

Labour Broking: A South African Perspective

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There has been a considerable growth of temporary employment services, or labour brokers, as they are more colloquially known, in South Africa over the past five years. In discussing the reasons for such enormous growth with labour brokers and those companies utilising their services, it is evident that there are two main reasons for this growth.

Firstly, there is a perception that the costs of complying with the employment laws are high, as are the costs of the direct administration of employees, and organisations are better served by temporary employment services (TES') who have the infrastructure to manage such compliance.

Secondly, that labour brokers often build up a pool of specialist employees who can be brought into a client organisation and utilised at the highest level of efficiency on short notice.

The common factor between these two reasons being one of cost, as an accepted norm in the TES industry is that the costs of utilising the services of a TES are approximately 10% of what it would cost to directly employ a temporary employee. It would be interesting to compile a report on the difference between employing temporary employees directly, as opposed to through a TES, over a 24 month period. It has been my experience that, on the whole, TES' are generally more efficient as temporary employment remains their core business, whereas in most instances other organisations use temporary employees in pursuance of their core business.

Relevant Legislation

The **Labour Relations Act** ("LRA") makes provision for TES' to lawfully exist and trade, with emphasis on the fact that an employee of a TES will remain an employee of the TES, irrelevant of the employee performing services for a client of a TES.

There is, however, joint and several liability on both the TES and the particular client of the TES in terms of Section 198 of the LRA with respect to contraventions of collective agreements, arbitration awards, the Wage Act or the **Basic Conditions of Employment Act**.

Section 82 of the **Basic Conditions of Employment Act** specifically spells out the ambits of such joint and several liability, which would range from salary shortfalls, overtime disputes, and/or incorrect working hours.

In terms of Section 57 of the **Employment Equity Act**, an interesting situation arises in that, for the purposes of employment equity, a TES employee who provides services for an indefinite duration or a period of three months, is deemed an employee of that particular client and, furthermore, where there has been an act of unfair discrimination, both the TES and the client remain jointly and severally liable.

There are a number of additional obligations on TES' because of the Income Revenue Legislation, which I am not going to deal with in this presentation.

Contractual Arrangements

The operation of a TES usually involves a tripartite relationship between the TES and client, and the TES and a particular employee. Careful examination of the TES industry reveals an administratively intensive industry in which the TES' are extremely particular with employment contract administration as there are clear pitfalls in circumstances where fixed term contracts, for example, are not monitored or permitted to roll for months on end.

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

It is my experience that the most common area for dispute is one in which employees frequently seek relief against a TES client erroneously. This often has its roots in either a misunderstanding of the nature of the relationship or, alternatively, a desire for some type of employment permanency with the client rather than with the TES.

This entails disputes directly against the client being referred in terms of the dispute resolution mechanisms of bargaining councils and the CCMA, necessitating the need for the TES intervention to clarify the situation. There should be no need for such disputes if TES' have entered into substantial contracts with their employees, in which the nature of the relationship is spelt out. Clearly, this is an

obligation incumbent upon the TES.

An additional factor to be borne in mind is that the provisions governing TES' do not apply to independent contractors, and in a recent Labour Appeal Court decision, **LAD Brokers (Pty) Limited v Robert Mandla, Unreported Case No. CA14/00(1)**, in which a United Kingdom-based company, Weatherford UK Ltd ("Weatherford"), with no ties in South Africa sought the services of two employees to work on an off-shore drill platform located off Cape Town. It accordingly employed the employees through a labour broker, who facilitated the employment and the payment of the salaries, thereafter rendering monthly invoices to Weatherford as part of its fee.

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

One of the employees instituted action against the labour broker.

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

In the circumstances, the broker was found to have unfairly dismissed the employee as, clearly, no procedure had been followed. This case is underscored with notions of equity as the nature of the defence created two alternative employers, both denying liability. The court was obliged to seek an equitable result.

South African Jurisdiction

The protections provided for an employee working within the Republic of South Africa are carefully legislated, providing mechanisms for efficient dispute resolutions. This cannot be said for employees working outside the jurisdiction of the Republic of South Africa. In essence, this issue will arise with respect to all companies in similar circumstances, not only TES'.

The Labour Appeal Court has ruled decisively in the **Chemical Workers Industrial Union v Sopelogg CC(2)** decision, holding that the Labour Relations Act has no extra territorial application and that the location of the workplace was "the factor" in determining whether the court will have jurisdiction or not. Similar sentiments were raised in **De Kok v Executive Outcomes BK & Another(3)**.

Although this remains the over-riding factor to be taken into consideration, the courts have considered that, in terms of private international law, the law of the country where the performance is to be rendered in terms of the contract, will apply. This ties to a court's consideration in deciding whether a court would be able to enforce its decision as, if it is not possible or practical for other considerations, there is no purpose in hearing the case as the outcome will be academic at best.

See **Watson v Petra Diamonds Limited, CCMA NC2500(4)**.

The relevance, from a TES perspective, is that employees employed by South African TES' but who are engaged in an extra-territorial workplace, will have virtually no remedies in South Africa, placing employees in a potentially weak position. This weakness, however, is usually balanced at the negotiation stage prior to entering into such employment contract, as employees would demand, quite justifiably, higher remunerative packages.

A further factor to bear in mind is the attitude of the country in which the employee is being employed to the relationship between the TES and the employee, as certain countries prohibit and regulate the existence and workings of temporary employment services.

A broad reading of various jurisdictions indicates that in the United Kingdom, Ireland, the Netherlands and Luxembourg and most southern and central African states, there is a widespread operation of temporary employment services, with fairly low level of regulatory compliance⁵.

Jurisdictions such as Belgium, Spain, Portugal, France and Norway permit the operation of temporary employment contracts, to maximum contract periods under specific conditions such as the replacement of an absent employee, a temporary increase in the company's activities, seasonal work, and work in hospitality industries.

Prior to 1997, temporary employment in Italy was banned, although subsequently, mostly due to pressure from the European Commission, TES' operate under stipulated conditions.

From a South African perspective, there are certainly serious implications in placing staff outside of South Africa, both for the employee and for the TES itself, with respect to potential breaches. I do not intend dealing with the practical implications and problems faced in enforcing contracts outside the South African jurisdiction, but do note that South African TES' do experience various legal and practical problems in placing staff outside of South Africa, none of which are made easier with the relative weakness of the South African Rand against foreign currencies.

The notion and use of TES' is certainly growing in South Africa, and the need to place staff outside of South African jurisdiction will and does continue to be a challenge in the lucrative source of business for TES', which such challenge has been met in joint ventures and even mergers in certain cases taking place with South African TES' and international organisations creating a global presence.

(1) Legal Info Web Site - RSA

(2) Industrial Law Journal (1993) page 144 (Labour Appeal Court)

(3) Industrial Law Journal (1995) page 1615 (Industrial Court)

(4) Legal Info Web Site

(5) Europa Scadplus Web Site

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