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

- Consequences of globalization – new forms of work:
  - Temporary employees;
  - Fixed term employees; and
  - Workers placed by employment agencies.

- Since 1998 - ILO Director Juan Somavia gave momentum to “Decent Work” agenda. It is about creating a balance between economic growth and the improvement of social conditions.

- Employment agencies have been on the agenda of the ILO since its inception.
1. **Introduction**

- In SA the social partners agree: workers of employment agencies are worst off. However, there is benefit. They use first appointments as springboard.

- Currently, robust debate in SA. We are on the verge of legislative change. Trade unions (and initially also government) want to ban. Employer organizations want to regulate.

- Focus of paper:
  - International norms established by ILO;
  - Existing legislative framework in SA;
  - Position in neighboring Namibia; and
  - What extent did ILO influence the debate in SA?
International market policy regarding “fee-charging” agencies has evolved.

• *Unemployment Convention 2 of 1919*
  Members must establish free of charge public employment agencies. Private “non-fee charging” agencies must be co-ordinated.

• *Unemployment Recommendation 1 of 1919*
  “Fee-charging” employment agencies should be banned.

• *Fee-Charging Employment Agencies Convention 34 of 1933*
  Fee-charging employment agencies must be banned in 3 months.
2. International Norms Established by the ILO

- *Fee-Charging Employment Agencies Convention 96 of 1949*
  Watered down
  Part II - ban in reasonable time
  Part III - regulate by license and prescribe fee

With globalization in full swing towards end of 1990s

- *Private Employment Agencies Convention 181 of 1997*
  “very different environment in which private employment agencies operate”

Recognise role of agencies - but regulate. Main methods:
freedom of association, collective bargaining.
SA was one of the founding members of ILO with *Treaty of Versailles* in 1919.

SA withdrew in 1964 due to apartheid and rejoined in 1994.

Modern *Constitution* of 1996 – right to:
• freedom of association;
• engage in collective bargaining;
• strike; and
• freedom of occupation, trade and economic activity.

International law “must” and foreign law “may” be considered.

To what extent did the ILO influence the debate in SA?
3. The SA Constitution and the LRA

SA and its neighbors have not signed the Conventions. No public placement agency has been established and fee-charging agencies were not banned.

The Labour Relations Act of 1996 (LRA) regulates “temporary employment services”.

The broker concludes commercial agreement with client, places worker with client, and submits invoice to client with premium.
The LRA establishes a fiction – the agent is the employer.

Two major shortcomings:
• not vicariously liable for unfair dismissal;
• the client and agent remains the dominant collective bargaining parties.

Labour remains a commodity. Trade union not central in bargaining.

This difference in treatment has lead to call for banning. Trade unions argue that it “reduces human dignity of such workers.”
Issue of employment agencies has been considered in Namibia.

Will influence, both countries:
- former colonies;
- members of ILO; and
- modern constitutions during process of transformation.

Namibian Constitution:
- must adhere to policies of ILO;
- freedom of association;
- freedom of discrimination; and
- right to “practice any profession, or carry out any occupation”.

4. The Position in Namibia
Attempts have been made to abolish “labour hire”.

Emotionally charged debates preceded amendments to the *Namibia Labour Act of 2007 (NLA)*.

A legislative ban and criminal sanction introduced in *NLA*. Reminiscent of Conventions 34 and 96.

*African Personnel Services* (SCA) challenged constitutionality of *NLA* based on freedom of trade.
Argued no place for 3	extsuperscript{rd} party in employment relationship. SCA held:

“If contracts of service [had] remained marooned in Roman or common law of pre-modern times, the narrow scope of their application would have been entirely inappropriate to address demands of the modern era”.


Effect, can continue, but Labour Commissioner has already taken steps to regulate.
5. **Conclusion**

Strong possibility that it will influence debate in SA.

ILO concerned with creation of jobs since 1919 and employment agencies always part of debate.

Promote public placement, but concerned about fee-charging.

Evolved, strict ban, regulation to recognition about positive role.

The debate in SA not initially influenced by ILO, but later indirectly when Namibia’s SCA interpreted the Constitution.
5. Conclusion

SA not bound by Namibia, but the case has highlighted the importance of:

- the new world of work;
- the Constitutional right to freedom of trade; and
- ILO conventions.

Predicted SA will introduce stricter regulation, but will take note of economic growth combined with the “Decent Work” agenda.

In all of this, representation by trade unions to safeguard decent conditions of employment will be imperative.