Muddled labour broker ruling overturned

In 2015 a confusing court judgment ruled that labour brokered workers were employed by both the broker and the client company. **Lynford Dor** tells how on appeal a new judgment states that only the client company is the employer. But this is contested.

On 10 July the Labour Appeal Court (LAC) ruled that after a labour broker worker has worked at a client company for three months they become the employee of the client company only. This overturns the 2015 Labour Court judgment of Acting Judge Brassey which said that after three months brokered workers become employees of both the client company and the labour broker.

This article explores the problems with labour broking and argues that the LAC judgment is a victory for labour broker workers. But to capitalise on this victory workers will have to organise and fight against bosses who are refusing to comply with the judgment. They will have to fight for themselves, because over the past two decades unions have not shown the willingness or capacity to organise them.

ECONOMY AND LABOUR BROKING

During the 1980s the capitalist labour process underwent massive restructuring throughout the world. Employers organised cheap labour through third-party employment arrangements which undermined trade unions globally.

In 1983 the apartheid government introduced provisions in the Labour Relations Act (LRA) which laid the basis for the use of labour broking. The amendments to the LRA in 1995 later ensured that labour broking remained legal post-apartheid.

Since the 1880s the South African capitalist economy has relied on the exploitation of cheap black labour. The growth of a militant workers' movement in the 1970s and 1980s threatened the existence of this system, and played a leading role in bringing down the apartheid regime.

But the ANC's negotiated settlement, which led to democracy in 1994, ensured that high levels of capital accumulation remained. Cheap black labour continued to be the foundation for economic growth. Labour broking became a central means through which to keep labour cheap.

UNIONS & LABOUR BROKING

Cosatu (Congress of South African Trade Unions) leaders, who played a central role in shaping the new LRA, soon recognised the disastrous effects of labour broking. Instead of employers buying labour power directly from workers, they now bought labour from other companies. This allows them to secure cheap labour without having to treat workers as their employees.

As a result, client companies don't have to deal with labour laws as brokers hire, fire and move workers around according to the client's production demands. Brokers sign a contract with the client company to manage its labour. In return the broker, or intermediary, is paid by the company and takes a portion of what should belong to the worker.

Most times the brokered workers don't ever see this contract and so don't know what has been agreed on concerning their conditions or wages. They generally earn poverty wages, have no benefits, no job security, and struggle to access their most basic rights.

Furthermore, broking has led to a fractured workforce. Despite both being exploited, brokered and permanent workers often advance their interests at the expense of one another. This causes deep divisions in the workplace. Within one workplace multiple labour broking companies may operate, creating further divisions.

But possibly most important for the Cosatu leadership was that the explosion of 'precarious' workers threatened to weaken it. The jobs of the permanent workers who they represented became more precarious as bosses turned to cheap brokered labour. Cosatu unions' stop-orders decreased and worker unity collapsed.

Instead of organising labour broker workers, Cosatu by the mid-2000s undertook a top-down campaign calling for labour broking to be banned. It went this route

because its ability to organise and mobilise workers had significantly diminished since its heyday in the 1980s, especially in the private sector. In contrast, its influence in the Tripartite Alliance was on the rise in the build up to the ANC's 2007 Polokwane Conference. This meant that the political arena was the site where Cosatu began to fight most of its battles.

The broader union movement followed its lead in denouncing labour broking but mainly avoided the task of organising brokered workers.

Over 200 labour broker workers marched on the Labour Court, Department of Labour and Road Freight Bargaining Council to deliver a worker memorandum which rejected the Brassey judgment. DOL refused to accept it but the Road Freight secretary received the demands. CWAO

INTERPRETING SECTION 198A

Surprisingly, Cosatu's campaign bore positive results.

In January 2015 new rights for labour broker workers in the LRA came into effect.

Section 198A of the LRA restricted the use of labour broking to work of a genuinely temporary nature. It limited brokered workers contracts to three months, after which a worker became permanently employed by the client company. The worker had to be treated 'not less favourably' than the client company's other permanent workers.

But on 8 September 2015 these new rights were threatened when Assign Services, a labour broker, and Krost, the client company, took a case involving Numsa (National Union of Metalworkers of South Africa) workers on review to the Labour Court. Acting Judge Brassey ruled that the brokered workers were employees of both the labour broker and the client. This became known as the dual employer interpretation and was binding on all labour broker workers in South Africa.

The Casual Workers Advice Office (CWAO) participated in an appeal against the Brassey judgment as a friend of the court with assistance from Lawyers for Human Rights (LHR).

The CWAO had from early 2015 conducted a drive to help labour broker workers secure their new 198A rights (see article 'Casual Workers Advice Office: New forms of worker organisation and power'). This was known as the '198 campaign' and in two years over 5,000 workers became permanent.

But more significant is that through these new laws the CWAO created a platform for thousands of brokered workers to organise across Gauteng. Far from being impossible to organise, as unions long claimed, these workers organised themselves.

Due to its experience of the 198 campaign, the CWAO was well placed to comment on the effects of Brassey's judgment. The CWAO argued in the LAC that Brassey's interpretation was wrong because it did not protect brokered workers in the way the law intended. It argued that the 'dual employer' interpretation continued the confusion and uncertainty for workers.

The LAC judgment confirmed this by stating that the intention of section 198A is to 'free the vulnerable worker from atypical employment by a TES (labour broker)'.

The judgment has cleared up confusion over the meaning of 198A, saying it 'unambiguously supports *the sole employer interpretation*'. This is a victory for brokered workers, who can now look to the client company as their sole employer after three months.

BOSSES REFUSE TO COMPLY

Many employers have refused to comply with the LAC judgment. They argue that the judgment is suspended because Assign Services has asked for leave to appeal to the Constitutional Court. The employer's organisation, the Confederation of Associations in the Private Employment Sector (CAPES), stated: 'The appeal will have the effect of the status quo remaining until the Constitutional Court finally determines the matter.'

In a letter to CAPES the CWAO and LHR warned them to withdraw the statement, which encourages employers to break the law: 'We note with concern the statements made in your press release, in particular your advice to your members that the pending appeal to the Constitutional Court has the result that the status quo remains. This advice is being construed by your members to mean that the decision of Brassey subsists.'

The CWAO went on to insist that the LAC's interpretation of section 198A is now the law and is

binding on all relevant role-players and institutions. Despite this, many employers have followed the advice of CAPES.

Management at Rema Industries in Krugersdorp have refused to meet with workers, saying they do not recognise the LAC judgment as law. It told their workers to continue negotiating with Staffcore, the labour broker.

Similar stories were recorded at companies like Toll Global and Procter & Gamble, where management told workers that the broking companies were still their employers, despite the LAC judgment stating otherwise.

At Shoprite Distribution Centre in Midrand, workers took an interesting approach and insisted that Adfusion make them permanent. Adfusion is a labour broker connected to the Adcorp Group – a massive chain of outsourcing and labour broking companies.

Adfusion management had previously told workers that it was the client company, and not Shoprite. The workers, although believing Shoprite to be the client, approached Adfusion to say that as the client company it must comply with the LAC judgment by making them permanent.

Adfusion management sent them away saying that they must wait for the Constitutional Court to rule on the matter.

Workers at Simba in Isando have made it clear they no longer recognise labour broker AdcorpBlu as their employer. Instead they approached Simba management with a list of demands. One was that Simba make them permanent workers.

In a strange turn of events, Simba, which uses around 400 brokered workers, sent a threatening letter to CWAO, claiming it was misleading workers on the LAC judgment. They complained that CWAO had produced a pamphlet that was 'inflammatory and aggressive in nature' (see next page).

In the letter Simba also expressed its concern over the workers' list of demands, which was 'not signed but it states that it is from the Simba workers'. It also said the LAC judgment was suspended and they had informed the workers that they must still report to AdcorpBlu.

In response to the CAPES press release and reports of non-compliance, another CWAO pamphlet declares, 'The bosses are lying, the LAC judgment is the law' and has been distributed in workplaces around Gauteng.

areas, shopping malls etc with Saftu regalia, enforcing that LAC judgement in every shop, searching for organised and unorganised workplaces and construction sites, farms, call-centres, private learning establishments etc.'

Saftu's commitment represents a welcome departure from the usual union position, including that of some of its affiliates, of ignoring labour broker workers. But it needs to commit to a programme that goes beyond banners and membership forms. The only way to force stubborn bosses to make

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The LAC judgment is only suspended for Assign workers who work at Krost (the two companies involved in the Brassey/LAC case). For all other workers in South Africa the LAC judgment is now the law.

SAFTU AND LABOUR BROKING

Saftu (South African Federation of Trade Unions) intends to take the lead in a campaign to enforce the LAC judgment.

In a 24 August statement, Saftu spokesperson Patrick Craven wrote: 'We will organise teams of recruiters in every town to walk in the streets of Johannesburg and every other town, industrial

concessions is hard and consistent organising.

Saftu may find that it is not only the bosses that stand in the way of organising brokered workers, but also some of its affiliates. It will have to heal shopfloor divides caused by labour broking, and find ways to unite brokered with permanent workers. Although the hope is they will all soon be permanent.

In the meantime, workers need to continue with the process of self-organising in order to, once and for all, get rid of brokered forms of employment. LB

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