

**LEGISLATIVE FRAMEWORK GOVERNING LABOUR BROKING
IN SOUTH AFRICA**

BY

MALOSE TITUS KUTUMELA

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SUPERVISOR: ADV. LT NEVONDWE

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ABSTRACT

The study will analyse section 198 of the Labour Relations Act 66 of 1995. This section is the founding provision of labour broking in South Africa. The section gives recognition of labour broking and also provides for joint and several liabilities between the client and the broker in instances of infringement of this section. The utilization of labour brokers in South Africa has sparked debates between various stake-holders, with the other side arguing that labour broking should be banned as it diminishes the rights of employees employed through this sector. On the other hand those against the ban argue that the existing legal framework needs to be adequately regulated to protect employees. In order to resolve the challenges relating to labour broking the study will make a comparative analysis with the Namibian jurisprudence.

The study takes full cognize of legislative framework governing labour broking and determines whether the available legislations provide full protection of the labour rights. Through case law the study will highlight the constitutional challenges of labour broking in South Africa and challenges faced by employees employed through labour broking. The study concludes that the regulation of labour broking is appropriate as the industry creates employment and thus alleviates poverty and that the total ban of labour broking in South Africa would be detrimental to those who seek employment without the necessary skills and qualifications.

DECLARATION BY SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this mini-dissertation by **Kutumela Malose Titus** for the degree of Masters of Laws (LLM) in Labour Law be accepted for examination.

Signed

Date

Adv. Lufuno Tokyo Nevondwe

DECLARATION BY STUDENT

I, **Kutumela Malose Titus**, declare that this mini-dissertation for the degree of Masters of Laws in Labour Law in the University of Limpopo (Turfloop Campus) hereby submitted, has not been previously submitted by me for a degree at this or any other university, this is my own work in design and execution and all material contained herein has been duly acknowledged.

Signed.....

Date.....

Kutumela Malose Titus

DEDICATION

This work is dedicated to the following people:

1. To my late grandparents, Elias Lehutjo and Josephine Lehutjo for their encouragement and support throughout my life. I wish you were still alive to share the achievements with me.
2. To my parents, Alfred Kutumela and Esther Kutumela for their support and the sacrifices, I shall forever be thankful.
3. To my uncle, Alfred Lehutjo, I shall forever be thankful for the support you have given me.

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LIST OF ABBREVIATIONS

1. ANC African National Congress
2. CAPES Confederation of Associations in the Private Employment Sector
3. CCMA Commission of Conciliation, Mediation and Arbitration
4. COSATU Congress of South African Trade Union
5. DA Democratic Alliance
6. FEDUSA Federation of Unions of South Africa
7. IFP Inkata Freedom Party
8. ILO International Labour Organisation
9. PER/PELJ Potchefstroom Electronic Law Journal
10. NEDLAC National Economic Development and Labour Council
11. YCL Young Communist League

LIST OF INTERNATIONAL INSTRUMENTS

1. Fee charging Employment Agencies Convention of 1933.
2. Fee charging Employment Agencies Convention of 1949.
3. Private Employment Agencies Convention, 181 of 1997
4. Private Employment Agencies Recommendation 1997.
5. Unemployment convention of 1919.

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5. Employment Equity Act 55 of 1998.
6. Labour Relations Act 56 of 1956.
7. Labour Relations Amendment Act 2 of 1983.
8. Labour Relations Act 66 of 1995.
9. Labour Relations Amendment Bill, 2012.
10. Namibian Constitution Act 2 of 1990.
11. Namibian Labour Act 11 of 2007.
12. Namibian Labour Bill of 2007
13. South African Constitution, Act 108 of 1996.
14. South African Citizenship Act 88 of 1995.
15. Workmen's Compensation Act 25 of 1914.

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6. *Denel (Pty) Ltd v Gerber*, 2005 9 BLLR 849 (LAC).
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8. *Jonas v Quest Staffing Solutions*, 2003 7 BALR 811.
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15. *Mahlamu v CCMA*, 2011 4 BLLR 381 (LC).
16. *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC).
17. *Mayo and Another v Global Cleaning Services (Pty) Ltd*, 2011 10 BALR 1051 (CCMA).

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20. *National Education Health and Allied Workers Union v University of Cape Town and Others*, 2003 (3) SA 1 (CC).
21. *National Union of Mineworkers of South Africa v Bader Bop (Pty) Ltd*, 2003 BLLR
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22. *Niselow v Liberty Life Insurance Association of South Africa Ltd* 1998 19 ILJ 752
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24. *NUM & others v Billard Contractors CC & another*, 2006 12 BLLR 91 (LC).
25. *Ongevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA
446 (A) 457A.
26. *South African Broadcasting Corporation v McKenzie* 1999 20 ILJ 585 (LAC).
27. *SA National Defence Union v Minister of Defence & Another*, 1999 (4) SA 469 (CC).
28. *SA Post Office v Mampeule*, 2009 8 BLLR 792 (LC).
29. *Sibiya & others v HBL Services cc*, 2003 7 BALR 796.
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CHAPTER ONE: INTRODUCTION

1.1 Historical background to the study

Labour broking is not a new concept in South Africa it dates back to the colonization that has since taken place in 1652 when the settlers arrived at Cape of Good Hope for the first time.¹ When minerals were discovered in the 19th century, the issue of migrant employees became a key element of labour movement in South Africa, as it entailed the purpose of procuring a persons to client in return for reward, the labour broker had to recruit employees in as far as Homelands and other parts of Southern Africa to be employed in the mines.² The labour broker operated in a close conjunction with the employers that utilized the labour.³ In most cases the labour brokers were employed by the employers for whom they were recruiting for.⁴

Black employees were as a result of apartheid laws that discriminated unfairly against them regarded as second class citizen in all spheres of life and were recruited by a labour broker and consequently completed fixed term contracts, the laws protected the interest of white minority at the expense of black majority.⁵ During this period the utilization of labour broking increased and the labour laws did not afford employees employed through labour broking protection, these resulted in the exploitation of employees.

¹ Labour brokers are governed by section 198 of the Labour Relations Act which defines a TES as, “any person who, for 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 temporary employment service.

² Rufaro Audrey Mavunga, Critical analysis of labour brokers: Should they be regulated or banned in South Africa, University of Pretoria, (2010), 19.

³ J Theron, S. Godfrey and P Lewis, The Rise of Labour Broking and its Policy Implications, Development and Labour Law Monographs 1/2005, 18.

⁴ Ibid.

⁵ A fixed term contract of employment is defined as a contract of employment which:

- (a) has a definite start and end date, or
- (b) terminates automatically when a particular task is completed , or
- (c) terminates after a specific event (other than retirement or summary dismissal).

See, Fixed-term contracts, website; <http://www.atl.org.uk/help-and-advice/flexible-working/fixed-term-contracts.asp>, accessed on 10 August 2012.

The introduction of the Labour Relations Act of 1956⁶ also did not address the issue of labour broking and the uncertainty about the legal status was clearly a critical constrain in their growth.⁷ The Wiehahn Commission was set up by the government to study labour laws and make recommendations thereof and the recommendations of the Commission were viewed as essential period in transformation of South African labour laws, with regard to labour broking after the consideration of activities of a new type of placement services where undertakings lease the services of a persons in their employment to other persons, the latter being the client of those undertakings and this resulted in the inclusion of labour brokers in the Amendments⁸ to the Labour Relations Act of 1956.⁹

Labour broking started to progress during this period and an express provision on the issue was introduced for the first time by the Amendment of the Labour Relations Act of 1956.¹⁰ The Labour Relations Amendment Act was ground breaking as it gave recognition to labour brokers unlike the Labour Relations Act¹¹ that did not contain their legal status and these placed labour brokers in a limbo as participants in a labour market. The recognition of labour brokers brought about relieves in the labour market but challenges were still vast.¹²

The Amendments introduced the definition of labour broker and defined labour brokers as any person whose business for reward is to provide a client with person to render service or to perform work for the client.¹³ Labour brokers were then deemed to be the employers of the individual whom they had placed with a client, provided they were the one entitled to remunerate such individual placed with client. However in most cases it occurred that the labour brokers escaped their duty to pay the employees and when

⁶ Labour Relations Act 56 of 1956.

⁷ Jan Theron, The shift of service and Triangular Employment, 2008 29 ILJ 813, 819.

⁸ Labour Relations Amendment Act 2 of 1983.

⁹ Van Der Riet, talks presented at SASLAW meeting on 23rd March 2010, Labour brokers; The future. Website; <http://www.saslaw.org.za>, accessed 22 August 2012, see further Rufaro Audrey Mavunga, op cit, 21.

¹⁰ MSM Brassey and H Cheadle, Labour Relations Amendment Act 2 of 1983, 1983 4 ILJ 37.

¹¹ Labour Relations Act 56 of 1956.

¹² Labour brokers often neglected to reward their employees for their services and this created a dilemma in that that the client would shift blame to the broker and this led to employees having no recourse against the client.

¹³ MSM Brassey et al, op cit, 37.

such employee visits the labour broker to enquire they would find that the labour broker had changed contact details and they are no longer available.¹⁴ This left employees in a predicament as they had no recourse.

To curb this loophole, the labour brokers were then required to register with the Department of labour and the operation of this industry without the required registration was deemed to be a crime.¹⁵ However the Amendments placed no liability on the client in this form of employment as the only recourse that an employee had was against the labour broker.

In 1994 South Africa gained its independence and the apartheid era laws were abolished. The introduction of the new labour laws paved way in a new system of industrial relation, and brought about a stronger regulation to address the inequalities brought about by the previous apartheid era.¹⁶

1.2. The statement of the research problem

The growth of labour broking in South Africa has grown rapidly in recent years resulting in problems for the South African labour law and thus raising serious jurisprudential questions. Although there are attempts by the South African government to address the challenges associated with labour broking, this attempts however seem to do little to minimize these challenges as this industry remains fraught with many problems.

Labour broking in South Africa is slowly becoming a trend because the costs incurred by employers when employing permanent or temporary employees is high and as a result the employers opt to be better served by the labour brokers whose costs are minimal. This is also perpetuated by the fact that labour brokers often build up a pool of specialist employees who can be brought into a client organization and utilized at the highest level of efficiency on short notice.

¹⁴ Ibid.

¹⁵ Section 63, Labour Relations Act Amendment 2 of 1983. See also, MSM Brassey, et al, op cit, 37.

¹⁶ Rufaro Audrey Mavunga, op cit, 23.

The Constitution provides that every employee has the right to form and join a trade union.¹⁷ However, employees employed through labour brokers are not active enough in an industry to form and join trade union. This significantly diminishes their bargaining power; consequently employees are not able to demand better wages and safe working conditions from a client.

In addition to the above, the Labour Relations Act¹⁸ provides that the employees have a right not to be unfairly dismissed.¹⁹ However it is unfortunately that in the workplace, clients are able to infringe this right without any consequences. Labour brokers often terminate the employment of the employees when the client terminates its services with the labour broker.

Labour broking has been said to be tantamount to slavery, trading of human beings as commodities, which in essence violates section 13 of the Constitution which provides that “No one may be subjected to slavery, servitude or forced labour.”²⁰

Labour broker agencies are also often called upon to provide scab labour as substitute employees for those on strike, with aim of undermining the rights to embark on industrial action, undermining collective bargaining rights.²¹

It has been argued that labour broking amounts to delegation or refusal of the true employer to comply with its obligations resulting in employees unable to enforce their rights against any party that may be identified legally as the employer.²²

Lastly, the labour broker usually provides a series of indemnities to the client in respect of various issues, including those areas in which the client would be jointly and severally

¹⁷Section 23 of the South African Constitution, Act 108 of 1996.

¹⁸ Labour Relations Act 66 of 1995.

¹⁹ Section 186 of the Labour Relations Act 66 of 1995.

²⁰Sanjay Balkaran, Position paper on labour brokers and temporary employee services (TES), To ban or regulate? 19. Website: http://npswu.org/index.php?option=com_content&view=article&id=134%3Ashould-labour-broking-be-banned-or-regulated&Itemid=60 accessed 22 August 2012.

²¹ Ibid.

²² Ibid.

liable. This ensures that the employees do not have recourse against the Client and is obviously prejudicial to the employees because this gap perpetuates abuse and exploitation of these employees.

1.3. Literature review

The African National Congress (ANC) took a resolution at the Polokwane 52nd conference to create decent work and eliminate poverty.²³ In the 2009 ANC election manifesto, it was stated that “In order to avoid exploitation of employees and ensure decent work for all employees as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices. Provisions will be introduced to facilitate unionization of employees and conclusion of sectoral collective agreements to cover vulnerable employees in these different relationships and ensure the right to permanent employment for affected employees. Procurement policies and public incentives will include requirements to promote decent work.”

The question that perhaps needs to be asked is whether there would be any impact on the South African labour market should labour broking be banned outright. Whilst many may answer this question in the affirmative suggesting that labour brokers create jobs , there are however strong arguments that labour brokers merely act as intermediaries to access jobs that already exist and not necessarily creating jobs *per se*.²⁴

Reasons that are brought by those who are in favour of the banning of labour broking are that the industry is a form of humans trafficking where an employee is sold to a client and is not accorded basic statutory rights that an employee should be awarded.²⁵

The former Minister of Labour Membathisi Mdladlana monumentally expressed his contentions about labour broking and accordingly stated that labour broking is:

²³ See the 52nd African National Congress resolution at Polokwane.

²⁴ Sanjay Balkaran, Position paper on labour brokers and temporary employee services (TES); To ban or regulate? 19. Website: http://npswu.org/index.php?option=com_content&view=article&id=134%3Ashould-labour-broking-be-banned-or-regulated&Itemid=60 accessed 22 August 2012

²⁵ Rufaro Audrey Mavunga, op cit, 29.

“A form of human trafficking and an extreme form of free market capitalism which reduces employees to commodities that can be traded for profit as if they were meat or vegetables. The agenda of labour brokers is pro-employer and anti-trade unionism. Labour brokers are anti-trade union because they constantly move employees around from one place to another often with no access to union officials, with no possibility of stop order deduction for union subscriptions”.²⁶

The above remarks suggests that labour broking infringes the employee’s right to form and join a trade union which is a fundamental right entrenched in the Constitution.²⁷ These remarks also suggest that labour broking is concomitant to human trafficking in that it promotes slavery as these employees are subjected to verbal, racial abuse and exploitation. Ultimately the employees do not have any recourse against the client as the Labour Relations Act does not impose any obligation on the client and this is of course a great concern. It can be concluded that the former Minister of Labour advocated the total ban of labour brokers in South Africa rather than its regulation.

While this view may be criticised by many but it is submitted that the mere fact that clients could hire and fire employees without some sort of consequence really begs the question as to whether recognition of labour brokers in South Africa is prudent considering that not only does it seem to violate the right to the employees human dignity²⁸ but it also deprives the employees of their rights in terms of section 23.²⁹

The Young Communist League (YCL) supports the view that labour broking is a form of human trafficking and accordingly views labour brokers as a new form of slavery wherein an individual or company owns the labour-power of employees and sells that labour-power on their behalf to capitalists (employers).³⁰ With the high rate of

²⁶ See Mdladlana slams labour brokers, website: <http://www.news24.com/SouthAfrica/News/Mdladlana-slams-labour-brokers-20090523>, online accessed on 22 August 2012.

²⁷ Section 23, South African Constitution Act 108 of 1996.

²⁸ Section 10, South African Constitution Act 108 of 1996.

²⁹ It is also important to note that Section 185 of the Act provides employees with the right not to be unfairly dismissed for reasons of conduct, capacity or operational requirements.

³⁰ Submission by the Young Communist League on labour brokers (27/08/2009). See Sanjay Balkaran, Position paper on labour brokers and temporary employee services (TES), To ban or regulate? 10.

unemployment in a flexible labour market free of legal requirements; employees remain vulnerable whilst labour brokers undermine employee's rights.³¹

Congress of South African Trade Union (COSATU) on the other side argues that;

“Labour brokering is equivalent to the trading of human beings as commodities. Generally this form of employment structure requires that the main commercial contract is agreed to between the labour broker and the so-called “client” enterprise, which sets out the various stipulated labour services to be supplied and the price at which these services are to be supplied, whereas the true suppliers of labour (namely the employee) are excluded from this process, thereby undermining their rights to negotiate their wages and employment terms.”³²

At the core of the arguments above lies the right to fair labour practices which has been entrenched in the Constitution. According to section 23, everyone has the right to fair labour practice.

In *National Education Health and Allied Workers Union v University of Cape Town and Others*³³, Ngcobo J noted the concept of fair labour practice as one that is incapable of precise definition. According to Ngcobo the problem is compounded by the tension between interests of the employees and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to define this concept. In giving context to this concept the Courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the end of the 1956 Labour Relations Act as well as the quantification of unfair labour practice in the Labour Relations Act.³⁴

According to Cheadle the Constitution is unique in constitutionalising the open ended right to fair labour practices. Cheadle states that this right is not to be found in

³¹ Ibid.

³² Federation of African Staffing Organization, Countering COSATU's Memorandum on labour brokering, website:

http://c.ymcdn.com/sites/www.apso.co.za/resource/resmgr/pdf/Countering_COSATU's_Memorand.pdf accessed 23 August 2012.

³³ *National Education Health and Allied Workers Union v University of Cape Town and Others*, 2003 (3) SA 1 (CC) at para 33 and 34.

³⁴ *National Education Health and Allied Workers Union v University of Cape Town and Others*, 2003 (3) SA 1 (CC) para 35.

Constitutions of comparable states.³⁵ The Constitutional Court has emphasized the importance of this right in the Constitution in the following;

“In Section 23, the Constitution recognizes the importance of ensuring fair labour relations. The entrenchment of the right of employees to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organizations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between employers and employees is key to a fair industrial relations environment.”³⁶

Those who are against the banning of labour broking assert that labour brokers are important, as they contribute to a flexible job market while creating employment in an already impoverished nation.³⁷ The regulation of labour brokers seems to have gained support from well-known political parties as well and this includes the Democratic Alliance (DA), Congress of the People and the Inkatha Freedom Party (IFP). In 2009, the Democratic Alliance and the Congress of the People expressed their support for labour brokers and stated that they believed that the labour broking industry was a critical component of the country's economy and should continue to exist.³⁸ The two Political Parties further stated in a joint statement that:

"The concerns that have been raised regarding the exploitation of individuals employed by labour brokers are in some cases real, and need urgent attention. It is likely, however, that an outright ban or excessive legislation will deepen exploitation by driving the industry underground".³⁹

The above remarks contribute significantly to this study in that not only is the labour broking industry commended for providing jobs to employees in the midst of the unemployment rate in South Africa but also the remarks acknowledge the problems that are associated with labour broking in South Africa, that is the exploitation of employees. It can be concluded that a proper regulation through legislations is required so as to ensure that labour broking continues to contribute to the flexibility of the market. The regulation of this industry would be advantageous to the employees because it would

³⁵ Cheadle, Davis and Haysom, *The South African Constitutional Law: The Bill of Rights* (2002) 363.

³⁶ *Ibid.*

³⁷ Rufaro Audrey Mavunga, *op cit*, 29.

³⁸ Sanjay Balkaran, *op cit*, 10-11.

³⁹ Mandy Rossouw - *Mail and Guardian* (2-8 October 2009), 8.

mean that the client would have obligations in terms of legislation towards the employees, this would, in essence, provide recourse to the employees against the client for any breach or abuse of his obligation in terms of that respective legislation.

Mkalipi also shares the view that proper regulation of the labour broking is desirable rather than the outright ban of this industry and accordingly stated that in order to avoid exploitation of employees and ensure decent work, laws should be introduced to regulate contract work, subcontracting and out-sourcing and address the problem of labour broking and prohibit certain abusive practices.⁴⁰

The Inkatha Freedom Party is one of the parties that advocated greater flexibility in the labour market and asserted that a temporary employment service can recruit employees across sectors; ensuring greater continuity of employment, what was required is the regulation of this industry and not its outright ban.⁴¹

The Government of South Africa is in support of the regulation of the labour broking industry and contemplated the laws to regulate contract work, subcontracting and outsourcing, addressing the problem of labour broking and prohibit certain abusive practices to cover vulnerable employees in different legal relationships, ensuring the right to permanent employment for affected employees.⁴² However, it is clear that this proper regulation lacks from the Department of labour due to sub-minimum wages, dismissal without due procedure and even physical harm experienced by these employees.

The former Minister also acknowledged this lack of non-regulation and passed the following the remarks:

⁴⁰ Thembinkosi Mkalipi, Presentation at a public briefing organised by the Department of Labour in Port Elizabeth on April 2012, website <https://www.labour.gov.za/media-desk/media-statements/2012/labour-broking-debate-dominates-dol-public-briefing-in-port-elizabeth> (accessed 27 August 2012).

⁴¹ Sanjay Balkaran, op cit, 11.

⁴² Sanjay Balkaran, op cit, 10.

“It has become increasingly clear to us that there are a number of critical areas where we simply lack sufficient information to make proper judgments of the impact of our interventions and one such area is the enforcement capacity of both councils and the Department of Labour is limited, which likely translates into relatively high levels of non-compliance”.⁴³

Perhaps the question that needs to be answered is whether the gains of banning labour broking are worth the cost of access to the labour market and economy for those who are most excluded. It is therefore submitted that given South Africa’s massive unemployment crisis, it is vital that the mechanisms that link available jobs and job seekers from all background be as effective and efficient as possible.⁴⁴

It is widely argued that it is a myth that labour’s broking adds value to economic growth and created jobs. The question that remains relevant to this study is whether the outright ban of labour broking is a prudent especially in a country that rapidly increases in poverty and unemployment.

The Solidarity Trade Union argues that the banning or partial banning of labour brokering in South Africa will have a negative impact on the right of labour brokers to engage in free trade.⁴⁵ Shutting down labour brokers will be a serious infringement of the rights of these individuals.⁴⁶ Regulation of the industry will ensure that the rights of these individuals are balanced with the right of employees in the industry to fair labour practices. The banning or partial banning of labour brokering in South Africa will not necessarily ensure that fair labour practices are ensured for all employees.⁴⁷

⁴³See <http://www.news24.com/SouthAfrica/News/Mdladlana-slams-labour-brokers-20090523>.

⁴⁴See Labour brokers an important route into formal employment-CDE, Website, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=316490&sn=Detail&pid=71616>, accessed 28 August 2012.

⁴⁵ Solidarity Trade Union, Labour brokering in South Africa , website: <http://www.solidarityresearch.co.za/wp-content/uploads/2010/08/labour-brokering-in-south-africa.pdf>. Accessed 28 August 2012.

⁴⁶The Constitutional court in *Nehawu v University of Cape Town And Others*, 2003 5 BLLR 409 (CC), found that this right is incapable of a precise definition and that fairness would depend on the circumstances of a particular case and essentially involves a valued judgement.

⁴⁷Solidarity Trade Unions argues that “Indications are that, given the level of unemployment, poverty in the country and the current economic climate, employees will still be forced to work in some part of the

Labour brokers are relying on the Constitution to counter the banning of labour brokers as unconstitutional in terms of section 22⁴⁸ of the Constitution as the right to freedom of trade, occupation and profession is granted to each citizen.⁴⁹ Confederation of Associations in the Private Employment Sector (CAPES) argue that most of the current labour broker agencies were established after the Labour Relations Act was enacted, thereby complying with the legislative prescripts of the Constitution and the Labour Relations Act.⁵⁰

Palmer argues that should labour broking be permitted in south Africa the country is bound to face constitutional challenges as a hypothetical labour brokers seeking to bring an action for infringement of the constitutional right to freedom of trade would encounter problem in that the final Constitution of the Republic provides the right to choose a trade freely and this right is only accorded to citizen as opposed to everyone as it was provided for in the interim Constitution.⁵¹

Palmer further opines that when attempting to define a citizen consideration should be taken from the South African Citizenship Act⁵² as this Act defines the wording citizen, the right of citizen to freedom of trade in as far as the Act is concerned would only be applicable to natural persons.⁵³ Palmer further argues that any law that intends to ban labour broking would first have to comply with the general limitation clause in terms of the Constitution.⁵⁴

informal sector of employment. A typical and informal work will in all probability still continue, albeit on the grey or black labour market”.

⁴⁸Everyone has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation may be regulated by law.

⁴⁹Solidarity Trade Union, op cit, para 7.1.

⁵⁰Ibid.

⁵¹Palmer, G, “Labour brokers under threat”, 2009. <http://www.polity.org.za/article/labour-brokers-under-threat>, accessed on the 30 August 2012.

⁵²South African Citizenship Act 88 of 1995.

⁵³Professor Paul Benjamin, University of Cape Town, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010 prepared for the department of labour and the presidency.

⁵⁴Palmer, G, “Labour brokers under threat”, 2009. <http://www.polity.org.za/article/labour-brokers-under-threat>, accessed on the 30 August 2012.see also section 36 the Constitution of South Africa Act 108 of 1996.

The utilization of labour broking has resulted in legal fiction when coming to the identity of the employer, thus Harvey stipulates that it is not the existence of labour brokers, but rather the legislative fiction that the labour broker is the employer, that results in the violation of rights that has significantly given rise to the calls to ban this industry. It is this legislative fiction that must be removed through statutory amendment.⁵⁵

The government in response to the trade unions' request for the banning of labour broking introduced the proposed amendment to section 198 of the Labour Relations Act. The proposed amendments are aimed at repealing section 198 of the Labour Relations Act and would effectively prohibit labour broking but a prominent risk is that this would result in a violation the Constitution on two primary grounds.⁵⁶

According to Benjamin the first ground is that it would violate the protected right to choose a trade, occupation or profession freely.⁵⁷ The second ground is that such risk would bear the definitional changes that would significantly narrow the scope of who qualifies to be an employee under labour law. This, according to Benjamin, would not only violate the right to fair labour practices and place South Africa in breach of international obligations but also have serious destabilising effects in the labour market.⁵⁸

Cabinet has approved the Basic Conditions of Employment Amendment Bill⁵⁹ and the Labour Relations Amendment Bill⁶⁰ that deal with labour broking without heeding the call to ban the practice. The two Bills have been debated in the National Economic Development and Labour Council (NEDLAC) will now be submitted to Parliament.

⁵⁵Suzanna Harvey, Labour Brokers and Workers Rights: Can they co-exist, South African Law Journal, Volume 128, 101.

⁵⁶Professor Paul Benjamin, University of Cape Town, Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010 prepared for the department of labour and the presidency.

⁵⁷Ibid.

⁵⁸Ibid.

⁵⁹ Basic Conditions of Employment Amendment Bill, 2012.

⁶⁰ Labour Relations Amendment Bill, 2012.

The legislature is yet to hold public hearings on the Bills.⁶¹ The question that this study will answer is whether the two proposed Bills, in their current state adequately addresses the challenges of labour broking in South Africa.

1.4. Aims and objectives of the study

The aim of this study is to evaluate the prospects and challenges of labour broking in the South African labour market in recent years. This study determines the lessons which South Africa can learn from foreign countries where labour broking is regulated and further determines in this regard, whether the same regulation would be a safer route in South Africa considering the negative connotations attached to this industry.

The study will be of benefit to students, labour law practitioners, trade unions, employers organizations, The National economic development and labour Council, Department of labour, Community law centers, Constitutional law, International law, Jurisprudence, Non-governmental organization, Commission of Conciliation, Mediation and Arbitration (CCMA) and other research institutes.

1.5. Research Methodology

The research methodology adopted in this study is qualitative. Consequently a combination of legal comparative and legal historical methods based on jurisprudential analysis is employed. Legal comparative methods will be applied to find solutions, especially for the challenges that are brought about by the utilization of labour broking in South Africa.

The purpose of historical research method on the other hand will be to establish the development of legal rules, the interaction between law and social justice and also to propose solutions or amendments' to the existing law or Constitutional arrangements, based on practical or empirical and historical facts. Concepts will be analyzed,

⁶¹ Media briefing by Minister of Labour on the Bills amending the Labour Relations Act and the Basic Conditions of Employment Act , <https://www.labour.gov.za/media-desk/media-statements/2012/media-briefing-by-minister-of-labour-on-the-bills-amending-the-labour-relations-act-and-the-basic-conditions-of-employment-act> . Accessed 02 September 2012.

arguments based on disclosure analysis developed. A literature and case law survey of the Constitutional prescription and interpretation of statute will be made.

This research is library based and reliance will be made on library materials like textbooks, reports, legislation, regulations, case-law, articles and papers presented on the subject in various conferences.

1.6. Scope and limitations of the Study

This mini-dissertation consists of five interrelated chapters. Chapter one is the introductory chapter laying down the foundation. Chapter two deals with legislative framework governing labour broking in South Africa. Chapter three deals with case study in relation to labour broking. Chapters four deals with a comparative study. Chapter five deals with conclusions drawn from the whole study and makes recommendations.

CHAPTER TWO: LEGISLATIVE FRAMEWORK GOVERNING LABOUR BROKING

2.1 Introduction

The existence of labour legislations in every country is vital for the regulation of the employment relationship and giving adequate protection the employees because it is evident that employers and the employees are not on an equal bargaining position. South Africa has good legislative framework that regulate employment laws, which laws are not limited to labour broking. These legislations include *inter alia*, the Constitution the Labour Relations Act, Compensation for Occupational Injuries and Diseases, Basic Conditions of Employment Act, Employment Equity Act. Below is a full discussion of these legislations to the extent of regulating labour broking. From this chapter the term labour broker and temporary employment services will be used interchangeably.

2.2 The Labour Relations Act 66 of 1995

Labour Relations Act⁶² provides adequate recognition to labour broking in section 198. According to this section, labour brokers are classified under 'Temporary Employment service' and defined as any person who, for reward, procures for or provides to the client other person whom renders services to, or performs work for the client and who are in returned remunerated by the labour broker.⁶³

Section 198 provides further that a person whose services have been procured for or who provides work for the client becomes the employee of the labour broker and the labour broker would then become the employer and the client whom such employee is procured for becomes the client to the labour broker.⁶⁴ Should there be doubt about whether a person is hired as an employee by the labour broker then the normal tests to determine whether an employment relationship exist between the parties should be

⁶²Labour Relations Act 66 of 1995.

⁶³Section 198 (1) of the Labour Relations Act 66 of 1995.

⁶⁴Rufaro Audrey Mavunga, op cit, 24, see also, section 198 (2) of the Labour Relations Act 66 of 1995.

utilized as recourse. However it should be noted that Independent Contractors are excluded from the definition of the employees of the labour broker.⁶⁵

Section 198 (4) introduces joint and several liabilities between the labour broker and the client, as the section provides that:

The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes-

- (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
- (b) a binding arbitration award that regulates terms and conditions of employment;
- (c) the Basic Conditions of Employment Act; or
- (d) a determination made in terms of the Wage Act.

According to Van Eck, this section creates a legal fiction by making the labour broker the employer of the person whose services have so been acquired, and the employee is identified as the employee of the labour broker. This construction prevails despite the fact that the employee generally renders services under the supervision and control of the client, is provided with tools of the trade and forms part of the client's organization.⁶⁶

In *NUM & others v Billard Contractors CC & another*,⁶⁷ the court stated that:

“Section 198 of the Labour Relations Act applies to arrangements of this kind. Parties are entitled to choose to structure their relationships in this way, and they may do so even if the principal purpose is to make the labour broker (and not its client) the person who is responsible for managing employees and ensuring compliance with the various statutes that regulate employment rights. The provisions of section 198(4) make the client jointly and severally liable in respect of contraventions of specifically identified employment rights. Unfair dismissal rights are not among these. Whether or not this is desirable as a matter of policy is not for me to decide in these proceedings, and I express no view on that question here.”⁶⁸

⁶⁵ Rufaro Audrey Mavunga, op cit, 25, see also, section 198 (3) of the Labour Relations Act 66 of 1995 and section 200A of the Labour Relations Act 66 of 1995.

⁶⁶ BPS van Eck, Temporary employment services (labour brokers) in South Africa and Namibia, 2010 (13)2, Potchefstroom electronic law journal (PER),109.

⁶⁷ *NUM & others v Billard Contractors CC & another*, 2006 12 BLLR 91 (LC).

⁶⁸ *NUM & others v Billard Contractors CC & another*, 2006 12 BLLR 91 (LC) at para 79.

2.2.1 Labour Broking under new proposed amendments

Amendment Bills for the Labour Relations Act⁶⁹ and the Basic Conditions of Employment Act⁷⁰ were submitted to the Cabinet Committee on March 2012.⁷¹ These Bills aim to avoid exploitation of employees and ensure decent work for all employees as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices. Most in particular, The Labour Relations Amendment Bill retains section 198 and it will continue to apply to all employees.⁷² Temporary employment is limited to genuine temporary work that does not exceed six months.⁷³

Temporary employment service is the employer of persons whom it pays to work for a client and the temporary employment service and its client are jointly and severally liable for specified contraventions of employment laws.⁷⁴ Additional protection is extended to persons employed in temporary work and who earn below an earnings threshold (set at the Basic Conditions of Employment Act threshold of R172, 000.00 per annum). Unequal treatment of those employed in temporary work who earn below the threshold is prohibited.⁷⁵

⁶⁹ Labour Relations Amendment Bill, 2012.

⁷⁰ Basic Conditions of Employment Amendment Bill, 2012.

⁷¹ Media briefing by Minister of Labour on the Bills amending the Labour Relations Act and the Basic Conditions of Employment Act. Website: <https://www.labour.gov.za/media-desk/media-statements/2012/media-briefing-by-minister-of-labour-on-the-bills-amending-the-labour-relations-act-and-the-basic-conditions-of-employment-act>. Accessed on 28 August 2012.

⁷² The latest version of the Bill defines temporary employment service as “any person who, for reward, procures for or provides to a client other persons – who render services to, or perform work for the client” and who are paid by the temporary employment service.

⁷³ It notes that temporary services means work for a client by an employee that does not exceed six months, or is a substitute for a staff member who is temporarily absent; or in a category of work and for any period of time which is determined to be temporary services by a collective agreement.

⁷⁴ This means that if both the client and the service are liable under the Bill, the staff member can institute labour proceedings against either.

⁷⁵ Media briefing by Minister of Labour on the Bills amending the Labour Relations Act and the Basic Conditions of Employment Act. Website: <https://www.labour.gov.za/media-desk/media-statements/2012/media-briefing-by-minister-of-labour-on-the-bills-amending-the-labour-relations-act-and-the-basic-conditions-of-employment-act>. Accessed on 06 September 2012.

A temporary employment service must provide an employee it assigns to a client with written particulars of employment that comply with the Basic Conditions of Employment Act. An employee may not be employed by a temporary employment service on terms and conditions of employment, which are not permitted by the Bill, or any employment law, sectorial determination or collective bargaining agreement.⁷⁶ According to the proposed legislation no person should act as temporary employment services, unless they are registered in terms of any applicable legislation in force.⁷⁷

In their current form the Amendments Bills will regulate labour broking and labour brokers will change how they operate in South Africa. These amendments to employment legislations are most likely to be enacted in the second quarter of 2013 as they are currently being considered by parliament.

2.3 Constitution of the Republic of South Africa

It should be born in mind that the South African laws or legislatures are subject to the provision of section 2 of the Constitution,⁷⁸ which provides that the Constitution is the supreme law of the republic and that any law inconsistent with it is invalid, this can be interpreted to mean that the laws including the labour laws are subjected to the Constitution. The Constitution entrenches the Bill of rights in chapter two, included in these rights is the right to fair labour practice, the right to join trade union and the right to collective bargaining.

2.3.1 The Right to Fair Labour Practice: Section 23 (1)

According to Van Eck section 23 (1) of the Constitution provides that everyone has the right to fair labour practice, which in itself can be interpreted in the way that affords protection to Temporary Employment Service employees and it should be noted that the

⁷⁶ See, labour broking; to be regulated not banned, http://www.itweb.co.za/index.php?option=com_content&view=article&id=56554:labour-broking-to-be-regulated-not-banned accessed on 06 September 2012.

⁷⁷ See section 82 The Basic Conditions Of Employment Act 75 of 1997.

⁷⁸ Constitution of South Africa Act108 of 1996.

issue of equality needs to be taken into consideration when one deals with the right of employees.⁷⁹ The Constitution makes the following provision in this regard:

- 1) Everyone is equal before the law and has the rights to equal protection and benefit of the law;
- 2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislation and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.

The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town & others*⁸⁰ held that the right to fair labour practice encompasses security of employment: specifically the right not to be dismissed unfairly. Employment security is comprehensively regulated in the Labour Relations Act, which provides in section 185 that every employee has the right not to be unfairly dismissed. The majority of disputes referred to the CCMA and Bargaining Councils concern alleged unfair dismissals.⁸¹

2.3.2 The right to join trade union and the right to bargain

According to Harvey, labour broker employees cannot bargain collectively because they cannot organise, they cannot organise because they cannot exercise the organisational rights accorded to trade unions that are 'sufficiently representative of the employees employed by an employer in a workplace'.⁸²

It is evident labour broker's employees' rights in terms of this section are infringed. The question that should perhaps be asked is what remedies does this employees have against such infringements, can they then approach the Constitutional court for remedies. *South African National Defence Union v Minister of Defence and Another*,⁸³ case concerned the question of whether it was Constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions.

⁷⁹ BPS van Eck, op cit, 121.

⁸⁰ *National Education Health & Allied Workers Union v University of Cape Town & others* 2003 (2) BCLR 154, 42.

⁸¹ *National Education Health & Allied Workers Union v University of Cape Town & others* 2003 (2) BCLR 154, 42.

⁸² Suzanna Harvey, Closing a loophole in the Labour Relations Act: Constitutionality of section 198, University of Cape Town, September 2008, 11.

⁸³ *SA National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC).

The court declared that a provision of the Defence Act,⁸⁴ which prohibited members of the Defence Force from becoming members of a trade union or engaging in any protest action, as defined in the Act, was unconstitutional.

The Court decided that prohibiting participation in acts of public protest violated the right to freedom of expression of Defence Force members. This curtailed the right of Defence Force members to receive and express opinions on a wide range of issues, whether in public or private gatherings. This amounted to a great infringement on the fundamental rights of soldiers. The Court determined that this infringement constituted an unjustifiable limitation upon the right to freedom of expression of soldiers, and was consequently unconstitutional. However, the Court indicated that a different, narrower legislative provision, may be constitutionally justified but that this question was not before this Court.

This is however places labour broker's employees in a very difficult position to challenge the infringement of the right to join trade union and to partake in collective bargaining as they are not recognized as employees in terms of the Labour Relations Act.

2.4 Compensation for Occupational Injuries and Diseases

The Compensation for Occupational Injuries and Diseases⁸⁵ (COIDA) which defines an employer to include a labour broker requires the labour broker as an employer, to register in terms of the Act, and it is obliged to report an accident to the Compensation Commissioner.⁸⁶

In *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*⁸⁷, there was a robbery at the appellant's retail shop, the robbers seized Ms Rieck who was the cashier as they realized that security had been alerted of the robbery. As they fled the scene security personnel fired gun shots at the getaway car as a result Rieck was struck by one of the bullets. Rieck sued the appellant in the South-Eastern Cape High Court for damages arising from her injury, alleging that the person who shot her acted wrongfully and

⁸⁴ Defence Act, 44 of 1957.

⁸⁵ The Compensation for Occupational Injuries and Diseases, Act 130 of 1993.

⁸⁶ Rufaro Audrey Mavunga, op cit, 27.

⁸⁷ *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*, 2007 (1) BLLR 1 (SCA).

negligently and that the appellant was vicariously liable for the consequences of his conduct.⁸⁸

With agreement between the parties the learned judge had to only determine the question whether appellant was liable for the harm that was caused. The learned judge held that the appellant was liable to Rieck for the damages that she suffered in consequence of being shot. Before judgment was delivered, the appellant applied to amend its plea to introduce a special defence that the claim was precluded by section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, but such was refused on the grounds that the evidence that was sought to be relied upon by the appellant did not disclose a defence,⁸⁹ an appeal against the order was then noted. On appeal it was not disputed that the bullet that struck Rieck was fired by either of two employees in the appellant's loss control division.

On the of question whether the claim against the appellant is excluded by section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the court remark that It is not disputed that Rieck was an 'employee', and that she sustained an occupational injury, what is in issue is only whether the appellant was her employer. In making a determination the court observed that, a workman could have only one employer at any time, which was the person with whom he was in a contractual relationship of employment, whether he performed his duties for that person or for someone else.⁹⁰ The court further quoted section 2(2) of Workmen's Compensation Act⁹¹ which provides that;

If the services of a workman be temporarily lent or let on hire to another person by the person with whom such contract of employment is made, the latter shall be deemed to continue to be the employer of the workman, while he is working for that other person.

⁸⁸ *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*, 2007 (1) BLLR 1 (SCA), para 3 and 4.

⁸⁹ *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*, 2007 (1) BLLR 1 (SCA), para 5.

⁹⁰ *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*, 2007 (1) BLLR 1 (SCA), para 18.

⁹¹ Workmen's Compensation Act 25 of 1914.

The Compensation for Occupational Injuries and Diseases Act,⁹² defines an employer to mean;

'any person...who employs an employee, if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person;⁹³ and includes a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker.⁹⁴

Rieck was a party to an employment contract with a labour broker, TMS-Shezi Industrial Services (Pty), which paid her salary, deducted and remitted her income tax, and made the required contributions in relation to her employment to the unemployment insurance fund and the workmen's compensation fund. TMS-Shezi, in turn, supplied her services to the appellant in return for a fee, and Rieck performed her employment duties for, and under the direction and control of, the appellant.⁹⁵ The person referred to as the employer must be the client of the labour broker.⁹⁶

In determining liability the court observed that although subsection (b) provides that 'Where an employee's services are lent or let or temporarily made available by the employer to some other person, that person becomes the employer for the period that the employee works for them,' the rationale for extending the definition of employer to include labour brokers was that labour brokers are considered not as employers in terms of the definition of an employer.⁹⁷

The 1983 Amendments to the Labour Relations Act placed no liability on the client in this form of employment as the only recourse that an employee had was against the labour broker, However to remedy this the introduction of The Compensation for Occupational Injuries and Diseases Act of extended liability to the client.

⁹² Compensation for Occupational Injuries and Diseases Act 130 of 1993.

⁹³ Compensation for Occupational Injuries and Diseases Act 130 of 1993, section 1 (xix) (b).

⁹⁴ Compensation for Occupational Injuries and Diseases Act 130 of 1993, section 1 (xix) (c).

⁹⁵ *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*, 2007 (1) BLLR 1 (SCA), para 25.

⁹⁶ *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*, 2007 (1) BLLR 1 (SCA), para 26.

⁹⁷ *Crown Chickens (Pty) Ltd t/a Rockland's Poultry v Rieck*, 2007 (1) BLLR 1 (SCA), para 27.

2.5 Basic Conditions of Employment Act

In terms of the Basic Conditions of Employment Act⁹⁸, section 82 provides that:

- (1) For the purposes of this Act a person whose services have been procured for or provided to, a client by a temporary employment service is the employee of that temporary employment service and the temporary employment service is that person's employer.
- (2) Despite subsection (1) a person who is an independent contractor is not an employee of a temporary employment service nor is the temporary employment service the employer of that person.
- (3) The temporary employment service and the client are jointly and severally liable if the temporary employment service in respect of any employee who provides services to that client does not comply with this Act or a sectoral determination.

In terms of the Act this section gives effect to and regulates the right to fair labour practice as the above mentioned section caters for the establishment of the basic conditions of employment, regulate sick leaves, maternity leave and as well as the working hours. Like the Labour Relations Act, the Act also refers to the person whose services have been procured for a client, by the labour broker, making the labour broker the employer and further caters for the joint and several liabilities in the same manner as the Labour Relations Act.⁹⁹

2.6 Employment Equity Act

In terms of the Employment Equity Act,¹⁰⁰ section 57 provides that:

- (1) For purposes of Chapter III of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where that person's employment with the client is of indefinite duration or for a period of three months or longer.

⁹⁸The Basic Conditions of Employment Act 75 of 1997.

⁹⁹Rufaro Audrey Mavunga, op cit, 26, see also Sanjay Balkaran ,Position paper on labour brokers and temporary employment service, to ban or to regulate, website <http://npswu.org/docs/NPSWU%20submission%20on%20Labour%20Brokers%20%5BSanjay%20Balkaran%5D.pdf>, 9, accessed 8 September 2012.

¹⁰⁰ Employment Equity Act 55 of 1998.

(2) Where a temporary employment service, on the express or implied instructions of a client, commits an act of unfair discrimination, both the temporary employment service and the client are jointly and severally liable.

The purpose of the Act is to promote equality and fair treatment of employees within the workplace, as the Act deems the person who has been procured by the labour broker to be the employee if such person's services have been utilized for a period longer than three months, like the Labour Relations Act and the Basic Conditions of Employment Act, the Act also provides for joint and several liabilities should it be established that the labour broker had unfairly discriminated against the employee on the instruction of the client the EEA also provides for joint and several liabilities should it be established that the labour broker had unfairly discriminated against the employee on the instruction of the client.

2.7 International instruments

The International Labour Organization (ILO) can be defined as a body committed to the issues of social justice in its member states. It is said to regulate the labour relations worldwide.¹⁰¹ Labour broking is also recognised under this international organisation, and having South Africa as a member of the International Labour Organisation and as a signatory to its conventions and practices, it would be prudent to establish the conventions that are related to labour broking. This is also essential because labour broking is existing worldwide and in some countries they have put measure to regulate it and whereas in other countries it has been banned. Accordingly, knowledge of these conventions is essential and paves direction because this is the current debate in South Africa, as to whether labour broking should be banned or regulated.

2.7.1. Private Employment Agencies Convention 181 of 1997

It is critically important to note at the outset that this concept of labour broking is regulated by the Private Employment Agencies Convention, 181 of 1997. Convention 181 does not support the theory of a ban whether total or partial, nor does it support the

¹⁰¹ Rufaro Audrey Mavunga, op cit, 6.

theory of illegality. This convention is about realizing the 'importance of flexibility in the functioning of labour markets; recognizing the role played by private employment agencies in labour markets and importantly recalling the need to protect employees against abuse'.¹⁰² Under this convention, labour broking is referred to as private employment agency. Private employment agency is defined as 'any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

(a) Services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

(b) services consisting of employing employees with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and employees organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment'.¹⁰³

According to this definition there are two types of labour brokers, the first is merely a recruiter of persons seeking employment and which the labour broker does recruit and place them with the client. For all intents and purposes, these jobseekers become the employees of the client or user enterprise. The second type of labour broker employs the jobseekers and places them for employment to the user enterprise, which enterprise assigns those tasks and supervises these tasks. This type of labour broker is the employer.¹⁰⁴

It is the second type of labour broker that has raised debates in South Africa. This debate emanates because employers have been accused of deliberately frustrating

¹⁰² See the Preamble of the Private Employment Agencies Convention, 181 of 1997. See further Bongani Mtshali, labour brokering, an ILO perspective. Website <http://www.business-swaziland.com/new/index.php/ir-a-social-policy/news-paper-articles/19-labour-brokering>, Accessed on 13 September 2012.

¹⁰³ Article 1(1) of Private Employment Agencies Convention 181 of 1997.

¹⁰⁴ Bongani Mtshali, labour brokering, an ILO perspective. Website <http://www.business-swaziland.com/new/index.php/ir-a-social-policy/news-paper-articles/19-labour-brokering>, Accessed 20 September 2012.

permanent employment contracts to favouring having labour supplied by labour brokers,¹⁰⁵ this stems from the manner in which South Africa defines a labour broker because section 198 of the Labour Relations Act¹⁰⁶ defines a temporary employment service 'as a person who, for reward, procures for or provides to a client other persons, firstly, who render services to, or perform work for, the client and secondly, who are remunerated by the temporary employment service'. The Labour Relations Act further provides that such an employee is an employee of the Temporary Employment Service and the Temporary Employment Service is the employer of that person. The Labour Relations Act further provides for joint and several liabilities on the client/user enterprise and the temporary employment service.¹⁰⁷

The Convention requires that where employment agencies are themselves employers of the jobseekers, that the employees should be adequately protected in relation to freedom of association; collective bargaining; minimum wages; working time and other conditions; statutory social security benefits; access to training; occupational safety and health; compensation in cases of occupational accidents and diseases and compensation in case of insolvency and protection of employees claims and maternity protection and benefits and parental protection and benefits.¹⁰⁸ It appears that the convention deems as is important there needs to be a balance between the right of labour brokers to trade and guarding against the abuses of employee's rights which every employee has in terms of international and domestic labour law instruments.¹⁰⁹

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

¹⁰⁵ See Chapter one above , where it is stated that labour broking in South Africa is slowly becoming a trend because the costs incurred by employers when employing permanent or temporary employees is high and as a result the employers opt to be better served by the Temporary Employment Services whose costs are minimal.

¹⁰⁶ Labour Relations Act 66 of 1995.

¹⁰⁷ Bongani Mtshali, labour brokering, an ILO perspective. Website <http://www.business-swaziland.com/new/index.php/ir-a-social-policy/news-paper-articles/19-labour-brokering>, Accessed on 13 September 2012.

¹⁰⁸ See article 11 of Private Employment Agencies Convention 181 of 1997.

¹⁰⁹ Bongani Mtshali, labour brokering, an ILO perspective. Website <http://www.business-swaziland.com/new/index.php/ir-a-social-policy/news-paper-articles/19-labour-brokering>, Accessed on 13 September 2012.

implementation can be an engine for job creation, structural growth, and improved efficiency of national labour markets, better matching of supply and demand for employees, higher labour participation rates and increased diversity.¹¹⁰ This convention can serve an important role in helping South Africa in its debate of banning or regulating labour brokers. It is submitted that South Africa should in force a system of licencing and registration this is because the Labour Relations Act has not placed emphasis on the requirement that temporary employment services must register. The registration would be adequate enough to address that issues related to labour broking in South Africa.

2.7.2. Private Employment Agencies Recommendation 1997

The Provisions Private Employment Agencies recommendation supplements 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 practices by labour brokers. In this instance labour brokers are encouraged to promote equality and afford employees proper training. It is submitted that these guidelines are there to prevent the abuse of employees as they grant them the liberties and freedoms that normal employees would normally have.¹¹¹

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

CHAPTER THREE: CASE STUDY

3.1. Introduction

Labour brokers rely on section 7 and section 22 of the Constitution¹¹² to counter the banning of labour brokers as unconstitutional.¹¹³ Most of the current labour broker agencies were established after the Labour Relations Act was enacted, thereby complying with the legislative prescripts of the Constitution and the Labour Relations Act.¹¹⁴ The arguments set against the banning of the labour broking include *inter alia*, the fact that the clients do not have any obligations towards the employees as imposed by the Labour Relations Act. This is perpetuated because a person whose services have been procured for, or provided to, a client by a labour broker is the employee of that labour broker, and the labour broker is that person's employer and the client is not featured in this relationship.¹¹⁵ However the Labour Relations Act provides for instances in which the client and temporary employment service are jointly and severally liable, that is if the temporary employment service, in respect of any of its employees, contravenes –

- (a) a collective agreement concluded in a bargaining Council that regulates terms and conditions of employment;¹¹⁶
- (b) a binding arbitration award that regulates terms and conditions of employment;¹¹⁷
- (c) the Basic Conditions of Employment Act;¹¹⁸ or
- (d) a determination made in terms of the Wage Act.¹¹⁹

¹¹² South African Constitution, Act 108 1996.

¹¹³ Section 7 of the Constitution reads: This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Section 22 of the Constitution reads : Every citizen has the right to Choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

¹¹⁴ Sanjay Balkaran, op cit, 17.

¹¹⁵ Section 82(1) of the Basic Conditions of Employment Act 75 of 1997.

¹¹⁶ Section 198(4) (a) of the Labour Relations Act 66 of 1995.

¹¹⁷ Section 198(4) (b) of the Labour Relations Act 66 of 1995.

¹¹⁸ Section 198(4) (c) of the Labour Relations Act 66 of 1995.

¹¹⁹ Section 198(4) (d) of the Labour Relations Act 66 of 1995.

The labour broking industry in South Africa also recognises the need to regulate the industry due to the exploitation and violations of rights of the employees at the hands of the clients and the labour broker. This industry supports self-regulation and/or co-regulation with all stakeholders/social partners; acknowledging that there are bad eggs in the sector, but they're willing to be regulated so that these labour brokers can be ousted.¹²⁰

3.2. The dynamics of labour broking in South Africa through case law

The dynamics of labour broking exist in our case law and therefore serve as precedents to the jurisprudence of labour law in South Africa. The protections provided for an employee working within the Republic of South Africa are carefully legislated, providing mechanisms for efficient dispute resolutions, which now pose a difficult position for labour broker who at times do not have recourse against the client.

In the case of *Mandla v LAD Brokers (Pty) Ltd*,¹²¹ a United Kingdom based Company, Weatherford U.K. Limited (the client) which had no prior business interests in South Africa, sought the services of two service technicians for an offshore oil drill platform of Mossel bay. The applicant (Mandla) was one of the technicians recruited, through interviews held by one Graham Laws of Weatherford therefore applicant's position, employment conditions and remuneration with Weatherford was agreed on. Later the applicant was told that he would be employed through a labour broker, Weatherford approached LAD brokers (respondent) with the request to facilitate payments employments of the applicant.¹²²

The labour broker became part of the tripartite relationship after applicant commenced service at the client. LAD brokers gave applicant a contract titled Independent Contractor-Contracting agreement and after he signed it, LAD brokers entered into an agreement

¹²⁰ Sanjay Balkaran, op cit, 17.

¹²¹ *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC), see also J Grogan, Dismissal, Discrimination and Unfair Labour Practices, 2nd edition, 26.

¹²² *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC), para 4.

with the client in terms of which services would be let from LAD brokers.¹²³ The client paid the temporary employment service and it paid the applicant in return and after a year the client terminated the independent contracting agreement with the applicant.¹²⁴

The applicant approached the labour court alleging unfair dismissal, the court had to determine whether there was an unfair dismissal or as to whether the employment relation was that of employee or independent contractor. In its finding the court held that the applicant was LAD broker's employee and that the termination of contract amounted to a dismissal. The honourable judge Basson noted that the fact that the applicant was in terms of the contract clearly under the control of LAD brokers weighs heavily in favour of the existence of an employer/employee relationship,¹²⁵ and therefore concluded that this created an employment relationship and the applicant was therefore not a work contract employee.¹²⁶

In reaching this conclusion the court observed that a mere fact that the respondent did not procure the services of the applicant does not mean that it did not in fact provide such services to its client as it is stated in terms of section 198(1)(a) of the Labour Relations Act.¹²⁷ The court observed that it must be reiterated that a person in the *sui generis* position of the applicant may find that he is the employee of both the client and the temporary employment service designated to be the employee of only the temporary employment service in terms of section 198(2) of the Labour Relations Act.¹²⁸

It should be note from the judgment that the court supports the notion that the creation of a tripartite employment relation should not be utilized to undermine the employees right to freedom of occupation by declaring an employee to be a contractor, the court observed that even if temporary employment service is the employer, this does not discharge the

¹²³ See, *SA Broadcasting Corporation v McKenzie* 1999 20 ILJ 585 (LAC) and *Niselow v Liberty Life Insurance Association of South Africa Ltd*, 1998 19 ILJ 752 (LAC) 754C.

¹²⁴ *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC), para 4.

¹²⁵ *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC), para 42

¹²⁶ *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC), para 46.

¹²⁷ *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC), para 36

¹²⁸ *Mandla v LAD Brokers (Pty) Ltd*, 2000 9 BLLR 1047 (LC), para 40. The court relied on the case of *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB*, 1976 (4) SA 446 (A) 457A and *Medical Association of South Africa and others v Minister of Health and others* (1997) 18 ILJ 528 (LAC) 536CE when making its observations.

client from liability in terms of the Basic Conditions of Employment Act and imposes that both the client and the labour broker are jointly and severally liable.

It is against this background that the disgruntled party instituted action at the Labour Appeal Court,¹²⁹ the labour broker argued that the employee was an independent contractor. The court looked at the circumstances and found that the labour broker was the employer and that the employee was not an independent contractor. The court held as follows

“Subsections (1) and (2) clearly refer to a person who renders services to the client. The deeming provision would not be necessary were the services rendered to the temporary employment service. The latter pays the remuneration and there would therefore not be any doubt about the existence of an employment contract. It is only where the services are rendered to one person but another pays the remuneration that there is scope for uncertainty and need for a deeming provision. As the deeming provision of subsection (2) is in itself wide enough to include independent contractors with whom the Act is not primarily concerned, subsection (3) provides for their necessary exclusion. The reference to independent contractors is therefore to independent contractors who render services or perform work for the client. Thus interpreted the awkward position of an employee working for one person but being remunerated by another and faced with a denial of both that they are his employers, will be addressed. So will be the situation where a fly-by-night employer utilizes a (reputable) labour broker and absconds. For the sake of certainty the legislature clearly intended labour brokers and the like who pay the remuneration to be held liable as employers under the Act.”¹³⁰

It is therefore imminent that a labour broker cannot conclude independent contracts with its own personnel, because of the presumption in section 198. The labour broker must therefore employ the personnel supplied by it to its clients. In the circumstances, the labour broker was found to have unfairly dismissed the employee as, clearly, no procedure had been followed. This case is underscored with notions of equity as the

¹²⁹ *LAD Brokers (Pty) Ltd v Mandla*, 2002 (6) SA 43 (LAC).

¹³⁰ *LAD Brokers (Pty) Ltd v Mandla*, 2002 (6) SA 43 (LAC), 27.

nature of the defence created two alternative employers, both denying liability. The court was obliged to seek an equitable result.

According to Botes nothing in law prohibits the labour broker and the client from identifying the temporary employee as an independent contractor, thereby effectively excluding him from all labour legislative protection.¹³¹ By doing this both the labour broker and the client are exempted from complying with any restrictive labour legislation. However this places the employees in a very precarious position. This would especially have the effect that the contract of the worker could be terminated without the parties having the obligation to ensure that the termination is substantively and procedurally fair, as it would not be considered a dismissal.¹³² However Botes remarks further that due to the decision in *LAD Brokers v Mandla*¹³³ the court will have regard of the substance of the relationship between the client and the worker to determine whether the worker is an employee of the temporary employment service or not.

The Constitution affords labour rights to employees and this includes the right not to be unfairly dismissed.¹³⁴ However it appears that through labour broking these rights, arguably, are infringed. A typical example is found in the matter of *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*¹³⁵ where an employee Simon Nape committed an act of misconduct by sending an email containing offensive material from the client's premises to one individual, the client, Nissan (Pty) Ltd, invoking its contractual rights, demanded that the labour broker remove the employee from its premises.¹³⁶ Nape was suspended and, after a disciplinary hearing, a final written warning was imposed.¹³⁷ The employee

¹³¹ A Botes, The history of labour hire in Namibia; A lesson for South Africa, 2013 16 PER 1, 526.

¹³² Ibid.

¹³³ *LAD Brokers (Pty) Ltd v Mandla* 2002 (6) SA 43 (LAC).

¹³⁴ South African Constitution, Act 108 of 1996.

¹³⁵ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC).

¹³⁶ See, *Lebowa Platinum Mines Ltd v Hill* 1998 7 BLLR 666 (LAC) which deals with dismissals at the behest of third parties, in this case the court held that the mere fact that a third party demands the dismissal of an employee would not render such dismissal fair. Such an approach would indeed open a veritable Pandora's Box of injustices. The demand for the employee's dismissal must usually enjoy a good and sufficient foundation. Where it impinges upon the fundamental rights of the employee in terms of the Constitution special considerations need to be taken into account in determining whether it enjoys such a foundation."

¹³⁷ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC), para 2-3.

agreed to the written warning but Nissan was not satisfied and refused to allow the employee access to its premises.¹³⁸

The labour broker (INTCS Corporate Solutions) was obliged, in terms of its contractual relationship with Nissan, to accede to Nissan's demands and invoked the retrenchment provisions of section 189 of the Labour Relations Act.¹³⁹ After a consultation, the employee was retrenched by the labour broker on the basis that it did not have employment for him.¹⁴⁰ The labour broker contended that it acted lawfully in terms of its contractual arrangement with Nissan.

It is commonly found in labour broking arrangements, that the client can compel the labour broker to remove the employee from the client's premises regardless of whether this is justifiable. Against this submission the court stated that:

"The Constitution provides that everyone and not just employees have a right to fair labour practices. Consequently, even though a person may not be regarded by the law as an employee of the client but of the labour broker, the client still has a legal duty to do nothing to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation. There is nothing in the text of section 198 of the Labour Relations Act that indicates to me that a labour broker and a client may limit the right of an employee not to be unfairly dismissed."¹⁴¹

This difficulty in respect of unfair dismissal in South Africa is perpetuated by the fact the section 198 of the Labour Relations Act does not extend shared responsibility of some of the most significant protections offered by the Labour Relations Act, such as

¹³⁸ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC), para 3.

¹³⁹ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC). See also *Jonas v Quest Staffing Solutions*, 2003 7 BALR 811, in this case Jonas was employed on a fixed-term contract by Quest, a labour broker, to render services as an insurance agent to Quest's client. Jonas was charged with misconduct and given a final warning. However, although he did not repeat the misconduct, he was fired because the client no longer required his services. The respondent argued that the contract of employment termination of contract at the request of the client. The arbitrator found that, despite this contractual clause the broker had no right to dismiss the employee without first following the legal procedures laid down in the Labour Relations Act.

¹⁴⁰ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC), para 4.

¹⁴¹ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC). para 53 -54.

protection against unfair dismissal and unfair labour practices perpetrated by the client against its employees.¹⁴²

The court in *Nape* recognized the vulnerability of employees in temporary employment service arrangements, as the weakest and most vulnerable party in the triangular relationship, and held that they may not be treated in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client. Against this background the court provided that it is a duty of arbitrators and courts to ensure that alleged temporary employment services arrangements meet all the requirements of section 198 and not to regard labour broking arrangements as presumptively valid on face value as soon as a signed contract is put up by an employer.¹⁴³

The Employment Equity Act¹⁴⁴ provides rather an interesting aspect to labour broking in South Africa. More in particular, section 57 provides that for the purposes of employment equity, a temporary employment service employee who provides services for an indefinite duration or a period of three months, is deemed an employee of that particular client and, furthermore, where there has been an act of unfair discrimination, both the temporary employment service and the client remain jointly and severally liable. This means that in the matter of *LAD Brokers Pty Ltd v Mandla*,¹⁴⁵ based on section 57 of the Employment Equity Act, the employee would have become the employee of the client if he has worked for a period of more than three months.

There is joint and several liabilities for unfair discrimination by the labour broker on the express or implied of the client.¹⁴⁶ There are however two exceptions to when the labour broker is considered to be the employer, namely for the purposes of affirmative action and when a person is placed with a client for an indefinite period or for a period of three

¹⁴² Rufaro Audrey Mavunga, op cit, 25.

¹⁴³ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC), para 60.

¹⁴⁴ Employment Equity Act 55 of 1998.

¹⁴⁵ *LAD Brokers (Pty) Ltd v Mandla*, 2002 (6) SA 43 (LAC).

¹⁴⁶ Section 57(1) of the Employment Equity Act. See also Rufaro Audrey Mavunga, op cit, 26.

months making the client the employer for the purposes of compliance with health and safety measures.¹⁴⁷

In *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*,¹⁴⁸ Dyokwe (the applicant) was employed by the Mondi Packaging South Africa (Pty) Ltd (third respondent), for more than two years. The applicant was then informed that he would have to sign a new contract of employment with the fourth respondent, Stratostaff (Pty) Ltd trading as Adecco Recruitment Services. Adecco is a temporary employment service as defined in section 198 of the Labour Relations Act or, in common parlance, a labour broker.¹⁴⁹

The applicant continued to work at Mondi for another 5 ½ years until 5 January 2009, when Mondi summarily informed him that his employment had been terminated, without any notice or other procedure. The supervisor Gert Manuel showed him a list of employees including his name and uttered that “If your name is on the list your contract of employment is terminated, the work is finished.”¹⁵⁰

When inquiring about the termination of contract of employment Manuel referred applicant to go to Adecco where he was told they did not have work for him as he was too old. The applicant then referred an unfair dismissal dispute to the CCMA. The arbitrator was tasked to determine the true employer at the time of the dismissal of the employee.¹⁵¹

In arbitration both Mondi and Adecco were cited as respondents, after consideration of the evidence the Commissioner found that Adecco was the applicant’s employer at the time of his dismissal after taking into account the provisions of section 198 of the Labour Relations Act and further noted that Adecco at no stage has tried to run away from the fact that they are applicant’s employer and they conceded as much during the arbitration proceedings.¹⁵²

¹⁴⁷ Section 57(2) of the Employment Equity Act.

¹⁴⁸ *Khululekile Dyokwe v Coen De Kock N.O. and 3 other*, 2012 33 ILJ 2401 (LC).

¹⁴⁹ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 2.

¹⁵⁰ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 2. See also *Denel (Pty) Ltd v Gerber*, 2005 9 BLLR 849 (LAC), 17.

¹⁵¹ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 12.

¹⁵² *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 16.

In coming to the finding that Adecco was the employer, the Commissioner took the following factors into account:¹⁵³

1 The applicant signed a new contract with Adecco on 7 July 2003. It is clear from the contract that he was to be regarded as being employed by Adecco and no longer by Mondi, from that date onwards.

2 Despite the fact that the applicant was illiterate and could not understand the written terms of the new contract, he was advised that he was needed at Mondi; that, "whenever they wanted to find him, they would know where to find him"; and that he signed the document "for the time being until Mondi started recruiting".

3. The applicant realized that this rate of pay had been reduced and that he received a pay slip from Adecco at the end of July 2003.

Mondi was then excused from attending any further arbitration proceedings and the matter was rescheduled for arbitration between the applicant and Adecco in order for a decision to be made as to the existence of the dismissal and, if so, the fairness thereof.

The applicant was dissatisfied with the outcome of the commissioner that it filed for review, the court remarked that it has recognized the vulnerability of employees in temporary employment service arrangements, as the weakest and most vulnerable party in the triangular relationship, and held that they may not be treated in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client.¹⁵⁴

The court remarked that, arbitrators and courts must ensure that alleged temporary employment service arrangements meet all the requirements of section 198 and not to regard labour broking arrangements as presumptively valid on face value as soon as a signed contract is put up by an employer.¹⁵⁵

¹⁵³ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 17.

¹⁵⁴ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 (33) ILJ 2401 (LC), para 29, see also P.A.K. le Roux, Protecting the employees of temporary employment services, Contemporary Labour Law Monthly Journal, 22 3, October 2012.

¹⁵⁵ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 (33) ILJ 2401 (LC), para 30.

According to Benjamin section 198 was enacted to regulate the temporary employment sector, the court however observed that it has become a vehicle for permanent triangular employment and this was exactly the situation that prevails at Mondi. It is evident from the facts that from one day to the next, the applicant found himself ostensibly employed by a new employer; but the only difference was that he was being paid more than 20% less.¹⁵⁶

The court noted that there is no reason why the well-known principles relating to sham independent contractor relationships should not also apply to temporary employment service relationships.¹⁵⁷ The question remains who the true employer is; and although no presumption akin to that in section 200A addresses this question in a temporary employment service relationship, the court should not shy away from examining that relationship.¹⁵⁸

The court found that the applicant had been working for Mondi since 2000, it was until 3 years later that he was told to sign a new employment contract with Adecco and that after signing such the applicant continued doing the same work as he had previously done. It is against this background that the court found that Mondi remained the applicant's employer in that the arrangement on the facts of this case was not that of a temporary employment relationship.¹⁵⁹

From the decision of the court it is evident that for a contract of temporary employment to be concluded there must be an element of procurement, the absence of which would invalidate the contract, thus one cannot conclude a temporary employment contract without an employee being procured to the client by the labour broker.¹⁶⁰ The case illustrates that in determining who the employer is, there are considerations to be made, like identifying whether a contract of employment is a sham one and determining the arrangement in *fraudem legis* of a contract.

¹⁵⁶ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 39.

¹⁵⁷ *Dick v Cozens Recruitment Services*, 2001 22 ILJ 276 (CCMA).

¹⁵⁸ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 53.

¹⁵⁹ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 54.

¹⁶⁰ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC), para 58..

The principle followed in the case of *Khululekile Dyokwe v Coen De Kock and others*¹⁶¹ is also confirmed in *Barkhuisen and Mozart Ice Cream Parlour*,¹⁶² where the court stated that the labour broker is in fact not powerless to resist its client's attempt to wield its bargaining power in a way which undermines the fundamental rights of employees. The labour broker is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed. The labour broker is also entitled to resist any attempt by the client to enforce a contractual provision which is against public policy. If a court were to reinstate an employee into the employ of the labour broker, the labour broker may enforce such an order against the client to give effect to the employee's rights to fair labour practices.¹⁶³

In *Smith v Staffing Logistic*,¹⁶⁴ Smith (the applicant) had a disagreement with the client (Armour Systems) that resulted in the client requesting the temporary employment service to remove Smith.¹⁶⁵ In this case (Staffing Logistic) the respondent, a labour broker, recruited the applicant to carry out an assignment of work for a client, and entered into a limited duration contract of employment with the applicant for this purpose.¹⁶⁶ It was a term of contract that employment might be terminated if the client, for any reason whatsoever advised the respondent that it no longer wished to make use of the employee. The respondent later advised the applicant that his duties had been completed and that he was being placed in standby pool to await other possible assignments.¹⁶⁷

¹⁶¹ *Khululekile Dyokwe v Coen De Kock N.O. and 3 others*, 2012 33 ILJ 2401 (LC).

¹⁶² *Barkhuisen and Mozart Ice Cream Parlour*, 2009 3 SA 78 (C), see also *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC), para 73.

¹⁶³ *Barkhuisen and Mozart Ice Cream Parlour*, 2009 3 SA 78 (C).

¹⁶⁴ *Smith v Staffing Logistic*, 2005 (26) ILJ 2097 (BCA), 2098, see also J Grogan, *Workplace law* 9th edition, 148.

¹⁶⁵ See, *Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distribution*, 2002 23 ILJ 492 (LC), where the court held that that the employer had to take all reasonable steps to persuade its client to drop the request to remove employee from service.

¹⁶⁶ *Smith v Staffing Logistic*, 2005 (26) ILJ 2097 (BCA), 2098.

¹⁶⁷ *Smith v Staffing Logistic*, 2005 (26) ILJ 2097 (BCA), 2100.

The employee alleged that he had been unfairly dismissed for no reason, while the respondent denied that he had been dismissed, and stated that he had been placed on standby in accordance with the terms of the contract.

In arbitration the arbitrator noted that;

The Labour Relations Act does not exempt labour brokers from the obligation to ensure that fair labour practices are applied to its employees. A labour broker cannot contract out of this obligation by simply allowing its client to take over the role of employer without requiring them to assume some responsibilities for fair labour practice. If the employment was terminated simply because the client advised the labour broker to remove the employee this would constitute unfair dismissal.¹⁶⁸

From the above remarks by the arbitrator it is evident that the client is precluded from terminating a contract with the labour broker or advising the labour broker to remove an employee from his or her premises before the actual assignment is completed.

In its finding the bargaining Council found that the conduct of the temporary employment services to remove the applicant constituted to a dismissal and that even though there was an agreement that allowed for a termination of a contract of employment upon the request of the client. The dismissal was however still unfair and thus the temporary employment service was ordered to pay compensation to the equal of 14 months to Smith.¹⁶⁹ The case illustrates that the labour broker is in fact not powerless to restrict the instruction of the client.¹⁷⁰

¹⁶⁸ *Smith v Staffing Logistic*, 2005 (26) ILJ 2097 (BCA), 2101.

¹⁶⁹ In *Lakomski v TTS Tool Tecnic Systems (Pty), Ltd* 2007 (28 ILJ 2775 (LC), the Court recognized the principle that the fact that an employee suffered no financial harm is not a bar to the granting of compensation. The test is not whether the employee suffered patrimonial loss but whether it is just an equitable to grant compensation in these circumstances.

¹⁷⁰ *Smith v Staffing Logistic*, 2005 (26) ILJ 2097 (BCA), 2102.

3.3 Termination of employment

In terms of section 186(1) (b) of the Labour Relations Act,¹⁷¹ dismissal includes the following ground;

“An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew on less favourable terms, or did not renew it”.

It has appeared to be problematic in establishing as to whether the termination of a temporary employment service amounts to a dismissal.¹⁷² Should it happen that the temporary employment service relies on the termination of a contract as a ground for dismissal it faces a difficulty of identifying a reason as such difficulty in finding the reason arises if in fact the dismissal was initiated by the client.¹⁷³

Justifying the grounds for dismissal and the lengthy procedures are one of the reasons why companies opted to hire contract labours through a temporary employment agency, as it was easier to terminate contractor contracts as opposed to employment contracts,¹⁷⁴ according to Botes employees job security is tenuous at best as the labour broker and client can avoid liability when terminating employee’s contract, this is achieved by adding clauses that discharge both parties from liability.¹⁷⁵

The first clause is normally added in the contract between the labour broker and the client which grants the client the right to request the labour broker to remove the employee from their services in short term notice. While the second clause added by the labour broker in a contract with employee provides that should the client request it to

¹⁷¹ Labour Relations Act 66 of 1995.

¹⁷² In the case of *Sibiya & others v HBL Services cc*, 2003 7 BALR 796. The employees were employed by a labour broker to provide work to a client. The employees refused to change to a new shift system and they were locked out when they appeared for work at their normal shift, they referred for unfair dismissal dispute. The arbitrator found that they were entitled to refuse the change and as no proper dismissal procedures had been implemented. See also *Labuschagne v WP Construction*, 1997 9 BLLR 1251 CCMA.

¹⁷³ Jan Theron, Labour Brokers and the Triangular Employment Relationship, 2005 26 ILJ, 639.

¹⁷⁴ *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC).

¹⁷⁵ A Botes, op cit, 526.

remove employee and it compliance then the contract of employment automatically lapses and therefore no dismissal would have taken place.¹⁷⁶

In *April and Workforce Group Holdings t/a The Workforce Group*,¹⁷⁷ the respondent (Workforce Group Holdings), a temporary employment services, entered into a written contract with the applicant (April) for the hire of her service as a checker to one of its clients. Clause 4.4 of their employment contract provided that should client for any reason advise the labour broker that it no longer wished to make use of the employee's services the contract would terminate.¹⁷⁸ The arbitrator found that it is a sound principle of law that a person when signing a contract is bound by the ordinary meaning and the effect of the words which appear over his or her signature and allowed this clause and determined that, as the employee's contract terminated due to an act of the client, who was not the employer, dismissal had not taken place.¹⁷⁹ The employee's claim for unfair dismissal therefore failed.

However a conflicting view was reached in *Mahlamu v CCMA and others*,¹⁸⁰ the court observed that clauses that allowed employee's contract of employment to be terminated due to the unreasonable act of a client could not be tolerated. The court held further that one cannot contract out of the duty to comply with the provisions of labour legislation, and can therefore not prevent an employee from exercising his employment rights.¹⁸¹

In making such observation the court took precedent from the Nape case where the presiding officer stated that any clause in a contract between a labour broker and a client which allows a client to undermine the right not to be unfairly dismissed, would be

¹⁷⁶ Ibid.

¹⁷⁷ *April and Workforce Group Holdings t/a The Workforce Group* 2005 26 ILJ 2224 (CCMA).

¹⁷⁸ *April and Workforce Group Holdings t/a The Workforce Group*, 2005 26 ILJ 2224 (CCMA), para 5.

¹⁷⁹ *April and Workforce Group Holdings t/a The Workforce Group*, 2005 26 ILJ 2224 (CCMA), para 26. See *Sindane v Prestige Cleaning Services*, 2010 31 ILJ 733 (LC), the court accepted that automatic termination clauses could be utilised, at least in the circumstances where the client no longer needed the services of the worker.

¹⁸⁰ *Mahlamu v CCMA* 2011 4 BLLR 381 (LC) 389(22).

¹⁸¹ A Botes, op cit, 527.

viewed to be against public policy and that It is axiomatic that an employer should not be allowed to invoke such a clause to justify a dismissal for operational requirements.¹⁸²

A contractual device that renders termination of employment to be something other than dismissal, with the result that the employee is denied the right to challenge the fairness thereof, is prohibited in terms of section 5 of the Labour Relations Act.¹⁸³

The Labour Relations Act in terms of section 3 (b) stipulates that Act must be interpreted in compliance with the constitution, therefore an unjustifiable termination of contract of employment infringes the employee's right to freedom of occupation, thus the essence of section 5 of the Labour Relations Act is to afford employee's protection against such situation. This was stressed out in *Mahlamu v CCMA and others*,¹⁸⁴ the third respondent Gubevu security group employed the applicant (Mahlamu) as a security officer. The contract of employment stipulated that,¹⁸⁵

This employment contract will commence on 2008/10/23, and will automatically terminate on:

- (a) expiry of the contract between the Employer and the Client alternatively
- (b) In the event where the Client does not require the services of the Employee for whatsoever reason.

The client is not defined in the agreement but it is common cause that the third respondent was contracted to provide armed escort services to the Bombela Joint Venture (client) at various sites related to the Gautrain project, and that the applicant was engaged on these sites.¹⁸⁶

During January and February 2009, Bombela advised the third respondent that the armed escort services at the Park, Marlboro Portal and Benrose sites would end, with

¹⁸² *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*, 2010 8 BLLR 852 (LC), para 71 and 72.

¹⁸³ A Botes, op cit, 527. See also, C Bosch, Contract as a barrier to "dismissal": the plight of the labour broker's employee' 2008 29 ILJ 813. See further *Barkhuizen v Napier*, 2007 5 SA 323 (CC).

¹⁸⁴ *Mahlamu v CCMA and others*, 2011 32 ILJ 1122 (LC).

¹⁸⁵ *Mahlamu v CCMA and others*, 2011 32 ILJ 1122 (LC), para 2.

¹⁸⁶ *Mahlamu v CCMA and others*, 2011 32 ILJ 1122 (LC), para 2. See also *Springbok Trading (Pty) Ltd vs Zondani and Others*, 2004 9 BLLR 864, where the court held that in dismissing employees the proper procedure accorded by the Labour Relations Act must be followed, in the case the employer had failed to properly consult with employees when it wanted to transfer some of them to the labour broker.

immediate effect. On 6 March 2009, the third respondent wrote the applicant a letter stating that the Bombela contract had been cancelled and that in the absence of alternative positions, the applicant's services were no longer required. The letter refers specifically to clause 2.1 (B) of the contract, intimating that the contract had terminated automatically on account of the fact that Bombela no longer required the applicant's services.¹⁸⁷

At arbitration after hearing both side the arbitrator held that the applicant's employment contract specified that the applicant's employment would terminate automatically if for any reason the client no longer required the services of the employee. Since the client had stated that the applicant's services were no longer required, the applicant's employment had terminated automatically and there was therefore no dismissal for the purposes of section 192 of the Labour Relations Act. On that basis, the arbitrator dismissed the applicant's claim.

The applicant was dissatisfied with the order and proceeded with review, in review the court found that, the upshot of the commissioner's award is that the applicant's security of employment was entirely dependent on the will and the whim of the client. The client could at any time, for any reason, simply state that the applicant's services were no longer required and having done so, that resulted in a termination of the contract, automatically and by the operation of law, leaving the applicant with no right of recourse. For the reasons that follow, and to the extent that the commissioner regarded this proposition to be the applicable law, thus committing a material error of law that must necessarily have the result that his ruling is reviewed and set aside.¹⁸⁸

From this case it is evident that the Labour Relations Act in terms of section 5 protects the employees of temporary employment services against unfair dismissal as the section limits the labour broker's defenses that termination of employment contract resulted from cancelation of a contract.

¹⁸⁷ *Mahlamu v CCMA and others*, 2011 32 ILJ 1122 (LC), para 4, see also *ESG Recruitment CC v Tsatsimpe NO and Others*, 2008 ZALC 183.

¹⁸⁸ *Mahlamu v CCMA and others*, 2011 32 ILJ 1122 (LC), para 10.

In respect of a contract of employment that provide for termination of contract of employment by virtue of a clause that caters for termination of unjustifiable grounds, Commissioner Pretorius in *Mashesu v Red Alert TTS*,¹⁸⁹ remarked that a contract which contravenes provisions of statutes may be void, as the contract was termed to limit the unfair dismissal protection afforded to employees in terms of the Labour Relations Act. Hence, the provision in the contract of employment relation to the termination of employment is invalid in terms of section 5 of the Labour Relations Act.¹⁹⁰

However according to Lawrence and Moodly, this finding has profound and far-reaching consequences as regards the enforceability of an automatic termination clause included in an employment contract which provides for the automatic termination of the employment contract, should the labour broker no longer require the services of the employee.¹⁹¹ In terms of this case, this will now constitute a dismissal for the purposes of the Labour Relations Act and the aggrieved party will be entitled to refer the matter to the CCMA or Bargaining Council on the basis of an unfair dismissal claim.¹⁹² The effect of this is that labour brokers are now effectively precluded from including or rather enforcing these automatic termination clauses in employment contracts as this will be considered a dismissal in terms of the Labour Relations Act.¹⁹³

¹⁸⁹ *Mahesu v Red Alert TTS (Pty) Ltd*, 2011 12 BALR 1306 (CCMA) 1311 (37). See also A Botes, op cit, 527.

¹⁹⁰ *SA Post Office v Mampeule*, 2009 8 BLLR 792 (LC) 803(46). See also *Nkosi v Fidelity Security Services*, 2012 4 BALR 432 (CCMA) 436 and *Mayo and Another v Global Cleaning Services (Pty) Ltd*, 2011 10 BALR 1051 (CCMA).

¹⁹¹ Irvin Lawrence and Jason Moodley, The perils of automatic termination clauses in a labour broking context, website: <http://www.polity.org.za/article/the-perils-of-automatic-termination-clauses-in-a-labour-broking-context-2011-10-13>. Accessed 12 November 2012.

¹⁹² Ibid.

¹⁹³ Ibid.

CHAPTER FOUR: COMPARATIVE ANALYSIS OF LABOUR BROKING WITH NAMIBIA

4.1. Introduction

Labour broking in Namibia is referred to as labour hire, in this chapter the words labour hire and labour broker will be used interchangeably. Namibia has provided a precedent or landmark case dealing with the banning of labour brokers.¹⁹⁴ Labour brokers in Namibia supply labour to third parties (client companies) with whom they have a commercial contract. Their services are used when employers are trying to cope with the peaks in demand, reducing costs, avoiding industrial relations problems, greater flexibility as well as avoiding retrenchment problems.¹⁹⁵ The negative side of labour brokers in Namibia is similar to those in South Africa and this includes job insecurity, low wages, substandard working conditions, limited training and skills development.¹⁹⁶ Labour broking in Namibia is likened to a contract of labour system, as the employment relationship is developed between the labour broker and the workforce.¹⁹⁷

4.2. *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia.*¹⁹⁸

In an attempt to remedy inhumane labour hire system that was entrenched through apartheid policies in Namibia, the Namibian National Assembly engaged in intense debates which preceded the regulation of labour hire in the Namibian. According to Van Eck arguments in favour of the regulation of labour broking, as opposed to its abolition, were countered in the Namibian Parliament with the view that it would be similar to regulatory attempts made by the opponents to the abolitionists struggle against slavery and that slavery could not be regulated in an attempt to give it a humane character.¹⁹⁹

¹⁹⁴ *Africa Personal Services v Government of Namibia* 2011, 32 ILJ 205 (Nms).

¹⁹⁵ Rufaro Audrey Mavunga, op cit, 41.

¹⁹⁶ Rufaro Audrey Mavunga, op cit, 42.

¹⁹⁷ A contract of labour system inspired policies of racial discrimination, segregation and repression.

¹⁹⁸ *Africa Personal Services v Government of Namibia* 2011, 32 ILJ 205 (Nms).

¹⁹⁹ BP Van Erk, op cit, 113.

It is against this background that the outcome of the debate resulted in a withdrawal of the initial proposal that sought to regulate labour broking. The amended provision in terms of section 128 placed an outright ban on the triangular relationship, backed by criminal sanction.²⁰⁰

The applicant Africa Personnel Services (the labour broker) is a company which its main business is labour hire and has conducted its business since 1996 without any legal intervention by the government and employs approximately 6085 employees and is one of the biggest employers in Namibia. The applicant brought an application in the Namibian High Court to challenge the constitutionality of section 128 of the Labour Act²⁰¹ of Namibia, on the grounds that the section infringes on its fundamental freedom to engage in any profession, or carry on any occupation, trade or business.²⁰²

The applicant asserted that the Namibian Constitution guarantees a number of fundamental rights and freedoms. Included in the list of human rights are the rights to freedom from slavery and forced labour,²⁰³ equality and freedom from discrimination,²⁰⁴ freedom of association²⁰⁵ and, significantly for purpose of this discussion, all persons right to practise any profession, or carry on any occupation, trade or business.²⁰⁶ The above mentioned provisions are also contained in the South African Constitution.²⁰⁷ The

²⁰⁰ Ibid.

²⁰¹ Namibian Labour Act 11 of 2007.

²⁰² Section 128 of Namibian Labour Act 11 of 2007. 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 therefrom.
- (3) Any person who contravenes or fails to comply with this section 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."

²⁰³ Article 9 Namibian Constitution Act 2 of 1990.

²⁰⁴ Article 10 Namibian Constitution Act 2 of 1990.

²⁰⁵ Article 21(e) Namibian Constitution Act 2 of 1990.

²⁰⁶ Article 21(j) Namibian Constitution Act 2 of 1990.

²⁰⁷ Section 22 of the South African Constitution, Act 108 of 1996.see also section 9 which provides that the equality provisions in the Constitution and consequently section 18 provides that everyone has the right to freedom of association.

applicant contended that section 128 violated the above mentioned rights and therefore was unconstitutional.

The Namibian High Court considered the Roman law origin of the common-law contract of employment and held that the equivalent of that time, the *locatio conductio operarum*, entailed the letting and hiring of personal services in return for monetary return. One of the other forms of hiring (that is no longer valid today) was slavery, where the owner of the slave could in terms of the *locatio conductio rei* rent out the object (namely, the slave). It was held that the common-law contract of employment had only two parties to it and that there was no room for interposing a third party, the labour broker, into this relationship.²⁰⁸ The court further added that labour broking was akin to slavery and it should be eradicated. The court held that since section 128 also rendered labour hire illegal; the labour broker could not claim a right to conduct such business under the fundamental freedom of occupation, profession, trade or business.²⁰⁹

It is evident that from this decision the High Court only considered the infringed rights of the employees employed under labour broking and therefore failed to take consideration of the right to carry trade or business, in this regard the court failed to strike a balance between the employees' rights and that of the employer.

It is against this background that the applicants was disgruntled with the decision of the High court and preceded with appeal. The Namibian Supreme Court of Appeal considered and upheld the appeal and consequently struck section 128 off the statute book. In reaching its decision, the Supreme Court of Appeal held that even though labour broking might be associated with the abhorrent history of labour hire of the past the Constitution served as a compass for current and future developments of the law. The Supreme Court of Appeal recognised that the freedom of trade and occupation is essential to the social, economic and political welfare of society as a whole. This is applicable not only to individuals, but also to those who organise themselves into collectives such as partnerships and companies.²¹⁰

²⁰⁸ Bps Van Eck, op cit, 114.

²⁰⁹ Ibid.

²¹⁰ Ibid, 116.

The court found the restriction to be overbroad and unreasonable, and held that emphasis should rather be placed on the regulation of such activities to create a framework within which private agencies could operate while at the same time protecting the rights of the employees.

The importance of the Namibian Supreme Court decision cannot be overlooked as a similar ban on labour broking in South Africa should be subject to a similar challenge, given that the South African Constitution similarly protects the right to carry on a trade or business. Accordingly, provided our legislators have regard to the Namibian Supreme Court ruling, it is increasingly unlikely that South Africa will see an outright ban of labour broking.²¹¹ The effect of banning labour broking is that the reliance of one right will be pitted against another right, according to Van Eck the right to fair labour practice will not prevail against the right to freedom of trade and occupation as the Constitutional Court has accepted that fairness must be applied to both the employers and the employees and placed responsibility on the courts to establish an appropriate fairness.²¹²

It is against this background that in seeking the balance the courts will undoubtedly be influenced by the Namibian Court decision and international best practice, which directs that labour brokers should be regulated and not banned in the modern world of work.

It is suggested that labour brokers and employees of labour brokers should take comfort from the Namibian ruling; if the South African legislature takes note of these findings it would be better placed to redirect its energies on eliminating abuse and unsavory practices within the industry by way of improved regulation rather than an outright ban. This would empower the industry to continue making a contribution to the growth of the South African economy and job market.

According to Nghiishililwa in the High Court judgment there were several options open to the Court, as opposed to merely upholding the section 128 ban, like the court could have followed the ILO's example by not banning labour hire, but rather implement stricter regulations and provide greater protection for employees employed under the

²¹¹ Ibid, 120.

²¹² Ibid, 121.

labour hire system.²¹³ Reliance can be made with the example of France where a company that is engaged in hiring temporary employees, is obliged to declare this to the labour administration, and to provide some financial guarantee to ensure their ability to pay the wages of the employees as well as tax contributions to the state if the temporary work firm ever gets declared insolvent.²¹⁴

Nghiishililwa further observes that the Court would have been able to make a more objective analysis of the issues that were raised and, accordingly, reach a more accurate conclusion if had they interpreted article 21(1) (j) of the Constitution in a more purposive, broad and generous manner so as to include the protection of the rights of all the parties involved in the labour hire relationship.²¹⁵

Furthermore that section 128(1) of the new Labour Act²¹⁶ appears unrealistic, unreasonable and defective, as it is not considerate of what is actually happening in the Namibian labour market. Also, the law is not static, but dynamic, as it must address the contemporary legal, social and economic needs of the society it aims to serve.²¹⁷

Nghiishililwa criticizes the government of Namibia that it failed to balance the rights of labour hire companies that are protected in article 21 of the Constitution, with the disadvantages that such labour hire companies have on the workforce. Parliament tried justifying the prohibition of labour hire on the grounds that it was contrary to public policy as it offended decency and morality.²¹⁸

4.3. Lessons to be learnt from *Africa Personal Services v Government of Namibia*

The Namibian Constitution guarantees a number of fundamental rights and freedoms that are similar to the South African Constitution which includes, *inter alia*, the rights to

²¹³ F, Nghiishililwa, "The banning of labour hire in Namibia: How realistic is it?", Namibia Law Journal, 1 (2), 89, 2009.

²¹⁴ Nghiishililwa *ibid*, 90.

²¹⁵ *Ibid*.

²¹⁶ Namibian Labour Act 11 of 2007.

²¹⁷ Nghiishililwa, *op cit*, 91.

²¹⁸ *Ibid*.

freedom from slavery and forced labour,²¹⁹ equality and freedom from discrimination,²²⁰ freedom of association²²¹ and, significantly for purpose of this paper, all persons' right to practise any profession, or carry on any occupation, trade or business.²²² The above mentioned provisions are also contained in the South African Constitution.²²³

The Principles of State Policy enjoins the State to actively promote and maintain the welfare of the people of Namibia by adopting, *inter alia*, policies aimed at;

- actively encouraging the formation of independent trade unions to protect employees' rights and interests, and to promote sound labour relations and fair employment practices.²²⁴
- ensuring that employees are paid a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;²²⁵

South Africa needs to put mechanisms that properly regulate the labour broking industry and by doing so, sound labour relations would be promoted. It is opine that the socio-economic changes at the workplace prompt the need to revisit the employment laws that prohibit economic activities that operate within the ambit of the law. The Supreme Court correctly observed:

“...given the evolution of employment relationships from classical to modern times and the rapid changes in recent decades as a result of globalization, industrial innovations, information technology developments and instant global telecommunication, we must point out that contracts for the letting and hiring of services have not remained static but continuously evolved in scope and application to address continuously emerging challenges presented by socio-economic changes at the workplace over more than 2000 years.”²²⁶

²¹⁹ Article 9 Namibian Constitution Act 2 of 1990.

²²⁰ Article 10 Namibian Constitution Act 2 of 1990.

²²¹ Article 21(e) Namibian Constitution Act 2 of 1990.

²²² Article 21(j) Namibian Constitution Act 2 of 1990.

²²³ Section 9, section 18 and section 22 of the Constitution of South Africa Act 108 of 1996.

²²⁴ See article 95 (c) of the Namibian Constitution Act 2 of 1990.

²²⁵ See article 95 (i) of the Namibian Constitution Act 2 of 1990.

²²⁶ *Africa Personal Services v Government of Namibia*, 2011, 32 ILJ 205 (Nms), para 21.

Whilst the High Court slammed the triangular relationship and viewed it as creating an unacceptable situation that has no legal basis in the Namibian law, the study however agree with the Supreme Court that regulative measures have to be adopted including those contemplated in the Conventions intended to ensure social protection, fair employment practices, collective bargaining, equal treatment, and occupational health and safety

The Constitution of South Africa permits the granting of the labour law rights²²⁷ but the contradiction arises when it comes to the usage of labour broking in that some of the rights seems to be infringed, the call for the banning of labour broking is a result of some of the infringement to the labour rights enshrined in the Constitution such as the right to collective bargaining or trade union.²²⁸

From the point of view of trade unions and the employee, the argument is advanced is that many labour brokers fail to adhere to minimum standards of employment and that the transient form of such employment makes it difficult to organize employees and thus fringes with the right to collective bargaining or trade. This is indeed a legitimate concern as it places employees employed through labour broking at a predicament.²²⁹

Employees recruited by the labour brokers should not be denied the right to collective bargaining and freedom of association this in itself forms evidence of the importance of freedom of association and collective bargaining and is clear and state members have the positive duty to makes sure that have access to this procedure.²³⁰

South Africa is a member of the ILO and the Constitution of the Republic of South Africa²³¹ directs that international law must, and foreign law may be considered when the Bill of Rights is interpreted.²³² The issue of labour broking was recently considered

²²⁷ Section 23 of Act 108 of 1996.

²²⁸ Section 23 of the Constitution of South Africa, Act 108 of 1996.

²²⁹ Solidarity Trade Union, op cit, para 11.1.6.

²³⁰ Article 4 of Private Employment Agencies Convention of 1997.

²³¹ The Constitution of South Africa, Act 108 of 1996.

²³² Section 39(1) of the Constitution of South Africa, Act 108 of 1996. states that:

When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

by the Namibian Courts and ILO principles were taken into account in determining as to whether to pass a ban or regulation on labour hire

In the Namibian Court²³³ case the Supreme Court of Appeal held that even though labour broking might be associated with the abhorrent history of labour hire of the past the Constitution served as a compass for current and future developments of the law. The Supreme Court of Appeal recognised that the freedom of trade and occupation is essential to the social, economic and political welfare of society as a whole. This is applicable not only to individuals, but also to those who organise themselves into collectives such as partnerships and companies.²³⁴The ILO's Agencies Convention recognises labour brokers as a labour market service and in Article 2(3)²³⁵ states that: one purpose of the Convention is to allow the operation of private employment agencies as well as the protection of employees using their services, within the framework of its provisions

Theron stipulates that the fiction that arises in the utilisation of labour broking is not resolved by providing legal techniques to create accountability, such as making the client jointly and severally liable with the agency. As long as the workplace of the agency's employee continues to be regarded as the workplace of his employer, the agency, rather than the workplace of the client, the problem of incompatibility remains unresolved. Thus to say the introduction of section 198 (4) that places joint liability on both the client and the labour broker still encounters challenges of its own.²³⁶

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- (b) must consider international law; and
 - (c) may consider foreign law.

See further *South African National Defence Union v Minister of Defence* 1999, ILJ 2265 (CC) and *National Union of Mineworkers of South Africa v Bader Bop (Pty) Ltd* 2003 BLLR 103 (CC), which serve as examples where ILO principles were followed.

²³³*Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others*, 2011 (32) ILJ 205.

²³⁴The Supreme Court of Appeal in, *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others*, 2011 (32) ILJ 205 accepted that:

Anyone who seeks to justify the limitation of a fundamental freedom by law bears the burden to show that the justification falls clearly and unambiguously within the terms of permissible constitutional limitations, interpreted objectively and as narrowly as the Constitution's exact words will allow.

²³⁵ILO's Agencies Convention.

²³⁶J, Theron, Prisoners of a paradigm: Labour broking, the 'new services' and non-standard employment, 55.

According to Mavunga the purpose of the inclusion of section 198 (4) is to serve as a safety net for employees who usually are at a disadvantage, but to Theron this creates a legal fiction which then defies from the purpose of serving as a safety net.²³⁷

What can be learned by the from the Namibian case is that regulating the labour broking industry seems to be a better option as Amendments are proposed to adjust the powers of the Minister and the Employment Conditions Commission in respect of sectoral determinations to, *inter alia*, facilitate regulation of temporary employment by also extending protection of vulnerable employees and facilitate their right to freedom of association.

²³⁷ Rufaro Audrey Mavunga, op cit,25.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

It is evident from this study that labour laws are fraught with challenges, which range from the cost of employee benefits spiralling, having to deal with trade unions often being painful, the complexity of dismissing undesirable employees is discouraging, and the cost of dealing with CCMA disputes and strike action is immeasurable, it is against this background that employers look for cheaper ways of hiring employees in the form of labour broking.²³⁸

South Africa should take comfort from the Namibian ruling; if the legislature takes note of these findings it would be better placed to redirect its energies on eliminating abuse and unsavoury practices within the industry by way of improved regulation rather than an outright ban. This would empower the industry to continue making a contribution to the growth of the South African economy and job market.²³⁹

It is also evident that labour brokers have become prominent role players in the South African economy where they facilitate employment creation, train employees and assist business to optimise their operational design.²⁴⁰ According to Mavunga of business flexibility is crucial in the age of economy, but that does not mean flexibility should be granted at the expense of the rights of employees.²⁴¹

The study supports the notion that to stimulate employment growth in the formal sector in South Africa labour broking should be vigorously pursued. Job creation and job retention should be the primary focus in South Africa and this might entail removing basic minimum regulatory barriers in the way of employers willing to start enterprises

²³⁸ Ivan Israelstam, Labour brokers could go broke, Website <http://www.hrpulse.co.za/legal/legal-opinion/229376-labour-brokers-could-go-broke>, accessed 1 March 2013.

²³⁹ Vatalidis, July and Workman-Davies, Namibian judgment may have an impact on the future of labour broking in South Africa. Website <http://www.itinews.co.za/news.aspx?categoryid=39&subcategoryid=1201> accessed 1 March 2013.

²⁴⁰ Ivan Israelstam, Labour brokers could go broke, Website <http://www.hrpulse.co.za/legal/legal-opinion/229376-labour-brokers-could-go-broke> accessed 1 March 2013.

²⁴¹ Rufaro Audrey Mavunga, op cit, 25.

that meet South Africa's mostly unskilled employees.²⁴² In this regard it might be prudent to revisit the nature of labour market regulation in South Africa in order to ensure that the vast pool of under skilled labour in South Africa is absorbed in the South African economy as employees.

It is against this background that the study opines that the total ban of labour broking in South Africa would be detrimental to those who seek employment without the necessary skills and qualifications. The regulation of this industry seems to be more appropriate, in that already South Africa has legislations that regulate labour broking. Although these legislations do not address the issues of unfair dismissals and unfair labour practices, it is however submitted that the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill addresses this loophole in the industry. The requirement of registration of these labour brokers is also a good attempt to minimise the exploitative practices in this industry.

The constitutional objectives of regulating labour brokers would be more favourable than a total ban where numerous jobs could be lost. The proposed regulatory system of reform includes mandatory registration for all practitioners; an establishment of a Board to regulate and enforce set standards; a code of conduct enforced by the industry board; annual consideration of profit margins and promotion of job creation initiatives. If this system is successfully enforced, unskilled employees who wish to break into the market place, employed by labour brokers would have adequate protection of their rights. Prescribed minimum standards would then ensure security for the temporary employee.²⁴³

In the premise, labour broking creates opportunities for the disadvantaged and diverse groups' entrance into the labour market. It reduces economic well-being, lowers output, and erodes human capital. It must be noted that some people actually choose not to take up permanent positions of employment and prefer temporary as caters for their

²⁴² Solidarity Trade Union, op cit, para 9.2.

²⁴³ Lauren Hastie, To Ban or not to Ban Labour Brokers in South Africa, website; <http://www.polity.org.za/article/to-ban-or-not-to-ban-labour-brokers-in-south-africa-2011-03-24>. Accessed 1 March 2013.

desires and needs. Cognizance should also be taken, on the fact that new entrants in to the labour market usually do not have prior experience and the utilization of labour brokers, makes it easier for the employee to obtain employment while getting some sort of experience. This, in essence, makes labour brokers an attractive option when seeking employment.²⁴⁴

From the point of view of the employee, labour broking is often advanced as making a significant contribution to job creation and ultimately the South African economy. Given the current economic circumstances in which permanent posts are scarce and retrenchments are at the order of the day, temporary employees are provided with a means of earning a salary and contributing to the economy.

Given South Africa's massive unemployment crisis, it is vital that the mechanisms that link available jobs and job seekers from all backgrounds be as effective and efficient as possible. These have to help both firms and job seekers, but attention should be paid to ensuring that mechanisms exist to help employees who are least connected to the labour market. It is submitted that temporary employment service do help a significant number of people , especially young, inexperienced employees and those who have the most tenuous connections to the labour market.²⁴⁵

The outright ban of labour broking as opposed to regulating will result in immediate job losses for temporary employees who will not have the resources to locate temporary work opportunities in many dispersed locations and A rise in costs due to employers needing to employ larger in house Human Resources and recruitment staff to fill the gaps left by the exit of temporary employment services.

The Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill also provide for the requirement of registration of these labour brokers, which is also a good attempt to minimise the exploitative practices in this industry. The

²⁴⁴ Rufaro Audrey Mavunga, op cit, 30.

²⁴⁵ See Labour brokers an important route into formal employment – CDE, Accessible on <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=316490&sn=Detail&pid=71616> . Accessed 2 March 2013.

Bills will also narrow the definition of employer and employee and presumption of being an employee regardless of form of contract, temporary employment service will be able to place persons in work, but will not be able to be the employer after certain duration.

It is required that the role of the Department of Labour be increased by introducing the registration process similar to that of the 1956 Labour Relations Act and that this registration should be made a legal requirement which will serve as an incentive for a temporary employment service provider to register. It will be required of the department to also lay down guidelines regarding the content of such contract of employment between the temporary employment service provider and the employee. It will be recommended that a business that requires the services of labour brokers acquire the service of those labour brokers that have necessary level of compliance. The intention of the South African government in introducing the Basic Conditions of Employment Amendment Bill and the Labour Relations Amendment Bill is commendable as they recognise challenges faced by employees employed through labour broking. However it is yet to be tested whether the two Bills would provide adequate protection to employees.

5.2 Recommendations

It is not undisputed that labour broking has received much attention of lately, with two sided side on the matter, one side arguing for the total ban while the other argues for the proper regulation of the labour broking industry. The study has highlighted the challenges the government is to be subjected to should labour broking be banned and therefore the following is recommended:

This study recommends that the regulation of this industry should be fast tracked as it seems to be more appropriate, in that already South Africa has legislations that give full recognition of labour brokers. Although this legislations do not address the issues of unfair dismissals and unfair labour practices, it is however submitted that that the new amendment Bills addresses this loophole in the industry.

The study recommends further that labour broker should use labour law experts to draw up labour brokerage contracts with clients and employees in order to avoid legal traps and ensure that their employees are hired, disciplined or dismissed through a legally sound procedure.

This study recommends furthermore that the proposed regulatory system of registration of these labour brokers; an establishment of a Board to regulate and enforce set standards; a code of conduct enforced by the industry board; annual consideration of profit margins and promotion of job creation initiatives should be fast tracked in order to minimise the exploitative practices in this industry. If this system is successfully enforced, unskilled employees who wish to break into the market place, employed by labour brokers would have adequate protection of their rights. Prescribed minimum standards would then ensure security for the temporary employee.²⁴⁶

The study lastly recommends that the establishment of the Board that will regulate and enforce set standards, should be comprise different stakeholders who will Act impartially

²⁴⁶ Lauren Hastie, To Ban or not to Ban Labour Brokers in South Africa, website: <http://www.polity.org.za/article/to-ban-or-not-to-ban-labour-brokers-in-south-africa-2011-03-24>. Accessed 10 March 2013.

and independent from the pressures of trade unions and the public in general, this would include academics, practitioners and retired judges.

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