Labour Relations Act:

Labour broker workers vulnerable

Labour broking, in which companies gain high profits by paying workers lower wages without benefits and protection, is a reality and a growing South African industry that takes many different forms. The increasing exploitation and trading of labour by mostly 'fly-by-night' brokers is against labour rights enshrined in the Constitution, writes **Jerry Mmanoko Mathekga**.

Too many workers are tossed around in a global world of work. The workplace, consisting of many labour agencies, turned into a casino gambling with workers' livelihood, their security, and their future. Workers are living in a world where the majority do not enjoy their labour rights, and those who do are very few. In South Africa, business sectors such as retail, mining, agriculture, manufacturing and construction are increasingly using labour brokers.

On the other hand, workers' peculiarities can only be understood by going back to the Labour Relations Act (LRA) of 1996 and its weaknesses, and the manner in which business sectors capitalised on the LRA's weaknesses to accumulate capital at the expense of poor workers. The LRA, which legalised labour broking, has further increased inequality in the workplace as more and more workers are turned into labour broking workers without security and benefits. Persistent poverty, unemployment, social exclusion and insecurity are threatening social cohesion.

However, the government delays to amend the LRA, and to regulate or ban the labour broking industry have, to a large extent, not yet benefitted workers. All too often, the government's attempt has been too good in making labour laws flexible. This flexibility has not provided incentives to workers. So far, companies are competing in a race to the bottom, preferring to hire workers via labour brokers who provide cheap labour so as to avoid labour costs and thus make more profit – all on the basis of the higher profit model of dominant economic thinking.

Persistent discrimination continues to lock both men and women in a precarious position. Workers, especially the labour broker workers, continue to suffer from loopholes in the LRA. Most women and men, who are employed via labour broking in the agriculture, mining and retail sectors, are under-valued and under-recognised. Workers who seek to work in a rights-based working environment find their rights ignored and their livelihood jeopardised. This article emphasises the need for South Africa to consider stepping up efforts to protect vulnerable workers.

In South Africa, employment by the labour broker (temporary employment service) is, to a certain extent, regulated by the LRA and the Basic Conditions of Employment Act (BCEA). In terms of section 198 of the LRA, labour broking, now named 'temporary employment service' according to the LRA, refers to any individual(s) who, for remuneration, supply clients with workers who perform given duties for the client, say researchers Van Eck and Ndungu. Labour brokers consistently provide workers to the client in a flexible manner, add Bezuidenhout and Kenny.

In addition, the client pays the labour broker for providing workers and then the broker pays the workers' wages. Furthermore, the LRA spells out that it is the responsibility of both labour broker and client to comply with the BCEA as they are strictly liable, argue Van Eck and Ndungu.

Rob Rees

Marching against e-tolls and labour brokers.

BROKER AS THIRD PARTY

Since the transition to democracy, and instead of a company hiring staff directly, with all the obligations and administration that usually involves protecting employee's rights, existing labour laws allow employers to go to the third party – the labour broker – to source contract workers who will be paid by the broker. Furthermore, an employer may sign the contract with the labour broker saying that the workers will be paid a particular amount, but in most cases, workers do not get the agreed amount but lower. In South Africa, most people are desperate for employment, and they accept any work for much less without any of the benefits involved in permanent employment. When the employer feels like terminating such work, he or she can, by law, do so without compensation.

South Africa, one of the southern African countries with relatively high per capita incomes, has the highest level of inequality in the world, write Godfrey Kanyenze, Timothy Kondo and Jos Martens. Inequality and exploitation in the workplace today are as high, if not worse, than they were under apartheid. Theron argues that one of the primary reasons has to do with externalisation of employment, which is commonly understood to be a response to competitive pressure of economic globalisation. But, practically, is used to maximise profit, and to avoid labour costs. Yet, organised formations of employers also constituted new services, providing an active institutional presence promoting externalisation.

Thus far, the role of agencies providing temporary employment services is probably the most significant example of externalisation. As a result, existing workplaces become home to groups of service providers each having its own workers, serving the core business that did not employ them, says Theron. As it removes the significance of the trade unions within the workplace, it widens the capitalist class base by creating the opportunity for enrichment by a layer of what are in effect intermediaries, typically at the expense of the most vulnerable sectors of the working class, and the non-South Africans.

Externalisation further fragments the working class, as workers in employment and in the organised workplace are divided between those employed by the core business and those employed by service providers. Their benefits and working conditions are not the same and equal, adds Theron. Furthermore, a large portion of formal sector workers earn 'poverty wages' that can hardly enable them to sustain themselves and their families. Wage inequality is a major factor contributing to the region's overall high level of inequality, adds Kanyenze, Kondo and Martens.

Over the past years, the government has issued a number of interesting labour law documents

that protect workers' rights to fair labour practice, to join trade unions, to strike and so forth. But, what is absent is a comprehensive explanation of what constitutes 'fair labour practices,' says Ndungu. And this has been left to subsidiary legislation (BCEA provisions) and interpretation by the courts. On the other hand, the very same laws have actively encouraged labour broking, and this led to problems. The fact that the labour broker is the employer of the placed workers, not client, means that workers cannot insist on their guaranteed constitutional rights.

Additionally, one has to look at the rights to fair labour practice. For example, if a worker wants to claim these rights, he/she has to point out whether an employer was involved in an unfair labour practice. But, the labour broker workers cannot do so against the client because the law does not regard the client(s) as an employer, but he/she cannot do so against labour broker too, who is almost not present at the workplace and does not even supervise what needs to be done. Another factor is that the labour broker is not even involved in everyday work just like the client. Here, the law has made it easy for the clients to do as they wish with the labour broker workers – such as engaging in unfair labour practices.

Dealing with unfair dismissals is another problem caused by the law for workers placed by labour brokers. Interestingly, the law emphasises the security of employment by stating that workers have the right not to be unjustly dismissed, and sections 186-189 of the LRA briefly explain incidences of unfair dismissals such as being unfairly discriminated against on the grounds of race, sex and gender, employers denying employees to resume work after maternity leave and when the employer makes the employment relationship intolerable.

We have to face up to the fact that, whether a dismissal is fair or unfair depends on whether there is an employment relationship between the employer and the employee in the first place. Here, the employee-labour broker employment relationship is weakened by a commercial contract between the labour broker and the client. It is the client who spends almost every day with the placed workers, and who gives day-to-day instructions and supervision to them, found Benjamin and Ndungu.

Furthermore, some of the rights workers are entitled to include: joining and taking part in activities of trade unions, engaging in collective bargaining, and freedom of association. But, in the case of the labour broker (the employer of the placed workers in terms of the LRA) these rights are not promoted. As a result, trade unions find it difficult to organise placed workers at the workplace of the client. Further confusion comes in with section 213 of the LRA which explains a 'workplace as the place(s) where the employees of an employer work,' says Du Toit and others. As persisted by the LRA that labour brokers are employers, it gives clients legal advantage of avoiding trade union movements from recruiting and organising workers at their workplaces (at the workplace of a client).

BROKERS' TAKE ADVANTAGE

It further strengthens their advantage of walking away with any unfair dismissals cases and unfair labour practices charged against them. As a consequence, the Commission for Conciliation, Mediation and Arbitration (CCMA) finds it difficult to deal with disputes in respect of unfair labour practices and dismissals between the client and the labour broker worker. There is no room for workers to mobilise for better working conditions.

The law has created the situation where there are almost five times as much benefit to the clients and labour brokers, and very little for workers. Therefore, due to the loopholes in the law, the rights of workers employed by labour brokers are seriously and automatically compromised. This leaves more and more workers in a vulnerable position, argue the Centre for Rural and Legal Studies.

How could workers or trade unions defend themselves in this situation? The trade union movements are no longer a strong weapon to defend the interests of workers in this situation and at the workplace of a client. Thus the voice of the workers is becoming weaker. As the labour broking increases, the vulnerability of workers grows. In the mean time, the workers' collective bargaining at the workplace is becoming more and more isolated. As a result labour broking, together with loopholes in the LRA, are creating many obstacles for workers.

From the early 2000s, trade unions have attempted to argue in favour of, and pressure for, an amendment to LRA, and banning of labour brokers, but to little avail. The post-apartheid LRA further erodes whatever gains trade unions had on behalf of South African workers. As protests to labour broking escalate, the state is reluctant to amend the LRA, arguing that the amendments will have a negative impact on economic growth, job creation, and will discourage foreign direct investment in South Africa.

When trade unions organise to protect workers, their decisions are affected not only by the political will of their leaders and administrators, but also by complex economic considerations influenced directly or indirectly by the wishes and ideas of major economies and global institutions. This fact makes economic policy and labour law decisions directly dependent on the wishes of major global economic players, but whose preferences directly affect local workers' income,