

Namibia: labour broking ban and challenge

In 2007 Namibia's new labour act criminalised labour hire. Since then this clause has been the subject of legal challenges. **Ntwala Mwilima** traces these judgements and the arguments for and against labour broking.

On 1 December 2008, a Namibian high court ruled in favour of the government's decision to outlaw labour hire, which involves renting, or contracting out workers to client companies. This decision was welcomed by trade unions and the government whilst some employers and Africa Personnel Services who brought the case sought further legal action.

BACKGROUND

In December 2007, the new Labour Act was signed into law by government. Contained in the Act is article 128, which criminalises labour hire practices in Namibia. The article reads as follows: "no person may for reward employ another person with the intention to make that person available to a third party to perform work for the third party".

The law further states that any person found disobeying this section of the law will be fined up to NS80 000 (R80 000) or five years imprisonment or both (article 128 of the Namibian Labour Act of 2007). However, the implementation of article 128 was temporarily suspended pending the outcome of the high court application in November 2008.

DEBATES ON LABOUR HIRE

Whilst the labour movement and

government welcomed the banning of labour hire in Namibia, labour hire companies and some employers (client companies) did not welcome this decision.

Understanding the reaction of the different stakeholders to section 128 requires an understanding of the debates on labour hire in Namibia, which to a larger extent formed part of the arguments used in the court case between Africa Personnel Services (APS) as plaintiff and the government as respondent.

For instance, the Namibia Employers Federation, NEF (to which APS is a member) has often argued for the regulation and control of labour hire rather than the outlawing of labour hire. The employer's federation contends that the flexibility that labour hire practices awards the employers allows them the ability to maximise profits and save unnecessary costs, hence promoting job creation

Also, NEF argues that labour hire is a direct response by employers to the rigidities found in the labour market and labour laws such as minimum wage laws and rights for trade unions. Furthermore, the NEF often pointed out that the main cause of exploitative labour practices was the small unregistered labour hire companies and not the main, large labour broking companies.

On the other hand, large sections of government and the labour movement are against labour broking.

Firstly, they argue that labour hire is a form of modern day slavery and to a larger extent, reminiscent of the South West Africa Native Labour Association (Swanla) that existed under the apartheid regime and Namibia's occupation by South Africa. Under Swanla, labour agencies were set up to provide cheap labour to the farms and mines. The working conditions were highly exploitative.

Secondly, labour and government argue that the practice of labour hire companies is in direct contradiction to Namibian liberation struggle gains and a clear insult to the working class as a whole.

Trade unions also argue that labour hire undermines collective bargaining due to the ambiguity of the employment relationship. Employees don't always know who their employer is because their workplace is not the place of their direct employer. When they have grievances they do not know who to direct them at.

The ambiguous employment relationship allows both the labour hire company and its client to evade their social responsibilities in providing workers with social security benefits.



William Matiala

Labour broking undermines one union, one industry and collective bargaining.

Also, unions have argued that labour hire undermines the principle of one-union, one-industry because labour hire workers move across industries, making organising such workers highly problematic. In addition unions contend that labour hire companies are parasitic, often creaming off 60% of a worker's wage, thus profiteering unreasonably off workers' hard labour.

Based on the above reasons, government and unions have argued that it is an immoral and indecent system that undermines the promotion of decent work and the well-being of Namibian workers.

HIGH COURT HEARING

The court case was finally heard on 7 January 2008 when APS, which is the biggest labour hire company in Namibia, launched a High Court application against the government.

In its application, APS argued that article 128 was a direct infringement on the company's fundamental right to "practice any profession, carry on any occupation, trade or business". On this basis, it challenged the

constitutionality of the government to outlaw labour hire. APS's legal representative put the following two main arguments in support of their application:

- that APS, which employs about two thirds of all labour hire workers is a good employer that follows good labour practices; and
- that the clause in the Labour Act which bans labour hire can also be interpreted as banning other companies dealing with outsourcing, which includes cleaning and security companies.

Government's counsel counter argued:

- What APS and other labour hire companies practiced was reducing human labour to a commodity. This was borne out by one manager's perception of workers, "We order 20 bodies for a month and the broker must make sure that 20 bodies come to work. It does not matter if it is the same people or not". This showed that some companies started perceiving workers as objects that they could order and dispose of when they did not need them.

- Labour hire increases the vulnerability of workers as it exposes the worker to abuse at the hands of their employer and the client company. Chalkson, government's legal counsel, argued that labour hire exposes workers to arbitrary dismissals as "when a company does not like a person sent to them, it can simply call and have that worker replaced".
- There was a strong resemblance between labour hire employment practices characterised by exploitation and that under Swanla.
- Despite the fact that APS was an exemplary employer, government was expected to make laws based on the norms in an industry.

Whilst the legal counsel for APS concentrated on questioning the constitutionality of government's decision and presenting APS as a good employer, government's legal counsel questioned the morality of labour hire, because of the exploitative working conditions under the system.

The mainstay arguments of government were rooted in two main findings of a study conducted by the Labour Resource and Research Institute (LaRRI). The LaRRI study of 2006 had revealed that labour hire promoted exploitation of workers and that the working conditions under labour broking was similar to the contract labour system under Swanla.

Despite it being 19 years after independence, many of Namibia's policy makers, including the founding father, worked under the contract labour system and experienced the hardship and exploitative nature of the system. Therefore, labour hire practices induced strong antipathy from policy makers who had experienced the system first hand.

JUDGEMENT AND APPEAL

After listening to the arguments, three judges made a unanimous decision which supported government's decision to outlaw labour hire. Judge Parker presented the following arguments:

Firstly, the judges agreed with government's legal counsel that labour hire reduced human beings to personal property, thereby turning them into commodities.

Secondly, the judges argued that "the constitutional right to trade is subject to restriction and that not all business or trades are entitled to constitutional protection". For instance, Judge Parker contended that a person who was involved in a trade which involved slavery or child trafficking does not deserve constitutional protection just because their trade "yielded profit or an income". Based on this, he concluded that "labour hire, like slavery or child trafficking has no legal basis in Namibian law".

In addition, Judge Parker questioned the third tier employment relationships under labour hire. He argued that Namibia's contract of employment law only recognises the traditional employment relationship between an employer and employee as compared to the employment relationship under labour hire, which involves a third party.

Following the judgement on 1 December 2008, two events occurred. APS immediately filed for an appeal to overturn the High Court's decision whilst the Ministry of Labour and Social Welfare announced that as of 1 March 2009, labour hire would be illegal in Namibia.

In the application, APS argued that "labour hire greatly contributed to the national economy, particularly in fulfilling seasonal, short term labour requirements in sectors such as mining, fishing, agriculture, transportation and construction".

Government, on the other hand, continued to argue that labour hire was "dangerously exploitative in its nature and robbed workers of their dignity".

On 16 February 2009, APS put an urgent application to the High Court which requested that section 128 of the Labour Act be suspended until the Supreme Court had made its ruling regarding the appeal. The two judges who heard the appeal granted APS its request. Therefore, government plans to ban labour hire on 1 March 2009 were temporarily suspended following the Supreme Court decision.

APPEAL TO SUPREME COURT

The case at the Supreme Court commenced on 3 March 2009. Five judges presided over the case. The arguments presented by the legal counsels of government and the APS did not differ significantly to the ones used in the High Court.

For instance, APS's legal counsel re-

emphasised the unconstitutionality of article 128 which infringed on APS right to do business and on the broad definition of the articles which could be interpreted as prohibiting services such as cleaning, security and auditing.

Government's counsel on the other hand reiterated that labour hire was immoral as it reduced human beings into commodities. In addition, government's counsel argued that it is parliament's right as the legislator to regulate the labour market, and not the courts' right.

At the time of writing this article, the case was still being heard. Its decision remains to be seen. LB

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We plan to ban labour brokers says minister

Labour Minister Membathisi Mdladlana says the ANC will "ban labour brokers after it wins next year's election".

"Labour brokers are not doing our workers a service.

People who are employed by labour brokers have no pensions, no benefits – in the end they are just dumped," he said.

Mdladlana said "the better option" was that the government deal with the labour brokers because they had the power to do so..."

Cosatu spokesman Patrick Craven praised Mdladlana's suggestion and said "labour broking is a form of human trafficking".

"Labour brokers collect huge pools of workers and then sell them at the lowest possible wages to the lowest bidder," he said.

"They also reduce wages overall in the country because employers can pick and choose workers for the lowest price."

Craven said recruitment agencies, which advertise vacancies but don't employ people like labour brokers do, were unlikely to be affected by any ban on labour brokers.

Anna Majavu, Sowetan, Johannesburg, 8 December 2008