

**A CRITICAL ANALYSIS OF THE NEW LABOUR ACT NUMBER 11 OF 2007 IN
LIGHT OF THE LAW ON LABOUR BROKERAGE**

THESIS PRESENTED IN FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE
OF MASTER OF LAWS OF THE UNIVERSITY OF NAMIBIA

By: Jabulani Ncube

Student number: 201014025

August 2013

Supervisor –

Professor J Baloro

TABLE OF CONTENTS

ABSTRACT.....	5
ACKNOWLEDGEMENTS.....	7
DECLARATIONS.....	9
ABBREVIATION.....	10
CHAPTER ONE.....	12
1. INTRODUCTION.....	12
1.1 ORIENTATION OF STUDY.....	12
1.2 HISTORICAL BACKGROUND IN NAMIBIA.....	13
1.3 ACCOMMODATION AND LIVING CONDITIONS OF CONTRACT WORKERS.....	17
1.4 OTHER CONDITIONS.....	18
1.5 LABOUR UNREST – THE STRIKE	2020
1.6 THE POST- STRIKE ERA	21
1.7 1990 AND BEYOND.....	22
1.8 THE 1992 LABOUR ACT	23
1.9 LABOUR ACT 15 OF 2004	25
1.10 HISTORICAL CONTEXT OF SECTION 128 OF THE LABOUR ACT 11 OF 2007.....	26
1.11 THE IMPACT OF LABOUR BROKERAGE ON NAMIBIA.....	31
1.12 A BRIEF INTRODUCTION TO OTHER JURISDICTIONS.....	34
1.13 STATEMENT OF THE PROBLEM.....	36
1.14 OBJECTIVES OF THE STUDY.....	38
1.15 SIGNIFICANCE OF STUDY.....	39
1.16 LITERATURE REVIEW.....	39
1.17 METHODOLOGY.....	47
1.19 RESEARCH DESIGN.....	48
CHAPTER TWO.....	49
2. LABOUR BROKERAGE IN RELATION TO THE NAMIBIAN ECONOMY	Error! Bookmark not defined.
2.1 WHAT IS LABOUR BROKERAGE	49
(i) The supervision and control test.....	51

(ii)	The organisation or intergration test.....	52
(iii)	The multiple or dominant impression test.....	52
(iv)	The Economic test.....	53
(v)	The pragmatic approach.....	53
2.2	Exploring the employer & contractor model under labour brokerage.....	54
2.2.1	Contractor service model.....	54
2.3	Labour brokerage definition under International Conventions and the ILO framework.....	56
CHAPTER THREE.....		59
3.	Landmark labour brokerage case:- The African Personnel Services V Government of the Republic of Namibia vis a vis The Labour Act 11 of 2007.....	59
3.1	Purpose of the Act	59
3.2	The abolition of labour brokerage	59
3.3	The High Court proceedings.....	61
3.4	Reaction to the high court judgment.....	68
3.5	The Supreme Court Judgment case number SA 51/2008- decided on 14 December 2009.....	74
3.6	Reaction to Supreme Court Ruling.....	81
3.7	Conventions on labour brokerage vis a vis judgments	88
3.7.1	Convention 181 of 1997.....	90
3.8	Advantages of labour brokerage.....	91
3.9	Disadvantages of labour brokerage – case study	95
3.9.1	Casualisation.....	95
3.9.2	The APS and Etale saga.....	96
CHAPTER FOUR.....		101
4.	THE REGULATION OF LABOUR IN OTHER JURISDICTIONS	101
4.1	South Africa.....	101
4.2	Why Labour brokers must be banned?.....	103
4.3	Labour Amendment Bill	106
4.3.1	The New Clause 198.....	106
4.4	Current legal position on labour brokerage.....	119

4.5	The European Experience	125
4.6	Labour brokerage in the Netherlands.....	13030
4.6.1	The Temporary Agency work Act of 1965.....	131
4.6.2	Employment Placement Act of 1991.....	132
4.6.3	The allocation of employees by Intermediaries Act of 1998 (WADDI).....	133
4.6.4	The Flexibility and Security Act of 1999.....	134
4.6.5	The Civil Code of 1999.....	135
4.7	The United Kingdom	140
4.7.1	The statutory framework in the UK in the Post 2000 Period.....	143
4.7.2	The case law in the UK.....	147
4.8	The Australian Experience	152
4.9	Legislative protection in Australia- Fair Workers Act of 2009	165
4.10	The Zimbabwe Experience	170
CHAPTER FIVE.....		177
5.1	The Namibian Regulations	177
5.2	Reaction to the Regulations.....	182
5.3	The Legal Challenge to the Labour Amendment Act number 2 of 2012	187
CHAPTER SIX.....		206
CONCLUSION.....		206
BIBLIOGRAPHY.....		213

ABSTRACT

Labour brokerage is a term used to describe the relationship that exists between labourers, known as contractors or hired employees and the labour brokerage organizations that employ the labourers. The company to which they provide labour is not their employer. The term therefore refers to the situation in which the labour broker provides clients to render services or perform work for the third party that contracts with the labour broker and in return, the third party rewards the labour broker for the services rendered. The case of *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* 2009 (2) NR 596 (SC) thus sums up the powerful and painful memories of the abusive “contract labour system” which was part of the obnoxious practices inspired by past policies of racial discrimination.

This study thoroughly examined how labour brokerage has polarized the Namibian society as a result of the painful memories it evokes. In light of the Supreme Court’s decision to allow the operation of labour brokerage, albeit within a regulated framework, the study examined in detail the Labour Amendment Act of 2012 enacted on the 1st of August 2012. The regulatory framework is examined by making a comparative analysis of the law on labour brokerage in other jurisdictions. The jurisdictions examined in this study included South Africa, the Netherlands, Australia, the United Kingdom and the Republic of Zimbabwe. The challenges Namibia has faced *vis a vis* each of these jurisdictions in relation to the regulations were critically analyzed.

The study was based on both primary and secondary sources of law which include statutes, conventions, judicial precedent and academic writers. The research found that even though the various jurisdictions including Namibia have faced challenges with the implementation of a

uniform regulatory framework, it has been concluded that permitting a system of regulated labour brokerage rather than an outright ban is the best available option. Most of these countries have adopted regulatory frameworks in their respective jurisdictions in compliance with ILO Convention 181 of 1997. The only exceptions are Zimbabwe, which has an outright ban on labour brokerage, and South Africa, which drafted a Labour Amendment Bill in 2012. It is an inescapable conclusion that the regulatory framework in Namibia which has conferred on the temporary employees a degree of permanency has similarities with the South African legislation. It is evident that the regulations comply with the ILO Convention 181 of 1997. The study concludes that this is a positive development in the jurisprudence on labour brokerage in Namibia as it will curtail the abuses and exploitation of temporary employees which was the major concern of its opponents.

ACKNOWLEDGMENTS

First, I would like to thank the Lord Almighty, the creator of the heavens and earth, the rose of Sharon and the Lily of the valley. Without God and fervent daily prayer this project would have never come to fruition. It is through Christ who strengthens us that he strengthened me to complete this study (Phillipians 4:13).

I would also like to thank my supervisor, Professor J Baloro, who was patient with me as I went through this project. His dedication, commitment, selfless service and wise guidance throughout this project was truly invaluable. As the saying goes “experience is the best teacher”. I also would like to thank my wife, Linda Ncube and my children, Zoe and Jabulani Junior. It was your prayers, support and encouragement that sustained me throughout the research and study. I would like to thank my brother Trevor Ncube for taking his time to edit this thesis. You have been a blessing to me “*mntakamama*”. Special mention goes to Ndahafa Nghatanga for typing the script of this study. You endured my sometimes illegible handwriting but you still managed to manoeuvre and type the manuscript. Despite the pressure of deadlines, you still managed to finalize it and I am indebted to you.

I also salute one of the most profound pillars in my life, a fallen giant and a man of extremely high moral scruples, Samuel Dumisani Siyaya. You were a cut above the rest as you instilled values of diligence, hard work, patience and dedication to any given project. You were a pillar of strength in my life and robbed too soon by death on 1 August 2012.

To all those in the trenches of labour brokerage, those who made this study possible, this is your study. It is my hope that the findings herein will assist all parties involved in the phenomenon of labour brokerage.

DECLARATION

I, Jabulani Ncube, declare that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education.

No part of this thesis may be reproduced, stored in any retrieval system, or transmitted in any form, or by any means (e.g. electronic, mechanical, photocopying, recording or otherwise) without the prior permission of the author, or the University of Namibia on its behalf.

I, Jabulani Ncube, grant the University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which the University of Namibia may deem fit, for any person or institution requiring it for study and research; providing that the University of Namibia shall waive this right if the whole thesis has been or is being published in a manner satisfactory to the University.

.....

Jabulani Ncube

April 2013

ABBREVIATIONS

ABU	Dutch Association of Temporary Workers Agency (in English)
ANC	African National Congress
APS	Africa Personnel Services
ARV	Anti – Retroviral Therapy
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
COPE	Congress of the People
COSATU	Congress of South African Trade Unions
DA	Democratic Alliance
EU	European Union
FES	Fredrich Ebert Stiftung
GDP	Gross Domestic Product
ILO	International Labour Organisation
LARRI	Labour Research Institute
LRA	Labour Relations Act
LZF	Lifestyle Zimbabwe Furnishers
MAWU	Metal and Allied Workers Union
MUN	Mineworkers Union of Namibia
NACTU	National Council of Trade Unions

NAFAU	Namibia Food and Allied Union
NEDLAC	The National Economic Development and Labour Council
NEF	National Employment Federation
NSAEU	Namibia Seamen and Allied Employees Union
NUNW	National Union of Namibian Workers
PAYE	Pay as You Earn
PEPFAR	President's Emergency Plan for Aids Relief
PMTCT	Prevention of Mother to Child Transmission
RWEU	Retail and Wholesale Employees Union
SARS	South African Revenue Service
STAR	Netherlands Tripartite Alliance (in English)
STIPP	Netherlands Pension Scheme (in English)
SWANLA	South West Africa Native Labour Administration
TCL	Tsumeb Corporation Limited
TES	Temporary Employment Services
WRA	Worker's Relations Act

CHAPTER ONE-AN OVERVIEW OF LABOUR BROKERAGE

1. INTRODUCTION

1.1 ORIENTATION OF STUDY

In the case of *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others*,¹ Maritz JA remarked as follows:

“In Namibia, the expression labour brokerage is loaded with substantive and emotive content extending well beyond its ordinary meaning. Considered in its historical context, it evokes powerful and painful memories of the abusive contract labour system which was part of the obnoxious practices inspired by policies of racial discrimination. So regarded it constitutes one of the deeply disturbing and shameful chapters in the book of injustice, indignities and inhumanities suffered by successive colonial and foreign rulers for more than a century before independence.²”

This statement aptly sums up the crux of the historical context of labour brokerage in Namibia. The question whether or not to regulate or ban labour brokerage in Namibia is and has been a controversial issue. The debate refuses to die; thus necessitating this study into the phenomenon of labour brokerage.³

Labour brokerage has long been known as the phenomenon by which labourers, known as contractors, field employees or hired employees are employed by labour brokerage organizations. The company to which they provide labour is not the employer. The term,

¹ 2009 (2) NR 596 (SC).

² *ibid* p 596.

³ The Supreme Court handed down its judgment on 14 December 2009. The bench consisted of Shivute, CJ; Maritz JA, , StrydomAJA, Chomba AJA and Mtambanengwe AJA.

therefore, refers to the scenario in which the labour broker provides labourers or workers to render services or perform work for the third party that contracts with the labour broker and in return the third party rewards the labour broker for the labourers supplied. In light of this definition, a detailed examination of whether the phenomenon of labour brokerage does infringe articles 8 (right to dignity) and 9 (prevention of forced labour) of the Namibian Constitution will be the basis of this study. These two constitutional provisions will be examined *vis a vis* article 21(1) (j) which provides for the right to practice any profession or carry on any business, trade or occupation of one's choice.

1.2 HISTORICAL BACKGROUND OF LABOUR BROKERAGE IN NAMIBIA

When South Africa bore the brunt of apartheid, the repressive apartheid policies were extended to Namibia and as a result, the policy of racism brought with it cheap labour for the white – dominated economy⁴:

In 1925, the South African administration in Namibia organized a conference for the major white employers. It was in 1943 that the notoriously termed South West Africa Native Labour Administration (SWANLA) was founded. SWANLA was a well-known vehicle used to abuse labour law rights. The SWANLA system worked as follows:-

- 1) Employees were classified under four categories namely the A, B, C and D categories.
- 2) Tags were hung around their wrists or necks with their classifications;
- 3) The recruits were placed under authorities that secured work permits to work in officially proclaimed areas.

⁴ Hishongwa, H, (1992), *The contract labour system and its effects on family and social life in Namibia*, Windhoek, Gamsberg, Macmillan at p. 48.

- 4) Where the workers were casual labourers, they were provided with a metal tag which was displayed on the person at all times. It contained the registration number of the individual and the proclaimed area to which he was limited.
- 5) Only employers with labour requisitions with SWANLA were recognized.
- 6) The signed contracts contained provisions which prohibited the labour contractees to leave entitlement for a period of up to two years.⁵ This prohibition was inclusive of sick leave and compassionate leave. Only white employers, more specifically from both Namibia and South Africa, could recruit African labourers.
- 7) The main aim of SWANLA was to thus recruit cheap labourers in different job categories which included hard labour such as railway construction, agriculture and mining at minimal rates.⁶

It must be noted that recruitment of labour and work opportunities for workers from Northern Namibia was completely controlled by SWANLA. Any employer who required labour had to apply to the local magistrate for a permit. Upon being granted permission by the local magistrate, the employer forwarded the permit to SWANLA with a requisition for labour⁷. The type of work needed, duration of work and wages offered were contained in the application. The workers were prohibited from bringing their families with them on contract and families were hardly allowed to visit.⁸ Other regulatory provisions that were in force during the time included the following:-⁹

⁵ See Bauer, G (1998), *Labour and Democracy in Namibia, 1971- 1996* –London, James Currey publishers, p. 22.

⁶ Hishongwa, H, supra @ p. 50.

⁷ Jauch, H, (2000)- *Labour Hire in Namibia: new flexibility or a new form of slavery*- Windhoek, Labour Resource and Research Institute, p. 7.

⁸ Bauer ,G, supra at p. 29.

⁹ Bauer,G, ibid.

- i) A man who succeeded in finding work and had signed a contract was not allowed to break the contract.¹⁰
- ii) Breaking of the regulatory provisions in place made it a crime punishable by imprisonment with or without hard labour¹¹ for anyone who refused to obey or neglect any lawful command from the employer.
- iii) A person would be punished for absencing himself during working hours from the workplace without leave or lawful cause;¹²
- iv) A person would also be punished for carelessly or improperly performing his duties or for neglecting to perform any work when one had a duty to perform such work.¹³
- v) It was further prohibited to enter the service of another employer during the currency of one`s employment or to fail or refuse without lawful cause to commence service at the stipulated time.¹⁴

Moreover, if the employer so desired the judicial officer could in addition-

“make an order directing any native convicted under this regulation, after having satisfied the sentence imposed upon him, to return to work and complete the term of his contract to which shall be added any period lost by reason of desertion, trial proceedings or sentences served in

¹⁰ Bauer, G(Ibid).

¹¹ See Regulations 33 of the Regulations published in Government Notice Number 65 of 1955 as read with section 36 of the Native Administration Proclamation Government Gazette 15 of 1955.

¹² Bauer, G(Ibid).

¹³ Bauer, G(Ibid)

¹⁴ Bauer, G(Ibid)

respect of any convictions for offences under this regulation and if any such native shall fail to comply with such order he shall be guilty of an offence.”¹⁵

Once their contract terminated the contract labourers had to return to their respective reserves as it was a crime not to do so.¹⁶ The contract workers from Ondangwa were transported by South African railways couriers and buses to the SWANLA headquarters in Grootfontein. From there, they were transported by rail or road to their different regions. Depending on their respective employers` needs, the means of transport was imposed upon the employees.

In brief this practice as stated was popularized in the early 1950s when companies decided to utilize labour broker companies for that purpose. In 1972, labour brokerage was abolished after the Oshiwambo strike and replaced by an employment bureau system. Labour brokerage was seen as a system that was oppressive to the employees as their basic rights to joining and forming trade unions were not recognized. The black people mostly affected by labour brokerage could not free themselves from the system.

With this historical background in mind, Section 128¹⁷ of the Labour Act Number 6 of 2007 (hereinafter the Labour Act) was passed to abolish labour brokerage. However, in reversing the abolition of labour brokerage, the Supreme Court in the *Africa Personnel Services v The Government of the Republic of Namibia and 3 others*¹⁸ proffered the following reasons:

(a) That labour brokerage greatly contributed to the flexibility of the labour market.

¹⁵ see Regulations 9(1) of the Regulations published in Government Notice Number 65 of 1955 Government Gazette 15 of 1955.

¹⁶ see the Supreme Court judgment in the case of *Africa Personnel Services (Pty) Ltd vs. Government of the Republic of Namibia and 3 others* 2009 (2) NR 596 (SC).

¹⁷ The section provides as follows:

128 (i) no person may hire, for reward with a view to making that person available to a third party to perform work for the third party.

(ii) Any person contravening this section shall be guilty of an offence.

¹⁸ 2009 (2) NR 596 (SC).

(b) It enhances opportunities for the transition from education to work by workers entering the market.

(c) It has to be properly regulated within the ambit of the Namibian constitution and the Private Employment Agencies Convention 181 of 1997.¹⁹

The Supreme Court's decision will be examined later in the course of this study. Thus, an examination of labour brokerage will entail a detailed discussion of the legal provisions and practices in other countries including Australia, South Africa and Zimbabwe in regulating labour brokerage. The study will examine whether or not such legislative provisions have been effective or have exacerbated the phenomenon of labour brokerage in the jurisdictions referred to.

1.3 LIVING CONDITIONS OF CONTRACT WORKERS

The white employers were responsible for the accommodation needs of the contract workers. The employers made every effort to reduce the cost of labour. The contract workers in working areas lodged in white controlled and guarded compounds or barracks or quarters where ten to fifteen men shared a single room.²⁰ They slept on thin mattresses and blankets which were returned after the contract was over. The blankets were hardly washed and they were lice infested, which resulted in a number of infections which affected the employees. The toilet facilities that the contract workers used differed significantly from those that the white people were provided with. One example is the shoddy toilet facilities at Rossing mine. These were

¹⁹ See the headnote of *Africa Personnel Services (Pty) Ltd vs. Government of the Republic of Namibia and 3 others*. Article 8 of the Private Employment Agencies Convention 181 of 1997 is designated to allow the operation of private employment agencies within the framework of its provisions thus providing for a regulatory framework. Namibia is a signatory to this Convention which had a large bearing on the regulation in Namibia. The Employment Services Act Number 8 of 2011 allows the operation of private employment agencies and the provisions of the Convention constitute a large portion of the Act.

²⁰ see *African Personnel Services V Government of the Republic of Namibia* (Ibid p. 3).

situated in a long building which had no privacy and the ablution facilities were deplorable. The ablution facilities were unhygienic and hardly cleaned with disinfectants.²¹ The compound in Katutura was originally built to cater for 3000 men but the compound was overcrowded and contract workers on different shifts had to share the same rooms. Men who worked night shifts had difficulties securing sleeping facilities during daytime and had nowhere else to sleep.²² Contracts lasted from twelve to eighteen months, but could drag on for up to thirty months. Working hours for contract workers were not fixed. Each recruiting company therefore used its power to exploit the workers as much as possible for their own gain and profit. Sometimes these contract workers had no specific jobs.

1.4 OTHER CONDITIONS

The workers could be ordered to take up different kinds of jobs against their will, and it was usually jobs in which they had little or no experience.²³ The food was of poor quality. Meals were invariably poor, lacking a proper nutritional balanced diet. Workers were mainly given maize porridge, or a small piece of bread and meat. In some cases, workers had no choice of the food they ate regardless of whether or not they paid for it.

The workers remained without food for the entire day in most cases but they were still expected to work tirelessly.²⁴ The workers' wages were likewise appalling. For example, in 1968 a sample survey was conducted of the average wages of the African urban workers. The survey showed that 80% of the workers earned between twenty Rands (R20) and forty nine Rands (R49)

²¹ Hishongwa, H. (1992), *The contract labour system and its effects on family and social life in Namibia*, Windhoek, Gamsberg, Macmillan at p. 52.

²² Hishongwa, H. *supra* n @ p. 64 -65.

²³ see Haidula, S, 2010 *Regulating Labour Hire in Namibia*, UNAM dissertation, Faculty of Law, LLBS (Honours) p. 6.

²⁴ Bauer, G 1998: *Labour And Democracy In Namibia, 1971 – 1996*. London, James Currey publishers, p. 22.

per month, while seven percent earned less than twenty Rands (R20) per month and five percent (5%) earned more than twenty Rands (R20) per month.²⁵

Even though the black workers joined the system out of their own accord, it is prudent to say that it was involuntary as there were not many jobs in South West Africa under the apartheid South African Government. Many of the jobs were reserved according to colour. For example, the Mines, Works and Minerals Regulations of 1968 stipulated that whenever the manager of a mine was “European”, those employed as mine overseer, shift boss, gauger, engineer, surveyor, hoist driver, and bankman also had to be white.²⁶

It is clear that the recruited persons were unfairly treated by their employers due to the system which favoured the employers over employee rights. It became increasingly clear that the system offended the employees’ dignity and was deeply resented by the majority of Namibians who felt that it infringed their rights to collective bargaining and denied them equality of treatment before the law. The contract workers were paid low wages which did not factor in their long working hours and shifts as they were denied opportunities to develop their skills. As a result, they had no entitlement to promotions and opportunities to enhance their careers and their years of experience were not considered.

²⁵ Bauer, G *supra* p. 22).

²⁶ See Section 3(2) of the Mines, Works and Minerals Regulations of 1968.

1.5 LABOUR UNREST – THE STRIKE OF 1972

In 1971 -1972, with discontent simmering as a result of the system that deprived the contract workers of their rights as a result of labour brokerage, the workers held a general strike. This strike is popularly known as the “Oshiwambo strike”²⁷.

The objective of the strike was a demand for the abolition of the entire contract labour system.

The contract workers had a number of demands, but there were five major demands which formed the crux of their grievances. These demands were:-

- (i) The contract labour system had to be abolished. The workers needed to be given the freedom to choose their own employment and to change employment without the interference of the police or the employers and the government;
- (ii) Workers had to be granted the freedom to have their wives and children with them thereby preserving their right to a family;
- (iii) Salaries and wages had to be paid on merit according to work done. Furthermore, wage rates for all job categories needed to be specified.
- (iv) Employees had to be paid a sufficient wage to be able to buy their own food and pay for their own transport.
- (v) Labour officers or employment bureau had to be established throughout the homelands and in every town, with freely advertised vacancies to enable people to look for jobs of their own choice²⁸.

²⁷ See Hishongwa, H.(supra p.77 – 79).

The strike was meant to improve the employees` conditions of services.

1.6 THE POST- STRIKE ERA

After the strike, the South African authorities agreed to accede to some of the workers` demands and undertook to change the system. A new recruitment policy replaced the contract labour recruitment system. It was agreed that SWANLA would be abolished and replaced by an employment bureau under tribal government. The words “employer” and “employee” replaced “master” and “servant”. The classification of workers into various groups was abolished. However, working hours remained fixed and medical examinations remained intact as they were under the old contract labour system. The new system was known as the “employment bureaux system”. The reality, however, was that the employment bureaux system did not replace labour brokerage, *in toto*.

The contract labour system in both its former and latter forms was abhorred and resented by the majority of Namibians. It offended their dignity, infringed on their liberty, denied them equality and brought profound suffering on the workers. It offended their dignity in the sense that the workers had to endure long periods of staying in damp, crowded and lice infested hostels. They were not allowed to visit their families without permission of the employer and a pass from the government. The white employees with similar or lesser skills than the contract workers earned better salaries and enjoyed better working privileges than the contract employees. It further destroyed families. Whilst many Africans boycotted the system outright and others resisted it with industrial action, some took up arms to rid Namibia of this practice, the policies on which it

²⁸ See the Employment Bureau Regulations, 1972 (Proclamation R. 83 of 1972) by the State President of South Africa.

was based and those who had imposed it upon the people.²⁹ The system continued to be the key component in effecting the policies of control, segregation and racial discrimination until 1977 when most of the statutory framework on which it had been based was abolished.³⁰ The abolition was preceded by the United Nations Council for Namibia which declared in a statement on 19 January 1972 that the contract labor system violated the U.N. Declaration of Human Rights.³¹ Prior to its abolition the system left a deep scar on the Namibian labour relations, and very few Namibians were left untouched by it. Similarly the policies and practices of apartheid and racial discrimination which the system mirrored were abhorred.³²

1.7 1990 AND BEYOND

After Namibia's independence in 1990, the labour brokerage system was reintroduced albeit in a disguised form. One of the first and biggest labour brokerage companies was the African Labour Brokers which was based in Walvis Bay. Prior to 1994, Walvis Bay was still administered by apartheid South Africa despite the fact that Namibia was independent. The South Africans employed some workers on a contract basis, while others workers were recruited on a day to day basis depending on requests from labour brokers. Companies made use of labour brokerage seasonally.

Private companies and parastatals³³ such as Rossing Uranium, NamibMills, Telecom Namibia and TransNamib used the system more often.³⁴ However, resistance against the system of labour brokerage had been raised prior to its reintroduction in 1990 and workers as a result protested in

²⁹ Bauer, G 1998: *Labour And Democracy In Namibia, 1971 – 1996*. London, James Currey publishers, p. 22.

³⁰ The General Law Amendment Proclamation, 1977 (Proclamation AG 5 of 1977) by the Administrator-General.

³¹ Swarthmore College, Ovambo Migrant Workers General Strike for Rights, Namibia, 1971-1972 accessed from <http://nvdatabase.swarthmore.edu/content/ovambo-migrant-workers-general-strike-rights-namibia-1971-72> retrieved on 11 May 2014.

³² See the Supreme Court Judgment in *African Personnel Services vs Government of the Republic of Namibia & others* case (supra).

³³ Jauch H, 2010, *Namibia's Labour Hire Debate In Perspective*, Windhoek, Fredrick Ebert Stiffing, p. 7.

³⁴ Jauch, H 2000, *Labour hire in Namibia, new flexibility or a new form of Slavery?* Windhoek, Labour Resource and Research Institute p. 1.

Walvis Bay against the labour brokerage companies. The general sentiment was that labour brokerage was no different from the pre- independence contract labour systems and continued to exploit unskilled workers for minimum remuneration³⁵. Since Namibia's independence, the issue of labour brokerage has been raised a few times, in legislation and regulatory guidelines, up until the 2007 Labour Act. However, no express action had been taken against or in regard to the fundamental flaws that the labour brokerage system had brought.

1.8 THE LABOUR ACT 1992

Namibia's first Labour Act was promulgated in 1992 to, in collaboration with the Constitution of Namibia, govern all labour relations in Namibia and provide an equal opportunity work environment, free from discriminatory practices. The Labour Act 6 of 1992 extensively regulated the relationship between employers and employees, including making provision for basic conditions of employment and procedures to be followed in addressing grievances for both employers and employees. Labour brokerage was not provided for in the Labour Act of 1992. As a result, labour brokerage was not regulated and continued in practice. At the time, the idea was to regulate labour brokerage through a regulatory framework. Proposed guidelines for Labour Hire Employment and Operating Standards were enacted in the year 2000.³⁶ However, this created confusion because labour brokerage creates a three way relationship namely the worker, the broker and the client. The distinction between the employer and employee was, as a result, blurred by this distinction. The broker would provide the client with the worker, but whenever the rights of the worker were infringed, both the broker and the client would proffer compelling reasons on why they were not ultimately the employer.

³⁵ Jauch (ibid p. 3).

³⁶ Botes, A(2013), The History of Labour Hire in Namibia: A lesson for South Africa retrieved from Africa <http://www.saflii.org/za/journals/PER/2013/16.html#sdfootnote42sym> accessed on 11 May 2014.

This was a way of denying ultimate responsibility for the rights of the worker whenever these rights were infringed. In 1999, the Ministry of Labour developed guidelines for labour brokerage employment and operating standards. These guidelines provided for, inter alia, the registration of labour brokerage companies, an obligation to set up training programmes, grievance and disciplinary procedures and records of employees.³⁷

In August 2000, the Ministry of Labour presented an amended set of guidelines for labour brokerage and employment agencies. In terms of these guidelines, employment agencies were required to register with the Labour Commissioner and adhere to the Constitution of the Republic of Namibia Act 1 of 1990, the Labour Act of 1992, the Companies Act 69 of 1973 and any other relevant Namibian legislation.³⁸

These guidelines also set out prescribed minimum wages for unskilled, semi- skilled and skilled workers. They further required employment agencies to design training programmes that would uplift skills for workers employed on a regular basis by such employment agencies.

The guidelines were, however, fraught with glaring shortcomings from their inception. They did not stipulate what constituted a “regular basis”, thus leaving it to the employment broker’s discretion to decide who was eligible for training. The regulations were also vague on the question of minimum conditions of employment and were silent on the permissible fees that labour brokerage companies were allowed to charge.³⁹ Although these guidelines attempted to deal with and regulate the labour brokerage system in Namibia, they failed to address and resolve the fundamental conflict experienced with the system. This fundamental conflict is whether labour brokerage should be abolished or should be allowed to exist, albeit in a regulated manner.

³⁷ Ibid p. 6.

³⁸ Ibid p. 7.

³⁹ See *Africa Personnel Services Pty Ltd vs Government of the Republic of Namibia* (supra) p. 609.

1.9 LABOUR ACT 15 OF 2004

The Labour Act 15 of 2004 was meant to replace the Labour Act Number 6 of 1992. The Act was meant to improve the rights of the employees. It shed more light on the problems faced in the labour brokerage industry and clearly provided acceptable solutions to some of the problems that plagued the industry. Section 126 (1) of the Act defined employment hire services and Section 126 (2) explained the three way employment relationship in labour brokerage. It stated as follows:

“an individual whose services have been procured for, or provided to a client by an employment hire service is the employee of that employment hire service and the employment hire service is that individual’s employer”.

Section 126 (3) provided that the employment hire service and the client would be held jointly and severally liable for any of the contraventions enumerated in the Section.⁴⁰ Section 126 (4) of the Act dealt with the unfair and unreasonable conditions that workers experienced under employment hire agencies. It prohibited employment hire agencies from offering employees conditions which were less favourable than the conditions stipulated in the Act. Section 126 (5) further provided that individuals employed under employment hire agencies were to be regarded as employees irrespective of the irregular periods of employment or when there was no work. Finally, section 126 (6) of the Act contained a penalty clause that imposed a fine not exceeding N\$ 50 000 or imprisonment for a period not exceeding two years or both for an employment hire service that contravened Section 126. Unfortunately, the Labour Act of 2004 never came into effect due to differences of opinion on its implementation between trade unions, employers,

⁴⁰ Jauch (Ibid).

employees and the Government. The proposals in the Act, more particularly with regards to labour brokerage, remained a bone of contention.⁴¹ The Labour Act of 2004 therefore did not repeal the 1992 Act.

1.10 HISTORICAL CONTEXT OF SECTION 128 OF THE LABOUR ACT 11 OF 2007

The Labour Act of 2004 was referred to the stakeholders in the labour industry to explore how labour brokerage could be regulated or banned. The Namibian Government assumed that the labour brokerage system was based on the contract labour system of the 1990s. It therefore argued that a total ban was justified.⁴² As a result, when clause 128 of the Labour Bill of 2007 was introduced for debate in the National Assembly at the Committee stage, it sparked fierce opposition and condemnation across the political sphere.⁴³ The Clause provided that-

“no person may, for reward, employ any person with a view to making that person available to a third party to perform work.”

The Government argued that there were too many similarities between labour brokerage and the contract labour system to allow labour brokerage to continue.⁴⁴ Africa Personnel Services, the largest labour brokerage firm, argued that the sweeping ban imposed by the clause infringed on its right to carry on any trade or business of its choice as protected by Article 21(1)(j) of the Constitution of Namibia.⁴⁵ The Employment Federations stated that the Government was failing to appreciate that labour brokerage, despite of its historical negatives, was regulated by the

⁴¹ Jauch (Ibid).

⁴² Botes, A(2013), The History of Labour Hire in Namibia: A lesson for South Africa retrieved from Africa <http://www.saflii.org/za/journals/PER/2013/16.html#sdfootnote42sym> accessed on 11 May 2014 at p 5.

⁴³ *Africa Personnel Services Pty Ltd vs Government of the Republic of Namibia* supra at p. 609.

⁴⁴ Botes, A(2013) ibid

⁴⁵ Botes, A ibid.

European Union and Australia.⁴⁶ It was a success story in those continents. In the heated debate that followed, the concept of labour brokerage was likened to the oppressive SWANLA system that had existed before independence.⁴⁷ Labour brokerage was likened to the sale of human beings⁴⁸ at a profit by the broker to the user companies. The House was further reminded of how thousands of Namibians had been brought from northern Namibia with tickets around their necks saying they will be sold to another person.⁴⁹ The view was expressed that the attempt to regulate labour brokerage was not dissimilar to attempts made during the slave trade to regulate it and make it a bit humane to the abolitionist. Thus typifying labour brokerage as a form of slavery where human beings were being bought and sold resonates with similar characterizations of the contract labour system.⁵⁰ In the National Assembly debates, one of the members after quoting after Article 63 (2) (h) (i) of the Constitution remarked thus:-

“The National Assembly is constitutionally obliged to remain vigilant and vigorous for the purpose of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have been historically the victims of these pathologies.”⁵¹

Given the racial practices and policies which exacerbated labour brokerage during the pre-independence era, the National Assembly was justified in questioning and scrutinizing the recognition and regulation of labour brokerage in the Labour Bill.

⁴⁶ Botes, A *ibid.*

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ Africa Personnel Services (*supra* p. 610).

⁵⁰ Kawana, A, 2007 June 27 *Parliamentary Hansard*, at p. 22.

⁵¹ *Ibid.* See also Article 63 (2) (i) of the Constitution of Namibia.

During the debate, other objections to labour brokerage were raised. It was noted that Clause 128 of the Bill did not limit the labour brokers' fundamental freedoms protected by Article 21 (i)(j) of the Constitution. This Article protects a fundamental freedom to pursue economic activities that are lawful. The Article does not entrench a fundamental freedom to unfettered economic activities.⁵² Article 21 (i)(j) provides as follows:-

21 (i)(j)- "All persons shall have the right to practice any profession, or carry on any occupation, trade or business."

Dr. Kawana, the Attorney General, also made reference to the Declaration of Philadelphia⁵³ as an important component that he referred to in the National Assembly debate in line with Article 95(i)(d) of the Constitution.⁵⁴ He observed that the Declaration of Philadelphia restated the traditional objectives of the International Labour Organization (ILO) and emphasized mostly the centrality of human rights to social policy. Mr. Kawana further stated that one of the key principles of the Declaration of Philadelphia is that labour is not a commodity.

During the debate Mr. Kawana also recounted a brief history of the Declaration of Philadelphia. He stated that the Declaration was adopted at the 26th session of the International Labour Organization, in Philadelphia, United States of America on 10 May 1944. The Declaration was drafted by the ILO Directors Edward J Phelan and C Wilfred Jenks. Most of the demands of the Declaration were as a result of a partnership of American and Western European labour unions

⁵² See Article 21(i)(j) of the Constitution of Namibia.

⁵³ the Declaration of Philadelphia of 10 May 1944 was drafted by the ILO Director Edward J Phelan and C Wilfred Jenks as a response to labour brokerage expansion during the World War Two. It concerns the aims and purpose of the International Labour Organization in regulating labour brokerage..

⁵⁴ Article 95(i)(d) of the Constitution provides as follows: "the state shall actively promote and maintain the welfare of the people by adopting, inter alia, membership of the International Labour organization and, where possible, adherence to and action in accordance with the International Conventions and recommendations of the ILO".

and the ILO Secretariat.⁵⁵ If there was commoditization of labour, a number of issues would arise mainly:-

- i) Once permanent workers become agency workers under labour brokerage they are no longer protected by the various protective measures accorded to them under the Act.
- ii) The workers are vulnerable to exploitation as they would become units of labour and may be disposed of by agency service providers without any social responsibility.

Relying on the provisions of the Declaration of Philadelphia, the National Assembly sought to preclude the deleterious effects of labour brokerage on attaining the fundamental objectives of the Labour Act.⁵⁶

Thus the National Assembly debates made reference to the desire of the majority of the Namibian people to reject a system that undermines human dignity in favour of corporate profits. Therefore, in light of Namibia's historical experience, outlawing labour brokerage was justifiable on the basis that it is immoral and offends against several standards of decency.⁵⁷ Labour brokerage was considered pernicious in its character. Mr. Kawana further reiterated how Article 23 (i) of the Constitution was meant to prohibit racial discrimination as labour brokerage was a painful reminder of discrimination during the apartheid era.⁵⁸

The upshot of the parliamentary debate was that the Minister of Labour and Social Welfare, Immanuel Ngatjizeko, had to withdraw and later table an amended Clause 128 of the Labour

⁵⁵ Kawana, A, (supra p. 33).

⁵⁶ See *Africa personnel Services* Supreme Court judgment (supra), p. 645.

⁵⁷ See the Answering Affidavit by the Permanent Secretary of the Ministry of Labour and Social Welfare, Ulitala Hiveluah, on p. 648 of the APS judgment (supra).

⁵⁸ Article 23 of the constitution provides as follows: "23(i) *the practice of racial discrimination and the practice and, ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary courts by means of such punishment as Parliament may deem necessary for the purpose of expressing the revulsion of the Namibian people at such practices*".

Bill. The amended clause was later enacted without opposition as section 128 of the Labour Act 11 of 2007 (the Labour Act). In effect, the Clause 128 and the new section 128 did not differ though the Minister referred to it as the new amended section 128. Section 128 stated that:

“(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 and applications for employment without that person becoming a party to the employment relationship that may arise there from.

(3) Any person who contravenes or fails to comply with this 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 five years or to both such fine and imprisonment.

(4) In so far as this section interferes with the fundamental freedoms in Article 21(i)(j) of the Namibian Constitution, it is enacted upon the authority of sub- article 4 of that Article in that it is required in the interest of decency and morality.”

In effect the section banned labour brokerage and thus rendered labour brokerage firms redundant. It also criminalized the practice of labour brokerage and by extension labour brokerage firms and clients that received contract employees. Employees that were outsourced by labour brokerage firms had to seek permanent employment.

1.11 THE IMPACT OF LABOUR BROKERAGE ON NAMIBIA

A study of the impact of labour brokerage on the various sectors of the economy, inter alia, the health and legal sectors in Namibia will be examined in this section. The merits and demerits of labour brokerage will be thoroughly examined objectively with a view to examining the Labour Amendment Number 2 of 2012 that was enacted on 1 August 2012 vis a vis labour brokerage. It is therefore hoped that the outcome of the present study will contribute to finding legally durable solutions for all stakeholders in the labour brokerage debate as the regulations have not resulted in a lasting solution to the debate on labour brokerage.

In 2008, the High Court in the case of *Africa Personnel Services Pty Ltd v Government of Namibia and Others*⁵⁹ held that section 128 of the Labour Act 6 of 2007 was constitutional. The African Personnel Services (APS) argued that it represented two thirds of Namibia's labour brokerage sector. At the core of Africa Personnel Service's (APS) business was labour brokerage. Outlawing labour brokerage meant the entire company would be liquidated as its core business would be illegal. The company further argued that in accordance with the Namibian Constitution, it should be allowed to pursue any trade or business in line with Article 21 of the Constitution of Namibia. The Government argued that labour brokerage was inhumane, notorious and a reminder of the South West African Native Labour Association (SWANLA) system. The High Court upheld the Government's argument and confirmed the banning of labour brokerage. It meant in a nutshell that it was illegal to engage or conduct business as a labour broker. The underlying principle enunciated by the court was that labour brokerage was *contra bonis mores* as it offended decency and morality, thus justifying its criminalization.

⁵⁹ High Court unreported judgment A 4/2008.

The reaction to its banning was mixed. The unions at the time hailed the High Court judgment as a positive step towards what they termed the eradication of an anachronistic form of slavery. However labour brokerage firms were antagonistic to the ruling and the negative repercussions it posed to their operations.

The Minister of Health, Dr Richard Kamwi, held talks with the then Minister of Labour, Mr Immanuel Ngatjizeko, labour brokerage companies and the Prime Minister Mr Nahas Angula to discuss a blue print on how to avert a catastrophe that would arise as a result of the laying off of health workers employed through the recruitment agencies which operate as labour brokers. The Ministry of Health was the most affected as labour brokerage agencies had recruited doctors from a number of countries including Nigeria, Tanzania, Kenya, South Africa, Malawi, Zambia and Zimbabwe.⁶⁰

The persons mostly affected were staff funded by organizations such as the Global Fund Programme, United States President's Emergency Plan for Aids Relief (PEPFAR) and Anti-Retroviral Therapy (ARV) and Prevention of Mother To Child Transmission (PMTCT).⁶¹ The *Namibian* newspaper at the time reported that the banning of labour brokerage would lead to the redundancy of 10000 to 16000 workers who risked losing their jobs. The umbrella National Union of Namibian Workers (NUNW) however expressed gratitude at the demise of labour brokerage.⁶²

When it was clear that there would be no breakthrough in the discussions involving the various stakeholders, the labour brokerage agencies launched an appeal in the Supreme Court. This

⁶⁰ Maletzky, C. "Labour hire Ban Sparks Health crisis" *Namibian Newspaper*, Jan. 2,2009 p. 2.

⁶¹ Ministry of health statistics obtained from their archives, 12 March 2009, published and retrieved from www.eservice.net/ministry of health and accessed on 12 May 2012.

⁶² Maletzky C. "Labour hire breeds mixed reactions" *Namibian Newspaper*, February 2, 2009, p. 2

culminated in the decision to overturn the ruling by the High Court. The Supreme Court judgment in the case of *Africa Personnel Services v The Government of the Republic and 3 Others*⁶³ clearly highlighted that a regulatory framework was of importance in striking a balance to mitigate the potential problems labour brokerage might pose.

When the labour brokerage regulations were promulgated on the 1st of August 2012, only four companies had informed the labour commissioner of their desire to retrench employees.⁶⁴

According to Bro-Matthews Shinguadja, the Labour Commissioner, the list of employees to be retrenched included “20 workers from EduLetu, 14 from Africa Personnel Services, and not more than ten each from two other labour brokers.”⁶⁵ Those who would be retrenched were mostly office managers and not casual workers.

The Labour Commissioner further advised companies to follow the law on retrenchments. APS owner Ranga Haikali⁶⁶ also stated that 7 000 of the labour brokerage industry’s more than 10 000 casual workers would be left jobless after the implementation of the new law. The Minister of labour, Immanuel Ngatjizeko said;

“Government and parliament have made a policy choice in favour of decent work and greater protection of employees. Although some dislocation of temporary employees may result...their services will still be required by Namibian employers through direct hire or through private employment agencies...this will result in the reduction of employer discriminatory practices.”⁶⁷

⁶³ 2009(2)NR 596(SC)

⁶⁴ Duddy, J M , “No evidence of ‘massive’ casual layoffs”, *The Namibian*, August 15, p. 3.

⁶⁵ (ibid: p. 3).

⁶⁶ (ibid: p. 3).

⁶⁷ Duddy, J M, “APS drops urgent interdict on labour hire”, *The Namibian*, August 14, p. 3.

1.12 A BRIEF INTRODUCTION TO THE LAW AND PRACTICE OF OTHER JURISDICTIONS

It is useful to note in brief how various jurisdictions have dealt with labour brokerage. Two landmark decisions in Australia set the tone for regulating the controversial policy of labour brokerage in that country. The Australian example in addressing these problems is persuasive. The labour unions in the year 2000⁶⁸ submitted a draft paper to the Ministry of Labour in that country with the view of improving its framework and modus operandi, thus culminating in the 14 point plan⁶⁹ which is the basis of regulating labour brokerage in Australia. In the case of *Drake Personnel Africa Ltd v Work Cover Authority (Insp. Ching)*⁷⁰ the New South Wales Industrial Commission held that the threat to health, safety and welfare of employees rested on both the employers and labour brokerage firms. They all had an obligation to ensure that employees are not exposed to conditions which would render it unsafe to work. Such a principle is the standard by which labour brokerage firms are measured in ensuring that the welfare of employees are catered for. In *Labour Cooperative Limited v Work Cover Authority of New South Wales (Inspector Robins)*⁷¹ a 14 point plan on the regulation of labour brokerage agencies was drawn up as a way of ensuring that a positive and proactive approach was implemented in the field of labour brokerage.

Such a framework saw an increase in labour brokerage prosecutions as a form of regulation. The most successful prosecutions were against directors of labour brokerage firms who failed to prevent agencies from contravening their general duty to their employees.⁷² In South Africa, the debate on labour brokerage has a different dimension. It is termed Temporary Employment

⁶⁸ Guy F. (2000) "The Labour hire phenomenon", published on www.labour.net.au/news/426.htm retrieved on 12 October 2011.

⁶⁹ See *Labour cooperative Limited v Work Cover Authority of New South Wales (Inspector Robins)* (2003) 121 IR 78.

⁷⁰ (1999) 90 IR 432.

⁷¹ (2003) 121 IR 78, 84 – 85.

⁷² *Inspector Sharpin v Concrete Civil (Pty) Ltd and Inspector Sharpin v Smith* (2004) NSWLR Comm. 173.

Services. Section 198 of the South African Labour Relations Act 66 of 1995 defines Temporary Employment Services as follows:

- (i) “in this section "temporary employment service" means 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.”

The South African provision recognizes the labour broker as the employer, not the client. The framework encapsulated by the Australian and South African examples is based on the International Labour Organization (ILO) standards on free market policies firmly entrenched in constitutional rights to freedom of engaging in employment of one’s choice.

The Basic Conditions of Employment Act 75 of 1997 of South Africa further provides a definition of labour brokerage.

Section 82 of the Act provides as follows-

- “(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.”

Drawing comparisons with the South African legislative provisions, the African Personnel Services, which instituted proceedings in the High Court of Namibia appealed to the Supreme Court. The Appeal culminated in the Supreme Court decision allowing labour brokerage albeit in a regulated manner.⁷³

1.13. STATEMENT OF THE PROBLEM

Namibia is polarized by the concept of labour brokerage, with a number of schools of thought emerging on the merits and demerits of labour brokerage and the challenges that other countries have with labour brokerage. The ruling by the Supreme Court in the case of Africa Personnel Services (Pty) Ltd v The Government of the Republic of Namibia and Others⁷⁴ allowed labour brokerage to operate within a regulatory framework. This statutory regulatory framework was enacted on the 1st of August 2012 as the Labour Amendment Act of 2012.

The statutory framework which was introduced in Namibia balances the need to address the dearth of skilled labourers vis a vis the negative perceptions labour brokerage generates in light of its historical context. The regulatory framework will be discussed in detail in this research. There are concerns that the employees’ rights were not catered for as they are not involved in the mainstream negotiation for salaries or wages or improved conditions of service. There were genuine fears that labour brokerage agencies provide “scab labour” as substitutes for those on

⁷³ Africa Personnel Services (Pty) Ltd v The Government of the Republic of Namibia and Others 2009(2) NR 596 (SC)

⁷⁴ 2009(2) NR 596 (SC).

strike thus undermining the right to undertake industrial action. However, the regulatory framework in a nutshell equates the status of employees of labour brokers with permanent employees at a firm.

This study seeks to investigate whether labour brokerage can be adequately regulated by legislation. It will further seek to explore whether the Namibian Constitution and Labour legislation have adequate provisions which protect workers employed by labour brokerage firms.

In addition, provisions of ILO Convention Number 87 of 1948 on Freedom of Association, ILO Convention 98 of 1976 on International Labour Standards all of which have a bearing on labour brokerage will be examined as Namibia has ratified these Conventions.⁷⁵ Article 2 of the Forced Labour Convention of 1930 impliedly refers to labour brokerage as a form of forced or compulsory labour because the seconding of employees to firms through a third party is normally done to avert a crisis of skills. This may be construed as forced labour as the client's bargaining rights are compromised. However, Article 2 of the International Labour Organisation's (ILO) Convention 87 of 1948 clearly provides for a right to join an organization of one's choice without prior authorization. This study will analyze these provisions in detail. Another issue which will be discussed is whether Namibia's arguments for abolishing and criminalizing labour brokerage were not in contravention of the ILO instruments it ratified. Furthermore, the study would identify the problems labour brokerage has created and whether such problems outweigh the advantages it has brought to most sectors of the economy which experienced a dearth in skilled work force.

⁷⁵ Published on www.op.gov.na/decade-peace/mol.htm accessed on 26 March 2010.

1.14 OBJECTIVES OF THE STUDY

This study seeks to:

- (a) Analyse and establish the extent to which labour brokerage companies have penetrated the Namibian labour market.
- (b) Establish the effects of the operations of labour brokerage companies on working conditions and collective bargaining.
- (c) Consider whether the historical legal framework on labour brokerage justifies the mixed reactions it has received in Namibia from all spectrums of the society.
- (d) Examine the impact labour brokerage has had on the economy and whether it has addressed the shortage of skilled labour or worsened it.
- (e) Assess the prospects of reform on labour brokerage and whether the existing regulatory framework is suitable in light of regional and international trends on the subject.

In view of the above mentioned objectives, the questions for the present study may be summarized as follows:-

- 1) Does the unbanning of labour brokerage in Namibia and the regulatory framework in place address the political and social misgivings on the labour brokerage phenomenon? and
- 2) To what extent should a proposed regulatory framework on labour brokerage conform with global and regional trends?

1.15 SIGNIFICANCE OF STUDY

It is trite that the Supreme Court in the case of *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia*⁷⁶ held that labour brokerage is constitutional albeit with in a regulated structure. The present study will contribute towards finding durable solutions for those employees whose lives are intertwined with labour brokerage. This study will advocate for the relevance of labour brokerage in Namibia which is in dire need of skilled labour in certain specialized fields like the health and construction sector.

It should further be highlighted that this study is a pioneering study in Namibia to enable a broader understanding of the law on labour brokerage because there have not been any studies of any significance in Namibia. Fritz Nghishililwa⁷⁷ has written an article on the regulatory framework of labour brokerage before the enactment of the Labour Amendment Act number 2 of 2012 which ushered in the Regulations. It is thus the aim of this study to assist broadly in the contribution of debate on this issue and to make recommendations that could be adopted in the form of amendments to the regulatory legislation. Case studies from other jurisdictions like Zimbabwe, the Republic of South Africa, Australia, the Netherlands and England will be used comparatively in helping to develop a regulatory framework for Namibia.

1.16 LITERATURE REVIEW

It is important to note that the prohibition of labour brokerage was based on the argument that the practice was *contra bonos mores* because it offended public decency and morality. Fritz

⁷⁶ 2009(2) NR 596.

⁷⁷ Nghishililwa, F, (2009), "The Banning of Labour Hire in Namibia – How realistic is it-?" *Namibia Law Journal* 1 (3) p. 89.

Nghishililwa⁷⁸ in his article points out that certain conduct is a crime because the law pronounces it to be so. The medium of the criminal law should determine the particular type of conduct which is obnoxious and ought to be repressed. In the book *Principles of Criminal Law*, Burchell⁷⁹ defines a crime as: - “any conduct which is defined by the law to be a crime for which punishment is prescribed.”

Nghishililwa concludes that there is no criminal code to justify criminalizing labour brokerage. The Labour Resources and Research Institute conducted a study in 2006 for the Ministry of Labour and supports the view by Nghishililwa. The report,⁸⁰ though criticizing the exploitative nature of the labour brokerage system, acknowledged that the system offers many advantages to client companies. The institute pointed out the following:

“Outlawing labour brokerage while allowing other forms of outsourcing to continue might thus not solve the problem. Instead, the general practice of outsourcing would have to be severely limited by placing restrictions on companies. This would certainly be vehemently opposed by the private sector and given Namibia’s pronouncements in favour of free market policies it is unlikely that the Namibian government would be prepared to take such a step.”⁸¹

The report thus proposes strict regulations for labour brokerage and states that separate legal instruments should be enacted to govern and regulate labour brokerage. The report thus proposes the following regulations:

- i) A licensing regime for labour brokerage companies;

⁷⁸ Nghishililwa, F, (2009), “The Banning of Labour Hire in Namibia – How realistic is it-?” *Namibia Law Journal* 1 (3) p. 89.

⁷⁹ Burchell, J 2005, *Principles of Criminal Law* (Third Edition) Cape Town, Juta and company Ltd, p. 58.

⁸⁰ LARRI, Labour Resources And Research Institute, 2006- *Labour hire in Namibia current practice and effects*. Windhoek (LRRL, p. 72).

⁸¹ Labour Resources and Research Institute report (supra: 15).

- ii) Compulsory licence fees;
- iii) The specification of responsibilities and liabilities of labour brokers and client companies towards their workers, especially with regard to issues of occupational health and safety and retrenchments;
- iv) Trade unions should have a specific role in negotiating terms on behalf of employees.

The *Entrepreneur magazine* in an article that was published on 5 May 2010 examines the South African legislation being implemented to regulate labour brokerage.⁸² The article noted that the trade union movement in South Africa has launched a powerful attack on what they term “slave labour” demanding that labour brokerage be banned outright. The labour unions view labour brokerage, subcontracting, casual labour, seasonal work, part- time work and fixed term employment as barbaric because of the ill-treatment of employees.⁸³

The Government of South Africa does not favour outright banning but does agree that the employees’ basic rights are not protected under the labour brokerage system. On the 7th of March 2012,⁸⁴ tens of thousands of people participated in a strike which was organized by the Congress of South African Trade Unions (COSATU).⁸⁵ The strike was against e-tolling and labour brokerage. In a statement COSATU congratulated all those who participated in the strike.

Part of the statement reads:-

“...a one day COSATU strike will not be enough. We call labour brokers to release all their

⁸² *Entrepreneur magazine* (2010, May 5), “How new Legislation affects Labour Brokers and Contractors”.accessed from www.entrepreneurmag.com.za/advice /staff/labour -complexity/how-new legislation retrieved, on 29 February 2012.

⁸³ Supra p. 2

⁸⁴ Mutasa, H. (2012, March 7), *Thousands march as South Africa strikes*, accessed from www.aljazeera.com/news/africa/2012/03/201237961752372.html and retrieved on 14 March 2012.

⁸⁵ See the statement by *The Congress Of South African Trade Unions* released on 8 March 2012, accessed from www.cosatu.org.za/show.php?id=5923 and retrieved on 10 March 2012.

employees to the employment of a real company.⁸⁶

In another statement released by COSATU on 5 March 2012,⁸⁷ the following is stated in opposition to labour brokerage.....

“.....we have always stated that we will only rest on this matter when there is a total ban of labour brokers, as we believe that they are nothing but another form of modern day slavery and sophisticated system of human trafficking. It remains our contending view that labour brokers are far from being part of the decent work agenda. In fact they are the worst and most ruthless form of human exploitation.”⁸⁸

COSATU further contends that workers are reduced to commodities, hired out to companies like a sack of potatoes.⁸⁹ These workers cannot form a trade union and exercise their constitutional rights to organize, bargain and strike.

The root of the employer and employee relationship in relation to labour brokerage in Namibia can be traced back to Roman law. According to Collins Parker⁹⁰ Roman law recognized three types of employment or contracts of service. These were:

- 1) The letting and hiring of a specific thing for monetary reward, also known as *locatio conductio rei*: Roman legal and political thought recognized the institution of slavery and regarded a slave formed the thing and the master of the slave could lend the slave to another person.⁹¹ This is where labour brokerage obtained its controversial tendencies.

⁸⁶ (Ibid).

⁸⁷ See statement by COSATU, 5 March 2012, accessed at www.cosatu.za/show.php?id=5909 and retrieved on 14 March 2012.

⁸⁸ *ibid*.

⁸⁹ See the COSATU statement released on 1 March 2012 after the COSATU Central Executive Committee meeting held from 27- 29 February 2012 accessed at www.cosatu.org.za/show.php?id=5889 and retrieved on 15 March 2012..

⁹⁰ Parker, C, (2012), *Labour Law in Namibia*, Windhoek, UNAM press, John Meinert printers, p. 2.

⁹¹ Parker, C, (Ibid: p. 2), see also *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A), @56A.

- 2) The second type was the modern day independent contractor known as the *locatio conductio operas faciendi*.⁹² This equates with labour brokerage. This provided for a consensual contract in which the workman was the employee who undertook to perform a particular piece of work or job for the employer (lessor) in consideration for fixed money payments. A particular piece of work has to be given in return for monetary payment.
- 3) The third type dealt with the letting and hiring of personal service in return for a monetary return, known as the *locatio conductio operum*.⁹³

The difference between the third and second component is significant. The second component dealt with the product whilst the third states that labour brokerage firms are not job creators and they contribute very little to Namibia's development because they undermine attempts at creating decent work. Jauch⁹⁴ further gives interesting statistics on how workers are exploited and how unemployment is factored in as an advantage. Most labour brokerage workers earn N\$3- 6 per hour and in some cases wages as low as N\$2 per hour are paid. Labour brokerage workers work 37 to 46 hours per week and overtime is not performed on a voluntary basis as workers are forced to do so by managers and supervisors.⁹⁵ Labour brokerage firms earn a substantial part (15- 55%) of the workers' hourly wage rates as their fees. In some instances, permanent workers were retrenched and replaced by labour brokerage workers.

Professor Van Eck⁹⁶ in his 2010 article critiques section 198 (1) of the South African Labour Relations Act 66 of 1995. The South African position refers to labour brokerage as temporary

⁹² Parker, C. (Ibid: p. 3).

⁹³ Parker, C (Ibid: p. 3).

⁹⁴ Jauch, H (Ibid: p. 4).

⁹⁵ Jauch, H. (Supra p. 31).

⁹⁶ Van Eck, Stefan, Temporary Employment Services (Labour Brokers) in South Africa and Namibia, *PER/PELJ*, 2010 (13) p. 400.

employment services. He states that the section establishes a legal fiction by making the labour broker the employer of the person whose services have been so acquired and the worker is thus an employee of the labour broker. The clients are wrongfully deprived of all employer – employee responsibilities.⁹⁷ He notes that in the last Labour Relations Act, both the temporary employment service and the client were jointly and severally liable for unfair dismissals. Such joint liability though included in the earlier drafts of the current South African Labour Relations Act, was not included in the final version of the Act.⁹⁸ He further decries the fact that the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court do not have jurisdiction to consider disputes in respect of unfair dismissal and unfair labour practice disputes between the worker and client.⁹⁹ The termination of the commercial contract with the labour broker does not constitute dismissal in terms of South African jurisprudence.¹⁰⁰ The author further decries that Namibia is not a signatory to the ILO's Private Employment Agencies Convention.¹⁰¹ Noting that the issue of labour brokerage amongst the authors brings divergent views, it is important to note that Namibia is part of the global market place in which labour brokerage is widely practiced. Van Eck¹⁰² lauds the Supreme Court decision in the *Africa Personnel Services*¹⁰³ case for protecting the right to free economic activity and striking a balance between the right to freedom of economic activity and the protection of workers' rights. In an article that appeared in the *New Era Newspaper* of Namibia on 25 February 2010,¹⁰⁴ the Labour Commissioner indicated that new labour brokerage regulations were complete. The regulations enforce equal pay and benefits for labour brokerage employees and permanent

⁹⁷ Ibid at p 400.

⁹⁸ Ibid at p 400.

⁹⁹ Ibid at page 400. See also *Vilane v Sita (Pty) Ltd* 2008 BLLR 486 (CCMA).

¹⁰⁰ In *Sindane v Prestige Cleaning Services* 2009 BLLR 1249 (LC), the Labour Court of South Africa confirmed that position.

¹⁰¹ ILO Convention 181 of 1997.

¹⁰² Van Eck (supra p. 407).

¹⁰³ 2009 (2) NR 546 (SC)

¹⁰⁴ Heitu, D, (2010, February 25) *New Labour Hire Regulations near completion*, accessed on www.newera.com.na/articles/31901/newlabourhireregulations, on 14 March 2010.

employees. Such employees are entitled to written contracts of employment signed by both the labour broker and the client.¹⁰⁵ The regulations will be discussed in detail below.

Laplagne et al¹⁰⁶ observe that changes in the industrial relations environment and practices by firms had contributed to an increase in the number of labour brokerage firms. They also note that, in addition to these changes in the labour environment and practice, widespread technological changes and increased pressures on firms have necessitated the use of labour brokerage.¹⁰⁷

The International Labour Organization has a variety of Conventions on the subject. The majority of literature on this topic is based on the historical and modern trends of labour brokerage. These Conventions include Convention 87 of 1948 on Freedom of Association, Convention 98 of 1976 on International Labour Standards and the Forced Labour Convention of 1930 will be explored in more detail particularly the provisions that deal with labour brokerage.

Comparatively, the judgments handed down by both the High Court and Supreme Court of appeal will be examined closely as they form the basis and foundation of this study.

The *Africa Personnel Services v The Government of the Republic of Namibia and 3 others*¹⁰⁸ judgment in the High Court upheld section 128 of the Labour Act on the basis that it has no legal basis in the Namibian common law. On the other hand, the Supreme Court closely looked at the presumption of constitutionality in construing the words 'employees' and 'independent contractors' *vis a vis* Article 21 of the Constitution of Namibia. It construed the interpretation of

¹⁰⁵ *ibid.*

¹⁰⁶ Laplagne, P. M, Colver M and Fry, T,(2005), *The growth of labour hire in Austria*, "Productivity Commissioner Staff Working Paper, February" p. 33.

¹⁰⁷ *Ibid.*

¹⁰⁸) *African Personnel Services V Government of Namibia and 3 others unreported judgment of the High Court Case Number A4/2008* delivered on 1 December 2008.

labour brokerage as provided for under Section 128 as overboard, unreasonable and deserving to be struck out.¹⁰⁹

The Supreme Court further found that prohibiting a particular trade or business does not amount to regulation of that trade or business as it precludes that trade or business from being carried out.¹¹⁰

The article by Fritz Nghishililwa examines whether or not the initial decision by the High court in banning labour brokerage was justified. The following is stated in his Article:

“The first option was to follow the ILO stance by not banning the labour brokerage industry, but rather to suggest stricter regulations. Other countries have done the same. Thus to interpret Article 21 (i)(j) in a purposive, broad and generous manner so as to include the protection of the rights of all the parties to the labour brokerage relationship was crucial if the court was to arrive at an objective analysis of the issues raised in order to make the correct finding.”¹¹¹

The findings by Nghishililwa are in the researcher's view the correct approach in assessing the situation in Namibia. The regulatory approach of criminalizing labour brokerage will be examined. The relationship between the three parties – employee, labour brokerage agency and the client- is paramount in the review. Grogan¹¹² states that the temporary employment service agency is the employer subject to an exception that an independent contractor is not an employee of the labour brokerage firm. This will be examined in light of the decision of the Labour Court

¹⁰⁹ Ibid at p 56.

¹¹⁰ p.612 of the Supreme Court judgment.

¹¹¹ Nghishiliwa, F, (2009), “The Banning of Labour Hire in Namibia – How realistic is it?” Namibia Law Journal 1 (3) p. 89

¹¹² Grogan J, (2005) *Workplace Law*, 8th Edition, Cape Town, Juta and Company Limited p. 27.

of South Africa in the case of *LAD Brokers v Mandla*.¹¹³ In that case it was held that the client and labour brokerage firm are jointly and severally liable if a labour brokerage firm contravenes a binding collective agreement or arbitration award. This is a positive step in setting checks and balances for the proper regulation of labour brokerage firms. Helga Landis and Lessley Grosset¹¹⁴ examine why labour brokerage agencies are necessary. The learned authors argue that labour brokerage firms should, however, be held accountable for advancing the basic conditions of employment of their clients. Thompson and Benjamin¹¹⁵ state that labour brokerage is one of the fundamental rights not expressly mentioned in the South African constitution under its Bill of Rights. The study will buttress this view in light of the International Labour Conventions and persuasive legislation in other jurisdictions like Australia, South Africa and Zimbabwe that have successfully regulated it.

1.17. METHODOLOGY

A large part for this research will be conducted through literature investigation in order to ascertain the concept of labour brokerage and its purpose within Namibia as well as what the concept entails in other countries. Desktop research will be utilized to review the contemporary perceptions regarding labour brokerage and its existence in Namibia. Further research will include a review of Namibian legislation regarding labour brokerage as well as legislation from other jurisdictions on the topic. This study will analyze in detail both the High Court and Supreme Court judgments in the *African Personnel Services* case.

¹¹³ (2001) 22 ILJ 1813 (LAC).

¹¹⁴ Landis, H, Grosset, L, (2003) *Employment and the Law – A Practical Guide for the Workplace*, Cape Town, Juta and Company, p. 51.

¹¹⁵ Thompson C, and Benjamin R, 2003 - *South African Labour Law*, Juta and Company Limited, 2003, p. 1 – 4.

1.19 RESEARCH DESIGN

Qualitative research based on major sources of law will be used. The major sources of law will include writers both published and unpublished, the Labour Act number 6 of 2007, judicial precedent and the International Labour Organization Conventions. Journals as well as statutes and other sources of law from the Republic of South Africa, Australia and Zimbabwe and other jurisdictions relevant to the study on labour brokerage will also be referred to.

CHAPTER 2

LABOUR BROKERAGE IN RELATION TO THE NAMIBIAN ECONOMY

The introductory chapter proffered a definition of labour brokerage albeit as a brief definition. At the core of defining labour brokerage is understanding the relationship between the employer and employee. Parker¹¹⁶ examines the relationship between the employee and employer. The employer- employee relationship is traced to the *locatio conductio rei*, which connotes the letting and hiring of a “thing” or “slave” because employees like slaves did not have recognizable rights. The employer – employee relationship creates certain rights, obligations and liabilities under the law.¹¹⁷ The study will explore whether or not labour brokerage conforms to the definition of the employer – employee relationship.

2.1 WHAT IS LABOUR BROKERAGE

Labour brokerage can be defined as an arrangement “whereby a labour brokerage company or agency provides an individual worker to a client or host with the labour brokerage company being ultimately responsible for the worker’s remuneration.”¹¹⁸ The client companies pay remuneration for the labour to the labour brokerage company. Their relationship is known as a three way tripartite relationship namely between the employee, labour brokerage company and the client. Dr Richard Hall¹¹⁹ observes that the essential quality is the splitting of contractual and control relationships. The worker works at the site and under the practical day to day direction of the client company; the worker is paid by the labour brokerage firm and has a direct contractual or employment relationship with them. The client firm pays a contract fee to the

¹¹⁶ Parker, C Labour Law in Namibia, Windhoek, UNAM press, John Meinert printers, p. 2.

¹¹⁷(ibid). See also the Swaziland case of *Sibongile Nxumalo and others v Attorney General* CA 25/96, 28/96, 29/96, 30/96 (Consolidated) in which the court on p15 of the Cyclostyled Judgment stated the following, “Briefly speaking, labour employment is to be understood as the common law of master and servant as expanded and otherwise modified by industrial legislation.”.

¹¹⁸ Charles, P, (2004), “Labour Hire: The New Industrial Law Frontier,” *Law Institute Journal*, 76, (6) p. 64.

¹¹⁹ See Hall, R. *Labour Hire In Australia: Motivation, Dynamics and Prospects*”, p3, Working paper 76 dated April 2002, University of Sydney.

labour brokerage firm for the provision of that labour and thus also has a contractual relationship with the labour brokerage firm. It is important to note that labour brokerage in Namibia is predominantly the only form of contracting labour through a third party.¹²⁰ There are two forms of subcontracting namely job contracting and labour only contracting. Labour only contracting deals with the supplying of labour, whilst the former deals with the supply of goods and services. As stated above, the question remains whether labour brokerage is a form of employment particularly in the light of the common law. A contract of employment has also been defined as an arrangement in terms of which one party (the employee) agrees to make his personal services available to the other party (the employer) under the latter's supervision and authority in return for remuneration.¹²¹ If one of these elements is absent, that is:-

- (a) an agreement to make personal services available
- (b) remuneration
- (c) subordination,
- (d) two parties

then the relationship is no longer that of employer and employee, but may for example be a relationship of agency, mandate or at most a partnership.¹²² It was for this reason that the High Court of Namibia decided that labour brokerage has no legal basis in Namibian jurisprudence.¹²³ However, the Supreme Court digressed from the High Court reasoning. It concluded that because labour brokerage does not fit the typical mould of a bilateral contract of service described in Roman law or Roman Dutch law it does not mean that it is not lawful as times are

¹²⁰ Rycroft A and Jordan B. (1991), *A Guide to South African Labour Law*, Cape Town, Juta and company p. 35. Also see section 1 of the repealed Namibia Labour Act number 6 of 1992 and the current section 11 of the Labour Act 11 of 2007.

¹²¹ Du Plessis, JV, 1994 *A Practical Guide To Labour Law*, Pretoria: Digma publications, p. 8.

¹²² *African Personnel Services vs Government of the Republic of Namibia* unreported case Number A 4/2008 p 17.

¹²³ *African Personnel Services vs Government of the Republic of Namibia* High Court unreported case number A 4/2008 p 19.

changing.¹²⁴ The definition of an employer- employee relationship has to be determined in light of the highly complex and technology in the industry which has evolved over time. The following statement by Parker J¹²⁵ is persuasive in determining the fact that the modern- day definition of an employee in relation to the employer cannot remain as rigid as it was in the past. Parker J states as follows:

“It need hardly be said that while the definition of the employee in labour law has been enigmatic at times, in most cases, it is not difficult to identify the employee. However, because employment practices have changed considerably over the years and because Government, commerce and industry have become highly complex and technical requiring specialist expertise, problems do at times arise in identifying the modern- day employee ...”¹²⁶

There are five common law tests that are applied in identifying an employer – employee relationship and they will be examined in brief below.

(i) The supervision and control test

As the name suggests in simple terms the test is based on the element of control exercised by the employer over the employee.¹²⁷ The control is the right to control *Dejure* as opposed to *defacto* control. The higher the degree of supervision and control that the alleged employer (or master) exercises, the stronger the indication that such a person is an employee (servant).¹²⁸

In the case of *Yewen vs Noakes*,¹²⁹ the court stated that, “a servant is a person subject to the command of his master as to the manner in which he shall do his work’.¹³⁰

¹²⁴ Africa Personnel Services v Government of the Republic of Namibia and Others 2009(2) NR 59 6 at p. 636).

¹²⁵ See Parker, C ,supra at p. 5.

¹²⁶ Ibid at p. 5.

¹²⁷ Ibid at p.5.

¹²⁸ Ibid at p.5.

In *Smit v Workmen's Compensation Commissioner*,¹³¹ Joubert JA summarised the model to include inter alia, the right of an employer to decide what work is to be done by the employee. It further determines the manner in which it has to be done by him, the means to be employed by him in doing it, the time when and the place where it has to be done by him. It further connotes the supervisor's right to inspect and direct the work being done by the employee.¹³² This model forms the basis of labour brokerage where the original Roman Dutch law definition of "master and servant" resonates strongly in the application of labour brokerage.¹³³

(ii) The organization or integration test

This test was first developed in French law and was later adopted in English law in the case of *Cassidy v Ministry of Health*.¹³⁴ The approach underlying the organization or integration test is that an employee is a person who is integrated into a business or enterprise. It was a vague test and was rejected by the Appellate Division in the case of *S v Amca Services & Another*.¹³⁵

(iii) The multiple or dominant impression test.

This test is mainly split into two models, namely: the propriety test and the dominant impression test. However, it is more recognizable and understandable as a single model. The model is derived from English law. In the case of *Ready Mixed Concrete v Minister of Pensions*,¹³⁶ it is stated that three conditions need to be fulfilled for a contract of employment to exist. These are:

¹²⁹ (1880). 6 QBD 530 at p. 532 .

¹³⁰ *Yewen vs Noakes* 1880). 6 QBD 530 at p 533.

¹³¹ 1979 (1) SA 51 (A) p. 62.

¹³² The supervision and control test is derived from English Law.

¹³³ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) p. 62.

¹³⁴ *Cassidy v Ministry of Health* [1951] 2KB 353.

¹³⁵ *S v Amca Services & Another* 1962 (4) SA 537 (A).

¹³⁶ *Ready Mixed Concrete (South East) V Ministry of Pensions* [1968] 2 QB 433.

- (a) The servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of service to the master.
- (b) He agrees expressly or impliedly that in the performance of some service he will be subject to the other's control in a sufficient degree.
- (c) The other provisions of the contract are consistent with it being a contract of service. This means that the contract of employment must conform to the management and ownership of assets of the business and the risks thereof. The court will then examine the relationship and decide whether it is an employment relationship.¹³⁷ Factors will include whether or not the rights protected by the Labour Act to both the employer and employee are inherent in the relationship.

(iv) **The Economic test**

This test simply differentiates between employees and independent contractors.¹³⁸ The question to be asked is whether the party is carrying on business for himself or herself and not merely for a superior.¹³⁹

(v) **The pragmatic approach**

This approach has been enunciated in recent times by the courts in deciding not to mechanically apply the above tests piecemeal and impulsively. In *Hall (HM Inspector of Taxes) v Lorimer*,¹⁴⁰

¹³⁷ Parker C, supra at p. 10- 13.

¹³⁸ See *Dempsey v Home and Property* (1995) 16 LCJ 378 (LDC) at p 381 B-C. Also see *Stein v Rising Tide Productions CC* 2002 (5) SA 199 (C).

¹³⁹ Grogan, J. (February 2011), Too Fast, Too Fast, a Labour Brokers Reprieve 22 *Employment law Journal*, p. 3.

¹⁴⁰ (1994) IRLR 171.

it was held that each case should be determined on the particular facts available to the court.¹⁴¹

The test therefore alludes to the application of the facts of a particular case to modern employment principles.¹⁴² It is this latter theory that labour brokers lean on for support *vis a vis* freedom of association.

The employee service model under labour brokerage borrows heavily from the five models discussed above. It is the labour brokerage agency which pays the worker, usually on a weekly basis, and withholds income tax deductions. The worker may be employed casually, permanently or for a fixed term; full time or part time; or as a trainee or apprentice.¹⁴³

2.2 EXPLORING THE EMPLOYER AND CONTRACTOR MODEL UNDER LABOUR BROKERAGE

As alluded to above, the labour broker is the employer of the worker rather than the host even though the general day to day control over the worker's performance rests with the company. This is due to the fact that a genuine labour brokerage arrangement involves the labour broker and the client. The contract worker is employed by the labour broker whilst the client has a contract with the labour broker for the provision of a contract worker. Ultimate control rests with the labour brokerage entity as the actual employer.

2.2.1 CONTRACTOR SERVICE MODEL

The contractor service model has its foundations in the "OdcO" arrangements which are independent contracting arrangements in the labour brokerage industry. These arrangements

¹⁴¹ *Montreal v Montreal Locomotive Workers* (1947) 1 DLR 161.

¹⁴² Parker, C (supra p 14).

¹⁴³ This principle was relied on by Smuts SC in his heads of argument in the Supreme Court Appeal hearing of *Africa Personnel Services (Pty) Ltd vs Government of the Republic of Namibia* 2009(2) NR 596 (SC), p 100 of record and Heads of Argument.

derive their name from the case of *Building Workers Industrial Union of Australia v Odco (Pty) Ltd.*¹⁴⁴ This model creates independent contracting arrangements in which the workers are neither employees of the labour brokerage company nor of the client company. The brief facts of the case are as follows:

The workers for the respondent signed an agreement which stated that they were not employees. They were paid a weekly wage commensurate with the work performed. They were responsible for their own tax deductions. The court decided that the workers were not legal employees on the basis that there was no expectation of continuing employment and the contract between the agency and the workers expressed genuine intent to achieve independence. It was further determined that the client with whom they were placed was not their employer.

The courts under this model in considering labour brokerage contract arrangements scrutinize the contracts to ensure that they are not being used to avoid entitlements due to employees. These issues will be discussed in detail when a comparative analysis of the various jurisdictions is carried out in Chapter four below. In one instance,¹⁴⁵ in the case of *Damevski vs Leiv Guidice* the Federal Court of Australia found that a worker remained an employee of a host business despite the host business attempt to end the employment relationship and deal with the worker as an independent contractor through a labour broker.

These relationships are not straight forward in describing labour brokerage. The following issues clearly resonate from these relationships:-

¹⁴⁴ *Building Workers Industrial Union of Australia v Odco (Pty) Ltd.* (1991) 29 FCR 109.

¹⁴⁵ *Damevski vs Leiv Guidice* 2000 FCAFC 252. See also Australian Government Department of Employment and Workplace Relations, Discussion paper: *Proposal for Legislative and Independent Contracting and Labour Hire Arrangements* p. 24.

- a) There is typically a control relationship but not a contractual relationship between the workers and the client company. Since the labour law definitions of employment envisage a bipartite employment relationship between an employer and employee the law has at times struggled to establish where liabilities should rest in some labour brokerage cases.¹⁴⁶ This explains the two contrasting judgments handed down by both the High Court and Supreme Court of Namibia in dealing with labour brokerage.
- b) The character of the legal relationship between the worker and labour brokerage firm is not always clear.¹⁴⁷ Some labour brokerage workers are often described as associates or contractors when clearly it may be argued that they are employees in the strictest sense of the word.
- c) The extent to which the worker is working under the control and direction of the host company or labour brokerage company might be disputed. This scenario arises whenever occupational health and safety become an issue or where a breach of some terms of a contract of employment are alleged. These issues will be explored further when the advantages and disadvantages of labour brokerage are discussed.

2.3 LABOUR BROKERAGE DEFINITION: THE ILO FRAMEWORK

According to Fritz Nghishililwa,¹⁴⁸ the case against labour brokerage started in the 1910s shortly after the inception of the International Labour Organisation (ILO). The ILO Forty Hour Week Convention 34 of 1935 abolished labour brokerage in favour of state monopolies. However,

¹⁴⁶ See the case of *Damevski v Leiv Guidice* 2000 FCAFC 252.

¹⁴⁷ Parker, C (ibid p 5).

¹⁴⁸ Nghishililwa F, supra p. 87.

state actors could not meet the demand for employment whilst private entrepreneurs responded to the needs of those seeking employment despite the legal prohibitions. The demand for change could not be ignored. This resulted in the revision of the Convention Concerning Fee- charging Employment Agencies (Number 96 of 1940). The Convention defined labour as a commodity in line with the Philadelphia Declaration of 1944.¹⁴⁹ Professor Valticos¹⁵⁰ states that the original aim of the ILO upon its creation was to mainly regulate conditions of work in industry.

Another instrument of note was the Forced Labour Convention Number 29 of 1930 which aimed to, “work to ensure that structural adjustment measures are consistent with respect for ILO standards, particularly the basic human rights Conventions as well as Conventions concerning promotion of economic and social rights.”¹⁵¹

The Forced Labour Convention of 1930 had a major shortcoming in that it failed to address forced labour. The Treaty of Versailles¹⁵² after World War One entrenched various core principles surrounding the rights of workers. It included the term “social justice”.¹⁵³ The clause concerning workers’ rights included the rights of workers which included freedom of association, the eight hour day, weekly rest, the abolition of child labour, equal remuneration for work of equal value and the general principle that labour was not a commodity. The ILO’s main concern has been focused on workers who find themselves outside the protection of labour legislation. This is more so with labour brokerage employees who are chiefly in a triangular

¹⁴⁹ See Haidula, S supra: p. 11.

¹⁵⁰ Valticos, N. (1979), *International Labour Law*, Kluwer, Netherlands .p. 8.

¹⁵¹ see Finlein, M and Sanford M, (2001) “An Introduction To The Regulation Of Leasing And Employment Agencies”, *Comparative Labour Law And Policy Journal* 2, 3 (1): p. 3- 4.

¹⁵² Plant, R, (1994), *Labour Standards and Structural Adjustment International Labour Office*, Geneva, p. 20.

¹⁵³ The Treaty of Versailles was signed on 18 June 1919 at the Paris Peace Conference after World War one. It was signed by France, Britain, Italy, Japan and the United States of America. Information retrieved on www.wikipedia.org/wiki/treaty-of-versailles on 20 March 2012..

employment relationship.¹⁵⁴ ILO thus adopted the Private Employment Agencies Convention 181 of 1997 as a response to the tension within the regulatory regimes associated with the standard employment relationship. As Nghishililwa¹⁵⁵ pointed out “this tension centres on the perceived necessity to transform the normative model of employment, while simultaneously preserving security for workers engaged in employment relationships where responsibility could not be placed squarely on one entity in full.”¹⁵⁶

¹⁵⁴ See Vosko, L. F. (1997), *Legitimising the triangular employment relationship: Emerging Labour Standards from a perspective*, *Comparative Labour Law and Policy*, 19 (1) p. 148 – 49.

¹⁵⁵ Nghishililwa, , *supra* at p. 88.

¹⁵⁶ *ibid.*

CHAPTER 3

LANDMARK LABOUR BROKERAGE CASE: THE AFRICAN PERSONNEL SERVICES V GOVERNMENT OF THE REPUBLIC OF NAMIBIA¹⁵⁷

Before the cases are examined in detail it is imperative to examine the Labour Act in the context labour brokerage.

3.1 PURPOSE OF THE ACT

The Labour Act 11 of 2007 was gazette under Government Notice number 260 of 2008¹⁵⁸ on 31 December 2007 and entered into force on 1 May 2008. In its preamble it is stated that the Act aims to consolidate and amend the existing labour laws. It also seeks to establish a comprehensive labour law for all employers and employees and thus entrench fundamental labour rights and protections. The Act aims to regulate basic terms and conditions of employment as well as to protect employees from unfair labour practices. In addition, the Act makes provision for the prevention and resolution of labour disputes and establishes the Labour Advisory Council, the Labour Court, the Wages Commission and the Labour Inspectorate.

3.2 THE ABOLITION OF LABOUR BROKERAGE

The old Section 128 of the Labour Act 11 of 2007 provided as follows:-

“128 (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.

¹⁵⁷Unreported High Court Judgment Case Number A4/2008 and Supreme Court case reported in 2009(2) NR 596(SC)

¹⁵⁸ Government Gazette 31 October 2008 Number 4151.

- (2) Subsection (1) does not apply in the case of a person who offers services consisting of matching offers of and applications for employment without that person becoming a party to the employment relationship that may arise there from.
- (3) Any person who contravenes or fails to comply with this 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 five years or to both such fine and imprisonment.
- (4) In so far as this section interferes with the fundamental freedoms in Article 21(i)(j) of the Namibian Constitution, it is enacted upon the authority of sub- article 4 of that Article in that it is required in the interest of decency and morality.”

This section is the most- well- known provision of the entire Act albeit controversial as witnessed by the reaction the section received after the enactment of the Act.

The motivation behind the insertion of Section 128 of the Act was the similarities labour brokerage bore with the pre- independence contract labour system. The continued exploitation of Namibian and expatriate workers, both skilled and unskilled in the labour market was cited as a reason for the enactment of the provision.¹⁵⁹ The section also placed an obligation on employers to employ directly from the job market rather than have a labour broker second employees to them. It was stated that the section would further enable the employers to bear responsibility for their employees’ welfare and rights.¹⁶⁰ In November 2008, the largest labour brokerage company in the country, Africa Personnel Services, brought an application in the High Court challenging the constitutionality of Section 128 of the Labour Act.

¹⁵⁹ Jauch, H, 2010 *supra* at p 6.

¹⁶⁰ See the Parliamentary debates *Hansard* (2007, 27 June) *supra* at p. 5.

3.3 THE HIGH COURT PROCEEDINGS

African Personnel Services(APS) argued that it represented two thirds of Namibia’s labour brokerage sector.¹⁶¹ At the core of Africa Personnel Service’s (APS) business was labour brokerage. Outlawing labour brokerage meant the entire company would be liquidated as its core business would be illegal. The company further argued that in accordance with the Namibian Constitution, it should be allowed to pursue any trade or business in line with Article 21 of the Constitution of Namibia.¹⁶²

Article 21 of the Constitution provides as follows:

“(1) All persons shall have the right to :

.....

(j) carry on any trade or business.”

APS further argued that Section 128 of the Labour Act banned other companies which dealt with outsourcing such as clearing agencies and security companies.¹⁶³ The matter came before Parker J, Ndauendapo J and Swanepoel AJ.¹⁶⁴ The Government, which was the first respondent in the Application, argued that the applicant had no *locus standi* to bring the application because the right enshrined in Article 21 (1)(j) rests only in natural persons. It argued that labour brokerage “shared certain attributes with the erstwhile notorious, inhuman, apartheid –coloured SWANLA

¹⁶¹ See the High Court judgment *Africa Personnel Services v Government of the Republic of Namibia and Others* unreported case number A4/2008 at p. 3.

¹⁶² Horn, H and Kanguuehi, K, (2009, January). *African Personnel Services v Government of Namibia and others* (decided on 1 December 2008), *Namibian Law Journal*, 1 (1), p. 101.

¹⁶³ *Africa Personnel Services v Government of the Republic of Namibia and Others* supra at p. 3.

¹⁶⁴ *Ibid.*

(South West African Native Labour Association) system.”¹⁶⁵ The Government further argued that:

- 1) Labour brokerage commoditized labour and stripped brokers’ employee’s of their dignity.
- 2) The prohibition was not only constitutional, but also necessary under a constitution that requires legislation to promote decency and morality.

In a nutshell, Government’s case rested on three main points:

- (i) That African Personnel Services being a juristic person, lacked *locus standi* to pursue a right that was limited to natural persons;
- (ii) Even if the company was a bearer of the fundamental right to conduct business, the Labour Act did not limit their right, because the right protects equal opportunity and access in the field of economic activity, not forms of economic activity themselves.¹⁶⁶ If the brokers’ rights were limited that limitation was constitutionally permissible.
- (iii) That the ban was justified by the past repugnant practices of the contract labour system.

APS in motivating its applications had further argued that in Namibia alone, APS employs more than 6 000 workers,¹⁶⁷ both skilled and unskilled. It further described in detail the model by which it operates. It stated that the company does not utilize the labour of those employees for

¹⁶⁵ Grogan, J, February 2011, “*Too Fast, Too Fast, a Labour Brokers Reprieve*” 22 *Employment law Journal*, p. 3.

¹⁶⁶ *Ibid* at p.4.

¹⁶⁷ *Ibid* at p.4.

itself.¹⁶⁸ Having employed its employees, APS enters into agreements with clients in terms of which the broker undertakes to supply the client with employees to satisfy the clients` labour needs, and the client agrees to pay the company an hourly or daily rate, for the employees` labour. That rate is higher than what the employee is paid. After deducting administrative fees, and its profit, Africa Personnel Services pays the employee.¹⁶⁹ The difference between the amount paid by the client and the workers` wages, less the administrative costs, constitutes the company`s revenue and profit.¹⁷⁰

Further, APS argued that the terms of employment for the APS employees were either fixed-term or indefinite contracts. The fixed- term contracts were usually entered into with skilled workers hired to perform a specific task and it terminates when the task is completed. Such employees will only be re- engaged if and when their skills and services are required.¹⁷¹

Workers engaged on an indefinite basis are paid at hourly rates commensurate with their skills. If there is no demand for their services, they are either re assigned to other clients or retrenched in accordance with applicable labour laws. APS further stated that whilst the relationship exists, APS is responsible for ensuring that employees enjoy all the benefits of labour and social security laws.

The company conceded that labour brokerage may be abused but it argued that its model was neither abusive nor abused.¹⁷² It contended that:

¹⁶⁸See the Founding Affidavit in the matter deposed to by Johannes Arnoldus Botha, the executive chairperson of African Personnel Services (p. 518 of the record of proceedings).

¹⁶⁹ APS High court judgment p. 7.

¹⁷⁰ Ibid.

¹⁷¹ APS High Court judgment supra at p 10.

¹⁷² See Affidavit by Johannes Arnoldus Botha Ibid at p. 519 of record.

- 1) There must be a regulatory framework in place as Namibia does not have one in existence;
- 2) It provided thousands of people with work and the company was thus a huge employment generating concern;¹⁷³
- 3) The company contributed to the Namibian economy by providing labour for short- term and seasonal requirements for the mining, fishing, agricultural and transport sectors;
- 4) While employed, its employees enjoyed all normal rights of employees, save for security of employment.¹⁷⁴

Parker J from the outset acknowledged that the crux of the application made before the High Court was a challenge to the constitutionality of section 128 of the Labour Act.¹⁷⁵ Parker J held that the right in question vests in persons regardless of whether they are citizens or non-citizens of Namibia, or natural or artificial persons. The judge was of the view that even though some of the rights contained in Article 21 can only be enjoyed by natural persons, such as the right to freedom of speech and freedom of expression, the right contained in Article 21 (1)(j) does not only vest in natural persons.¹⁷⁶ He reasoned that if the drafters of the Constitution intended to restrict the enjoyment of all rights contained in Article 21(1) to natural persons who are Namibian citizens, they would have included such intention in clear terms. The court thus found the *locus standi* argument inconceivable. The court then laid the foundation for its judgment on the rest of the issues raised by pointing out that Article 21 was not an absolute right.¹⁷⁷

¹⁷³ Ibid.

¹⁷⁴ Ibid at par. 8.

¹⁷⁵ Ibid at par .10.

¹⁷⁶ Horn, H and Kanguuehi, K, (2009, January). African Personnel Services v Government of Namibia and others (decided on 1 December 2008), Namibian Law Journal, 1 (1), p. 101 at p 102.

¹⁷⁷ APS High Court judgment Ibid: par. 13.

The right to conduct a trade or business was not among the non-derogable rights listed in the Constitution. Also, the exercise of this right is subject to a restriction, namely that the exercise of the right must be subject to the laws of Namibia.¹⁷⁸ This therefore meant it was subject to restrictions in terms of Article 21(2) of the Constitution, provided that the limitations were reasonable and necessary in a democratic society¹⁷⁹ and required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.¹⁸⁰

Thus, Parliament may make a law which is inconsistent with Article 21(1)(j) or which takes away the right as long as such inconsistency was reasonable and necessary in a democratic society.¹⁸¹ Article 21(1)(j) is thus in a nutshell not absolute, but subject to permissible restrictions.¹⁸² Furthermore, the court held that Article 22 of the Constitution provides that whenever an Act of Parliament takes away a derogable right under the Constitution, the law in question must be of general application, shall not negate the essential content thereof and shall not be aimed at a particular individual. It should further specify the extent of such limitation and identify the constitutional authority on which the limitation is based.¹⁸³ Therefore, legislation inconsistent with Article 21(1)(j) must meet the requirements stated in Article 21(1) as read with Article 22, otherwise such legislation will be inconsistent with the Constitution and void.¹⁸⁴ The court reasoned that not every trade or business is entitled to the protection of Article 21(1)(j). For instance, business that promotes a criminal enterprise, such as stock theft, the keeping of a brothel, trafficking in women or children, and slavery cannot claim protection on the basis of the

¹⁷⁸Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ *Africa Personnel Services High Court Judgment* Ibid at par 12.

¹⁸¹ Ibid at par. 15.

¹⁸² Ibid at par. 16.

¹⁸³ Ibid at par. 17.

¹⁸⁴ Ibid at par. 18.

right under Article 21(1)(j) of the constitution.¹⁸⁵ This was despite the fact that the business or trade yielded a profit. They were simply unlawful activities. Quoting from the judgment of Maritz J (as he then was) in the case of *Hendricks and Others v Attorney General of Namibia and others*¹⁸⁶ the court stated thus “it is, in my view, implied by Article 21(1)(j) that the protected right relates to a profession, trade or occupation or business that is lawful.”¹⁸⁷

The court then proposed a legal definition of labour brokerage as defined by Charles Power, an employer and industrial lawyer in Australia, where labour brokerage has a regulatory framework. According to Power labour brokerage is “...a form of an indirect employment relationship in which the employer (agency) supplies its employees to work at a workplace controlled by a third party (the client) in return for a fee from the client. A typical agency will direct an employee to work for a period (assignment) ranging from a single day to a number of years.”¹⁸⁸ The applicant’s actions, the court concluded, were commensurate with this definition of labour brokerage. The court then proceeded to determine whether labour brokerage could be regarded as a form of employment under Namibian law. A contract of employment under common law was defined by Van den Heever in the case of *National Automobile and Allied Workers Union (now known as National Union of Metal Workers of SA) v Borgwarner SA (Pty) Ltd*¹⁸⁹ as follows:

“under the common law, parties conclude a contract under which one of them is to provide services in return for payment. Their agreement determines when the relationship so constituted

¹⁸⁵ Ibid at par. 20.

¹⁸⁶ 2002 NR 353 at p. 357 (H).

¹⁸⁷ *Africa Personnel Services v Government of Republic of Namibia and Others* High Court case at par 20.

¹⁸⁸ *Africa Personnel Service* High Court Judgment Ibid at par. 22.

¹⁸⁹ (1908) 6 CLR 41.

starts, what reciprocal rights and duties are acquired and incurred by each and if it is to be of indefinite duration, how it may be determined.”¹⁹⁰

Thus in terms of Namibian law a contract of employment extends between an employee and his/her employer. Furthermore, an employment contract in Namibia was defined under the Roman law of *locatio conductio operarum*, which is the letting and hiring of personnel in return for a monetary return.

The only other form of hiring or letting of labour under Roman law was slavery where the slave was the possession of its owner. A slave could be the object- hired on to an independent contractor.¹⁹¹ Thus labour brokerage sought to subvert the process. The court held that labour brokerage creates an unacceptable interposition of a third- party to a broker and the broker’s client in the employer employee relationship which has no basis at law.

The court also pointed out that labour brokerage violated the fundamental principle of the International Labour Organization, of which Namibia is a member, namely that labour is not a commodity.¹⁹² Parker J further stated that by repealing the Labour Act 6 of 1992 as well as the Labour Act 15 of 2004 and enacting the Labour Act 11 of 2007, the Legislature made its choice with the power given to it by the Constitution. The decision to prohibit labour brokerage meant that the court had to respect the decision by the Legislature. Though the court has powers to override a legislative provision which was repugnant to the Constitution, the present case was an exception to that rule.¹⁹³ The debate was over the moment labour brokerage was found to be *contra bonos mores*. The court thus declared Labour brokerage illegal and upheld section 128 as

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid at par. 37).

¹⁹³ Maletzky, C (2009, January 27) Labour Hire ban sparks Health crisis, *The Namibian*, p. 2.

Constitutional. The application was dismissed with costs. Ndauendapo J and Swanepoel AJ concurred with Parker J's judgment.

3.4 REACTION TO THE HIGH COURT JUDGMENT

After the High Court Judgment, the Minister of Health, Dr Richard Kamwi, held talks with the Minister of Labour, Immanuel Ngatjizeko and the Prime Minister, Nahas Angula.¹⁹⁴ Also present were the labour brokerage companies. The aim of the conference was to discuss the blueprint on how to avert a catastrophe that would arise as a result of the ruling. The Ministry of Health was the most affected Ministry as the implications of the judgment were far reaching in so far as the employment of health workers through recruitment consultancies were concerned. It was further reported that the banning of labour brokerage would lead to the redundancy of 10 000 to 16 000 employees who risked losing their jobs.¹⁹⁵

Skorpion Zinc, in anticipation of the ban on labour brokerage negotiated its service contract to comply with Government policy, more specifically section 128 of the Labour Act of 2007.¹⁹⁶ The biggest labour union, the National Union of Namibian Workers (NUNW) which had always advocated for labour brokerage to be banned, welcomed the news. The secretary General of NUNW, Evalistus Kaaronda, was then quoted as saying that labour brokerage is a "*lion which was clothed in a sheep's skin*".¹⁹⁷ He explained that a case in point was the decision of Commercial Investment Corporation (CIC) to cut all jobs and have those workers taken up by the labour broker and labour supply chain. As a result, the employee's salaries were effectively reduced by 34 percent. The Unions hailed the High Court judgment as a positive step towards

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Shejavali, N, "Skorpion ready for labour hire ban", *The Namibian*, 2008, March 3 retrieved on 23 March 2012 from www.namibian.com.na/index.php?id=28tx_ttnews90_5D=52982890-cahe=1.

¹⁹⁷ Maletzky, C(supra p 2).

what they termed the eradication of an anachronistic form of slavery.¹⁹⁸ Kaaronda was quoted as saying that:

“the process further increases poverty, as it more often than not results in unemployment and in a few instances it significantly cuts the workers buying power by heavily reducing the wages and benefits of the workers as they enter new employment contracts under the most extreme, exploitatitive conditions of labour brokerage companies.”¹⁹⁹

In South Africa, the new Labour Minister, Midred Olifant, clearly referring to the Namibian experience published new draft labour laws on 17 December 2009.²⁰⁰ The draft labour law banned labour brokerage and declared all temporary employment to be permanent.²⁰¹ The Secretary General of the NUNW Evalistus Kaaronda, further stated that the outlawing of labour brokerage took it to its grave where it belongs.²⁰² Nghishililwa²⁰³ makes the most compelling responses to labour brokerage. He is of the opinion that the High Court’s interpretation of Article 21 (1)(j) was very narrow, conservative and unrealistic. A wider interpretation of the Constitution could have seen the High Court follow the ILO’s example of not banning labour brokerage outright, but rather implementing stricter regulations and providing greater protection for workers employed under the labour brokerage systems.²⁰⁴ Nghishililwa points out that section 128 is unrealistic and unreasonable because it ignores the reality of the labour market and the fact that the law is not static. The law is dynamic in the sense that it must address the legal,

¹⁹⁸ Isaacs, D, APS defends Labour hire concept, *The Namibian*, 27 April 2009, p.2.

¹⁹⁹ Isaacs, D ,ibid.

²⁰⁰ Maletsky, C , ‘Labour Hire breads mixed reactions’, *The Namibian*, 2009, February 2, Windhoek p. 2.

²⁰¹ See the first South African Labour Amendment Bill Number 10 of 2009 Clause 198.

²⁰² . Hartmann, A. (2010, May 5), ‘The High court put Labour Hire in the grave where it belongs! Kaaronda’, *The Namibian* retrieved from [www.namibian.com.na/index.php?id=288tx-tnews\[tt_news\]=674468_no_cache=1](http://www.namibian.com.na/index.php?id=288tx-tnews[tt_news]=674468_no_cache=1) ON 25 March 2012.

²⁰³ Nghishililwa, F lbid at p87- 94. Mr. F. Nghishililwa is the former Acting Dean of the Faculty Law, University of Namibia. He is currently studying for his PHD in the Field of labour law at the University of Cape Town, South Africa.

²⁰⁴ ILO Convention 181 concerning Private Employment Agencies was adopted to provide regulations for the relationship between Private Employment Agencies and workers as well as establishing a minimum level of protection to employees who are used by enterprises to perform contract labour.

social and economic needs of the society it serves. Roman law in its original forms is outdated and cannot be relied on in the strictest sense as that would render a narrow interpretation of the law as the High Court did. He provides the example of France where a company that is engaged in hiring temporary workers is obliged to declare this to the labour administration. The company then provides some financial guarantees to ensure their ability to pay the wages of the workers as well as tax contributions to the State if the temporary work firm ever gets declared insolvent.²⁰⁵

In his criticism, Nghishililwa notes that the High Court failed to balance the rights of labour brokerage companies that are protected under Article 21 of the Constitution with the disadvantages that such labour brokerage companies have on the employees. Parliament's basis of banning labour brokerage on the grounds that it offended decency and morality was not only self-serving but was unjustified.²⁰⁶ Grogan²⁰⁷ argues that the High Court, in invoking the time-honoured principle that reference in a statute to conduct is presumed to refer to lawful conduct, offered an unrealistic interpretation of employee rights. He argues that it is now unlawful for labour brokers to hire employees who consent voluntarily to offer their services to work for others. He further argues that the ban already stood on shallow foundations the moment the High Court pronounced it.²⁰⁸ The court had determined the matter on a single point. This was that, since labour brokerage is not recognized by the common law, it cannot form the basis of a constitutional right.²⁰⁹ That proposition was misdirected as courts throughout the world recognize that constitutional rights extended further than the common law because if they did not, there would be no point in having them. The fact that the Roman commentators did not recognize labour brokerage should not automatically mean all, "*arrangements in which a person*

²⁰⁵ Nghishililwa, F (2009), "The Banning of Labour Hire in Namibia – How realistic is it?" *Namibia Law Journal* 1 (3) p. 89 at p. 91.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Grogan, J, February 2011, "Too Fast, Too Fast, a Labour Brokers Reprieve" 22 *Employment law Journal*, p. 3.

²⁰⁹ *Ibid.*

*agrees with another person to work for another has no basis in law.*²¹⁰ In any event, he argues that the common law recognizes such arrangements as a form of cession, in which parties to the *locatio conductio operarum* may, by mutual consent transfer employer's rights and obligations to another. The comparison between illegal activities like child trafficking and prostitution, on the one hand, and labour brokerage on the other on the ground that none was recognized at law is misplaced. According to Grogan,²¹¹ such a distinction begs the very question the court was required to answer.

The fact remains that the conduct stated is obviously illegal but it cannot be equated with labour brokerage arrangements, as their structure can be justified by constitutional protection.²¹²

Haidula S²¹³ argues that the prohibition by section 128 in light of the High Court judgment makes the wider formulation of the section drastic. The section prohibits all persons not to offer for reward any person with a view to making that person available to a third party to perform work for the third party. Unlike Article 1(b) of the Private Employment Agencies Convention of 1997, section 128 (1) does not require that the third person also “*assigns the tasks and supervises the execution of these tasks*”.²¹⁴ Grogan argues that whether it is assigned or supervised by the employer and not the third party, it does not matter because such labour constitutes working for the third party. It thus creates a blanket prohibition. The words “making that person available” do not remedy the prohibition. Haidula illustrates this point with a few examples. A lawyer engaged as a professional assistant to a legal firm in private practice is employed with the purpose to make himself available to a client, who is a third party, by performing work of a legal

²¹⁰ Grogan J, “Too Fast, Too Fast, a Labour Brokers Reprieve” 22 *Employment law Journal*, p. 3at p. 5).

²¹¹ *Ibid.*

²¹² See ILO Convention 87 of 1997.

²¹³ Haidula, S, 2010, “*Regulating Labour Hire in Namibia*”, UNAM Law Dissertation, LLBS(Honours) at p. 23.

²¹⁴ Menges, W (2009, March 6), “Labour High Court Appeal to face Supreme Court test”, *The Namibian*, p.1.

nature for that client.²¹⁵ Payment for the work done by the client is made to the firm and is normally not directly related or proportionate to the salary payable by the firm to the professional assistant. The same aspect covers auditors, doctors, architects and other professional persons engaged in a similar fashion who render professional services to clients and patients. These employment relationships would be proscribed by the judgment.

After the 2008 ruling by the Namibia High Court, the Congress of South African Trade Unions (COSATU) held public oral hearings into labour brokerage.²¹⁶

The trade unions hailed the Namibia High Court decision and supported the call for a complete ban on labour brokers. The reasons preferred were *inter alia*:

- 1) Labour brokers do not create jobs, as this is an erroneous notion which is unwarranted. On the contrary, labour brokers are intermediaries to access jobs that already exist and which in many cases would have existed previously as permanent full time jobs.²¹⁷
- 2) Labour brokerage, combined with other forms of typical work, reflects current trends of intensification of the rate of exploitation of workers.²¹⁸
- 3) The replacement of normal jobs through labour brokerage arrangements or other equally insecure forms of typical employment effectively displaces and destroys decent jobs. This is worsened by the substitution of insecure contractual relations and downgrading of wage and employment terms.

²¹⁵ Haidula Ibid at. p. 23.

²¹⁶ COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCAWU and ATAWU Submission on Labour brokerage, (2009, August 16), retrieved from f www.cosatu.org.za/show.php?id=22378 on 16 March 2012.

²¹⁷ Ibid.

²¹⁸ Ibid.

- 4) Labour brokerage is tantamount to slavery as it amounts to trading of human beings as commodities. Generally the main commercial contract is agreed between the labour broker and the client, thereby excluding the real suppliers of labour, the worker from the whole process. This then undermines their rights to negotiate the wage and employment terms.
- 5) Labour brokers undermine collective bargaining rights and provide ‘scab labour’ as substitute workers for those on strike. This therefore undermines their rights to embark on industrial action.²¹⁹
- 6) Historically, labour brokerage was banned in many jurisdictions. The lifting of this ban in international and domestic laws of many countries reflects the rampant free-market capitalist principles which are legitimized at the expense of principles relating to human dignity and decency.
- 7) In the context of globalization, companies and industries with an aim to win a competitive edge over their opposition use the most vulnerable ways to cut costs in order to subsidize their pursuit of profit.²²⁰
- 8) Labour brokerage violates section 23 of the Constitution of South Africa. Section 23 sets out various rights *inter alia* rights to fair labour practices, rights to join and form trade unions, participate in strikes and the right to engage in collective bargaining. Labour broker arrangements do not permit the workers to enjoy the same rights or legislative protection as compared with those in normal, regularly constructed situations.²²¹

²¹⁹ (Ibid.: p. 4).

²²⁰ Ibid.

²²¹ Theron, J(2010 January), *Sour Grapes*, retrieved on 16 March 2012 from [www.ajol.info: /index.php/ldd/article/viewfile/68279/56361](http://www.ajol.info/index.php/ldd/article/viewfile/68279/56361).

By declaring labour brokerage unconstitutional, the High Court considered a narrow definition of labour which was inconsistent with the modern jurisprudence in other jurisdictions discussed in Chapter 4 below which regulate it. The court had to be alive to the scope of regulating it or ensure that measures are introduced to facilitate trade union organization and collective bargaining. It was thus inevitable that APS would take the High court decision on appeal to the Supreme Court.

3.5 THE SUPREME COURT JUDGMENT

Subsequent to the High Court judgment, APS appealed to the Supreme Court against the High Court decision of the 3rd of March 2009. Prior to the lodging of the appeal, there had been a number of meetings between all the concerned stakeholders to reach an amicable solution. With the labour brokers, Government, and workers unions irreconcilable in their differences,²²² the APS appealed. The prohibition on labour brokerage was set to come into operation on the 1st of March 2009. However, the High Court granted an interim interdict to the prohibition pending determination of the issue by the Supreme Court.²²³

For the appellant, it was argued that a limitation on a constitutional right must be reasonable to withstand scrutiny of the court. It was argued that the section 128 prohibition did not qualify as a reasonable limitation to APS right to conduct its chosen business.²²⁴

The appellant further argued that section 128 is too wide, overboard and too general. It had the effect of criminalizing services such as, inter alia cleaning and security guard agencies. These entities made their employees available for service to third parties. On the other hand, the

²²² Supreme Court Judgment, Case no SA 51 /2008 p. 5.

²²³ Supreme Court Judgement (Ibid: p. 9).

²²⁴ Ibid.

respondents argued that labour brokerage turned labour into a commodity and it was a clandestine way of selling human beings without regard to their dignity. Labour brokerage is a means to evade the protection that labour laws provide to Namibian workers as companies make use of labour brokerage in order for them not to be held responsible for the people working for them.²²⁵ The respondents further argued that the basis of the principle of separation of powers requires the judiciary to respect the choices of the legislature and the choice whether to ban labour brokerage or simply regulate it is for the legislature, and not for the courts. As in the High Court, the respondents questioned the appellants' *locus standi* to claim the court's protection of a constitutional right. The constitution protected rights of natural persons only, as opposed to juristic persons.²²⁶

The respondents viewed the abolition of labour brokerage as a socially relevant arrangement which has its advantages far outweighing the infringement of Article 21(2).²²⁷ The respondents further raised 8 undesirable labour practices that necessitated the ban of labour brokerage. These were²²⁸:

- i) The replacement of permanently employed workers with casual labour procured from labour brokerage companies;
- ii) The use of labour brokerage employees to prevent the unionization of a workforce;
- iii) The use of labour brokerage employees to break strikes and sit ins;
- iv) The use of labour brokerage employees to avoid the need for fair procedures in the termination of employment of permanent employees;

²²⁵Ibid.

²²⁶ Ibid.

²²⁷ *Africa Personnel Services* Supreme Court Case supra at p. 12.

²²⁸ See p. 201 of the Supreme Court record of the *Africa Personnel Services* Supreme Court Appeal, at par. 16.

- v) The retrenchment of existing employees so that they can be rehired at cheaper rates as employees of labour brokerage companies;
- vi) The use, alongside permanent employees, of lower paid labour brokerage employees to exert downward pressure on wages;
- vii) The failure of labour brokerage companies to pay benefits to labour brokerage workers; and
- viii) The failure of labour brokerage companies to provide permanent employment to their employees who are “lent out” as labour brokerage employees.²²⁹

Thus, Government was of the view that these eight factors cumulatively justify an absolute prohibition of labour brokerage. A regulatory framework would not cure these unfair labour practices.

APS had raised a compelling argument about the dire consequences the economy would suffer if the prohibition remained in force. As the largest labour brokerage company in Namibia, it provided personnel to its clients in most spheres of the economy which included the fishing, mining, construction and hospitality industries. It also supplied the retail and wholesale sector as well as general goods and services industries.²³⁰

APS further argued that it had a large client base comprising approximately fifty business entities of varying sizes. These included inter alia Barloworld, Namibian Beverages, Cell One, Diesel Electric and Namibia Breweries.²³¹ The appellant further provided evidence that most of the employees belonged to different Unions. These unions include the Mineworkers Union of

²²⁹Ibid.

²³⁰ The record of appeal in the APS case (p. 203 par. 5).

²³¹ Supreme Court record p 202 par. 170.

Namibia (MUN), the Namibia Food and Allied Union (NAFAU), Namibia Seamen and Allied Employees Union (NSAEU), the Retail and Wholesale Employees Union (RWEU) and the Metal and Allied Workers Union (MAWU).²³² The Appellant supplied 3 categories of workers viz unskilled, semi- skilled and skilled workers to its client companies. About 50% of those are skilled or semi- skilled whilst the other 50% are unskilled.²³³

A closure of APS would mean that all these clients would be deprived of vital services relevant to the economy of Namibia. It would also render²³⁴ permanent staff employed by the appellant and who were not hired out to clients redundant.²³⁵ These employees dealt with the day to day management and operations of the Appellant`s²³⁶ activities in its branches countrywide.²³⁷ The full bench of the Supreme Court acknowledged that this case was an emotional case evoking powerful and painful memories of the abusive contract labour system which was part of the obnoxious practices of centuries of racial discrimination.²³⁸ The court stated that the passing of clause 128 of the labour bill sparked a huge outcry and opposition. As a result labour brokers were compared to SWANLA and the practices it condoned. Labour brokerage was thus comparable to the sale of human beings for a profit by brokers to client companies.²³⁹

The Supreme Court recounted the history at length of labour brokerage in Namibia. It noted that the High Court ruled that the labour broker - employment relationship does not conform to the common law contract of employment which is based on the Roman law contract of *locatio conductio operarum*. The High Court noted that this doctrine relates to the letting and hiring of

²³² Annexure B1, p. 203 of the Supreme Court record.

²³³ Ibid.

²³⁴ Record of the Supreme Court Appeal, bid, Annexure B2 p. 3.

²³⁵ APS Supreme Court appeal record supra at p. 232.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ APS Supreme Court Judgment Ibid at p. 3.

personal services in return for a monetary reward. As a result, labour brokerage had no basis in Namibian law. The Supreme Court, however, noted that Namibian common law, including employment relationships, has evolved from classical to modern times. Thus, just because labour brokerage or “agency work” does not fit the typical mould of a bilateral employment agreement as provided for in Roman or common law does not render such an employment relationship illegal. What is of greater importance is that employees freely enter into contracts of their choice. *Maritz JA* held therefore that freedom of contract is not only a public policy issue but also a fundamental principle of our law.

The Supreme Court, citing the case of *Minister of Defence vs Mwandingi*,²⁴⁰ held that there was no evidence from Chapter 3 of the Namibian Constitution that justified excluding juristic persons from the protection of Article 21 (1)(j). The court stated that the phrase “all persons” in Article 21(1) when read together with the freedom provided for in paragraph (j) includes both natural and juristic persons. It was the court’s contention that international human rights instruments *vis a vis* Chapter 3 of the Constitution, call for a generous, broad and purposive interpretation.

The appellants opposed the notion that the business the agency service conducts is similar to the recruitment and placement agencies that existed during the pre- independence era. The appellant justified this by arguing that the current legal framework under which agency work is performed has no resemblance to the discriminatory and coercive legal framework under which the pre-independence contract labour system was based. The labour recruitment and employment agencies under the contract labour system such as SWANLA did not employ any of the workers

²⁴⁰ *Minister of Defence vs Mwandingi* 1993 NR 63 (SC) at p. 71 F- H.

themselves. They did not remunerate them nor did they become a party to the resulting employment contract between the worker and the employer.²⁴¹

The Supreme Court upheld this submission. The court observed that the main features of placement agencies correspond considerably with those provided by employment agencies such as SWANLA. However, agency service providers, such as the appellant, employ their employees and they assume the contractual and statutory obligations of an employer towards an employee. They also remunerate employees and when they hire out the services of their employees to third parties, they form part of the tripartite relationship which arises therefrom.²⁴²

The Supreme Court thus held that the contract labour system of the past and contemporary concept of agency work and labour brokerage differ considerably under the current constitutional dispensation. The respondents could not rely on the abusive contract labour system to justify the prohibition of agency work.²⁴³ The court further stated that regulated agency work is accepted by ILO Convention 181 of 1997 as supported by the Private Employment Agencies Recommendation²⁴⁴ which contains a number of recommendations to members concerning the protection of agency workers. The recommendations include:

- i) Fair and ethical employment practices by private employment agencies;
- ii) Cooperation between public employment services and private employment agencies;
- iii) Written contracts of employment with labour brokers;

²⁴¹ APS Supreme Court case (supra p. 75).

²⁴² APS Supreme Court case (Ibid: p. 79)

²⁴³ APS Supreme Court case (Ibid. p. 80).

²⁴⁴Private Employment Agencies Recommendation Number 188 of 1997.

- iv) Labour brokers should not be permitted to make workers available to client companies to replace those on strike;
- v) The labour brokers are not permitted to intentionally recruit workers for jobs that are hazardous or risky or where they may be subjected to abuse or discriminatory treatment.²⁴⁵

The Convention thus requires that workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively, and that equality of opportunity and treatment in access to employment and to particular occupations be promoted.²⁴⁶ As to the contention that agency work is unconstitutional because it is inimical to union organization, the court simply observed that although agency work may present difficulties for unions, they too must be dynamic and move with the times. In any case, “conventional” forms of labour such as farm and domestic workers confront unions with similar organizational difficulties. This can hardly be a reason to ban these forms of labour.²⁴⁷ Where agency workers work in remote areas their freedom to join trade unions as entrenched in Article 95(c) as read with Article 21 (1)(e) of the Constitution should not be restricted.

On the argument by the respondent that labour brokerage facilitates the casual labour, the court observed that this was not a reason to ban labour brokerage outright. The court stated that such practices might, in an unregulated environment, have an impact on the employment relationship especially with regard to the bargaining strength, skills development and possibility of training employees.

²⁴⁵ APS Supreme Court case (Ibid: p. 101).

²⁴⁶ Grogan, J (supra . 6).

²⁴⁷ APS Supreme Court (Ibid: p. 106).

European countries such as, *inter alia*, France, the UK, Germany and Italy have thus addressed these concerns through legislation specifying the length of agency work contracted. The legislation also includes restrictions on the purposes for which labour brokers may recruit as well as ensuring that labour brokerage employees have the right to trade union membership and representation.

The court thus came to the conclusion that the blanket prohibition of labour brokerage as an economic activity was substantially overbroad and it thus did not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected under Article 21 (I) (j) of the Constitution. Agency work needed to be properly regulated under the Constitution and Convention 181 of 1997 whilst a regulatory framework was being devised.²⁴⁸ Such a regulatory framework has to be devised in such a way that it does not compromise the objectives of the Labour Act or the constitutional objectives of decency and morality. Section 128 of the Labour Act was disproportionately severe compared to what is necessary in a democratic society²⁴⁹ as it “substantially over shoots permissible restrictions.”²⁵⁰ The court ordered the appeal to succeed with costs and the order of the court a quo was set aside. Section 128 of the Labour Act 11 of 2007 was struck down as unconstitutional.

3.6 REACTION TO THE RULING OF THE SUPREME COURT

The Supreme Court judgment generated the same mixed reactions that greeted the High Court ruling. It can be deduced that Government, trade unions and labour movements were and are still to an extent disappointed with the Supreme Court’s ruling. On the other hand, labour brokers, their client companies and the Namibian Employers` Federation were and still are

²⁴⁸ APS Supreme Court (Ibid.: p. 117).

²⁴⁹ APS Supreme Court Judgment (Ibid: p. 118).

²⁵⁰ Ibid.

ecstatic about the judgment. The Minister of Labour and Social Welfare, Mr. Immanuel Ngatjizeko, vehemently criticized the ruling. The Minister, whilst pronouncing that he respected the final authority of the Supreme Court to interpret the Constitution, stated that the Government would be remiss if it did not exercise its constitutional right to voice its disagreement with the court's judgment.²⁵¹

The Minister reiterated the evils inherent in labour brokerage. He argued that the contract labour system and labour brokerage are synonymous. The Namibian citizens suffered daily under the labour brokerage system as cheap labour supply to employers unfettered by labour protections or workers' rights.²⁵²

The Minister stressed the point that unemployed persons, as was the case in the days of SWANLA, take up employment with labour brokerage companies because of limited options for gainful employment. He further criticized the Supreme Court for failing to appreciate the vestiges of apartheid colonial exploitation which continue to plague Namibia.²⁵³ The court, in his view, further gave a broad definition of agency workers to include employees who are not covered by section 128 as such workers fall outside the coverage of labour brokerage. The court stated that agency work prohibited by section 128 includes the services, among others, of modeling agencies, casting agencies, advertising and production agencies. The Minister stated that it was puzzling for the court to imagine that Parliament would criminalize such activities.²⁵⁴

²⁵¹ Ngatjizeko, I. (2009), "*We will fight on, despite court ruling*," accessed from www.swapoparty.org/we/will/fight/on.html. retrieved on 20 March 2012.

²⁵² Ngatjizeko, I *Ibid* at. p.1.

²⁵³ Ngatjizeko, I *Ibid*: at p. 2.

²⁵⁴ Ngatjizeko, I *Ibid*: at p. 2.

The Minister then cited the provisions of Article 81 of the Constitution which provides that even though the decisions of the Supreme Court are binding on all courts of Namibia and all persons in Namibia, the decisions can be reversed either by the Supreme Court itself or by a lawfully enacted law of Parliament.

The Minister thus pledged to protect the most marginalized and vulnerable workers in the country and that the Government would pursue the goals of dignity and justice for employees working in the labour brokerage system.²⁵⁵ The Government would thus prepare legislation to put an end to labour brokerage in accordance with constitutional requirements and thus create a strong administrative framework to enforce such legislation. He outlined the main factors that led Parliament to enact the ban on labour brokerage. The factors are:

- i) Employees have no choice of their actual employer or place of work;
- ii) Employees are referred to by those who use their labour as bodies with identification numbers, rather than by their names;
- iii) Sick leave, maternity leave, and vacation leave are denied to labour brokerage employees under the principle of no work, no pay;
- iv) Employees may be dismissed at will without legal protection, regardless of how long they have worked for a particular client company;
- v) Employers may ignore the Labour Act's protections for retrenched employees;

²⁵⁵ Ibid.

v) The labour brokerage company and client company may agree to exclude trade unions from having access to their work place despite express provisions of the Labour Act which require that employers grant access to trade unions.²⁵⁶

It was thus Government's view that it was quite ironic that a provision of the Namibian Constitution that was intended to eradicate apartheid practices and thus protect black workers from the injustices and humiliation of job reservation and influx control had now resolved to turn a blind eye to commercial arrangements. The rental of human labour in order to avoid protections afforded to workers by the labour laws was reminiscent of labour brokerage.

In a nutshell, it was Government's view that the judges had in their wisdom closed their eyes to social and economic realities of the repugnant exploitation of workers in the labour brokerage sector.²⁵⁷ The African Labour and Human Rights Centre, Workers Advice Centre, the Tsumeb Corporation Limited (TCL), Workers Committee and the Association of Legal Service providers in Namibia²⁵⁸ criticized the Supreme Court judgment at a joint press briefing.

At the briefing, August Maletzky²⁵⁹ argued that the judgment took away real substantive livelihood for employees as labour brokerage was contrary to the dictates of the Constitution.²⁶⁰ He further asked how the Supreme Court arrived at its decision. He questioned the methods of construction it employed to reduce one of the simplest issues of human exploitation to such incomprehensible and ludicrous interpretation.

²⁵⁶ Ibid.

²⁵⁷ Ndjebela, T. (2010, 8 February) "Government acts on labour hire", *The New Era*, p. 1- 2.

See also Heita, D, (2010, February8), "Labour hire debate takes APS to task". *The New Era* p. 3.

²⁵⁸ Shipanga, S and Muraranganda E, (January 2010), "Labour bodies slam Supreme court ruling," *The Namibian*, p. 1.

²⁵⁹ August Maletzky is a Director of the African Labour and Human Rights Centre.

²⁶⁰ Shipanga S, Muraranganda, E Ibid at p. 2.

The former Secretary General²⁶¹ of the National Union of Namibian Workers (NUNW) labeled the judgment as imperialistic and unpatriotic. The Secretary General²⁶² remarked that “the time has come for the complacent and ignorant functionaries of the judiciary to be dismissed as they clearly have no clue of, nor do they respect the suffering endured by our people enslaved by labour brokerage.”²⁶³

The Union made it clear that it would fight to ensure that the judgment was reversed and that an Act of Parliament would repeal it. The Union further stated that the Ministry of Labour had to be cognizant of its responsibility to ensure that labour brokerage is banned and that the legislation related to labour brokerage should never be accepted.

Herbert Jauch, the head of research and education of the Labour Research Institute (LARRI) viewed the Supreme Court ruling as highly insensitive towards the plight of labour brokerage workers.²⁶⁴ While addressing a crowd of about 1 000 workers from Luderitz and Oranjemund at the Luderitz stadium on workers day, 1 May 2010, the Head of State His Excellency Hifikepunye Pohamba,²⁶⁵ aired his views concerning labour brokerage.²⁶⁶

The President said he hates the ongoing practices of labour brokerage in the country. He urged Parliament to plug the loopholes in the Labour Act 6 of 2007 so that the practice is declared illegal. The President himself was a product of the labour brokerage system when he joined the Tsumeb Corporation Limited in 1956 under SWANLA. He stated that the practice is

²⁶¹ Evalistus Kaaronda is the former Secretary General of National Union of Namibian Workers. The Society of Advocates was displeased with this statement and expressed disappointment with it and asked him to retract the statement..

²⁶² Heita, D. (2009, December 16), “Tempers flare after labour brokerage ban judgment”, *The New Era*, p.2.

²⁶³ Shejavali, N. (2009, December 16), “NUNW could be held in contempt of court”, *The Namibia*, p. 3.

²⁶⁴ Njebela, T (2010, January 13) “Labour Ruling “insensitive” towards poor”- LARRI, *The Namibian*, p. 1-2.

²⁶⁵ Uys, N. (2010, May 3) “Pohamba condemns labour hire at Luderitz rally”, *The Namibian* pg 3 see also Ndjebela, T. (2010, 3 May) “Pohamba detests Labour hire”, *The New Era* p. 1- 2.

²⁶⁶ Uys, N, Ibid at p. 2.

exploitative and cannot be allowed to continue in an independent Namibia. The President was more diplomatic in addressing the Supreme Court decision, stating that “I am not attacking the Supreme Court’s decision on the matter. All I am saying is that our interpretation of labour brokerage must also be put into consideration.”²⁶⁷

The workers *VanGuard*²⁶⁸ carried an article in which the ban was viewed in the South African context in light of the judgment. The blame was placed squarely on South African President Jacob Zuma for allowing labour brokerage. The article argues that labour brokers use it as a cost-cutting measure to maximize profits.²⁶⁹

The *VanGuard* further argued that the labour broker pays the worker a meager, unlivable fraction of the cost of labour that the worker provides to the client and pockets the rest.²⁷⁰

The National Employment Federation (NEF) stated that unfair treatment does not only occur at labour brokerage firms. The NEF was not ignorant of the fact that labour brokerage companies often paid lower wages and might not provide medical aid or a pension scheme. Tim Parkhouse, the Secretary of the NEF believes that the ills of labour brokerage can be regulated and strict enforcement monitored by the Ministry of Labour. The NEF further stated that one always gets bad apples in a sector and even amongst labour brokers. However, permanent employees also get exploited either through the Social Security Commission levies which are not paid, or the lack of proper pension and medical aid schemes. The essence of his argument is that there is no sector which does not have its shortcomings and for the labour brokerage industry to be singled out is unfair. Regulation, as opposed to banning labour brokerage, is the best route

²⁶⁷ *Workers Vanguard*, (2011, September 2), ‘For a class –struggle Fight against Labour broker parasites!’ Retrieved from www.icl-fi.org/English/wv/985/laborbroker.html p. 1 on 12 July 2012.

²⁶⁸ *Workers Vanguard* *ibid* at p. 1.

²⁶⁹ Uys, N *supra* at p. 3.

²⁷⁰ *Van Guard* *ibid* at p. 2.

Government can take. A proper regulation of labour brokerage contributes to job creation. Parkhouse²⁷¹ further argued at the time that one must be cognisant of where the line must be drawn between companies outsourcing jobs in an entire department and labour brokerage.

The fact that a large percentage of Namibians are unemployed²⁷² means Government should not take emotional decisions. In clamping down on labour brokerage companies, politics or ideologies should not be considered but the reality on the ground when it comes to changing existing legislation.²⁷³ The President of the NEF, Vekuii Rukoro opined that, “we must not allow ourselves to rush into drawing up any regulations to control any industry, without due and deep thought as to their implications. Any such rule or regulation must be viable, it must have economic sense and it should be reasonable and most importantly it must be legally enforceable and practically implementable to the business world.”²⁷⁴

Rukoro stated that the judgment by the Supreme Court was an extremely detailed judgment that gave guidance and direction as to the preferable ways to regulate the industry. Rukoro argued that the tripartite partners, which are the Ministry of Labour, Employers Federations and Trade Unions, need to be guided by the advice and enter into consultations via the Labour Advisory Council framework to draft the necessary controls and regulations.

The regulations, he argued, had to be drafted in such a manner that they are cognizant of how the labour brokerage industry contributes not only to the reduction of unemployment but to Gross Domestic Product (GDP) of the country as a whole.²⁷⁵ Thus, the National Employer Federation

²⁷¹ Weidlich, B (2010, 8 January) “Unfair treatment not only at Labour Hire firms”, *The Namibian*, p. 1- 2.

²⁷² Duddy, J. (2010, February 4), “Half of all Namibians unemployed”, *The Namibian*, p. 3.

²⁷³ Duddy, J (Ibid pg. 3) Staff Reporter, (2010, February 24), “NEF urges caution on labour brokerage”, *The Namibian*, p. 1- 2.

²⁷⁴ Staff Reporter (Ibid.: P. 1).

²⁷⁵ Staff Reporter, “NEF calls for careful Regulation of labour hire”, *The Namibian Economist*, p. 1- 2.

noted that the judgment was reasonable in light of the shocking and deplorable levels of unemployment in Namibia as was revealed by the National Labour Force Survey of the Ministry of Labour.

The statistics as at 2010²⁷⁶ revealed that one out of every two Namibians is jobless. More than 58 percent of women in Namibia are jobless while nearly 44 percent of the men are jobless²⁷⁷.

Thus the regulations had to take this into cognizance to avoid industrial disputes and unhealthy legal challenges.

The critics of the judgment failed to appreciate that the Supreme Court had relied heavily on international jurisprudence in allowing for the regulation of labour brokerage. They relied more on anachronistic historical references without considering the job opportunities labour brokerage availed. In Namibia alone, 250000 people are employed through labour brokerage.²⁷⁸ The proponents of labour brokerage were justified in stating that the Namibian labour landscape had to recognize its importance in job creation.

3.7 CONVENTIONS ON LABOUR BROKERAGE vis a` vis THE JUDGMENTS

The treaty of Versailles²⁷⁹ after World War one entrenched various core principles surrounding the rights of workers. It included the term “social justice.”²⁸⁰ The clause concerning workers’ rights included the rights of workers which included freedom of association, the eight hour day, weekly rest, the abolition of child labour, equal remuneration for work of equal value and the

²⁷⁶ *The Namibian Economist*, *ibid* at p. 2.

²⁷⁷ *The Namibian Economist* *ibid* at p. 1.

²⁷⁸ *Ibid*.

²⁷⁹ The Treaty of Versailles was signed on 18 June 1919 at the Paris Peace Conference after World War one. It was signed by France, Britain, Italy, Japan and the United States of America.

²⁸⁰ Vosko, T, and Leah, F. (1997), “Legitimizing the triangular employment relationship: Emerging Labour Standards from a comparative perspective”, *Comparative Labour Law and Policy Journal*, Full, 19(1) p. 48- 49.

general principle that labour was not a commodity. As Nghishililwa²⁸¹ points out the ILO's main concern has been focused on workers who find themselves outside the protection of labour legislation. This is more so with labour brokerage employees who are chiefly in a triangular employment relationship. ILO thus adopted Convention 181 as a response to the tension within the regulatory regimes associated with the standard employment relationship. As Nghishililwa²⁸² pointed out "this tension centres on the perceived necessity to transform the normative model of employment, while simultaneously preserving security for workers engaged in employment relationships where responsibility could not be placed squarely on one entity in full."²⁸³

He²⁸⁴ argues that the main purpose of labour law is to regulate the employment relationship. He further argues that the proposed regulations that the Supreme Court stated must be provided to regulate the labour brokerage industry must be tested against Article 21(1)(j) of the Constitution. In light of the Versailles Treaty which the ILO Convention 181 of 1997 relied on heavily to set a regulatory framework for labour brokerage, any regulations that will be enacted would have to pass the constitutional muster if the regulations take cognizance of the said ILO Convention. Therefore balancing the rights and interests of those who provide work and those who accept work should be the ultimate objective of any law or amendment.²⁸⁵

Thus Nghishililwa supports the Supreme Court ruling for affording all workers the opportunity to enjoy the same rights, irrespective of who the employer is.

²⁸¹ Nghishililwa, F supra at p 88.

²⁸² Ibid.

²⁸³ See also Raday, F (1999), "The insider- outsider politics of labour –only contracting". *Comperative Labour Law and Policy Journal*, 20 (4) p. 1- 2.

²⁸⁴ Nghishililwa, F, (2011, November 15), "What is the problem with labour Hire?", *The Namibian*, p. 2.

²⁸⁵ Nghishililwa, F,(2011) What is the problem with labour hire Ibid p. 2.

3.7.1 CONVENTION 181 of 1997

The ILO Convention 181 concerning Private Employment Agencies of 1997 is the main ILO Convention that regulates labour brokerage. It establishes a minimum level of protection for employees made available to perform contract labour for a third party. Convention 181 legitimizes a triangular employment relationship as it is structured from the standard employment relationship towards a new model which embraces a more contemporary form of employment relationship. Article 1 of Convention 181 defines the term private employment agency 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 and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise there from;
- (b) Services consisting of employment of workers with a view to making them available to a third party, who may be a natural or legal person which assigns their tasks and supervises the execution of these tasks;
- (c) Other services relating to jobseekers, as determined by the competent authority such as the provision of information that does not set out to match specific offers and applications for employment.”

This therefore means that Convention 181 allows the operation of private employment agencies as well as protecting workers using their services within the framework of its provisions.²⁸⁶

Member states have to determine the conditions that govern the operations of the private employment agencies in accordance with a system of certification or licencing that accords with the Convention. Appropriate national laws are however not precluded from determining the regulatory framework.²⁸⁷ Other provisions of the Convention include the following:

- 1) Workers recruited under this model have a right to freedom of association and to bargain collectively;²⁸⁸
- 2) Private agencies are prohibited from charging fees to workers;²⁸⁹
- 3) Member states should ensure that necessary measures are taken to provide adequate protection for workers employed by private employment agencies vis a vis their working conditions.²⁹⁰

3.8 ADVANTAGES OF LABOUR BROKERAGE

Having viewed labour brokerage in light of what may be deemed as its disadvantages, a brief analysis of labour brokerage and its advantages will be examined in detail below.

²⁸⁶ Article 2. It states that workers in the private employment agencies must be protected by the National labour law in accordance with the licencing regime the Convention provides for.

²⁸⁷ Article 3.

²⁸⁸ Article 4.

²⁸⁹ Article 7.

²⁹⁰ Article 11. Namibia acceded to ILO Convention 87 of 1997 on 3 January 1995- see www.lac.org.na/namlex/labour.pdf accessed on 18 February 2013.

According to Rahul Gladwin,²⁹¹ broker recruitment has three major advantages which cannot be ignored. Labour brokerage gives an increased access to labour. This, he argues, gives brokers exposure to labour in different countries noting that brokers are travellers. Gladwin²⁹² further states that brokers provide assessment of labour in a more convincing manner. This is because brokers know the skills of their staff and can readily provide industries with employees who possess the exact qualifications. Furthermore, labour brokers are able to provide industries with information on current employees and their suitability for the work assigned.

According to ISIZA,²⁹³ (which means to help in the local Zulu language) a construction company in South Africa, labour brokerage though rendered inconceivable and having some disadvantages, has advantages that outweigh its disadvantages. It notes that the business community has a high demand for a flexible workforce, driven by seasonal changes in product demand, staff absences or a need for skilled employees temporarily. It is an economically efficient model which generates employment on a large scale.²⁹⁴ Incentives are high for those brokers who train their workers to possess a variety of rare skills which can be developed further through workplace experience. Furthermore, where labour brokerage is practiced ethically, brokers are best suited than clients to manage compliance with costs and employment administration. This enables clients to pass risks associated with employment onto the broker.

²⁹¹ Gladwin, R. “*Advantages And Disadvantages of Broker Recruitment*” (2010), retrieved from www.rahulgladwin.com/noteblog/business/is/advantages-and-disadvantages of broking on 21 March 2013.

²⁹² Gladwin R, (Ibid.: p. 1).

²⁹³ ISIZA, “Construction for Development,” (2009 August) retrieved on 21 March 2012 from www.isiza.co.za/features/leadership-and-management/222721.htm.p1.

²⁹⁴ ISIZA, Consultation for Development (Ibid.: p. 9).

South Africa is also a good example of how labour brokers can exist in a lawful, accommodating climate if there is a willingness to regulate their operations.²⁹⁵ Due to the fact that labour brokerage is a large employment generating industry, outlawing its existence is unwarranted. Richard Pike, the Chief Executive Officer of Adcorp Holdings, South Africa's largest placement and employment company argues that a ban on labour brokers is unworkable as it puts too many people out of work in South Africa. More than a million jobs are on the line and this thus makes labour brokerage indispensable to the current global climate.²⁹⁶ Richard Hall²⁹⁷ considers the five most profound advantages of labour brokerage, more particularly in the Australian context.

The points are:

- i) Capacity outsourcing – labour brokerage is used to cope with demand in labour. This is more so during the peak periods and seasons.
- ii) Specialization subcontracting – labour brokerage provides specialist skills.
- iii) Cost Reduction – use of labour brokerage at premium contract prices that a labour brokerage company demands. These prices are negotiated in good faith without derogating from the provision of labour. This enables the client company to bargain²⁹⁸ for lower rates and more employees.
- iv) Flexibility – the continuing shift in the employer - employee contract renders the significance of labour brokerage imperative to the needs of the labour market. Thus short term engagement of a relatively small number of labour brokerage employees helps cover

²⁹⁵ ISIZA, Labour brokerage (Ibid.: p. 1).

²⁹⁶ ISIZA, Labour brokerage (Ibid.: p. 2).

²⁹⁷ Hall, R, (2002) "*Labour Hire in Australia: Motivation, Dynamics and Prospects*," Working paper, University of Sydney p. 8.

²⁹⁸ Hall, R, (Ibid p. 8).

for absence, meet peaks in demand or access specialist skills that might be needed from time to time.²⁹⁹

- v) Stimulating of organizational change³⁰⁰ – labour brokerage can be used to fundamentally change the work ethic and workplace culture. The permanent employees cease to be complacent as they are aware that they may be replaced by labour brokerage employees with better skills and a profound work ethic.

In the long term, this study argues that labour brokerage creates jobs especially for the semi skilled and unskilled labourers who would not ordinarily be employed in formal office jobs due to a lack of the requisite academic qualifications. Furthermore, labour brokerage provides a workforce that meets peaks in demand. This aspect enables companies to maintain a workforce that is useful during certain seasons when there is an urgent need for this type of workforce.

There is the advantage of increased productivity through the use of temporary labour due to the fact that reliable contract labour companies can insulate the client from elevated outsourcing costs associated with big contracts.

The most attractive advantage that this study seeks to show is that labour brokerage allows flexibility. This is due to the seasonal nature of some industries such as fishing and agriculture as the nature of these industries depend on the climate and weather patterns.

Short term contracts are also viable as they enable organizations that may be harmstrung by staff shortages to utilize labour brokerage when the need arises for that purpose. Furthermore, the

²⁹⁹ Hall, R (Ibid p. 9).

³⁰⁰ Hall, R (Ibid p. 8).

costly and time consuming risks of facing unfair dismissal lawsuits for permanent employees are mitigated by these short term contracts. It is therefore more advantageous for labour brokerage to be in existence than an outright ban which would exacerbate unemployment rates and thus affect the economy in the process. It is important to note that the employees in labour brokerage play a significant role in the fishing and agricultural sectors which are mostly seasonal. The introduction of labour brokerage in the health sector of Namibia led to a huge influx of foreign doctors and nurses from countries such as Zimbabwe, Uganda, Zambia, Cuba, Tanzania, Russia and the Ukraine. This lessened the burden on the shortages of health personnel in state hospitals as Namibia faces an enormous shortage of doctors.

3.9 DISADVANTAGES OF LABOUR BROKERAGE –A CASE STUDY

It is imperative to note that the banning of labour brokerage in Namibia was based on the ills of labour brokerage. A case study of labour brokerage will be examined in detail.

It should be noted that the arguments raised by the opponents of labour brokerage are mostly two pronged, mainly preventing the casualization of labour and the resultant commoditization of labour. These aspects will be examined below in brief.

39.1 CASUALISATION

This concept is best understood as the process of shaping employment relations to deprive workers, particularly vulnerable workers of their basic statutory rights as employees.³⁰¹ Agency work “essentially, dilutes the content of the standard employment relationship.”³⁰² As a result labour brokers and their clients circumvent the requirements of the Labour Act and its

³⁰¹ Theron, P (2003),” Employment is not what it used to be,” 24 *ILJ* (1)(2) p. 47.

³⁰² Theron, P *Ibid* at p. 125.

regulations in the process. Moreover, because permanent workers are increasingly replaced by agency workers, the number of workers who enjoy protection of their social benefits under the Act is eroded.

39.2 The APS and Etale saga³⁰³

Etale is a fishing company in Walvis Bay that makes use of workers provided to it by Africa Personnel Services. Following a demonstration on 10 March 2010 by workers on Etale's premises, the workers contracted at Etale Fishing Company were suspended with immediate effect. The demonstration was as a result of workers who aired their grievances over conditions of employment, including pay. The workers claimed that they had not received an increment to their salaries in 3 years.

The workers documented how APS paid them N\$5. 80 per hour which they claimed was little compared to the permanent employees at Etale although their terms and conditions of employment were similar.³⁰⁴ The employees did not receive any benefits. Furthermore, workers were disgruntled by the fact that Etale's management refused to grant the Namibian Seaman and Allied Workers Union officials access to their premises to hold meetings with the disgruntled employees. This was the union the workers had mandated to negotiate with the company, Etale Holdings to improve their working conditions of employment.³⁰⁵ The workers' union then blamed the Government for failing to protect the sea workers from being exploited by Africa Personnel Services. The workers who received suspension letters were subsequently dismissed and they then held a one day demonstration at the Ministries of Labour and Social Welfare and

³⁰³ The story appeared on The Namibian Broadcasting Corporation eight o'clock news bulletin of 11 March 2010.

³⁰⁴ Nakale, A. (2010, March 12), "Etale suspends APS employees" *The New Era* p. 13.

³⁰⁵ Staff Reporter, May 2011, 31, TUCNA unhappy about slow judicial system, *The Namibian*, p. 2, retrieved from www.namibian.com.na/index.php?id=28tx-t/new90 SBT on 1 May 2012.

of Fisheries and Marine Resources.³⁰⁶ Etale had in the meantime through its Managing Director made it clear that they have a contract with Africa Personnel Services and that whatever grievances the workers had to be addressed by Africa Personnel Services.³⁰⁷

After the employees received notices of suspension, they camped outside the Etale premises seeking answers for their suspension. As a result of the picketing, the Etale Company threatened Africa Personnel Services with a lawsuit of N\$5 million if they did not provide Etale with new employees. Faced with the prospect of being sued, Africa Personnel Services opted to bus in new workers to take up the positions of the suspended workers.³⁰⁸

However, the unhappy 624 suspended employees blocked the bus from entering the premises. The suspended workers stoned the bus and the bus driver sustained minor injuries during the scuffle.³⁰⁹ The bus left the premises with the new workers. APS then filed an urgent application with the Labour Court seeking an interdict against the suspended employees. The court granted the interdict which inter alia restrained the 624 workers from interfering in any way or obstructing the normal operations of APS business or any person involved in APS operations.³¹⁰

The Erongo police Regional Commander, Festus Shilongo, together with union leaders served the court order on the workers and persuaded them to move away from Etale premises. The employees were subsequently dismissed. When the matter was referred to arbitration whilst they were on suspension, the proceedings were postponed on three occasions. When the matter was

³⁰⁶ Staff Reporter (2010), NASAWU actions irresponsible, *SWAPO Party newsletter*, retrieved from www.swapoparty.org/nasawu-actions-irresponsible.html on 11 March 2012.

³⁰⁷ Nakale, A, "Etale suspends APS employees" *ibid* at p. 15.

³⁰⁸ Nakale, A, 2010, March 18, "APS workers served with court orders," *The New Era*, p. 7.

³⁰⁹ Nakale, A, "APS workers served with court order" *ibid* at p.7.

³¹⁰ Nakale, A: *ibid* at p. 7.

finally heard by the arbitrator, whom the workers accused of bias, he held that the suspension could not be challenged as the parties had been dismissed by the time a hearing was held.³¹¹

These employees had the following grievances against Africa Personnel Services:

- 1) Workers employed by labour brokerage companies are not protected by both the labour broker and the client.
- 2) Arbitrators collaborate with labour brokerage companies and are paid for their services by employers (labour brokerage companies) for services rendered.
- 3) The lack of a minimum wage in the fishing industry and the lack of a Wage Commission meant APS could pay them meager wages.
- 4) They were technically unemployed.
- 5) The labour ministry was failing to regulate labour brokers.

The Etale scenario is a candid case study of the ills of labour brokerage and the reason why Parliament frowns upon it. As a result, the opponents of labour brokerage call for its outright ban because of the fact that this case showed the vulnerability of the employees in so far as the Labour Act did not protect their rights to bargain and negotiate for better working conditions with both APS and Etale.

The case study epitomizes the typical abuse of basic labour rights by labour brokerage firms. Workers with genuine grievances with regard to their conditions of employment are easily replaced by equally unskilled labour due to the fact that their bargaining powers are weakened by the fact that they seldom are members of trade unions. The moment the employees raised

³¹¹ Sasman, C, (2010, September, 30), "Namibia Fisheries Companies workers demonstrate," *New Era*, retrieved from www.allafrica.com/stories/201009300259.html 1 May 2012.

grievances especially on wages and salaries, they were easily replaced and the vicious cycle is likely to continue when the new employees challenge their conditions of service. The client and the labour broker were mostly concerned about the earning of hefty profits at the expense of the employees' welfare. When the employees exercised their right to strike, APS was threatened with a law suit. This clearly shows the extent to which APS was placed under pressure to provide employees to Etale for its operations to continue. The right to strike and picket as envisaged by the Labour Act was clearly infringed by both the labour broker, APS, and the client, Etale, as the workers were easily replaced by substitute labour for exercising their right to strike. There were clearly no efforts at ensuring that all the interested parties to the dispute congregated to seek a viable negotiated settlement to the impasse. The Seaman and Allied Workers Union clearly failed to play an active role in the negotiation for better working conditions of the employees who clearly felt exploited by both APS and Etale.

A lack of a suitable provision in the Labour Act at the time to regulate labour brokerage was responsible for leaving the employees vulnerable to exploitation. This case therefore shows the dire need to regulate labour brokerage. Such regulations if they were in place at the time would have ensured that the workers were protected. The protections would have extended to a recognition of their rights in the Labour Act, more particularly their Chapter 7 rights to strike, the right to picket, the right to bargain for better working conditions through the recognized trade union in terms of Parts B and C and the right to a fair arbitration hearing as provided for by section 85 of the Labour Act. Raising the matter with the arbitrator was mainly a *brutum fulmen* for the employees as the arbitrator dispensed with the matter on a technicality instead of dealing with the merits. The Preamble of the Labour Act provides that the Act was enacted

‘to establish a comprehensive labour law for all employers and employees; to entrench fundamental labour rights and protections; to regulate basic terms and conditions of employment; to ensure the health, safety and welfare of employees; to protect employees from unfair labour practices; to regulate the registration of trade unions and employers' organizations; to regulate collective labour relations; to provide for the systematic prevention and resolution of labour disputes.’

Clearly, the Etale case failed to grant these protections to the employees. It is therefore difficult to construe the Labour Act as an all inclusive statute for the benefit of those employees employed by labour brokers. This Etale case study however does not justify an outright banning of labour brokerage as the introduction of the regulations by the legislature clearly ameliorated the abuses and exploitation of the workers. The regulations are discussed in detail in Chapter 5 below. The regulations clearly recognise the significance of labour brokerage in the mainstream economy.

A detailed examination of labour brokerage in other jurisdictions will be assessed in detail below and the lessons that Namibia can derive from the manner in which labour brokerage has been regulated.

CHAPTER 4

4. THE REGULATION OF LABOUR BROKERAGE IN OTHER JURISDICTIONS.

4.1 SOUTH AFRICA

Labour brokers are mainly active in the manufacturing, construction, wholesale, retail trade, mining, transport and security industries.³¹² The industry is highly profitable and generates in excess of R23 billion per year³¹³. Average wage rates vary between R8 per hour in the agricultural sector to R430 per hour in the mining sector.³¹⁴

Despite of these statistics, the debate on labour brokerage in South Africa refuses to die down. The Judge President of the Labour Court of Appeal, Dunstan Mlambo P, said that many companies in South Africa use labour brokers to circumvent labour laws.³¹⁵ He stated the following whilst addressing a labour law conference in Johannesburg, South Africa “labour brokerage fills the pockets of labour brokers at the expense of the employee, while the client gets the fruit of the employee’s labour, leaving the employee with no protection... I am afraid that the emerging enterprises, especially those who are previously disadvantaged, need to be reined in. Otherwise, as history has shown, the poor will be ground into the dust under punishing labour conditions and declining wages so that the captains of industry grow fatter.”³¹⁶

The Judge President cited strategies that include outsourcing, the use of fixed term contracts, temporary and part-time work as a deprivation of many employees’ rights to labour law protection. He further remarked thus:

³¹² Mazanhi, I, (2012,18 April),” Labour brokerage to ban or regulate?” *Newsday* retrieved from www.newsday.co.zw/article/2012-04-18-labour-broking-to-ban-or-regulate retrieved on 5 June 2012.

³¹³ Mazanhi, I Ibid: at p. 2.

³¹⁴ Mazanhi, I Ibid at p. 1

³¹⁵ Areff, A.,(2012, August 1), “Companies use brokers to avoid laws, says Judge,” retrieved from www.mg.co.za/article/2012-08-companies-use-brokers-to-avoid-labour-law-says-judge on 29 March 2013.

³¹⁶ Areff, A Ibid.

“Allowing labour brokers to continue to place workers in terrible and uncertain working conditions on the contention that half a loaf is better than nothing will only serve to alienate the working class and harden the attitudes of unions with labour brokerage ...yes, we need employment. But we also need decent work. In that way, at least the individual has dignity and spirit and (it) gives him or her a sense of pride in being able to do an honest day’s work at decent pay.”³¹⁷

In South Africa, the term “temporary employment services” is used rather than labour brokerage. The statement by the Judge President of the South Africa Labour Court of Appeal expresses the reason why the biggest critic of labour brokerage, the Congress of South African Trade Unions(COSATU),which is the largest trade union federation in South Africa, has called for an outright ban of labour brokerage. Due to the scars of apartheid in South Africa, labour brokerage is an apt reminder to the workforce of the oppressive and repugnant attitudes of employers during the time. On March 2012, COSATU together with the National Council of Trade Unions (NACTU) issued a joint statement.³¹⁸ In the joint statement, the following salient points emerge:

- i) That labour brokerage in South Africa should be banned;
- ii) Poverty, unemployment and inequality are the three principal challenges facing the working class and this is fuelled by labour brokerage;
- iii) Labour brokers are the main drivers of casualization of labour. Their practices are the “absolute contradiction to the principle of decent work.”³¹⁹

³¹⁷ Areff, A Ibid.

³¹⁸ See www.cosatu.org.za/show.php?id=5917 retrieved on 29 March 2013.

³¹⁹ Ibid.

- iv) Labour brokers do not create jobs but sponge off the labour of others and replace secure jobs with temporary and casual forms of employment.
- v) Workers employed by labour brokers take home a mere pittance as a salary whilst their superiors are millionaires.
- vi) The face of casualization is predominantly the black working class youth employed by labour brokers. The industry is thus exploitative as it circumvents labour laws and regulations to human trafficking and modern- day slavery.

In summary, COSATU proposed that labour brokers should be banned.

4.2 Why Labour brokers should be banned?

- 1) Labour brokerage is equivalent to the trading of human beings as commodities. Generally, the main commercial contract is agreed to between the labour broker and the so-called “client” enterprise. It sets out the various stipulated labour services to get supplied and the price at which these services are to be supplied, whereas the true suppliers of labour (namely the workers) are excluded from the process. This undermines their rights to negotiate their wages and employment terms. The Constitution of South Africa guarantees a right to fair labour standards and the right to collective bargaining. The practice of labour brokerage tramples upon both of these constitutional protections of workers.
- 2) Labour brokers do not create jobs but merely act as intermediaries to access jobs that already exist, and which in many cases would have existed previously as permanent full-time jobs;

- 3) Labour brokers destroy permanent jobs as they lead to insecure contractual relations and downgrading of wages and employment terms;
- 4) Labour brokers do not practice the principle of equal pay for work of equal value. Workers employed by the labour brokers work longer hours without any compensation for working on Sundays and public holidays;
- 5) Apart from undermining collective bargaining rights, labour brokers also provide scab labour and therefore serve as strike breakers;
- 6) Labour brokerage, combined with other forms of atypical work, reflects the current trends of the intensification of the rate of exploitation of workers;
- 7) Significant emphasis is placed on the commercial rationale of using labour brokers to lower costs for clients, which is commonly achieved by reducing wages and excluding employment benefits;
- 8) Labour brokerage allows employers to evade their obligations as stipulated in the Labour Relations Act. This is tantamount to outsourcing labour relations to a third party;
- 9) Workers under labour brokers are unable to enforce their rights against any party that may be identified legally as the employer. In cases where this may be imposed against the labour broker agency, its precarious financial standing, especially in cases of insolvency, renders workers' rights of enforcement merely notional;

- 10) Increased regulation of the industry will not work because of capacity constraints within the department of labour to enforce existing legislation and a ban against labour brokers may be administratively simpler than detailed regulation, thereby simplifying enforcement;
- 11) Most of the workers employed by the labour brokers do not enjoy pension fund/provident funds, medical aid benefits, etc. The employers dump these workers on the government social security system thereby increasing the state burden to provide for them in their pension life. This means the taxpayers are subsidising the employers to make super profits;
- 12) Labour brokers are also anti-trade unions because 'their' workers are constantly being moved around from one workplace to another within short periods, often with no access to union officials or the possibility of stop-order deductions for union subscriptions. They find it very hard to join a union or to remain union members.
- 13) Labour brokers contribute to the progressive de-skilling of workers, especially as a result of the short-term and irregular nature of the contracts associated with labour brokerage and other forms of atypical labour.

COSATU reinforced its disdain of labour brokerage when on the 7th of March 2012 it organized a national strike against e-tolling and labour brokerage.³²⁰ COSATU in its memorandum of grievances strongly called for the outright banning of labour brokerage in South Africa.

However, noting that the Government of South Africa seeks to follow the Namibian model of regulating labour brokerage, it is certain that continuing tension will simmer on.

³²⁰ Anderson, A and Wolmarans, R (2012, March 7), *Thousands on strike as COSATU lists demands*, retrieved from www.bdlive.co.za/articles/2012/03/07/thousands-on-strikeasCOSATUlistsdemands; jsessionid=3FA71B701E6DBCA4684E6D892E6D798.presents.bdfm on 29 March 2013.

The South African government thus proposed a Labour Amendment Bill which will be examined in detail below.

4.3 LABOUR AMENDMENT BILL

The Labour Amendment Bill of South Africa is currently being debated in the South African National Assembly. It was published in Government Gazette number 3/5212 of 5 April 2012.

One of the objectives of the Bill as appears from the Preamble is to provide for the greater protection of workers placed by temporary employment services.

4.3.1 THE NEW CLAUSE 198

The Bill maintains the original definition of temporary employment services (TES). It however now specifically expands the definition to state that the temporary employment service remunerates the employee. Clause 1 of the Bill reads-

“(1) In this section, ‘temporary employment service’ means any person who, for reward, procures for or provides to a client other persons – (i) who [rendered services to, or] performed work for the client; and (ii) who are remunerated by the temporary employment service.”

Clause 4A of the Bill provides that where the client is deemed to be the employer and is jointly or severally liable for a failure to uphold minimum labour standards for employees, the employees may institute proceedings against both the employer and the TES. A Labour Inspector may secure a compliance order against the client as the employer of the worker. This provision is meant to safeguard employees from clients who fail and/or refuse to grant the employees their minimum and basic rights as envisaged by the Act especially noting that clients would state that

they are not the employer. The client and the TES are now recognized as employers making it difficult for both parties to abdicate their responsibilities towards the employees. An award and a compliance order would be enforceable against both the client and the TES.

A new Clause 4B has been enacted which would enable the client to keep a detailed record of the particulars of the employee in terms of section 29 of the Basic Conditions of Employment Act. Such records would include the name, sex, age, salary, period of employment of the employee and the leave records for such employee inclusive of annual leave, sick leave and compassionate leave. This provision introduces the various forms of leave to the employees who are clothed with the same rights as permanent employees. At present, these employees do not have proper access to leave nor do the employers keep proper records of their employment history. The TES and the client are compelled by the law to enter into contracts with the employees in terms of the provision. The Namibian regulations have a similar provision which has the effect of placing the temporary employees at par with the permanent employees.

A TES cannot employ an employee on conditions which are contrary to the Labour Relations Act.³²¹ This means that the employees can now enjoy rights to form and join trade unions of their choice, bargain for satisfactory wages and salaries and to also strike and picket if there is a justification to do so. The employees can also be protected by collective agreements in their sectors. The prohibition clause means any contravention of this section would render the TES and the client criminally liable. It has also opened avenues to the employees to pursue civil claims against both the client and the TES.

³²¹ Clause 4C.

The Labour Court and the arbitrators are empowered to deal with disputes arising from the interpretation of provisions of the contracts of employment and may make appropriate awards and orders which are enforceable against the client and the TES.³²² Namibia has a similar provision in terms of section 128(6) which provides for the employee referring a matter to the Labour Commissioner for arbitration where there is a dispute with regards to a strike, a lockout and any other contraventions of the Act. This provision elevates the employees to the same status as that of permanent employees.

TES must be registered. A failure to register will not constitute a defence in the event that proceedings are instituted against the TES and the client by an aggrieved employee.³²³

The scope of what is termed temporary services means carrying out work for a client by an employee in three ways viz-

- a) for a period not exceeding six months.
- b) As a substitute for an employee of the client who is temporarily absent.
- c) In categories of work for any period of time which is determined in a collective agreement concluded in a bargaining council or by notice by the Minister.³²⁴

This means by implication that an employee who is employed for a period exceeding 6 months on a short term contract is deemed by operation of law to be a permanent employee. As will be shown below in a detailed discussion of Namibia, a similar provision was enacted in the regulations. The intention of the legislature is to ensure that employees are made permanent.

³²² Clause 4E.

³²³ Clause 198(4F).

³²⁴ Clause 198A.

An employee who performs temporary services for the employer is an employee of the TES.³²⁵

Where the employee does not perform temporary services such employee is deemed by operation of law to be the employee of the client who should ensure that the provisions of the Labour Relations Act are complied with in full with regard to an employer and employee relationship.³²⁶

Where the client terminates the employee's assignment to avoid being labeled the employer, it becomes a dismissal.³²⁷ This provision thus enables the employee to institute proceedings at the CCMA and subsequently the Labour Court. The provisions safeguard the rights of the employees making it difficult to replace the employees with scab labour whenever they strike or picket or negotiate through their recognized trade unions and bargaining councils for better conditions of service.

The employee of a client performing temporary work and the permanent employee of the client must be treated the same unless there is a justifiable reason for different treatment. The client will have to bear the onus to prove such justification.³²⁸

Just like the Namibian regulations which have sought to place temporary employees at par with their permanent counterparts, the South African Labour Amendment Bill seeks to achieve the same balance in relation to both sets of employees.

The employment of persons on short term contracts is justified in extremely limited circumstances which include inter alia:

a) The replacement of another employee absent from work temporarily.³²⁹

³²⁵ Clause 198A(3)(a).

³²⁶ Clause 198A(3)(b).

³²⁷ Clause 198A(4).

³²⁸ Clause 198A(5).

- (b) The volume of work though large is for a period that will not exceed 12 months.³³⁰
- (c) a student or recent graduate employed only for the purposes of being trained or gaining work experience in order to enter a job or profession.³³¹
- (d) The employee is engaged to work exclusively on a genuine and specific project that has a limited or defined duration;³³²
- (e) The employee has been engaged for a trial period of not longer than 6 months for the purpose of determining the employee's suitability for employment. This amounts to a permissible period of probation.³³³
- (f) the employee is a non-citizen who has been granted a work permit for a defined period. This applies to foreign nationals.³³⁴
- (g) Furthermore, the employee is engaged to perform seasonal work. This provision takes cognizance of seasonal work including fishing and agriculture industries.³³⁵
- (h) The employee is engaged on an official public works scheme or similar public job creation scheme.³³⁶
- (i) The employee is engaged in a position which is funded by an external source for a limited period.³³⁷
- (j) The employee has reached the normal or agreed retirement age applicable in the employer's business.³³⁸

³²⁹ 198B(2)(a).

³³⁰ 198B(2)(b).

³³¹ 198B(2)(c).

³³² 198B(2)(d).

³³³ 198B(2)(e).

³³⁴ 198B(2)(f).

³³⁵ 198B(2)(g).

³³⁶ 198B(2)(h).

³³⁷ 198B(2)(i).

³³⁸ 198B(2)(j).

Where the employer seeks to circumvent any of the 10 points above, the employees will be deemed to be permanent employees. The employer will have to justify and demonstrate any other justifiable reason for fixing the term of the contract.³³⁹

Contracts on a short term basis must be in writing.³⁴⁰ It is a criminal offence not to reduce the contract into writing.³⁴¹

The Bill further provides that if an employee is employed beyond the permissible six month period, the employee must be treated equally like the permanent employees. The onus is on the employer to justify the decision to employ beyond the aforementioned period.³⁴²

Where the employee is contracted for a period exceeding twenty four months on a fixed term contract, the employer must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract.³⁴³ This provision will ensure that employees are not retained as temporary employees when they in fact work as permanent employees. In the past, the TES would employ the employees on these contracts without affording the employees their rights to collective bargaining or joining and forming of trade unions of their choice. In that way, both the client and the TES would continue to exploit the employees and pay them a mere pittance of a salary for the duration of the contract. As a result, they would perform similar and probably more work than permanent employees but they would be termed temporary employees.

³³⁹ 198B(3)(b).

³⁴⁰ 198B(6)(b).

³⁴¹ 198B(6)(c).

³⁴² 198B(8).

³⁴³ 198B(10).

Furthermore the Bill provides that the employers must afford the employees equal access to training and skills development comparable to full time employees.³⁴⁴ Whenever there is an opportunity to apply for vacancies, such opportunities should be granted to both permanent employees and temporary employees alike.³⁴⁵

A detailed analysis of the proposed amendment shows a drastic improvement in the conditions of service for the employees under the South African labour brokerage system. The debate regarding the amendment to the legislation to afford employees more protection has been raging on for decades. The amendments should have been promulgated in early 2010.³⁴⁶ However, the sharp divisions arising from a total ban of the industry, to regulation and greater policy on existing legislation rendered it difficult to promulgate the Labour Amendment Bill.

The current Bill if enacted will:

- i) Grant the employees' rights to institute proceedings against either the temporary employment service or the client or both;
- ii) Ensure that labour inspectors have the right to secure and enforce compliance against the temporary employment service or the client or both. The award is enforceable against both parties.
- iii) Ensure that a proper employment contract as contemplated by section 29 of the Basic Conditions of Employment Act must be concluded. section 29 of the Basic Conditions of Employment Act provides that:

³⁴⁴ 198C(3)(b).

³⁴⁵ 198C(4).

³⁴⁶ Mahomed, I (2010, October 8), "Labour brokers real remedies?", retrieved from <http://www.hg.org/article.asp?id=18869> on 29 March 2013.

“the employer must provide his full name and address, the worker’s name, occupation and brief description of;

- vii) The place of work
- viii) Date of employment
- ix) Working hours and days of work
- x) The payment details, leave details and the notice and contract period must be included in the contract of employment.”

This provision provides permanency and degree of security to an employee.

Section 198A4(c) provides that the terms and conditions of employment of the employees must comply with the Act when they are employed inclusive of the rights to strike and join trade unions of their choice.

The employee also has a right to institute proceedings to the labour court or an arbitrator. This gives the employee the right to protection by the law.

The proposed section 198 is a stringent provision that will make it increasingly unattractive to the temporary employment services and clients to hire employees on short term contracts.

However, the provisions that permit the clients and temporary employment services to hire employees on short term contracts in exceptional circumstances provided for in the proposed Bill open another route for abuse of employees. Foreigners may be exploited noting that the Act does not provide for exceptions to non citizens who may qualify for permanent residence by reason of marriage. Furthermore, there must be a definition of a student. Students may either be part time or full time and there is a categorization of both. The TES and client would justify the

conclusion of short term contracts under the guise that the parties concerned are students. It is common cause that such students would not remain students *ad infinitum*. Therefore, the proposed Clause 198B(c) must ensure that there is a limit placed on what it terms a student and a recent graduate. Would an employee who graduates and works for a year or one who works for two years still be termed a recent graduate and would they both fall in the same category? There must be certainty to the definitions of a student and a graduate.

The South African authorities have thus decided to regulate the labour brokerage industry. This is in line with recognizing the need to monitor potential abuses in labour brokerage arrangements. Similarly, Namibia has enacted regulations to avoid abuses of temporary employees as is apparent with the labour brokerage system. As the Supreme Court of Namibia highlighted,³⁴⁷ an absolute prohibition is unjustified. This is in light of the right to free trade, the need for flexibility which labour brokers cater for in a dynamic market and the importance of freedom of contract. Thus a balance needs to be struck between the interests of workers who should not be treated as commodities, and thus ensuring that their value is recognized by paying them competitive salaries which permanent employees in their position would enjoy. Furthermore, the employees would be able to join and form trade unions of their choice. The employees would be entitled to unfettered access to annual leave, compassionate leave and sick leave, rights which the current Section 198 does not protect.

The landmark case of *Simon Nape v INT CS Corporate Solutions (Pty) Ltd*³⁴⁸ highlights the need for labour brokerage to be regulated in South Africa. The case exposes how an employee can be dismissed by a labour broker as a result of a client who no longer wishes to have the employee on the premises. In this case, the applicant committed an act of misconduct. The client, Nissan

³⁴⁷ *Africa Personnel Services V Government of the Republic of Namibia and 3 Others*2009(2) NR 596.

³⁴⁸ (2010) ZALC 33.

(Pty) Ltd, invoked its contractual rights, and demanded the removal of the complainant from its premises. The complainant was suspended, and after a disciplinary hearing he was given a final written warning. The complainant agreed to the written warning. Nissan was however not satisfied and refused to allow him access to its premises.

The labour broker was obliged in terms of its contractual relationship with Nissan to accede to Nissan's demands. The broker thus invoked the retrenchment provision of Section 189 and retrenched the complainant. He was retrenched on the basis that there was no employment for him. The labour broker contended that it had acted lawfully in terms of its contractual agreement with Nissan. The court held that such a provision was unlawful and against public policy as it did not take into account the right of an employee not to be unfairly dismissed. Boda AJ confirmed that public policy considerations preclude the enforcement of contractual terms whose enforcement would be unfair and unjust. Labour brokers and their clients are not at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and treated at the whims and fancies of clients.³⁴⁹

This is a landmark case whose ratio decided will be remedied by the Bill. The Bill as expected met a divided response. Whilst conceding defeat in its determination to have labour brokers banned outright,³⁵⁰ COSATU has called for a draft of further changes to the Labour Relations Bill. At a public hearing on the Labour Relations Amendment Bill, COSATU's parliamentary representative, Prakesnee Govender admitted that the ANC had won the battle on labour brokers.³⁵¹ COSATU's call for an outright ban of labour brokers had not received support.

³⁴⁹ *Simon Nape v INT CS Corporate Solutions (Pty) Ltd* 2010 ZALC 33

³⁵⁰ Ferreira, E, (2012, July 31), "COSATU admits ANC won on labour brokers battle", retrieved from www.mg.co.za/article/2012-07-31-cosatu-admits-anc-won-labour-brokers-battle retrieved on 30 March 2013.

³⁵¹ Ibid.

Business people widely see the bill as a disincentive for investment and job creation.³⁵²

Govender further argues that the bill fails to adequately address the exploitative labour market trends and social inequalities spawned by apartheid.³⁵³

COSATU called for the scrapping of the six month period mentioned in Section 198(C) of the Labour Relations Amendment Bill after which temporary workers are recognized as permanent staff. Govender argued that this clause would allow employers to hire and fire employees during the first six months of employment. Furthermore, the worker would have no recourse to a claim of unfair dismissal.³⁵⁴

The Ministry of Labour³⁵⁵ enacted the Amendment Bill as an effective tool to ensure that vulnerable workers receive adequate protection. This would enable them to be employed in conditions of decent work. It would also enable South Africa's compliance with its obligations in terms of international labour standards.

The Ministry further stated that the amendments to Section 198 are introduced to address more effectively certain problems and abusive practices associated with temporary employment services. The amendment will further regulate the employment of persons by a temporary employment service in a way that seeks to balance important constitutional rights. This would in the main analysis restrict the employment of more vulnerable, lower paid workers by labour

³⁵² Ferreira, E Ibid.

³⁵³ Ferreira, E Ibid.

³⁵⁴ Ferreira, E Ibid.

³⁵⁵ See memorandum of objects, Labour Relations Amendment Bill, 2012 retrieved on 31 March 2013 from www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsLra.pdf p.1.

brokers in exploitative conditions. Section 186 additionally provides for protection against dismissal for all employees in fixed term contracts.³⁵⁶

Due to the ambiguous explanation found in the Memorandum of Objectives pertaining to the bill, it appears that two possible interpretations on the meaning of clause 198A(3)(b) have emerged.

On the one hand, in circumstances where section 198A (3)(b) becomes operative, the employee is regarded as having become an employee of the client and thus ceases to be an employee of the temporary employment service. On the other hand it may be equally argued that the employee remains an employee of the temporary employment service but is also deemed for purposes of the LRA to be an employee of the client. They suggest that the memorandum of objectives be reworded in order to address the aforesaid ambiguity.

Furthermore, the new clause 198B introduces additional protection for more vulnerable workers, applying only to employees who earn below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act.³⁵⁷

The new clause 198C is guided by the provisions regulating part-time employees in the European Union and the ILO Convention on part-time work (Convention 175 of 1994).³⁵⁸ The effect of the Convention is to place temporary employees in the same bracket with permanent employees in relation to the opportunities for training and development. This means the employees are entitled to promotion and to other employment opportunities that arise as a result.

³⁵⁶ Memorandum of objects Ibid at p. 22.

³⁵⁷ Memorandum of objects Ibid: at p. 24.

³⁵⁸ Memorandum of objects Ibid at p. 26.

A major addition is clause 198D which provides for referral of disputes between a temporary employment service and an employee to the CCMA or bargaining council, with jurisdiction. The first referral will be for conciliation and where the dispute is not resolved, it is referred to arbitration.

However, Vatalidis and Davies³⁵⁹ argue that there is a lack of clarity as to what may constitute temporary employment services. This could make many labour brokers anxious. This is due to the fact that the Minister invites representations from the public on categorization of temporary services. The authors further argue that “if the Minister’s proposed amendments dealing with labour brokers are introduced into law, an employee employed by a labour broker earning below the threshold prescribed in the BCEA (currently R250 000), assigned to a client for more than six months could be deemed to be the employee of the client and must unless there is a justifiable reason for the differentiation, be employed on terms which are no less favourable than the terms applicable to the clients’ other employees performing the same or similar work. This amendment, if introduced into law, may have the effect of indirectly banning the practice of labour brokerage.”³⁶⁰

The authors conclude their article by stating that the publication of the bill has not put to bed many of the debates which began in 2010 when they were first published for public debate. This may mature into constitutional challenges.

It remains to be seen whether the proposed amendment will go a long way in regulating the conduct of temporary employment agencies in South Africa.

³⁵⁹ Vatalidis, A and Workman-Davies, B,(2012),” *Proposed Amendments to the Labour Relations Act and the Basic Conditions of Employment Act*, retrieved from www.polity.org.za/article/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act-2012-05-07 on 31 March 2013.

³⁶⁰ Vatalidis, A and Workman-Davis, B Ibid at p. 3.

The Solidarity Trade Union (hereinafter ‘Solidarity’) commended government for its proclaimed goal of ensuring that workers’ rights to fair labour practices are protected and decent work for all is created.³⁶¹

Solidarity argues that indications in the recent past have been that the number of permanent employees has significantly decreased in the past decade, while employees employed by temporary employment services have increased drastically. This would pose problems for South Africa because it follows the mode of employment that focuses on permanent jobs. This is called the standard employment relationship.³⁶² Trends suggest a decline in permanent employment since 1986 and this coincides with an upsurge in labour brokerage. There are indications that the labour dynamic is shifting from full time employment to outsourced and informal employment.³⁶³

4.4 CURRENT LEGAL POSITION ON LABOUR BROKERAGE

In South Africa the term temporary employment service is used rather than labour brokerage. The first legislative provision for temporary employment services (TES) was enacted in 1983 when the Labour Relations Act of 1956 was amended to provide for what is called a labour broker’s office.³⁶⁴ The manner in which TES is defined legislatively is peculiar. The 1956 Labour Relations Act defined a labour broker as someone who, “for reward provides a client with a person to render services to or perform work for the client or procures such persons for him, for which service or work such persons are remunerated by the labour broker.” Of note is

³⁶¹ Solidarity Research Institute (2012 July), ‘*Comments on the Labour Relations Amendment Bill and the Basic conditions of Employment Amendment Bill*’ published by solidarity Trade Union retrieved from www.navorsing.co.za/wp-content/uploads/2012/07/solidarity-comments-on-labour-Bills-July-2012-3-pdf on 31 March 2013.

³⁶² Solidarity Ibid at p. 9.

³⁶³ Solidarity Research Institute Ibid at p. 9.

³⁶⁴ See Section 1 of Act 28 of 1956 as amended by Act Number 2 of 1983.

that the labour broker was deemed to be the employer of the employee. After independence in 1994, the temporary employment service definition was rephrased. The 1995 Labour Relations Act was consistent with the 1983 amendments though another proviso has now been added. The section thus provides that a temporary employment service is any natural person who procures or provides to a client a person who renders and performs services to a client. This must be done for reward.³⁶⁵ Thus the full definition of a labour broker is provided as:

“any natural person who conducts or carries on any business whereby such person for reward provides a client for such business with other persons to render a service or perform work for such client, or procures such other persons for the client for which services or work such other persons are remunerated by such person”.³⁶⁶

The broker is thus the employer. The TES providing the worker must remunerate the workers. Furthermore, in terms of Section 198 (4), the client is jointly responsible with the broker if there is a contravention of:-

- 1) A collective agreement concluded in a bargaining council that regulates terms and conditions of employment, or
- 2) A binding arbitration award that regulates terms and conditions of employment.

Section 82 of the Basic Conditions of Employment Act contains a similar provision on the definition of a temporary employment services as Section 198 of the Labour Relations Act.

³⁶⁵ Section 198 (7).

³⁶⁶ Section 198 (1).

In terms of section 82, the TES is deemed to be the employer of the workers it procures or provides to a client, but in terms of which the client may be jointly and severally liable for breaches of legislation.

The Compensation for Occupational Injuries and Diseases Act of 1993 (COIDA) defines an employer to include a labour broker who, against payment provides a person to a client for the rendering of a service or the performance of work. Similarly an employee is defined to include a person provided by and paid for by a broker.³⁶⁷ A TES is thus obliged to register the employer of any workers it provides to a client, regardless of the period of the placement. It is also obliged to report any accident at work to the Commissioner. The client is liable for the accident to the employee in terms of the COIDA unless it pays the worker concerned.

The Skills Development Act of 1998 does not refer to TESs. Instead it introduces a requirement that “*any person who wishes to provide employment services for gain must apply for registration...*”³⁶⁸ The registration form is basic, requiring no more than the address and particulars of the Applicant.³⁶⁹ The application must be forwarded to the Director General of Labour. If satisfied that the prescribed criterion has been met, the Director General may register the applicant as a private employment office.

However, it should be noted that since not all employment services for gain are TESs, registration in terms of the Skills Development Act of 1998 is not a significant issue. It does not affect temporary employment services, nor does it represent a means to regulate their activities.

³⁶⁷ See Section 1 (xvii) and (xvi) of the Compensation for Occupational Injuries and Diseases Act of 1993.

³⁶⁸ Section 24 of the Skills Development Act of 1998.

³⁶⁹ Annexure 5.

As employers, temporary employment services are liable to apply to the South African Revenue Services to be registered for the purposes of payment of skills development levies.³⁷⁰ Unless exempted, a registered employer must pay a one percent levy in respect of the total leviable amount. This amount is “the total amount of remuneration paid or payable, or deemed to be paid or payable, by an employer to its employees during any month, as determined in accordance with the provisions of the fourth schedule of the Income Tax Act...”³⁷¹ In terms of the schedule an employer may be liable to pay levies in respect of persons who may be regarded as independent contractors.

A provision which most temporary employment services have used to their advantage is the exemption clause.³⁷² An employer is not required in terms of that clause to register with the South African Revenue Service (SARS) if his employees are paid below the threshold. That threshold is R250 000.³⁷³

Theron et al³⁷⁴ raise the following question- if an employer is not required to deduct tax from his employees because they earn less than the threshold, how will one know whether there are reasonable grounds to believe an employer will pay more than R250 000 per annum in remuneration or not? Theron et al³⁷⁵ argue that the effect of this provision is to make registration for purposes of the skills levy wholly reliant on the good will of the employer. Undoubtedly, many TESs pay wages below the threshold. Labour legislation in South Africa has not curbed the growth of labour brokerage.

³⁷⁰ Section 5.

³⁷¹ Section 2 (4) of the Skills Development Levies Act, 1999.

³⁷² Paragraph 5 (1) of the Fourth schedule to the Income Tax Act 58 of 1962.

³⁷³ Fourth schedule Total Income Tax Act.

³⁷⁴ Theron, J, Godfrey, S, Lewis P and Pienaar M, (2010), “*Labour broking and Temporary Employment Services: A report on trends and policy implications of the rise in triangular employment arrangements*” Labour and Enterprise project Institute of Development and Labour Law, Sociology Department, University of Cape Town.

³⁷⁵ Theron, J et al Ibid at p.5

However, the Employment Equity Act of 1998 (Equity Act) has a provision that strongly protects employees. In terms of the Act, a person whose services have been procured by a TES will be deemed to be an employee of the client if that person's services are utilized by the client for longer than three months.³⁷⁶ Further, the client will be liable in the event that unfair discrimination against such an employee is established. A TES which commits an act of unfair discrimination on the instructions of the client may be held jointly and severally liable with the client.³⁷⁷

The South African Labour Laws Amendment Bill which applies to both the Labour Relations Act and the Basic Conditions of Employment Act was brought under scrutiny as a result of the strike action by COSATU on 7 March 2012. The Minister stated that the additional amendments had been made to the laws to bring them in line with labour law developments by, inter alia, improving the functions of the Commission for Conciliation, Mediation and Arbitration. This would enable the Commission to meet International Labour Organization obligations vis `a vis labour brokerage.³⁷⁸

The Minister referred to the ANC's 2009 election manifesto which was cosigned by COSATU as well as providing the Government the mandate to "give urgency to the task of introducing amendments to regulate contract work, subcontracting and outsourcing and to address the problem of labour brokerage and prohibit certain abusive practices."³⁷⁹

³⁷⁶ Section 52 (1).

³⁷⁷ Section 57 (2).

³⁷⁸ Vatalidis, A and Workman-Davies, B,(2012), "Proposed Amendments to the Labour Relations Act and the Basic Conditions of Employment Act, retrieved from www.polity.org.za/article/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act-2012-05-07 on 31 March 2013 at p. 1.

³⁷⁹ Vatalidis et al Ibid at p.5.

The Labour Relations Amendment Bill of 2012 limits temporary employment to genuine temporary work that does not exceed 6 months.³⁸⁰ A temporary employment service is the employer of persons whom it pays to work for a client and it and the client are jointly liable for specified contraventions of employment laws.³⁸¹

Further, there is additional protection extended to persons employed in temporary work who earn below an annual threshold of R172 000 per year. Unequal treatment of these employees is prohibited.³⁸² Commenting on the amendments, the spokesperson of the Democratic Alliance, Ian Ollis stated that his party would push for its own legislative proposals to be included in the draft law.³⁸³ He further stated that the Amendment Bills could place 2.13 million jobs in jeopardy.

The department of labour had always described labour brokerage as a ploy by employers to avoid labour regulations. The opposition parties, the Democratic Alliance and Congress of the People (COPE) issued a joint position paper on labour brokers stating that they believe labour brokerage is critical to developing South Africa's economy and should thus exist.³⁸⁴ The DA argued that the government was itself using labour brokers, more particularly in the police service and thus spent in excess R339 million on labour brokers in the 2008 – 2009 financial year.³⁸⁵

³⁸⁰ Vatalidis, A and Workman-Davies, B, (2012), "Proposed Amendments to the Labour Relations Act and the Basic Conditions of Employment Act, retrieved from www.polity.org.za/article/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act-2012-05-07 on 31 March 2013

³⁸¹ Ibid at p 3.

³⁸² Ibid at p. 2 .

³⁸³ . Mazanhi, I , " Labour brokerage to ban or regulate?" 2012, 18 April *Newsday* retrieved from www.newsday.co.zw/article/2012-04-18-labour-broking-to-ban-or-regulate retrieved on 5 June 2012 at p 1

³⁸⁵ Mazanhi, I Ibid at p 2.

Thus it is conceivable to conclude that once the South African Bill is enacted, there will be similarities with a number of provisions in the Namibian Law. The most notable of these provisions is placing temporary employees at the same level with permanent employees.

Temporary employees attain permanency after six months of their assumption of duty. Both the client and the labour broker are regarded as the employer and cannot abdicate from their duties to ensure that safety conditions are provided for the employees. Furthermore, the CCMA in South Africa and the Labour Commissioner in Namibia play a significant role in hearing and issuing of arbitration awards. The Namibian regulations will be discussed in detail in Chapter 5 below to demonstrate these similarities.

4.5 THE EUROPEAN EXPERIENCE

AN OVERVIEW

The European Union has an interesting model of labour brokerage regulation which can be followed by Namibia in regulating labour brokerage. This section will therefore begin with an overview of Europe and the main highlights of labour brokerage in Europe, before dealing with specific countries in deducing how labour brokerage is regulated in the respective countries.

Since the early 1980s, the issue of labour brokers has been a contentious issue in the European Union. However, as will be demonstrated below, the European model, more particularly the one in the Netherlands, is persuasive and worthy of emulating in Namibia.

Labour brokerage gained prominence in Europe in 1982 at a meeting that was held amongst the stakeholders in the labour brokerage industry. After haggling and a couple of failed attempts, the

1982 meeting enabled the representatives of the social partners, Euro – CIETT³⁸⁶ and UNI – Europa,³⁸⁷ to reach an agreement on a joint Declaration on temporary agency work. Prior to this Declaration, it should be noted that from the end of the First World War to the early 1980s, there was a breakup of Europe’s power and supremacy. The Declaration was therefore meant to address the ever changing employment landscape which had seen a large increase in migrant labour across European Union territory. Therefore, the Declaration came up with 13 objectives which the social partners believed should be addressed in a proposed EU Directive taking into consideration the increased influx of migrant labour. Amongst other things, the objectives include:³⁸⁸

- 1) The recognition that non-agency work and ongoing contracts of employment should continue to be the most commonly used forms of employment;
- 2) The recognition of the principle of equal treatment both with respect to relationships between agencies, workers and companies;
- 3) Acceptance that certain restrictions, prohibitions and regulations may be required to prevent potential abuses of the use of temporary agency work so that the conditions of work of workers in non- agency employment are not undermined;
- 4) Ensuring that temporary agency work is not used to replace striking workers;

³⁸⁶ The European Committee on the International Confederation of Temporary Work Businesses.

³⁸⁷ The European Regional Organisation of the Union network international.

³⁸⁸ Hall, R. (2002). “Labour Hire in Australia: motivation, Dynamics and prospects,” *working paper 76* (3).

- 5) Recognising that agencies have the legal obligations of an employer toward their temporary agency workers, ensuring that temporary agency workers have access to appropriate training and development opportunities, both in the agency and in the host company;
- 6) Developing innovative solutions, to ensure that occupational benefits continue to accrue for temporary agency workers.

After these directives were issued labour brokers doubled their activities during the 1990s and in Scandinavia, Spain and Italy they increased at least five fold.³⁸⁹

Prior to the directives, agency work was prohibited until the late 1970s in some states of the European Union mainly because it was considered as an infringement of the public monopoly on job placement.³⁹⁰

In *Hofner & Elser v Macrolum GMBH*³⁹¹, the Ober Landegerich, which is the Appellate Court, in Munich, Germany held that the statutory public monopoly on recruitment services which denied private employment agencies that freedom to operate in that market was in breach of the European laws on monopolies. While Europe was separating ideologically from the Soviet Union, new plans were put forward for European integration.³⁹² The judgment in Hofner it must be noted opened the door for private employment agencies in Europe and contributed to the

³⁸⁹ Storrie, N. (2006), "The Emergence of temporary work Agencies", *Oxford Economics papers* (13) (7).

³⁹⁰ Ahcberg, K (2008), "Regulating Temporary Agency Work: on the interplay between EU level, National level and Different Industrial Relations Traditions: (eds Ronmar, M) *EU industrial relations v national industrial relations: comparative and interdisciplinary perspectives*" *EU Journal* at p. 6.

³⁹¹ (1991) ECR I 1979.

³⁹² Burket, L. (2006), "The International Labour Dimensions, An Introduction" *Globalization and the future of labour law journal*, 2005, 1(1) p. 56

growth of the industry in Europe. This ultimately led to the recognition thereof by ILO Convention Number 181 of 1997 decades later.

This was the new consciousness which fostered the foundation for the formation of the European Union. This was essentially as a result of the experiences of war and the weaknesses of Europe in relation to the Federations of the United States and the Soviet Union.³⁹³ Contemporary economic dynamics with rapid technological change have intensified global competition resulting in labour markets becoming more complex and volatile. Thus, with unstable employment and higher levels of job insecurity, and employment turnover, both employers and workers have resorted to intermediaries.³⁹⁴ The Second World War further led to the strengthening of the European Union and thus saw the need for labour brokerage. The economic and political role of the major powers of Europe had been diminished. This led to the desire of the identity of Europe to be strong enough to permit it not only to play a strong role in international relations but also to develop an original political model of democracy.

Since the inception of the broader political model of democracy, the regulatory approaches to labour brokerage vary within the European Union. Countries such as Denmark and Ireland have limited specific regulations, whilst countries like Germany and France have detailed regulations.³⁹⁵

Hall summarises the European labour broker scenario as follows:

“it specifies the permissible length of agency work contracts, restricting the purpose for which agency workers may be engaged, guaranteeing agency workers parity with other comparable

³⁹³ Corporate et al. (1986), “*Commentary on the Draft Adopted by the EU Parliament on 14 February 1984: The European treaty.*”

³⁹⁴ Benver, C ,(2003), “Labour Flexibility and Regional Development: The Role of Labour Market intermediaries,” *Regional Studies Journal*, (6), (12) p. 1.

³⁹⁵ Bronshtein,(2006),*Labour Law in Central Europe:Globalisation and the Future of Labour Law*, Copenhagen, Denmark p 208.

workers in terms of pay and conditions of employment and ensuring agency workers' rights to union membership and representation. Where there are legislative restrictions on the use of agency workers, these typically identify permissible purposes as including:

Temporary replacement in absent employees or the interim prior to a new permanent engagement, the performance of a special fixed term task or role or for the performance of inherently temporary or seasonal work. Nine countries (Australia, Belgium, France, Italy, England, Luxembourg, the Netherlands, Portugal and Spain) have laws guaranteeing that agency workers enjoy the same pay and conditions as similar permanent employees working in the same host organisation. Thus many states have adopted a relatively strong regulatory approach, seeking to restrict temporary agency work to genuine cases of an employer's need for temporary workers as a supplement to, rather than a replacement for, the existing permanent workforce."³⁹⁶

As labour brokerage expanded and became readily accessible in Europe, in 2008, a new directive was put in place. The directive provides that temporary workers should have the same rights as permanent employees. The directive further requires countries to give statutory recognition to triangular relationships.³⁹⁷ The European Union has done much to regulate the industry. This chapter will explore the manner in which labour brokerage is regulated in the European Union and how those examples could be explored and adapted in Namibia.

³⁹⁶ Hall, R, (2002) "*Labour Hire in Australia: Motivation, Dynamics and Prospects*," Working paper, University of Sydney p. 8.

³⁹⁷ Benjamin, P, (2009) "*Untangling the triangle: The regulatory challenges of triangular employment*" retrieved from www.ilo.org/wcmsp5/groups/public/---ed.../wcms_122343.pdf on 30 March 2013.

4.6 LABOUR BROKERAGE IN THE NETHERLANDS

RA Mavunga³⁹⁸ in his dissertation states that the Netherlands has an estimated population of 16.6 million people. The GDP growth rate is 1.25% as at the year 2011. According to Stuyven and Stuers,³⁹⁹ the labour force participation rate in the Netherlands rose from 57% in 1994 to 64% in 1999, which is above the average of the European Union. Unemployment fell sharply from 8% in 1995 to 3 % in 2000, representing approximately 270 000 people recorded as directly available to the labour market. As of the year 2010, the unemployment rate had further decreased to 2%.⁴⁰⁰ The global financial crisis of the years 2008 and 2009 affected the Netherlands to a larger degree and the economy shrunk by 4% though it is recovering rapidly.⁴⁰¹ Labour brokers have existed before World War II in the Netherlands though their number was negligible.

It is important to note that as at 2005, the Netherlands labour force numbered an estimated 7.53 million. In 2002, 14 percent were employed in services, 20 percent in manufacturing, 49 percent in agriculture and the remainder in undefined occupations.⁴⁰² As at 2005, all workers, whether permanent or temporary, were allowed to organize and join trade unions, engage in collective bargaining and exercise their right to strike.⁴⁰³ Labour unions further currently account for 25% of the country's workforce. Anti-union discrimination is strictly prohibited. In 1930, a law was passed introducing a public employment service for each municipality.⁴⁰⁴ The public employment service became state run in 1940 and was placed under the supervision of the

³⁹⁸ Mavunga, RA, (2010), *Critical Analysis of Labour brokers: should they be regulated or banned in South Africa?*, Pretoria, University of Pretoria.

³⁹⁹ Stuyven, L and Steurs, G, (2003), "*The Competitive market for Employment Services in Netherlands*", OECD, OCDE, retrieved from www.oecd.org/social/socialpoliciesanddata/17725096.pdf retrieved on 28 October 2012.

⁴⁰⁰ Mavunga, R. Ibid at p. 58.

⁴⁰¹ See www.indexmund.com/netherlands/unemploymentrate.html retrieved on 28 October 2012.

⁴⁰² See www.encyclopedia.com/topic/Netherlands.aspx retrieved on the 28 October 2012.

⁴⁰³ Ibid.

⁴⁰⁴ Mavunga, R. Ibid. p. 53.

Ministry of Social Affairs in 1954.⁴⁰⁵ In the 1950s the number of labour brokers increased rapidly in different sectors of industry and the need for extra labour offered attractive possibilities for temporary workers. In 1965, an Act titled the Temporary Agency Workers Act was enacted to regulate temporary employment services.

4.6.1 THE TEMPORARY AGENCY WORKERS ACT OF 1965

The Act places temporary employees working for labour brokerage firms at par with permanent employees under the social security and tax laws.⁴⁰⁶ Licencing for brokers became obligatory in 1970 and the licence contained a number of conditions to be fulfilled by a broker. The conditions included the following:

- a) Temporary workers' wages had to be equal to the wages of employees in the same or similar jobs in the user enterprise;
- b) The duration of assignments was limited by a maximum period which varied between 3 and 6 months;⁴⁰⁷
- c) Temporary work was allowed only for temporary assignments;
- d) Labour brokerage was forbidden in the construction and road haulage industries.

The licencing system was meant to safeguard the collection of social premiums and avoid competition between temporary jobs and permanent jobs. It should be noted that in the 1980s unions were suspicious of brokers who were associated with bad employment conditions and

⁴⁰⁵ Purcell, J and Purcell, K, (2004), "Temporary Worker Agencies: Here today, gone tomorrow", *British Journal of Industrial Relations* (7) (20), at p. 4.

⁴⁰⁶ Visser, Pressen and Jacobs, (2004), "Temporary Agency Work and Information Society," *Bulletin of Comparative Labour Relations*, (22) (16), p. 3.

⁴⁰⁷ Visser, *Ibid* at p 3.

illegal black market labour exchanges.⁴⁰⁸ The Act was meant to also curb the mushrooming of illegal brokerage firms that were threatening the viability of the industry. Thus in the late 1990s, a regulatory overhaul was necessary for purposes of ensuring that temporary employment services were regulated.⁴⁰⁹

4.6.2 EMPLOYMENT PLACEMENT ACT OF 1991

In 1991 the Netherlands realized that flexibility at work was of major concern and thus needed to be addressed. According to Mavunga,⁴¹⁰ the socio-cultural changes as well as economic conditions made changes in labour inevitable. The licencing system was continued but licences were given in the regulation of the allocation of workers. The Act further legalized profit driven brokers.⁴¹¹ Some of the matters regulated in the Act were conditions of the maximum duration of assignments, prohibitions on preventing a temporary worker from entering employment with another company and prohibition of using temporary workers in the construction industry.

According to Sol,⁴¹² the draw backs of this traditional Dutch legislative system were that legal barriers rendered employees reluctant and afraid to change jobs whilst encouraging companies to increasingly engage the services of labour market intermediaries. As a result the government focused on trimming down the welfare State and increased reliance on market intervention.

In 1996, the need for flexibility led to the unions, employers' organizations and government uniting in the labour foundation, also known as STAR.⁴¹³ The Minister of Social Affairs and Employment was given a mandate to modernize labour law, and thus ensure its flexibility and

⁴⁰⁸ Koene, J, Pauwe, P and Groenewegen, W (2004), "Understanding the Development of Temporary Agency Work in Europe", *Human Resources Management Journal* (6) (3) p. 4.

⁴⁰⁹ Arrow Smith, J. (2006), *Temporary Agency Work in an enlarge European Union*, retrieved on from [www.ciett.org/fileadmin/templates/ciett/research/EIROfoundation-report-on-TAW March 06.pdf](http://www.ciett.org/fileadmin/templates/ciett/research/EIROfoundation-report-on-TAW_March_06.pdf) on 28 October 2012.

⁴¹⁰ Mavunga, R. Ibid at p. 30.

⁴¹¹ Sol, C, (2001), "Targeting on Transitions: Employment services in the Netherlands", *Comparative Labour Law and Policy Journal* (1) (4) p. 95.

⁴¹² Ibid at p. 96.

⁴¹³ Mavunga, R, Ibid at p. 60.

security. Employers were accorded greater flexibility in their relationship with employees and more security was granted to employees. Thus the licencing system was effected and this necessitated the enactment of the Allocation of Employees by Intermediaries Act of 1998.

4.6.3 THE ALLOCATION OF EMPLOYEES BY INTERMEDIARIES ACT OF 1998⁴¹⁴

The Act came into force on 1 July 1998.⁴¹⁵ It had the effect of abolishing the licencing system and a number of restrictions which related to placement, maximum duration and worker redeployment. It further placed a limitation on the ability of temporary worker agencies to obstruct temporary workers from entering into direct employment contracts with user firms and others.⁴¹⁶ Other rules remained which included prohibitions on posting temporary agency employees in user firms in which there was a strike. Other rules were also the dual responsibility of user firms and temporary worker agencies for the payments of social premiums and taxes, and an equal wages clause for temporary agency workers. Furthermore, the ban on temporary workers in the construction and road haulage industries was lifted. User firms were able to use one and the same temporary worker for an indefinite period. The equal pay principle was also brought into effect.

Article 8.1 of the Act provides that the broker has to pay the temporary worker wages and other expenses equal to those paid to employees working in the same or similar jobs or positions with the user enterprise. One exception to this law would be a collective agreement applicable to the labour brokers that determines wages, and additional expenses such as overtime.

⁴¹⁴ The Allocation of Employees By Intermediaries Act of 1998 is also referred to as WADDI.

⁴¹⁵ Arrowsmith, J, (2006), *Temporary agency work in an enlarge European Union*, IRRU, University of Warwick, UK, p. 13.

⁴¹⁶ Ibid at p. 14.

Article 11 of the Act provides temporary workers with information on occupational qualifications and safety rules for the job concerned before sending a temporary worker on an assignment with the user enterprise.

4.6.4 THE FLEXIBILITY AND SECURITY ACT OF 1999

This Act came into force on 1 January 1999. This came as a result of an agreement between the social partners in the bipartite consultation body STAR.⁴¹⁷ The Act approached the legal position of temporary employees as a standard labour contract between a temporary employee and the temporary workers agency thus introducing participation rights for temporary agencies. In a nutshell, the Act was meant to adequately match employer's demands for flexibility with employee demands for security of labour.⁴¹⁸ Labour brokerage was placed under regular labour laws and temporary workers were awarded rights of employees with regular employment contracts. The broker and worker would agree in writing that the temporary agreement is dissolved. In the case of dismissal an employer needs to seek permission from the Public Employment Service Bureau to dismiss such an employee.

The temporary employee would also be entitled to receive training on the job which is quite specific in relation to the skills that need to be utilized. To enhance capabilities that will be appreciated by other employers, the temporary worker needs to develop more general skills which the current employer may not be willing to finance because the employee would negotiate a higher salary.⁴¹⁹

⁴¹⁷ Ibid. at p. 63.

⁴¹⁸ Ibid. at p. 64.

⁴¹⁹ Mavunga, R. Ibid. at p. 60.

A new law was enacted to ensure that the broker as the employer would facilitate the training of a temporary worker under contract as a permanent worker if certain conditions were met. This therefore improved the quality of services rendered.

4.6.5 THE CIVIL CODE OF 1999

Before 1 January 1999, there was little certainty on the status of the temporary employment contract.⁴²⁰ It was regarded by some as a regular employment contract. Others argued that it was not a regular labour contract because not all the requirements of such a contract were fulfilled. Thus the flexibility and security discussion led to changes in the civil code. A new section was added regarding the temporary employment contract. Article 7.690 was added. It provides that the temporary employment contract is an employment contract whereby one party, the employee, is hired out by one party the employer who does so in furtherance of carrying on its profession of trade to a third party. This will enhance performance of work under the supervision and direction of that third party pursuant to an order placed by the latter with the employer.

Therefore, the temporary worker is a normal employee within the meaning of the civil code, with all the rights and obligations of employees. Such rights include minimum wages, paid holidays, holiday allowances, payment of salary during sickness, parental leave and adjustment of working hours.⁴²¹ Furthermore, the broker has a say in the termination of the temporary stipulation which can no longer be used in the contract. As at that moment, Mavunga⁴²² notes that the employer has to conclude a fixed term contract with the temporary worker.

⁴²⁰ Visser, et al Ibid at p. 230.

⁴²¹ Mavunga, R Ibid at p. 62.

⁴²² Ibid.

The Netherlands is a country that values and upholds strongly the use of collective agreements. A number of collective agreements over the years have been enacted that have regulated the ways labour brokers function. The collective agreement for temporary workers dealt with 3 major trade unions,⁴²³ on the one side and the Employer's Federation for the Temporary Workers Agencies on the other hand. These are commonly known as the Dutch Association of Temporary worker Agencies or ABU. The ABU has promoted the interests of labour brokers since 1961 and has concluded various collective agreements.⁴²⁴

In 1973 the first ABU collective agreement was declared as generally binding by the Minister of Social Affairs in that it applied to all labour brokers and all office administrative temporary workers working for them. With the introduction of the Flexibility and Security Act a new collective agreement for temporary workers was introduced for the periods of 1999 to 2003. This Act was declared to be compulsorily applicable which means it only applied to the ABU temporary workers in the Netherlands.

This agreement regulated temporary employment contracts, remuneration, working times, days of holiday, holiday allowances and sick leave.⁴²⁵ A phased system was introduced which consisted of four consecutive phases. They progressed from extreme flexibility for the employer with little security for the employee, to security for the employee with little flexibility for the employer over a period of three years.⁴²⁶ Phase one was a period of up to 26 weeks. Only weeks on which the temporary worker actually worked were counted. During phase one it could be stipulated in writing that the temporary employment contract will terminate if the assignment for

⁴²³ ABU, The Temporary Employment sector in Netherlands, retrieved from www.abu.nl/aba2/?filled=14306 on 20 November 2012.

⁴²⁴ ABU Ibid.

⁴²⁵ Mavunga, R, Ibid. at p. 63.

⁴²⁶ Visser, et al, supra. at p. 234.

which the temporary worker was appointed has been exhausted. These were temporary employment contracts with a temporary stipulation.

Phase two was a 6 month period. Phase three allowed the employer to offer fixed term employment contract for not more than a 3 month period. Pay was guaranteed if no work is available and up to a level of 100% in the case of illness. Phase four allowed the applicant to seek authority before dismissing the employee. Before dismissal, public authorization was required. Thereafter, on the same terms as the previous one, the ABU contracted another agreement valid from the years 2003 to 2006.

The current ABU collective agreement is valid from 2006 to 2013. With time, there have been modifications to the ABUs. The first one introduced is that each worker is supposed to receive a copy of the collective agreement for temporary employees. The old phases one and two were combined into phase A. In phase A, the employer or client may terminate the contract at any time. Phase A lasts for longer than 7 weeks.⁴²⁷ In phase B a contract is for a definite period and up to 8 contracts may be concluded in phase B within a period of 2 years. A significant change which has been of note is the fact that once an employee enters into a phase C contract, it becomes an indefinite contract. In other words, the worker becomes permanent.

The labour broker will then choose between pay based on the collective agreement for temporary employees and pay based on the rules that apply in the user company. Every temporary employee from the age of 21 is entitled to participate in a pension scheme. According to Mavunga R, once the employee renders his services for a continuous period of 26 weeks for the

⁴²⁷ Mavunga, R, *ibid* at p. 64.

same client in phase A, then that employee is eligible to participate in the Basic Pension Scheme.⁴²⁸ Temporary workers in phases B and C participate in the Plus Pension Scheme (STIPP) which is the pension fund for temporary employment sectors.⁴²⁹

Full time temporary employees are entitled to 24 days holiday per year. Only the hours worked are counted in phase A for the accrued holidays and holiday salary. Employees are entitled to an unemployment benefit during unemployment. The duration of the unemployment benefit depends on how long the temporary employee has worked. With this collective agreement temporary workers need to be properly informed about the working conditions in which they will be working. The client is therefore responsible for providing the broker with the relevant information in the form of a working conditions document.

Thus, the main aim of ABU is to deal with misunderstandings with a view to improving the image of temporary employment and to look after the interests of labour brokers.⁴³⁰ It was as a result of this process that the process led to the enactment of the Flexibility and Security Act of 1999. ABU members are frequently inspected by an independent body or a certifying institution. The inspections involve inter alia social insurance contributions and taxes. The Netherlands has a large temporary employment sector with more than 730 000 temporary workers per day. It has a turnover of almost US\$10 billion annually and it is therefore a model to be emulated for its regulation which, candidly speaking has made great strides in the European Union labour brokerage market.⁴³¹

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Ibid at p. 65.

⁴³¹ European Foundation for the Improvement of living and working conditions, (2007), "Temporary Agency work in the European Union," *EU Law Journal*, 6(7) p. 7.

The temporary employment sector plays a prominent role in the Dutch economy and the labour market. The Netherlands has also ratified ILO Convention 181 of 1997. It is thus evident that the Dutch have taken time to put in place a proper regulatory framework for labour brokerage. Various statutory enactments have been enacted with a balance between providing security with a measure of flexibility.

The Dutch policies have statutorily legalized temporary workers' rights to sick leave and payment during a period of idleness with no work. The provision of pension benefits depends on how long one has worked.

In conclusion the Netherlands labour brokers were extensively regulated until the 1990s. The flexibility and security within its system has given it a form of self-regulation after proper research which encompassed the interests of all the parties concerned to a larger extent. The regulatory framework which seeks to place permanent and temporary employees at par is commendable and worthy of emulation. Namibia needs to emulate such policies and the regulations of 2012, though aiming to place the temporary employees at par with permanent employees, still does not adequately make provision for the security of the employees. The Netherlands is a beacon of what self-regulation within the industry can achieve. The major role players such as employers' organizations, trade unions and Government have been given the collective platform and mandate to help with ensuring that the industry functions effectively. The Namibian regulations are however a good starting point in that regard. However, inclusion of the phased systems in Namibia would assist in a more flexible classification of the employees depending on the industry in which they exist. The Namibian regulation refers to the temporary employee attaining permanency after a period of six months. The definition should be expanded

in the same way as the Netherlands system. The manner in which the Netherlands regulates temporary work during a strike is a positive lesson that Namibia can use in its regulation of labour brokerage. In that way, the use of scab labour during a strike is prohibited. Furthermore, the framework on pensions is innovative and should be incorporated into the Namibian regulations. The incorporation of the pension's provision would give the temporary workers earnings that can sustain them either after they retire from employment or they are declared unfit to continue working due to ill health.

4.7 THE UNITED KINGDOM

The United Kingdom's (UK) labour laws' progress in embracing temporary agency workers and providing them with the protection they require has moved at a tremendously slow pace. The UK has an ambiguous regulatory regime. Agency workers are paid less than permanent workers. Temporary agency workers have low levels of union membership. Working hours are erratic and their conditions of employment are deplorable.⁴³² It should be noted that employment agencies in the UK register workers according to their employment availability. The Government runs the agencies and employees are not paid by the agencies.⁴³³ Therefore, these centres basically play the role of a clearing house.

However, this has raised concerns about agency workers who encounter obstacles whenever they want to leave an agency to take up direct employment or to be supplied with work by another agency.⁴³⁴

⁴³² McCann, D, (2009). *Regulating Flexible work*, London Oxford University Press, p 143 -145.

⁴³³ Editorial "Labour brokerage is here to stay,"(2012, July 8). *SA Time*, p.3.

⁴³⁴ McCann, D *ibid* at p 144.

Agency workers are indirectly prevented from changing jobs by the imposition of fees on their clients.⁴³⁵ Agency workers are also prevented from registering or being supplied work by other employment agencies. This is due to the imposition of charges on clients who are supplied with a worker by another agency. Hirers are charged exorbitant fees which can discourage them from informing temporary workers of opportunities in other firms.

The courts and tribunals in the United Kingdom have made a number of noteworthy decisions with regard to regulating labour brokerage and the protection that should be extended to these employees. In the case of *Construction Industry Training Board v Labour Force Ltd*,⁴³⁶ the Queen's Bench Division held that temporary agency workers were not recognised as parties that exhibited the same traits as those of the bipartite employment relationship. Cooke J remarked thus, "I think there is much to be said to the view that where A contracts with B to render services exclusively to C the contract is not a contract for services, but a contract *sui generis*, a different type of contract from either of the familiar two."⁴³⁷

In essence, the court was stating that the contract between the worker and agency is not a contract of employment in the strictest sense of the word.

It must be stated that the definition by the court was vague and thus did not assist in developing the jurisprudence of this type of employment in the UK. In the Employment Appeal Tribunal in the case of *Wicken v Champion Employment*,⁴³⁸ the tribunal held that temporary agency workers were workers under either a contract of service or contract for services with their agency. The tribunal sought to classify this type of employment as casual work and in the process define if the employment contract could have the mutual obligations that should exist inherently in all

⁴³⁵ Haidula, S supra at p 35.

⁴³⁶ [1970] 3 All ER 220 (QBD).

⁴³⁷ [1970] 3 All ER at p. 220.

⁴³⁸ [1984] ICR 365 (EAT).

employment relationships. When the tribunal noted that the rights of the temporary employment agency workers do not equate with those in permanent employment relationships, it refused to recognise them as employees. However, subsequent to the Wicken case, the case of *Secretary of State for Employment v McMeechan*⁴³⁹ came up with a different view point. The case took the view that an agency worker can be an employee of the agency for which he or she works.

The Court of Appeal held that the contract between the worker and the agency was, in relation to a specific engagement with one client, a contract of employment. The contract had a number of employment obligations which include the right to dismiss the agency worker and the right to bring an assignment to an end. The court further held that the fact that the temporary employment worker had the right to access review proceedings if his employment services were terminated is a grievance procedure that exists for him in such matters. This therefore means that an employment relationship existed.

The court further stated that temporary agency workers pose a particular problem of their own in that there are often two engagements to consider viz:

- 1) The general engagement under which sporadic services and tasks are performed.
- 2) Specific engagements which begin and end with performance of any one task.

As a result, the Judge concluded that, “each engagement is capable, according to its context, of giving rise to a contract of employment.”⁴⁴⁰ *In casu*, both conditions existed to warrant classifying it as a contract of employment. However, in the case of *Wickens v Champion*

⁴³⁹ (1997) IRLR 353.

⁴⁴⁰ p. 371.

Employment,⁴⁴¹ where similar conditions were interpreted, the court held that such workers cannot be considered as employees by virtue of the fact that they do not have mutual obligations with the employer.

4.7.1 THE STATUTORY FRAMEWORK IN THE UNITED KINGDOM

The employment business of temporary agencies in the UK is provided for under the Employment Agencies Act of 1973 as amended.⁴⁴² The regulations made under the Act which are currently in force are the Conduct of Employment Agencies and Employment Business Regulations of 2003.⁴⁴³

The regulations came into force in April 2004 and have since been amended by the Conduct of Employment and Business (Amendment) Regulations of 2007.⁴⁴⁴ The regulations set basic standards that the Industry has to meet. Agency work law in the UK refers to law which regulates people's work through employment agencies in the United Kingdom.

It should be noted that agency workers are less likely than permanent staff to be adequately paid, less likely to have reasonable notice before dismissal and have less access to important standards under the Employment Rights Act of 1996. It must also be noted that for most of the 20th century employment agencies in the UK have not met the international trends on safeguarding the rights of workers. The United Kingdom despite being one of the proponents of the ILO Convention of

⁴⁴¹ [1984] ICR 365 (EAT).

⁴⁴² Wynn, M. (2009), "Regulating Rogues Employment Agency Enforcement and Section 15-18 of the Employment Act of 2008" *Industrial Law Journal*, 38 (65) p. 5.

⁴⁴³ Wynn, M, Ibid at p. 6

⁴⁴⁴ Wynn, M. (2009), "Regulating Rogues Employment Agency Enforcement and Section 15-18 of the Employment Act of 2008", *Industrial Law Journal*, 38 (65) p. 5.

1997, did not honour its obligations.⁴⁴⁵ In 1973, the United Kingdom passed the Employment Agencies Act which was further amended by the Deregulation and Contracting Act of 1992. The effect of the 1994 amendment was to abolish licences for employment agencies, with the only exception being that there is an inspectorate.⁴⁴⁶ In 2004, the Gang Masters(Licensing) Act⁴⁴⁷ which required agencies in the agricultural, shellfish and packing sectors to be licensed was enacted.⁴⁴⁸ The inspectors in the Act have a role to find any violations and close the agencies. Such a decision is however subject to review. The Employment Agencies Act of 1973 regulates the conduct of agencies operating in the UK. Agencies are prohibited from charging fees upfront and placing misleading advertisements of jobs that do not exist is an offence punishable with deregistration.

The Act further sets standards for assessing an employee's experience.⁴⁴⁹ The regulations of 2003 made under the Employment Agencies Act fully prescribe the regulatory framework to be adopted for and by agencies. These regulations provide as follows:

- a) The regulations prohibit an employment agency from providing services other than those services it is permitted to offer;
- b) The regulations prohibit sending workers to employers or replacement for workers on strike;
- c) Regulation 27 provides for the agency worker's personal details being captured in a database.

⁴⁴⁵ Wynn, M, Ibid at p.5.

⁴⁴⁶ See Deregulation and Contracting Act of 1997.

⁴⁴⁷ See www.legislation.gov.uk retrieved on 11 March 2012.

⁴⁴⁸ Haidula, S I bid at p. 45.

⁴⁴⁹ See Section 14 of the Act.

The same regulations which adopted the European Commission's Directive on Temporary Agency work 2008/104/EC, further prohibits the following:

- 1) The withholding of pay from employees regardless of whether or not they have time sheets charging any fees directly to a worker for their work.
- 2) Sending of temporary agency workers to employers who have not submitted proof of their health and safety standards.
- 3) It further prohibits temporary employment agency workers from working without a contract and without providing the Regulatory Authority with a written statement of the hours, and the amount payable per hour.

The Gang Masters Licensing Act of 2004 has sought to include a more proactive application of the regulation. It covers the most vulnerable workers. In 2004, 21 agency workers in the shell fishing and food packaging sector were involved in a shipwreck and all died as a result. This prompted the reintroduction of licensing of employment agencies in what is loosely termed as vulnerable or "gang master" sectors. The disaster is known as the Morecambe Bay disaster. These regulations thus require all agencies which provide labour in the agricultural, shell fishing and food packaging sectors to operate with a licence. The construction industry has adopted similar provisions in an effort to avoid similar problems.

An example of a recruiting agency for temporary workers which has aligned itself with the regulations is the Old Knights Recruitment services, trading as TOK Recruitment Services.

Founded in 1984,⁴⁵⁰ TOK Recruitment Services is a construction company which aims to ensure the best personnel is always available and is deployed rapidly.

All personnel hired out by TOK Construction are employed on a pay as you earn (PAYE) basis. This has enabled the company to retain the same personnel consistently for many years.

TOK Construction has a ISO 9001:2008 quality assured service. This thus enables it to ensure that the best practice is followed in all aspects of its operations and in all of its departments as well. TOK Construction works with employers openly and honestly in its communication. If there is a doubt about the ability to supply a particular type of worker, TOK says so immediately, thus allowing the employer to make other alternative arrangements.

TOK Construction states its commitment to customer and client service. It employs area managers to oversee the supply of personnel at site level. The sites related to the recruitment agency states the following in summary about its operations in compliance with the regulations.⁴⁵¹

- i) TOK Construction supplies building industry staff throughout the UK.
- ii) It has a database which is consistently updated at the beginning of the contract and, subsequently, twice a week and further when a request is made by the site agent.

However, the reality is that these requirements are not enforced because the agency workers do not bring claims of abuses and breach of the regulations. These regulations were passed in

⁴⁵⁰ See www.tokconstruction.co.uk retrieved on 16 July 2012.

⁴⁵¹ See the website www.tokconstruction.co.uk/employers for the details.

January 2010 as the Agency worker Regulations of 2010 (S I 2010/1993). The two positives that can be derived from these regulations is that they guarantee equal pay and working time rights.⁴⁵²

This directive had met initial resistance from the Tony Blair Government. However, upon the assumption of his successor, Gordon Brown, the regulations and the Agency Workers Directive were enacted as an addition to the Part-Time workers (Prevention of less favourable Treatment) Regulations of 2000 and Fixed Term Employees (Prevention of less favourable Treatment) Regulations of 2002.⁴⁵³

4.7.2 THE CASE LAW IN THE UK IN THE POST 2000 PERIOD

After the *Wickens*⁴⁵⁴ matter the case law in the United Kingdom has mostly been ambivalent. Haidula⁴⁵⁵ makes an interesting observation that implied contracts are virtually impossible to prove in the UK. The post 2000 case law brings to the fore most of the ambivalence. In *James v London Borough of Greenwich*⁴⁵⁶ the claimant was an agency employee who had worked for the defendant local authority for three years. The claimant was absent due to sickness and was as a result replaced by a different agency worker. The court held that the claimant was not an employee of the local authority and was thus not classified as an employee requiring statutory protection from unfair dismissal as required by law. The court further held that he had no *locus standi* to sue the employment agency. Lord Justice Mummery stated the following *obiter*:

“it is a significant move in the direction of the casualisation of labour and the growth for a two-tier workplace. One tier enjoying significant statutory protection, the other tier in a legal no

⁴⁵² Wynn, M, 2009 *Ibid* at p 67.

⁴⁵³ Wynn, M, *Ibid*. at p. 68. See also on Wikipedia.org/wiki/united-agency-worker-law retrieved on 18 July 2012.

⁴⁵⁴ W C Kannan, *Ibid*. at p. 12.

⁴⁵⁵ Haidula, S, 2010, *Regulating Labour Hire in Namibia*, UNAM dissertation, LLBS(Honours) *Ibid*. at p. 51.

⁴⁵⁶ (2008) LBC 35.

man's land, being neither employed nor self-employed, vulnerable but enjoying little or no protection.⁴⁵⁷

He further held that the ground of necessity can be the only ground that an employment tribunal may imply terms in a contract of employment between an agency worker and the client. The court further held that it was not for the courts or tribunals to extend employment protection rights to agency workers and that further developments will need to come from the Government as it was a policy issue. This means that only the Government can regulate the industry.⁴⁵⁸

Another significant case is the case of *Tomislav Kljun vs HMRC*⁴⁵⁹ which at most exposed the tax pitfalls of international labour brokerage.

In this case, the claimant, who was a Croatian national, entered into an employment contract with a Cypriot company. The Cyprus Company then deployed him to the UK for a fee to a UK company dealing with standby vessels in oil and seas. The Cypriot company retained the right to remunerate him and it thus deducted his tax in accordance with the prevailing tax legislation. He claimed that he was not accordingly resident in the UK and as a result, the tax deductions for the 2007 and 2009 tax years were illegal and he was therefore entitled to a refund. His argument relied on Article 15 of the Double Tax Agreement between the UK and the old Yugoslavia, of which Croatia is a part. The section dealt with the meaning of "employee" for purposes of tax deductions. The HMRC rejected the refund claims. The court stated that the test had to determine which entity (person or employer) received the economic benefit of Mr Kljun's work. It held that since the claimant's employment was physically in the UK, his remuneration had the

⁴⁵⁷ James v London Borough of Greenwich (2008) LBC 35 at p.38.

⁴⁵⁸ Ibid at p 40.

⁴⁵⁹ See www.cliffe-deklerk-hofmeyr.com/en/news/pressrelease/2011/tax-pitfalls-of-international-labour-broking, retrieved on 26 July 2012.

capacity to be taxed under Article 15 (1) of the Yugoslavia treaty. It was however stated further that because the claimant was not available for more than 183 days as provided for by Article 15 (2), he was exempt from taxation for the first 183 days of his employment.

However, the court considered Article 15 (2) (b) of the Yugoslavia Treaty which provides that the remuneration of the agency worker must be paid by or on behalf of a person for whose benefit the relevant services are rendered and who is not a resident of the United Kingdom. The court held therefore that the company in Cyprus was not the entity for whose benefit services were rendered. As a result, the court concluded that the UK Company was the claimant's economic employer for whose benefit the relevant personal services were recorded and as a result he was not entitled to an exemption.

This case thus epitomises the ambivalence in the United Kingdom vis-à-vis regulation of the labour laws in relation to labour brokerage. The UK model thus requires more regulation.

In the case of *Dorcas v Brook Street Bureau (UK) Ltd*,⁴⁶⁰ the aspect of labour brokerage took another interesting twist. The applicant was a registered nurse who was recruited via an employment agency to work part-time for Dia Geo Global supply in Dublin, Ireland. The complainant provided cover for other nurses during sick leave absences, vacation and compassionate leave. It was the terms of the agreement that she would be called to work as and when she was required.

However, a dispute arose on the exact amount of hours she was supposed to work whenever she was asked to appear and work on a part time basis. The union claimed that the respondent was in

⁴⁶⁰ (2004) IRLR 358 (CA).

breach of the Protection of Employees (Part Time work) Act of 2001 because her conditions of service, more particularly her hours of attendance were altered unilaterally.

The respondent maintained that the complainant was not an employee of the company but of the agency. It was the respondent's contention that the agency paid the claimant's wages and that Section 3 of the Protection of Employees (Part-time Work) Act defined an employer to include the party liable to pay the wages. As a result, the only contract that existed was the one between the company and the agency. The respondent asked the labour court to pronounce that only the agency could claim unfair treatment and not the complainant. She contended that she had never entered into any contractual arrangements with the agency and that the agency had merely acted as the paying agent for the respondent. The complainant stated that she worked under the control, direction and supervision of the respondent and this constituted an employment relationship. The court, in considering the circumstances of the case noted that the complainant had an employment relationship with the respondent, by virtue of the fact that the respondent could determine the hours of service of the complainant. The court thus concurred with the submissions that the complainant raised.

Such confusion does not ordinarily arise in the two-way employment relationship where someone is directly and permanently employed. Temporary agency work brings these distortions, and the United Kingdom is evidence to that. The tripartite relationships of the worker, agency and the client needs to be carefully regulated. This relationship is based primarily on two contracts which are:-

- a) A business contract between the agency and the user company/client.

- b) A contract of employment between the worker and the agency. In that way, the employee will be an employee of both the agency and the client as provided for in Namibia.

A positive development that Namibia can include in the regulations is to ensure that when the temporary employment agency applies for registration, it must produce evidence of the safeguards in place to protect the health and safety of the employees. This would include an allowance for protective clothing such as overalls, safety shoes, helmets and any other safety clothes that may be needed depending on the industry. In the mining sector for instance, there must be provision for consistent and thorough inspections every six months of vital organs of the body such as the lungs, the heart, liver and the spleen. Such checkups would enable the early detection of terminal diseases such as tuberculosis, bronchitis and asthma so that precautionary measures are put in place to either prevent the outbreaks of these diseases or quarantine any outbreaks. Another innovative provision of note that Namibia could emulate from the United Kingdom's Protection of Employees (Part-time Work) Act is the role of the inspectors in ensuring that the health and safety standards of the employees are not compromised. The inspections would ensure that there will be a strict monitoring of trafficking of employees from other countries who would be vulnerable to exploitation as was the case in the Morecambe disaster of 2004. Criminal sanctions should be imposed for those who fail to follow the minimum standards that the Government sets through the responsible Minister of Labour. There are parallels between the *James v London Borough of Greenwich*⁴⁶¹ case and the 2013 Namibia decision in the *Africa Labour Services v Minister of Labour*⁴⁶² matter which will be discussed in

⁴⁶¹ (2008)LBC 35

⁴⁶² *African Labour Services(Pty) Ltd v The Minister of Labour and Social Welfare and the Government of the Republic of Namibia* unreported judgment of the High Court A163?2012 heard on 27 September 2012 and delivered on the 27th of June 2013 by Geier J and Liebenberg J.

detail in Chapter 5 below. Both cases observed that the regulation of labour brokerage is a policy decision that can only be undertaken by the Government and not the courts.

Another provision that has parallels with the Namibian regulation is the fact that there must be records that prove the number of hours the employee works and the amounts payable to the employees by the labour broker. Despite of these provisions, the UK has made some strides in ensuring that the regulations protect temporary employees in requiring that they are treated equally with permanent employees. This would be in relation to the payment of wages, negotiation of collective agreements and the provision of equal job and skills development opportunities as permanent employees. Temporary agency workers have low levels of union membership. The regulations must make provision for union membership and subscriptions to the workers.

4.8 THE AUSTRALIAN EXPERIENCE

A BRIEF OVERVIEW

Australia is one of the prime examples of how to regulate labour brokerage. It's important to note that labour brokerage in Australia represents a large industry which has grown rapidly. The Australia Labour Brokerage Agency (also known as Adecco) and Manpower⁴⁶³ are now the largest labour brokerage operators in Australia. According to Hall,⁴⁶⁴ these operators have spread their supply of labour across the entire labour market while other big established players still manage to retain more specialized operations. As at the year 2000, Adecco had revenues in Australia of over \$100 million which rose to \$1 billion by 2005.⁴⁶⁵

⁴⁶³ Hall, R, *Ibid* at p. 4.

⁴⁶⁴ Hall, R, *Ibid* at p. 4.

⁴⁶⁵ *Ibid* at p.5

Under section 51 (35) of the Commonwealth Constitution of Australia of 1900 which came to force on 1 January 1901,⁴⁶⁶ the Federal Government has the power to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one state.”⁴⁶⁷

In 1904, the Federal parliament enacted the Conciliation and Arbitration Act 1904 which was primarily the Act that regulated labour relations. The Act was primarily concerned with preventing and settling interstate industrial disputes through conciliation and arbitration pursuant to section 51 (35) of the Commonwealth Constitution.⁴⁶⁸

It should be noted that the industrial turmoil of the 1890s in Australia was instrumental in bringing about a regulated labour market system that lasted for over eight decades.⁴⁶⁹ The labour market in Australia throughout the years since the 1890s has seen enormous changes, and for eighty years, there was a standard model of permanent full time work. The years from the end of World War 2 to the mid-1970s have been accepted, according to Williams,⁴⁷⁰ as the measure of the labour conditions. Since that time there have been significant developments in casualization of the workforce with approximately 3 % of the labour force in Australia working in casual employment conditions. A significant part of this casual labour force is employed by labour brokerage firms.⁴⁷¹

⁴⁶⁶ Accessed from [www.en.wikipedia.org/wiki/Constitution ...Australia](http://www.en.wikipedia.org/wiki/Constitution...Australia) retrieved on 31 March 2012.

⁴⁶⁷ See www.ilo.org/ifpdial/information-resources/hatiamcl-labour-law-profiles/wcoms_158892/lang-en/index.htm retrieved on 26 December 2012.

⁴⁶⁸ www.ilo.org (Ibid).

⁴⁶⁹ Williams, (2006), Labour Hire: “A Casual Affair with work,” retrieved from www.newcastle.edu.au/Resources/Schools/NewcastleBusinessschool/APSA/AN2POL/Williams-Harry.pdf. on 26 January 2012 p. 1.

⁴⁷⁰ Williams, H,C Ibid at p. 3.

⁴⁷¹ Williams, H Ibid at p. 1.

Australia had a manufacturing sector to serve its needs during the 19th century. The factory workers were not happy as they toiled on average for 12 hours per day.⁴⁷² As a result, the 1904 Conciliation and Arbitration Act 20 of 1904 which came into force on 15 December 1904 and *Ex Parte HV McKay Harvester*⁴⁷³ shaped the labour relations landscape of Australia including labour brokerage for decades to follow. In that case, Justice Higgins determined the basic wage on the basis of the needs of workers rather than on what employers wanted.⁴⁷⁴ In that case, the workers in question were employed by a manufacturer of agricultural machinery based in Melbourne, HV McKay (Pty Ltd).⁴⁷⁵ McKay was the owner of the sunshine Harristor harvesting machine, hence the judgment came to be known as the “Harvester judgment”. The workers were disgruntled by the “less food and less pay” policy as temporary employees of McKay especially during the harvesting season when work was in abundance. They took their complaint to the Commonwealth Court of Conciliation and Arbitration. They argued that as temporary workers they were exploited, earning meager wages making it difficult for them to afford to buy enough food to sustain themselves through their working day. Thus, Justice Higgins set a minimum wage for unskilled labourers of 2 pounds, 2 shillings per day.⁴⁷⁶

Higgins ruled that remuneration must be enough to support the wage earner reasonably and this included an amount on average work paid for food, shelter and clothing. It did not cover women workers as it was assumed that either their fathers or husbands would support them.⁴⁷⁷

However, despite the fact the judgment by Higgins was successfully overturned on Appeal,⁴⁷⁸ it was regarded as a landmark decision in Australia as an industrial case law in determining

⁴⁷² Williams, H *Ibid* at p .2.

⁴⁷³ (1907) 2 CAR 1

⁴⁷⁴ *Ibid* at p. 8.

⁴⁷⁵ *Ibid* at p. 8.

⁴⁷⁶ *Ibid* at p. 1.

⁴⁷⁷ *Ibid* at p 7.

minimum wages and in determining employer-employee rights in labour brokerage. This concept brought the employer's capacity to pay into the spotlight. According to Williams,⁴⁷⁹ this judgment set the tone for providing casual workers security in their jobs by penalizing employers who strayed from what was regarded as normal employment. Thus as the twentieth century progressed, the labour market became more structured and regulated via a largely centralized award system.

However, in recent years the Australian labour market has seen an increase in casualization in new workplaces and firms. Though the model of regulating labour brokerage in Australia is persuasive and worthy of emulation by other jurisdictions, it is important to note that the ambivalence in the system is a distortion. It thus infringes on employee right, as shall be demonstrated below.

After the minimum wages had been in place through the Industrial Arbitration Act of 1916, labour brokerage in Australia only became significant in the 1950s. According to Bennet,⁴⁸⁰ the company credited with pioneering labour brokerage in Australia in the 1950s is the Skilled Group. These agencies emerged and were known as "temping agencies" specialized in the provision of workers to help employers to cope with fluctuations in demand or the temporary absence of employees through holidays. The agencies thus provided clerical, administrative and other white collar support staff. These staff according to Hall⁴⁸¹ could normally walk into organizations with standard secretarial and administrative skills.⁴⁸² The firms flourished from

⁴⁷⁸ See *R v Burger* (1908) 6 CLR 41.

⁴⁷⁹ Williams, H (2006) (Ibid at p. 33).

⁴⁸⁰ Bennet, P, "What is the History of Labour Hire companies providing skilled labour"? retrieved from www.articlerich.com/Article/what-is-the-History-of-labour-hier-companies-providingskilled-labour-/799638 on 1 April 2013.

⁴⁸¹ Hall, R, (2002), *Labour Hire in Australia, motivation, Dynamics and Prospects*, Working paper 76, University of Sydney p 7.

⁴⁸² Hall, R supra at p. 3.

the 1950s and expanded the number of staff they could provide including the original office employees that dominated the labour brokerage market prior to the 1990s.

According to Hall, with the increasing propensity to regulate aspects of human resources functions in the 1970s and 1980s, many firms looked to specialist recruitment companies to provide a shortlist of suitable candidates. As the growth in demand for labour brokerage grew, recruitment firms found it easier to offer clients short-term or long-term placements whereby the worker worked at the client's premises but their wage was paid by the recruitment firm. In the late 1980s a number of small specialist firms began to offer contract labour as a replacement for or as a supplement to existing employers for companies in a number of highly unionized industries such as building and construction industries. The 1991 case of *Building Workers Industrial Union and others v ODCO (Pty) Ltd*⁴⁸³ changed the manner in which labour brokerage was regulated in Australia. In that case, the Federal Court upheld an earlier decision that the workers supplied by the labour brokerage company, Trouble-shooters, were employees of neither the host company nor the labour brokerage firm but were in fact independent contractors. This meant that neither Troubleshooters nor their clients were bound by the prevailing building industry awards. The decision paved the way for labour brokerage companies to provide contract staff to clients at highly competitive rates.

Compared to Europe, most of the Australian jurisdiction has been shown to provide comprehensive regulation of labour brokerage. This is despite the fact that labour brokerage is a large industry in Australia. The Federal, New South Wales and Queensland governments have wide provisions for labour brokerage.⁴⁸⁴ Queensland and Victoria have the most detailed set of legislative regulations. In Queensland, Section 6 of the Queensland Industrial Relations Act of

⁴⁸³ (1991) 29 FCR 104.

⁴⁸⁴ Fenwick, C and Hodger, J (2010), *International Labour Law Profile: Australia*, University of Melbourne, Victoria.

1999, defines an employer and employee specifically to include labour brokerage companies and labour brokerage workers.⁴⁸⁵ Contractors can be deemed employees by the Industrial Relations Commission in Queensland, whilst the Fair Employment Tribunal in Victoria does the determination. According to Hall, no Australian jurisdiction currently has legislation to regulate the length of labour brokerage contracts or the purpose for which labour brokerage may or may not be engaged.⁴⁸⁶

It was in May 2000 that the New South Wales Attorney General and Minister for Industrial Relations established a Task Force to inquire into and make recommendations about the labour brokerage industry in New South Wales.⁴⁸⁷ The report of the Task Force made a number of recommendations concerning reforms to better regulate the labour brokerage industry in New South Wales. The recommendations included, inter alia:

- (i) To expand the definition of employer to include labour brokerage companies. This definition assisted in broadening the range of workers who would be afforded protection under the New South Wales Industrial Relations Act;⁴⁸⁸
- (ii) To establish a licencing regime for labour brokerage companies. This licencing provided an opportunity for the state to develop a regulatory approach to the industry;
- (iii) The department of Industrial Relations to conduct an education campaign on the rights and responsibilities of all parties to a labour brokerage arrangement;

⁴⁸⁵ Section 7 of the Victoria Industrial Relations Act of 1979 has a similar provision.

⁴⁸⁶ Hall, R *Ibid* at p.13-14.

⁴⁸⁷ Hall, R *Ibid*.at p. 14.

⁴⁸⁸ The Industrial Relations Act 17 of 1996

(iv) To amend the Occupational Health and Safety legislation such that both client organizations and labour brokerage companies are rendered jointly responsible for the occupational health and safety of labour brokerage workers.

The latter recommendation was necessitated by the circumstances that arose in the New South Wales case of *Ankucic v Drake Personnel t/a Drake Industrial*.⁴⁸⁹ In that case both Drake and the host company were fined for failing to ensure that the health and safety standards of the workers were safeguarded adequately. In that matter, Hungerford J stated as follows:

“the failure to ensure the safety of Mr. Douglas arose in a situation where he was directed by his employer, the defendant to perform work for a third party, Mr. Warman, at that third party’s premises. In such a situation, my view is that an employer has a special responsibility to ensure the safety, health and welfare of its employees at the other workplace for no reason other than that workplace is removed from the employer’s direct management and control and would usually be at a location foreign, or at least unfamiliar, to the employees concerned. The evidence established that the defendant did not satisfactorily attend to this aspect and it was not until Mr. Darey was engaged that specially designed safety policies and procedures were implemented. But that was in July 1997 at least two years after the present offences were committed. Mr. Douglas thereby suffered injury resulting in absence from employment for a period of at least two months and with a permanent deficit to the use of his right hand...it is that feature of this case which gives to the assessment of the penalty such a degree of importance as will encourage employers in a business similar to that of the defendant to implement appropriate steps to ensure

⁴⁸⁹ (1997) 89 IR 574.

the safety of their employees whose labour is hired to third parties and at the same time deter employers for failing to take such steps.”⁴⁹⁰

Thus the mandating of joint responsibility in the protection of workers’ safety ensures that injured labour brokerage workers stand a better chance of accessing improved rehabilitation. This in turn enables them to return to work opportunities. The only practical problem Hall acknowledges is the difficulty most companies may have in providing the necessary cover for injured employees.

In Victoria, after the 20 December 2004 report which made recommendations on regulating labour brokerage, an Economic Development Committee was set up.⁴⁹¹ Prior to the setting up of the Economic Development Committee, a Committee that had to consider the regulation of labour brokerage and make its recommendations was set up. Its recommendations formed the basis of the formation of the Economic Development Committee.⁴⁹² The Committee had played a prominent role in compiling the report and based its recommendations on workplace safety and health. The Committee recommended the establishment of a registration system for labour brokerage agencies which would help to lift safety standards within the industry.

However, the major criticism levelled against the Australian labour brokerage system is that it primarily takes people from other countries who come to Australia with limited skills.⁴⁹³ It has been argued that the use of labour brokerage has led to a decrease in innovation and productivity

⁴⁹⁰ At page 592 of the judgment.

⁴⁹¹ Hall(*supra* at p.8).

⁴⁹² May, Campbell, Burgess, (2008), *The rise and rise of casual work in Australia: who benefits, who leaps?*, Sydney University; Australia at p 7.

⁴⁹³ May, Campbell, Burgess, (2008), “*The rise and rise of casual work in Australia: who benefits, who leaps?*”, Sydney University; Australia.

as well as limiting the formation of skills.⁴⁹⁴ It was also noted that women and students make up the bulk of those in labour brokerage as it is a more flexible work environment especially for those who combined it with childcare. This raises questions of the rights of women. Underhill⁴⁹⁵ observes also how Australia has preferred to allow agency arrangements to deteriorate in a relatively unrestricted way.

During the late 1990s, temporary agency employment grew rapidly in Australia. By the 2000s, it made up around 39 percent of the workforce.⁴⁹⁶ As there was a weak regulating environment at the time, trade unions in Australia responded in two ways. Firstly, collective agreements with agency employers directly regulated terms and conditions of agency workers` employment. Secondly collective agreements at most limited the use of agency workers and also determined their employment conditions.⁴⁹⁷

According to Underhill,⁴⁹⁸ employment regulation in Australia has until recently been a complex mix of minimum standards, known as awards. These were determined by State and Federal tribunals, and collective agreements negotiated primarily at an enterprise level and certified by tribunals. However, due to the exploitative nature of these awards, Mitlacher and Burgess⁴⁹⁹ conclude that regulatory arrangements protecting agency workers in Australia were essential. This was further exacerbated in 1993 by the legislated standards governing a minimum hourly wage and leave provisions which began to replace such state award conditions. Thus, because

⁴⁹⁴ Women on forums project (2009), "Going for Broke: A case study of fruit farms in Grabouw" Stellenbosch, South Africa retrieved from [www.crls.org.za/document\(B=report-final.pdf](http://www.crls.org.za/document(B=report-final.pdf) on 30 March 2013.

⁴⁹⁵ Underhill, E (2006), "Labour Hire employment and independent contracting in Australia: Two inquiries, how much change?" *Australian Journal of Labour Law* 19 (2006) p. 306-314.

⁴⁹⁶ Underhill, E (Ibid. at p. 307).

⁴⁹⁷ Underhill, E and Rimner, M, (2009) "State protection for temporary agency workers: Australia Developments, Blanpain, R, Browich, W, Rymkevich, O and Spatai, S (eds), *Modernization of Labour Law and Industrial relations in a comparative perspective*, Kluwer Law.

⁴⁹⁸ Underhill, E and Rimner, EM(Ibid at p. 175).

⁴⁹⁹ Mitlacher, W and Burgess, J (2007), "Temporary agency work in Germany and Australia :Contrasting regimes and policy challenges", *International Journal of Comparative Labour Law Industrial Relations*, 23 (3) p. 401-431.

most agency workers are employed on a casual basis, the regulation of agency work has been designed to cater for this aspect. This arrangement has profound implications for their employment entitlements and their capacity to collectively bargain to improve their pay and conditions.⁵⁰⁰ It is argued that though casual employment is a form of engagement recognized under Australian legislation, little protection of the workers is offered in the statutes.⁵⁰¹ Thus, casual employees in Australia are paid by the hour, and enter a new contract of employment each time they commence a new engagement. They also are not entitled to paid sick and annual leave.⁵⁰² Labour brokerage employers have justified extensive use of casual employment on the grounds that the availability of work is dependent upon demand from hosts and therefore unpredictable. There are still disparities between the way permanent employees and temporary agency workers are treated, and there is a mismatch between who bears responsibility and who determines employment standards.⁵⁰³ The Australian government has surprisingly not ratified the ILO Convention 181 of 1997 because its labour market has been experiencing a transition.⁵⁰⁴

One of the most glaring disparities in the Australian context is the fact that permanent employees are entitled to procedural and substantive fairness in relation to dismissals, and can be reinstated, reemployed or receive compensation of up to six months wages when their dismissal is deemed harsh, unjust or unreasonable. Casual employees, on the other hand, are entitled to this protection only when they have been employed on a regular basis for more than 12 months, and

⁵⁰⁰ Underhill, E and Rimmer, E (Ibid p. 175).

⁵⁰¹ Campbell, I and Burgers, J (2001), "Casual Employment in Australia and Temporary Employment in Europe: Developing a Cross-National Comparison" *Work, Employment and Society Journal*, 5 (1) p. 171-184.

⁵⁰² Ibid at p 180.

⁵⁰³ Underhill, E (2010), "Should host employers have greater responsibility for temporary agency workers' employment rights"? *Asia Pacific Journal of Human Resources* 48(3) p. 339.

⁵⁰⁴ Ibid at p 184.

have an expectation of continuing employment.⁵⁰⁵ Those casuals employed for less than 12 months with one employer can be dismissed without justification with one hour's notice.⁵⁰⁶

However, with the amendments to the Australia Workplace Relations Act of 1996 in 2006, Section 643 (10) now excludes all employees employed by small business (100 or fewer employees) from unfair dismissal. It should be noted further that casual workers share some rights with permanent employees. They have the right to protection from discrimination on the basis of union membership or activities, and on other grounds such as sex, age, pregnancy and race. They also have a right to protection and participation in collective bargaining.⁵⁰⁷

It should be noted that labour brokerage is an important fabric of Australian society. As of the year 2009, the largest labour brokerage agency in Australia employed 9 290 of its 25 000 workers as casuals.⁵⁰⁸ Though the Fair Work(Registered Organisations)Act of 2009⁵⁰⁹ was meant to regulate this aspect and thus adequately cover temporary agency workers, their rights enshrined in the Act have been limited. The Act aimed at imposing responsibility on the common-law employer which is the agency not the host. However, faced with the risk of job loss for raising a grievance, casual workers have had to accept any job placement to maintain an income and because their work is geographically dispersed at times, the workers have little power to enforce these employment entitlements.⁵¹⁰ Thus Underhill comes up with a compelling argument for increased regulation which protects the temporary workers. She argues thus:

⁵⁰⁵ Underhill, E and Rimmer, E, Ibid at p. 339.

⁵⁰⁶ Ibid at p 340.

⁵⁰⁷ See the Fair Work(Registered Organisations) Act of 2009.

⁵⁰⁸ Ibid at p 343.

⁵⁰⁹ Accessed from www.fwc.gov.au/about-us/legislation and retrieved on 23 March 2013.

⁵¹⁰ Ibid at p 345.

“...casual employment is regarded by agency employers as integral to their spot-market business model built upon hiring labour only for the duration of placements with hosts. As long as casual employment with its inherent vulnerability is considered a lynchpin for the success of agency arrangements, these workers will require special protection.”⁵¹¹

Thus it is important to note that in 2005, the Australian government having noted these disparities launched an inquiry into independent contracting and labour brokerage arrangements.⁵¹² In the inquiry report which included a dissenting report by the then Labour Party opposition, recommendations for a radical change to the regulation of the temporary agency industry were made. The report recommended:

- 1) Joint responsibility by agency employers and hosts with respect to occupational health and safety and unfair dismissals;
- 2) Prohibition on agency workers undercutting wages and conditions at host firms following the change in government in 2007 when the labour government came into power and the overhaul of federal employment laws in 2009. Some of the recommendations were implemented.⁵¹³

However, Underhill argues that a lot still needs to be done. The recommendations that included licencing and joint responsibility for unfair dismissal have yet to be considered, and the prohibition on agency employers undercutting most employment conditions has only been given a weak approval as unions are allowed to negotiate such an outcome. She further adds that:

⁵¹¹ Underhill, E (2010) *Ibid.* at p.372.

⁵¹² *Ibid.* at p. 372.

⁵¹³ *Ibid.* at p. 372.

“Without recognition of the role which most play in undermining employment conditions and securing agency workers, gaps in protection will continue. As long as compliance rests upon employers who can easily evade their obligations, a culture of non-compliance will also be pervasive.”⁵¹⁴

As from 2001, casual employees continually engaged for more than six months could request conversion to permanent employment subject to the changing of such a right in an accord or agreement.⁵¹⁵

This thus potentially expanded unfair dismissal protection to some agency workers. However, this entitlement was later prohibited from federal awards in amendments to the Worker’s Relations Act (WRA) in 2006.⁵¹⁶

However, a significant case in recent Australian jurisprudence is testament to the strides that still need to be taken in the regulatory industry of labour brokerage in Australia.

In *Bruce Neilson and 5 Others vs JSM Trading (Pty) Ltd t/a Workhire (Pty) Ltd*,⁵¹⁷ six permanent agency workers who had been involved in union activities at the host workplace were dismissed on one week’s notice due to lack of work but replaced by others at the host’s workplace within a fortnight. The Australian Industrial Relations Tribunal found that the employer had not breached the Workplace Relations Act of 1996. The union’s allegation that the dismissals arose from the workers’ union activities was not accepted, notwithstanding that such activities may have been a

⁵¹⁴ Underhill, E (2010) (Ibid at. p. 374).

⁵¹⁵ Owens, R (2001), “The long-term or permanent casual – An oxymoron” or a well enough understood Australians’ in the law”?, *Australian Bulletin of labour*, 27 (2), p. 118-136.

⁵¹⁶ See Section 513.

⁵¹⁷ (2003) AIRC 331.

reason not to re-engage them. It was further held that it was commonly accepted that it was not improper for retrenchment to take place in such circumstances on as little as 24 hours' notice.⁵¹⁸

4.9 LEGISLATIVE PROTECTION IN AUSTRALIA- FAIR WORK (REGISTERED ORGANISATIONS) ACT OF 2009

In order to understand the Act, a brief historical background is provided, the context of the enactment of the Act and what this seeks to achieve.

The Act was set up to ensure that the conditions of service of temporary employees are regulated.⁵¹⁹ The Act would ensure that a Fair Workers Commission is set up to determine the setting and varying of modern awards, the setting of a minimum wage and resolution of disputes.⁵²⁰ The Commission would handle claims for unfair dismissal, the approval of enterprise agreements and the determination of industrial policy relations.⁵²¹ The framework and discussions towards the enactment of this Act had started in 2001.⁵²² The Commission was meant to take over the roles of the Australian Industrial Relations Commission in creating a more centralized regulating system.⁵²³ The employees required more protection from unfair labour practices which had been highlighted in the Odco arrangements judgment discussed in detail above in paragraph 4.8.⁵²⁴

Under this Act which was enacted in 2009, the labour brokerage employees must show that they have been dismissed.⁵²⁵ Dismissal is defined to mean,

⁵¹⁸ At p 2 of the judgment.

⁵¹⁹ Owens, R, *Ibid* at p. 122.

⁵²⁰ Owens, R, *Ibid* at p.123.

⁵²¹ *Ibid* at p. 123.

⁵²² *Ibid* at p. 123.

⁵²³ Accessed from www.en.wikipedia.org/wiki/Fair_Work_Commission retrieved on 14 May 2014.

⁵²⁴ *Building Workers Industrial Union and Others v ODCO(Pty) Ltd* (1991) 29 FCR 104.

⁵²⁵ Section 385 (a).

“the person’s employment with his or her employment has been terminated on the employer’s initiative⁵²⁶ or that the person in question was forced to resign from his or her employment ‘because of conduct, or a course of conduct, engaged in by his or her employer.’”⁵²⁷

Such a dismissal must be proved to have been harsh, unjust or unreasonable. In considering whether such a dismissal was harsh, unjust or unreasonable, section 387 of the Workplace Relations Act, and the Fair Worker’s Act must be taken into account. The factors are:-

- (a) Whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) Whether the person was notified of that reason.
- (c) Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person.
- (d) Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal.
- (e) If the dismissal related to unsatisfactory performance by the person, whether the person had been warned about that unsatisfactory performance before the dismissal;
- (f) The degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal;

⁵²⁶ Section 386 (1) (a).

⁵²⁷ Section 386 (1) (b).

- (g) The degree to which the absence of dedicated human resource management specialists or expert in the enterprise would likely impact on the procedures followed in effecting the dismissal.

The term ‘genuine redundancy’ replaced the previous defence of a genuine operational reason.⁵²⁸ Importantly, the Australian Industrial Relations Commission determined the common regulatory instrument. Until the early 1990s, accords were the domain form of employment regulation in Australia, offering comprehensive protections and entitlement. In 1996, Underhill⁵²⁹ notes that their content was reduced to six matters. These were:-⁵³⁰

- a) Rates of pay;
- b) A minimum engagement period of four hours;
- c) Loadings for casual employment;
- d) Ordinary hours of work and loadings for work performed outside of those hours;
- e) Rest breaks; and
- f) Load allowances;

Permanent labour brokerage employees were entitled on the other hand to all award conditions, including annual leave, sick/vacation leave, long service leave, other miscellaneous forms of leave, public holidays, overtime and notice of termination.⁵³¹

⁵²⁸ Maine, T, (2011), “*Vulnerability in the fair workplace: why unfair dismissal laws fail to adequately protect labour-hire employees in Australia*,” University of Melbourne, Center for Employment and labour Relations law, p. 11.

⁵²⁹ Underhill, E and Rimner, E (2008) *Ibid* at p. 6.

⁵³⁰ *Ibid* at p 6.

⁵³¹ Underhill, E and Rimner, E (2008) *Ibid* at p.6.

In conclusion the Australian experience, though laced with imperfections, is worthy of emulating as it is of assistance in determining a proper regulatory framework for Namibia. This is so in the following ways-

- 1) The Odco rules⁵³² in Australia enhanced a development of continuous education to the employees about their rights to collective bargaining, strike and more importantly the safeguarding of their health and safety standards. Namibia should ensure that the regulations provide for compulsory continuous education to the temporary employees and enhancing of skills by both the employer and the client. They must bear the expenses for the provision of the training.
- 2) The labour broker and the client are held jointly and severally liable for any breach in the health and safety standards of the temporary employees. In Namibia, criminal liability should be imposed for both the broker and the client that fail to adhere to the health and safety procedures.
- 3) The provisions of the Fair Workers Act of 2009 protect the temporary employees` rights to a fair hearing before the arbitrator and thus ensuring that their rights to a fair trial and to natural justice are protected. The Act sets out what the arbitrator must consider in an unfair dismissal complaint. In Namibia, the provision for arbitration does exist. However, concerns have been raised with regard to the qualifications and the capacity for arbitrators to adjudicate upon labour cases referred to the Labour Commissioner for resolution of disputes. Most of the arbitrators in Namibia who deal with complex labour matters do not have the requisite skills and qualifications to resolve labour disputes to the satisfaction of the parties to a dispute. As a result, providing for detailed grounds that an arbitrator should consider in a

⁵³² *Building Workers Industrial Union and Others v ODCO(Pty) Ltd (1991) 29 FCR 104.*

matter referred to him/her would thus ensure that the proceedings are not tainted with an irregularity which may lead to the setting aside of such proceedings on appeal to the Labour Court. The Arbitrators must be trained extensively in labour law, including training them in understanding the principles of a fair trial and natural justice as provided for by Article 12 and 18 of the Namibia Constitution respectively.

- 4) Namibia as will be noted in the detailed discussion below recognized that a temporary employee becomes permanent within six months of employment and is thus entitled to approach the Labour Commissioner for the resolution of a labour dispute. If successful, the temporary employee is entitled to compensation and the award is enforceable as a court order in terms of section 90 of the Labour Act. In contrast, the Australian provision states that the temporary employee is only entitled to compensation after an unfair dismissal if he/she is employed for a regular basis of 12 months with the expectation of continuing employment. This leaves the employees vulnerable to exploitation as an employees could be dismissed within the 12 month period without any prospects of compensation. The dismissals may be unfair and the employees clearly do not have a legal basis to challenge the dismissals within the 12 month period. Australia could emulate the Namibia, the United Kingdom and the Netherlands examples in granting an automatic right to the employees to compensation after an arbitrator finds that there was an unfair dismissal or an unfair labour practice.
- 5) Furthermore, the rights to what is termed unfair labour practices should be expanded in Namibia to include discrimination on the grounds that include inter alia sex, race, age and religion. The regulations are silent in Namibia on these aspects whilst the Australian

regulations explicitly provide for such grounds. Section 5 the Namibian Labour Act 11 of 2007 prohibits discrimination on any employment on the grounds of, inter alia, sex, HIV/AIDS status, physical and/ or mental disability , pregnancy and religion. The Act should emulate the Australian Fair Workers Act of 2009 which specifically provides that temporary employees shall not be discriminated on any of the grounds referred to in the Act.

Thus the Australian model as demonstrated would add significant value to the development of the law in Namibia.

4.10 THE ZIMBABWE EXPERIENCE

The Zimbabwe labour law system does not provide explicitly for labour brokerage. The Zimbabwe Labour Relations Act of 1995⁵³³ in its preamble provides as follows:-

“an Act to declare and define the fundamental rights of employees; to give effect to the international obligations of the Republic of Zimbabwe as a member state of the International Labour Organization and as a member to any other International Organization or agreement governing conditions of employment which Zimbabwe would have ratified; to define unfair labour practices; to regulate conditions of employment and other related matters...”

The Zimbabwe Labour Act further recognizes the right of every group of employees to form trade unions and be part of trade unions⁵³⁴.

⁵³³ Chapter (28:01) referred to as the Zimbabwe Labour Act.

⁵³⁴ Section 27.

Furthermore the definition section of the Act recognizes an employer – employee relationship which in some circumstances involves a third party. The Act loosely refers to this relationship as the ‘Hirer of services’⁵³⁵.

An employee is defined as:-

“Any person who performs work or services for another person for remuneration on such terms and conditions as are agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person:-

- a) In circumstances where, even if the person performing the work or services supplies tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or
- b) In any other circumstances that may closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services.” (emphasis mine).

This provision on the hirer is similar to section 198 of the South African Labour Relations Act Number 66 of 1995 as it places liability on the third party for the welfare of the party hired.

However, the definition of employer tacitly includes labour brokerage as the parties to the employment contract as stated in the definition may agree on the remuneration to be paid and the conditions of employment for all the parties. Furthermore, the definition of an employer is placed into five categories. The definition is widely couched to an extent that it includes labour brokerage. An employer is thus defined as follows:-

⁵³⁵ See the definition Section of the Act.

“Any person whatsoever who employs or provides work for another person and expressly or tacitly undertakes to remunerate him and includes:-

- a) The manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed; and
- b) The judicial manager of such a person appointed in terms of the Companies Act (Chapter 24:03);
- c) The liquidator or trustee of the insolvent estate of such person if authorized to carry on business of such person by:-
 - (i) The creditors;
 - (ii) In the absence of any instruction given by the creditors, the Master of the High Court,
- d) The executor of the deceased estate of such person if authorized to carry on the business of such person by the Master of the High Court;
- e) The curator of such person who is a patient as defined in the Mental Health Act (No. 15 of 1996) if authorized to carry on the business of such person in terms of section 88 of the Act.”

The only labour brokerage consultancy of note in Zimbabwe is the Clive Bruce and Charles Consultancy from Mutare, which expanded to Harare in 2005.⁵³⁶

⁵³⁶ Mazanhi, I (2012, April 18) “*Labour brokerage; to ban or to regulate?*” Retrieved from <http://www.newsday.co.zw/article/2012-04-18-labour-broking-to-ban-or-regulate> on 1 July 2012.

Mazanhi⁵³⁷ notes that labour brokerage is not a widespread phenomenon in Zimbabwe but the legal developments in both South Africa and Namibia on the subject might have an impact and strong influence on labour brokerage practices in Zimbabwe. The debate in Zimbabwe about this issue has never been fully canvassed and it remains to be seen what impact Namibia and South Africa will have on Zimbabwe labour brokerage. .

The Zimbabwean position on labour brokerage was recently pronounced by the Government of Zimbabwe.⁵³⁸ The Government warned companies hiring employees as labour brokerage employees that it is an illegal practice in Zimbabwe.⁵³⁹ The director of Labour Administration in the Ministry of Labour and Social Services, Paul Dzviti, was quoted as saying that workers in a particular industry should be paid directly by the company they work for. This issue arose as a result of investigations by the *Herald* newspaper⁵⁴⁰ that revealed that workers in the furniture, manufacturing, food and beverage industries had been affected by labour brokerage. A certain company by the name of Weberly Investment (Pty) Ltd had been contracted by a food company known as National Foods Limited to hire out workers to third parties.

The landmark case of *Lifestyle Zimbabwe Furnishers v Admire Mawapo and 295 others*⁵⁴¹ is the case that banned casualization of labour in Zimbabwe. It has always been a concern of labour analysts that brokers offer commercial services whilst the workers belong to the manufacturing sector. In that case, Lifestyle Zimbabwe Furnishers (hereinafter referred to as LZFF) employed the 296 workers at four different companies. The workers signed weekly contracts and the employment periods varied from 3 to 10 years. In December 2005, the company terminated the

⁵³⁷ Ibid at p .1.

⁵³⁸ Murape, W ,(2013, February 28), Zimbabwe Labour Broking illegal in Zimbabwe, *The herald*, retrieved on from www.allafrica.com/stories/201202280310.html on 10 March 2013.

⁵³⁹ Ibid at p.1.

⁵⁴⁰ Ibid at p 1.

⁵⁴¹ Ibid at p.2.

workers' contracts by not renewing them. The workers argued that they were permanent employees. The matter was then referred to arbitration. The arbitrator was asked to determine whether the workers were deemed to be contract workers on a contract with no time limit, or whether those contracts were unlawfully terminated.

The arbitrator held that all employees engaged on a weekly contract by LZP for more than six weeks in the four consecutive months following the coming into force of the Labour Relations Amendment Act of 2002 become employees on contract without limit of time. Thus when the employer did not legally terminate their contracts of employment in December 2005, they had become permanent workers at that stage. The arbitrator further stated that in the event that reinstatement was no longer possible, the parties should, within 14 working days of the receipt of the Arbitral Award, agree on the damages to be paid to each employee in lieu of reinstatement. The arbitrator was following the reasoning by Arbitrator Mr. Matsikidze in the case of *Stanley Takaendes v Schweppes*⁵⁴² (Pvt) Ltd in which the arbitrator said the following:-

“what is clear is that the labour broker Lorimark is not the employer, but Schweppes. To allow employers to use middlemen in order to avoid statutory regulations will be to put to ransom the workforce”⁵⁴³

Thus, the arbitrator noted that any employee who had been reengaged by LZP should be treated as a permanent employee from the time of the original contract. The Zimbabwe example is not comprehensive but clearly shows that labour brokerage is impliedly prohibited.

It is clear that Zimbabwe does not recognize the existence of labour brokerage. All employees on contracts are deemed to be permanent employees when a dispute arises. Namibia has a similar

⁵⁴² Murape, W (ibid).

⁵⁴³ Ibid at p 1.

position with regard to temporary employees who are employed for a period of six months. The arbitrator would consider payment of compensation to such employees on the same scale as permanent employees. The fact that temporary employees are deemed to be permanent employees by operation of law after four consecutive months following the coming into force of the Labour Relations Amendment Act of 2002 is a persuasive provision. Namibia should shorten the period from six to four months. This would enable a stricter monitoring of contracts entered into between the labour broker and clients. All the rights of the employees to trade unionism, sick leave, annual leave and compassionate leave would be protected as the temporary employees would have the same rights as permanent employees at the inception of their contracts. The Zimbabwean Labour Act Chapter 28:01 does not define labour brokerage as it is illegal. The labour broker who acts as a middleman is responsible for the welfare of the temporary employer. It is clear that it is difficult for labour brokers to operate in Zimbabwe.

The fact that some matters have appeared before arbitrators is a clear indication that in the foreseeable future labour brokerage will thrive in Zimbabwe. This would necessitate the need for regulations. Zimbabwe can no longer afford to adopt the anachronistic position of deeming labour brokerage unlawful. Labour brokerage exists in Zimbabwe though in a small scale. The fact that the phenomenon of labour brokerage exists in various jurisdictions, albeit with stricter regulation, means Zimbabwe needs to prepare regulations for the industry. It remains to be seen if the status quo will prevail infinitely in light of the developments in South Africa and Namibia. The Zimbabwean position is far detached from reality as it does not recognize the significance of labour brokers. However, as was noted in the *Stanley Takaendesha v Schweppes (Pvt) Ltd*⁵⁴⁴ case, statutory regulation of labour brokers is the viable option in ensuring labour brokers do not

exploit workers. Namibia`s regulations, as will be demonstrated below, seek to protect the workers from exploitation. Zimbabwe has to enact regulations to that effect.

CHAPTER 5

5.1 THE NAMIBIAN REGULATIONS

The fundamental concern of the labour movement regarding the operations of labour brokerage companies is that the brokers do not provide permanent employees but they merely turn the casualization of work into a business venture. Furthermore, labour brokerage companies tend to undermine collective bargaining because workers are deployed at different workplaces in highly insecure circumstances. The workers remain vulnerable and it is difficult for trade unions to represent employees of labour brokers.⁵⁴⁵

It was against this backdrop that the Namibian Government came up with proposed regulations that were circulated for discussion amongst unions and employees to gauge their views as to whether or not the regulations would be sufficient to regulate the labour brokerage industry. The process began in 1999⁵⁴⁶ and it was an ongoing process that culminated in the Labour Act 6 of 2007, more particularly section 128 of the Act. Cabinet therefore endorsed the amendment of the Labour Act to address labour brokerage in accordance with the following principles:⁵⁴⁷

- (a) To properly define labour brokerage to apply only to employees in the labour brokerage system and not to *bona fide* subcontractors and independent contractors;
- (b) To clarify the position of seasonal and temporary employees;

⁵⁴⁵Labour Resource and Research Institute, (2006), "Labour Hire in Namibia," LARRI, p. 4.

⁵⁴⁶Labour Resource and Research Institute, Ibid p. 4.

⁵⁴⁷Menges, W (2010, February 8), "Screws tighten on labour hire," *The Namibian*, p. 5.

- (c) To make it possible for the Minister to introduce regulations on what constitutes an employment relationship, regardless of whether the affected person is referred to as an employee, service provider or an independent contractor;
- (d) That labour brokerage employees shall be remunerated at a rate that is not less than that of other employees performing comparable work for the same company or related companies and shall be entitled to the same fringe benefits;
- (e) Labour brokerage workers shall be entitled to written contracts of employment that are signed by both the labour brokerage firm and the client;
- (f) To prohibit the use of scab labour during strikes or lockouts. Labour brokerage workers are not to be used during strikes;
- (g) The Minister of Labour will have the power to grant exemption from labour brokerage provisions and promulgate regulations concerning the implementation of labour brokerage provisions.

Section 128 of the Act that banned labour brokerage was as a result of these consultations and deliberations. This was before the Supreme Court pronounced that section 128 was unconstitutional and that a regulatory framework had to be put in place.⁵⁴⁸ With the help of these principles, and in light of the Supreme Court judgment, the Government restarted the process of setting up a regulatory framework for labour brokerage. The office of the Labour Commissioner was tasked with drafting the regulations.⁵⁴⁹

⁵⁴⁸ APS Supreme Court case (supra).

⁵⁴⁹ Poolman, J , (2010, May 5), "Shingudja optimistic about labour hire changes," *The Namibian Sun*, p. 7.

The Labour Commissioner, Bro-Matthews Shinguadja, stated that the complexity of the labour brokerage industry demands that a new but separate legal instrument be enacted to regulate the industry.⁵⁵⁰ The Labour Amendment Act 2 of 2012 was gazetted on the 1st of August 2012. This was after President Hifikepunye Pohamba at the workers day celebrations on 1 May 2012 had called on the Ministry of Labour and Social Welfare to put the law into operation to grant more protection to Namibian workers, more particularly those in the labour brokerage industry.⁵⁵¹ The regulations should be read with the Employment Services Act 8 of 2011 which was also amended by Act 2 of 2012 (“The Employment Services Act”). The user enterprises must be registered for them to operate unless there is an exemption from the Minister.⁵⁵² An enterprise that fails to register is liable to be prosecuted and upon conviction may be sentenced to a fine of up to \$20000 or to imprisonment not exceeding 2 years or to both such fine and imprisonment.⁵⁵³ The director responsible for labour market services issues a licence for a prescribed period with conditions which must be met by the user enterprise.⁵⁵⁴ The director is mandated to keep a record of the licences.⁵⁵⁵ The licence may be renewed after the prescribed period has expired.⁵⁵⁶ This provision ensures that the labour brokers are monitored by the Ministry of Labour to ensure that they do not contravene the provisions of the law. A contravention of the safeguards that exist in the Labour Act would have a negative impact on the grounds to be considered for a renewal of the licence. Furthermore, where the Director is of the view that an agency is not complying with the Act, the registration will be cancelled after 30 days notice is given to the agency to make representations to show cause why it should not be cancelled.⁵⁵⁷

⁵⁵⁰ Heita, D (2010, February 25) “New Labour Hire Regulations near completion,” *The New Era*, p. 3.

⁵⁵¹ Duddy, MJ, (2012, May 3), “End of Labour Hire in Namibia,” *The Namibian*, p. 2.

⁵⁵² See Section 19 of the Employment Services Act 8 of 2011.

⁵⁵³ Section 19(2).

⁵⁵⁴ Section 21(1).

⁵⁵⁵ Section 21(3).

⁵⁵⁶ Section 21(2).

⁵⁵⁷ Section 22.

The new regulations stipulate that when a company uses a casual worker from a labour brokerage agency that worker becomes an employee of the company.⁵⁵⁸ The worker then enjoys the same rights as other employees of the company under the Labour Act, including protection against unfair dismissal and the choice of belonging to a trade union.⁵⁵⁹

The regulations further stipulate that a company has to hire the worker on the same terms and conditions as its other employees. The regulations also introduce a presumption of indefinite employment for any worker unless the company can justify a fixed term contract.⁵⁶⁰

Noting that the employees should be treated equally with permanent employees, private employment agencies and user enterprises should adhere to the Namibian Constitution, the Labour Act, the Companies Act and any other Namibian legislation which protects employee rights. The regulations define the user enterprise as the employer of the employee placed by the private employment agency.⁵⁶¹ This means that the user enterprise has an obligation to ensure health and safety standards and the rights to trade unions are afforded to employees. The private employment agencies and the user enterprises are therefore jointly and severally liable for any contraventions to the Labour Act.⁵⁶² The private employment agencies have to declare whether they render their services free of charge or whether they levy a fee on the user- enterprise or their workers.⁵⁶³ Further the employees would fall within Part C of the Labour Act which provides for a Wage Commission to determine minimum wages for them.

⁵⁵⁸ See Section 128(4) (a) of the Labour Act.

⁵⁵⁹ Section 128(3) and section 128C.

⁵⁶⁰ Section 128(4) (b).

⁵⁶¹ Section 128(2).

⁵⁶² Section 128(9).

⁵⁶³ Section 24(1) of the Employment Services Act.

The user enterprise has to register its workers with the Social Security Commission.⁵⁶⁴ This ensures that the employees who retire or are discharged on medical grounds are entitled to a pension. Furthermore, women employees are entitled to the same maternity leave rights as their permanent counterparts. Private employment agencies and user enterprises are under obligation to ensure that training programmes are designed to ensure that the workers training skills are enhanced as if they are permanent employees. They will therefore be responsible for the provision of training for their workers on health, safety and welfare. The brokers will have to keep records of their workers, develop fair and just grievances and disciplinary procedures in line with the Labour Act and the promotion of good labour relations. The labour brokers are also not allowed to participate in any scheme aimed at retrenching workers at client companies and replacing them with workers from employment agencies.⁵⁶⁵ Where the employee is aggrieved by any contravention of the Labour Act, they have the right to refer matters to the Labour Commissioner to seek a remedy for reinstatement, back pay or any other relief that the Labour Commissioner may deem fit.⁵⁶⁶ User enterprises must not employ an employee placed by a private employment agency in contemplation of a strike or lockout.⁵⁶⁷ This provision ensures that the user enterprise does not replace striking employees with scab labour and thus terminate their contracts of employment for exercising their right to strike. The user enterprise would previously replace the employees with those provided by the private employment agency and dismiss those on strike. The Africa Personnel Services and Etale fishing saga⁵⁶⁸ is a perfect example of the user enterprise replacing striking workers with scab labour. Where the user enterprise dismisses employees within six months of them performing similar work and a private employment agency places them for temporary work, the private enterprise must not employ

⁵⁶⁴ See the Social Security Act 34 of 1994.

⁵⁶⁵ Section 128(9) of the Labour Act.

⁵⁶⁶ Section 128(7).

⁵⁶⁷ Section 128(5)(a).

⁵⁶⁸ For a detailed discussion of the APS- Etale saga see the discussion in Chapter 3 above.

them.⁵⁶⁹ Contravening these provisions is an offence and a fine not exceeding \$80000 or imprisonment for two years or to both such fine and imprisonment is imposed on conviction.⁵⁷⁰

The sanctions will deter the user enterprises and the private employment agencies from replacing the employees who strike or who are dismissed within the first six months of their employment by other temporary workers. The legislature in enacting this Amendment Act had the intention of placing temporary employees at par with permanent employees with regard to employment rights and privileges. It is clear that the Act has gone beyond placing them at par and has in fact ensured that temporary employees are no longer in existence. All employees placed with a user enterprise are deemed permanent employees.

5.2 REACTION TO THE REGULATIONS

The Namibian Employers Federation⁵⁷¹ Secretary General Tony Parkhouse has observed that the new regulations are too strict and stringent such that they effectively ban labour brokerage. He added that whilst it is prudent to have the Regulations due to the fact that some labour brokerage companies abuse their workers, the changes are too restrictive.⁵⁷² The NEF argued that the Labour Amendment is tantamount to banning labour brokerage, and the Minister had been advised at the tripartite meeting of October 2010 not to implement the amendment as a result. Noting that Namibia has a large casual workforce, the new regulations will lead to a loss of jobs for casual labourers. Mr. Parkhouse gave an illustration of how the regulations will negatively impact one of its members. The company has 80 permanent employees and employs up to 150 casual workers on an ad hoc basis. With the regulations which are now law, the company will

⁵⁶⁹ Section 128(5)(b).

⁵⁷⁰ Section 128(7).

⁵⁷¹ Duddy, MJ,(2012, May 3), "End of Labour hire in Namibia" retrieved from www.namibian.com.na/index.php?archive_id=94710...story on 3 April 2013.

⁵⁷² Duddy, MJ Ibid at p. 1.

only be able to employ 50 of its previous casual workforce permanently. The rest will be rendered redundant.⁵⁷³ On the other hand, The National Union of Namibian Workers (NUNW) supported the new Labour Amendment Act.⁵⁷⁴ Evalistus Kaaronda, the then Secretary General of the NUNW reiterated the unions` support for the Government at a press conference. Mr. Kaaronda further observed how in his opinion the NEF had deliberately sought to create pandemonium by misinforming the public about the effects of the Amendment.

Africa Personnel Services argued that more than 7 000 of the more than 10 000 casual workers will be left jobless with the implementation of the new law. The General Manager of Africa Personnel Services, the largest labour brokerage company in Namibia, Mr. Bennie Buys, noted that there will be huge job losses as a result of the regulations.⁵⁷⁵ Namibia already has a high unemployment rate, and the regulations will exacerbate the unemployment problem. On the other hand, Africa Personnel Services stated that the enactment of the regulations would not change the existing operations of Africa Personnel Services. The APS had put measures in place to comply with the changes by focusing on value addition to both employees and clients.⁵⁷⁶ Nghishililwa⁵⁷⁷ argued that the regulations are bound to be challenged in the High Court thus bringing the process back to where it started. He argued that the amendment should not be used as an avenue for abolishing labour brokerage in Namibia. The regulations must be neutral. Noting there are competing interests, the regulations must be able to protect labour brokerage workers from being exploited whilst allowing labour brokerage companies to carry on the trade or business of their choice.

⁵⁷³ Ibid at p.1.

⁵⁷⁴ New Era, "NUNW hails Labour Act," retrieved from www.newera.com.na/articles/46829/NUNW-hails-labour-Act on 12 August 2012.

⁵⁷⁵ Ibid at p 1..

⁵⁷⁶ Duddy, MJ (Ibid).

⁵⁷⁷ Nghishililwa, F, (2011, May 15), "What is the problem with labour hire?" retrieved from www.namibian.com.na/index.php?archive_id=88153&page on 3 April 2013.

Haidula⁵⁷⁸ makes some interesting observations on the regulations. He argues that the fundamental problems with labour brokerage companies as expressed by the labour movement are unlikely to be resolved through the proposed regulations. One of the likely problems will be the means and methods of monitoring and enforcing the provision that aims to prevent the replacement of permanent workers with labour brokerage labourers and scab labourers. Companies may find convincing arguments for retrenchments just to re-employ workers some time later through labour brokerage companies. Companies are likely to resort to a strategy of not filling permanent vacancies and instead employ labour brokerage workers. Furthermore, the permissible fees that the brokers are allowed to charge may pose problems. The regulations do not adequately address the issue. The period within which an employee can be treated as a casual worker is not specified. This, Haidula argues,⁵⁷⁹ would allow client companies to make use of casual and labour brokerage employees indefinitely without imposing any duty on them to create permanent employment. The regulations do not resolve the fundamental conflict regarding the operations of labour brokerage firms in Namibia. The regulations are insufficient in that regard in changing labour brokerage practices. Haidula⁵⁸⁰ proposes a more radical approach to the problems inherent in labour brokerage. He advocates for the amendment of the Constitution to authorize the banning of labour brokerage. Alternatively, the use of ILO recommendation 198 of 2006 as a guide to protecting labour brokerage employees’.

However, this research strongly views and concludes that the banning of labour brokerage is unconstitutional in that it infringes on Article 21(1) (j) of the Namibian Constitution which provides for persons to freely practice any profession or carry on any occupation or trade or

⁵⁷⁸ Haidula, S *ibid* at p. 25.

⁵⁷⁹ Haidula, S, *ibid* at p. 25.

⁵⁸⁰ Haidula *ibid* at p. 26.

business of their choice. It will also be *ultra vires* the ILO Convention 181 of 1997 which advocates for domestic labour legislation to provide for safeguards to the rights of temporary employees. Banning labour brokerage will also be divorced from the current labour trends that permit labour brokerage, albeit in a regulated manner.

The President of the National Union of Namibian Workers (NUNW), Mr. Elias Manga, hailed the introduction of the regulations as a step in the right direction.⁵⁸¹ He argued that the jobs people got through labour brokerage were temporary, and that Namibia as a nation should look at permanent solutions towards tackling unemployment, rather than short-term solutions like labour brokerage.

Herbert Jauch⁵⁸² argued that the new amendments to the Labour Act are a positive attempt at improving the working conditions of the temporary employees who have long been exploited. He argued further that labour brokerage companies in Namibia are suppliers of labour only, contrary to the international experiences of labour brokerage companies that supply goods or services only. The labour brokerage companies do not create jobs but are merely suppliers of unemployed workers to various client companies. According to Jauch,⁵⁸³ labour brokerage employees are vulnerable as they do not receive any paid leave nor severance pay in case of retrenchment. As a result, he argues that the new Labour Amendment Act to section 128 does not ban labour brokerage nor does it prevent the use of temporary or seasonal workers. He concludes his argument by stating that there is an improvement in the employment conditions of the employees by the reduction of the gap in earnings between casual and permanent workers. This gap has essentially been used by labour brokerage companies to make profits.

⁵⁸¹ Duddy, MJ Ibid at p.1.

⁵⁸² Jauch, H, (2012, August 10), "Job Creation Versus Workers' Rights," *The Namibian*, p. 3.

⁵⁸³ Jauch, H, Ibid at p.3.

Prior to the coming into force of the new Labour Amendment Act, the former Minister of Labour, Immanuel Ngatjizeko explained in detail what the new Labour Amendment Act sought to achieve. The Minister explained that part 4 of the Employment Services Act which regulates Private Employment Agencies would come into effect on the 1st of September 2012.⁵⁸⁴ This will require all labour brokerage agencies and private agencies to obtain a licence from the Employment Services Bureau of the Ministry of Labour and Social Welfare. The Minister argued that labour brokerage required stringent regulation because it is, “viewed by many as the contract system in a new suit of clothes.”⁵⁸⁵ The Minister reiterated the fact that the new legislation should be understood against the historical background of extreme exploitation of black workers and marginalization of a sector of Namibian workers. Under standard labour brokerage contracts, there is no provision for a safe-working environment for the employee to ensure that they enjoy basic conditions of employment guaranteed by law.⁵⁸⁶

The Minister further argued that the labour brokerage agency avoids responsibility for unfair dismissal or benefits payable upon termination under the “no work, no pay” policy as a withdrawn employee remains in the employment of the labour brokerage agency without work or pay. The Minister gave an example of a scenario where workers employed continually for five to seven years were treated as temporary workers whilst some employers use renewable short term contracts as a modern form of employment. This means therefore that there is no termination of the employment needed.⁵⁸⁷ When the tripartite parties could not reach an agreement with regards to ensuring that the amendments should not come into operation on the 1st of August 2012, Africa Labour Services previously known as Africa Personnel Services, under its trading

⁵⁸⁴ Smit, E. (2012, January 27), “Labour Amendment Act explained,” *The Namibia Sun*, retrieved on from www.namibiansun.com/content/national-news/labour-amendment-act-explained on 18 August 2012.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid.

name, brought an Application on an urgent basis seeking to stop the enforcement of the Amendment Act.

5.3 THE LEGAL CHALLENGE TO THE LABOUR AMENDMENT ACT NUMBER 2 OF 2012: African Labour Services(Pty) Ltd v The Minister of Labour and Social Welfare and the Government of the Republic of Namibia

Africa Labour Services, which is the trading name for Africa Personnel Services, brought an urgent application in the High Court seeking the High Court to declare the Labour Amendment Act 2 of 2012 unconstitutional.⁵⁸⁸ It further sought an interim interdict against the Amendment Act pending the finalization of the matter. Africa Labour Services argued that the regulations contravened Article 10 of the Constitution, viz, equality before the law and Article 21(1)(j) which provides that all persons have a right to practice a profession of their choice. In support of its arguments, the Africa Labour Services raised the following points:

- 1) Africa Personnel Services (APS) is the largest labour brokerage company in Namibia. It provides personnel to its clients in most spheres of the economy, including fishing, mining, construction and hospitality industries, the retail and wholesale sector as well and general goods and services industries. All employees belong to different unions depending on the industries within which they work. These unions include the Mineworkers Union of Namibia (MUN), the Namibia Food and Allied Union (NAFAU), Namibia Seaman and Allied Employees Union (NSAEU), Retail and Wholesale Employees Union and the Metal and Allied Workers' Union (MAWU).

⁵⁸⁸ See *African Labour Services(Pty) Ltd v The Minister of Labour and Social Welfare and the Government of the Republic of Namibia* unreported judgment of the High Court A163/2012 heard on 27 September 2012 and delivered on the 27th of June 2013 by Geier J and Liebenberg J.

- 2) APS employs 1 618 employees who are hired out to various business entities and supplies 3 categories of employees to its clients viz skilled, semi-skilled and unskilled. About 50% of the employees are semi-skilled and the other 50% are unskilled.

- 3) Africa Personnel Services argued that the Act jeopardized its position as all the employees were at risk of losing their jobs as a result of the Act. Furthermore, it stated that it had already made the following undertakings which the Amendment Act would scupper. These are:
 - (a) The registration of all its employees with the Social Security Commission and Employee Compensation Commission (formerly the Workers' Compensation Commissioner) in accordance with current legislation.

 - (b) The delivery and collection of its employees to and from the work station of the client at the beginning and end of each working day. The client in terms of this agreement is required to ensure that the hours worked by the employees supplied by APS are controlled and documented by means of check cards or sheets which are always available to APS from time to time for invoicing purposes.⁵⁸⁹

 - (c) It appraised all its employees supplied to the client of the relevant rules and regulations and codes of conduct of the client. These codes of conduct as well as the disciplinary code of APS are explained to the employees from the outset and a copy is provided by the client to APS.

⁵⁸⁹ Par 22 of the Founding Affidavit by Johannes Arnoldus Botha.

- (d) Recognition and negotiating with all trade unions and affiliates registered in terms of the Labour Act and to comply in all aspects with the Act and all applicable legislation.⁵⁹⁰
- 4) Further, APS argued that the employees` wages and payments are determined on a no work/no pay basis subject to APS`s attempts to start phasing this requirement out wherever possible. The transport of the employees to and from work is at APS expense at no extra cost to employees. Employees are further provided with protective clothing for free and are responsible for the upkeep and maintenance of this clothing, failing which they are required to repay the value of the protective clothing to APS which would then deduct it from their salary by agreement.⁵⁹¹
- 5) The right to annual leave is further included which accumulates in terms of the Labour Act.⁵⁹² Disciplinary procedures and standards are complied with by APS in terms of the Labour Act in disciplining its employees. As a result, APS argued that the new Amendment Act does not take into consideration that many business entities which make use of APS`s employees prefer not to engage employees on an indefinite and permanent period. The employees may only be temporarily required for fixed periods to meet seasonal demands because it does not make business or financial sense to them in their particular environment to employ workers on a permanent basis when their services are required for a temporary period.

⁵⁹⁰ Par 22.4.

⁵⁹¹ Par 28.

⁵⁹² Par 29.

- 6) The Labour Act is also premised upon employment being of an indefinite or permanent nature despite the need for flexibility and temporary employment required by a wide range of Namibian businesses. This is necessitated by either their nature or by reason of fluctuating or seasonal peaks or demands.⁵⁹³
- 7) Further, APS argued that the direct and indirect costs of making temporary employees permanent as prescribed by the Act are prohibitive because of the heavily regulated employment legislation. It therefore makes it more viable and preferable for business concerns to engage APS to provide necessary employees for that purpose.
- 8) Further because of the relatively expensive and time consuming labour dispute resolution mechanisms of conciliation and arbitration for permanent employees, as well as the delay of matters in the labour court, the contract system adopted by APS is thus more viable. APS entered into contracts with the workers and this ensured the workers to be part of collective bargaining and to join trade unions of their choice.
- 9) Furthermore, APS argued that clients prefer to rely on specialized services provided for by APS to provide temporary employees when needed. This relieves them of the cost and burden of recruiting employees, retaining employees that are only required on a temporary or fixed-term basis and addressing their conditions of employment and their termination when they are no longer required. APS's services have thus given rise to greater business efficiency which is necessary and conducive to economic growth. The ILO Convention 181

⁵⁹³ Par 33.4.

of 1997 has provided that employment agencies are specially recognized as playing a vital role in the flexible labour market in a well-functioning labour market.⁵⁹⁴

10) APS further argued that section 128 is in extent and nature extremely wide and clearly designed to make use of labour brokerage so burdensome to user enterprises that the latter will refrain from using such services conversely. It is so designed to make the environment in which APS operates so hostile as to force it to close down its business. It is an attempt to, under the guise of regulatory powers, achieve the initial objective of the legislature, namely to prohibit such practice.⁵⁹⁵

11) APS had at that stage received six cancellations of its services agreements, and this would make it difficult as it will no longer be possible for APS to place its employees with other alternative user enterprises and thus the employees who work in sectors like the fishing industry which relies on quotas will be retrenched, thus exacerbating the unemployment rate of Namibia.⁵⁹⁶

On the other hand, the respondents argued that they have a broad mandate, derived from the Namibian Constitution and post-independence labour and employment legislation to regulate the labour market. This is in order to foster harmonious labour relations,⁵⁹⁷ to implement international labour standards, to promote employment and to eradicate vestiges of apartheid. Article 95 of the Constitution which the respondents relied on provides as follows:

⁵⁹⁴ Par 34.

⁵⁹⁵ Par 35.

⁵⁹⁶ Par 39.

⁵⁹⁷ See the Respondent's answering affidavit deposed to by the Minister of Labour and Social Welfare, Immanuel Ngatizeko.

“The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:-

- (a) Enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society, in particular, the government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women. Further the government shall seek through appropriate legislation to provide maternity and related benefits for women;
- (b) Active encouragement of the formation of independent trade unions to protect workers’ rights and interests; and to promote social labour relations and fair employment practices;
- (c) Membership of the ILO and where possible adherence to and action in accordance with the international conventions and recommendations of the ILO;
- (d) Ensure that workers are paid wages adequate for the maintenance of decent standard of living and employment of social and cultural opportunities.”

The respondents further raised the issues that have been at the centre of the basis of their objection to the practice altogether. The points raised were:

- a) Employment according to the principle of “no work, no pay” whereby employees are deprived of the entitlement to sick pay, annual leave, compassionate leave, maternity leave and other statutory basic conditions of employment and social security benefits.

- b) Employees of the Labour brokerage system were often deprived of the protections against unfair dismissal in terms of the Labour Act, and of their right to severance procedures.
- c) Treatment of long-serving labour brokerage employees as “temporary” or “casual.”
- d) Use of lower-paid labour brokerage employees alongside permanent employees.
- e) The failure of labour brokerage companies to pay fringe benefits to employees.
- f) The absence of adequate health, safety and sexual harassment protections at the workplace.
- g) Use of labour brokerage to avoid unions and collective bargaining at the workplace.
- h) The absence of a means for labour brokerage employees to raise grievances at the workplace.⁵⁹⁸

Therefore the Minister argued that even though the Supreme Court ruling⁵⁹⁹ ordered the setting up of a regulatory framework, the practices referred to above persisted and options were considered to protect labour brokerage employees in a manner consistent with the Supreme Court ruling.

Thus the Ministry noted that the growing gap in the protection of labour brokerage employees that existed was due to the fact that enterprises utilizing the labour of the employees had no statutory responsibility towards them. Thus the legislation is meant to protect such employees, by affording them the right to enforce their rights as employees against the user enterprise, who not only utilizes their services on a daily basis and supervises and controls their work at the workplace, but who in any event acts as an employer in terms of the Labour Act.

⁵⁹⁸ See the Answering Affidavit by the then Minister Ngatjizeko in response to the APS' Notice of Motion.

⁵⁹⁹ See *APS & Others vs Government of the Republic of Namibia & Others*, Supreme Court Matter (Ibid).

The Government therefore argued that the Labour Amendment Act of 2012 was developed in accordance with ILO Private Employment Agencies Convention 181 of 1997 to:

- i) Protect freedom of association and the right to bargain collectively for employees recruited by private employment agencies;
- ii) Require, in accordance with national law and practice, the respective responsibilities of private employment agencies and of user enterprises in relation to, amongst others;
 - (a) Collective bargaining;
 - (b) Minimum wages;
 - (c) Working time and other working conditions;
 - (d) Statutory social security benefits;
 - (e) Protection in the field of occupational health and security;
 - (f) Maternity protection benefits.

As a result, the Act is meant to place obligations on the user company.⁶⁰⁰ On the 27th of June 2013, the High Court delivered its judgment on the challenge to the constitutionality of the Labour Amendment Act of 2012.⁶⁰¹ Judge Geier, writing the judgment for the court, held that the regulations created by the new section 128 were a response to the Supreme Court case. The legislation is meant to close the gap which had allowed the circumventing of the Labour Act in the past, more particularly in relation to the abuses associated with labour brokerage. The court laid out a three legged approach that an applicant alleging a violation of Section 21 (1)(j) of the Constitution must show. These are:-

⁶⁰⁰ Paragraph 40 of the Answering Affidavit.

⁶⁰¹ See Africa Labour Services (Pty) Ltd v Minister of Labour & Social Welfare and Government of the Republic of Namibia, unreported Judgment Case No. A 163/2012(Ibid).

- (i) That the regulatory legislation is irrational.
- (ii) That the regulatory legislation although rational, is so invasive as to constitute a material barrier to the practice of that profession.
- (iii) Furthermore, if the applicant can show that the regulatory legislation is so invasive as to constitute a material barrier to the profession, the legislation will pass constitutional muster if the Government can justify it under Article 21(2).⁶⁰²

The court concluded that the new amendment did not infringe upon Article 21 of the Constitution because the Labour Amendment Act adopted the provisions of the ILO Convention 181 of 1997. This is in line with ILO Recommendation of 2006 which states that the nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, taking into account international labour standards. The law or practice further has to be clear, adequate and ensure effective protection for workers in an employment relationship.⁶⁰³ In holding that the Amendment Act is not invasive, the court held that the legislature had ensured that agency workers are to be afforded the same protection as is accorded to employees in permanent employment. The court further held that extended protection to the temporary employees does not constitute a material barrier to the applicant practicing its trade.⁶⁰⁴ The court also held that courts in most modern democratic countries proceed from the premise that it is not for the courts to dictate economic policy and regulation. In other words, it is not for courts to say that they would do it differently because they do not like the economic structure of a particular provision passed by Parliament. Consideration of economic reasons may dictate the fact that there may for example be a state controlled airline, transport agencies, electrical and water utilities. It is nowadays the attitude of the courts in a number of countries to allow the

⁶⁰² Ibid at p 12.

⁶⁰³ Ibid at p 75.

⁶⁰⁴ APS Judgment (paragraph 57).

elected legislature a large degree of discretion in relation to the form and degree of economic regulation selected by a democratic legislature. Therefore the determination of the tenets or wisdom of an Act is the role of the elected representatives of the people wherever applicable.⁶⁰⁵ The court referred to the case of *Ferreira v Levin NO and others*⁶⁰⁶ in which the majority of the judges of the South African Constitutional Court stated that in a modern state the question whether or not there should be regulation and redistribution in the public interest is essentially a political question which falls within the domain of the legislature and not the courts. It is not for the court to approve or disapprove such policies.

The court specifically quoted the case of *Namibia Insurance Association v Government of Namibia & Others*⁶⁰⁷ in which it was stated:

“in other words, it is not for the courts to say that they would do it differently because they do not like the economic structure of a particular provision passed by parliament because there are economic reasons or reasons of policy which dictate the fact that there may for example be a state controlled airline, transport agencies, electrical and water utilities and the like. It is nowadays the attitudes of the courts in a number of countries to allow the elected legislatures a large degree of discretion in relation to the form and degree of economic regulation selected by a democratic legislature. Therefore the determination of the merits or wisdom of an Act is the task of the elected representatives of the people wherever applicable”.⁶⁰⁸

As a result, the Act protects employees who are temporary and has achieved the following:-

(a) The protection of the labour law rights of labour brokerage employees;

⁶⁰⁵ See *Reynolds v Sims* 777 US 531 (1964) which postulate this proposition.

⁶⁰⁶ 1996 (5) SA 984 (CC).

⁶⁰⁷ See *Namibia Insurance Association v Government of Namibia & Others* 2001 NRI (HC).

⁶⁰⁸ of APS Judgment Ibid at p 26 – 27.

(b) ensure equality of treatment between labour brokerage employees and employers directly engaged by a user company without the intermediation of a labour brokerage company.

(b) Prevent the use of labour brokerage employees to break strikes or enforce lockouts;

(c) Promote permanent employment as opposed to the casualization of labour;

(e) Prevent user companies from avoiding their labour law responsibilities to persons who are *de facto* their employees. They are now also afforded remedies that come with such placement together with the right to enforce such remedies against both the private employment agency and the user enterprise.⁶⁰⁹

The application was thus dismissed with costs. Africa Personnel Services did not appeal against the judgment of the High Court, thus paving way for the implementation of the Amendment Act without any legal impediment.

A close analysis of the Amendment Act shows that the new section 128 regulates the relationship between the user enterprises, the private employment agencies and the employee. Its object is to ensure non-discrimination and equal treatment of employees placed by a private employment agency, fair labour practices and the protection of their collective bargaining rights. The following constitutional rights were protected by the Legislature in enacting the provision viz:

i) Article 8 – the right to human dignity.

iii) Article 10 – right to equality and freedom from discrimination.

iv) Article 12 – the right to a fair trial.

⁶⁰⁹ Subsections (8) and (9) of the Labour Amendment Act of 2012.

- v) Article 21 (1)(j) – the right to freedom of association including the freedom to form and join trade unions.

This was therefore put into law based on the duty imposed on the Legislature by the Constitution to pass laws that give effect to fundamental objectives and principles of state policy contained in Article 95 of the Namibian Constitution. It is a permissible legislative choice taken by Parliament.

It is important to emphasize that the Labour Act of 2007 protects the fundamental rights of employees at work, regulates labour relations, and sets minimum basic conditions of employment of labour disputes. The Labour Act aims to cover all employers and employees alike. It is important to note that labour brokerage employees are now protected by the following provisions of the Labour Act, viz:

- i) Prohibition of discrimination in any employment decision against any person on the basis of his or her social or economic status.⁶¹⁰
- ii) The protection of freedom of association.⁶¹¹
- iii) The protection against unfair dismissal.⁶¹²
- iv) The enactment of provisions that ensure the health, safety and welfare of employees at the workplace.⁶¹³
- v) Resolution of disputes through Conciliation and Arbitration.⁶¹⁴

⁶¹⁰ Section 5 (2)(d).

⁶¹¹ Section 6.

⁶¹² Section 33.

⁶¹³ Section 39.

It is important to note that the regulations seek to address the following undesirable practices which were discussed during the deliberations to ban labour brokerage:

- (a) Employees who were not paid any wage by the labour broker who deployed them to a user company thereby depriving them of their entitlement to sick pay, annual leave, compassionate leave, maternity leave and other statutory basic conditions of employment and social security benefits,
- (b) Employees of the system were often deprived of the protections against unfair dismissal in terms of the Labour Act and of the right to severance procedures,
- (c) Treatment of long-serving labour brokerage employees as temporary or casual,
- (d) Use of lower-paid labour brokerage employees alongside “permanent” employees performing essentially identical work,
- (e) The failure of labour brokerage companies to pay fringe benefits to employees,
- (f) Absence of adequate health, security and sexual harassment protection at the workplace,
- (g) Use of labour brokerage to avoid unionization and collective bargaining at the workplace,
- (h) Absence of a forum for labour brokerage employees to raise grievances at the workplace,

It is commendable that Namibia`s regulatory framework extensively protects the employees just like in the Netherlands and Australia. Namibia`s regulations rely extensively on ILO Convention

⁶¹⁴ Section 82 and 86.

181 of 1997. The Convention in its Preamble provides that members in member states are expected to draft legislation and practice that should take into account the necessary measures that adequately protect workers employed by brokers. In the Netherlands and Australia, the employees are entitled to pension and to equal opportunities for training to enhance their skills. In both jurisdictions, it is clear that the temporary employees are guaranteed occupational health and safety and compensation in case of insolvency and claims by workers. Namibia also follows international trends in relation to these aspects. However, Namibia should adopt the Dutch Association of Temporary Work Agencies (ABUs) phased system. The phased system clearly grants more security to the employees as their contracts are dependent on a continuous analysis of the relevance of the industry. The ABUs contain collective agreements that last for a period of five years as they will be an assessment of any amendments to the field. Namibia needs to embark on a continuous assessment of labour brokers to ensure more clarity on the functioning of the labour brokerage industry. This would ensure that regulation is more efficient as there will be no room for anachronistic provisions that may be subject to a court challenge in future. Namibia can also adopt the Netherlands, United Kingdom and Australian methods of collecting statistical data on labour brokerage patterns including the number of expatriate employees, whether user enterprises are training their employees to enhance their skills and the number of cases referred to the Labour Commissioner. In that way, it will be easier for the Government to monitor the implementation of the regulations and ensuring that parties that do not comply with the law are prosecuted.

As in Australia, the Namibia Amendment Act in the writer's view is labour legislation which is designed to protect workers from the consequences of contracts that are designed to place the relationship between an employee and the user company who is his/her employer within the

confines of the labour laws. Namibia needs to enact legislation which will ensure that migrant workers as happens in Australia are not exploited when they are brought in by labour brokerage companies. Namibia can also derive lessons from the United Kingdom which enacted the Gang Masters Licencing Act of 2004 after the Morecambe Bay disaster. The Gang Masters Act provides for the suspension and eventually deregistration of labour brokerage companies that fail to comply with the licencing provisions. In the UK and Australia, the licence will be renewed on condition that the user enterprise produces a health inspector`s report on the safety and health procedures put in place by the user enterprise and the private employment agency. In the Netherlands, in terms of the collective agreements concluded under the ABUs, the labour brokerage company and the clients that continuously contravene provisions of the collective agreements and the Fair Workers Act will have their licences cancelled. This would mean that both the labour broker and the client would not be entitled to recruit employees. Namibia should contemplate a similar provision in the regulations and in the Employment Services Act.

The South African Amendment Bill of 2012⁶¹⁵ adheres to the ILO Recommendation 198 of 2006. The recommendation provides that the nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, taking into account international labour standards.⁶¹⁶ However, the South African example should follow the Namibian regulations in ensuring that expatriate employees are placed in the same category as permanent employees. The South African Bill in Clause 198B(4)(f) justifies the conclusion of a fixed term contract if an employee is a non citizen granted a work permit for a definite period. This would clearly lead to the exploitation of non citizens who may not enjoy the same benefits as those of permanent employees on the basis that they are on permits that expire and the

⁶¹⁵ South Africa Labour Amendment Bill Number 3/5212 of 5 April 2012.

⁶¹⁶ Clause 4.

employer may choose not to renew them. In the event that the contracts are renewed on a continuous basis, the non citizen may be a temporary employee for up to a period of twenty years without similar labour law protections as citizens employed to work in the same conditions. The Namibian regulations do not make this distinction and protect all employees whether they are citizens or non citizens. All employees enjoy the same protections guaranteed under the Labour Act and the regulations.

A comparative analysis of Namibia with the jurisdictions discussed above reveals that the ILO Recommendation 198 of 2006 has played a huge impact in ensuring that temporary employees rights are protected in the domestic labour legislation of each of these countries. The Recommendation requires that national policy adopted by members should include measures to:

- (a) Provide guidance to employees and workers on establishing the existence of an employment relationship and on the distinction between employed and self-employed workers.
- (b) Combat disguised employment relationships such as using forms of contractual arrangements to hide the true legal status. A disguised employment relationship connotes a situation where an employer hides the true legal status of an employee by depriving him/her of the protection s/he is due. Namibia has not experienced this situation and the regulations have eliminated the possibility of having this form of contract in existence.
- (c) Ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due.

- (d) Ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein.
- (e) Provide effective access to employers and workers to appropriate speedy, inexpensive, fair, and adequate procedures for settling disputes regarding the existence and terms of an employment relationship.
- (f) Ensure compliance with and effective application of laws and regulations concerning the employer relationship.

Thus the legislature in each of these jurisdictions, except in Zimbabwe, has not sought to ban and prohibit labour brokerage in any industry but rather to permit labour brokerage to continue. This is therefore subject to the requirement that user enterprises comply with statutory obligations to those employees who ought to be recognized as employees.

The Zimbabwe case study represents an anachronistic example detached from modern trends of reality as there is a ban on labour brokerage. However, the Labour Relations Act of Zimbabwe defines an employer as any person whatsoever who employs or provides work for “another person and expressly or tacitly undertakes to remunerate that person.”⁶¹⁷ This provision widely defines an employer and thus implies the existence of labour brokerage as any person can be remunerated by the employer including employees who are placed by labour brokers. Zimbabwe cannot continue to ignore the international trends that provide for the recognition and regulation of labour brokerage. Clive Bruce and Charles Consultancy from Mutare is the only labour

⁶¹⁷ Section 1 of the Zimbabwe Labour Relations Act.

brokerage consultancy of note and it is interesting to note how the developments in both Namibia and South Africa will have a bearing on the Zimbabwe labour brokerage landscape.

In light of the above jurisprudential theories it can be argued that the Namibian Amendment Act clearly passes the constitutional test. One would argue that the Act has made it permissible for the state to ensure that labour brokerage employees` rights are protected by ensuring that inter alia-

- a) They are guaranteed an equality of treatment between labour brokerage employees and employers directly engaged by a user company without the intermediation of a labour brokerage company.
- c) There is a prevention of the use of labour brokerage employees to break strikes or sit ins.
- d) There is a promotion of temporary employees to the status of permanent employment as opposed to the casualization of labour.
- e) There is also a prevention of user companies from avoiding their labour law responsibilities to persons who are their employees.

In light of the detailed discussion above in this chapter, it`s important to note that overally the regulations in Namibia represent an important milestone for the protection of workers` rights.

The protections are in light of the international labour instruments such as the ILO Convention 81 of 1997 and the ILO Recommendations⁶¹⁸ in closing the gap in the existing legislative

⁶¹⁸ Recommendations such as the Freedom of Association and Protection of the Right to Organize Convention 87 of 1948, the Right to Organize and Collective Bargaining Convention 98 of 1949, the Workers` Representatives Convention 135 of 1971, the Collective Bargaining Convention 134 of 1981, the Collective Agreements Recommendation 91 of 1951 and the Collective Bargaining Recommendation 163 of 1981.

framework which allowed for the circumvention of the Labour Act by labour brokers in the past. The Amendment Act is thus not a barrier to the practice of regulated labour brokerage in Namibia.

CHAPTER 6

CONCLUSION

In the previous chapters this research examined the true position of labour brokers, what they entail and the problems that labour brokerage creates. The research also demonstrated that banning labour brokerage should not be contemplated as it is evident that regulating labour brokerage is the best available option.

It must be noted that the Namibian experience on labour brokerage is a unique experience. Namibia had not adopted the ILO's conventions until the introduction of the regulatory framework in August 2011. It has been examined above that Namibia functions under a supreme Constitution that guarantees the right to freedom of occupation, trade and profession.⁶¹⁹ The legislature, having the past atrocities of the apartheid regime in mind, decided to ban labour brokerage in the old Section 128 of the Labour Act 6 of 2007. As has been noted, the labour brokerage ban deeply polarized the various stakeholders in the industry. In emphasizing the negativity around the aspect of labour brokerage, an article which appeared in a local daily newspaper summed it up thus:-

“the hulla baloo about the ban of labour hire in Namibia is highly capitalistic. When a few labour tycoons rake in millions of dollars through the hiring out of poor citizens who get low salaries, no permanent job and no basic allowances, that is exploitative capitalism. Research conducted by the Fredrich Ebert Stiftung (FES) in 2010 reveals how labour hire companies show that they were prepared to compromise on workers' wellness in pursuit of huge revenues. They centred their operations around profit making, even if it means sacrificing employees to attain

⁶¹⁹ See Article 21 (f) of the constitution.

their ends. Many labour hire companies that FES interviewed bragged that this practice reduces the impact of strikes, it offers flexibility and promotes cost-cutting, it helps avoid disciplinary cases and allows them to concentrate on their core business and makes replacing unproductive workers easier...we therefore commend the law makers for finally washing the country clean of draconian and exploitative practices that only benefitted a small club of elites and punished the masses.”⁶²⁰

However, it should be noted that when the Supreme Court declared the banning of labour brokerage unconstitutional, the Supreme Court confirmed the importance and indispensability of labour brokerage to the Namibian economic setting. The Supreme Court emphasized how the modern trends dictated that labour brokerage had to be strictly regulated by the state. The various jurisdictions alluded to in this study clearly show that labour brokerage cannot be entirely eliminated. A study of the Netherlands, the United Kingdom and Australia clearly rebut this proposition. These jurisdictions have well regulated labour brokerage systems that protect the rights of the employees. The regulatory frameworks in those jurisdictions clearly grant the temporary workers equal pay for the same work done by a permanent worker in the employ of a client who is regarded as the employer of the temporary worker. The workers have equal opportunities of improved training and skills development. They also have access to medical aid, pensions, leave days and healthy and safety standards are made a priority. The labour brokers and their clients must be registered and licenced as a failure to comply with licensing renders the parties liable to prosecution. Furthermore, it is clear from the various amendments to the legislation in the various jurisdictions that labour brokerage is an evolving industry and the parties in the industry must anticipate future changes that may affect the global labour market

⁶²⁰ Editor, (2012, August 9), “Labour hire ban will pay off,” *The Namibian Sun*, retrieved from www.namibiansun.com/content/editors-corner/labour-hire-ban-will-pay on 3 March 2013.

and incorporate them in their domestic labour legislation. It is important to note that labour brokerage is an international trend widely accepted as the norm for future human capital management. As a result labour brokers should ensure that contracts entered into between a broker, a client and an employee are lodged with the Ministry of Labour. Such contracts are scrutinized to see if they do not infringe on the rights of the temporary employees. These contracts in the Netherlands form a basis of the statistics that the Ministry of Labour uses in the amendments to the legislation, more particularly the collective agreements. This is an important provision that Namibia should emulate so that the labour regulations evolve in line with the international trends. In implementing these regulatory steps, the employees are protected and unfair labour practices that the government complains about are thus eliminated. As a result of the evolution of labour brokerage, labour brokerage enables the parties involved in the market to anticipate future changes that may affect the global labour market.

The South African Labour Relations Amendment Bill of 2012 is commended for its positive contribution to the development of the law on labour brokerage. If temporary employment services remain uncurbed in their operations they tend to exploit employees. This invokes the repugnant and oppressive tendencies that have been the feature of the South African labour landscape for decades. The regulations rather than advocate for an outright ban represent a positive step in the right direction. The regulatory framework is in line with the international conventions that recognize the importance of labour brokerage in modern labour jurisprudence. It is clear that South Africa, just like Namibia, is on the right track in relation to the regulation of labour brokers.

The Namibian stance on regulating labour brokers is commendable. It is the correct position which strikes the proper balance in recognizing the indispensable nature of labour brokers. Labour brokers are custodians of labour. This means that with modern trends and obligations placed on them by the labour conventions, the labour brokers acknowledge their responsibilities towards their temporary employees. These responsibilities include development of workers through training, social responsibility, education and all other aspects of their living that will result in a productive, stable and cost effective workforce. Namibia has shown by its stance that it is better to regulate than to ban. As Mavunga⁶²¹ notes, the nature of work is rapidly changing and one needs to adapt to change. A complete ban does not necessarily mean you are protecting workers as this could awaken illegal services.⁶²²

As has been highlighted above, Namibia's regulations have been positive in the following respects-

- i) The registration of labour brokers and their clients. The clients are the employers of the employees which means that they can no longer abdicate their responsibilities to their employees as provided for in the Labour Act and discussed in detail above. The only exception to this presumption is an application to the Minister for an exemption.⁶²³ The exemption will be granted if the Minister is satisfied that the rights of the employees will be protected by the private employment agency and the user enterprise, who is the employer. Where the exemption is granted, both the private employment agency and the user enterprise

⁶²¹ Mavunga, R, Ibid at p 55.

⁶²² Ibid at p. 55.

⁶²³ Section 128(8) of the Labour Act.

are liable jointly and severally for the contravention.⁶²⁴ The employee can seek redress for such contraventions from the Labour Commissioner.⁶²⁵

- ii) The obligation to train employees by the labour brokers and the clients.
- iii) The fact that employees can join trade unions and be represented in collective bargaining by a trade union. This clothes the employees with a degree of permanency.
- iv) The introduction of grievance procedures through the Labour Commissioner for a referral of disputes by the employees.
- v) Ensuring that the exploitative aspects of labour brokerage are eliminated as the workers are entitled to the same benefits as permanent employees.
- vi) During strikes and lockouts, employers are prevented from hiring scab employees to replace those on strike.
- vii) The recognition of the ILO Convention 181 of 1997 and all other international labour instruments vis-à-vis regulating labour brokerage.

Furthermore, Article 21(1) (j) of the Constitution of Namibia has not been infringed by the regulations. The right to freedom to practice any profession or to carry on any occupation, trade or business has been safeguarded by the regulation. This is because by incorporating the provision of ILO Convention 181 of 1997, the Namibian Government has considered that this

⁶²⁴ Section 128(9)(a).

⁶²⁵ Section 128(9)(b).

Convention is an engine for job creation, structural growth and improved efficiency of labour markets.

Article 11 of the ILO Convention 181 of 1997 provides that member states should draft national laws and practices which take into account necessary measures that ensure adequate protection for workers employed by labour brokers. Namibia should be commended for following the guidelines contained in the 2007 ILO Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement. The guide provides guidance to national legislators in drafting legal frameworks in line with the Convention and considering a country's history and economic standing.

However, there is still ground for more regulation to labour brokerage. The inclusion of a provision similar to the five year collective agreements that exist in the Netherlands, popularly known as the ABUs, would ensure that the industry keeps to date with the evolving nature of the labour market. Furthermore, the contracts that are entered into between the labour broker and the client should be lodged with the Ministry of Labour. This would enable transparency in clarifying who the recognized employer is. This would ensure that the user enterprise does not circumvent the provisions of the regulations that provide that the user enterprise is the employer.

There should be a statutory body similar to the Law Society of Namibia that would effectively regulate the labour brokerage sector. Theron⁶²⁶ refer to one such example provided in the Metal and Engineering Industry. The main agreement of Metal Industry Bargaining Council (MEIBC) prohibits the use of labour brokers unless they are registered with MEIBC. The employer may only use workers supplied by a labour broker for a continuous period of 12 months. In addition there should be a Code of Good Practice that highlights what can be considered as good practice.

⁶²⁶ Theron,P(2003),Labour Recruitment and the Services sector:Is the legislative framework adequate?" *SETA Research Journal* 1(4) p. 7.

Where a labour broker infringes on the Code, there should be a revocation of the licence as provided for in the regulations. In addition, there should also be disciplinary action against the labour broker with additional sanctions like deregistration from the statutory body in the same way that legal practitioners are regulated by the Law Society.

The adoption of these recommendations will vastly improve the labour brokerage regulations and ensure that further protection of employees` rights.

BIBLIOGRAPHY

Books, Journals and Internet sources

ABU, “*The Temporary Employment sector in Netherlands*”, retrieved from www.abu.nl/aba2/?filled=14306 on 20 November 2012.

African Labour Services(PTY) Ltd v The Minister of Labour and Social Welfare and the Government of the Republic of Namibia unreported judgment of the High Court A163/2012 heard on 27 September 2012 and delivered on the 27th of June 2013 by Geier J and Liebenberg J.

Ahberg, K (2008), “Regulating Temporary Agency Work: on the interplay between EU level, National level and Different Industrial Relations Traditions: (eds Ronmar, M) *EU industrial relations v national industrial relations: comparative and interdisciplinary perspectives*” p. 6.

Anderson, A and Wolmarns, R (2012, March 7), *Thousands on strike as COSATU lists demands*, retrieved from www.bdlive.co.za/articles/2012/03/07/thousands-on-strike-as-COSATU-lists-demands;jsessionid=3FA71B701E6DBCA4684E6D892E6D798.presents.bdfm on 29 March 2013.

Areff, A,(2012, August 1), “*Companies use brokers to avoid laws, says Judge*,” retrieved from www.mg.co.za/article/2012-08-companies-use-brokers-to-avoid-labour-law-says-judge on 29 March 2013.

Arrow Smith, J. (2006), *Temporary Agency Work in an enlarge European Union*, retrieved on from www.ciett.org/fileadmin/templates/ciett/research/EIROfoundation-report-on-TAW_March_06.pdf on 28 October 2012

Arrowsmith, J, (2006), *Temporary agency work in an enlarge European Union*, IRRU, University of Warwick, UK.

Australian Government Department of Employment and Workplace Relations, Discussion paper: *Proposal for Legislative and Independent Contracting and Labour Hire Arrangements* p. 24.

Bauer, G (1998), *Labour and Democracy in Namibia, 1971- 1996* –London, James Currey publishers.

Benjamin, P,(2009) “*Untangling the triangle:The regulatory challenges of triangular employment*” retrieved from www.ilo.org/wcmsp5/groups/public/---ed.../wcms_122343.pdf on 30 March 2013.

Bennet, P, “*What is the History of Labour Hire companies providing skilled labour*”? retrieved from www.articlerich.com/Article/what-is-the-History-of-labour-hier-companies-providingskilled-labour-/799638 on 1 April 2013

- Benver, C ,(2003), “Labour Flexibility and Regional Development: The Role of Labour Market intermediaries,” *Regional Studies Journal*, (6), (12), p. 1
- Bronsftein, (2006),” *Labour Law in Central Europe: Globalisation and the Future of Labour Law*”, Copenhagen, Denmark.
- Burchell, J 2005, *Principles of Criminal Law* (Third Edition) Cape Town, Juta and company Ltd
- Burket, L. (2006), “*The International Labour Dimensions, An Introduction*” Globalization and the future of labour law journal, 2005.
- Campbell, I and Burgers, J (2001), “*Casual Employment in Australia and Temporary Employment in Europe: Developing a Cross-National Comparison*” *Work, Employment and Society Journal*, 5 (1), p. 171-184.
- Charles, P, (2004), “Labour Hire: The New Industrial Law Frontier,” *Law Institute Journal*, 76, (6), p. 64.
- Corporate et al. (1986), “*Commentary on the Draft Adopted by the EU parliament on 14 February 1984: The European treaty.*”
- COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCAWU and ATAWU Submission on Labour brokerage, (2009, August 16), retrieved from f www.cosatu.org.za/show.php?id=22378 on 16 March 2012.
- Delange, D, (2012, July 8), “*Labour brokerage is here to stay*,” SA Time, p. 3.
- Du Plessis, JV, 1994 *A Practical Guide To Labour Law*, Pretoria: Digma publications, p. 8.
- Duddy, J, Staff Reporter, (2010, February 24), NEF urges caution on labour brokerage, *The Namibian*, p. 1- 3.
- Duddy, J, (2010, February 4), Half of all Namibians unemployed, *The Namibian*, p. 3
- Duddy, MJ, (2012, May 3), “End of Labour Hire in Namibia,” *The Namibian*, p. 2
- Duddy, MJ,(2012, May 3), “*End of Labour hire in Namibia*” retrieved from www.namibian.com.na/indexx.php?archive_id=94710...story on 3 April 2013.
- Duddy, J M (2012 August, 14), “APS drops urgent interdict on labour hire”, *The Namibian*, p. 3
- Duddy, J M (2012, August 15), “No evidence of ‘massive’ casual layoffs”, *The Namibian*, pg. 3
- Editor, (2012, August 9), “Labour hire ban will pay off,” *The Namibian Sun*, retrieved from www.namibiansun.com/content/editors-corner/labour-hire-ban-will-pay on 3 March 2013.

Entrepreneur magazine (2010, May 5), “How new Legislation affects Labour Brokers and Contractors” retrieved, on 29 February 2012 www.entrepreneurmag.com.za/advice /staff/labour-complexity/how-new-legislation

European Foundation for the Improvement of living and working conditions, (2007), “Temporary Agency work in the European Union,” EU Law Journal, 6(7), p. 7.

Fenwidge, C and Hodger, J (2010), “International Labour Law Profile: Australia”, University of Melbourne, Victoria.

Ferreira, E, (2012, July 31), “COSATU admits ANC won on labour brokers battle”, retrieved from www.mg.co.za/article/2012-07-31-cosat-u-admits-anc-won-labour-brokers-battle retrieved on 30 March 2013.

Finlein, M and Sanford M, (2001) “An Introduction To The Regulation Of Leasing And Employment Agencies”, *Comparative Labour Law And Policy Journal* 2, 3 (1): p. 3- 4.

Gladwin, R. “Advantages and Disadvantages of Broker Recruitment” (2010), retrieved from www.rahulgladwin.com/noteblog/business/is/advantages-and-disadvantages of broking on 21 March 2013.

Grogan J, (2005) *Workplace Law*, 8th Edition, Cape Town, Juta and Company Limited p. 27.

Grogan, J. (February 2011), Too Fast, Too Fast, a Labour Brokers Reprieve 22, *Employment law Journal*, p. 3.

Guy F. (2000) “The Labour hire phenomenon”, published on www.labour.net.au/news/426.htm.

Haidula, S, (2010) *Regulating Labour Hire in Namibia*, UNAM dissertation, p. 6.

Hall, R, (2002) “Labour Hire in Australia: Motivation, Dynamics and Prospects,” Working paper, University of Sydney, p. 8-9.

Hall, R, (2002), *Labour Hire in Australia, motivation, Dynamics and Prospects*, Working paper 76, University of Sydney p. 7.

Hall, R. *Labour Hire In Austria: Motivation, Dynamics and Prospects*”, p. 3, Working paper 76 dated April 2002, University of Sydney

Hall, R. (2002). “Labour Hire in Australia: motivation, Dynamics and prospects,” *working paper 76* (3)

Hartmann, A. (2010, May 5), ‘The High court put Labour Hire in the grave where it belongs! Kaaronda’, *The Namibian* retrieved from [www.namibian.com.na/index.php?id=288tx-ttnews\[tt_news\]=674468_no_cache=1](http://www.namibian.com.na/index.php?id=288tx-ttnews[tt_news]=674468_no_cache=1) on 25 March 2012.

Heita, D, (2010, February 25) “New Labour Hire Regulations near completion,” *The New Era*, p. 3.

- Heita, D, (2010, February 8), “Labour hire debate takes APS to task”. *The New Era*, p. 3.
- Heita, D. (2009, December 16), “Tempers flare after labour brokerage ban judgment”, *The New Era*, p. 2.
- Heitu, D, (2010, February 25) *New Labour Hire Regulations near completion*, retrieved from www.newera.com.na/articles/31901/newlabourhireregulations, on 14 March 2010.
- Hishongwa, H, (1992), *The contract labour system and its effects on family and social life in Namibia*, Windhoek, Gamsberg, Macmillan, p. 48.
- Horn, H and Kanguuehi, K, (2009, January). African Personnel Services V Government of Namibia and others (decided on 1 December 2008), *Namibian Law Journal*, (1) (1), pg. 101
- ISIZA, “*Construction for Development*,” (2009 August) retrieved on 21 March 2012 from www.isiza.co.za/features/leadership-and-management/222721.htm.pl
- Jauch H, (2010), *Namibia’s Labour Hire Debate in Perspective*, Windhoek, Fredrick Ebert Stiffing, p. 7.
- Jauch, H, (2000)- *Labour Hire in Namibia; new flexibility or a new form of slavery*- Windhoek, Labour Resource and Research Institute, p. 7.
- Jauch, H, (2012, August 10), “Job Creation versus Workers’ Rights,” *The Namibian*, p. 3
- Kawana, A, (2007, June 27) *Parliamentary Hansard*, p. 22.
- Kirby, R, (2009), History of the Harristor Judgment, retrieved from www.worksite.actu.org.au/fact-sheets/history-harrister-judgment.aspx on 26 December 2012.
- Koene, J, Pauuwe, P and Groenewegen, W (2004), “Understanding the Development of Temporary Agency Work in Europe”, *Human Resources Management Journal* (6) (3) p. 4.
- Labour cooperative Limited v Work Cover Authority of New South Wales (Inspector Robins)(2003) 121 IR 78.
- Labour Resource and Research Institute, (2006),” *Labour Hire in Namibia*,” LARRI, p. 4.
- Landis,H, Grosset, L, (2003), *Employment and the Law – A Practical Guide for the Workplace*, Cape Town, Juta and Company, p. 51.
- Laplagne, P. M, Colver M and Fry, T,(2005), *The growth of labour hire in Austria*, Productivity Commissioner Staff Working Paper, February, p. 33
- LARRI, Labour Resources And Research Institute, 2006- *Labour hire in Namibia current practice and effects*. Windhoek (LRRL, p. 72)

Mahomed, I (2010, October 8),” *Labour brokers real remedies?*” retrieved from <http://www.hg.org/article.asp?id=18869> on 29 March 2013

Maine, T, (2011), “*Vulnerability in the fair workplace: why unfair dismissal laws fail to adequately protect labour-hire employees in Australia,*” University of Melbourne, Center for Employment and labour Relations law, p. 11.

Maletsky, C ,(2009, February 2), ‘Labour Hire breads mixed reactions’, *The Namibian*, Windhoek p. 2.

Maletzky C. (2009, 27 January) “Labour hire Ban Sparks Health crisis” *Namibian Newspaper*, p.2.

Maletzky C. (2009, February 2) “Labour hire breeds mixed reactions “*Namibian Newspaper*, p. 2.

Maletzky, C (2009, January 27) Labour Hire ban sparks Health crisis, *The Namibian*, pg. 2.

Mavunga, RA, (2010), *Critical Analysis of Labour brokers: should they be regulated or banned in South Africa?* Pretoria, University of Pretoria

May, Campbell, Burgess, (2008), “*The rise and rise of casual work in Australia: who benefits, who leaps?*”, Sydney University; Australia.

Mazanhi, I (2012, April 18) “*Labour brokerage; to ban or to regulate?*” Retrieved from <http://www.newsday.co.zw/article/2012-04-18-labour-broking-to-ban-or-regulate> on 1 July 2012

Mazanhi, I , (2012,18 April),” Labour brokerage to ban or regulate?” *Newsday* retrieved from www.newsday.co.zw/article/2012-04-18-labour-broking-to-ban-or-regulate retrieved on 5 June 2012.

McCann, D, (2009). “*Regulating Flexible work*, “London Oxford University Press, p. 143 -145.

Memorandum of objects, Labour Relations Amendment Bill, 2012 retrieved on 31 March 2013 from www.labour.gov.za/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsLra.pdfatpg1.

Menges, W (2009, March 6), “Labour High Appeal to face Supreme Court test’, *The Namibian*, p. 1.

Menges, W (2010, February 8), “Screws tighten on labour hire,” *The Namibian*, retrieved from www.allafrica.com/stories/201001080152.html on 3 April 2013.

Ministry of health statistics obtained from their archives, 12 March 2009, published on www.eservice.net/ministry of health.

Mitlacher, W and Burgess, J (2007), “Temporary agency work in Germany and Australia: Contrasting regimes and policy challenges”,*International Journal of comparative Labour Law Industrial Relations*, 23 (3) p. 401-431.

Murape, W, (2013, February 28), Zimbabwe Labour Broking illegal in Zimbabwe, *The herald*, retrieved from www.allafrica.com/stories/201202280310.html on 10 March 2013.

Mutasa, H. (2012, March 7), *Thousands march as South Africa strikes*, retrieved on 14 March 2012 from www.aljazeera.com/news/africa/2012/03/201237961752372.html.

Nakale, A, (2010, March 12), “Etale suspends APS employees” *The New Era*, p. 13.

Nakale, A, (2010, March 18), APS workers served with court orders, *The New Era*, p. 7.

Ndjebela, T. (2010, 3 May) Pohamba detests Labour hire, *The New Era*, p. 1- 2.

Ndjebela, T. (2010, 8 February) “Government acts on labour hire’, *The New Era*, p. 1- 2.

New Era, “*NUNW hails Labour Act*,” retrieved from www.newera.com.na/articles/46829/NUNW-hails-labour-Act on 12 August 2012.

Ngatjizeko, I. (2009),” *We will fight on, despite court ruling*,” retrieved on 20 March 2012 from www.swapoparty.org/we/will/fight/on.html.

Nghishililwa, F, (2011, May 15), “*What is the problem with labour hire?*” retrieved from www.namibian.com.na/index.php?archive_id=88153&page on 3 April 2013.

Nghishililwa, F, (2011, November 15), *What is the problem with labour Hire?* *The Namibian*, p. 2.

Nghishiliwa, F, (2009), “*The Banning of Labour Hire in Namibia – How realistic is it-?*” *Namibia Law Journal – 1 (3)*, p. 89.

Njebela, T (2010, January 13) *Labour Ruling “insensitive” towards poor- LARRI*, *The Namibian*, p. 1-2.

Owens, R (2001), “*The long-term or permanent casual – An oxymoron*” or a well enough understood Australianism in the law”? *Australian Bulletin of labour*, 27 (2), p. 118-136.

Parker, C, (2012), *Labour Law in Namibia*, Windhoek, UNAM press, John Meinert printers, p. 2.

Plant, R, (1994), *Labour Standards and Structural Adjustment International Labour Office*, Geneva, p. 20.

Poolman, J, (2010, May 5), “*Shinguadja optimistic about labour hire changes*,” *The Namibian Sun*, p. 7.

Purcell, J and Purcell, K, (2004),” *Temporary Worker Agencies: Here today, gone tomorrow*”, *British Journal of Industrial Relations (7) (20)*, p. 4.

Raday, F, (1999), “*The insider- outsider politics of labour –only constructing*”. *Comparative Labour Law and Policy Journal*, 20 (4), p. 1- 2.

- Rycroft A and Jordan B, (1991), *A Guide to South African Labour Law*, Cape Town, Juta and Company p. 35.
- Sasman, C, (2010, September, 30), "Namibia Fisheries Companies workers demonstrate," *New Era*, retrieved from www.allafrica.com/stories/201009300259.html 1 May 2012.
- Shejavali, N (2008, March 3), Skorpion ready for labour hire ban, *The Namibian*, retrieved on 23 March 2012 from www.namibian.com.na/index.php?id=28tx_ttnews905D=52982890-cahe=1.
- Shejavali, N. (2009, December 16), "NUNW could be held in contempt of court", *The Namibia*, p. 3.
- Shipanga, S and Muraranganda E, (January 2010), Labour bodies slam Supreme court ruling, *The Namibian*, p. 1.
- Smit, E. (2012, January 27), "Labour Amendment Act explained," *The Namibia Sun*, retrieved on from www.namibiansun.com/content/national-news/labour-amendment-act-explained-on-18-August-2012.
- Sol, C. (2001), "Targeting on Transitions: Employment services in the Netherlands", *Comparative Labour Law and Policy Journal* (1) (4), p. 95.
- Solidarity Research Institute (2012 July), 'Comments on the Labour Relations Amendment Bill and the Basic conditions of Employment Amendment Bill' published by solidarity Trade Union retrieved from www.navorsing.co.za/wp-antent/uploads/2012/07/solidarity-comments-on-labour-Bills-July-2012-3-pdf on 31 March 2013.
- Staff Reporter (2010), NASAWU actions irresponsible, *SWAPO Party newsletter*, retrieved from www.swapoparty.org/nasawu-actions-irresponsible.html on 11 March 2012.
- Staff Reporter, May 2011, 31, TUCNA unhappy about slow judicial system, *The Namibian*, p 2, retrieved from www.namibian.com.na/index.php?id=28tx-t/new90 SBT on 1 May 2012.
- Staff Reporter, NEF calls for careful Regulation of labour hire; *The Namibian Economist*, p. 1- 2.
- Storrie, N, (2006), "The Emergence of temporary work Agencies", *Oxford Economics papers, Journal*, (13) (7), p. 7.
- Stuyven, L and Steurs, G, (2003), "The Competitive market for Employment Services in Netherlands", OECD, OCDE, retrieved from www.oecd.org/social/socialpoliciesanddata/17725096.pdf on 28 October 2012.
- The Congress of South African Trade Unions* released on 8 March 2012, retrieved on www.cosatu.org.za/show.php?id=5923 on 10 March 2012.
- Theron, J, (2010, January), *Sour Grapes*, retrieved on 16 March 2012 from [www.ajol.info:/index.php/ldd/article/viewfile/68279/56361](http://www.ajol.info/index.php/ldd/article/viewfile/68279/56361).

Theron, J, Godfrey, S, Lewis P and Pienaar M, (2010), “*Labour broking and Temporary Employment Services: A report on trends and policy implications of the rise in triangular employment arrangements*” Labour and Enterprise project Institute of Development and labour law, Sociology Department, University of Cape Town.

Theron, P (2003),” Employment is not what it used to be,” *24 ILJ (1)(2)*, p. 47.

Theron, P, (2003), Labour Recruitment and the Services sector: Is the legislative framework adequate?” *SETA Research Journal 1(4)*, p. 7.

Thompson C, and Benjamin R, (2003) - *South African Labour Law*, Juta and Company Limited, 2003, p 1 – 4.

Underhill, E (2006), “Labour Hire employment and independent contracting in Australia: Two inquiries, how much change?” *Australian Journal of Labour Law 1 (9)*, p. 306-314.

Underhill, E (2010), “Should host employers have greater responsibility for temporary agency workers’ employment rights?” *Asia pacific Journal of Human Resources 48(3)*, p. 339.

Underhill, E and Rimner, M, (2009) “*State protection for temporary agency workers: Australia* Developments, Blanpain, R, Browich, W, Rymkevich, O and Spatai, S (eds), *Modernization of Labour Law and Industrial relations in a comparative perspective*, Kluwer Law.

Uys, N. (2010, May 3) Pohamba condemns labour hire at Luderitz rally, *The Namibian*, p. 3.

Van Eck, Stefan- Temporary Employment Services (Labour Brokers) in South Africa and Namibia, *PER/PELJ, 2010 (1)(3)*, p. 400.

Vatalidis, A and Workman-Davies, B,(2012),” *Proposed Amendments to the Labour Relations Act and the Basic Conditions of Employment Act*, “retrieved from www.polity.org.za/article/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act-2012-05-07 on 31 March 2013.

Vaticos, N. (1979), *International Labour Law*, Kluwer, Netherlands at p. 8.

Visser, Pressen and Jacobs, (2004), “Temporary Agency Work and Information Society,” *Bulletin of Comparative Labour Relations*, (22) (16), p. 3.

Vosko, L. F, (1997), *Legitimising the triangular employment relationship: Emerging Labour Standards from a perspective*, *Comparative Labour Law and Policy, Journal, 19 (1)*, p. 148 – 49.

Vosko,T, and Leah, F. (1997),”Legitimizing the triangular employment relationship: Emerging Labour Standards from a comparative perspective”, *Comparative Labour Law and Policy Journal, Full, 19(1)*, p. 48- 49.

Weidlich, B (2010, 8 January), Unfair treatment not only at Labour Hire firms, *The Namibian*, p. 1- 2.

Williams, H, (2006), “Labour Hire: A Casual Affair with work,” retrieved from www.newcastle.edu.au/Resources/Schools/NewcastleBusinessschool/APSA/AN2POL/Williams-Harry.pdf on 26 January 2012 p. 1.

Women on forums project (2009), “*Going for Broke: A case study of fruit farms in Grabouw*” Stellenbosch, South Africa retrieved from [www.crls.org.za/document\(B=report-final.pdf](http://www.crls.org.za/document(B=report-final.pdf) on 30 March 2013.

Workers Vanguard, (2011, September 2),’ *For a class –struggle Fight against Labour broker parasites!*’ Retrieved from www.icl-fi.org/English/wv/985/laborbroker.html p. 1 on 12 July 2012.

Wynn, M. (2009), “Regulating Rouges Employment Agency Enforcement and Section 15-18 of the Employment Act of 2008”, *Industrial Law Journal*, 38 (65) p 5.

LIST OF CASES

Africa Personnel Services vs Government of the Republic of Namibia, unreported judgment, A163/2012

African Personnel Services vs Government of the Republic of Namibia, 2009(2) NR 596(SC)

Antacic vs Drake Personnel t/a Drake Industrial (1997) 89 ILR 574

APS vs Government of the Republic of Namibia, High Court unreported judgment A 4/2008

Bruce Neilson and 5 Others vs JSM Trading (Pty) Ltd t/a Workehire (2003) AIRC

Building Workers Industrial Union of Australia vs ODCO (Pty) Ltd

Cassidy vs Ministry of Health [1951] 2KB 353

Construction Industry Training Board vs Labour Force Ltd [1970] 3 ALLER 220 (QBD)

Damevski vs Leiv Guidice 2000 FCAFC 252

Dempsey vs Home and Property (1995) 16 LCJ 378 (LDC), p. 381 B-C.

Dorcas vs Brook Street Bureau (UK) Ltd (2004) IRLR 358 (CA)

Drake Personnel Australia Ltd vs Work Lower Authority (Insp ching), the New South Wales Industrial Commission (2003) 121 R 78

Ferreira vs Levein N.O and Others 1996 (S) SA 984 (CC)

Hall CHM Inspector of Taxes vs Lorimar 1994 IRLR 71

Hendricks and Others v Attorney General of Namibia and Others 2002 NR 353

Hofner and Elser vs Macolim GMGH (1991) ELR 1979

Inspector Sharpin vs Concrete Civil (Pty) Ltd and Inspector Sharpin vs Smith (2004) NSWLR Comm. 173.

James vs Condon Borough of Greenwich (2008) LBC 35

Labour cooperative Limited vs Work Lower Authority of New South Wales (Inspector Robbins) (1999) 90 ILR 432

LAD Brokers vs Mandla (2001) 22 ILJ 1813 (LAC)

Lifestyle Zimbabwe Furnishers vs Admire Mawapo and 295 Others 2006 (2) ZLR 55

Minister of Defence vs Mwandingi 1993 NR 63 (SC)

Montreal vs Montreal Locomotive Workers (1947) 1 DLR 161

Namibia Insurance Association vs Government of Namibia & Others 2001 NRI (HC)

National Automobile and Allied Workers Union (NUNWA) vs Borgwaner SA (Pty) Ltd

R vs Burger (1908) 6 CLR 41.

Ready Mixed Concrete (South East) vs Ministry of Pensions [1968] 2 QB 433

Reynolds vs Sims 777 US 531 (1964)

S vs Amca Services & Another 1962 (4) SA 537 (A)

Secretary of State Employment vs M C Mechann

Sibongile Nxumalo and others vs Attorney General CA 25/96, 28/96, 29/96, 30/96
(Consolidated)

Simon Nape vs INTCS Corporate Solutions (Pty) Ltd (2010) ZALC 33

Sindane vs Prestige Cleaning Services 2009 BLLR 1249 (CC)

Smit vs Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at p. 62

Stanley Takuendesha vs Schweppes (Pty) Ltd

Stein vs Rising Tide Productions CC 2002(5) SA 199 (C)

Tomislav Kljun vs HMRC (2003) LBC 29

Vilane vs Sita (Pty) Ltd 2008 BLLR 486

Vilane vs SITA (Pty) Ltd 2008 BLLR 486 (CCMA)

Yewen vs Noakes (1880) 6 QBD 530

STATUTES

AUSTRALIA

Commonwealth Constitution of Australia

Conciliation and Arbitration Act of 1904

Fair Workers Act of 2009

Queensland Industrial Regulations Act of 1999

Skills Development Act of 1998

The Compensation for Occupational Injuries and Diseases Act of 1993

Workplace Relations Act of 1996

EUROPE

European Commissions Directive on Temporary Agency Work 2008/104/EC

INTERNATIONAL CONVENTIONS

Declaration of Philadelphia of 1955

Forced Labour Convention Number 29 of 1930

ILO Collective Agreements Recommendation 91 of 1951

ILO Collective Bargaining Convention 134 of 1981

ILO Collective Bargaining Recommendation 163 of 1981

ILO Convention 135 of 1971

ILO Convention Number 181 of 1997

Treaty of Versailles of 1919

NAMIBIA

Employment Bureau Regulations, 1972 (Proclamation R. 83 of 1972)

Government Notice Number 65 of 1955

Labour Amendment Act Number 2 of 2012

Employment Services Act Number 8 of 2011

Labour Act Number 11 of 2007

Labour Act Number 6 of 1992

Native Administration Proclamation of 1931

The Constitution of the Republic of Namibia

NETHERLANDS

Employment Placement Act of 1991

The Allocation of Employees by Intermediaries Act of 1998

The Civil Code of 1999

The Flexibility and Security Act of 1999

The Temporary Agency Work Act of 1965

SOUTH AFRICA

Basic Conditions of Employment Act Number 3 of 1983

Basic Conditions of Employment Act Number 75 of 1997

Labour Amendment Bill 3212 of 2012

Labour Relations Act Number 66 of 1995

UNITED KINGDOM

Agency Workers Regulations of 2010

Conduct of Employment Agencies and Employment Business Regulations of 2003

Conduct of Employment and Business (Amendment) Regulations of 2007

Deregulation and Contracting Act of 1992

Deregulation and Contracting of Act 8 of 1997

Employment Agencies Act of 1973

Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002

Gangmasters Licencing Act of 2003

Part Time Workers (Prevention of less favourable Treatment) Regulations of 2000

Protection of Employees (Part Time Work) Act

ZIMBABWE

Labour Act (Chapter 28:01)