

Revisiting Agency Work in Namibia and South Africa: Any Lessons from the Decent Work Agenda and the Flexicurity Approach?*

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Namibia has recently introduced policies regarding the regulation of agency work, and South Africa is in the process of doing the same. The promotion of the decent work agenda by the International Labour Organization (ILO) and the implementation of flexicurity policies by the European Union (EU) have been followed by the adoption of instruments giving recognition to agency work. This contribution revisits the approach to the regulation of agency work in Namibia and South Africa. It considers the question of whether these two cases can cast light on the changing role of labour law regulation as developments unfold on the international front.

Keywords: Agency Work; Decent Work; Flexicurity; Labour Hire; Temporary Agency Work, Temporary Employment Services.

1 INTRODUCTION

In the past decade, policy-makers in two neighbouring southern African states, Namibia and South Africa, have been grappling with the regulation of the contested issue of agency work.¹ Namibia has taken the lead and has recently adopted legislation that strictly regulates agency work, whereas in South Africa draft bills have been published that seek to strike a balance between recognizing this form of work and providing security for agency workers.²

* The article is based on an article presented at the inaugural Labour Law Research Network conference, held on 13–15 Jun. 2013, Barcelona, Spain. This research was made possible by the generous financial support of the South African National Research Foundation.

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¹ The issue of agency work in South Africa has previously been considered in S. Van Eck, *Employment Agencies: International Norms and Developments in South Africa*, 28 *Intl. J. Comp. Lab. L. & Intl. Rel.* 29 (2012) and hence reference is made to ‘revisiting’ the issue in the title of this contribution. Different terms are used to describe agency work. The ILO refers to ‘private employment services’ and the EU uses the concept ‘temporary agency work’. The generic term ‘agency work’ is used in this contribution.

² See the discussion in sec. 5.3 below.

Over more or less the same decade, the EU has adopted an employment policy, known as ‘flexicurity’, with a view to improving the region’s labour market-related competitiveness. This policy shift trailed the adoption by the International Labour Organization (ILO) of the ‘decent work’ agenda. What insights (if any) can Namibia and South Africa gain from these developments?

This discussion is structured as follows. First, the contribution reflects on the traditional role of labour law, considering whether its function should be broadened against the backdrop of the decent work agenda. Second, EU flexicurity policy is considered. Third, existing ILO and EU agency work instruments are compared. Fourth, the regulation of employment agencies in Namibia and South Africa is analysed, and in the final instance, there is a reflection on what lessons can be learnt from the decent work and flexicurity approaches.

2 LABOUR LAW AND THE DECENT WORK AGENDA

In southern Africa, labour law’s point of departure is still closely linked to a role that was outlined by the influential Sir Otto Kahn-Freund.³ The courts accept that it is one of the main purposes of labour law to serve as ‘a countervailing force’ in response to the imbalance in the power relationship between employers and employees.⁴ This model accepts that the employer is the bearer of power, and labour law has the key function of protecting employees.⁵ In line with traditional thinking, two mechanisms are recognized that hold the potential to counter this imbalance, namely, the setting of minimum employment standards and the endorsement of the process of collective bargaining.⁶ The key element of this labour law framework is the existence of a contract of employment. However, despite this point of departure, it is worth mentioning that positive gains have been made insofar as rebuttable legislative presumptions have been introduced in Namibia and South Africa, with the effect of broadening the

³ In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007), Indus. L.J. (South Africa) 2405 (CC), para. 72, the South African Constitutional Court refers to Kahn-Freund’s description of labour law as being ‘a countervailing force to counteract the inequality of bargaining power’ as a ‘famous dictum’.

⁴ See R. Le Roux, *The Purpose of Labour Law: Can it Turn Green?* in K. Malherbe & J. Sloth-Nielsen, *Labour Law into the Future: Essays in Honour of D’Arcy du Toit* 230, 238 (Juta 2012); P. Benjamin, *Labour Law Beyond Employment*, in R. Le Roux & A. Rycroft, *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and Future Challenges* 21, 22 (Juta 2012).

⁵ *Sidumo*, n. 3 *supra*, at para. 74, held that workers’ rights ‘were hard-won’ after years of intense struggle.

⁶ A. Van Niekerk, et al., *Law@work* 9 (2d ed., LexisNexis 2012).

coverage of labour law to workers on the margins of the traditional employment relationship.⁷

To what extent is this traditional role of labour law still suitable for Namibia and South Africa? In a recent insightful article, Paul Benjamin claims that dialogue between the social partners about the function of contemporary labour law has reached a policy 'logjam'.⁸ He argues that debates should be informed by a broader notion of 'labour market regulation', and that it is too limiting to see the function of labour law as covering only those who are already hired on employment contracts. He points to the fact that local labour policy debates should be broadened to cover, *inter alia*, the capacity of individuals to earn a livelihood and to enter and exit employment.⁹

In the European context, the regulation of employment relations is underpinned by the notion of 'social justice', which in the words of Hugh Collins, relates to the 'distribution of wealth and power'.¹⁰ This notion has a broader base than the term 'labour law' as used in southern Africa. It includes aspects related to social security and social protection. As pointed out by Mark Bell, the shifts in European labour policy can be better understood against the background of two predominant approaches. On the one hand, the 'social rights' perspective seeks to protect fundamental workers' rights, while on the other, the 'labour market regulation' approach aims to balance the interests of workers against economic efficiency.¹¹ The one does not exclude the other, but the first model holds that 'once a fundamental right is at stake [...] it tends to exclude from consideration any other policies or principles'.¹² In terms of the second approach, economic considerations are legitimate and should be weighed up against the protection of social rights.¹³

In developing my arguments below, I am influenced by the fact that eminent labour law scholars have recognized that much has changed since Kahn-Freund conceptualized the traditional role of labour law.¹⁴ My first argument supports Benjamin, insofar as developing countries, such as South Africa and Namibia, are burdened with unemployment rates that have been

⁷ In South Africa, sec. 200A of the Labour Relations Act 1996 (No. 66 of 1996), and in Namibia, sec. 7 of the Labour Amendment Act, 2012 (No. 2 of 2012) contain these presumptions.

⁸ Benjamin, *supra* n. 4, at 22.

⁹ *Ibid.*, 31.

¹⁰ H. Collins, *The Productive Disintegration of Labour Law*, 26 *Indus. L.J.* 295 (1997).

¹¹ M. Bell, *Between Flexibility and Fundamental Social Rights: The EU Directives on Atypical Work*, 37 *European L.R.* 31 (2012).

¹² S. Fredman, *Discrimination Law in the EU, Labour Market Regulation of Fundamental Social Rights in Legal Regulation of the Employment Relation* 183 (H. Collins, P. Davies & R. Rideout eds., Kluwer Law Int'l. 2000).

¹³ Bell, *supra* n. 11, at 32.

¹⁴ A. Hyde, *What is Labour Law?* in *Boundaries and Frontiers of Labour Law* 37, 54 (G. Davidov & B. Langille eds., Hart 2006). Le Roux, *supra* n. 4, at 239.

persistently high.¹⁵ The traditional role of labour law presupposes a situation where there is an existing employment relationship, and this framework may be too narrow for strategies aimed at facilitating access to the formal job market for the unemployed.¹⁶

Second, in the quest to become more competitive, employers have devised new forms of flexible working arrangements, and labour law has consistently needed to adapt to respond to these changes.¹⁷ Rather than merely attempting to proscribe undesirable forms of work, it may be a more effective strategy to recognize alternative forms of work and to establish boundaries within which they are permitted to function.

Third, global trends and policies have changed significantly, and it would be almost impossible to consider Namibia and South Africa in isolation from international policy developments. The ILO initially functioned in a context where the emphasis was on full employment and social welfare. However, as Bob Hepple indicates, this situation has since changed, and the ILO was faced with a number of post-war challenges which threatened its continued existence and compelled it to react.¹⁸ He states that the ILO's response was threefold:¹⁹ it adopted the ILO Declaration of Fundamental Principles and Rights at Work;²⁰ revised and integrated its international labour standards;²¹ and most significantly, embraced the decent work agenda.²² The objectives of this policy are well known. They seek to strike a balance between safeguarding fundamental rights at work, the promotion of job creation, and effective social protection for all, while encouraging tripartism and social dialogue.²³ In sum, the decent work agenda has realigned the ILO's attention from a rights-based agenda to one that includes policies that could potentially create jobs and reduce poverty.²⁴

¹⁵ Benjamin, *supra* n. 4, at 34 mentions that 'South African labour law operates within a context characterised by the world's highest levels of unemployment' and substandard education. See the statistics provided in sec. 5.1 below.

¹⁶ Added to this, collective bargaining has limited traction among the unemployed.

¹⁷ H. Collins, *Justifications and Techniques of Legal Regulation of the Employment Relation* 181 (Hart 2006).

¹⁸ B. Hepple, *Labour Laws and Global Trade* 33 (Hart 2005).

¹⁹ *Ibid.*, 56.

²⁰ The preamble to the ILO Declaration on Fundamental Principles and Rights at Work states that the core conventions are significant to maintain 'the link between social progress and economic growth'.

²¹ Hepple, *supra* n. 18, at 63 mentions that the Governing Body decided that of the 185 conventions, only 71 conventions were up to standard.

²² ILO, *Decent Work*, Report of the Director-General, International Labour Conference, 87th Session (ILO: Geneva, 1999).

²³ G. Rodgers, E. Lee, L. Swepston & J. van Daele, *The ILO and the Quest of Social Justice 1919-2009* 205-235 (Cornell U. Press 2009).

²⁴ The ILO, *Organizing Social Justice*, Report by the Director General (Geneva: ILO, 2004), sixteen mentions that 'the principal route out of poverty is work, and to this end the economy must generate opportunities'.

Does this mean that the ILO's conception of the role of labour law policy has changed to the extent that Kahn-Freund's formulation has become obsolete? The answer must surely be 'no'. Labour law's foundation remains relevant insofar as the decent work agenda seeks to protect fundamental workers' rights. However, it makes sense to extend the role of labour law in the context of the formulation of Namibian and South African labour policies.

3 FLEXICURITY IN CONTEXT OF THE EU

Since its inception, the role of the EU in the field of labour law regulation has been contested. Initially, the rationale of the EU was market integration, and it was only deemed justifiable to harmonize labour law as long as it ensured the smooth functioning of the common market.²⁵ However, there has been a shift in the EU's role from seeking market integration to focusing on market regulation which aims to improve competitiveness.²⁶

After lengthy debates,²⁷ the EU (like the ILO) changed its labour policy strategy in 2007 by implementing the flexicurity policy framework.²⁸ The policy is underpinned by the idea that a balance should be struck, increasing flexibility in the labour market, while at the same time improving the security of workers. The European Expert Group on Flexicurity developed a number of pathways to support the policy of flexicurity, namely, to:²⁹ make provision for flexible and reliable contractual arrangements to promote the upward transition of non-standard contractual arrangements; promote investments in comprehensive life-long learning; enhance active labour market policies to strengthen the transition of workers between jobs; and modernize social security systems to contribute to the mobility of workers.³⁰

The idea of flexicurity is reinforced by the idea that 'job security' is replaced by 'employment security'.³¹ Whereas job security aims to protect a worker's current job by means of protection against unjustified or unfair dismissal,

²⁵ Bell, *supra* n. 11, at 31.

²⁶ *Ibid.*

²⁷ R. Sultan, *Flexibility and Security? "Flexicurity" and its Implications for Lifelong Guidance*, British Journal of Guidance and Counselling, 1, 2 (2012) mentions that debates about flexibility and security can be traced to the post-war era.

²⁸ EC Green Paper on *Modernising Labour Law to Meet the Challenges of the 21st Century* (Brussels, COM(2006) 708); European Commission *Towards Common Principles of Flexicurity: More and Better Jobs Through Flexibility and Security* (Brussels, COM(2007) 359).

²⁹ European Commission *Flexicurity Pathways: Turning Hurdles into Steppingstones 2–3* (European Expert Group on Flexicurity 2007).

³⁰ S. Bekker & T. Wilthagen, *Flexicurity – A European Approach to Labour Market Policy*, Intereconomics, 68, 70 (2008).

³¹ M. Rönmar & A. Numhauser-Henning, *Swedish Employment Protection in Times of Flexicurity Policies and Economic Crisis*, 28 Intl. J. Comp. Lab. L. & Intl. Rel. 443, 449 (2012) correctly criticize the

employment security has the goal of providing workers with assistance during job transitions by means of life-long training and appropriate social security.³² The argument continues that flexible forms of work must be recognized as a ‘stepping stone’ into positions with progressive employment protection.³³ A number of points emerged when examining the considerable amount of literature on the topic.³⁴

The first is that flexicurity was not developed as a ‘one-size-fits-all’ approach for all members of the EU.³⁵ From the outset, the EU accepted that there are significant differences between the levels of social protection and levels of unemployment amongst Member States. For example, two countries that are deemed to be flexibility success stories, Denmark and the Netherlands, adopt two quite different models.³⁶

The second point is that European academics put forward convincing arguments about the need for supportive and constructive social dialogue as a prerequisite for the implementation of flexicurity policies.³⁷ For example, in the Netherlands, the Foundation of Labour played a significant role in positive-sum bargaining, in pursuit of ‘win-win’ strategies for employers and employees, paving the way for the adoption of a flexicurity approach.

Third, there are indications that flexicurity on its own is a ‘fair-weather strategy’. In a recent four-country study, Jason Heyes found that all of the countries have introduced austerity measures cutting back on social spending, resulting in ‘a reduced emphasis on the security dimension of flexicurity’.³⁸

4 ILO AND EU AGENCY WORK INSTRUMENTS

How did the ILO and EU respond to the regulation of agency work subsequent to adopting the decent work and flexicurity approaches? There can be no doubt that there has been a marked relaxation in ILO policies regarding the regulation of ‘private employment agencies’ (the term used by the ILO). The ILO policy

incorrect use of the terms ‘job security’ and ‘employment security’. For the purposes of this discussion, I use the terms as referred to in the EU’s flexicurity policies.

³² European Commission *Flexicurity Pathways*, *supra* n. 29, at 4.

³³ European Commission, *Flexicurity Pathways*, *supra* n. 29, at 2–3.

³⁴ For A. van den Berg, *Flexicurity: What Can We Learn from the Scandinavian Experience?* 11/3 *European J. Soc. Sec.* 245, 246 (2009) ‘flexicurity’ has become a ‘buzzword’.

³⁵ Bekker & Wilthagen, *supra* n. 30, at 69.

³⁶ N. Lyutov, *Russian Employment Protection: Analysis from the Perspective of EU Flexicurity Policy*, 28 *Intl. J. Comp. Lab. L. & Intl. Rel.* 335, 337 (2012). See also C. Jensen, *The Flexibility of Flexicurity: The Danish Model Reconsidered*, 32 *Econ. & Indus. Democracy* 721 (2011).

³⁷ Bekker & Wilthagen, *supra* n. 30, at 70.

³⁸ J. Heyes, *Flexicurity in Crisis: European Labour Market Policies in a Time of Austerity*, 19 *European J. Indus. Rel.* 71–80 (2013) covered Ireland, the United Kingdom, Germany and the Czech Republic.

underwent major changes from 1919 when only public employment agencies were authorized,³⁹ to 1933 when Member States were encouraged to abolish private employment agencies,⁴⁰ and 1997 when private employment agencies were legitimized.⁴¹

The Private Employment Agencies Convention 1997 (No. 181)⁴² (Agencies Convention 1997) recognizes two forms of agencies: in the first case, the agency becomes the employer of the agency worker, and in the second case the agency simply acts as a matchmaker between job applicants and employers.⁴³ It directs that signatories must introduce measures to ensure that agency workers' right to freedom of association and their right to engage in collective bargaining are protected.⁴⁴ In addition, signatories shall ensure that workers receive 'equality of opportunity and treatment in access to employment', and that they may not be discriminated against on grounds such as race, colour, sex, religion, age or disability.⁴⁵

There are, however, arguably some weaknesses in the ILO's Agencies Convention 1997. Even though the instrument proscribes discrimination on the classical arbitrary grounds of discrimination in respect of 'access to employment', it does not specify that there must be equal treatment in working conditions of agency workers and workers of the user undertaking. Furthermore, it does not make direct mention of the idea that agency work should normally be of a temporary nature.

In 2003, the Lisbon Employment Taskforce⁴⁶ recognized that 'the development of temporary agency work is impaired by legal obstacles' in a number of EU countries, and that the removing of obstacles could significantly support 'job matching'.⁴⁷ Shortly after the adoption of the flexicurity strategy in

³⁹ Unemployment Convention 1919 (No. 2). The Unemployment Recommendation 1919 (No. 1) stated that members should take measures 'to prohibit the establishment of employment agencies which charge fees'.

⁴⁰ The Fee-Charging Employment Agencies Convention 1933 (No. 34). The ILO later relaxed the limitation and adopted the Fee-Charging Employment Agencies Convention (Revised) 1949 (No. 96).

⁴¹ Van Eck, *supra* n. 1, at 31–35.

⁴² Article 2(3) states that the convention 'allow[s] the operation of private employment agencies as well as the protection of the workers'.

⁴³ Article 1 of the Agencies Convention 1997.

⁴⁴ Article 4 of the Private Agencies Convention 1997.

⁴⁵ Article 5(1) of the Agencies Convention 1997. Art. 12 directs that members shall determine with whom (namely, either the agency or the third party) the responsibilities lie in relation to, amongst others, collective bargaining and minimum wages.

⁴⁶ The Lisbon Employment Task Force was established with a view to identifying the reforms necessary to achieve the objectives of the European Employment Strategy.

⁴⁷ W. Kok, *Jobs, Jobs, Jobs – Creating more Employment in Europe* 29–30 (Empl. Task Force Rep. 2003). B. Waas, *A Quid Pro Quo in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment – Lessons to be Learnt from European and German Labour Law*, 34 *Comp. Lab. L. & Policy*. J.

2007, the EU adopted the Temporary Agency Work Directive 2008⁴⁸ (the Agency Directive 2008), which has the stated purposes of recognizing the role that ‘temporary work agencies’ can play and providing protection for agency workers.⁴⁹ The Agency Directive 2008 is the third of a trilogy of directives seeking to balance the social rights of non-standard employees on the one hand, and on the other, to leave room for flexible working arrangements as part of labour market regulatory strategies.⁵⁰

The Agency Directive 2008 provides that the agency becomes the employer, and it does not apply to instances where the agency acts as matchmaker between job applicants and user undertakings.⁵¹ The Directive states that restrictions on the use of agency work by Member States will be tolerated only in exceptional cases, and it provides that by the end of 2011 any prohibition on agency work will only be acceptable if it can be ‘justified on grounds of [the] general interest’ of agency workers.⁵²

The main protection included in the Agency Directive 2008 is that the principle of ‘equal treatment’ of working conditions must apply to agency workers.⁵³ Article 5(1) provides that the working conditions of agency workers shall be ‘at least those that would apply if they had been recruited directly by that undertaking to occupy the same job’.⁵⁴ Article 6 of the Agency Directive 2008 further safeguards the right of agency workers to be informed of, and to apply for, vacant positions in user undertakings.⁵⁵

There are problems associated with the implementation of the equal treatment provision.⁵⁶ Bernd Waas alludes to the fact that the equal treatment principle can be set aside by collective bargaining.⁵⁷ As a result, as long as the

47, 48 (2012) confirms that Germany, for example, had extensive limitations, whereas countries such as Denmark and Sweden hardly regulated it.

⁴⁸ Directive 2008/104/EC of the European Parliament and the Council on *Temporary Agency Work*.

⁴⁹ Article 2 of the Agency Directive 2008.

⁵⁰ Council Directive 97/81/EC of 15 Dec. 1997 (*concerning the Agreement on Part-Time Work*); and Council Directive 1999/70/EC of 28 Jun. 1999 (*concerning the agreement on Fixed-term Work*).

⁵¹ Article 3(1)(b) and (c) of the *Agency Directive*, 2008. See M. Schlachter, *Transnational Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide*, 28 *Intl. J. Comp. Lab. L. & Intl. Rel.* 177, 180 (2012).

⁵² Articles 4(1) and (2) of the Agency Directive 2008.

⁵³ Article 5 of the Agency Directive 2008.

⁵⁴ Articles 5(2)–(3) of the Agency Directive 2008. There are two exceptions to the equal treatment provision. First, it is permissible to exempt agency workers from equal treatment if they are engaged in open-ended contracts, which remunerate them during gaps between placements. Second, it is permissible to deviate from equal treatment in instances where collective agreements have been concluded that regulate the situation.

⁵⁵ Article 6(1) of the Agency Directive 2008. It also provides that any agreement which has the effect of preventing agency workers from concluding contracts with a user undertaking after an assignment will be void.

⁵⁶ Schlachter, *supra* n. 51, at 181.

⁵⁷ Waas, *supra* n. 47, at 54.

employment relationship falls within the ambit of the collective agreement, a mere reference to the relevant collective agreement in the agency worker's contract of employment is sufficient to circumvent the equality principle. Furthermore, there is no evidence that the policy is a cure for unemployment. Since the 2008 financial crisis, there has been a steady increase in unemployment. Statistics indicate that by the first quarter of 2008, EU-27 unemployment was at a relatively low rate of 6.7%. In January 2012, it was 10.1%, rising to 10.8% in January 2013.⁵⁸

5 NAMIBIA AND SOUTH AFRICA

5.1 INTRODUCTION

The legal and social contexts within which Namibia and South Africa's policies are formulated show a number of similarities. Both countries are members of the ILO, neither is a signatory to the ILO's Agencies Convention 1997, and both have a modern Constitution containing a Bill of Rights,⁵⁹ including the rights to equality, freedom of association and the right to engage freely in a trade or occupation.⁶⁰ As will become apparent in the discussion below, the right to engage freely in a trade or occupation and the constitutional obligation to take account of international law when interpreting national law⁶¹ have played a role in relation to the development of policies regarding agency work in the two countries.

The socio-political contexts also show some resemblances. Both countries were for many years governed by a minority of predominantly white members of society before the first democratic elections were held. The white population exercised both political and economic power until the early 1990s when first Namibia and then South Africa were transformed into social democracies following the promulgation of their constitutions.⁶² In addition, these neighbouring countries have experienced long periods of structural unemployment. Currently, Namibia has an estimated unemployment rate of

⁵⁸ D. Autor, *The Economics of Labor Market Intermediation: An Analytical Framework*, in *Studies in Labor Market Intermediation* 1–23 (D. Autor ed., The U. Chi. Press 2009); European Commission Eurostat, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics (accessed 16 Mar. 2013).

⁵⁹ Chapter 3 of the Constitution of Namibia, 1990 and Ch. 3 of the Constitution of South Africa, 1996.

⁶⁰ Sections 10, 21(e) and (j) of the Namibian Constitution and secs 9, 22 and 23 of the South African Constitution.

⁶¹ Section 95(d) of the Namibian Constitution and secs 39(b)-(c) and 232 of the South African Constitution.

⁶² Benjamin, *supra* n. 4, at 35.

37.6%⁶³ compared to South Africa's figure of 36.7%.⁶⁴ In addition, the issue of agency work has been extensively debated, becoming a bone of contention in both countries. However, this is where the similarities end. Namibia has a relatively small population of 2.2 million⁶⁵ compared to its relatively large neighbour with 52.98 million inhabitants.⁶⁶

5.2 NAMIBIA

Namibia is a late starter in respect of the regulation of agency work.⁶⁷ It gained independence from South Africa in 1990 and its first post-independence labour legislation came into force in 1992.⁶⁸ Even though the Namibian Labour Act 1992 strengthened the labour rights of workers in formal employment, the Act did not contain any provisions regarding 'labour hire' (as it is known in Namibia).⁶⁹ At the same time, the incidence of non-standard work grew exponentially during the era of post-independence. According to Gilton Klerck, the workforce of the largest labour hire company increased by 600% over a three-year period between 1999 and 2002.⁷⁰ By the mid-2000s, Namibia's agencies placed approximately 10,000 to 16,000 agency workers,⁷¹ and non-standard jobs seemed to thrive at the interface between the regulated formal sector and the informal sector.⁷²

In a significant turn of events, Namibia shifted from the non-regulation of agency work to its prohibition in 2007.⁷³ This is in stark contrast to

⁶³ G. Kanyenza & F. Lapeyre, *Growth, Employment and Decent Work in Namibia: A Situation Analysis* (ILO Employment Working Paper No. 81, 2012) ix, 5 and 6 indicate that unemployment increased from 20.2% in 2000 to 37.6% in 2008. However, it is difficult to obtain reliable unemployment statistics for Namibia.

⁶⁴ Statistics South Africa, *Quarterly Labour Force Survey*, Quarter 1 2013, vi, <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2013.pdf> (accessed 14 May 2013). The report states that 25.2% are still looking for jobs while 36.7% include those who have become discouraged from looking for work.

⁶⁵ Kanyenza & Lapeyre, *supra* n. 63, at 5. This was the estimate during 2010.

⁶⁶ Statistics South Africa, *Quarterly Labour Force Survey – Quarter 1 2013*, <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2013.pdf> (accessed 14 May 2013).

⁶⁷ The ILO adopted the Agencies Convention in 1997 and South Africa first attempted to regulate agency work in 1982.

⁶⁸ Labour Act 1992 (No. 6 of 1992).

⁶⁹ Namibia's Labour Act 2004 contained detailed regulations about labour hire and although parliament passed this Act, it never came into force.

⁷⁰ G. Klerck, *Rise of the Temporary Employment Industry in Namibia: A Regulatory Fix*, 27 J. Contemporary Afr. Stud. 85, 89 (2009).

⁷¹ H. Jauch, *Namibia's Ban on Labour Hire in Perspective*, *The Namibian*, 3 Aug. 2007; P. Benjamin, *To Regulate or to Ban? Controversies Over Temporary Employment Services in South Africa and Namibia*, in *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* 189, 202 (K. Malherbe & J. Sloth-Nielsen eds., Juta 2012).

⁷² Klerck, *supra* n. 70, at 85.

⁷³ Section 128(1) of the Labour Act 2007 (No. 11 of 2007).

developments at the level of the ILO and the EU. There is no indication that policy-makers were mindful of the international labour market approach which seeks to strike a balance between the recognition of agency work and the protection of agency workers. The Labour Act 2007 stipulated that no person may 'for reward, employ any other person with a view of making that person available to a third party'.⁷⁴ Nonetheless, this prohibition of agency work did not last long. In 2012, the Labour Act 2007 was amended, and it currently recognizes, albeit in a limited fashion, 'private employment agencies'.⁷⁵ In addition the Employment Service Act 2011⁷⁶ provides for the registration of private employment agencies.

What was the reasoning behind the initial ban and what caused the regulatory U-turn? Agency work became a controversial political topic in the run-up to the adoption of the Labour Act 2007. In the national assembly, members referred back to an era when workers 'were brought in from the North with tickets around their necks saying they are going to be sold' and some members likened agency work to the era when attempts were made to regulate the slave trade.⁷⁷

The turnaround was brought about by a judicial challenge. As mentioned, the Namibian Constitution protects all persons' right to 'practise any profession, or carry on any occupation'.⁷⁸ In *Africa Personnel Services*,⁷⁹ an agency challenged the constitutionality of the prohibition contained in the Labour Act 2007, and the Supreme Court lifted the ban by declaring the limitation unconstitutional.⁸⁰ The Court held that the policy-makers' reliance on the immoral nature of agency work did not justify such a disproportionate limitation.⁸¹ Influenced by the ILO's Agencies Convention 1997,⁸² the Court concluded that rather than placing a blanket ban on agency work, the industry could have been regulated.⁸³

The Namibian Cabinet responded by issuing a media release stating that it had decided that 'the Constitution will have to be amended to authorize the banning of labour hire or, alternatively, stringent new legislation must be enacted'

⁷⁴ Section 128(1) of the Labour Act 2007.

⁷⁵ Labour Amendment Act 2012 (No. 2 of 2012).

⁷⁶ The Employment Service Act 2011 (No. 8 of 2011).

⁷⁷ *Africa Personnel Services (Pty) Ltd v. Government of the Republic of Namibia & others* (2011) 32 *Indus. L.J. (South Africa)* 205 (Nms), para. [7].

⁷⁸ Section 21(j) of the Constitution of Namibia.

⁷⁹ See *Africa Personnel Services*, *supra* n. 77.

⁸⁰ Benjamin, *supra* n. 71, at 205 criticizes the initial High Court decision for failing to reconcile its view with the ILO's Agencies Convention 1997.

⁸¹ *Africa Personnel Services*, *supra* n. 77, at para. 67.

⁸² Section 95(d) of the Namibian Constitution provides that the state shall foster 'respect for international law and treaty obligations'.

⁸³ *Africa Personnel Services*, *supra* n. 77, at para. 99.

to regulate such work.⁸⁴ This is a further indication of the extent to which the Namibian government's opinion had hardened against agency work. After this, Namibia enacted the Employment Service Act 2011 and the Labour Amendment Act 2012,⁸⁵ which recognize, but severely limit, agency work. Namibia currently recognizes three categories of private employment agencies. First, agencies providing services 'matching' the supply and demand for labour; second, agency work 'consisting of engaging individuals with a view to placing them to work for an employer which assigns their tasks *and supervises the execution* of those tasks'; and, finally 'other services' relating to job seeking.⁸⁶

The amendments provide that in instances where employment agencies 'engage' individuals and 'place' them with a user undertaking, such individuals are regarded as employees of the user undertaking and not the private employment agency.⁸⁷ It is clear that the definition of the second type of private employment agency seeks to protect workers under the 'supervision' of user undertakings. During an interview with a prominent Namibian labour lawyer, it was confirmed that existing agencies are considering placing their own managers at user undertakings to supervise agency workers.⁸⁸ This, they argue, could have the effect of removing their activities from the scope of regulated agency work.

In order to prevent constitutional challenges similar to the one launched in *Africa Personnel Services*, the Labour Act 2007 allows an exception to the rule that the user undertaking must become the employer in respect of all agency workers. A user undertaking, supported by both the private employment agency and the affected employee, may apply to the authorities to be exempted from the requirement that the user undertaking must be the employer in the triangular relationship.⁸⁹ Should such an exemption be granted, the user undertaking and the private employment agency will both be deemed to be the employer of the agency worker.⁹⁰

A number of observations can be made regarding the way in which Namibia currently regulates agency work. First of all, policy-makers have not been persuaded by ILO or EU standards, which require that agencies become

⁸⁴ Cabinet of Namibia, *Media Release from Cabinet Chambers*, http://209.88.21.36/opencms/opencms/grnnet/MIB/modules/news/news_0018.html?uri=/grnnet/MIB/archive/media/index.html (accessed 18 Mar. 2013).

⁸⁵ Section 1 of the Employment Service Act 2011, as substituted by sec. 8 of the Labour Amendment Act 2012, defines 'place' to mean 'place, engage, refer, recruit, procure or supply an individual, to work for an employer or a prospective employer'.

⁸⁶ Section 1 of the Employment Services Act 2011, as substituted by sec. 8 of the Labour Amendment Act 2012; emphasis added.

⁸⁷ Section 128(2) of the Labour Act 2007.

⁸⁸ Interview with Pieter de Beer, of De Beer Law Chambers, on 23 Mar. 2013 in Pretoria.

⁸⁹ Section 128(8), as substituted by sec. 6 of the Labour Amendment Act 2012.

⁹⁰ Section 128(9).

the employer in triangular relations. There is no resemblance to the EU Agency Directive 2008 which provides that restrictions on agency work will only be 'justified on grounds of general interest' of agency workers.⁹¹ Second, it may be argued that the latest amendments may be found to be unconstitutional. Since the 1990s, agencies have functioned on the basis of a model in which they acted as employers of agency workers. Such agencies are currently prohibited from being the employer, and it is only possible for a user undertaking to apply for an exemption. This precludes agencies from initiating the process. Strategies are already being devised to seek loopholes in the Namibian model by placing managers at user undertakings to supervise agency workers to avoid the classification of agencies as private employment agencies. This supports the argument that it may be more appropriate to regulate than to ban agency work.

5.3 SOUTH AFRICA

During the early 1980s, South Africa implemented its first steps to regulate so-called labour brokers. In 1982, the previous Labour Relations Act 1956⁹² (LRA 1956) was amended to define an agency as any person who for reward procures services of workers to perform work for clients and for which service 'such persons are remunerated by the labour broker'.⁹³ The LRA 1956 further provided that the agency was 'deemed' to be the employer of the agency worker. The concern at the time was that agency work was structured in such a way that workers were not protected by statutory wage regulations.⁹⁴

An attempt was made to strike a balance between the protection of workers' rights and labour market regulation in the formulation of post-apartheid labour policy. The country held its first post-apartheid elections in 1994, and in January 1995 a Ministerial Task Team produced an Explanatory Memorandum⁹⁵ which was the forerunner of the current Labour Relations Act 1995 (LRA 1995).⁹⁶ The Task Team expressed the view that the draft Bill sought 'to balance the demands of international competitiveness and the protection of fundamental rights of workers', and that it sought to 'avoid the imposition of rigidities in the labour market'.⁹⁷

⁹¹ Article 4(1) and (2) of the Temporary Agency Directive 2008.

⁹² Labour Relations Act 1956 (No. 28 of 1956) amended by Labour Relations Amendment Act 1982 (No. 51 of 1982).

⁹³ Section 1(3) of the LRA 1956.

⁹⁴ H. Cheadle, *Labour Relations Amendment Act 51 of 1982*, 4 Indus. L.J. (South Africa), 31, 37 (1981).

⁹⁵ *Explanatory Memorandum Prepared by the Ministerial Task Team*, 16 Indus. L.J. (South Africa), 278 (1995).

⁹⁶ Labour Relations Act 1995 (No. 66 of 1995).

⁹⁷ Explanatory Memorandum, *supra* n. 95, at 285–286.

Shortly after this, an ILO Country Review⁹⁸ influenced leading South African commentators to develop the notion of 'regulated flexibility'.⁹⁹ This concept allows space within which standards can be adapted to suit the needs of workplaces. This South African brand of regulated flexibility includes a number of mechanisms, of which the most prominent strand concerns the selective application of legislative standards on low paid and more highly paid employees and larger and smaller businesses.¹⁰⁰ At the time when flexicurity was a matter of debate in the EU, the South African Government briefed Halton Cheadle to consider the conceptual underpinnings of regulated flexibility as it applied in the 1990s.¹⁰¹ In a sobering report, Cheadle pointed out that despite the existence of the term 'regulated flexibility', the phased and urgent nature of the reforms resulted in piecemeal negotiations about specific statutes, preventing the formation of a logically integrated set of labour laws.¹⁰²

Returning to the first set of post-democratic labour legislation, the LRA 1995 introduced the term 'temporary employment service' and unfortunately established a loosely regulated environment in which categories of agency workers are to this day being exploited. Under the current model,¹⁰³ the agency is recognized as the employer. Moreover, the agency and the user undertaking are jointly and severally liable for transgressions of bargaining council agreements and the provisions of the BCEA 1997¹⁰⁴ and despite using the term 'temporary employment services' there is no protection regarding the indefinite employment of agency workers. In addition, there is no obligation on the part of agencies to register or to adhere to requirements laid down by the authorities.

Similar to the situation in Namibia, South Africa has experienced exponential growth of agency work over the past fifteen years.¹⁰⁵ The above-mentioned ILO Country Review¹⁰⁶ estimated that in 1995, 100,000 workers were placed by agencies, and in 2010 the National Association of Bargaining Councils estimated that this number had grown to 780,000.¹⁰⁷ A

⁹⁸ G. Standing, J. Sender & J. Weeks, *Restructuring the Labour Market: The South African Challenge: An ILO Country Review* (Intl. Lab. Org. 1996).

⁹⁹ H. Cheadle, *Regulated Flexibility: Revisiting the LRA and the BCEA*, 27 Indus. L.J. (South Africa), 663, 668 (2006) mentions that the 'concept of regulated flexibility was developed by Paul Benjamin and based on the approach to flexibility outlined in the *ILO Country Review*'.

¹⁰⁰ So, for example, the Employment Equity Act 55 of 1998 imposes a duty on employers with fifty and more workers to implement affirmative action measures.

¹⁰¹ Cheadle, *supra* n. 99, at 663.

¹⁰² *Ibid.*, 666.

¹⁰³ Section 198(1)-(2) of the LRA 1995.

¹⁰⁴ Section 198(4) of the LRA 1995.

¹⁰⁵ P. Benjamin, *Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa*, 31 Indus. L.J. (South Africa), 845 (2010).

¹⁰⁶ *ILO Country Review*, *supra* n. 98, at 95.

¹⁰⁷ Benjamin, *supra* n. 71, at 200.

growing body of research confirms that the current regulation of agency workers is inadequate. Employees placed by employment agencies are paid significantly less than their permanent counterparts at the same workplace;¹⁰⁸ employment agencies have been used to convert indefinitely employed employees into independent contractors of agencies;¹⁰⁹ and agency workers have been employed widely for indefinite periods.¹¹⁰

The South African social partners have been at odds about the way forward. The trade unions argue that employment agencies should be prohibited, whereas business organizations are in favour of the retention of agencies, even though they agree that there is a need for improved regulation. After protracted negotiations, the government proposed a new definition of 'employee' for the LRA as a whole in terms of which a person could only be an employee if the person works 'under the direction or supervision of an employer'.¹¹¹ This brings to mind the position in Namibia, as the aim is to prevent a situation where the agency is deemed to be the employer while the agency worker works under the authority of the user undertaking.

The idea of changing the definition of 'employee' in order to eradicate the triangular agency-user-worker relationship was ill-conceived. A persuasive Regulatory Impact Assessment Report¹¹² condemned the proposed amendments and noted that there is a 'prominent risk [...] that this would violate the Constitution'.¹¹³ The Report resulted in the Bills being scrapped¹¹⁴ with a new, more sensible but not flawless, set of amendments tabled in 2012. The Labour Amendment Bill 2012,¹¹⁵ which is currently before Parliament, builds on the

¹⁰⁸ Department of Labour, 'Synthesis Report: Changing the Nature of Work and "Atypical" forms of Employment in South Africa', (unreported 2004), referred to in Benjamin, *supra* n. 71, at 196; P. Benjamin, H. Bhorat, C. Van der Westhuizen & S. Van der Westhuizen, *Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010, Employment Equity Amendment Bill, 2010, Employment Service Bill, 2010*, Report Prepared for the Department of Labour and the Presidency', 32–34, http://smegrowthindex.co.za/wp-content/uploads/2012/03/FINAL_RIA_PA_PER_13Sept2010-1.pdf (accessed 10 Mar. 2013).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, 32; C. Bosch, *Contract as Barrier to 'Dismissal': The Plight of the Labour Broker's Employee*, 29 *Indus. L.J.* (South Africa), 831 (2008).

¹¹¹ Clause 23 of the 2010 Labour Relations Amendment Bill. The South African statutory presumption as to who is an employee (sec. 200A of the LRA 1995) contains a basket of indicators (such as whether a person forms part of the organization where work is performed; whether the person is economically dependent on the person for whom work is performed; and whether the person is provided with the tools of trade) to assist in determining who is an employee. This rebuttable presumption only applies to employees earning below the threshold of R193,805 per annum.

¹¹² Regulatory Impact Assessment Report, *supra* n. 108.

¹¹³ *Ibid.*, 5.

¹¹⁴ C. Carol, *Just a Temporary Draft*, *Financial Mail*, 2 Jun. 2011, 2, states that '[r]epresentatives of business, labour and government [...] have agreed to step away from the amendments that were published by the Department of Labour in December'.

¹¹⁵ [B 16B – 2012].

South African approach of regulated flexibility. It recognizes agency work and aims to strengthen the rights of especially low-paid workers. In addition, the Employment Services Bill¹¹⁶ provides for the registration and licensing of agencies. The key principles underpinning the 2012 amendments can be summarized as follows:

The amendments for the first time introduce detailed protection in respect of three types of non-standard work, namely, agency work, fixed-term work and part-time work:¹¹⁷

- The improved protection is aimed at agency workers earning below the threshold amount of ZAR 193,805 per annum.¹¹⁸ The *status quo* remains in respect of workers earning above this threshold.¹¹⁹
- The agency is the employer in the triangular relationship. However, in respect of employees earning below the threshold, the user undertaking is deemed to be the employer of the agency worker if the worker is not rendering a ‘temporary service’, which is less than three months of employment.¹²⁰
- Agency workers who are deemed to be employees of the user undertaking must, on the whole, not be treated ‘less favourably’ than employees performing similar work.¹²¹

Indications are that the amendments to the LRA 1995 will be implemented towards 2014. When comparing the Bills to the standards set by the ILO and the EU, a number of aspects are notably absent, though arguably they should have been included in the suggested amendments. First, there is no provision which safeguards the right of agency workers to be informed of (and to apply for) vacant positions in user undertakings.¹²² Second, the Bills do not provide protection for agency workers against agreements that may have the effect of preventing agency workers from concluding contracts of employment with user undertakings after the conclusion of their assignments. Third, no provision is made for an exemption pertaining to the equal treatment principle in instances where agency workers are guaranteed payment by the agency between assignments. Lastly, the same degree of emphasis on improved protection for

¹¹⁶ [B 38 – 2012].

¹¹⁷ Section 198A (agency work), 198B (fixed term contracts) and 198C (part-time employment) of the LRA 1995, inserted by sec. 44 of LR Amendment Act 2012.

¹¹⁸ *Government Gazette*, No 36620, 1 Jul. 2013. Based on the Rand-Euro exchange rate as of 8 Sep. 2013, it amounts to approximately EUR 14,670 per annum.

¹¹⁹ Section 198A of the LRA 1995 only applies to employees earning below the above-mentioned earnings threshold.

¹²⁰ Section 198A(3)(b) of the LRA 1995.

¹²¹ Section 198A(5) of the LRA 1995.

¹²² Article 6(1) of the Agency Directive 2008.

workers on low pay is not present in either the decent work or flexicurity policy frameworks.

6 CONCLUDING REMARKS

The title of the contribution poses the question of whether Namibia and South Africa can learn something from labour policy developments that occurred under the auspices of the ILO and the EU. The answer is that they can, but caution is needed insofar as there are significant socio-economic differences between the countries under discussion and the countries that make up the EU. Southern Africa is at a different stage of development compared to Europe. The adoption of a 'one-size-fits-all' approach is definitely not appropriate.

The first observation is that Namibia, South Africa and the EU are faced with the challenge of growing unemployment. The ILO decent work agenda, which shifted the focus of labour law from a rights-based methodology to one that also places emphasis on the creation of sustainable jobs, has paved the way for changes in labour market policy within the EU. The EU has adopted active policy directions that seek to improve the competitiveness of Member States with a view to reducing unemployment. Flexicurity is based on a multi-pronged balancing act, with a number of pillars that include social security protection, investment in training and flexible working arrangements. It is argued that policy-makers and academics in the southern African region should become involved in more in-depth debates regarding the merging of strategies which may stimulate job creation while protecting workers' rights.

Second, the ILO and the EU recognize the triangular agency work arrangement under which the agency is the employer and the user enterprise is the client. Among others, agency workers are protected by means of equal treatment provisions and the right to apply for jobs at user undertakings. On the face of it, Namibia has introduced measures that establish barriers against such work, which in my view, will ultimately not withstand constitutional scrutiny. Compared to this, South Africa's latest legislative proposals are better aligned with international policy directions. The employment agency is recognized as the employer and improved protective measures are currently being extended to low paid agency workers. In accordance with the notion of regulated flexibility, more highly paid agency workers receive less protection than low-paid agency workers.

Third, some countries are more suited for the implementation of market regulatory strategies than others. There are indications that it is essential to have a measure of responsible dialogue between the social partners before a deal can be struck regarding a rebalancing of labour security and flexibility in any particular

country. However, the relation between organized labour and business in southern Africa is characterized by an adversarial approach, political rhetoric and policy logjam, rather than one where common ground is sought through joint-decision making. A measure of trust must be developed between organized labour and business before there will be any chance of developing common ground between the social partners regarding the creation of an environment where jobs can be established.

Finally, the decent work and flexicurity approaches do not offer simple solutions regarding the problem of high unemployment rates. As a result, policy-makers in South Africa and Namibia should not harbour unrealistic expectations in this regard. However, it is my argument that policy-makers have no choice but to continue along the lines of seeking to strike an appropriate balance between the protection of fundamental labour rights which is an integral part of a framework in which sustainable businesses can be established. It does not seem viable to merely rely on the protection of fundamental workers' rights without also seeking to establish a regulatory framework conducive to the transition to the formal job market of the unemployed and those in the informal sector.

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Citation

The International Journal of Comparative Labour Law and Industrial Relations may be cited as follows: (2014)(1) *IJCLLR*.

Refereeing process

Articles for publication in the *IJCLLR* are subject to double-blind peer review.

ISSN 0952-617x

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The International Journal of Comparative Labour Law and Industrial Relations is published quarterly by Kluwer Law International BV, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands.

Periodicals Postage Paid at Rahway N.J., USPS No. 013-141.

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