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THE HISTORY OF LABOUR HIRE IN NAMIBIA: A LESSON FOR SOUTH AFRICA

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1 Introduction

Since the 1990s labour hire has increased rapidly in Namibia, without being regulated.[1] From 2007, however, labour hire was banned by the Namibian Government, up to the point in late 2008 where the Namibian Supreme Court case of *Africa Personnel Services v Government of the Republic of Namibia*[2] once again focused the attention on this form of employment. One of the important aspects traversed was the history of labour hire, then known as the contract labour system, and the reasons why it is feared. This history greatly influenced the decision of the Namibian Government to ban labour hire in 2007. As will be seen in the discussion below, the labour hire disposition as it was at the time left the particular type of employee vulnerable and, sadly, led to exploitation. In 2009 the Namibian Government reinstated labour hire but regrettably did so without simultaneously promulgating new legislation in order to regulate the situation. Consequently the precarious situation of contract labour employees prevailed.

The main aim of this paper is to describe the indignities of the past occasioned by the former contract labour system, in order to appreciate the negative reaction it evokes today. The protest march in March 2012 organised by COSATU, one of South Africa's leading labour federations, is a prime example of such negative reactions and shows a growing uneasiness towards the labour broking system in South Africa as well. After setting out the meaning of labour hire, this paper gives a brief

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1 Klerck 2005 *SARS* 273; Klerck *Fractured Solidarities* 188; Jauch *Namibia Bans Labour Hire* 1; Jauch *Confronting Outsourcing* 1.

2 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS).

overview of labour hire in Namibia. Thereafter the circumstances as they were in the 1900s are addressed, after which the new Namibian labour legislation is briefly analysed. A brief critical discussion regarding the current South African position follows shortly thereafter.

A conclusion will then be reached. It is submitted that the South African Government should take note of the history of labour hire in Namibia, and should appreciate the risks involved when there is a lack of regulation of labour brokers. Both the previous and current situations in Namibia, as will be indicated below, should serve as a lesson to the South African Government, which should follow the Namibian Government's example by passing the new amended legislation as soon as possible to prevent any further disadvantageous treatment of employees associated with labour brokers.[3]

2 What is "labour hire"?

Before the historical developments of labour hire are discussed, it is necessary to explain what the concept "labour hire" entails. It is a form of subcontracting, which means that certain services are obtained from an outside supplier. The International Labour Organisation (ILO)[4] distinguishes between two types of subcontracting, namely job contracting and labour-only contracting.[5] In the case of job contracting the contractor offers certain services or equipment, while only labour is provided in the case of labour-only contracting. The characteristics of labour hire in Namibia fit within the latter category, where only labour is provided, or rather *hired out*, by the agency to the client.[6]

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3 Although amendments to the current South African labour legislation, specifically those acts mentioning labour brokers, have been presented to Parliament from early 2012, none have been finalised or come into force yet.

4 The ILO is a global organisation committed to protecting the rights of employees and employers across the globe by way of conventions and recommendations. It regulates a vast variety of labour aspects. Countries who are members of the ILO can ratify these conventions, thereby accepting the moral obligation to apply the specific provisions in their own legislation. The ILO is responsible for labour uniformity between countries.

5 ILO Date unknown http://bit.ly/11dIp8w.

6 Jauch *Labour Hire in Namibia* 1; Jauch *Namibia Bans Labour Hire* 1; Jauch *Confronting Outsourcing* 1; LaRRI *Playing the Globalisation Game* 82.

It is generally accepted that labour hire in Namibia functions in a way that completely deviates from the standard employment relationship Namibian citizens are familiar with. The reason for this is that a standard employment relationship is understood as a two-party relationship consisting of the employer and the employee,[7] while in most countries three parties can be distinguished in the case of labour hire, namely the agency (which is considered/deemed the employer),[8] the client, and finally the (temporary) employee.[9] The client would approach the agency when he or she has a short-term project that needs to be completed or when he or she is temporarily short of staff. Under circumstances like these the agency would *lease* an employee for that limited duration.[10] The agency would then pay the temporary employee for the duration of the contract with the client. As soon as the end of the term arrives, as agreed upon by the parties, the contract between the client and the labour broker ends by operation of law.[11] In practice employees are, however, often placed with clients for extended or even indefinite periods of time.

The agency is responsible for the remuneration of the temporary employee and the placement of an appropriate employee within a specific client's service. In contrast the client incurs little responsibility towards the employee,[12] and is not charged with

7 Klerck 2003 *SAJLR* 85-86.

8 Section 126(2) *Namibian Labour Act*, 2004; Klerck 2005 *SARS* 270; Klerck *Fractured Solidarities* 183; LaRRI *Labour Hire in Namibia* 8; Klerck 2009 *JCAS* 93. Although the agency is considered to be the employer in countries such as South Africa and England, it is merely a third party in the new Namibian Labour Act, *Labour Amendment Act* 2 of 2012. According to this Act the client is the official employer.

9 Jauch *Labour Hire in Namibia* 2. The agency does not provide the client with specialised services, but merely labour where needed.

10 LaRRI *Labour Hire in Namibia* 7; Jauch *Namibia Bans Labour Hire* 1; Mwilima *Gender and Labour Market Liberalisation* 10; LaRRI *Playing the Globalisation Game* 82. Some workers might provide services to one specific client for years at a time, but due to the nature of their employment, they would still be considered temporary.

11 Jauch *Namibia Bans Labour Hire* 2; Jauch *Confronting Outsourcing* 1; Klerck 2005 *SARS* 270; Klerck *Fractured Solidarities* 183; LaRRI *Labour Hire in Namibia* 7. This termination of the employment contract does not amount to dismissal.

12 The client could be held vicariously liable for the delictual actions of the temporary employee, as was seen in *Midway Two Engineering and Construction Services Bk v Transnet Bpk* 1998 2 All SA 451 (LC). It was also possible that the client could be held liable for damages suffered by the temporary employee during the course of employment. This assumption was premised on s 35 of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993. This section provides that an employer is immune to claims of the employee or dependants of that employee for

any management functions during the course of the contract.[13] As far as the client was concerned he[14] could simply control and enjoy the services of the worker, and only when it was necessary.[15]

However, according to Klerck[16] employees of these agencies found themselves in a lawless situation. This was the case as there was a lack of proper legislation that could pay sufficient attention to such an atypical provision of services. The lack of proper legislation had the effect that these employees were unprotected, which made it possible for employers and clients to exploit their precarious situation.[17] The employees received low wages and had very little job security.[18] Such exploitation and vulnerability of the employees have been a reality since the early 1900s, a time when slavery was still practised in Namibia. It is therefore necessary to consider what the history of labour hire in Namibia entails.

3 A grim history: labour hire revealed

The uncertain circumstances of temporary employees in Namibia today should be understood in its historical context. During the 1900s labour hire was characterised by unfair labour treatment. During this era the contract labour system existed, a form of employment which could be regarded as the true origins of labour hire.[19] It represented a time when racism and discrimination determined one's position in

damages suffered in the form of disability or death of the employee due to an occupational injury or disease. As the client was by law not the true employer, he was therefore not immune.

13 LaRRI *Playing the Globalisation Game* 84, 85; Klerck 2009 *JCAS* 86. Some agencies expect of the temporary employees to provide their own equipment and safety clothing. The agency might then attempt to "negotiate" with the client on behalf of the employees. It is however generally accepted that the agency does not have the power to negotiate with the client. This would be the case since the agency has no control over the work the employee has to perform for the client or the way in which it should be done. This might be to the detriment of the employees, as very few of them have the means to obtain safety clothing (Klerck *Fractured Solidarities* 296).

14 "He" also includes "she".

15 Klerck *Fractured Solidarities* 186, 296.

16 Klerck 2009 *JCAS* 86, 87.

17 For example, strict rules regarding the collective negotiation of the terms and conditions of the temporary employee's employment were absent. It was therefore possible for the employer to unilaterally decide on such terms and conditions. See Klerck 2003 *SAJLR* 77 and Klerck 2009 *JCAS* 94.

18 LaRRI *Labour Hire in Namibia* 7.

19 Jagger *Prohibition of Labour Hire* 2; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 2(1).

society. The Supreme Court in *Africa Personnel Services v Government of the Republic of Namibia*[20] expressed itself on the topic as follows:

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

Indigenous Namibians[21] were subjected to extreme racial discrimination and prejudice over a number of years. Various laws, such as the *Native Administration Proclamation* of 1922, the *Prohibited Areas Proclamation* of 1928, the *Native Passes Proclamation* of 1930 and the *Natives (Urban Areas) Proclamation* of 1951 limited indigenous Namibians' freedom of movement by introducing curfews, removing them from and refusing them entrance to urban areas, and exercising influx-control. These Namibians were expected to carry passes[22] at all times. If they were found outside the permitted area without a pass, or if they did not heed the curfew, they were apprehended without question and, depending on the circumstances, could be criminally charged.[23] If they were found to have been outside of their permitted area for longer than 72 hours, they could also be relieved of all the cash that they had on their person. Legislation such as those mentioned above effectively also made it extremely difficult for indigenous Namibians to find employment.[24]

The only other option these people had was to subject themselves to the contract labour system in search of work. That system was regulated by the South West Africa Native Labour Association (SWANLA). SWANLA arose from the merger between two pre-existing organisations, namely the *Southern Labour Organisation*

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20 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 2(1).

21 Black and coloured citizens of Namibia.

22 Documents indicating the area(s) where the specific individual was allowed to be.

23 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 5(2).

24 Hishongwa *Contract Labour System* 60; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 3(1).

(SLO) and the *Northern Labour Organisation* (NLO). These organisations provided temporary employees to the mines in Namibia from 1925 to 1943 and were considered responsible for the breakdown of traditional Ovambo society.[25] SWANLA is regarded as the body that introduced the first forms of the exploitation of temporary employees, in 1943. It used the desperation and vulnerability of the employees to the advantage of Namibian (then South West African) employers.[26] The organisation made it possible for white employers to employ indigenous Namibians, in which case the employer could use the services of the employee in whichever way was deemed suitable.[27]

In terms of the SWANLA system, potential employees were classified according to their working abilities and health. As soon as they were classified, they were issued tags of sorts which they had to carry around their necks or arms to indicate their classification. Thereafter in terms of labour practices they had to be registered with the authorities and were issued with the necessary passes to enable them to perform work in specified areas. If the employee was registered for casual work, he would have received a badge which had to be attached to his lapel or any other visible place on his clothing. The badge indicated his registration number and the area within which he was employed. Finally, workers would be placed in the employ of the employer who had applied for their services. The employees then signed a contract in terms of which they were paid a minimum wage for the services they rendered for a period that could stretch over several years.[28]

SWANLA frequently provided the temporary employees with transport from the agency to the employer. The government provided the employees with one blanket, one shirt and one pair of shorts. These were the only clothes an employee would receive for the duration of his employment. During these periods employees were limited to the employer's premises, they had to eat what the employer provided and

25 Cooper 1999 *JSAS* 122, 123.
26 Jagger *Prohibition of Labour Hire* 2; Cooper 1999 *JSAS* 121.
27 Cooper 1999 *JSAS* 122.
28 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 5(3). Such services mostly occurred without any leave during the entire period.

they were not allowed to have contact with their families.[29] It was within the employer's discretion to decide how he would punish an employee for any presumed offences or for disregarding the rules.[30]

Disobedience or neglect of duty on the part of the employee could lead to his arrest and imprisonment. The court could determine that when the employee had carried out his sentence he had to return to the employer and complete his duties to the employer's requirements. After such completion the employee had to return to his designated area or risk being arrested again.[31]

The circumstances under which the employees had to live were inhumane. During the times when employees were not placed within the employment of a specific employer they lived in mine camps and were responsible for their own food and firewood. In the event that they used up all of their provisions, the employees had to walk hundreds of kilometres to their places of origin for new supplies.[32] The sleeping facilities in the mine camps were uncomfortable and compact. Ten to fifteen men shared a single room. In this room the beds were mere small hollows formed by four shallow walls. All of their personal belongings had to be stored inside these small hollows, while they still had to attempt to leave some semblance of a sleeping space. The sanitation facilities comprised a number of open toilets in a row in a single room, providing no degree of privacy.[33]

During the earlier years the temporary employees did not have any options when it came to their transportation. They were transported on the back of sheep trucks. After 1972 trains were utilised, but temporary employees were only allowed into the

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29 Employers did not provide accommodation for the employees' families near the workplace. This had the result that temporary employees did not have contact with their loved ones for long periods at a time (Hishongwa *Contract Labour System* 57).

30 Cooper 1999 *JSAS* 122.

31 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 7(4).

32 Hishongwa *Contract Labour System* 58, 64. Employees in mine camps could pay to receive food from the employer. Such meals consisted mostly of sour maize, corn bread and a small piece of meat. The food was disgusting and prepared in very unhygienic circumstances.

33 Hishongwa *Contract Labour System* 61, 62.

third (lowest) class compartments. Security in these compartments was non-existent and the employees had a good chance of being robbed of their belongings.[34]

Despite long working hours the temporary employees were paid extremely low wages and, in spite of the high health risks involved in their jobs, practically no medical care was provided. It frequently happened that the employees' feet and ankles got swollen from the long working hours up to a point where their shoes were too small. Instead of affording the workers sick leave or providing medical treatment, all the employer would do was to provide the employee with bigger shoes. Due to the unhygienic lifestyle of these employees, coupled with the lack of proper nutrition, the risk of serious illness was immense. If an employee fell ill to the extent that he could no longer work, he was simply dismissed and replaced by a healthy employee.[35]

An organisation called the South West Africa People's Organisation (SWAPO) arose in the 1950s and attempted to provide some degree of protection to employees suffering under the inhumane conditions of the contract labour system, and objected to any unreasonable and unfair labour treatment.[36] The area known as Ovamboland at the time (now "Ovambo") and the greater part of Namibia suffered labour unrest from December 1971 until January 1972,[37] during which time some of the most offensive elements of the contract labour system were addressed by regulatory changes, but in 1977 it was completely abolished by the *General Law Amendment Proclamation* of 1977.[38] The reason for taking such drastic measure was the wide-spread feeling of inferiority experienced caused by the contract labour system among the temporary employees.[39]

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34 Hishongwa *Contract Labour System* 61.
35 Hishongwa *Contract Labour System* 66, 71, 72.
36 Cooper 1999 *JSAS* 138.
37 Du Pisané "Beyond the Barracks" 7.
38 *Namibian General Law Amendment Proclamation* AG 5 of 1977.
39 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 7(5).

During the early 1990s the system of the hiring out of employees' services was reinstated, but this time in the form of labour hire. Various labour laws were subsequently introducing an attempt to regulate labour hire, giving rise to its current form.

4 Attempts to regulate labour hire

4.1 Namibian Labour Act of 1992 and proposed guidelines

Namibia's first official Labour Act, the *Namibian Labour Act* of 1992,[40] made no reference to labour hire, thus leaving labour hire to continue unregulated.[41] The first attempt to regulate labour hire in Namibia occurred by way of the *Proposed Guidelines for Labour Hire Employment and Operating Standards* in 2000.[42] According to these guidelines the standard labour law rules as set out in labour law legislation were to have applied to labour hire, but many of the detailed questions regarding labour hire *per se* were not answered.[43] Those guidelines were, however, never implemented.[44] During that same year the Ministry of Labour drafted a series of amended guidelines.[45] Those guidelines proposed that labour hire agencies should register with the Labour Commissioner before commencing their business. They were also required to ensure that their conduct complied with the *Constitution of the Republic of Namibia*, *Labour Act* of 1992, the *Companies Act* of 2004 and other relevant Namibian legislation, thereby ensuring that the rights of employees provided for in these Acts were protected.[46] These guidelines were also never implemented.[47]

40 Hereafter 1992 Act.
41 Jauch *Namibia Bans Labour Hire* 3.
42 Klerck *Fractured Solidarities* 199; Klerck 2009 *JCAS* 95. See para 2.1.
43 Jagger *Prohibition of Labour Hire* 12.
44 LaRRI *Labour Hire in Namibia* 66.
45 LaRRI *Labour Hire in Namibia* 69. Hereafter MoL.
46 Jauch *Labour Hire in Namibia* 12; Klerck *Fractured Solidarities* 199; Klerck 2009 *JCAS* 95; LaRRI *Labour Hire in Namibia* 69.
47 LaRRI *Labour Hire in Namibia* 69.

4.2 Namibian Labour Act of 2004

The successor to the *Namibian Labour Act* of 1992, the *Namibian Labour Act* of 2004,[48] attempted to address the shortcomings of its predecessor. In section 126 of the 2004 Act certain aspects of labour hire were provided for. Amongst others, a much-needed definition of labour hire was formulated. The term used for this was "employment hire services", and the definition read as follows:[49]

> "employment hire services" means any person who, for reward, procures for or provides to a client, individuals who, - (a) render services to, or perform work for, the client; and (b) are remunerated either by the employment hire service, or the client.

The Act paid special attention to the identity of employees in section 126(5)[50] and the proposed employer of these employees in section 126(2).[51] However, in spite of the definition provided by section 126(2), and mainly because the person who paid their salaries was not the person to whom they were accountable, employees were still not certain as to who their true employer was.[52] With regard to their identity as employees, section 126(5) determined that they could be considered as true employees in spite of any interruption in employment. However, if the characteristics of their employment were considered, it seemed they could even have been regarded as independent contractors, which excluded them from all labour law protection. These employees' status therefore still led to limited job security and limited labour rights.[53] The employees were also excluded from certain benefits such

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48 Hereafter 2004 Act.

49 Section 126 *Namibian Labour Act*, 2004.

50 Section 126(5) *Namibian Labour Act*, 2004: "For the purposes of this section an individual must be regarded as an employee even if that individual works for periods which are interrupted by periods when work is not done or work is not made available to the employee."

51 Section 126(2) *Namibian Labour Act*, 2004: "For all purposes of this Act, an individual whose services have been procured for, or provided to, a client by an employment hire service is the employee of that employment hire service, and the employment hire service is that individual's employer."

52 Jauch *Confronting Outsourcing* 2; Jauch *Namibia Bans Labour Hire* 1.

53 Klerck *Fractured Solidarities* 157. The manner in which the standard employment relationship is defined led to the lack of protection of those who did not fit within the scope of a standard employment relationship. Therefore the employees who were not in a full-time continuous employment relationship would have had limited rights.

as maternity leave, sick leave, pension, protection against unfair dismissal, and a minimum notice period.[54]

Unfortunately the 2004 Act never took effect since members of parliament, Namibian employers and trade unions were unable to reach consensus on all aspects of the legislation.[55] Therefore no solutions for labour hire were reached and it remained unregulated.

5 Labour hire banned

The *Namibian Labour Act* of 2007[56] did not attempt to regulate labour hire. Instead the Namibian Government, apparently assuming that the labour hire system was based on the contract labour system of the 1900s, argued that a total ban of labour hire was justified. It accordingly introduced section 128, which provided that "no person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party." Over and above this the introduction of a labour hire business was criminalised through the imposition of a fine and imprisonment to anyone who contravened section 128. The legislature regarded labour hire as a continued exploitation of desperate workers to the employers' advantage.[57] As Klerck argues, there were too many similarities between labour hire and the contract labour system to allow labour hire to continue.[58] The history of labour hire therefore influenced the Namibian Government's decision to ban labour hire in 2007. It informed the social policy choice of the Government and is therefore of some importance.

Modern labour hire touched a sensitive nerve in various societies. It was a constant reminder of the indignities suffered by workers in the past. However, in spite of the negative views held with regard to the existence of modern labour hire, which were coloured by the memories of a grim past, there were objections to the complete ban

54 Klerck *Fractured Solidarities* 157; Jauch *Confronting Outsourcing* 2.
55 Jagger *Prohibition of Labour Hire* 13.
56 Hereafter 2007 Act.
57 Klerck *Fractured Solidarities* 183.
58 Klerck *Fractured Solidarities* 183.

of labour hire. One of these objections triumphed at the court hearing of *Africa Personnel Services v Government of the Republic of Namibia*.[59]

6 Labour hire unbanned

The case of *Africa Personnel Services v Government of the Republic of Namibia*[60] was brought before the courts by Africa Personnel Services[61] in 2009 in its attempt to have the ban on labour hire nullified. Africa Personnel Services argued that the ban infringed on its right to carry on any trade or business of their choice protected, a right protected by section 21(1)(j) of the *Constitution of Republic of Namibia*, 1990.[62]

The respondents opposed Africa Personnel Services' application on three grounds, namely that the right contained in section 21(1)(j) was accorded only to natural persons, therefore the applicant could not claim such a right.[63] Secondly, they argued that, even if the fundamental right in section 21(1)(j) could be accorded to the applicant, section 128 of the *Namibian Labour Act* of 2007 would not limit such a right, because when purposively interpreted, it is clear that the right protects equal opportunity and access in the field of lawful economic activity, not the forms of economic activity themselves.[64] Their final argument was that the limitation to section 21(1)(j) by section 128 was a permissible limitation authorised by section 21(2)[65] of the *Constitution*.[66]

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59 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS).

60 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 2(1).

61 Africa Personnel Services is a labour broker providing employees to clients for various periods of time. These employees would perform work for the client until no longer needed, after which they would return to the labour broker.

62 Hereafter the *Constitution*.

63 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 22(18).

64 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 23(18).

65 This section states that "the fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of

The Court *a quo* dismissed the application with costs. That judgment, however, was not given in support of the opposing arguments, but merely because the Court *a quo* was of the opinion that "labour hire has no legal basis at all in Namibian law, and is therefore unlawful."[67] The court held that no legal right could be accrued by the applicant, Africa Personnel Services, in terms of such an arrangement, and that the applicant could not claim the right protected in section 21 of the *Constitution*.[68]

Africa Personnel Services appealed the judgement, still arguing its fundamental right to carry on any trade or business of its choice. In the Supreme Court the respondents refuted this claim by arguing that labour hire should remain banned, and used its grim history as justification.[69] Africa Personnel Services criticised the respondents'[70] argument and stated that such an argument was no longer relevant as the discrimination and racism of the period before Namibia's independence had been abolished many years ago. The argument was therefore not relevant in modern times, and could especially not be used as ammunition in the battle to keep labour hire banned.[71]

The respondents maintained their original grounds of opposition, once again argued that section 21(1)(j) was applicable only to natural persons, and that Africa Personnel Services could not claim the right protected by it. The Court held that the section provides that the right is accorded to "all persons", and that there is no reason why "all persons" could not also include juristic persons. The respondents' first argument was therefore rejected.

Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence".

66 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 23(18).

67 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 23(19).

68 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 23(19).

69 See para 3 above.

70 The Government of the Republic of Namibia, the Speaker of the National Assembly, the Chairperson of the National Council and the President of the Republic of Namibia.

71 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 75(75).

The respondents further argued that the ban had no effect on the right contained in section 21(1)(j) because this right could be claimed only by legal businesses. Seeing that Africa Personnel Services, they argued, was an illegal business in the light of section 128, section 21(1)(j) will not be applicable. In this regard the Supreme Court criticised the approach of the Court *a quo*, in that it did not question if the limitations of section 21(1)(j) fell within the ambit of section 21(2) of the same act. If this was not the case, the limitation would be unconstitutional. In that instance the economic activity would qualify for the protection offered by section 21(1)(j).[72] Unfortunately the Court *a quo* had focused only on the fact that Africa Personnel Services was *prima facie* an illegal business.

The Supreme Court also indicated that one could not summarily conclude that section 21 was not applicable to a business which was statutorily prohibited. This conclusion, according to the court, could have been reached only if it were determined that the prohibition also fell within the ambit of section 21(2). Consequently the question had to be asked if the said prohibition infringed a fundamental right as protected by the *Constitution*, such as the right protected by section 21(1)(j). If the answer was in the affirmative, it had to be determined if the prohibition unambiguously fell within the ambit of section 21(2). If not, the limitation of the right would be unconstitutional, which in turn would make section 21 applicable to the business in question. The court subsequently held that the prohibition of labour hire did not fall within the ambit of section 21(2), which meant that Africa Personnel Services could claim the right embodied in section 21(1)(j).[73]

Africa Personnel Services bore the onus to prove that section 128 infringed its right in terms of section 21(1)(j). It managed to show that if the prohibition were to be executed it would have to cease operating as a business. According to the Court that

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72 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 53(52).

73 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 53-57.

was sufficient proof of the infringement.[74] It was, however, also necessary to determine if such a limitation could be constitutionally justified. This was only possible if it were to be determined that the limitation met all of the criteria contained in section 21(2).[75] The Court, however, focused on the overarching requirements of "proportionality" and "rationality" with which the criteria referred to above are interrelated. These requirements were implicit in the words 'reasonable', 'necessary' and 'required'. It was therefore necessary to balance all relevant interests and to ascertain proportionality. The reason for the limitation should therefore outweigh the right itself in order for the infringement to be justifiable.[76] The limitation should finally have the purpose of reflecting the objectives set out in the preamble of the *Namibian Labour Act* of 2007.

The Supreme Court made it clear that the ultimate objective of the 2007 *Labour Act* was to provide for fair labour practices and the welfare of Namibian citizens. It was also of the opinion that these objectives reflected those of the Constitution, which are based on decency and morality.[77] The Court subsequently considered whether the ban of labour hire was necessary for the purpose of achieving decency and morality. It indicated that section 128 was so widely formulated that it not only banned labour hire but unreasonably banned all types of atypical employment. This was disproportionate and unreasonable and did not serve any valid purpose.[78] In the light of the aforementioned, as well as the fact that the ILO allows labour hire and merely requires proper regulation, the Court decided that the ban was not necessary to achieve decency and morality.[79] In the court's view it was possible to address the problems caused by labour hire by less drastic means; therefore, on this ground too, the ban was considered to be disproportionate. The limitation therefore did not fall

74 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 62(62).

75 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 65.

76 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 66(67).

77 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 70.

78 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 87-88(88-89).

79 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 87-88(88-89).

within the ambit of section 21(2). The court held that section 128 was so widely formulated that it did not impose a reasonable limitation to the right contained in section 21(1)(j),[80] and accordingly held that section 128 of the 2007 *Labour Act* was unconstitutional, with the effect that Africa Personnel Services prevailed.

After the Supreme Court's judgment, the Ministry of Labour and Social Welfare began been drafting new legislation to regulate labour hire. The Government met with ILO experts and issued position papers considering various options to regulate labour hire.[81] Finally, in April 2012 the Namibian government promulgated a new Labour Act. The *Labour Amendment Act* 2 of 2012 came into force on 1 August 2012. In addition, Part IV of the *Employment Services Act* 8 of 2011 came into force on 1 September 2012. The provisions contained in these Acts will now be briefly discussed.

7 Regulation of labour hire in Namibia

The ban on labour hire in section 128 of the 2007 *Labour Act* was lifted and replaced by an entirely new provision in the 2012 *Labour Act*. The main aim of the new provision is to provide for the protection of the temporary employees of labour brokers, and to grant them the entire scope of employment rights contained in the 2007 *Labour Act*.

One of the most important provisions in section 128 has regard to the identity of the employees' employer. The client is indicated as the "true" employer of the employee.[82] Due to the triangular employment relationship, two authority figures exist: the labour broker placing the employees and the client under whose control the employees are placed. As indicated earlier, this situation had the potential for confusion, as it was not certain to which of these parties would accrue the rights and duties of an employer. To my mind it makes perfect sense to consider the client the

80 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) 90(91).
81 Mbwalala 2012 http://bit.ly/10pW2PY.
82 Section 128(2) *Labour Amendment Act* 2 of 2012.

employer, as it is he who enjoys the labour potential of the employee, and also he who exercises control over the temporary employee's work performance on a daily basis.

The Act also provides that the client can be exempted from this responsibility, but only if all of the parties to the triangular employment relationship agree to this and provided the Minister of Labour is satisfied that no rights of the employee will be placed in jeopardy. This exemption, however, does not exclude the client from being held jointly and severally liable with the labour broker for any contraventions of the Act.[83]

The Act also provides that the employees will be entitled to receive all the rights and benefits of a standard/typical employee.[84] This provision is based on the fact that these employees may no longer be distinguished from the mainstream employees of the client, but should instead be treated equally. These employees may therefore not be placed under a client's service on terms and conditions on the whole less favourable than those of the client's normal employees, who perform work of equal value.[85]

According to the amended legislation, employers are not allowed to use temporary employees in anticipation of or during a strike or lock-out. They are also prohibited from employing temporary employees within six months after large-scale retrenchments were carried out within that particular business.[86] In addition, certain sanctions were put in place for such occasions where one of the abovementioned provisions was contravened. These sanctions are also relevant in situations where the client failed to comply with the requirement not to differentiate between its atypical and permanent employees. These sanctions entail the payment of a fine of N$ 80 000 and/or a maximum of two years imprisonment.[87] Any alleged

83 Sections128(8) en 128(9) *Labour Amendment Act* 2 of 2012.
84 Section 128(3) *Labour Amendment Act* 2 of 2012.
85 Section 128(4) *Labour Amendment Act* 2 of 2012.
86 Section 128(5) *Labour Amendment Act* 2 of 2012.
87 Section 128(7) *Labour Amendment Act* 2 of 2012.

contravention of the provisions contained in section 128 may be referred to the Labour Commissioner for dispute resolution.[88]

In terms of section 128(10) of the 2012 *Labour Act*, the Minister may issue regulations which contain provisions regarding the responsibilities of both the client and the labour broker. Should it at some point be determined that alternative regulation is required, the Minister may address the issue within the separate regulations, without having to go through a new amendment process of the current labour legislation.

While section 128 of the 2012 *Labour Act* essentially provides for the protection of employees involved in a triangular relationship, Part IV of the *Employment Services Act* 8 of 2011 focuses on the regulation of labour brokers as juristic persons *per se*. In terms of this act, a labour broker has to be licensed by the Employment Service Bureau of the Ministry of Labour and Social Welfare before it may conduct official business. All labour brokers are required to be licensed before 28 February 2013.[89]

The Act further provides for the prohibition of labour brokers conducting business for profit. They may therefore not receive any fees from the placement of employees with clients.[90] One of the two very important provisions contained in this Act refers to the duty of the labour broker not to discriminate in the advertisement of positions for placement or in the recruitment or referral of employees.[91] The other pertains to the prohibited placement of employees under the service of a client where such a client has an outstanding compliance order issued by a labour inspector with regard to the assurance that it will not expose the employees to terms and conditions less favourable than those of its standard employees.[92] This Act, like the 2012 *Labour Act*, prohibits the placement of employees for the purposes of performing the work of striking or locked out employees.[93]

88 Section 128(6) *Labour Amendment Act* 2 of 2012.
89 Ngatjizeko 2012 http://bit.ly/Z0xXmX 5.
90 Section 24 *Employment Services Act* 8 of 2011.
91 Section 26(1) *Employment Services Act* 8 of 2011.
92 Section 26(2)(a) *Employment Services Act* 8 of 2011.
93 Section 26(2)(b) *Employment Services Act* 8 of 2011.

To ensure compliance with these provisions, this Act also provides for appropriate sanctions. A party who fails to execute his duties as set out in the Act could be liable to a maximum fine of N$ 20 000 and/or two years imprisonment.[94]

It is therefore clear from the above that great strides have been made by the Namibian government in order to protect employees associated with labour brokers and to regulate labour brokers. The attempt to prevent the resurfacing of past indignities is clear throughout the new legislation. A brief exposition of the South African situation will now follow.

8 A South African perspective

Just as in Namibia, South African labour brokers have also been stirring the labour pot, causing plenty of turmoil as of late. Unlike the Namibian government, however, the South African Government did not place a ban on labour brokers, locally also known as temporary employment services, but did provide for some regulation of it in its current labour legislation. Section 198 of the *Labour Relations Act* 66 of 1995 (LRA) reads:

> 1) In this section, "temporary employment services" means any person who, for reward, procures for or provides to a client other persons—
> (*a*) who render services to, or perform work for, the client; and
> (*b*) who are remunerated by the temporary employment service.

This section also determines in section 198(2) that the labour broker is the employer of the temporary employee, and section 198(4) provides for the joint and several liability of the labour broker and the client for contraventions of a collective agreement concluded with a bargaining council, any provisions of the *Basic Conditions of Employment Act* 75 of 1997 (BCEA), a binding arbitration award or a determination by the *Wage Act*.[95] This is, however, where the regulation stops.

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94 Section 26(3) *Employment Services Act* 8 of 2011.
95 Section 198(2)-(4) *Labour Relations Act* 55 of 1996.

Section 198 of the LRA provides for the absolute basic aspects of labour brokers, and in the meantime employees employed by labour brokers are often differentiated from employees of the client in that they are paid much less, can seldom bargain collectively, and could in some instances be easily replaced. Although it can be argued that employees of labour brokers are entitled to the whole spectrum of employment rights, in spite of the atypical nature of their employment, in reality these employees cannot always effectively exercise these rights and enforcement is particularly problematic in these instances.[96] This would include the rights contained in the BCEA, the rights with regard to fair dismissal and fair labour practices, and finally the rights contained in the *Employment Equity Act* 55 of 1998.

Some of the most common problems these employees experience include the fact that trade unions have difficulty in organising them, as these employees tend not to remain within a specific workplace for very long and the union may not have organisational rights in the workplaces where they are *de facto* employed. The multiple authority figures complicate the endowment of organisational rights to the trade union. The general rule in this regard is that only a true employer can bestow upon a trade union organisational rights which it can exercise within that employer's workplace. The labour broker, being the employer of the temporary employees, does not, however, have the right to grant a trade union various organisational rights to exercise within the client's workplace. Therefore the chances of the recruitment and representation of these employees are slim.

Nothing in law prohibits the labour broker and the client from identifying the temporary employee as an independent contractor, thereby effectively excluding him from all labour legislative protection. By doing this both the labour broker and the client are exempted from complying with any restrictive labour legislation. This places the employees in a very precarious position. This would especially have the effect that the contract of the worker could be terminated without the parties having the obligation to ensure that the termination is substantively and procedurally fair, as it would not be considered a dismissal. The worker, employed as an independent

96 Le Roux 2009 *Contemporary Labour Law* 23.

contractor in this scenario, would also not have the right to claim for unfair dismissal at the Commission for Conciliation, Mediation and Arbitration (CCMA). It must be noted, however, that due to the decision in LAD Brokers v Mandla the court will have regard of the substance of the relationship between the client and the worker to determine whether the worker is an employee of the TES or not.

These employees' job security is tenuous at best. Even if an employee is not an independent contractor, labour brokers and clients can still avoid liability when terminating the employee's contract. This can be achieved by adding a clause in the commercial contract upon which the relationship between the broker and the client is based giving the client the right to request from the labour broker to remove the temporary employee from his service on short notice. In turn the labour broker could add a clause in the employment contract, the basis of the relationship between the broker and the employee, stating that should the client make such a request and the labour broker comply, the employment contract would end automatically (*ex lege* due to an (un)certain event occurring). As there would have been no dismissal in these circumstances, according to the broker and client, no liability would have been accrued by the parties.

This is a controversial issue which has been debated and analysed to a great extent in South African case law. In *April and Workforce Group Holdings t/a The Workforce Group*[97] the Commissioner allowed this clause and determined that, as the employee's contract terminated due to an act of the client, who was not the employer, dismissal had not taken place. The employee's claim for unfair dismissal therefore failed. On the other hand, in recent cases such as *SA Post Office v Mampeule*,[98] *NAPE v INTCS Corporate Solutions*[99] and *Mahlamu v CCMA and others*[100] the courts concluded that clauses such as these could not be tolerated. According to them one cannot contract out of the duty to comply with the provisions

97 *April and Workforce Group Holdings t/a The Workforce Group* 2005 26 ILJ 2224 (CCMA) 2235, 2236.

98 *SA Post Office v Mampeule* 2009 8 BLLR 792 (LC) 803(46). See also *Nkosi v Fidelity Security Services* 2012 4 BALR 432 (CCMA) 436.

99 *NAPE v INTCS Corporate Solutions* 2010 31 ILJ 2120 (LC) 2133.

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

of labour legislation, and can therefore not prevent an employee from exercising his employment rights.

This argument was premised on section 5(2)(b) and section 5(4) of the LRA, determining respectively that no one may prevent an employee from exercising his or her rights as envisaged by labour legislation, and that no contractual provision may negate or limit any provision contained in section 5.

In this respect Commissioner Pretorius said the following in *Mahesu v Red Alert TSS*[101] with regard to the contract in the particular case, which contained a provision as described above:

> … a contract which contravenes the provisions of a statute may be void. In this case … it could be said that this contract of employment "… was termed as it was in order to limit the unfair dismissal protection afforded to employees in terms of the LRA. Hence, the provision in the contract of employment relating to the termination of employment is invalid in terms of section 5 of the LRA".

The multiple authority figures lead to the question of where the true employment relationship is situated, and therefore who would be responsible for which employer duties. Even though the identity of the employer is certain, as provided for by section 198(2), the execution thereof raises some doubts. The most important point that should be raised here is that it seems to be flawed to hold the labour broker accountable as the employer, while the broker is in fact a mere intermediary and has little or no control within the triangular employer relationship.

The current LRA is lacking with regard to these issues. In reaction, trade unions have demanded that there be a complete ban on labour brokering, while employer organisations have been fighting to keep it alive.[102] Trade unions and federations such as Congress of South African Trade Unions (COSATU) and the National Public Service Workers Union (NPSWU) have been calling for a ban on labour brokers so

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101 *Mahesu v Red Alert TSS (Pty) Ltd* 2011 12 BALR 1306 (CCMA) 1311(37).
102 Van Eck 2010 *PELJ* 107, 118.

strongly that COSATU organised a country-wide strike in March 2012 to have their demands heard.[103]

Meanwhile attempts are being made by the National Economic Development Labour Council (NEDLAC) to amend the South African legislation to properly provide for the protection of temporary employees. In December 2010 Nelisiwe Mildred Oliphant, Minister of Labour at that time, published the proposals for amendment bills (relevant to labour brokers) in the Government Gazette for the first time, and expressed the intention to submit these proposals to NEDLAC for consideration.

The proposal contains provisions regarding additional obligations imposed on labour brokers as employers, thereby attempting to provide for better protection to and prevention of exploitation of employees. In addition, the joint and several liability of the authority figures is set out in more explicit terms, attempting to remove any doubt under these circumstances. The proposal also contains a section which considers the client as the employer of the employees under certain circumstances, for example in cases where an employee exceeds a period of six months' placement under the control of a particular client.[104]

The negotiations between the Government and its social partners commenced during January. The proposals have since been heavily debated, and in early 2012 NEDLAC conceded that the social partners reached a deadlock with regard to the question of new labour regulations.[105] The deadlock has been resolved, however, and the Minister of Labour submitted the new amendment bills to the Cabinet Committee during March 2012. Later that same month the Cabinet approved these bills for submission to Parliament. The bills now need to be scrutinised by the Portfolio Committee of Labour. The next step will be to submit these bills to the National Assembly and the National Council of Provinces for adoption.

103 Medley 2012 http://bit.ly/XTBUno.
104 Le Roux *Amendments to the Labour Relations Act* 136-138.
105 SAPA 2012 http://bit.ly/127tyzp.

By July 2012 the bills were still subject to public hearings before the Portfolio Committee. It is apparent that the bills are strongly opposed by businesses throughout South Africa. At time of writing, the bills are still being considered by Parliament. Whether the bills will be passed or not remains to be seen.[106]

9 Conclusion

Labour hire has the advantage of ensuring a degree of flexibility in the Namibian and South African labour market. It nevertheless tends to be a challenging issue, especially as it is contrary to common law principles. And therefore requires the framing of new legislation. It is obviously necessary that the situation be regulated to promote the proper management of the atypical triangular employment relationship.

The history of labour hire in Namibia and the progress made in regulating should be informative and helpful to the South African Government. Banning labour brokers, as many South African trade unions demand, will not necessarily solve the problem, as the case of *Africa Personnel Services v Government of the Republic of Namibia* proves. The possibility exists that the banning of labour brokers in South Africa might also be considered as infringing upon the right to carry on any trade or business of a South African citizen's choice, a right protected by section 22 of the *Constitution of the Republic of South Africa*, 1996. Consequently the possibility also exists that such a ban could be regarded as unconstitutional.

In retrospect the negative connotation attached to labour hire as it currently exists can be appreciated. The opinion of Africa Personnel Services in the case discussed above, that the indignities of the past cannot be used in the current situation, is supported, but the circumstances under which the contract labour system operated cannot be ignored. Care should be taken to prevent a perpetuation of the indignities and inequalities inflicted on workers by the practice of labour hire, and this can be

[106] As the possibility of changes to the bills still exists, it seems presumptuous to discuss the contents of the bills here in detail.

done only by promulgating proper legislation to that effect. The Namibian Government achieved this by adopting new legislation. This step, and in part the legislation itself, should serve as an example to the South African Government. The Namibian Government has addressed the most important issues in their legislation, a fact that should be commended. It is suggested that the social partners consider the *Namibian Labour Amendment Act* 2 of 2012 for any guidance it might be able to provide.

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List of abbreviations

BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of South African Trade Unions
ILO	International Labour Organisations
JCAS	Journal of Contemporary African Studies
JSAS	Journal of Southern African Studies
LaRRI	Labour Resource and Research Institute
LRA	Labour Relations Act
PELJ	Potchefstroom Electronic Law Journal

NEDLAC	National Economic Development Labour Council
NLO	Northern Labour Organisation
NPSWU	National Public Service Workers Union
SAJLR	South African Journal of Labour Relations
SARS	South African Review of Sociology
SLO	Southern Labour Organisation
SWANLA	South West Africa Native Labour Association
SWAPO	South West Africa People's Organisation

THE HISTORY OF LABOUR HIRE IN NAMIBIA: A LESSON FOR SOUTH AFRICA

A Botes*

SUMMARY

Labour hire, the practice of hiring out employees to clients by a labour broker, has been a part of Namibia's history since the early 1900s in the form of the contract labour system. This form of employment was characterized by inhumanity and unfair labour practices. These employees were subjected to harsh working conditions, inhumane living conditions and influx control. The contract labour system continued until 1977, when it was abolished by the *General Law Amendment Proclamation* of 1977. It was during the 1990s that the hiring out of employees returned in the form of labour hire. It continued in this form without being regulated until it was banned in the *Namibian Labour Act* of 2007. In 2009 Africa Personnel Services, Namibia's largest labour broker, brought a case before the court against the Namibian Government in an attempt to have the ban nullified on grounds of unconstitutionality. It argued that the ban infringed on its right to carry on any trade or business of its choice as contained in section 21(1)(j) of the *Constitution of the Republic of Namibia*. APS triumphed. It was not until April 2012 that new legislation was promulgated in order to officially lift the ban and to regulate labour hire in its current form. This new legislation came into force in August 2012. Various very important provisions are contained in the *Labour Amendment Act* 2 of 2012 concerning labour brokers. Part IV of the *Employment Services Act* 8 of 2011, containing provisions for the regulation of labour brokers as juristic persons *per se,* was also introduced and came into force in September 2012. The aim of this note is to serve as a lesson to the South African government as to what could happen if labour brokers continue without legislation properly addressing the

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pitfalls associated with labour brokers. Also, it could serve as an example as to how the employees of a labour broker should be protected. In this regard the history of labour hire and the current strides in Namibia cannot be ignored.

KEYWORDS: Labour hire; Namibia; temporary employees; exploitation of contract labour system; SWANLA; Namibian Labour Act; labour hire banned; regulation of Africa Personnel Services; Labour Amendment Act; Employment Services Act; labour brokers; South Africa; precarious; collective bargaining; triangular employment relationship; duties of employer; true employment relationship; job security; automatic termination; proposed amendments; Labour Relations Act