Indecent employment

What is to be done about labour broking?

The ANC's election manifesto called for the banning of labour brokers. The call has been hugely supported by unionists. **Jan Theron** explains that labour broking and other forms of externalising labour are complex, which makes him believe that banning labour brokers is not the best way to go.

Robert (not real name) started working for ITR Recruitment as a crew member on a truck in 2000. In 2007 he was employed as a driver. He is now a 'permanent' as he works a full week, as opposed to the temporary workers, who often do not.

Yet there is nothing 'permanent' about what he and the other workers do, delivering products for a local flour and maize mill.

The mill is part of a larger group, Sasko, that owns a variety of food manufacturing plants. Previously the group had transport divisions distributing its products. Then in the 1990s, it introduced owner-driver schemes. In terms of these schemes, drivers were 'converted' to owners of the trucks. Instead of receiving a wage, they were paid per load delivered.

Then in 2002 amendments to labour legislation were adopted. The effect of one of these amendments was that owner-drivers became employees in the law. Sasko clearly wanted to avoid this, so it engaged an outside contractor, Supergroup, to distribute its products.

ITR does not have a contract with the mill. The mill has a contract with Supergroup, and Supergroup has a contract with ITR. ITR is a labour broker. It supplies workers like Robert to Supergroup, which in turn supplies workers to Sasko.

A labour broker is a 'temporary employment service' in terms of the Labour Relations Act (LRA). However this is a misleading term, as the case of Robert shows. For 'temporary' is not defined in the LRA so nothing prevents Robert from being employed on a temporary basis indefinitely.

DEVELOPING A NEW PARADIGM

Outsourcing is a term business people use to describe a business strategy. At its most basic, outsourcing is the farming out of services to a third party. However the list of operations that can be defined as a service is limitless. One writer has described this as the next capitalist frontier because "everything is a service". So, in the case of labour broking, the function of employing workers to operate a business is also a service.

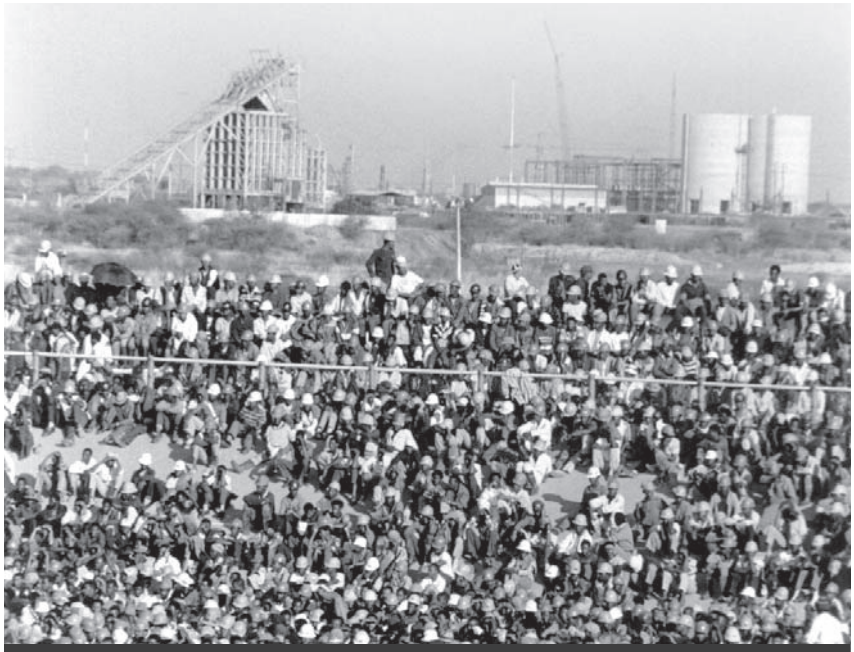
Business has a variety of justifications for the outsourcing strategy, which has its own language. For example, employers often say they need to focus on their "core business", or "core competencies". However what is "core" or not is random, as the case of the owner-drivers shows. The delivery of flour and maize is clearly the core business of the mill.

In reality the object of outsourcing is to lower costs by cutting the costs of labour, especially unskilled labour. So the employment of a delivery crew is the owner-driver's cost. The owner-driver and crew are also not paid when the company does not need their services.

Also owner-driver schemes are not about services being "farmed out", as the above definition suggests. Rather it is employers restructuring the employment relationship. In the case of owner-drivers, the employer does this by converting drivers from employees to 'small business'. In the same way that former managers, supervisors and even shop stewards have been converted into labour brokers.

There is an ideological dimension to all this. Labour broking fragments traditional ideas of the workplace on which the organisation of trade unions was founded.

Beyond the workplace, the strategy of outsourcing divides and fragments the working class. The belief that jobs are being created in small businesses and the services sector, such as with owner-drivers and labour brokers, is capital's way of softening the blow and hiding that sustainable jobs are being destroyed. Government statistics sustain this belief and



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At least 400 000 miners are sub-contracted workers.

disregard that the jobs created are not new.

Organised labour needs to develop its own ideas around employment, with its own terminology, supported by its own data. The object of an alternative model, or paradigm, is to hold business accountable for the consequences of its restructuring of employment, or *externalisation* as it is known.

Externalisation describes the various ways that employers have restructured their operations to employ a minimum 'core' workforce, while the rest of the workforce is provided by service providers and intermediaries.

Although business calls workers employed through brokers and intermediaries 'non-core', of course they are not. It is rather that the core company can control workers through a commercial contract between themselves and a service provider or intermediary.

Another object of an alternative union paradigm is to clarify where the control lies. A new paradigm should deal with the full spectrum of restructuring, including arrangements that are not conventionally seen as 'outsourcing', such as franchising.

A new union paradigm must be a comprehensive strategy to stop externalisation. Unions should avoid a piecemeal response to outsourcing by only banning labour broking.

LAW AND LABOUR BROKING

What the law says shapes how employment is structured. For example, there is no longer an owner-driver scheme at Robert's mill because employers saw the closing of a legal space when the amendments to the LRA came in.

Other employers saw the law differently so owner-driver schemes still exist. Yet other employers have found different legal spaces to use for similar ends. Supergroup, where Robert is placed, is a case in point.

Supergroup employs its own drivers but it has engaged ITR to provide most of the drivers to fulfil its contract to the mill. This means its own workforce is in a vulnerable position. Probably this is why Supergroup is able to pay its own drivers per load, in the same way as the owner-drivers. This may be in violation of the collective agreement that regulates wages and conditions of work in the road transport industry. But Supergroup has so far got away with it. For this reason Robert prefers to work for ITR on contract to Supergroup, rather than be employed by Supergroup itself.

The existence and extent of labour broking in South Africa is a direct result of the legal space the law opened.

Firstly, the legislation regards labour broking as a legitimate activity.

Secondly and importantly, it defines the broker as the employer of the workers it provides to a client. This provides Supergroup with an incentive to use labour brokers. Any claims the workers have are against ITR, rather than Supergroup, or the mill.

Thirdly, the law does not provide an effective means to regulate labour broking.

Labour broking was not always regarded as a legitimate activity in the law. Internationally, it was for many years seen as illegitimate to procure or provide labour to a client for reward. "Labour is not a commodity" was the slogan.

However after the Second World War, groups such as Manpower in the United States and Adecco in Europe asserted the legitimacy of labour broking, and spearheaded a series of legal challenges. As a result, a number of countries recognised the broker (or agency) as the employer of workers they provided to clients.

A landmark in legitimising labour broking was the adoption of the Private Employment Agencies (PEAS) Convention in 1997 by the ILO (International Labour Organisation). It recognised for the first time agencies that provide "services consisting of employing workers with a view to making them available to a third party… which assigns their tasks and supervises the execution of these tasks." Business saw this as the recognition of labour broking, even though the convention proposed measures to address issues that this gave rise to.

REGULATION FROM ABOVE OR BELOW?

If the LRA has encouraged labour broking, then the response should perhaps be to amend the law. Proposals to amend the law have been before Nedlac (National Economic Development Labour

Council) since 1995, but so far no proposed amendments have materialised. During the elections the Minister of Labour called for the banning of labour broking. Broking, he said, amounts to human trafficking and is against the Constitution.

In Namibia (see pg 4) there is a law banning labour hire which the High Court recently upheld. But it is important to distinguish South Africa from Namibia, because the scale of broking in South Africa is much greater and because Namibia had adopted legislation banning broking.

The Namibian High Court's judgement is also, unfortunately, flawed. It relies on outdated ideas of employment from Roman law. It also seems that the court was not aware that the ILO had adopted the PEAs Convention.

It is difficult to see how labour broking can be unconstitutional in South Africa when the laws making it legal were adopted before the new Constitution. Also a decision by government to ban labour broking will certainly be challenged by employers. Such a challenge could take years to resolve.

So the question arises, what to do in the interim? And even if a ban came into being, what would stop employers from achieving the same outcomes by other means?

The case of Robert illustrates the point. If broking is banned, ITR would probably lose its contract with Supergroup, or it would redefine itself as a transport service provider. Either way, it would not disturb arrangements between Supergroup and the mill. It also would not affect relations between the mill and other service providers, such as contract cleaners.

Regulation is mainly the function of the state. If government bans labour broking it would represent a strong form of regulation from above. However regulation also occurs from below when people put pressure on the state and through collective bargaining. The course adopted by Robert's union, Satawu (South African Transport & Allied Workers Union) suggests regulation from below that may, in the long run, be a more effective counter to labour broking and other forms of externalisation.

The course the union has adopted shows an alternative. Firstly Satawu, like a handful of unions, has begun organising workers like Robert who are employed by brokers.

There are many difficulties in doing this not least the insecure position of the workers the union is targeting. But by organising these workers the union is involved in finding solutions without creating divisions between them and permanent 'core' workers.

Secondly, the union is using collective bargaining to regulate labour broking. It is importantly demanding that the workers of brokers are paid the same minimum wage as other workers. In Robert's case, the union has achieved this by extending the agreement to all employers in the industry.

Satawu has also managed to limit the scope of brokers. It has done this through a limitation on employers not to engage more than 30% of their workforce through brokers over a 12 month period.

There is a further limitation. Labour legislation does not define the period of temporary employment. But the Satawu agreement states that a worker who is provided "to one or more clients on a continuous basis for a period in excess of two months shall be deemed to be an ordinary employee…"

Satawu's agreement is not without problems. But, it represents the most ambitious attempt to regulate labour broking through collective bargaining. It is only by holding employers to account for the consequences of using labour brokers, that there is any prospect of checking this form of employment. LB

Robert was a participant at a workshop organised by the International Transport Federation (ITF) on 22-23 January 2009 where he was interviewed.

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Many drivers are supplied to the core business by labour brokers.

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