</sup> Horn and Kanguuehi “*Africa Personnel Services v Government of Namibia and others*, decided on 1 Dec 2008. Case no A4/2008” (2009) *Namibia Law Journal* 102.

<sup>223</sup> Van Eck “Temporary Employment Services (Labour Brokers) in South Africa and Namibia” (2010) *PER* 113.

law.<sup>224</sup> It was also alleged that labour broking was similar to slavery and should be eradicated.<sup>225</sup>

The court also stated that article 21(1)(j) of the Constitution that allowed the freedom to carry on any trade or business was not an absolute right. The court stated that the protection in this section was not entitled to businesses with a criminal enterprise. The hire of services had no legal basis in Namibia, and one could not therefore allege that section 128 violated the right to freedom of trade and business. The right could also be lawfully limited if it was reasonable and necessary. An appeal was then heard in the Supreme Court Appeal (SCA) on the 3<sup>rd</sup> of March 2009. In the appeal it was concluded that section 128 was so over broad that it did not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on a business and was struck down as unconstitutional. “The SCA recognised that the freedom of trade and occupation is essential to the social economic and political welfare of society as a whole.”<sup>226</sup>

The court considered ILO Convention 181 which created a framework within which labour brokers may operate, while ensuring rights of employees are protected. The court found that the justification which sought the prohibition of labour brokers in the abusive labour contract system was misplaced and the court found that there was no rational relationship between the contract of labour system and the prohibition of labour brokers based on decency and morality. The sweep of the prohibition was considered too wide and included professional, where for example a lawyer undertook legal work for a client.<sup>227</sup> The prohibition imposed restrictions on commercial activities which were grossly unreasonable. The contract of labour system and labour broking actually have very little in common under the current constitutional dispensation.<sup>228</sup> If properly regulated within the ambit of the Constitution and ILO Convention 181, labour broking would typically pose no real threat to standard employment and greatly contribute to flexibility.

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<sup>224</sup> *Ibid.*

<sup>225</sup> Paragraph 20 of *Africa Personnel*.

<sup>226</sup> Van Eck (2010) 116.

<sup>227</sup> Paragraph 114-116 of *Africa Personnel*.

<sup>228</sup> Jauch (2010) 8.

## 9 Conclusion

Namibia's stance in relation to labour brokers is correct and South Africa can learn from Namibia's experience. Both Namibia and South Africa have made it clear that they uphold international law. They both function under a supreme Constitution that guarantees the right to freedom of occupation, trade and profession.<sup>229</sup> They are both at a point of law reform but Namibia has shown by its stance of legalising labour broking that it is better to regulate than ban.<sup>230</sup> The nature of work is rapidly changing and one needs to adapt to change. A complete ban does not necessarily mean you are protecting workers as this could awaken illegal services.

The Labour Commissioner of Namibia has indicated that new labour broking regulations were near completion.<sup>231</sup> On Namibia's proposed regulations are the registrations of labour brokers, the obligation to set up training programmes, the adherence to grievance and disciplinary procedures and records of employees.<sup>232</sup> The Minister of Labour and Social Welfare<sup>233</sup> further stated that cabinet had decided to eliminate exploitative aspects of the labour hire system.<sup>234</sup> Workers will also be entitled to the same benefits as permanent employees. The Labour Act is to be amended to prevent labour hire during strikes and lock outs. Proper regulation within the terms of the Constitution and ILO perspectives has been promised and this definitely seems like a step in the right direction.<sup>235</sup> It is the researcher's contention that South Africa rethink its decision, to banning and in its effort to regulate the industry consider some of Namibia's guidelines on the regulation of labour broking.

## Chapter Six

### Labour Broking in the Netherlands

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<sup>229</sup> Van Eck (2010) 120.

<sup>230</sup> *Ibid.*

<sup>231</sup> Van Eck (2010) 121.

<sup>232</sup> Jauch "Labour Hire in Namibia: New Flexibility or a New Form of Slavery," (2000) *study carried out by the Labour Resource and Research Institute (LaRRI)* 7.

<sup>233</sup> Immanuel Ngatjizeko.

<sup>234</sup> Menges "Screw tighten On Labour Hire" (2010) *The Namibian*.

<sup>235</sup> *Ibid.*

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1	Introduction	51
2	Background	53
3	Temporary Agency Work Act of 1965	54
4	Employee Placement Act of 1991	54
5	Act on the Allocation of Employees by Intermediaries (WADDI) Act of 1998	55
6	Flexibility and Security Act of 1999	56
7	Civil Code of 1999	57
8	Collective Labour Agreements	58
9	Conclusion	61

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## 1 Introduction

The Netherlands is part of a large community, the European Union,<sup>236</sup> which has the central aim of establishing a peaceful association of European states.<sup>237</sup> The first World War saw the break up of Europe's power and supremacy. While it was becoming separated ideologically from the Soviet Union, new plans were put forward for European integration.<sup>238</sup> The new consciousness which fostered the idea of the European Union<sup>239</sup> was essentially the result of the experiences of the war and the weakness of Europe in relation to the federations of the United States and the Soviet Union.<sup>240</sup> Contemporary economic dynamics with rapid technological change,

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<sup>236</sup> Burket "The International Labour Dimension: An Introduction" (2006) *Globalisation and the Future of Labour Law* 18.

<sup>237</sup> Capotorti, Hilf, Jacobs, Jacque "The European Union Treaty" (1986) *Commentary on the Draft Adopted by the EU Parliament on the 14<sup>th</sup> of Feb 1984* 1.

<sup>238</sup> *Ibid.*

<sup>239</sup> Capotorti *et al.*, (1986) 26. The European Union has legal personality and in each of the member states the Union enjoys the most extensive legal capacity accorded to legal persons under national legislation.

<sup>240</sup> *Ibid.* The Second World War further diminished the economic and political role of the major powers of Europe. This led to the desire of the identity of Europe to be strong enough to permit it not only to play a strong role in international relations but also to develop and original political model of democracy.



has intensified global competition resulting in labour markets becoming more complex and volatile.<sup>241</sup> With unstable employment and higher levels of job hopping both employers and workers have resorted to intermediaries.<sup>242</sup> Intense debates have therefore been ongoing on how best to balance employment generation and flexibility on the one hand, with employment protection and security on the other.<sup>243</sup>

Labour brokers have been a contentious issue at a European level since 1982 when the first directive on the matter was proposed.<sup>244</sup> In Europe, labour brokers are commonly referred to as temporary agencies. In every member state of the European Union, labour brokers are said to have doubled their activities during the 1990's and in Scandinavia, Spain, Italy and Austria they increased at least five fold.<sup>245</sup> Regulatory approaches to labour broking vary within the European Union. Some countries have very limited specific regulations e.g. Denmark and Ireland, while others have detailed regulations like France and Germany.<sup>246</sup>

In 2008 a new directive was put in place that provides temporary workers with the same rights as permanent employees. The directive requires that countries give statutory recognition to triangular relationships.<sup>247</sup> The European Union has done much to help regulate the industry but the focus of this chapter is not on the European Union. The aim of this chapter is to get a brief exposure into the regulation of labour brokers in the Netherlands. The market for brokers in the Netherlands is relatively well developed,<sup>248</sup> and has thus sparked the researcher's interest in the country. The Netherlands is one of the biggest users of labour brokers and the Dutch labour market is marked

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<sup>241</sup> Benner "Labour Flexibility and Regional Development: The Role of Labour Market Intermediaries" (2003) *Regional Studies* 621.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> Arrowsmith "Temporary Agency Work in an Enlarged European Union," (2006) *paper presented for European Foundation for the Improvement of Living and Working Conditions* 1.

<sup>245</sup> Neugart, Storrie "The Emergence of Temporary Work Agencies," (2006) *Oxford Economic Papers* 137.

<sup>246</sup> Bronstein "Labour Law in Central Europe" (2006) *Globalisation and the Future of Labour Law* 208.

<sup>247</sup> Benjamin (2009) 13.

<sup>248</sup> Hurley "Temporary Agency Work National Reports: The Netherlands" (2001) *European Foundation for the Improvement of Living and Working Conditions* 2.

by high statutory protection against unemployment.<sup>249</sup> South Africa and the Netherlands are clearly on different levels of development but South Africa can still learn one or two things from its system.

## 2 Background

The Netherlands has an estimated population of 16,6 million people.<sup>250</sup> The GDP growth (estimate 2010) is 1.25%.<sup>251</sup> It is a country rich in natural gases, petroleum and fertile soil. The unemployment rate in 2010 was estimated as 5%.<sup>252</sup> The global financial crisis hit the Netherlands hard in 2008 and in 2009 and the economy shrunk by 4,0%, but is said to be gradually recovering.<sup>253</sup> The role of labour brokers is both complex and dynamic. They seek to meet client companies' needs for labour at various levels of skill and experience, yet do so beyond the traditional activity of immediate short term once off demand, they have to build a supply relationship with each client, and attract appropriate labour to register and be available to work.<sup>254</sup>

Labour brokers in the Netherlands are said to have existed before World War 2 but their number was negligible.<sup>255</sup> In 1930 a law was passed introducing a public employment service for each municipality. The public employment service became state run in 1940 and was placed under supervision of the Ministry of Social Affairs in 1954.<sup>256</sup> During the 1950's the number of brokers increased rapidly in different sectors of industry and the need for extra labour offered attractive possibilities for temporary workers. In 1965 the Temporary Agency Work Act was enacted to regulate temporary employment services.

## 3 Temporary Agency Work Act of 1965

As a result of this Act temporary employees working for labour brokers were regarded equal to normal employees under the social security and tax

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<sup>249</sup> *Ibid.*

<sup>250</sup> [www.state.gov/r/pa/ei/bgn/3204.htm](http://www.state.gov/r/pa/ei/bgn/3204.htm) accessed on 2010/08/15

<sup>251</sup> *Ibid.*

<sup>252</sup> [www.indexmundi.com/netherlands/unemployment\\_rate.html](http://www.indexmundi.com/netherlands/unemployment_rate.html) accessed on the 2010/09/15

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

<sup>254</sup> (J)Purcell, (K)Purcell, Tailby "Temporary Work Agencies: Here today, Gone Tomorrow" (2004) *British Journal of Industrial Relations* 720.

<sup>255</sup> Visser, Pressen, Jacobs "Temporary Agency Work and the Information Society" (2004) *Bulletin of Comparative Labour Relations* 226.

<sup>256</sup> *Ibid.*

laws.<sup>257</sup> A license system for brokers became obligatory in 1970.<sup>258</sup> The license contained a number of conditions to be fulfilled by the broker such as, temporary work was only allowed for temporary assignments, the duration of assignments was limited by a maximum period (over the years this varied from 3-6 months). Temporary workers wages had to be equal to the wages of employees in the same or similar jobs in the user enterprise. The labour broker was however forbidden in the construction and road haulage industries. Until the 1980's unions were suspicious of brokers, who were associated with bad employment conditions and illegal black market labour exchanges.<sup>259</sup>

This Act was supposedly created to separate the chaff of illegal brokers from the wheat of legal brokers.<sup>260</sup> The license system safeguarded the collection of social premiums, to avoid competition between temporary jobs and permanent jobs.<sup>261</sup> In 1991 the Employee Placement Act came into force and replaced the Temporary Agency Work Act of 1965

#### 4 Employee Placement Act of 1991

In the 1990's there was a need for greater flexibility in labour relations. Flexibility of work is subject of concern in the Netherlands as it is regarded as positively and specifically increasing employment in the Netherlands.<sup>262</sup> Socio-cultural changes as well as economic situations made changes in labour inevitable.<sup>263</sup> The licensing system was continued, but licences were given in the regulation of the allocation of workers. The Act legalised profit driven brokers.<sup>264</sup> Some of the matters regulated in the Act were conditions of the maximum duration of the assignments, the prohibition on preventing a

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<sup>257</sup> Visser *et al* (2004) 227.

<sup>258</sup> *Ibid.*

<sup>259</sup> Koene, Paauwe, Groenewegen "Understanding the Development of Temporary Agency Work in Europe" (2004) *Human Resources Management Journal* 63.

<sup>260</sup> Dunnewijk "Temporary Work Agencies in the Netherlands: Emergence and Perspective." (2001) *Dutch Association of Temporary Work Agencies* 40.

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

<sup>262</sup> Oorschot "Flexible Work and Flexicurity Policies in the Netherlands, Trends and Experiences" (2004) *Transfer: European Review of Labour and Research* 209.

<sup>263</sup> Visser *et al* (2004) 227.

<sup>264</sup> Sol "Targeting on Transitions: Employment Services in the Netherlands" (2001) *Comparative Labour Law and Policy Journal* 94.

temporary worker from entering employment with another company, the prohibition on using temporary workers in the construction industry.

The draw backs of this traditional Dutch legislative system was that legal barriers rendered employees reluctant and afraid to change jobs whilst encouraging companies to increasingly engage the services of labour market intermediaries.<sup>265</sup> Another reason for the need of flexibility was the governments focus on trimming down the welfare state and its increased reliance on market intervention.<sup>266</sup>

In 1996 the need for even greater flexibility led employers' organisations, unions, and governments uniting into the Labour Foundation (StAR).<sup>267</sup> An unanimous recommendation to the Minister of Social Affairs and Employment was given on modernising labour law, and entitling flexibility and security. Employers were to be awarded greater flexibility in their relationship with employees and on the other hand more security was granted to employees. This recommendation had far reaching consequences for labour brokers both in the rules and regulation.<sup>268</sup> It affected the licence system, the relationship with workers and other matters. In 1998 the Act on Allocation of Employees by Intermediaries came into force.

## 5 Act on the Allocation of Employees by Intermediaries (WADDI) Act of 1998

WAADI forms an important part on the liberalisation on the labour broking system.<sup>269</sup> The flexibility and security discussion showed that regulations regarding employment in many cases imposed limitations on the ability of brokers to carry out their business effectively.<sup>270</sup> This therefore resulted in the abolition of the licensing system and most conditions linked to it. The ban on temporary workers in the construction and road haulage was lifted. User firms

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<sup>265</sup> *Ibid.*

<sup>266</sup> Sol (2001) 96.

<sup>267</sup> Visser *et al* (2004) 227.

<sup>268</sup> *Ibid.*

<sup>269</sup> Hurley (2001) 16.

<sup>270</sup> *Ibid*

could make use of the one and the same temporary worker for an indefinite period. The equal pay principle was brought into effect.

WAADI left room to deviate from the general principles if agreed upon in collective agreements. Article 8.1 of this Act, states that the broker has to pay the temporary worker, wages and other expenses equal to those paid to employees working in the same or similar jobs or positions with the user enterprise.<sup>271</sup> Article 11 of this Act provided temporary workers with information on occupational qualifications and safety rules for the job concerned, before sending a temporary worker on an assignment with the user enterprise.

## 6 Flexibility and Security Act of 1999

This Act came into force on the first of January 1999 and the purpose of this Act was to adequately match employer's demands for flexibility with employee's demands for security.<sup>272</sup> Labour broking was placed under regular labour laws and flexible workers were awarded rights as employees with regular employment contracts. The broker and the worker could agree in writing that the temporary agreement is dissolved. In the case of dismissal an employer needs to seek permission from the Public Employment Service to dismiss such employee.

The kind of training a temporary worker receives on the job is mostly quite specific and almost certainly of less importance in another job. To enhance capacities that will be appreciated by other employers, the temporary worker needs to develop more general skills which the current employer is not willing to finance because when he does the employee may negotiate a higher wage from another employer.<sup>273</sup> The new law provided a solution for this problem. As an employer the broker, is obliged to train a temporary worker under contract, as a permanent worker if certain conditions are met. This therefore

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<sup>271</sup> One exception to this would be a collective agreement applicable to the labour brokers that determines wages, and additional expenses such as overtime.

<sup>272</sup> Hurley (2001) 17.

<sup>273</sup> Dunnewijk (2001) 40.

improves the quality of the services, and South Africa could benefit from such practises.

## 7 Civil Code of 1999

Before 1 January 1999 there was little certainty on the status of the temporary employment contract.<sup>274</sup> It was regarded by some as a regular employment contract. Others argued it was not a regular labour contract because not all the requirements for such a contract were fulfilled. The flexibility and security discussion led to changes in the Civil Code.<sup>275</sup> A new section was added regarding the temporary employment contract. Article 7.690 describes the temporary employment contract.<sup>276</sup> The manner in which the relationships are expressed is similar to the way South African legislation views or describes labour brokers.

The temporary worker is a normal employee within the meaning of the Civil Code, with all the due rights and obligations of employees. Such rights include minimum wages, paid holidays, holiday allowances, payment of salary during sickness, parental leave and adjustment of working hours. Health and safety rules must also be taken into account. South Africa does not adequately describe payment of salary during sickness, parental leave and minimum wages with particular reference to the relationship of labour brokers and their workers. The broker also has a say in the termination of the temporary employment contract during the first 26 worked weeks. After the period of 26 worked weeks the temporary stipulation can no longer be used in the contract. As of that moment the employer has to conclude a fixed term contract with the temporary worker. In South African legislation however such provisions are lacking.

## 8 Collective Labour Agreements

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<sup>274</sup> Visser *et al* (2004) 230.

<sup>275</sup> *Ibid.*

<sup>276</sup> The temporary employment contract is an employment contract whereby one party, the employee is hired out by one party, the employer in furtherance of the employer carrying on its profession of trade to a third party in order to perform work under the supervision and direction of that third party pursuant to an order placed by the latter with the employer.

The Netherlands is a country that strongly values and upholds the use of collective agreements. There have been several collective agreements that have been concluded that have regulated the way brokers function. The Collective Agreement for Temporary Workers dealt with 3 major trade unions<sup>277</sup> on the one side, and the Employer's Federation for the Temporary Work Agencies, ABU (The Dutch Association of Temporary Work Agencies). ABU has promoted the interest of labour brokers since 1961 and has concluded various collective agreements.<sup>278</sup> Such agreements are commonly referred to as the ABU CLA. In 1973 the first ABU CLA was declared as generally binding by the Minister of Social Affairs, in that it applied to all labour brokers and all office /administrative temporary workers working for them.

With the introduction of the Flexibility and Security Act a new collective agreement for temporary workers was introduced the ABU Collective Agreement for Temporary Workers (1999-2003). This Act was declared compulsorily applicable which means it not only applied to ABU temporary workers but practically all temporary workers in the Netherlands. This agreement regulated temporary employment contracts, remuneration, working time, days of holiday, holiday allowances and sick leave.

A phase system was introduced which consisted of 4 consecutive phases progressing from extreme flexibility for the employer with little security for the employee, to security for the employee with little flexibility for the employer over a period of 3 years.<sup>279</sup> Phase one was a period of up to 26 weeks. Only weeks in which the temporary worker actually worked were counted. During phase 1 it could be stipulated in writing that the temporary employment contract will terminate if the assignment for which the temporary worker is lived out by the broker to the user enterprise is terminated at request of the user. These were temporary employment contracts with a temporary stipulation.<sup>280</sup> Phase 2 was a period of 6 months. Phase 3 allowed the employer to offer fixed term employment contracts for 1 or more than 3 month

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<sup>277</sup> Namely (FNV) Bondgenoten, (CNV) Dienstenbond, and De Urie.

<sup>278</sup> ABU "The Temporary Employment Sector in the Netherlands" [www.abu.nl/abu2/?filied=14306](http://www.abu.nl/abu2/?filied=14306) accessed on 2010/08/15.

<sup>279</sup> Visser *et al* (2004) 234.

<sup>280</sup> *Ibid.*

periods. Pay was guaranteed if no work is available and up to a level of 100% in the case of illness. Phase 4 allowed the application of all dismissal rules. Before dismissal public authorisation was required. ABU conducted another agreement which was valid from 2003 to 2006.

Currently the ABU CLA is valid from the period 2009 to 2014. Each worker is supposed to receive a copy of the collective agreement for temporary employees. The system of phases was modified and the old phases 1 and 2 were combined into Phase A. In phase A the employer or client may terminate the contract at any time. Phase A lasts for no longer than 78 weeks.<sup>281</sup> In Phase B a contract is for a definite period. Up to 8 contracts may be concluded in phase B within a period of 2 years. After phase B one enters phase C, which is a contract for an indefinite period. The labour broker can choose between pay based on the collective agreement for temporary employees and pay based on the rules that apply in the user company.

From the age of 21 every temporary worker is entitled to participate in a pension scheme. Once they have worked 26 weeks for the same client in phase A then one can participate in the Basic Pension Scheme.<sup>282</sup> Temporary workers in Phase B and C participate in the Plus Pension Scheme (StiPP), the pension fund for the temporary employment sector.<sup>283</sup> Full time temporary workers are entitled to 24 days holiday per year. Only the hours worked are counted in phase A for the accrued holidays and holiday pays. Employees are entitled to an unemployment benefit during unemployment. The duration of the unemployment benefit depends on how long the temporary worker has worked. With this collective agreement temporary workers need to be properly informed about the working conditions of where they will be working. The client is responsible for providing the broker with the relevant information in the form of a working conditions document.

ABU's main aim can be summarised as to deal with misunderstandings with a view to improving the image of temporary employment and to look after the

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<sup>281</sup> ABU "The Temporary Employment Sector in the Netherlands" [www.abu.nl/abu2/?filied=14306](http://www.abu.nl/abu2/?filied=14306) accessed on 2010/08/15.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*



interests of labour brokers.<sup>284</sup> ABU was said to have been actively involved in the drafting of the Flexibility and Security Act of 1999. ABU members are frequently inspected by an independent body or a certifying institution. The inspections involve, matters such as payments of social insurance, contributions and taxes.<sup>285</sup> The Netherlands has a large temporary employment sector with more than 730 000 temporary workers per day and 1, 3 million placements,<sup>286</sup> with a turnover of almost 10 billion annually.

The temporary employment sector plays a prominent role in the Dutch economy and the labour market. The Netherlands has also ratified ILO Convention 181. It is evident that the Dutch have taken time to actually think through the matter of labour brokers. Statute that has specifically dealt with this sector has been enacted and there has been the provision of security but with a measure of flexibility.

The Dutch policies have allowed employees the right to sick leave and payment during a period of idleness with no work. The provision of pension benefits depends on how long one has worked. All such policies are lacking in South Africa. Current South African labour laws do not adequately address the unique status of labour brokers. There needs to be greater security for the employees versus the flexibility of employers. The fact that ABU has collective agreements that last for a period of 5 years displays the continual analysis of the relevance of the industry and if there is a need for amendments in the field they are considered. South Africa needs to embark on a continual assessment of labour brokers. More can be done in order to get clarity on the functioning of this industry. Once this has been done it can be regulated more efficiently.

South Africa can learn from the Netherlands as it is considered to be one of the most experienced countries in collecting statistical data on labour broking.<sup>287</sup> It is actually considered as having a longer tradition for monitoring

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<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> ABU “The Temporary Employment Sector in the Netherlands” [www.abu.nl/abu2/?fileid=14306](http://www.abu.nl/abu2/?fileid=14306) accessed on 2010/08/15.

<sup>287</sup> European Foundation for the Improvement of Living and Working Conditions “Temporary Agency Work in the European Union” (2007) 17.

the trends of brokers.<sup>288</sup> The major role players, employer's organisations, trade unions and government have been given the platform to help with the functioning of the industry. In this case all parties advocate for their rights and some sort of compromise is reached between the parties. South Africa can therefore learn from this example and allow for some form of self regulation within the industry.

## 9 Conclusion

In the Netherlands labour brokers were extensively regulated until the 1990's. In 1998 and 1999 the industry was newly regulated. Flexibility and the issue of security have given it a form of self regulation, but in general the industry has been properly researched and the interests of all parties have to a certain extent been considered. South Africa is a developing country and one can say as a result of its political fabric, we cannot compare ourselves to the Netherlands. The manner in which the Netherlands regulates temporary work during a strike is a positive lesson that South Africa can use in its regulation. The issue of time periods that determine when a person becomes a permanent employee are also essential issues that South Africa can consider. Workers should also be given the right to view the commercial contract. It is better to put in better regulation methods than to completely ban the industry. Once you have seen that regulation has failed one can then consider resorting to the use of banning of the industry

## Chapter Seven Conclusion

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<sup>288</sup> *Ibid*

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1	Introduction	62
2	Ratification of Convention 181 and the Drafting of New Legislation	62
3	Amendments to the LRA and BCEA	63
4	Registration and Licensing	64
5	Creation of a Statutory Body	64
6	Fringe Benefits	64

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## 1 Introduction

In the previous chapters this research displayed the true position of labour brokers, what they really entail and the problems that they generate. This research also attempted to show how labour brokers in Namibia and the Netherlands are regulated and how their examples can help in the regulation of labour brokers in South Africa. Banning should be used as a last resort when, it has become evident that regulation has failed.

## 2 Ratification of Convention 181 and the Drafting of New Legislation

It is the writer's submission that South Africa should ratify ILO Convention 181 as it deals with the issue of labour brokers. This Convention is considered as an engine for job creation, structural growth, and improved efficiency of national labour markets.<sup>289</sup> With ratification the government is obliged to draft law and policy that pertains specifically to labour brokers. Article 11,<sup>290</sup> stipulates that, members are expected to draft national law and practise, taking into account the necessary measures to ensure adequate protection for workers employed by brokers. This legislation should expressly address social security benefits such as pensions, and medical aids. Access to training, occupational safety and health, and the compensation in case of insolvency and protection of workers claims, should be addressed.

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<sup>289</sup> ILO (2009).

<sup>290</sup> Convention 181.

Current practises need to be investigated in order to observe the manner in which the existing brokers are functioning, their types of services, and malpractice. Employer's organisations, workers, trade unions and all the relevant role players should be consulted in a social dialogue during the process of drafting such legislation. The legislation should not only provide for controls on abuse in employment practise but should also include positive incentives for law abiding citizens.<sup>291</sup> With such new legislation an effective complaint and grievance mechanism should be enforced. This legislation needs to be publicised and made available to those concerned, including the labour brokers and the workers. The ILO has also published a Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement.<sup>292</sup> This guide provides guidance to national legislators in drafting legal frameworks in line with the Convention and taking into consideration a countries history, and economic standing.

### 3 Amendments to the LRA and the BCEA

Van Der Riet suggests that sections 198(2)<sup>293</sup> of the LRA and sections 82 of the BCEA be amended. There is a vacuum created as there is no joint or several liabilities in the case of an unfair dismissal. Suggested amendments are that the labour broker and the client should be jointly and severally liable in all circumstances. They should be liable for any breaches whatsoever and this would mean that the labour broker would be liable for even unfair dismissals. A Code of Good Practise could also be a means of adequately regulating the industry.

### 4 Registration and Licensing

A system of registration could be a good method of regulation. The Netherlands does not have a system of licensing but this is as a result of their flexibility policies. If registration were a legal requirement, that the labour

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<sup>291</sup> *Ibid.*

<sup>292</sup> Published in 2007

<sup>293</sup> This section provides that there is joint and several liabilities, in breaches of collective agreements, breach of the BCEA, the Wage Act.

broker had to comply with, clients would have a powerful incentive to deal with the brokers that comply with legal requirements.

## 5 Creation of a Statutory Body

Theron<sup>294</sup> suggests that there should be the conception of a statutory body along the lines of the Estate Agency Board, where the sector can effectively regulate itself. One such example is provided in the Metal and Engineering Industry.<sup>295</sup> The main agreement of the Metal Industry Bargaining Council (MEIBC) prohibits out work except under limited situations. It prohibits the use of labour brokers unless registered with the MEIBC. The employer may only use workers supplied by a labour broker for a continuous period of 12 months.

## 6 Fringe Benefits

Workers could also be granted equal pay for the same work done by a permanent worker in the employ of the client. In so doing unfair labour practises are eliminated, while the principle of equity is stimulated. Labour brokers may be well advised to adopt a skills focus. Legislation could obligate brokers to provide task variety and to incorporate additional skill acquisition. The broker should also lodge a copy of any contract entered into by the broker and the client. In so doing transparency exists and there is also clarity as to who the employer is. Occupational safety and health should be made priority and the broker should make sure that the employee is adequately protected.

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<sup>294</sup> Theron *et al* (2005) 36.

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

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