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DECLARATIONS

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__________________________________________  _______________________________________
MR. F. NGHIISHILILWA                         DATE
ACRONYMS

APS – African Personnel Services
The Minister – Minister of Labour and Social Welfare
SWANLA – South West Africa Native Labour Administration
NEF – Namibian Employer’s Federation
NUNW – National Union of Namibian Workers
LaRRI – Labour Research and Resource Institute
ILO – International Labour Organisation
NSW – New South Wales
LRA – Labour Relation Act
TES – Temporary Employment Service
EEA – Employment Equity Act
COIDA – Compensation for Occupational Injuries and Diseases Act
SDA – Skills Development Act
TWA – Temporary Work Agency
EU – European Union
EAA – Employment Agencies Act
SCA – Supreme Court of Appeal
ABSTRACT

The National Assembly is constitutionally obliged “to remain vigilant and vigorous for the purposes of ensuring that the scourge 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 historically been victims of these pathologies”.¹ Given the racial practices and policies which gave meaning and structure to the concept of “labour hire” during the pre-independence era, the National Assembly was clearly justified in questioning and scrutinising its recognition and regulation in the Labour Bill. When the National Assembly decided to ban labour hire in its entirety was it case of prescribing H1N1² for a mere headache? During the parliamentary discussion that led to section 128 being included in the

¹ See Article 63(2)(i) of the Namibian Constitution.

² The medicine used to treat Swine flu.
Labour Act, the distinction between the contract labour system and the current labour hire system were not adequately appreciated.\textsuperscript{3}

The Supreme Court’s ruling on the matter has given the stakeholders – government, labour movement, business community and civil society – a golden opportunity to start drafting of appropriate regulations to deal with the offensive and exploitative aspects of the practices of labour hire. Even though labour hire can be exploitative, regulating the industry as opposed to a complete ban would bring the practice in line with the Constitution. While exploitation of workers recruited by labour hire companies occurs world wide and also in Namibia, the reality is

\textsuperscript{3} The Supreme Court’s remark when it compared the SWANLA system to labour hire in the case of African Personnel Services v Government of the Republic of Namibia and others Case No. SA 51/2008.
that people at least manage to find employment. If we ban labour hire are we not adding to the population of unemployed masses?


CHAPTER ONE

1. INTRODUCTION
The question whether to regulate or ban labour hire in Namibia has been a hot bone of contention until the Supreme Court finally passed judgment concerning labour hire. Even though the Supreme Court has pronounced itself on the issue the controversy surrounding the whole topic of labour hire refuses to die. The debate was ignited when the Labour Act was passed. The said Act repealed the 1992 Labour Act. Its worth mentioning that the 2007 Labour Act made considerable improvements to the 1992 Act but for purposes of this paper I will limit myself to section 128 of the 2007 Labour Act.

What is contained in section 128? The aforementioned section provides in s.s. (1): “No person may, for reward with a view to making that person available to a third party to perform work for the third party.” Subsection (3) provides as follows “any person contravening the section would be guilty of an offence.”

The prohibition as contained in section 128 would have had a disastrous effect on labour hire companies in that they would been forced to rethink their business strategies and come up with new means of generating income. Should it have transpired that the High Court’s ruling in African Personnel Services v Government of the Republic of Namibia and Others was upheld by the Supreme Court, such a judgment would have had the effect of putting labour hire companies out of business.

As a result of section 128 African Personnel Services decided to challenge the constitutionality of the said section. Upon the High Court declaring labour hire illegal in a judgment handed down on the 1 December 2008 the Minister of Labour and Social Welfare on 3 December called a press conference where he announced that labour hire will be illegal as from the 1 March 2009.
The Minister’s announcement was published in the Government Gazette on the 3 December 2008 despite an appeal by APS against the High Court’s ruling.

As a result of the Minister’s announcement APS was hopeful of its appeal being heard before the March deadline given by the Minister. What were the implications of the High Court’s ruling? Did it mean that labour hire companies would be obliged to terminate the services of labour hire workers and if this was the case was there a procedure in place as to how to go about terminating these workers services.

APS appeal against the High Court ruling was brought before the Supreme Court and on 14 December 2009 the Supreme Court ruled that section 128 through which the labour hire system in Namibia had been banned was unconstitutional. The Minister of Labour and Social Welfare made it clear that Government did not and until the present day still does not agree with the Supreme Court’s judgment, but it nevertheless respects the country’s highest court ruling. The Minister stated that “the Supreme Court has spoken,” as a nation built on the rule of law, the Namibian Government respects the final authority of the Supreme Court to interpret the Namibian Constitution.”

In light of the fact that the Supreme Court is the highest court in the land, there is no need to dwell on the issue of whether labour hire has a legal basis in Namibian law. The question that requires much attention is that of regulating the labour hire industry and how this should be done.
1.1. HISTORICAL BACKGROUND OF THE CONTRACT LABOUR SYSTEM - SWANLA

During its illegal occupation, South Africa extended its own repressive apartheid policy to Namibia then South West Africa. The introduction of segregation and racism ensured cheap labour power for the white-dominated economy.

1.1.2 South Africa and the contract labour system

According to Dr. Ndeutala Nghishongwa, in 1925, the South African administration in Namibia organised a conference for the major white employers, who early in 1926 established two official recruiting companies. In 1943, these companies were replaced by the South West Africa Native Labour Administration in short SWANLA. It was only through SWANLA that white employers could now recruit contract labourers and that African men could sell their labour. The main aim of SWANLA was to recruit cheap labourers for different job categories, and then to assign them to different employers. The employers paid a sum of money to SWANLA, which in turn paid a share of this to the chiefs for each recruited labourer.

1.1.3 Recruitment of contract labourers

In 1977, some so called ‘reforms’ were put into effect to abolish the pass law, give Africans the freedom to search for work on their own in urban areas and grant them the right to have their families with them at their places of work, etc. in reality, however, the pre-1977 conditions were
still prevalent in 1980, since even then as late, most employers did not provide facilities for their workers’ families near the place of work.

While waiting at Ondangwa for employment, the workers were faced with many problems. They stayed in big compounds and sometimes they had to wait for months, depending on their luck in finding work. These men had to bring their own food with them as well as cooking utensils and wood. If there was a long delay before they were recruited, they often had to walk hundreds of kilometers back home to get more food, and return to wait for their luck to turn.

Once a man had succeeded in finding work and had signed a contract, it was considered a crime if he broke it. He did not have any right to change the job he had signed up for. Once the workers were placed with employers, their employment was subject to an array of offensive and coercive regulatory provisions. For example, during most of the SWANLA era, regulatory provisions were in place which made it a crime punishable by imprisonment (with or without hard labour) for them to refuse or neglect to obey any lawful command of their employers; to absent themselves during working hours from the work place without leave or lawful cause; to carelessly or improperly perform their work or neglect to perform any work which they were under duty to perform; to enter the service of another employer during the currency of their employment or to fail or refuse without lawful cause to commence service at the stipulated time.

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 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”. Once their employment terminated, they had to return to their respective reserves. It was a crime not to.

Once they have offered themselves for recruitment to SWANLA, they were – (a) graded into three groups according to their health, age and experience, they were given tags reflecting their classification which they had to wear around their wrists or necks. The tag indicated the group to which they belonged. This was reminiscent of being treated like cattle; (b) registered with the authorities for purposes of securing an official permit to work in proclaimed areas; (c) if permitted to work as a “togt” or casual labourer, provided with a metal badge which had to be prominently displayed on their person at all reasonable times and on which their individual registration numbers were recorded and, in each instance, also the name of the proclaimed area to which they were limited; (d) placed in the employ of employers who had placed labour requisitions with SWANLA and (e) signed contracts of employment at a minimum wage which, at stages, could be for a period of up to two years at a time without any leave.

From Ondangwa contract workers were transported by South African Railways lorries and buses to SWANLA headquarters in Grootfontein. From there they were transported by rail or road to different regions to their respective employers. The workers had no choice as to their means of transportation.

The white employers made every effort to reduce the cost of labour. This also applied to the accommodation they provided. While in working areas, the contract workers lodged in white controlled and guarded compounds or barracks, quarters where ten to fifteen men shared a single
They slept on thin mattresses and blankets which had to be returned when the contract was over. There was also a vast difference between the toilets provided for Africans and those provided for whites. At Rössing mine, for example, the toilets for Africans were in one long building which provided no privacy at all. The compound in Katutura was originally built to accommodate 3000 men. The compound was soon overcrowded and contract workers on different shifts had to share the same rooms. This meant that men who were working night shifts and had to sleep during daytime had nowhere to go and sleep.

Food was a major problem facing the workers. Even though they paid a sum of money for their food, they had no choice of diet. Meals were invariably of poor quality. Workers were mainly given maize porridge, or a small piece of bread and some meat. In some cases workers had no choice of eating the food which they had paid for. In some cases they remained without food for the entire day but were none the less expected to work.

The duration of contract was usually from twelve to eighteen months and sometimes dragged on for up to thirty months. Working hours for contract workers were not fixed. Therefore, each recruiting company used its power to exploit, as much as possible, the workers for its own benefit and profit. Sometimes, contract workers had no specific jobs. They could be ordered to take up different kinds of jobs against their will, and jobs which they had no experience in.

The workers’ wages were likewise appalling. Bearing in mind the number of hours the contract workers had to put in every day, and the type of work they had to do, one might believe that they received high salaries. But this was not the case the opposite was indeed true.
1.1.4 Organised strike

In 1971-1972 a general strike was conducted by contract workers. Contract workers decided to go on strike in protest against the repressive contract labour system. The objective of the strike was to overthrow the entire contract labour system. Among the demands of the contract workers’ were:

- The contract labour system to be abolished; and the workers to be given the freedom to choose their own employment and change that employment without police interference
- Workers to be granted the freedom to have their wives and children with them, and thus to preserve family life
- Payment of salary to be on merit and according to work done and wage rates for all jobs to be specified
- Employees to be paid sufficiently to buy their own food and pay their own transport
- Labour offices or employment bureaux to be established throughout the ‘homelands’ and in every town, with free advertising vacancies, to enable people to look for jobs of their choice

1.1.5 The post strike era

After the strike, the South African authorities agreed to some of the workers demands and promised a change. A new recruitment system, to replace the contract labour recruitment system, was promised. It was agreed that SWANLA would be abolished and replaced by an employment bureau under the tribal governments. The new form of contract included the words ‘employer’ and ‘employee’, in contrast to the old one which included the ‘master’ and ‘servant’. Medical
examinations would, however, continue as under the old contract labour system. Finally, the classification of workers into various groups would be abolished and working hours would be fixed. In reality, however, the existing labour system and its oppressive conditions remained in force.

The contract labour system was deeply resented by the majority of Namibians. It offended their dignity; infringed their liberty; denied them equality; denied them of opportunities to develop their capacities and abilities as human beings and brought with it such profound suffering that, whilst many boycotted the system and others resisted with industrial action, some took up arms to rid Namibia from this practice, the policies on which it had been based and those who had imposed it on our People. The contract labour system left a deep scar on the Namibian psyche. Very few Namibians were left untouched by it. Like the policies and practices of apartheid and racial discrimination which inspired the system and gave specific content to the phrase during those dark years of foreign rule – especially during the SWANLA era – the mere possibility of its reintroduction, albeit in a different guise, knee-jerks resistance. In that sense and context, the phrase “labour hire” contains “fighting words”.

CHAPTER TWO

2.1. DEFINITION OF LABOUR HIRE AND THE PROBLEM WITH LABOUR HIRE

Labour hire can be defined as an arrangement whereby ‘a labour hire company or agency provides individual workers to a client or host with the labour hire company being ultimately responsible for the worker’s remuneration. The essential quality of a labour hire arrangement is
the splitting of contractual and control relationships: the worker works at the site and under the practical day to day direction of the host company: the worker is paid by the labour hire firm and has a direct contractual or employment relationship with them: the client firm pays a contract fee to the labour hire firm for the provisions of that labour and thus also has a contractual relationship with the labour hire firm.

The question remains whether labour hire is a form of employment. To answer this question we must direct our attention to the following enquiry: what is a contract of employment i.e. the definition of a contract employment. A contract of employment may be 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. If one of these elements is absent i.e. (a) an agreement to make personal services available (b) remuneration (c) subordination – the relationship is no longer that of employer and employee, but may for example be a relationship of agency, mandate or partnership. The High Court was of the view that labour hire has no legal basis in Namibian law. The Supreme Court, however, came to the conclusion that the fact that labour hire does not fit the typical mould of a bilateral contract of service described in Roman or Common law does not mean that it’s not lawful as times are changing.

There are two broad categories of labour hire arrangements:

a) Those where the labour hire worker is an employee of the labour hire agency – the employee service model;
b) Those where the labour hire worker is engaged by the labour hire agency under a contract for services – the contract service model.

Employee service model

Under the employee service model, the labour hire agency establishes an employment relationship with the worker and hires him or her out to work for a host business. The labour hire agency 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. This is the most common method of labour hire.

Who is the employer under this model?

The labour hire business will be found to be 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 host. This is because in a genuine labour hire arrangement there is no contract between the host and the labour hire worker and therefore there cannot be an employment relationship between them. Ultimate control rests with the labour hire entity as the actual employer.

Contractor service model

The contractor service model is based on ‘Odco’ arrangements which are independent contracting arrangements in the labour hire industry. These kinds of arrangements were upheld in a Full Bench Court decision, Building Workers Industrial Union of Australia v Odco Pty
Odco arrangements create independent contracting arrangements where the workers are neither employees of the labour hire company nor of that company’s clients.

In this case, the Odco workers signed an agreement that stated that they were not employees. The workers were paid on a weekly basis according to the work they performed. The workers themselves were responsible for deducting their own tax. The court decided that the workers were not legal employees on the basis that there was no expectation of continuing employment and the contracts between the agency and the workers expressed genuine intent to achieve independence. The Court also found that the client with whom they were placed was not their employer.

When considering cases involving labour hire contractors, the courts look behind contracting arrangements to ensure they are not being used as a device to avoid entitlements due to employees. For example, in the Damevski v Guidicencase the Federal Court of Australia found that a worker remained an employee of a host business despite the host business’s attempt to end the employment relationship and deal with the worker as an independent contractor through a labour hire agency.

While the aforementioned relationships might appear to be relatively straightforward in theory they can become complicated in practice. First, there is typically a control relationship but not a contractual relationship between the worker and the client company. In a labour law context predicated on the assumed existence of a bipartite employment relationship between employer and employee the law has struggled to establish where liabilities should rest in some labour hire cases.
Secondly, the character of the legal relationship between the worker and the labour hire firm may not always be clear. For example, while some labour hire workers might be employees of the labour hire firm, labour hire firms often describe their workers as ‘associates’ or ‘contractors’ and seek to construct them as contractors rather than employees. Third, the extent to which the worker is working under the control and direction of the host company or the labour hire company might be disputed. The issue can be critical for ascribing responsibility for occupational health and safety.

The complicated legal character of labour hire arrangements in practice is therefore problematic for ascertaining liability in a number of instances – where there has been a breach of occupational health and safety regulations, where a labour hire worker is injured and neither client company nor labour hire company is prepared to assume responsibility for rehabilitation and return to work, and, in unfair dismissal cases where both client and labour hire firm might seek to deny that the aggrieved worker is their employee.

Labour hire is also problematic for individual workers and labour markets more generally. The labour market problems associated with labour hire employment arrangements are summarised as follows by Dr. Richard Hill under three inter-related themes:

1. Labour hire workers tend to be engaged as either casual employees or independent contractors. The employment conditions tend to be characterised by insecurity, precariousness, the absence of career paths, low or below award pay and substandard conditions.

Low pay and under award pay appears to be common in the labour hire industry. The incentive to pay low is a structural feature of the labour hire industry.
2. Labour hire employment tends to be associated with limited training and skills development. Labour hire workers receive less training and much less portable training and skills development than permanent employees.

3. Labour hire employment is often associated with limited industrial protection afforded by awards, enterprise bargaining arrangements and union coverage. Labour hire workers are inherently difficult for unions to organise for a number of reasons. First, labour workers often have relatively itinerant work histories and non-standard work patterns. This makes it difficult for unions to identify likely breaches of award or other industrial conditions. Second, labour hire workers are rarely prepared to speak out against employer breaches of award or statutory conditions because of their general vulnerability and dependency on their labour hire employer for future assignments.


2.2.1. Synopsis of High Court Ruling

A bid by APS in the High Court to challenge the ban on labour hire contained in the Labour Act 11 of 2007 failed in the High Court. Judge Collins Parker in his judgment called labour hire an unlawful activity which reduces people to personal property. APS which claims to represent around two-thirds of Namibia’s labour hire sector approached the High Court in an attempt to
have the Labour Act clause on labour hire struck down as unconstitutional.

What was the gist of the APS argument?

The company’s argument was simply that as per the Namibian Constitution, it should be allowed to pursue any trade or business. Judge Parker was, however, of the view that this constitutional right to trade is subjected to restrictions and that not all, businesses or trades are entitled to protection. He went further by giving an example “a person who is in the business of for instance, stock theft, the keeping of a brothel, trafficking in women or children, or slavery cannot be heard to claim a right under… the Constitution on the basis that the business or trade yielded a profit or income.” Judge Parker contended that labour hire has no legal basis in Namibian Law. The said Judge was of the view that there is no room for a third party in the relationship between an employer and employee. The Judge stated that labour hire is tantamount to the hiring of a slave by his slave master to another person under Roman law.

Examining the court’s decision from a different perspective, F. Nghiishililwa is of the opinion that one could argue that the approach employed was conservative and unrealistic. Secondly the court’s interpretation of Article 21(1)(j) was very narrow: surprisingly it overlooked or omitted to consider the position of the International Labour Organisation Conventions, which represent the law at international level in terms of labour hire.

2.2.2. Synopsis of the Supreme Court ruling
The Supreme Court differed with the High Court and made it clear that the ban on the labour hire system introduced by the Labour Act 11 of 2007 was unconstitutional. The Supreme Court in its ruling found that the outright outlawing of labour hire was an unreasonable infringement of the Constitution’s protection of the right to practice any profession, or carry on any occupation, trade or business. The Court in its 119 page judgment made reference to the SWANLA system and stated that “in Namibia, the expression ‘labour hire’ is loaded with emotive and substantive content extending well beyond its ordinary meaning.”

The Court went on and made a clear distinction between the SWANLA system and labour hire or temporary agency work in its modern day form. The Court stated that the contract labour system was structured on an array of discriminatory laws implemented as a part of a system of institutionalised apartheid. None of these discriminatory laws that underpinned the contract labour system still apply in Namibia. The defining features of the contract labour system can be distinguished from the current labour hire system. Unlike SWANLA for instance, which acted as a link between contract labourers and their eventual actual employers, labour hire companies employ their employers directly, assume their contractual and statutory obligations of an employer towards its employees, pay their employees and become part of the three way relationship between itself, its employees and the client making use of the employees’ services.

From the aforementioned it is safe to say that the Court was of the opinion that there is no rational relationship between the immoral SWANLA like contract labour system and the prohibition of agency work on the grounds of decency and morality, which were the grounds on which the Labour Act, 2007 purported to outlaw the labour hire system. The sort of employment placement services that section 128 expressly excludes from its ban on labour hire shares many
more similarities with the recruitment and placement services that were performed by SWANLA than there are similarities between SWANLA’s activities and the current labour hire system.

The Court came to the conclusion that the prohibition of labour hire as an economic activity “is so substantially overbroad that it does not constitute a reasonable restriction on the exercise of the fundamental freedom to carry on any trade or business protected in Article 21(1)(j) of the Constitution. Given the scope for regulating the labour hire system in Namibia to prevent potential abuses, without compromising the objects of the Labour Act, and the wide ranging regulations that had been introduced on this activity in other democratic countries, the blanket prohibition of agency work by section 128 of the Act “substantially overshoots permissible restrictions” that may be placed on the exercise of the freedom to carry on any trade or business.

2.2.3. Reaction to the Supreme Court’s ruling

The Supreme Court’s ruling was greeted with mixed feelings. It is safe to say that Government, trade unions and labour movements were and are still to a large extent disappointed with the Supreme Court’s ruling. On the other hand labour hire companies, client companies and the Namibian Employer’s Federation welcomed the judgment with open arms.

It is an open secret that Government disagreed in principle with the Supreme Court ruling. The Ministry of Labour and Social Welfare in particular was irked by the ruling, and vowed at the time that it would do everything in its power to ensure labour hire, which Government compares to renting of slaves in Roman times, is outlawed in Namibia. Government was disappointed with Supreme Court’s ruling which found that the outright ban of the labour hire system was in
conflict with the Constitution’s protection of the right to practice and carry on any occupation, trade or business. It was Government’s view that it was quite ironic that a provision of the Namibian Constitution that was intended to eradicate apartheid practices that subjected black workers to the injustices and humiliation of job reservation, influx control and the like has now been interpreted to turn a blind eye to commercial arrangements for the rental of human labour in order to avoid the protections afforded to workers by the labour laws. Furthermore, Government was of the view that judges in their wisdom closed their eyes to social and economic realities of workers exploitations in the labour hire sector.

The National Union of Namibian Workers labeled the judgment as imperialist and unpatriotic. The NUNW via its Secretary General 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 the labour hire system. The union made it categorically clear that it would fight to ensure that the judgment was reversed and contradicted by an Act of Parliament. The NUNW further stated that the Ministry of Labour must take cognizance of its responsibility to make sure that labour hire “does not see the light of day” and that the current legislation related to these companies meaning labour hire companies would not be accepted.

In addition to the disappointment voiced by Government, three civil society organisations also voiced their disappointment with the Supreme Court’s ruling. Their criticism questioned the basis on which the five judges had concluded “that the democratically elected representatives of the people did not adequately understand the distinction between the contract labour system and the current labour hire system”. August Maletzky opined that “the judgment should be seen for
what it really is. Its not about an ideological philosophy or some sort of intellectual abstraction, its about delivery of substantive citizenship, real sustainable livelihood for the working class and vulnerable members of society.” He further stated that that to hold that labour hire is something different from the apartheid-era contract labour system goes against conventional wisdom and that it is contrary to the dictates of the Namibian Constitution. The labour bodies were of the view that the Supreme Court ruling is in stark contrast to the legitimate expectations of the people of Namibia as personified in the expressions a democratically elected parliament and embodied in section 128 of the Labour Act of 2007.

Herbert Jauch, the head of research and education of LaRRI viewed the Supreme Court ruling as being highly insensitive towards the plight of the labour hire workers.

The Head of State also shared his views concerning the labour hire debate when he addressed workers from Lüderitz and Oranjemund at the Lüderitz Stadium on 1 May 2010. The President said he “hates” the ongoing practices of labour hire in the country. He urged Parliament to fill the current loopholes in the Labour Act of 2007 so that the practice is declared illegal. The President himself a product of the labour hire system when he joined the Tsumeb Corporation Limited in 1956 on the card of labour hire company, South West African Native Labour Association, said during his address that the practice is exploitative and cannot be allowed to continue in an independent Namibia. The President in criticising the Supreme Court ruling was more subtle and diplomatic by adding that, “I am not attacking the Supreme Court’s decision on the matter. All I am saying is that our interpretation of labour hire must also be put into consideration.
The NEF is of the view that unfair treatment does not only occur at labour hire firms. The NEF is not ignorant of the fact that labour hire companies often paid lower wages and might not provide medical aid or a pension scheme. Tim Parkhouse believes that the ills of labour hire can be regulated and strict enforcement monitored by the Labour Ministry. The NEF is of the opinion that one always gets bad apples in a sector, also among labour hire companies, but permanent staff regularly employed also get exploited where either the Social Security Commission levies might not be paid, or no proper pension and medical aid schemes are in place.

According to the NEF there is a market for labour hire and when properly regulated it contributes to job creation. Tim Parkhouse exclaimed that one must ask where the line must be drawn between companies outsourcing jobs and entire departments and labour hire. The fact that 51 per cent of Namibians are unemployed means that Government should be careful when clamping down on labour hire companies and should not consider politics or ideology when it changes existing legislation.

Vekuii Rukoro opined that “we must not allow ourselves to rush head long 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, they must have economic sense and they should be reasonable and most important they must be legally enforceable and practically implementable in the business world.” This basically means that Government should avoid hastily drafted regulations which might lead to industrial disputes and possibly again to unhealthy legal challenges.

CHAPTER THREE
3.1. What is it that Parliament wished to achieve by banning labour hire?

The main reason why Parliament wished to ban labour hire was to curb the casualisation of employment and resultant commodification of labour. “Casualisation,” because, agency work arrangements “essentially dilutes the content of the standard employment relationship” and enable agency service providers and agency clients to circumvent the requirements of the Act and its regulation of employment relationships in numerous ways. 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 decreasing.

“Commodification” because, once permanent workers become agency workers, they are no longer under the umbrella of the entire range of protective measures accorded to them by the Act; they are vulnerable to exploitation; they are more likely to be treated as units of labour and may be disposed of by agency service providers without any social responsibility. By prohibiting agency work Parliament sought to preclude these consequences and their deleterious effect on the attainment of the Act’s objects.

The question however remains; can this not be achieved by regulative measures to ensure that agency service providers comply with acceptable employment standards and to eradicate exploitative and unconscionable labour practices. If properly regulated there would be nothing indecent or immoral about agency work.

3.2. International Law and Labour Hire
Agency work violates a fundamental principle of the International Labour Organisation that “labour is not a commodity”. Namibia is enjoined by Article 95(d) to seek membership of that organisation and therefore it can be argued that agency work is inconsistent with the Constitution. One can even go further and argue that the commodification of labour cannot be addressed by regulation because it goes to the very core thereof. On the other hand one may present the argument that agency work is not inimical to the ILO-principle and therefore, also not inconsistent with Article 95(d) of the Constitution. In support of this contention one can have regard to the Private Employment Agencies Convention, 1997 and in particular, to the fact that the ILO recognises agency work as a “labour market service” in article 1(b) of the Convention and recommends the regulation thereof by its member States in numerous ways.

The ILO called for the abolition of profit-driven employment agencies shortly after its founding in 1919. This was given effect by ILO Convention 34 (1935), proposing the abolition of profit making employment agencies in favour of a state monopoly. However, the demand for contingent labour created a demand for service providers: a demand not efficiently met by state actors and to which private entrepreneurs responded, despite legal restrictions or prohibitions. The demand for change could no longer be ignored. Thus, the Convention Concerning Fee-charging Employment Agencies (No. 96) – which formed the legal basis of an ILO tenet that labour is not a commodity – was revised. Adopted in 1949, Convention 96 only regulated work recruitment and placement basically, it authorized limited exceptions to the rule laid down in Convention 34.
The ILO’s main concern has been focused on workers who find themselves outside the protection of labour legislation. Among them are workers employed in a triangular employment relationship. The ILO’s adoption of Convention 181 served as a response to the serious tension within the prevailing regulatory regimes associated with the standard employment relationship. Raday pointed out that this tension centers 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.

Convention 181 not only recognises private employment agencies as employers, but also establishes a minimum level of protection of their employees, who are made available to a user enterprise to perform contract labour. By adopting Convention 181, the ILO reversed its historic stance against labour market intermediaries and revised its sceptical view of non-standard forms of employment. In a way, Convention 181 also legitimises a triangular employment relationship, shifting from the standard employment relationship towards a new model which embraces more ‘flexible’ forms of employment.

The prohibition in section 128(1) of the Labour Act, 2007 and the exception in subsection (2) draw in part on two of the three types of “labour market services” defined in article 1 of the Private Employment Agencies Convention, 1997 of the ILO. Subsection (1) prohibits any person to “for reward, employ any person with a view to making that person available to a third party to perform work for the third party”. Its formulation corresponds in part with the type of labour market service defined in article 1(b) of the Private Employment Agencies Convention, i.e. “services consisting of employing workers with a view to making them available to a third party. … which assigns their tasks and supervises the execution of these tasks”. The differences
between the two formulations, indicated by the phrases in italics, are of significance in
determining the sweep of the prohibition in subsection (1): to fall within its ambit, the third party
need not be the one who assigns the tasks of the workers and supervises their execution; it will
suffice if the workers perform work for that party. For the purpose of differentiating between
s.128(1) and article 1(b) of the Private Employment Agencies Convention, nothing much turns
on the inclusion of the words “for reward” in the prohibition. Inasmuch as the Convention targets
“private employment agencies,” it may be assumed that they would provide labour market
services “for reward” – which is also what s. 128(1) requires. The specific inclusion of those
words in the section is probably intended to exclude employment services of a public nature
which the Government may provide without reward.

The exception in section 128(2) provides that the prohibition in 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 relationships that may
arise there from”. Except for the introductory words, the description of this type of labour market
service is identical to the definition used in article 1(a) of the Private Employment Agencies
Convention.

The preamble of the Convention notes awareness “of the importance of flexibility in the
functioning of labour markets”, recognises the “role which private employment agencies may
play in a well functioning labour market; recalls “the need to protect workers against abuses” and
recognises “the need to guarantee the right to freedom of association and to promote collective
bargaining and social dialogue as necessary components of a well functioning industrial relations
system.
Importantly, paragraph 3 of article 2 states that “one purpose of the Convention is to allow the operation of private employment agencies as well the protection of workers using their services, within the framework of its provisions.” Article 3 provides for the determination of the legal status of private employment agencies and the conditions governing their operation in accordance with a system of licensing or certification. Article 4 requires measures to be taken to ensure that workers recruited by private employment agencies are not denied the right to freedom of association and the right to bargain collectively. Article 5 requires that measures be taken to promote equality of opportunity and treatment in access to employment and to particular occupations. Article 11 requires of members to “take the necessary measures to ensure adequate protection for workers employed by private employment agencies …. in relation to:

Article 12, in addition, requires of members to determine and allocate the respective responsibilities of private employment agencies and of user enterprises in relation to all the matters mentioned in paragraphs (b)-(j). The Convention further provides that employment agencies should have written contracts of employment with the agency workers; refrain from making agency workers available to agency clients to replace workers who are on strike; not knowingly recruit, place or employing agency workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind; that they should not prevent agency clients from employing agency workers, restrict the occupational mobility of agency workers or impose penalties on an agency worker accepting employment in another enterprise, to mention a few Namibia is a signatory to the Private Employment Agencies Convention but has not ratified it to date.
3.3. Criticism of section 128

According to Nghiishililwa section 128(1) of the Labour Act, 2007 operates retrospectively in the sense that it has effectively taken away a fundamental right that existed before its enactment, namely the right to practice any profession, or carry any occupation, trade or business. Furthermore section 128(1) appears unrealistic and unreasonable because it ignores what is happening in the labour market, thus rendering it defective. Roman law, on which our Namibian law is based, is outdated. Secondly, the law is not static: it is dynamic in the sense that it must address the legal, social and economic needs of the society it serves.

The said section prohibits all persons to “for reward employ 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, 1997, section 128(1) does not require that the third party also “assigns the tasks and supervises the execution of these tasks”. As long as the labour constitutes “work for the third party”, it does not matter that it is assigned or supervised by the employer and not by the third party: it will still fall within the ambit of the prohibition. Moreover, it does not matter if the work is assigned, supervised or completed at the workplace of the employer; that of the third party; at the home of the person employed or at any other place. The implications of this wide formulation are drastic and not narrowed by the words “making that person available”.

The broad scope of the prohibition may be illustrated by a few examples. Lawyers engaged as professional assistants by legal firms in private practice are employed with the principal purpose to, for reward, make them available to clients (third parties) to perform work of a legal nature for
those clients. Payment for the work done by the client is made to the firm and is normally not
directly related or even proportionate to the salary payable by the firm (employer) to the
professional assistant. The same is true in the case of auditors, architects, doctors and other
professional persons engaged in a similar fashion and made available to render professional
services to clients, patients and the like. All these employment relationships are proscribed by the
section.

Evenly significant are the implications which follow from the use of the word “work” in the
prohibition. The prohibition is not in any way limited to the rendering of personal to the third
party by the person employed but, on the face thereof, also includes the performance of work
(including outsourced work) under contract of work. Contractors, contracted by third parties to
perform specified work, who make available their employees to the third parties to perform work
under contract for those parties also fall within the ambit of the prohibition. So too, if a person
employs an individual who is an independent contractor (not an employee) to make that
individual available to a third party to perform work for the third party as a subcontractor. The
section, in effect, also bans the subcontracting of work. Even persons who employ “home
workers” as defined in article 1 of the Home Work Convention, to make them available to user
enterprises for the manufacture of goods at their homes would fall foul of the prohibition.

3.4. Namibia and regulating labour hire

3.4.1 Proposed regulations
A fundamental concern of the labour movement regarding the operations of labour hire companies is that these companies do not provide permanent employment to their employees but merely turn the casualisation of work into a business venture. Secondly, labour hire companies tend to undermine collective bargaining because labour hire workers are deployed at different workplaces in highly insecure circumstance. This makes them vulnerable and it is very difficult for trade unions to represent employees of labour hire companies.

The Namibian government’s proposed guidelines for labour hire employment and operating standards were an attempt to regulate the labour hire industry. These guidelines provided for the registration of labour hire companies, the obligation to set up training programmes, the adherence to grievance and disciplinary procedures, records of employees etc.

The guidelines set out a duty for employment agencies to register with the Labour Commissioner and to adhere to the Namibian Constitution, the Labour Act, the Company Act and any other Namibian law. Employment agencies will also have to declare if they render their services free of charge or if they levy a fee on the user-enterprise or their workers. The Labour Commissioner may cancel the registration of any employment agency if they contravene any law or the guidelines. However, the Ministry of Labour may grant exemptions from the guidelines as long as the laws are adhered to. The guidelines had set out a minimum wage.

Employment agencies have to register their workers with the Social Security Commission. Employment agencies under the guidelines would have to design a training programme to ‘uplift industry training skills’. The proposed regulations held employment agencies responsible to provide training for their workers when they are required to carry out any work ‘which could
threaten their health, safety or welfare’. Furthermore, employment agencies will have to keep records of their workers; develop fair and just grievances and disciplinary procedures in line with the Labour Act; and promote good labour relations. Employment agencies are also not allowed to participate in any scheme aimed at retrenching workers at client companies and replacing them with workers from employment agencies.

3.4.2. Criticism of the proposed regulations

Although these proposed regulations might help to set some minimum standards and to prevent the operation of illegal labour brokers that violate the provisions of the Labour Act, the fundamental problems with labour hire companies as expressed by the labour movement are unlikely to be resolved through the proposed regulations. One of the likely problems will be how to monitor and enforce the provision that aims to prevent the replacement of permanent workers with labour hire workers. Companies might find convincing arguments for retrenchments just to re-employ workers some time later through labour hire companies. Companies might also resort to a strategy of not filling permanent vacancies and instead employ labour hire workers. Other problems that are likely to emerge are the permissible fees that the agencies are allowed to charge. The proposed regulations are silent on the issue and there are also no proposed limitations on the period for which an employee can be treated as a casual worker. This will allow client companies to make use of casual and labour hire workers indefinitely without imposing any duty on them to create permanent employment. It thus seems as though the proposed regulations would not have resolved the fundamental conflict regarding the operations of labour hire companies in Namibia. The proposed regulations were insufficient to significantly change labour hire practices.
Outlawing labour hire would be the preferred political option. This will only be effective if outsourcing as a whole is severely restricted. The question remains, is government prepared to do that?

The second option would be a combination of:

- Comprehensive and strict regulations, e.g. licensing system, compulsory training fees.
- Improved “guidelines” to ensure that labour hire workers’ wages and benefits are not below those paid to permanent workers performing similar tasks.
- Pro-active labour inspections and a public focus on labour hire.
- Systematic trade union recruitment and representation of labour hire workers.
- Improving labour relations through consultations and negotiations.
- Compulsory license fees.
- The specification of responsibilities and liabilities of labour hire and client companies towards their workers, especially with regard to issues of occupational health and safety as well as retrenchments.

3.4.3. What are the options open to Parliament?

To address problems inherent in the labour hire system, the constitution will have to be amended to authorize the banning of labour hire, or, alternatively, stringent new legislation must be enacted to eliminate the exploitative aspects of the system. It appears as if new legislation is the practical solution to the problem and the ILO recommendation 198 of 2006 can serve as a guide, among other instruments, guaranteeing protection to labour hire employees.
Cabinet therefore, endorsed the amendment of the Labour Act, 2007 to address labour hire in accordance with the following and other principles:

(a) To properly define labour hire to apply only to employees in the labour hire system and not to bona fide subcontractors and independent contractors;
(b) To classify the position of seasonal and temporary employees;
(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 hire 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; labour hire workers shall be entitled to written contracts of employment that are duly signed by the hire and using company;
(e) To prohibit the use of labour hire during strikes or lockouts in which non-labour hire employees have been retrenched; and
(f) The Minister will have the power to grant exemptions from labour hire provisions and to promulgate regulations concerning the implementation of labour hire provisions.

The complexity of the labour hire industry demands that a new but separate legal instrument be enacted to govern and regulate the industry. The Office of the Labour Commissioner has been tasked with drafting the regulations. The Labour Commissioner stated that his office had finalised the drafting of a replacement section of the part which the Court found unconstitutional.
All that remained in the opinion of the Labour Commissioner is to send the draft to the Labour Advisory Council for scrutiny.

3.4.4. Case Study: the APS and Etale saga

Etale is a fishing company in Walvis Bay that makes use of workers provided to it by APS. Following a demonstration by APS 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 wanting to air their grievances over conditions of employment, including pay. The workers claimed not to have received an increment over the past three years and that APS merely pays them N$5.80 per hour which they claim is very little compared to the employees at Etale although they are doing the same work. The workers claim not to receive any benefits. Furthermore, the workers were disgruntled at the fact that Etale’s management refused Namibian Seaman and Allied Workers Union officials to hold meetings at the company premises, the union the workers had mandated to negotiate with the company to improve their working conditions of employment. Etale through its Managing Director made it clear that they have a contract with APS and that whatever grievances the workers might have they must go through APS.

After the workers had received notice of their suspensions, they decided to camp outside the premises. As a result of the workers camping outside Etale’s premises, Etale threatened APS with a lawsuit of N$6 million if they did not provide Etale with new workers. Faced with the prospect of being sued APS opted to bus in new workers to take up the positions of the suspended workers.
The abovementioned factual scenario quite clearly demonstrates the ills of labour hire but bear in mind that such ills should not be looked at in isolation. I firmly believe that the ills as portrayed in the APS – Etale scenario as well as many other ills of labour hire can be addressed through proper regulating of the industry.

CHAPTER 4

4. THE REGULATION OF LABOUR HIRE IN OTHER JURISDICTIONS

4.1. The regulation of temporary agency work in Europe

Agency work was prohibited until the late 1970’s in some states of the European Union mainly because it was considered as an infringement on “the public monopoly on job placement”. In Höfner & Elser v Macrotron GmbH, the Oberlandesgericht in München, Germany held that the
statutory public monopoly on recruitment services which denied private employment agencies
the freedom to operate in that market was in breach of the European law on monopolies. This
judgment opened the door for private employment services; contributed to the growth of that
industry in Europe and, ultimately, the recognition thereof by the ILO Convention No. 181.

Since the early 1980s the European Commission has struggled to develop a Directive on the
European equivalent of labour hire, temporary agency work. After a couple of failed attempts the
representatives of the social partners, Euro-CIETT and UNI-Europa, reached agreement on a
Joint Declaration on Temporary Agency Work. The Declaration specifies 13 objectives which the
social partners believe should be addressed in the proposed EU Directive. Amongst other things
the objectives include:

• The recognition that non-agency work and on-going contracts of employment should
  continue to be the most commonly used forms of employment.

• Recognition of the principle of equal treatment both with respect to relationships between
  agencies and workers and host companies and workers.

• Acceptance that certain restrictions, prohibitions and regulations may be required to
  prevent potential abuses of the use of TAW so that the conditions of work of workers in
  non-agency employment are not undermined.

• Ensuring that TAW is not used to replace striking workers.

• Recognising that agencies have the legal obligations of an employer toward their TAW
  workers.

• Ensuring that TAW workers have access to appropriate training and development
  opportunities, both in the agency and in the host company.
Developing innovative solutions to ensure that occupational benefits continue to accrue for TAW workers.

Hall states that many of the concerns relating to labour hire are addressed by laws on those matters, including:

“specifying the permissible length of agency work contracts; restricting the purpose for which agency workers may be engaged, guaranteeing agency workers parity with other comparable workers in terms of pay and conditions of employment, and, ensuring agency workers right 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 of absent employees or in 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. Eight countries (Australia, Belgium, France, Italy, France, 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.

….Many states have adopted a relatively strong regulatory approach, seeking to restrict temporary agency work to genuine cases of employer need for temporary workers as a supplement to, rather than a replacement for, the existing permanent workforce.”

4.2. Regulation of labour hire in Germany
Employment laws in Germany must not violate the European Union general guidelines for employment; Germany is a full-fledged member of the European Union. Nonetheless, EU member states also have flexibility to enact laws governing employment with their countries.

### 4.2.1. Temporary agency work

Employment in a temporary work agency falls under the general regulations of either fixed term or permanent contracts (open ended contracts) in Germany, though in most cases, temporary agency employment contracts between employees and temporary work agencies are often open ended, while the posted work assignments are task related, i.e. fixed term contracts between TWAs and the receiving firms. Agency work was also subject to additional restrictions in the past, such as maximum duration of individual postings or a ban on the synchronization of the contract with the agency and the actual posting. The posted work period was extended stepwise from three to six months in 1985, further extended to nine months in 1994, to twelve months in 1997, to 24 months in 2002, and finally the limit was abolished in 2003. Agency workers are entitled to the same wages and working conditions as regular staff i.e. equal treatment. Deviations are only allowed in the case of hiring unemployed people or if collective agreements exist, triggering several collective agreements between trade unions and TWAs on wages and working conditions.

### 4.2.2. Permanent Contracts
Dismissal protection of permanent (open-ended) contracts sets in after a probationary period of six months during which only minimum requirements and a short notice period of two weeks apply. Although longer or shorter probationary periods can be agreed upon by individual or collective agreements, statutory dismissal protection will set in after six months. However, legal dismissal protection does not apply to small firms with less than 10 employees or, prior to 2004: 5 employees. With respect to permanent contracts, individual dismissals by the employer are possible if certain conditions are met.

The legal minimum notice period is four weeks for both employer and employee. Minimum notice periods for employers increase with tenure, e.g. 2 months after 5 years of service, 4 months after 10 years of service, 6 months after 15 years of service. Longer notice periods can be introduced through collective agreements or individual contracts, shorter notice periods only through collective agreements. There is no legal obligation to severance pay. Additional regulation is provided by collective agreements, particularly for older workers in case of dismissal. Recent collective agreements stipulate severance pay after 25 years of service. Employees can file a lawsuit against dismissal.

4.2.3. Fixed term contracts

A specific law regulates fixed term contracts. According to legislation, such temporary employment is possible if a valid reason is given: temporary demand for additional labour, termination of vocational or academic training, replacement of permanent staff, specific character of task, extended trial period or availability of temporary funds only. Fixed term employment without any valid reason is only possible for a maximum period of two years. The
employer cannot reemploy the same individual after a fixed term contract terminated without valid reasons. Deviation is possible through collective agreements.

4.3. Regulation of labour hire in Australia

Compared to Europe most Australian jurisdictions have been slow to move towards comprehensive regulation of labour hire. Queensland and Victoria have the most detailed set of legislative regulations. In Queensland and Victoria, the definitions of employer and employee in the relevant state industrial relations acts specifically include labour hire companies and labour hire workers. Contractors can be deemed ‘employees’ by the Industrial Relations Commission in Queensland or by the Fair Employment Tribunal in Victoria. Most states also have systems requiring the licensing of ‘employment agents’. No Australian jurisdiction currently has legislation that purports to regulate the length of labour hire contracts, the purposes for which labour hire may or may not be engaged, or establishes the parity of labour hire workers with other comparable workers in host organizations.

In May 2000 the New South Wales Attorney General and Minister for Industrial Relations established a Task Force to inquire into and make recommendations about the labour hire industry in NSW. The report of the Task Force makes a number of recommendations concerning reforms to better regulate the labour hire industry in NSW. The principal recommendations are as follows:

1. Expand the definition of employer to include labour hire companies.
This recommendation will assist in broadening the range of workers who will be afforded protection under the NSW Industrial Relations Act.

2. Establish a licensing regime for labour hire companies.
The licensing of labour hire operators provides an opportunity for the state to develop a regulatory approach to the industry.

3. The Department of Industrial Labour Relations to conduct an education campaign on the rights and responsibilities of all parties to a labour hire arrangement.
To the extent that labour hire operators or client organisations are actually ignorant of their responsibilities this recommendation may have some effect.

4. Amend the Occupational Health and Safety legislation such that both client organisations and labour hire companies are rendered jointly responsible for the Occupational Health and Safety of labour hire workers.
This recommendation reflects the leading NSW authority of Ankucic v Drake Personnel t/as Drake Industrial where both Drake and the host employer were fined for each failing to ensure the health and safety of the labour hire worker.

5. Amend the relevant legislation to mandate joint responsibility on both host organization and labour hire company for rehabilitation and return to work of injured workers.
The mandating of joint responsibility and the inclusion of WorkCover as the authority to determine the details of the implementation should ensure that injured labour hire workers stand a better chance of accessing improved rehabilitation and return to work opportunities. However,
the practical problem remains that few labour hire companies will have the capacity to provide anything other than routine office work for injured employees.

The NSW Industrial Relations Commission heard an application from the NSW Labour Council to vary a number of awards relating to labour hire including by effectively setting minimum wages and conditions and by enabling workers to elect to become employees of the host after working with them for six months. The danger posed by the imposition of these conditions on the use of labour hire arrangements would limit the flexibility that labour hire can provide and would inevitably reduce employment.

4.3.1. Victoria

In 2003 the Economic Development Committee launched an inquiry into labour hire employment in Victoria. The Committee released an interim report which focused mainly on workplace health and safety. The Committee recommended the establishment of a registration system for labour hire agencies which would help to lift safety standards within the industry.

4.3.2. Tasmania

The Tasmanian government reviewed the Industrial Relations Act 1984. One of the proposed amendments concerned giving the Tasmanian Industrial Relations Commission the power, upon application, to deem a person engaged through a labour hire arrangement to be an employee.

4.3.3. South Australia
The Industrial Relations Reform (Fair Work) Bill 2004 proposed to give the Industrial Relations Court of South Australia the power to declare persons to be an employee. These provisions were removed from the Bill by the Legislative Council. The Bill also contemplated the joining of a host business to an application for unfair dismissal. These provisions were also removed by the Legislative Assembly and the amendment confirmed by the House of Assembly. The Australian government does not support the joining of host businesses to such actions because it implies an employment relationship where none ever existed.

4.4. South Africa: Relevant legislative provision applicable to labour hire

In South Africa, the term temporary employment services is used rather than labour hire. The first legislative provision for TESs was made in 1983, when the LRA of 1956 was amended to provide for what it called a “labour broker’s office”. The manner in which TES is defined legislatively is peculiar. The 1956 LRA defined labour broker as someone who “for reward provides a client with persons 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.” But what was of cardinal importance was that the labour broker was deemed to an employee of the broker. Accordingly the definition of employer and employee were also amended.

The definition of TES in the 1995 Act is more elegantly phrased. Consistent with the 1983 amendments, the TES is regarded as the employer of those it procures or provides, who are employees of the TES. But the provisions of the 1995 Act are subject to a proviso. For “a person who is an independent contractor is not an employee of a temporary employment service, nor is
The reason for this proviso seems to be that it is increasingly common in certain industries for skilled workers to be provided by a TES on the basis that they are independent contractors. At the same time the proviso compounds an uncertainty that already exists as to when an employment relationship involving a TES subsists.

In terms of the definition in section 198 of the LRA, a TES is any person who procures or provides to a client persons who “render services to, or perform work for, the client.” However it must do so for reward. A non-profit organisation providing such a service won’t qualify to be a TES. The workers provided by a TES must also be remunerated by it. Furthermore, in terms of section 198(4), the client is jointly responsible with the broker if there is a contravention of –

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

Apart from the LRA, there is a specific reference to TESs in section 82 of the BCEA. This contains provisions equivalent to the LRA, in terms of which a 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 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 employee is defined to include a person
provided by and paid for by a broker. 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 in terms of COIDA unless it pays the worker concerned.

Although the Skills Development Act of 1998 was introduced after the LRA, it 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....” The registration form is basic, requiring no more than the address and particulars of the applicant. The application must be forwarded to the Director General of Labour. If satisfied that the prescribed criteria have been met, the Director General may register the applicant as a ‘private employment office’.

The object of registering employment services for gain appears to be to regulate certain activities or practices, such as the fee that work seekers are charged. It is also perhaps significant that these services are in competition with the labour centres established by the Department of Labour. Given that not all employment services for gain are TESs, it seems that registration in terms of the SDA is not a significant issue for TESs, and also does not represent a means to regulate their activities.

As employers, TESs are liable to apply to SA Revenue Services to be registered for the purposes of payment of skills development levies. Unless exempted, an employer who is registered is liable to pay a one percent levy in respect of to total ‘leviable amount.’ This 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
In terms of the said Schedule, an employer may be liable to pay levies in respect of persons who would be regarded as independent contractors in terms of labour legislation.

An employer is exempt from paying the levy where “during any month, there are reasonable grounds for believing that the total amount of remuneration...paid or payable to all its employees during the following 12 months period will not exceed R250 000, or such other amount as the Minister may determine....” and where the employer is also not required to register as an employer for the purposes of deducting PAYE. An employer is not required to register with South African Revenue Service if his employees are paid below the threshold determined from time for the payment of PAYE. The following question thus arises: 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? Arguably the effect of this provision is to make registration purposes of the skills levy wholly reliant on the goodwill of the employer, where employees are paid below the threshold. Undoubtedly many TESs do pay wages below the threshold.

TES’s are also obliged to comply with the requirements of the Employment Equity Act of 1998. Under section 57(1) of the EEA, 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 utilised by the client for longer than three months. The client will thus be liable in the event that unfair discrimination against any such employee is established. However a TES that commits an act of unfair discrimination on the instructions of the client will nevertheless be jointly and severally liable.
It has been suggested that labour legislation has not impeded the growth of labour broking, and that the 1983 amendment probably encouraged its growth. The only legislative provision that seem to have in any way impeded this growth relate to a general tightening of provisions relating to the taxation of labour brokers.

4.4.1. Contractual Arrangements

The operation of a TES usually involves a tripartite relationship between the TES and client, and the TES and a particular employee. The principle agreement entered into between the TES and the client usually provides for a series of indemnities from the TES to the client in respect of various issues, including those areas in which the client would be jointly and severally liable.

Experience has shown that the most common area for dispute is one in which employees frequently seek relief against a TES client erroneously. This often has its roots in either a misunderstanding of the nature of the relationship or, alternatively, a desire for some type of employment permanency with the client rather than with the TES. There should be no need for such disputes if TES’ have entered into substantial contracts with their employees, in which the nature of the relationship is spelt out.

An additional factor to be borne in mind is that the provisions governing TES do not apply to independent contractors, and in a recent Labour Appeal Court decision, *LAD Brokers (Pty) Limited v Robert Mandla*, in which a United Kingdom based company, Weatherford UK Ltd, with no ties in South Africa sought the services of two employees to work on an off-shore drill platform located off Cape Town. It accordingly employed the employees through a labour broker,
who facilitated the employment and the payment of the salaries, thereafter rendering monthly invoices to Weatherford as part of its fee.

The employees entered into contracts with the broker entitled “Independent Contractor-Contracting Agreement”. The employees worked on the drilling rig under the control of Weatherford until such time as Weatherford gave notice to the employees, terminating the agreement. One of the employees instituted action against the labour broker.

At the Labour Court, the court a quo, and subsequently at the Labour Appeal Court, the broker attempted to argue that the employee was an independent contractor. The court looked at the circumstances and found that the broker was the employer and that the employee was not an independent contractor. The court made an interesting finding in that, in applying the classical tests to establish whom the employer was, it found that Weatherford was the employer; however, the statutory intervention of section 198 of the LRA placed an obligation upon a broker who paid the remuneration to be held as the employer.

In the circumstances, the broker was found to have unfairly dismissed the employee as, clearly, no procedure had been followed.

4.4.2. South African Jurisdiction

The protections provided for an employee working within the Republic of South Africa are carefully legislated. The same cannot be said for employees working outside the jurisdiction of the Republic of South Africa. The Labour Appeal Court has ruled decisively in the Chemical
Workers Industrial Union v Sopelog CC(2) decision, holding that the Labour Relations Act has no extra territorial application and that the location of the workplace was “the factor” in whether the court will have jurisdiction or not. Similar sentiments were raised in De Kok v Executive Outcomes BK &Another(3).

Although this remains the over-riding factor to be taken into consideration, the courts have considered that, in terms of private international law, the law of the country where the performance is to be rendered in terms of the contract, will apply.

The relevance, from a TES perspective, is that employees employed by South African TES’ but who are engaged in an extra-territorial workplace, will have virtually no remedies in South Africa, placing employees in a potentially weak position. A further factor to bear in mind is the attitude of the country in which the employee is being employed to the relationship between the TES and the employee, as certain countries prohibit and regulate the existence and workings of temporary employment services. From a South African perspective, there are certainly serious implications in placing staff outside of South Africa, both for the employee and for the TES itself, with respect to potential breaches.

4.4.3. Is South Africa also advocating for regulation of the labour hire industry?

The debate regarding the existence of labour brokers in the South African economy was, prior to the 2009 general election a political hot potato. Amendments to the legislation dealing with labour brokers should have been promulgated in early 2010 but the discussions around the issue continue. Amendments are anticipated in the latter part of 2010. The debate on the existence of
labour brokers ranges from a total ban on the industry, to regulation and greater policing of existing legislation.

It is typical in the labour broking scenario to find that the employee is dismissed by the labour broker as a result of a demand by the client who no longer wishes to have the employee on the premises.

The decision of Simon Nape v INTCS Corporate Solutions (Pty) Ltd, which came before the Labour Court in March this year, demonstrates facts typical of this type of scenario. After Nape committed an act of misconduct, the client, Nissan (Pty) Ltd, invoking its contractual rights, demanded that the labour broker remove Nape from its premises. Nape was suspended and, after a disciplinary hearing, a final written warning was imposed. Nape agreed to the written warning but Nissan was 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 and involved the retrenchment provision of section 189 of the LRA. After a consultation, Nape was retrenched by the labour broker on the basis that it did not have employment for him. The labour broker contended that it acted lawfully in terms of its contractual arrangement with Nissan.

It is commonly found in labour broking arrangements, that the client can compel the labour broker to remove the employee from the clients’ premises regardless of whether this is justifiable. The court held that: insofar as the contract between the Respondent (labour broker) and its client (Nissan) allowed the client to arbitrarily require the removal of an employee from
its premises, such provision was unlawful and against public policy as it took no account of the right of the employee not to be unfairly dismissed.

Boda AJ in the Nape decision confirmed again that public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Recognizing that the tripartite arrangement has been given the stamp of approval by organized labour, capital and the legislature, the court held that this does not mean that the labour broker and its client are 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 the client. The court also found the judgment of the Namibian Supreme Court in African Personnel Services (Pty) Ltd v Government of the Republic of Namibia instructive.

In this landmark decision, the Namibian Supreme Court recognised the need to monitor potential abuses in the labour broking arrangement without altogether prohibiting it. It was concerned with the constitutionality of prohibiting labour broking arrangements and held that an absolute prohibition was unjustified because of the right to free trade, the needs for flexibility which labour brokers cater for in a dynamic market and the importance of freedom of contract. The court recognised the need to strike a balance between the interests of workers not to be treated as commodities because of the way the relationship is carried out.

In the circumstances, what would happen should a client insist on an employee being removed from the site? The court held that the labour broker is entitled to approach a court to compel the client not to insist upon the removal of the employee where no fair grounds exist. The labour broker is also entitled to resist any attempt by the client to enforce a contractual provision which
is against public policy. Is this the regulation that the organized sector in mind? Probably not.

4.5. Britain and regulating flexible work

In comparison to part-time and fixed-term workers, UK labour law’s progress in embracing temporary agency workers and providing them with the protection they need has been exceptionally slow. Agency workers are paid less than permanent workers. Temporary agency workers exhibit low levels of union membership and their working hours are unpredictable. The NACAB has suggested that the problems faced by temporary agency workers are exacerbated by the poor organisation of some agencies. Concern has also been expressed that agency workers encounter obstacles when they want to leave an agency to take up direct employment or to be supplied with work by another agency.

Agency workers can also be indirectly prevented from changing jobs by the imposition of fees on clients. Agency workers can also be prevented from registering with, or being supplied with work by, another employment agency by the imposition of charges on clients who are supplied a worker by another agency; and hirers can be charged fees to dissuade them from informing temporary workers of openings in other firms.

4.5.1. Leaving Limbo? The employment status of temporary agency workers

Temps are not employed by the clients nor by us. We are not allowed to treat them as self-employed. I do not know what their status is. No one in the agency business knows the answer. They’re in limbo.
Court and tribunal decisions on the status of temporary agency workers in the UK have excluded these workers from the protection of some of the most significant statutory rights by failing to recognise them as party to contracts of employment. Temporary agency workers were initially dismissed as working under contracts sui generis by the Queen’s Bench Divisional Court in its 1970 decision in Construction Industry Training Board v Labour Force Ltd, in a judgment that exhibited discomfort with the trilateral configuration of their working relationships. In the decision of the Employment Appeal Tribunal in Wickens v Champion Employment, these workers were assumed to be working under either a contract of service or a contract for services with their agency, although in line with the contemporary approach to casual work, the tribunal looked for ‘mutuality of obligation’ between the parties to an employment contract, in this context in the form of continuing obligations that agency workers would be offered assignments and accept those offered to them. Finding these obligations to be absent, it refused to recognise them as employees.

4.5.2. Statutory provisions providing for regulation of temporary agency work

Employment agencies and employment business in the UK are regulated under the Employment Agencies Act 1973, as amended and regulations made under this Act. The Conduct of Employment Agencies and Employment Business Regulations 2003 which came into force in April 2004 have recently been amended by the Conduct of Employment and Business (Amendment) Regulations 2007 (SI 3575). The regulations set certain basic standards that the recruitment industry must meet.
United Kingdom agency worker law refers to the law which regulates people's work through employment agencies in the United Kingdom. As a result of judge made law and absence of statutory protection, agency workers are less likely than permanent staff to be adequately paid, have reasonable notice before dismissal, and have access to important standards under the Employment Rights Act 1996.

For most of the 20th century, employment agencies were quasi-legal entities in international law. The International Labour Organisation in many Conventions called on member states to abolish them. However the UK never signed up. The major piece of legislation which regulates agency practices is the Employment Agencies Act 1973, though it was slimmed considerably by the Deregulation and Contracting Out Act 1994. This abolished licenses, so agencies operate without oversight, except for a small inspectorate and occasional court cases. Parliament also enacted the Gangmasters (Licensing) Act 2004, requiring agencies in the agricultural, shellfish and food packing sectors to be licensed.

In January 2010, the Government passed The Agency Worker Regulations 2010 (SI 2010/93) which guarantee, at least, equal pay and working time rights when compared what a direct worker would be paid. This is designed to implement the EU Agency Workers Directive, which is the first transnational legal measure to ensure agency workers are treated equally. The Directive was the culmination of initial resistance by the Government under Tony Blair, and a final surge of Parliamentary support for a Temporary and Agency Workers (Equal Treatment) Bill. The Regulations and the Directive are the third pillar of law, along with the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 to protect atypical workers.
The Employment Agencies Act 1973 regulates the conduct of agencies operating in the UK. It prohibits most agencies charging upfront fees, makes it an offence to put out misleading advertising for jobs which do not exist, sets standards for assessing an employee's experience, and more. The 1973 Act was amended by the Conservative government through the Deregulation and Contracting Out Act 1994, ostensibly to increase efficiency. It abolished the system of agency licensing, so that agencies can operate freely, unless inspectors find violations and closes them down.

Supporting the Act are The Conduct of Employment Agencies and Employment Businesses Regulations 2003. These regulations restrict agencies from:

- selling other services,
- sending workers to employers as strike breakers,
- sharing the agency worker's personal details,
- advertising jobs which do not exist,
- withholding pay from workers regardless of whether they have timesheets,
- charging any fees directly to a worker for their work,
- requiring agencies to document the health and safety standards of employers they send workers to,
- requiring agencies to give a written statement of the pay and hours they will have, and state their contractual status.

In reality these requirements are not enforced, because there are minimal resources devoted to oversight. Regulation enforcement relies on individual workers bringing claims, and these claims are simply non-existent. There is no reported case of an agency worker claiming a breach of regulations. The Gangmasters (Licensing) Act 2004 covers the most vulnerable workers in a more comprehensive way. It was introduced in the wake of the 2004 Morecambe Bay cockling disaster. It requires all agencies (commonly known as "gangmasters") which provide labour in the agricultural, shell fishing and food packaging sectors to operate under a license.
4.5.3. New enforcement powers in the Employment Act 2008

The new enforcement provisions in the Employment Act 2008 are part of a two-pronged approach to vulnerable workers. Sections 8-14 deal with enforcement of minimum wages and sections 15-17 make provision for the enforcement of offences under the EAA. Section 18 is a new provision on information sharing across enforcement agencies. The Act only addresses enforcement and penalties. It does not attempt to address the substantive rights of temporary agency workers. These issues are dealt with in the Directive on Temporary Agency Work, which was approved by the European Parliament recently after the Council’s Common Position was adopted in June 2008. The Directive must be implemented in national law within three years of its entry into force.

Section 15 of the Act provides that all existing offences under the EAA should be triable on indictment. The result of this is that unlimited fines may be imposed where offences are tried on indictment. The main offences that are triable either way are failure to comply with a prohibition order, receiving fees for providing work services and failure to comply with any standards in the Conduct of Employment Agencies and Employment Business Regulations (2003). Section 16 strengthens the powers of inspection of EASI under section 9 EAA. The new powers are designed to prevent obstructive tactics by agency owners, by enabling inspectors to require the production of information and records at a specific time and place.

A new clause was added to the Employment Bill by the Government at Committee stage, on information sharing between different enforcement agencies. The Vulnerable Worker
Enforcement Forum had highlighted the need for closer collaboration between the enforcement bodies and pressed for such a change. Currently there are legal barriers to information sharing once an inspection has started. Section 18 of the Act attempts to close this gap by allowing communications between the HH Revenue and Customs, the minimum wage inspectorate and EASI after investigations have begun.

In effect, the UK operates two different enforcement models for employment agencies, allowing the primary regulator for all labour providers, EASI, to operate on a markedly less stringent basis than the sector-specific Gangmasters License Act. Section 27 of the Gangmasters (Licensing) Act dis-applies the provisions of the EAA to any employment agency or employment business that qualifies as a ‘gangmaster’ and requires a license under the 2004 Act, recognizing that the stronger regime must apply where an employment agency is ‘acting as a gangmaster’. The licensing model under the Gangmasters (Licensing) Act exemplifies a stronger enforcement policy and a more rigorous compliance regime than applies to employment agencies across the rest of the economy: it covers a range of standards designed specifically to prevent worker abuse and exploitation backed up with a stronger range of sanctions.

4.5.4. The UK and Case Law

In recent times, case law has shown that an implied contract is virtually impossible to prove. Temporary workers are left with no one to turn to – neither agency nor the end user – as guarantors of basic employment rights.
In the case of *James v London Borough of Greenwich*, the claimant was an agency worker who had worked for the defendant local authority for three years. The claimant was absent due to sickness and replaced by a different agency worker. The claimant was not found to be an employee of the local authority and therefore was not entitled to statutory protection from unfair dismissal. The claimant could not sue the employment agency or the end user.

In his postscript to the judgment in *James v London Borough of Greenwich*, Lord Justice Mummery commented on:

“a significant move in the direction of the casualisation of labour and the growth of a two tier workforce, one tier enjoying significant statutory protection, the other tier in a legal no man’s land, being neither employed nor self-employed, vulnerable but enjoying little or non protection”.

He confirmed that only on the ground of necessity can an employment tribunal imply a contract of employment between an agency worker and the end user of his or her services. The Court of Appeal made it clear that it is not for courts or tribunals to extend employment protection rights to agency workers and that further developments will need to come from the Government. How best can government give employment protection rights to temporary agency workers other than by regulating the industry?

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Case law in the UK and Labour Court rulings in Ireland show that the question is more complex. This was illustrated in a case determined by the Labour Court in January 2004 concerning a registered general nurse who was recruited via an employment agency to work part-time with Diageo Global Supply in Dublin. The nurse provided cover for other nurses during sick leave, absences and holidays, and was called into work as she was required. Her union claimed that Diageo was in breach of the Protection of Employees (Part-Time Work) Act, 2001 by treating the claimant in an unfair manner when she was selected for a reduction to her hours of work and a change in her pattern of attendance, because of her part-time status.

Diageo maintained that the claimant was not an employee of the company, but of the agency, because the agency paid the nurse’s wages and the definition of ‘employer’ in Section 3 of the Act includes reference to the employer being the person ‘liable to pay the wages’. It asserted that the only contract that existed was that between the company and the agency. The claim of unfair treatment should rest, therefore, with the agency. The nurse contended that she had never entered into any contractual arrangements with the agency and that it had merely acted as the paying agent for Diageo. She further contended that she worked under the direction and control of Diageo and was, therefore, its employee. The Court concluded its investigation by concurring with the nurse.

Confusion as to who is the employer does not arise in the two-way employment relationship that exists in the case of a directly employed worker. Temporary agency working, on the other hand, involves three parties: worker, agency and user company. This relationship is based on two contracts – a business contract between the agency and the user company, and a contract of employment with the worker. The three-way relationship is a significant departure from the two-
way relationship: the contracts involved clearly need more regulation if only to avoid confusion.

4.6. Benefits of a properly regulated labour hire industry

If properly regulated within the ambit of the Constitution and Convention No. 181, agency work would typically be temporary in nature; pose no real threat to standard employment relationships or unionisation and greatly contribute to flexibility in the labour market. It will enhance opportunities for the transition from education to work by workers entering the market for the first time and facilitate the shift from agency work to full-time employment. By enlisting as an agency worker with more than one agency service provider, those who by reason of their unemployment are for economic reasons constrained to find temporary work until they secure permanent employment elsewhere, improve their chances of earning an income in the interim.

On the other hand, those, who by choice prefer the more flexible working arrangements offered by agency work also accept that the “no work, no pay” principle will apply and that they may be put on or off duty by the agency service provider – in much the same way as they may decide that they are available for a particular placement with an agency client or not. All these options are not available under the prohibition.

4.7. The Labour Hire Bill

Following the Supreme Court’s judgment, a new draft bill on labour hire that sought to give the minister of labour the power to regulate labour hire as he sees fit was contemplated. The bill, if signed into law, will replace section 128 of the Labour Act, 2007. The Labour Commissioner,
Bro-Matthew Shinguadja stated that “the new draft bill will not amend but replace the whole of section 128.”

The said bill advocated for equal treatment of labour hire workers and permanent employees, be it in terms of wages or benefits. Furthermore, the bill advocated for labour hire workers to belong to trade unions of their choice. If there is a medical scheme for employees, people hired through labour hire companies should also belong to such a scheme. Moreover, labour hire employees under the bill would have been permitted to make claims against both the user and labour hire companies. If a labour hire worker was to be dismissed unfairly by a labour hire company, such an employee can bring both the labour hire company and the user company before the court to explain what happened.

However, before the bill could become law, a clause on regulating labour hire companies was amended to such effect that labour hire companies will become illegal from the moment the new legislation is published in the Government Gazette. Among others, it is stipulated that “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.” The difference between section 128 of the Labour Act, 2007 and the proposed labour hire bill lies in the fact that the clause does not affect job agencies, because they offer a service to match job seekers with employers without the agency becoming “a party to the employment relationship that may arise” from the match making.

The proposed labour hire bill banning labour hire in actual fact does not solve anything if one were to look at the Supreme Court judgment in the APS case because the said bill just like section 128 of the Labour Act, 2007 is in conflict with Article 21(1)(j) of the Constitution.
Furthermore, outlawing labour hire firms totally is a regrettable infringement on the rights of those companies who are in compliance with decent labour practices. So are we not back to square one where labour hire firms will approach the courts to safeguard their rights?

4.8. CONCLUSION

The Supreme Court of Appeal was correct in its decision. The court followed the international standard that does not place an outright ban on labour broking. Although Namibia has its own history in respect of labour hire, it cannot escape the fact that it’s a member of the global market. Furthermore the distinction between labour hire as it was then and as it is now was not fully appreciated by Members of Parliament when they decided to ban labour hire. The SCA also interpreted the Constitution correctly by protecting the right to free economic activity. The court recognised that the only method of protecting workers placed by labour brokers is not limited to the complete banning of labour broking. The option of the protection of workers through the regulation of the labour broking industry remains viable. What the SCA has in effect done, is to endeavor to strike a balance between the right to freedom of economic activity and the protection of workers rights.
It is important to note, however, that there seemed to be a lack of consultation on the part of Government across the board prior to the drafting of legislation, such legislation should have as its end goal the strict regulation of a practice that is wide open to exploitation of workers unless it is properly monitored and administered. From my research I could not come across a democratic society where agency work is prohibited in *toto*.

The options open to Parliament to try and achieve a complete ban of labour hire is (1) amend the Constitution in such a manner so as to criminalise labour hire. However, an amendment in this regard will be difficult if not impossible to attain because Article 21(1)(j) which can be said to protect labour hire forms part of Chapter 3 of the Constitution and in terms of Article 131 an amendment of rights contained in chapter 3 is not permissible (2) make use of Article 81 of the Constitution and petition for a reversal of the Supreme Court’s ruling. Article 81 must be read in conjunction with Article 138(3)(b), the said article confers upon the Supreme Court “jurisdiction to hear and determine matters referred to it for a decision by the Attorney-General.”

A dual strategy of strict regulations and good labour laws coupled with effective unionisation strategies seem to be the only immediate solution to the burning issues of abuse and exploitation that casual workers at labour hire companies are facing.

In South Africa labour broking is currently allowed, and regulated in a limited sense, by the Labour Relations Act. It has been suggested that South African policymakers follow the example set by Namibia and regulate the labour hire industry rigidly as opposed to placing a blanket prohibition on labour hire. Most recently parliament’s labour committee has adopted a toned-down report on labour broking, retreating from initial demands by Labour Minister Memathisi
Mdladlana and committee chairwoman Lumka Yengeni that it be banned outright. Instead the committee resolved that only abusive practices be prohibited.

Also to be prohibited, the committee report recommended that where there was a different pay for the same work, and those contracts where the definition of the employer and workplace was not clear. The report recommended that the department redraft section 198 of the LRA “as it brings confusion to the employment relationship”, and examine all labour legislation to ensure that abusive practices in relation to labour broking be addressed.

Namibia when coming up with regulations should look at different jurisdictions that already have regulations in place. The exercise of drafting the regulations should not be premised on a copy and pasting basis but rather focused on extracting regulations that are unique to the Namibian society and in particular labour hire workers.

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