Responding to externalisation: Part 2

In the previous edition of the Bulletin, Jan Theron explored 'atypical' work and how companies are implementing it. In this second part of the article, he outlines why companies externalise and the effect this has on labour, organisation and institutions. He also proposes ways to address the more fundamental problems to which externalisation gives rise.

Part of the rationale for externalisation, is that outside operators can provide a better and cheaper service. Where the service is to be outsourced to a newly established enterprise the quality of the service provided can only be a matter of speculation. As to the cost, labour is all that a new enterprise is likely to be able to offer more cheaply.

Most sectors are facing an increasingly competitive business environment, as a consequence of government economic policy and globalisation. It goes without saying that in every instance where externalisation and casualisation occurs, there are economic reasons for it. In mining, the gold price has forced the closure of mines. In agriculture, major deciduous fruit producers are facing liquidation due to depressed world prices. In clothing, international competition and the reduction in trade tariffs have forced firms to close.

It costs R28 to produce a cotton poplin shirt in Durban, whereas a shirt of equivalent quality can be imported from China (duty paid) for R24. The production of lower-priced items in 'long runs' is located primarily in Durban. This goes some way to explain why Durban has been the focus of the Confederation of Employers' Orgnisation's (COFESA) drive to convert workers to 'independent contractors'.

Externalisation in these sectors appears to be no more than a crude attempt to lower labour costs. Yet the increase in 'labour-only' contracting in construction is significant. Construction as distinct from some other sectors is not subject to the competitive pressures of international trade. If the objective was to lower labour costs, in this instance at least it was not in response to external pressures.

Clearly there is also a powerful ideological imperative to externalise. It is articulated by a variety of consultants, as the brochure for a series of seminars

illustrates. 'Safe outsourcing and the flexible workforce, the fastest-growing trend in South Africa employment,' it reads. 'Can I "contract out" of labour laws? How do existing employees become "contractors"? Do I have to go through retrenchment and severance procedures? How do I handle the "sporadic employee"?' Clearly also there are perceived benefits to restructuring, whether they be framed in terms of flexible work practices, cost benefits, or improved productivity.

Labour costs are ordinarily regarded as comprising the actual wage or salary on the one hand, and the cost of the social benefits, and ancillary costs such as bargaining council levies, on the other. The social benefits and ancillary expenses are a significant cost for many employers. They also merge into what is commonly referred to as the 'hassle factor' associated with employing labour. The 'hassle factor' also relates to a number of real but indeterminate costs such as the amount of management time that is taken up with labour relations issues, and the potential cost of labour disputes.

Many employers cite the 'hassle factor' as a reason for outsourcing. This is not to say it really is. However, the fact that in metal and engineering, for example, businesses outsourced on the basis that the labour provided will earn no less than the bargaining council stipulates, strengthen the suggestion that avoidance of the dispute resolution system is a perceived benefit. Even if a causal relationship can not be established, it would be most surprising if labour legislation did not in turn affect the form that restructuring takes.

Labour legislation

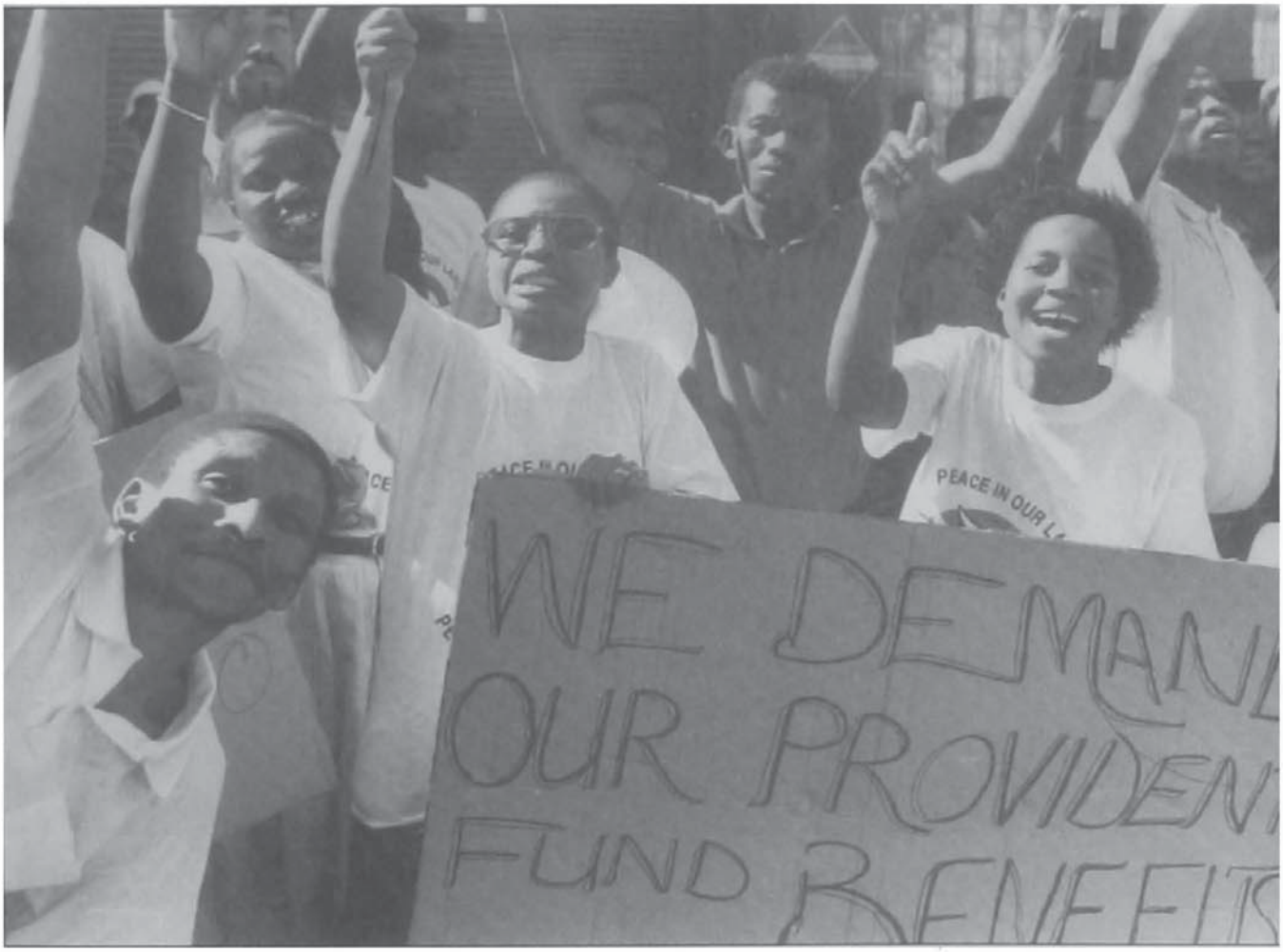
The question as to whether a relationship such as that between Appolus and the Loots' family business should be regulated in terms of labour legislation was raised in part one of this article. This context in which this relationship must be located is the casualisation of employment relationships, and widespread externalisation.

'Permanent' is not a category of employment that is explicitly acknowledged in South Africa's labour legislation, and the only sense in which a job may actually be permanent is an expectation that it will be ongoing. The protections the legislation provide are nevertheless premised on the 'permanent job'. The remedy of reinstatement, for example, implies there is a permanent job into which an employee can be reinstated.

In a society where permanent jobs are prevalent, it is well and good that the protections provided are determined by the permanently employed. It is after all the permanently employed who are best-placed to utilise and advance them. If permanent workers are properly organised, the argument goes, rights won will automatically be extended to non-permanents on the same basis. But the reality, it seems, is that permanent workers see non-permanents as a threat.

In an economy characterised by structural unemployment part-time or temporary work will always represent a potentially exploitative relationship. On the other hand, part-time or temporary work may be preferable to none at all. If legislation facilitated such forms of employment, employers would conceivably have an alternative to externalisation. This implies not only reconsidering a policy in terms of which the BCEA does not acknowledge these different categories of employment. It also entails a review of the dispute resolution provisions of the LRA.

Recent research suggests that part-time or temporary workers do not in fact utilise



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the dispute resolution provisions of the LRA. The dispute resolution system and the right not to be unfairly dismissed are relevant to permanent workers only. The difficulties confronting someone like Loots in exercising his rights illustrate the point. These difficulties are greatly magnified in the case of the workers of contractors servicing the peripheral needs of a core business. It is also not only in relation to dismissal that peripheral workers face difficulties exercising rights.

Historically, all forms of labour regulation have evolved in response to the organisation of workers, and depend on them for their efficacy. The degree to which workers are able to organise themselves and to articulate their interests must therefore be central to any scheme to better protect peripheral workers. The LRA ostensibly provides employees with organisational rights. However, the organisational rights granted not only make no concession to the difficulty of organising peripheral workers, but arguably make it more difficult than it was before the legislation was introduced.

For example, the organisational rights for which the LRA provides assume there is a workplace controlled by the employer. This is usually not the case with a satellite enterprise. A satellite enterprise providing cleaning services may well not have any premises of its own. If it does they will as likely be located in some remote suburb unknown to the employees concerned. In the 1980s, when the emergent unions were becoming established, the workplace meant what one would ordinarily suppose it to mean, the plant or shop where the employees were based.

Now, on the basis that it carries on two

or more operations, a retail chain is able to deny organisational rights on the basis that the workplace means all the plants or shops nationally. Given the difficulty of recruiting 'casuals' working weekends only, or irregular hours, this thresh-hold becomes practically unattainable.

If organisation is being eroded, what are the prospects for collective bargaining? Bargaining councils, the institutions that are supposed to underpin collective bargaining in the LRA, are premised on a status quo that is rapidly being eroded. Concretely, they are weakened by the weakness of the unions, and by the erosion of their own financial basis. The political ability of councils to extend their collective agreements to non-parties, and to enforce their agreements, is weaker now than it was under the old regime. This trend will not be easily reversed.

South Africa's pre-eminent council, in the metal and engineering industry, openly acknowledges its declining income base, and the difficulties it faced in regulating the burgeoning phenomenon of labour broking. In construction, the Gauteng council has scrapped its inspectorate and the Western Cape inspectorate only responds to complaints. The extent of non-compliance with council agreements is such that the Gauteng council is currently teetering on the brink of collapse.

The Bargaining Council for the Clothing Industry in KwaZulu-Natal is confronted with a co-ordinated revolt by small employers. Yet after two years attempting to bring recalcitrant employers to book for not registering with the council, and the expenditure of vast sums on legal expenses, all the council has to show is one jailed employer.

Denial

Bargaining councils attribute the difficulties they have with enforcing agreements to the removal of criminal sanctions for infringements of agreements. The procedure councils are required to follow to enforce a simple claim does seem intolerably burdensome. However, no one is asking for a return to the imposition of criminal sanctions.

In the study on which this article is based, the persons interviewed were asked whether peripheral workers needed better protection than exists at present. Unions and bargaining council representatives almost invariably said they did. Unionists generally favoured tighter regulation. Present attempts to do so were described by one as 'pathetic'. Another called for labour broking and sub-contracting to be outlawed. Several called for a stronger inspectorate, both for councils and the Department of Labour. On the other hand, employer representatives almost invariably said peripheral workers did not need more protection. The reason given by a spokesperson of the Chamber of Mines was that 'the workforce is highly unionised and exercising its rights in a well established collective bargaining structure'.

This is of course disingenuous. Yet employers are able to adopt such postures for as long as the extent of the problem externalisation poses are denied. In any event, to call for tighter regulation in the current context also amounts to posturing. Tighter regulation is obviously not a viable proposition, for a variety of reasons, and amounts to a denial of the problem. It is also a species of denial to regard the problems externalisation has generated as a form of 'disguised employment'.

It underestimates the extent to which emergent contractors are willing parties to the agreement. It is also difficult to disregard the service agreements and franchises that regulate the relationship

Peripheral workers often earn less than permanent workers and have fewer and lower benefits.

between emergent contractor and core business. To seek to regulate this kind of transaction transgresses the boundary between commercial and labour regulation that has hitherto been regarded as inviolate. There is no ready counter to the argument that emergent contractor is simply an entrepreneur, who should so far as possible be left to his or her own devices.

The notion of a dependent contractor, on the other hand, is helpful. Individuals who are dependent contractors, as in Apollus's case, would benefit from legislative protection. However, many 'dependent contractors' doubtless see themselves as being in a position of relative privilege, and as better off than they would have been in a permanent job. If this were not the case, they would not have been as easily induced to forfeit a permanent job in the first place. However, proposals to protect dependent contractors generally ignore the reality that many are employers in their own right. This is also the problem that deeming 'dependent contractors' to be employees in terms of the LRA and BCEA fails to address

How can the situation of these most vulnerable of workers, the employees of a dependent contractor, be addressed? Is there a basis for regarding the core business as still their employer? Can it be argued that these employees are in a similar position to the employees of a labour broker, and therefore that the core business is jointly liable?

The only apparent basis for holding the core business accountable is if economic reality is regarded as trumping legal form. The legal form in question represents both the commercial contract that regulates the relationship between the core business and satellite enterprise, and the employment contract between the

satellite enterprise and the workforce.

Conclusion

The need to amend the definition of employee in the LRA and BCEA can be justified in its own terms. However, it will do nothing to address the more fundamental problems to which externalisation gives rise. There can be no legislative quick fix, in terms of which the different forms of peripheral work created through externalisation can be made susceptible to regulation. The effect of externalisation is to replace a labour law regime with a commercial contractual regime. The consequences cannot be wished away. The question is rather how such a contractual regime can be regulated.

The counter to the argument that an emergent contractor is simply an entrepreneur, to be left to his or her own devices, must be framed in terms of a model of the kind of enterprise industrial policy should seek to promote. The counter to the argument that dependent contractors are persons in positions of relative privilege must be framed in terms of society's need of protection against them, or against the phenomenon they represent. The case of Appolus provides one example. The system under which he works induces him to work excessive hours, compromising not only his own health, but also the safety of road-users and passengers. Similarly, owner-drivers may be induced to make insufficient provision for the depreciation of their vehicles to maximise short-term returns. Again, the safety of road users may be compromised.

Unions are increasingly being presented with proposals to 'empower' their members. There are alternatives to a model whereby a few individuals are enriched. An obvious possibility is the co-operative form of enterprise. Government could be prevailed upon to offer incentives for acceptable models of empowerment, and disincentives for the inherently exploitative type of relationship that certain satellite enterprises represent. One such disincentive would be to compel such employers to take out some form of social insurance on behalf of its workforce. However, unions appear to have no policy in these respects.

If in the past labour regulation has depended on organisation for its efficacy, then it is up to unions and like organisations to develop institutions that will provide the kind of regulation that is now appropriate. A more proactive CCMA whose role extends beyond the strict confines of the employment relationship is one possibility. But before an institution such as the CCMA can be expected to play such a role, there will have to be some pressure from below. This requires unions to redefine their own role in relation to peripheral workers. It may well be that they have to do so in no less radical a way than the restructuring that confronts their members. ★

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