

**TEMPORARY EMPLOYMENT SERVICES (LABOUR BROKERS)
IN SOUTH AFRICA AND NAMIBIA**

ISSN 1727-3781



2010 VOLUME 13 No 2

TEMPORARY EMPLOYMENT SERVICES (LABOUR BROKERS) IN SOUTH AFRICA AND NAMIBIA

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1 Introduction

Role-players in the South African labour fraternity over the past number of months have been involved in a robust debate regarding the regulation of "temporary employment services"¹ (for ease of reference "labour brokers"). Labour broking is currently allowed, and regulated in a limited sense, by the *Labour Relations Act*.² However, the labour broker industry is currently under scrutiny and awaiting legislative reform. In October 2009, the social partners engaged in negotiations about this issue at the National Economic Development Labour Council (NEDLAC) and, as could be expected, were unable to reach consensus on future reforms.³ The most important trade union federations, namely the Congress of South African Trade Unions (Cosatu) and the National Council of Trade Unions (Nactu), confirmed that they are in favour of a legislative ban on labour broking.⁴ On the other hand, organised business and the Federation of Unions of South Africa (Fedusa) argued in favour of the retention of the existing system in South Africa, but accepted that there is a need for improved regulation.⁵ At the time of writing of this contribution, it was uncertain as to which direction legislative reforms will take.

Since the implementation of amendments to the Namibian *Labour Act* (NLA)⁶ in 2007, attempts have been made to ban 'labour hire' in Namibia. However, in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*⁷, the

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1 See S 198(1) of the *Labour Relations Act* 66 of 1995 (hereafter the LRA). This concept has been termed in various manners in various contexts. The International Labour Organisation's (ILO) *Private Employment Agencies Convention* 181 of 1997 refers to it as "private employment agencies" and in Namibia the expression "labour hire" is used.

2 S 198(1)–(8) LRA.

3 Backer *Rapport* 2.

4 Craven 2009 www.cosatu.org.za. Note that Fedusa called for a combination of regulation and enforcement of labour broking. It can be speculated that Fedusa recognises the need for flexibility in the modern world of work, but that the maintenance of decent work should not be undermined by unscrupulous labour brokers. See SAPA 2009 www.iol.co.za.

5 NEDLAC "Report on Atypical Forms of Employment in South Africa and Labour Broking" 3.

6 11 of 2007.

7 SA 51/2008 2009 NASC 17(hereafter *Africa Personnel Services*).

Supreme Court of Appeal (SCA) of Namibia recently held that a blanket prohibition on labour broking is unconstitutional under their legal framework. The purpose of this discussion is to compare the situations in South Africa and Namibia and to determine whether South African policymakers can learn any lessons in the run-up to the finalisation of amendments to the LRA. Section 2 of the contribution will cover the current position regarding labour broking in South Africa; Section 3 will explore the regulation of labour hire in Namibia; Section 4 will deal with some of the debates before NEDLAC; and the final section will present a number of conclusions and predictions.

2 The position in South Africa

Over the past two decades, business owners in South Africa have increasingly sought to 'externalise' the traditional full-time, permanent, employer-employee relationship into a triangular labour broker connection.⁸ This occurs when labour brokers make workers available to third-party clients that assign their duties and supervise the execution of their work. Most often the labour broker enters into a contract of employment with the worker, administers the payroll of persons who have been placed with clients and assumes the responsibilities of deducting employee's tax from the worker's salary. The contract of employment is often made subject to the condition that the agreement continues for as long as the client requires the services of the employee.⁹ The labour broker concludes a commercial agreement with the client in terms of which the client is invoiced for the services being rendered, the labour broker pays the worker's wages and there is no contractual relationship between the client and the worker.

Section 198(1) of the LRA¹⁰ provides certainty about the identity of the employer within this triangular relationship and delineates some of the responsibilities of the labour broker and the client. A "temporary employment service" is defined as:

8 Theron 2003 *ILJ* 1271. See also Theron 2005 *ILJ* 618; Theron 2008 *ILJ* 1.

9 Theron (n 8) 2008 14.

10 See also S 82 *Basic Conditions of Employment Act* 75 of 1997 (hereafter BCEA).

any person who, for reward, procures for or provides to a client other persons-

- (a) who render services to, or perform work for, the client; and
- (b) who are remunerated by the temporary employment service.

This section continues to establish a legal fiction by making the labour broker the employer of the person whose services have so been acquired, and the worker is identified as the employee of the labour broker.¹¹ 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 organisation.¹²

It does not follow that the client is relieved of all employer-employee responsibilities.¹³ The LRA stipulates that the labour broker (the deemed employer) and the client are jointly and severally liable in respect of contraventions of conditions of service arising from collective agreements concluded at bargaining councils, the minimum and maximum standards as set in the BCEA, and arbitration awards that regulate terms and conditions of service.¹⁴ In what appears to be a glaring omission, the section does not extend shared responsibility of some of the most significant protections offered by the LRA, such as protection against unfair dismissal and unfair labour practices perpetrated by the client against its workers.¹⁵

11 S 198(2) LRA. S 83(1) of the BCEA provides that the Minister of Labour may, on advice of the Employment Conditions Commission, issue a notice in the *Government Gazette* that deems any category of persons specified in the notice to be employees. It is submitted that this may occur in cases in which there is uncertainty regarding the identity of persons who have been placed as independent contractors, who are excluded from the BCEA. This would extend protection in respect of employee rights to vulnerable employees.

12 S 200A of the LRA establishes a presumption to the effect that a person who works under the supervision and control of another person is provided with tools of the trade and forms part of the other person's organisation is an employee of that person. This is also in accordance with common-law tests developed by the courts. See in this regard *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) and *South African Broadcasting Corporation v McKenzie* 1999 ILJ 585 (LAC).

13 In Van Niekerk *et al Law@work* 72, it is mentioned that:
[p]eculiar as it may seem, both the TES and the client were jointly and severally liable for unfair dismissals in terms of s 1(3)(d) of the 1956 LRA. In one of the drafts of the LRA, provision was also made for the inclusion of such joint liability in terms of the new act. However, for reasons unknown, this was not included in the final version of the LRA.

14 S 198(4) LRA.

15 This has been confirmed on a number of occasions. See, for example, *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 ILJ 2224 (CCMA) and *National Union of Metalworkers of SA v SA Five Engineering (Pty) Ltd* 2007 ILJ 1290 (LC).

Despite the mentioned omission, note that there are important provisions regarding joint and several liability contained in the *Employment Equity Act*.¹⁶ Should a labour broker commit an act of discrimination against an employee on the implied or expressed instructions of a client, both the labour broker and client will be jointly and severally liable.¹⁷ This could, for example, occur when a client instructs a labour broker only to provide persons who belong to a particular race group, follow a particular religion or who are not married or pregnant.¹⁸ This, I submit, does not extend to the unequal treatment between permanent employees of a client and those persons placed by a labour broker when it comes to equal pay for similar work and other conditions of service. Chapter II of the EEA was designed to protect workers against unfair discrimination in any employment policy or practice based on arbitrary grounds such as race, sex, gender and so forth but not in respect of unequal conditions of service.¹⁹ This was left to the devices of the BCEA and the LRA.

To return to the LRA, in as far as the person so placed is not deemed to be a worker of the client but rather of the labour broker, the Commission for Conciliation, Mediation and Arbitration and the Labour Court do not have jurisdiction to consider disputes in respect of unfair dismissal and unfair labour practice disputes between the client and the worker.²⁰ In addition, the contract between the labour broker and the worker is often made subject to the continuation of the commercial contract between the labour broker and the client. In instances in which this has been explicitly agreed upon, the courts have confirmed that the termination of the contract of employment on grounds that the client has terminated the commercial contract with the labour broker does not constitute dismissal at all.²¹ The effect of this is that if

16 55 of 1988 (hereafter EEA).

17 S 57(2) EEA.

18 S 6(1) of the EEA stipulates that no employer may unfairly discriminate, directly or indirectly, on a number of grounds including "race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth".

19 Note that in terms of S 10(1) of the EEA disputes in respect of unfair dismissal and unfair labour practices, which have discriminatory elements, must still be adjudicated in terms of the LRA. In terms of the last-mentioned

Act, employees placed by labour brokers are not deemed to be employees of the client.

20 *Mandla v LAD Brokers (Pty) Ltd* 2000 BLLR 1047 (LC); *Vilane v SITA (Pty) Ltd* 2008 BALR 486 (CCMA).

21 *Mavata v Afrox Home Health Care* 1998 ILJ 931 (CCMA); *Hattingh v AMT Placement Services (Pty) Ltd* 2005 BALR 595 (MEIBC). See also the discussion of *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 ILJ 2224 (CCMA) by Bosch 2008 ILJ 831. In *Sindane v Prestige Cleaning Services* 2009 BLLR 1249 (LC), the Labour Court recently confirmed that the

the termination does not constitute dismissal, a dispute about an unfair dismissal cannot be referred to the Commission for Conciliation, Mediation and Arbitration and the employee is left without remedy even though the circumstances may be grossly unfair.

In addition, employees placed by labour brokers are at a disadvantage when it comes to bargaining about their wages and other conditions of service. As pointed out by Theron,²² the client remains the dominant party in the bargaining process between labour brokers and the receivers of the services. If, for example, a steel mill (the client) is in need of cleaning services, the client will factor a specific amount into its budget for this part of the undertaking's expenses. Should one labour broker not be able to meet the amount that has been budgeted for, the client merely looks for another labour broker in the cleaning services industry. In this manner, the client compares what different labour brokers in the cleaning industry can offer and accepts the offer of the lowest bidder. In this example, employees and their trade unions do not form part of any collective bargaining process when it comes to the determination of the commercial agreement between the dominant client and the provider of the services (the labour broker). The result is that employees placed by labour brokers do not receive the same wages and other conditions of service as the employees who are permanently appointed by the same client. This phenomenon prompted Theron²³ to question whether there is a sound basis for the existence of these triangular relationships, which in essence remain a fiction.

Neither the LRA nor the BCEA currently provides for the registration, certification or further regulation of private or public temporary employment services. Although there are national forums at which collective bargaining takes place on conditions of service in, for example, the cleaning and security services industry, these national bargaining forums do not synchronise well with the granting of organisational rights (and other conditions of service) that are accorded to trade unions at particular workplaces.²⁴ Thus, for example, the labour broker who provides services in the

termination of a commercial agreement between a labour broker and a client that resulted in the coming to an end of a worker's contract did not constitute dismissal.

22 (n 8) 2008 13–14.

23 (n 8) 2008 15.

24 (n 8) 2008 14–15.

cleaning industry at a national level may not always be involved in the same sector of commerce as the client (such as the steel mill) in which the services are rendered.²⁵ Against this background, it has been widely accepted in the South African context that employees in this industry do not receive the same protection as employees who are appointed in terms of a traditional full-time contract of employment by the client.²⁶

South Africa is a member of the ILO and the *Constitution of the Republic of South Africa*²⁷ directs that international law "must", and foreign law "may" be considered when the Bill of Rights is interpreted.²⁸ The issue of labour broking was recently considered by the Namibian courts and ILO principles were taken into account. Although South African courts are not bound by decisions of foreign jurisdictions, I suggest that South African policymakers may gain valuable insights into the arguments that may, in all probability, be raised in the South African context, should it be decided to place an outright prohibition on labour broking.

3 The position in Namibia

Intense debates preceded the regulation of labour hire in the Namibian National Assembly during 2007.²⁹ Images of an inhumane labour broking system that was entrenched through apartheid policies are still fresh in Namibians' memories and it

25 In all fairness, it should be mentioned that there are some bargaining councils that compel labour brokers to adhere to the minimum conditions of service that are contained in collective agreements. See, for example, Clause 20(11)(d) of the main agreement concluded at the Metal and Engineering Industries Bargaining Council, published in GN R 898 in GG 32555 of 11 September 2009.

26 NEDLAC (n 5) Annexures A, B, C and D.

27 1996 (hereafter *Constitution*).

28 S 39(1) of the *Constitution* states that:

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

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

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) serve as examples where ILO principles were followed.

29 *Hansard* of Namibia 22–23, 25 and 30, as referred to in *Africa Personnel Services* para 7. The debate was preceded by LaRRI www.larri.com.na. The main findings of this report suggested that although the provisions of Namibian labour law apply to labour hire companies as well, the practice of employment at will is applied by labour brokers; labour hire is hardly a springboard for permanent jobs; and the most significant problems experienced by labour hire workers are the lack of benefits and job security and low wages. The LaRRI report concluded with the recommendation that the labour hire system be abolished in Namibia.

remains a politically charged issue.³⁰ Arguments in favour of the regulation of labour broking, as opposed to its abolition, were countered in the Namibian Parliament by the view that it would be similar to regulatory attempts made by the opponents to the abolitionists' struggle against slavery. It was said that slavery could not be regulated in an attempt to give it a humane character.

The outcome of the debate resulted in a withdrawal of the initial proposal that sought to regulate labour broking. The amended provision placed an outright ban on the triangular relationship, backed by criminal sanction. Section 128 of the NLA states:

128. Prohibition of labour hire

- (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) [...]
- (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\$80,000.00 or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

These provisions were implemented against the following background. Namibia is a member of the ILO and under the heading "Principles of State Policy", the Namibian Constitution provides that the state must adopt policies aimed at "adherence to and action in accordance with the international Conventions and Recommendations of the ILO".³¹ Although it is a member, Namibia is not a signatory to the ILO's *Private Employment Agencies Convention*,³² which seeks to provide guidelines in respect of labour broking.

Also relevant is 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,³³ equality and freedom from discrimination,³⁴ freedom of association³⁵ and, significantly for purpose of this discussion, all persons'

30 *Africa Personnel Services* para 7–8.

31 Art 95(d) Namibian Constitution.

32 181 of 1997 (hereafter ILO's *Agencies Convention*).

33 Art 9 Namibian Constitution.

34 Art 10 Namibian Constitution.

35 Art 21(e) Namibian Constitution.

right to "practise any profession, or carry on any occupation, trade or business".³⁶ A similar provision is contained in the South African *Constitution*.³⁷

The NLA's prohibition of labour hire was intended to take effect on 1 March 2009 but on 29 February 2009, the Namibian High Court (NHC)³⁸ suspended its implementation subject to constitutional review by the SCA. The facts before the NHC in the *Africa Personnel Services*³⁹ matter were straightforward. Africa Personnel Services (the labour broker) employs approximately 6 085 employees and is one of the biggest employers in Namibia. The labour broker brought an application challenging the constitutionality of Section 128 of the NLA on the grounds that the section infringes on its fundamental freedom to engage in any profession, or carry on any occupation, trade or business.

The NHC 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".⁴⁰ 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.⁴¹ To this, the NHC added that labour broking was akin to slavery and it should be eradicated.⁴² The NHC held that since Section 128 of the NLA also rendered labour hire illegal, the broker could not claim a right to conduct such business under the fundamental freedom of occupation, profession, trade or business. Despite finding in favour of the binding effect of Section 128, the NHC did, however, in the interim grant an urgent interdict suspending the

36 Art 21(j) Namibian Constitution.

37 S 22 of the South African *Constitution* provides that "every citizen has the right to choose their trade, occupation or profession freely".

38 Case number A13/2009.

39 Case number A4/2008. See the brief discussion of the case by Horn and Kanguuehi 2009 *Namibia Law Journal* 101.

40 *Africa Personnel Services* para 20.

41 *Africa Personnel Services* para 20–21.

42 The HC relied on the ILO's *Declaration of Philadelphia* (1944), which confirms that labour is not a commodity. See Horn and Kanguuehi (n 38) 103 in this regard.

implementation of the section until the SCA had the opportunity to provide finality regarding the question at hand.⁴³

The Namibian SCA considered and upheld the appeal and consequently struck Section 128 of the NLA off the statute book.⁴⁴ A unanimous bench noted that the respondents in the matter had never raised the argument in the court *a quo* about the allowing of a third party into the employment relationship. Africa Personnel Services had not been given the opportunity to argue this contentious argument before the NHC reached its decision. To this, the SCA added that significant changes have occurred in the way in which work is done in the contemporary globalised economy. It held that if:

contracts of service [had] remained marooned in Roman or common law of pre-modern times, the narrow scope of their application would have been entirely inappropriate to address the demands of the modern era.⁴⁵

On the issue of legality, the SCA held that the mere fact that the NLA declared labour brokers illegal placed limits neither on the ambit of the rights and freedoms contained in the Constitution, nor on the authority of the SCA to consider the constitutionality of legislative provisions that established possible infringements on constitutional rights. The SCA held that:

statutory, customary or common law restrictions that fall outside the ambit of permissible limitations under Sub-Article (2) are unconstitutional. Impermissible restrictions contained in legislation cannot be considered as 'legislation lawfully enacted' ... If the limitation of a fundamental freedom by 'the law of Namibia' is unconstitutional, the scope of the fundamental freedom is not circumscribed by it. To hold otherwise would be to put the proverbial cart before the horse.⁴⁶

It was argued on behalf of the Government of Namibia that the fundamental freedom protected by Article 21(1)(j) of its Constitution is linked to human dignity and that this value can only vest in a natural person and not in juristic persons. The SCA rejected this argument, pointing to the fact that the phrase applied to "all persons" and that

43 Case number A13/2009.

44 *Africa Personnel Services*.

45 *Africa Personnel Services* para 23.

46 *Africa Personnel Services* par 51.

this might refer to both natural and juristic persons. The court continued that it was essential that a generous and purposive interpretation be followed.⁴⁷ The SCA 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 SCA 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.

Despite the fact that Namibia has not ratified the ILO's *Agencies Convention*, the SCA took cognisance of the content of these international guidelines and I deem it necessary to consider them in more detail. The ILO's *Agencies Convention* recognises labour brokers as a "labour market service" and in Article 2(3) states that:

[o]ne purpose of [the] Convention is to allow the operation of private employment agencies as well as the protection of workers using their services, within the framework of its provisions.

Article 3 provides for the conditions governing their operation in accordance with prescriptions regarding registration and licensing before according them legal status. Article 4 requires measures to be taken to ensure that employees who are placed by labour brokers are not denied the right to freedom of association and the right to collective bargaining, while Article 11 requires that members take measures to ensure that employees employed by labour brokers are given adequate protection in relation to minimum wages, working time, social security benefits, occupational safety and health compensation in case of insolvency and maternity protection. One aspect that is patently clear is that the ILO's *Agencies Convention* does not seek to ban labour broking, but the aim is to recognise the existence of labour brokers and to regulate this economic activity to ensure that workers so placed are not exploited.

What remained for the SCA was to consider whether the restriction imposed by Section 128 was reasonable and justifiable in an open and democratic society. The SCA accepted that under the limitation clause, the otherwise generous application

47 *Africa Personnel Services* par 36–37.

and free exercise of fundamental freedoms might be circumscribed. As such, it constituted an exception to the norm and was, therefore, to be construed strictly. The SCA 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.⁴⁸

This limitation, the SCA held, went beyond the permissible limitations of the rights and freedoms guaranteed by the Constitution and Section 128 of the NLA was held to be unconstitutional. The effect of this decision is that Section 128 of the NLA has been nullified and the prohibition against labour brokers in Namibia has been lifted in its entirety. For the time being labour brokers are at liberty to continue with their activities in an unhindered fashion without any particular regulations applying to their trade.

I submit that the SCA was correct in its decision. The court followed the international standard that does not place an outright ban on labour broking. Although Namibia has its own particular history in respect of labour hire, it cannot escape the fact that it is a member of the global market place. The SCA in my view also interpreted the Constitution correctly by protecting the right to free economic activity. The court recognised that the only method of protecting workers placed by labour brokers is not limited to the complete banning of labour broking. The option of the protection of workers through the regulation of the labour broking industry remains viable. What the SCA had in effect done, was to endeavour to strike a balance between the right to freedom of economic activity and the protection of workers' rights.

That the SCA has lifted the ban on labour hire, does not mean that this unregulated situation will prevail. The Namibian Government has shown a strong resolve to protect the working conditions of workers who are placed by labour brokers. Barely three months after the handing down of the SCA decision the Namibian press reported that the Labour Commissioner had indicated that new labour hire

48 *Africa Personnel Services* par 65.

regulations were near completion.⁴⁹ According to one report, the regulations would enforce equal pay and benefits for labour hire employees and permanent employees and such employees would be entitled to written contracts of employment signed by both the labour broker and the client.⁵⁰

Although it can be said that it amounts to nothing more than speculation at this stage, there is in my view a strong possibility that the debate about labour broking in South Africa may be strongly influenced by the developments that are currently unfolding in Namibia.

4 Submissions before NEDLAC

As previously mentioned, policymakers in South Africa are in the process of deciding upon the extent to which labour brokers should be permitted to function in this society. During the deliberations at NEDLAC, Cosatu and Nactu reiterated their stance that labour broking should be banned as it is deemed "immoral and politically reprehensible". It was argued that labour broking "reduces the human dignity of workers and their families".⁵¹ The trade union federations were also opposed to the agenda for this round of discussions being narrowed to the issue of labour brokers rather than extending the examination to other vulnerable forms of work such as contract work, part-time employees and fixed-term employees.⁵²

As was expected, employer organisations representing labour brokers opposed the abolition of labour brokers. However, what might not have been expected, was their balanced stance regarding the real need for the regulation of the industry and that they reached a memorandum of understanding with the second largest trade union federation, Fedusa, about an agenda regarding the regulation of the labour broking industry.⁵³ In their written submission to the Parliamentary Portfolio Committee on

49 Heita 2010 *New Era* 1 reported that on 25 February 2010 the Labour Commissioner Bro-Mathew Shingudja commented that "[a]s we are speaking, we are about to finalise the regulations".

50 Heita (n 50).

51 NEDLAC (n 5) 3. See also Nactu 2009 <http://api.ning.com>. Note that Fedusa called for a combination of regulation and enforcement of labour broking.

52 See Fourie 2008 *PER* 110–184 for a comprehensive discussion of and international perspective on the vulnerability of non-standard employees.

53 Fedusa 2009 www.fedusa.org.za.

Labour Broking in August of 2009, the Confederation of Associations in the Private Employment Sector (CAPES) pointed out that they accepted the principle of vulnerability of employees placed by labour brokers and that they embraced the ILO notion of "decent work".⁵⁴

CAPES confirmed that labour brokers place more than 500 000 temporary assignees per day across all industries, 32% of which are appointed permanently each year.⁵⁵ Labour brokers also facilitate more than 20 000 learnerships per annum. CAPES argued: regulations that complied with ILO conventions must be implemented; a co-regulatory body should be established with the Department of Labour, trade unions and employer organisations as the constituting parties; labour brokers should be bound by bargaining council agreements in cases in which they are applicable; and proper enforcement and deregistration of non-complying labour brokers should take place through this co-regulatory body. During the deliberations at NEDLAC, organised business also mentioned that they were not completely averse to the idea of joint and several liability of labour brokers and their clients, but that this should be limited to vulnerable employees.⁵⁶

The position adopted by government at NEDLAC has shifted somewhat from the Minister of Labour's original point of view regarding the abolition of labour broking.⁵⁷ Government now suggests that the focus should fall on strict regulation rather than on outright prohibition. Amongst others, government proposes that all labour brokers should be required to register (subject to minimum requirements) and that any contract between an unregistered labour broker and a client would be invalid.⁵⁸ The suggestion continues that, after consultations with the Employment Conditions Commission, the Minister of Labour should be given the regulatory power to prohibit labour broking in specific sectors and to establish a joint governing structure for the industry. Government also supports the principle that labour brokers and clients should be jointly and severally liable for all contractual and legislative obligations. This would include disputes about unfair dismissal and unfair labour practices. In

54 Monage 2009 www.capes.org.za.

55 Monage (n 55) 2.

56 NEDLAC (n 5) 64 Annexure E.

57 Majavu 2008 *The Sowetan* 8.

58 NEDLAC (n 5) 6–8 Annexure A.

addition, employees who are placed by labour brokers should remain employees of such brokers during periods when they are not placed with a client and there should be written contracts of employment between the labour broker and all its workers.

Government suggests that employees placed by labour brokers should fall under general labour legislation that prescribes a six-month period of probation during which employees will not be protected against unfair dismissal provisions. It is also proposed that the EEA be amended to provide effective remedies in respect of unjustified discrimination in terms of conditions of service and wages between permanent workers and those placed by a labour broker. And, finally, workers who are placed by labour brokers should be protected to enable them to gain organisational rights and to engage in collective bargaining with both the labour broker and the client.

5 Conclusion

A number of similarities and differences between Namibia and South Africa are evident. Both countries are members of the ILO; have not adopted the ILO's *Agencies Convention*; and function under a supreme constitution that guarantees the right to freedom of occupation, trade and profession. Added to this, both countries are grappling with the issue of the manner in which to deal with labour broking and are at the point of changing their respective legislative regimes that regulate this issue.

The major difference between the two countries is that whereas one of the countries has elected to ban labour brokers, the other has until now expressly left room for the existence and flourishing of labour broking. The South African courts are not bound by decisions of foreign jurisdictions. However, foreign law may be considered⁵⁹ and, owing to the similarities of some of the constitutional principles of the two countries, nothing would preclude South African courts from considering what has happened in Namibia. Two issues are pertinent in this regard: first, there is a strong likelihood that should labour broking be prohibited in South Africa, the relevant provisions will

59 S 39 *Constitution*.

also be faced with a constitutional challenge based on the protection of the fundamental freedom to trade and occupation; second, even though both countries have not adopted the ILO's *Agencies Convention*, South African courts will probably also be directed (albeit indirectly) by this international institution's guiding principles.⁶⁰ This entails that labour broking be recognised, albeit with strict regulation protecting the vulnerable position of workers placed in the triangular relationship.

What would the result be in South Africa of a ban (albeit unlikely) on labour brokers and a constitutional challenge based on freedom to trade and occupation? I suggest that reliance on this right will be pitted against another constitutional right, namely "everyone's right to fair labour practice".⁶¹ It may be argued, for example, that the right to fair labour practices in South Africa trumps the right to economic freedom and that the ban on labour broking can therefore be justified.

In my view, there is a strong likelihood that the fundamental right to fair labour practices will not prevail against the first mentioned right. The reason I say this, is that the Constitutional Court has accepted that fairness must be applied to both employers and workers.⁶² The court has accepted the responsibility to tweak the scales between employers and workers to establish an appropriate and fair balance. In seeking this 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.

What legislative reforms are we likely to witness in the near future? I not only submit that South African policymakers will be influenced by the Namibian experience and prevailing ILO principles, but also predict that Parliament will be persuaded to introduce stricter regulation of labour broking. This will see the inclusion of requirements on the registration of labour brokers; joint and several liability for the labour broker and the client; the prohibition against discrimination associated with

60 The *Constitution* states that when interpreting the Bill of Rights international law must be considered (n 28).

61 S 23(1) *Constitution*.

62 *National Education Health and Allied Workers Union v University of Cape Town* 2003 ILJ 95 (CC) para 39.

different wages and conditions of service for full-time employees and those placed by labour brokers; and improvements regarding collective bargaining rights for labour brokers' workers. However, it is doubtful whether the suggested inclusion of a probationary period of six months during which workers will not be protected by unfair dismissal provisions will be included in the amendments. The South African *Constitution* entrenches "everyone's" right to fair labour practices,⁶³ which will make it difficult to justify why workers with a short service record should be exempt from protection offered against unfair dismissal.⁶⁴ It is also suggested that strong opposition will be staged against such an amendment by organised labour and that government will have more to lose than to gain by including it in future amendments.

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63 S 23(1).

64 It should be noted that Item 8(1)(j) of Schedule 8 of the LRA provides that a decision-maker may accept "less compelling reasons" when a worker is dismissed during or after the probation period when it considers the fairness of such a dismissal.

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List of abbreviations

BCEA	Basic Conditions of Employment Act
CAPES	Confederation of Associations in the Private Employment Sector
Cosatu	Congress of South African Trade Unions
EEA	Employment Equity Act
Fedusa	Federation of Unions of South Africa
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LaRRI	Labour Resources and Research Institute
LRA	Labour Relations Act
Nactu	National Council of Trade Unions
NEDLAC	National Economic Development Labour Council
NHC	Namibian High Court
NLA	Namibian Labour Act
PER	Potchefstroomse Elektroniese Regsblad (Potchefstroom Electronic Law Journal)
SAPA	South African Press Association
SCA	Supreme Court of Appeal