Employment Agencies under Scrutiny:  
Legislative Reforms under way in South Africa in the New World of Work

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1. Introduction

One of the uncontested consequences of globalisation has been the emergence of new forms of work in South Africa. There has been a change from the traditional Fordist workplace with its full time eight-to-five employees to a situation where employers seek more flexibility to enable them to compete with low costs businesses on an international level. Private and public institutions have in the last 20 to 30 years increasingly employed temporary employees, fixed term employees and independent contractors. Added to these categories, there has been a tremendous growth in the number of employees who are placed by private employment agencies.¹

In South Africa, organised business, the trade union movement and the government are involved in a fierce debate regarding the way forward in extending protection to employees placed by these agencies. Such employees are deemed to be marginalised and are, according to the Congress of SA Trade Unions, not employed in “decent jobs”. Amendments to legislation are on the verge of being introduced to parliament to either abolish, or to strictly regulate, the employment agency industry in South Africa.

The focus of this paper will fall on the following: the international norms established by the ILO in respect of private employment agencies; the existing legislative position in South Africa; and the current adverse effects that the South African regulatory framework is having on the individual and collective positions of this group of marginalised employees. The arguments for and against the abolition, or at the very least, increased regulation of the employment agency industry, will be scrutinised. In the final instance the paper will address the question of whether or not the localised regulation of this industry would be of any benefit to this group of employees, should consumers of goods and services decide rather to import than to absorb increased local production costs associated with such regulation.

2. The ILO, the South African Constitution and the Labour Relations Act

International market policy in respect of private employment agencies has shifted from non-regulation before the first ILO conference in 1919,² to the prohibition and strict regulation thereof, before and after the second world-war,³ and back to a more open, but still regulated, approach to private

¹ Theron “Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship” (2005) 26 ILJ (SA) 618. More than 500 000 employees render services through employment services in South Africa.
² At its first conference in 1919, the ILO recommended that “all practicable measures be taken to abolish” employment agencies which charge fees “as soon as possible”. See the ILO Unemployment Convention No 2 of 1919 and Recommendation No 1.
³ See Article 2(1) of the Fee-Charging Employment Agencies Convention No 34, 1933, in terms of which all “fee-charging employment agencies” should be abolished within 3 years of its adoption. In 1947 the ILO adopted Employment Service Convention No 88 which required ratifying countries to ensure that “the employment service shall consist of a national system of employment offices under the direction of a national authority” (Art. 2).
employment agencies during the era of globalisation. The ILO Conference in 1997 adopted a new Private Employment Agencies Convention,\(^4\) which “recognizes the role which private employment agencies may play” in the labour market. One of the main purposes of this convention is “to allow the operation of private employment agencies as well as the protection of the workers using their services”.\(^5\)

Since the first democratic elections during April 1994, South Africa has adopted a final Constitution of 1996 which protects employee interests as fundamental human rights and the country has rejoined the ILO after years of apartheid. The right to fair labour practices, the right to freedom of association, the right to engage in collective bargaining and the right to strike have all been entrenched in the country’s supreme law. The Labour Relations Act of 66 of 1995 (“LRA”) gives effect to these rights by protecting employees against unfair dismissal, safeguards freedom of association and promotes collective bargaining, grants sufficiently representative trade unions with organisational rights and jealously protects the right to strike.

The LRA regulates the position of persons rendering services through a Temporary Employment Service (“TES’’). The TES is currently deemed to be the employer of such employees even though such persons fall under the control of the client where the employees are placed, form part of that organisation and render services at the premises of the client.

One of the consequences of this triangular relationship is that these employees find it difficult to join trade unions that form part of the permanent workforce of the employer and that play the dominant role in collective bargaining at the workplace. Clients also include flexibility arrangements in their overarching service provider contracts with the TES. This undermines job security in respect of employees who have been placed in this manner, and generally, these TES’s, do not agree to provide their employees with medical and housing benefits as is the case with permanent employees.

In the debate about either banning, or merely introducing significantly stricter regulation of this industry, the Minister of Labour is suggesting that the position of the employer should be redefined in the triangular relationship. The client should be made the employer and all labour related responsibilities should be transferred from the TES to the client. Organised business and the TES industry are arguing that this will: increase labour costs; root out all forms of flexibility; lead to significant job losses; and probably mean the end of the employment agency industry in South Africa.

3. Conclusion

In this contribution it is argued that the debate in South Africa should ideally be guided by international norms and developments. After South Africa’s re-entry to the global market, South Africa has increasingly opened its economy to the in- and outflow of products and services. South Africa has become a member of the global market place and should take account of global trends. Consequently, international trends should be taken into account, rather than simply focussing narrowly on our localised industry, which has so far been insufficiently regulated. The abolition, or the over-regulation of this industry, could ultimately be to the detriment of those employees who are in need of protection. A balanced and informed approach should be adopted to ensure that the fruits of the marginalised employees labour are not merely replaced by importation, should the costs of overregulation become too burdensome.

\(^4\) See Convention 181 and Recommendation 188.
\(^5\) See Article 2(3) of Convention 181.