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Labour Broking in South Africa: Issues, Challenges and Prospects

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ABSTRACT Presently, there is an on-going heated debates on whether to ban or not to ban labour brokering in South Africa. These debates have been reported on the social media.While the two sides in the debates have advanced robust arguments for their views and stance, none of them is against close regulation of the trade. Hence this paper looks at how best to regulate labour brokers business without causing hardships as predicted by the pundits who asserted that if it is banned, it would create huge gap in the employment market and cause an increase in the already high unemployment rate in the country. The paper advocates vehemently for strict regulation coupled with monitoring, evaluation and enforcements of the laws on labour broking, particularly with regard to the treatments of the workers in their workplaces.

INTRODUCTION

Most of the constitutions and other regulations on labour of democratic countries promote decent work for workers (Anker et al. 2003). Decent work and decent conditions of employment are components of sustainable socio-economic development frameworks around the world. Since 1999, the International Labour Organization (ILO) has continually enjoined governments and employers to promote decent work in the workplaces. To this end, Anker et al. (2008) indicate that, "the promotion of decent work has been the ILO's central objective and organizing framework since 1999, when this concept was first introduced and described in terms of opportunity for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity." Kalleberg (2002) points out that labour broking is, *"an aspect of employment relationship that is recognized under the law but seems not to be decent work because of its limitations.The friction has always been on how to pay this workforce a living wage and how the employers will findthe undeniable costs linked to the provision of a social justice and security system that can effectively protect this workforce."* As such, organized labour unions have been fighting the use of labour brokers (temporary employment services (TES) being a third party interference).

Non-standard employment relations such as part-time work, temporary help agency and contract company employment, short term and contingent work, and independent contracting have become prominent ways of organizing work in recent years (Kalleberg 2002).

In South Africa, there have been ensuing heated debates on whether to prohibit and ban labour broking or not. On one hand, the labour unions have been on the vanguard of advancing robust arguments for the banning of temporary employment agencies (labour brokers) on the ground that, "this form of triangulated employment is based purely on commercial greed, and has turned the provision of labour into 'a form of human trafficking' " (Makepeace 2010). On the other hand, the industrial conglomerates operating in the country are of the opinion that labour broking should not be banned but should be allowed to thrive because of the different opportunities it offers (Ross 2009). Such as creation of economic and social growth and development that produce jobs for the people. The government is in the middle of this conflict and uncertainty is ravaging within these debates and it is expected that government will provide leadership by providing necessary political and administrative wills to pass a law banning labour broking. This is said against the backdrop that the laws regulating employment relations do not ban labour broking hence creating a conducive environment for labour brokers to thrive. The

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middle position, currently being taken and advocated by the government and civil society, is to ensure stringent regulation of labour broking. The government has rolled out a policy statement indicating that if an employee has been in the same job for a maximum of 6 months, such employee status should be converted to a permanent job.

Inequality, job insecurity and lack of access to socio-economic goods and services are apparent in the South African society (Standing et al. 1996). There is high unemployment rate and very few opportunities for the previously disadvantaged to get out of the poverty circle because majority of them are unskilled and uneducated (Guliwe 2005). South Africa is now one of the most unequal societies in the world, overtaking Brazil, with an enormous escalation in income inequalities (Bhorat 2004). With the current appalling and unprecedented unemployment rate which stands close to thirty-five percent, unskilled indigent South Africans are desperate and eager to accept any job offer whether temporary in nature or unsecured (Di Paola et al. 2013).

The reality is that, a large percentage of the unemployed people are the previously disadvantaged indigents black majority (Marais 2001). The problem is exacerbated by the role being played by labour brokers who hire blacks as casual workers to work in the white businesses. It has been argued that because the blacks are uneducated and unskilled, majority of them are being hired as casual workers (Nattrass and Seekings 2001). However, Guliwe (2005) indicates that,"concentration of unemployment mostly to the majority of the population (Black Africans) is not among white indicates the long-term racial supremacy and uneven development in SouthAfrica." This is the stack reality confronting the rainbow nation—South Africa—after two decades of a constitutionally democratic government. Due to lack of opportunities and chronic unemployment and poverty, labour brokers prey on the vulnerability of the black job seekers (Barchiesi 2007) and cajole them to take the casual employment with a promise of standard permanent employment if they increase productivity, and maintain peace and tranquillity in the workplace (Ross 2009). This promise however, is rarely fulfilled. This sometimes makes the workers become disillusioned and they resort to violent protests(Di Paola and Pons-Vignon 2013).

It is apparent that for various reasons ranging from lack of respect for labour laws, inhumane and unequal treatments of workers, outrageous and ridiculous wages and modern day slavery have been the justifications for persistent calls by the trade unions to ban and out rightly prohibit labour brokers in South Africa. The courts have also ventured into these debates by emphasizing the need to respect and protect the dignity and human rights of the workers even if they are hired through labour brokers. In the case of Mozart Ice-cream Classic Franchises (Pty) Limited versus Davidoff and Another [2009] 3 SA 78 (C), the court states emphatically that, *"the extent of the oppressive measures in South Africa was not confined to government-individual relations, but equally to individual-individual relations. In its effort to create a new order, our Constitution must have intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavors to restructure the dynamics in a previously racist society."*

Labour brokers and employers are contesting the banning of labour brokers. This is based on the justification that labour brokers play certain key roles in labour market by facilitating employment creation, training workers and assisting businesses to optimize their operational design and take responsibility for acts or omissions of the workers. Till date, these contentions and debates surrounding the banning of labour brokers have not been resolved. Pundits from all the divides that are involved in the debates are standing by their views on what should be done. The government has a responsibility to clarify the issue and come up with a reasonable conclusion rooted in law so as to serve as the basis for sustainable employment law. It is against the backdrop of this, that this paper makes a modest contribution to the debate by exploring the policies and laws pertaining to the issues in order to justify that the laws on labour broking should be improved and strengthened rather than banned in order to promote and protect the labour rights of the workers. The paper accentuates that even if labour brokers are allowed to continue, they must be closely monitored and strictly regulated in order to protect

the rights and dignity of the workers. It will be argued that all rights, entitlements and benefits that an employee is entitled to under the South African law should be made available to labour broker employees.

LEGAL FRAMEWORKS REGULATING LABOUR BROKERS

The South African Constitution of 1996 provides that, "every citizen has the right to choose their trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by law." The constitution, by providing for regulation of trade intends to ensure that trades are conducted in accordance with the law and there will be consequences for failure to comply. Other pieces of legislation have also been put in place specifically against unfair labour practices. With regard to regulation of labour broking, section 198 of the Labour Relations Act 66 of 1995, (LRA), section 82 of the Basic Conditions of Employment Act 75 of 1997 (BCEA), the Skills Development Act 97 of 1998 (SDA) and Compensation for Occupational Injury and Diseases Act 130 of 1993 (COIDA), stipulate how the trade and practice should be regulated.

The need to regulate labour broking becomes imperative considering that *"in South Africa, youth poverty, unemployment, and exclusion from decision-making processes are widespread and intensifying. According to estimates by the International Labour Organization(ILO), more than forty percent of the total unemployed population are currently young people"* (Guliwe 2005). To be removed from the abject poverty circle, workers need secure jobs that can guarantee and address their sustainable socio-economic needs. Currently, there is the Labour Amendment Act to the Labour Relations Act 66 of 1995. The Amendment Act has altered and changed section 98 of the LRA which uses the word 'temporary employment service' and it is now known and called "labour broker." Section 198(1) of the LRA provides that, 'In this section, 'temporary employment service'(TES) means any person who, for reward, procures for or provides to a client other persons,

1. who render services to, or perform work for, the client; and
2. who are remunerated by the temporary employment service.'

Whether it is called 'labour broker or 'temporary employment service' is really rhetorical. The most important thing is the extent to which the practice is being regulated to meet essential components of the rule of law, fair labour practice, equal treatment, socio-economic emancipations and labour rights.

On the other hand, a cursory look at the 2010 proposed labour amendments indicate that the practice should be banned on the grounds that, "all temporary employment should be deemed permanent unless the employer can provide a valid reason why the employment should be for a fixed term" (Botes 2014). If the employer is unable to provide convincing reasons rooted in law and good business practice, then it is deemed that a temporary employee would have to be made permanent. What this section does is to allow for fair labour practice on the part of the employer and the employee. The employee is given ample opportunity to state why temporary employment should be allowed to continue. The overall evidence and reasons advanced, if interrogated and adjudicated, may lead to the acceptance or rejection of the reasons advanced by the employer. This is a way of creating conducive labour environment that considers all issues before a certain decision is taken. It is in the best interest of all the stakeholders and role players.

The work of Gericke (2010) attests to the need to ensure that an employee is not left unprotected as a result of taking a job as a temporary employee in a company and against this backdrop, Gericke (2010) points out that,*"section 198 of the Labour Relations Act (herein after referred to as"LRA") regulates the employment relationship between a worker (the employee), a labour broker (the employer) and a third party (the client). It also regulates the aspect of liability between the temporary employment service and its client on the one hand in relation to the employee/worker on the other hand. It is with regard to the latter aspect that the employee is in a detrimental position as far as the loss of protection against an unfair dismissal as regulated by sections 185 and 186 of the LRA is concerned."*

The work of van Eck (2012) emphasizes on the concern about regulation of labour broker and at the same time pointing out that, *"South Africa is in the process of introducing new policies regarding the regulation of employment*

agencies. The International Labour Organization (ILO) has been concerned about the regulation of employment agencies since 1919. In South Africa, it is evident that workers placed by employment agencies are worse off than their counterparts who are directly employed by the employer."

Literature Review

The literature on this topic is cross/transdisciplinary in nature, and includes research by sociologists, organizations, occupations, labour markets, economics, anthropologists, legal experts and labour law practitioners (Kelleberg 2000). Labour brokers are referred to as those that manage alternative work arrangements, flexible staffing arrangements, a typical work and precarious employment (Evans and Gibb 2009). These labels portray labour brokers as unacceptable standard employment relations because work done should be on a fulltime basis and performed at the employer's place of business under the employers' direction and instructions (Gebretsadike 2009).

The battle of whether labour brokers should be banned or not has led to different interest groups voicing out their opinions via the social media, protests and heated debates at labour conferences and through scholarly writings. The organized trade unions are not relenting in their press for the outright ban of labour brokering. Boetes (2014) points out that, *"trade union opposition to the use of TESs has gradually increased, as trade unions feared that their effectiveness would be impaired by the atypical nature of the triangular employment relationship associated with TESs. This aspect, and the strong belief by many trade unions, such as Congress of South African Trade Unions (COSATU) and National Public Service Workers Union (NPSWU), that the use of TESs places the employees associated with it in an unprotected and exploitative position (due to a lack of efficient regulation thereof), led to trade unions' demanding the total ban of TESs."*

However, van Eck (2012) pointed out that, *"a prohibition of employment agencies would contravene international standards. Even though the ILO convention dealing with employment agencies has not been adopted, it already has an influence on labour relations and laws in Southern Africa. This is the reason why arguments in favour of the banning of employment agencies have been placed on hold for the moment. This is because there are a lot of grey areas to be resolved and more importantly, the international law and standard on labour relations and good practices will have to play a prominent role."* Those who share van Eck (2012) views have argued that intensive competition by industry and manufacturers have created opportunity for labour broking as the industry tends to want to maximize means of production to derive greater profits margins thereby making them more flexible in contracting with their employers. Some have even attributed the reason for the practice to sluggish economic growth that had triggered unemployment which created higher unemployment, hence the economy could not generate enough jobs to absorb and provide fulltime wage employment for all workers. However, unions like COSATU did not subscribe to this sort of argument as they assert that labour brokers are, *"the main drivers of casualization of labour. They perpetuate decreasing working conditions and rights of employees, not creating jobs but "scap labour" and replacing decent permanent jobs with temporary and casual forms of employment"* (Economic Policy in COSATU).

Labour broking, just like many other businesses is profit-driven. Labour brokers strive to do everything humanly possible to stay in business even if it involves abuse of workers' rights by exploiting them and violating their dignity and human rights. In the case of SA Post Office versus Mampeule [2009] 30 ILJ 664 (LC), the court held that, *"the Constitution provides that everyone and not just employees have a right to fair labour practices. Consequently, even though a person may not be regarded by the law as an employee of the client but of the labour broker, the client still has a legal duty to do nothing to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation."*

In South Africa, labour broking is recognized under section 198 of the LRA. It involves a triangular employment arena with three distinct relationships-between employee and broker, employee and client, and broker and client (Benjamin 2010). A lot of criticisms have been levelled against the practice of labour broking and it has sometimes been tagged as drivers of casualization of labour in South Africa. Labour bro-

kers do not see anything wrong with the practice and as a matter of fact have argued that the world is a global village and with the advent of modern day technology, skilled labour can be supplied and deployed on very short notice to perform a certain task for a client. It is against this swift reaction to demand for labour that the proponents have said that labour brokers create jobs and alleviate poverty. However, a lot of people particularly, the labour unions in South Africa have dispelled this assertion by saying labour brokers do not create jobs. In furtherance to this, they have expressed the views that the practice amount to modern day slavery because employees are without full benefit of protections of the law. Some government officials have likened the practice to a, *"form of human trafficking and an extreme form of free market capitalism which reduces workers to commodities that can be traded for profit as if they were vegetables. Labour brokers are anti-trade union because they constantly move workers around from one place to another with no access to union officials with no possibility of stop order deduction for union subscription."*

It is an undisputable fact that, "the evils of apartheid produced gross inequalities based largely on race and produced affluent elites deriving their income, wealth, status and power from a few industrial components" (Standing et al. 1996). To this end and in view of continuous labour oppression and exploitation, therefore, banning of labour broking may be justified based on the policy that supports radical economic transformation including labour which seeks to focus on the need to redistribute wealth in the country. Labour organizations have therefore been clamouring for permanent jobs as opposed to the concept of temporary employments being perpetrated and practiced, as this will accelerate and increase inequality instead of decrease it in the society. Job security and in particular, a permanent job is a way of promoting economic growth, not an impediment to growth as being expressed in some quarters. Consequently, from all indications, "Labour broking has never offered much prospect or reducing substantially the chronic poverty, inequality and unemployment as pundits made us to believe."

There is need for proper and stringent regulation of the trade with an enforceable code of conduct.The government has, over the years, promulgated necessary legislation on labour broking, but the challenge is lack of effective monitoring and enforcement.There is the valid argument by those supporting that law broking, that monitoring and enforcement laws on labour broking will be difficult. However, if the government and regulatory institutions want to take the issue of regulating labour broker seriously, then, there should be robust monitoring and enforcement mechanisms put in place. In this respect, definitely there will be successes recorded in regulation of labour brokers. More importantly, the essence of having employment regulation is to have mechanisms in place to ensure that persons with an employment relationship have access to the protection they are due under the law.

PROTECTION OF EMPLOYEES AND NEED FOR PERMANENT JOBS

Protection of employees from unfair labour practices is necessary for promotion of job security and sustainability in the workplace (Cassim 1984). Generally, the aspiration of any person seeking employment is to get a secured and permanent fulltime job. There are therefore, various processes of laws including the Constitution regulating labour relations. And more importantly, "their immediate effect, as a result of the acceptance of the concept of the unfair labour practice in our industrial legislation is to enable employees to preserve their jobs until statutory conciliation procedures of the LRA have been exhausted" (Cassim 1984). Instances of wilful termination of workers hired by labour brokers abound in South Africa and this is purely unfair labour practices (Bagley 2013).

The concern is that as Standing et al. (2006) indicates,*"the post-apartheid era, South Africa is faced with a lot of a high socio-economic challenges, including poverty, low economic growth, extreme income wage disparities and inequality which do not meet the various standards set by International Organizations. There is also chronically high unemployment caused by low economic growth and labour broking is now exacerbating the problem as this contributes immensely to unemployment and job security."*

Makepeace (2010) asserts that, *"labour brokers involve the externalization of administrative control and responsibility. This creates detached workers or triangular employment relations where a worker establishes connections with several employers such as the temporary help agency, and Contract Company."*

Labour brokers send the workers to clients and have the power to pay the wages, hire and fire the employees (Theron 2005). This practice is increasing at an alarming rate in South Africa and at the moment, it is still legal and unbanned and will continue to be a viable business for those who engage in it.

There is always confusion in resolving who is responsible and liable if a casual worker employed by a labour broker is involved in an accident in the workplace (Belovski 2015). The court had offered a resounding admonishment as expressed in the case of Napeversus INTCS Corporate Solutions (Pty) Ltd (JR617/07) where the labour court held that,*"even though labour brokering arrangements are legally permissible, this does not mean that the labour broker and the client are at liberty to structure their contractual relationship in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client."*

The courts will always protect the workers from abuses and unfair labour practices; however, the challenge is that most cases of unfair treatment of casual workers rarely get reported.

CONCLUSION

There are laws in place for regulating labour broking, however, there is the need for more enforcement of compliance. Concerned parties must take legal and moral responsibilities by ensuring that they comply with the law in order to protect labour rights. Regular monitoring, evaluations and reports on the activities of labour brokers by the government and regulatory labour institutions should be implemented. Employers should be made aware of the laws regulating labour broking, labour law and more importantly, progressive transmission from temporary to permanent-based on skilled acquired is to be encouraged and mandated. Failure to comply should be sanctioned. At all times, the industry must strive to create opportunity for permanent jobs and reduce labour abuse.

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