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TOPIC 2

LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE ASPECTS) AND PRODUCTIVE DECENTRALIZATION

SOUTH AFRICA

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QUESTIONS

1. General

Please indicate if in your country there is a trend toward increased productive decentralization of enterprises as described above. If there is such a trend,

There is no trend towards increased productive decentralization in South Africa. The system is fairly centralized. The social partners in South Africa are mostly divided according to political ideological lines and need their political allies to exercise part of their assertions even at the bargaining level, to leverage popular support.

It is already a historical fact that South Africa has suffered a long history of feudalism in the hands of traditional and indigenous rulers (prior to 1652), internecine wars, between 1820 and 1877[1], colonialism, slavery and the most recent, and still widely manifesting apartheid. This means that while during apartheid, there was democracy for the white minority by the white minority, the vast black majority of the population did not take part in that democracy. In the international arena, the truth is that:

> *"The history of labour in the 19th and 20th centuries is the history of efforts to modify the world of work, to change the bargaining positions*

[1] 1 This is South Africa, Summary of South African Year Book 1995:14.

of workers and employers – in short, to bite into the 'rights' of management and increasingly to bring all the terms and the conditions of work into the sphere of joint determination"[2]

Centralised bargaining in South Africa has bee seen by trade unions[3] as the best means by which to establish industry wide minimum and fair standards; one that allows for an efficient use of skilled negotiations; leading to a single collective agreement in each affected sector, strengthening to the capacity building of the bargaining agents; developing meaningful and cost effective social benefit funds and advancing the common interests of both social partners. On the other hand (Ibid), the dissenting view has been that centralised collective bargaining exposes employers to a double risk action, lacks flexibility as it ignores regional differences, relocates bargaining away from the key role players at the local (plant) level which matters and could deny access to bargaining to certain unions, who while they may have strong physical presence at plant level, may not have sufficient numbers to allow them a place at the central forum. These two opposed views are the ones at the heart of this debate.

The high rate of growth in the trade union movement in the 1980's is said to have occurred due to the then overstretching of the organisational and human resources. Centralised collective bargaining was the one that could ease off the strain on the trade union resources (both human and organisational). After many employers refused to bargain at plant level after 1979, insisting that unions should centrally bargain, in Industrial Councils, they immediately called for decentralisation of the bargaining after seeing the unions gain in solidarity, engendered by the centralised system. In cases such as Metal and Allied Workers Union v Hart Ltd (1985) 6 ILJ 478 (IC), even the Industrial Court refused to compel parties to bargain at plant level, stating that this was a dispute of interest to be dealt with through power play. The Industrial Court also compelled parties to bargain at plant level when they were not part of an Industrial Council. [BAWU v Pam Beach Hotel (1998) 9 ILJ 1016 (IC); and BAWU v Asoka Hotel (1989) 10 ILJ 167 (IC)].

In 1994, COSATU (the Congress of South African Trade Unions) in its campaign conference decided to secure centralised bargaining forums in all sectors by that year end. The conference also decided to seek ANC (African National Congress) approval of the approach. During that very time, some employers had rejected centralised bargaining as they saw that it brought more strength to the unions than themselves. Many employers openly advocated the flexible or pant level bargaining. During this time (1994), the legislation was just not providing a regulatory framework for local bargaining. Even the then Industrial Court was not prescriptive as to the level at which collective bargaining was to take pace; especially in the face of many competing forums for this purpose. However, a greater participation by employees at shop floor level would have been ideal in that it would have empowered workers, democratised the work place, increased constructive engagement between managers and the workers; increased common ground on wealth creation between the social partners at shop floor level.

a. which are the most current forms of productive decentralization;

b. if possible, present cases of companies operating in your country according to a productive decentralization strategy. What does the principal company typically keep under its direct control and what does it delegate/outsource to affiliated/subsidiary/partner companies? Are the latter enterprises independent of the principal company or they are controlled by it;

c. can you assess the impact of this strategy on individual labour relations;

d. can you assess the impact of this strategy on collective labour relations?

[2] 2 Sorrell, G.H.; Law in Labour Relations (Law Book Co., Sydney, 1979:30.

[3] 3 Du Toit et al, Labour Relations Law: A Comprehensive Guide, Third Edition, Butterworths: 244.

1. Groups of companies and unity of enterprise

Please indicate if under your national law or case law it is possible to consider that a principal company and its contracting affiliates, subsidiary companies or partners must be treated as if they were a single enterprise for the purpose of the application of labour and social protection law. If it is possible, please indicate the criteria on the basis of which such a decision can be reached and the legal effects which would follow.

In South African law, the contractor is the employer to its own employees and the client of that contractor does not have an employment relationship with the contractor's employees. The only time this client may be held responsible for anything done by the employees of its contractors is when there is vicarious liability, emanating from the client having issued direct instructions in any form to the employees of that contractor, culminating in the claim for vicarious liability. But section 213 of the Labour Relations Act No. 66 of 1995 as amended (LRA) expressly excludes independent contractors from the definition of an employee. The court further strengthened this view in some cases[4]

However the court held in the Camdons Realty (Pty) Ltd[5] case, that where the employer is an empty legal shell owned by a third party, a person employed by the former may be deemed the employer despite the lack of a written contract between the two.

Section 200A of the LRA, presumes any person an employee if any of 8 factors are present. These factors include control by the alleged employer, hours of work controlled by the employer, being part of the organisation, working for the other party for an average of 40 hours per week, being economically dependent on the one employer, and the alleged employer providing tools to the alleged employee as well as that employee only rendering services to that one person.

2. Transfer of undertaking and other modifications in the legal situation of an undertaking or parts thereof

a. Does your national law or case law have a legal definition of "transfer of undertaking or parts thereof". Under what situations, if any, does the definition apply to the externalization (subcontracting, outsourcing) of certain operations of an undertaking?

South African law still has room for common law definition of work as well as the statutory and stare decisis sources. Grogan[6] points out that "the modern contract of employment developed from the 'locatio conductio operarum'" type of 'locatio conductio' (letting and hiring). Thompson C, and Benjamin P.[7] quote Brassey[8], when stating that common law:

"offers little protection against arbitrariness. It allows the party with the greater bargaining power to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral. It allows him to change it when it no longer suits him, by threatening to terminate the relationship unless the other party submits to change. It allows him to flout the bargain whenever he likes, provided that he does not mind paying a paltry sum, which is invariably all the damages amount to".

b. Please describe the rules applicable in your country for the protection of workers' rights in situations involving the transfer of an undertaking or parts thereof.

The labour law implications of the transfer of a service to the new service provider are likely to fall under the dismissals based on operational requirements [s 188(1)] of the LRA. Section

[4] 4 Borcherds v CW Pearce & F. Sheward t/a Lubrite Distributors (1991) 12 ILJ 383 (IC) at 388D-E; and in Oak Industries (SA) (Pty) Ltd v John NO (1987) 8 ILJ 756 (N).

[5] Camdons Realty (Pty) Ltd v Hart (1993) 14 ILJ 1008 (LAC)

[6] Grogan John, Workplace Law, 7th Edition, Juta Law, 2003: 3.

[7] Thompson Clive and Benjamin Paul, in South African Labour Law, Vol. 1, Revision 42, January 2001, Juta Law, Service No. 32 of 1994; E1-35: 21

[8] Brassey M., The New Labour Law 5.

197 of the LRA deals specifically with transfers of contract of employment.[9] This section applies to the transfer of a whole business or part of a business [s 197(1)(a)], while the word "transfer", means the transfer by one employer (the "old" employer) to another (the "new" employer) [s 197(1)(b)]. In terms of section 197(2) of the LRA, regarding such transfers, if a transfer of a business takes place, unless otherwise agreed in terms of s 197(6)[10] of the LRA –

(a) "The new employer is automatically substituted in place of the old employer in respect of all contracts of employment in existence immediately before the date of the transfer[11];

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) Anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) The transfer does not interrupt an employees' continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

According to section 197(7)(a) of the LRA, in the event of transfer, the old and the new employer must also agree to an evaluation as of that date of the of transfer, of:

(i) The leave pay accrued to the transferred employees of the old employer;

(ii) The severance pay that would have been payable to the transferred employees of the old employer; and

(iii) Any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;

(e) Conclude a written agreement that specifies –

(i) Which employer is liable for paying any amount referred to in paragraph (a), and in case of apportionment of liability between them, the terms of apportionment; and

(ii) What provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment.

Unless otherwise agreed between the parties, the new employer is bound by[12]-

(i) Any arbitration award made in terms of the LRA, the common law or any other law;

(ii) Any collective agreement binding in terms of section 23; and

(iii) Any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.

According to section 197(8) of the LRA, the old employer with the new employer are jointly and severally responsible for 12 months, after the transfer, to any employee who becomes entitled to receive a payment contemplated in section 197(7)(a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section. Section 197A only applies to the case of an employer who

[9] 9 Schutte v Powerplus Performance (Pty) Ltd (1999), 20 ILJ 655 (LC).

[10] 10 According to section 197(6) of the LRA, the old employer, the new employer or both the old and new employer acting jointly, on the one hand and the employee(s) or body referred to in section 189 (1) on the other, may conclude agreements in which they may deal with any issues pertaining to the employment contract.

[11] 11 Food and Allied Workers Union v Royal Salt (Pty) Ltd (1997) 4 BLLR 434 (CCMA).

[12] Section 197(5)(b) of the LRA as amended by Act 12 of 2002.

becomes insolvent. However, there is no talk of insolvency[13] in this part of the question. So we will not explore this avenue any further.

Thompson C, and Benjamin also aver that the amended s 197 provides that whenever a business is transferred as a going concern, "then:

> • *The new employer is automatically substituted in the place of the old in respect of all pre-existing contracts of employment;*
>
> • *All employee's rights and obligations transfer to the new employer; and*
>
> • *An employee's service is deemed to be continuous.*
>
> *The major gain to employees is that their jobs are preserved, and on terms no less favourable than those previously prevailing. The key benefit to employees is that employees can be transferred without their consent, obviating the need for retrenchment proceedings and payouts. One question not answered in the section is*
>
> *under what circumstances, an outsourcing exercise amounts to a s 197 transfer of a business as a going concern."*

Grogan[14] submits that while it was generally thought that if a business was transferred as a going concern, the contracts of the affected employees transferred automatically, and regardless of whether or not the new employer wished to take the employees transferred into service; the Labour Appeal Court held that this was not the case.[15] The Constitutional Court overruled this judgment however, when it ruled that section 197 was aimed primarily at protecting jobs[16]. After taking note of judicial criticism, of the original section 197 in the NEHAWU v UCT case[17] the legislature recast the section to remove the ambiguities and unexpected judicial interpretation of its old section 197. There is now a separation between the old section197 that deals with transfers of business from a solvent employer while section 197A regulates transfers of business in circumstances of insolvency.

In section 197A, the employees of the old employer are also transferred automatically. I agree with the resultant interpretation of the final amendment of section 197, that, as Grogan (Ibid.) put it:

> *"The only difference between transfers of solvent businesses and transfers of insolvent businesses is that, in the case of the latter, anything done before the transfer by the old employer in respect of each employee, is considered to have been done by the old employer; and the new and old employer(s) (are) not jointly and severally liable for employee's claims against the old employer that arose before the transfer".*

Transfer could also happen in the case of an agreement, restructuring / rationalization, a merger, a will, and privatization[18]. The selling of shares does not constitute a transfer[19]. And a Business is transferred as a going concern when it is declared insolvent, being wound up or undergoing sequestration, and when there is an exchange of assets. However, selling of shares and changing control does not constitute a transfer.[20] The test as to whether a business is being transferred as a going concern, has been formulated already by the court. In Kgethe & others v LMK Manufacturing (Pty) Ltd & another (1998) 7 LAC 1.1.1, the court held that the test should include:

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[13] BSA v Frost (1991) (4) 599.
[14] Grogan John, Workplace Law, 7th Edition, Juta Law, 2003: 219 - 226.
[15] NEHAWU v University of Cape Town and Others (2002) ILJ 306 (LAC).
[16] NEHAWU v University of Cape Town and Others (2002) Case No. CCT 2/02 dated 13 December 2002.
[17] (2002) 23 ILJ 306 (LAC).
[18] Schutte v Powerplus Performance (Pty) Ltd (1999), 20 ILJ 655 (LC) quoted in Du Toit et al, Labour Relations Law: A Comprehensive Guide, 3rd Edition, Butterworths, 2000: 399.
[19] Ndima and others v Waverly Blankets Ltd (1999) BLLR 577 (LC); also see Article 1(1)(q) of the Amending Directive to Directive 98/50/EC of the EC Acquired Rights Directive of 1977 s quoted in Smit N, "Labour Law Implications of the transfer of an undertaking; LLD Thesis at RAU: 2001: 59.
Schutte v Powerplus Performance (Pty) Ltd (1999), 20 ILJ 6671A-C (LC).
[20] Schutte v Powerplus Performance (Pty) Ltd (1999), 20 ILJ 6671A-C (LC).

(i) Whether the business is operated for the same purpose;

(ii) Whether it is a going concern; and

(iii) Whether the economic entity remained in existence.[21]

In a case similar to the one in the assignment, Du Toit et al[22]submit that subsection (2) (of section 197 of the LRA), regarding the automatic transfer of rights and obligations applies where the whole or any part of a business or occupation is transferred as a going concern.[23] The notion of a going concern has been said by the majority ruling in the Labour Appeal Court judgment of the NEHAWU v UCT case (Supra), that[24] "the transfer of a business without its employees cannot be deemed a transfer of that business as a going concern, does not survive the amendment"[25] This reinstates the cases such as those of both Ndima and Schutte (Op Cit).

The provisions of the original section 38 of the Insolvency Act No. 24 of 1936. Section 339 of the Companies Act 61 of 1973[26] also applies directly to a company situation. Contracts of employment were terminated by the insolvency of the employer, in a company setting,[27] "if the business of the former but insolvent employer is transferred to a new entity. Section 197 overrides the terms of the Insolvency Act by providing that when such a transfer takes place, then as in the case of other business transfers, the new employer is automatically substituted in the place of the old employer."[28]

However, the Insolvency Amendment Act[29] has substituted the whole of section 38 by providing, in summary, that:

(1) The contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order;

(2) While the employees in question have their contracts suspended, they are not required to render services in terms of the contract and are also not entitled to any remuneration;

(3) The employees are entitled to unemployment benefits during the suspension of their employment contracts; in terms of section 35 of the Unemployment Insurance Act no. 30 of 1966; from the date of suspension, subject to the provisions of that Act[30].

However, as Grogan[31]puts it, "if a company goes into voluntary liquidation, the termination of the services of its employees constitutes a dismissal"[32]. While, on the other hand, section 14(1)(c)[33] of the Pension Funds Act No. 24 of 1956, provides that transactions involving amalgamation of any business carried on by a registered fund whether that business or person is or is not a registered fund, shall not be of any force or effect "unless the registrar is satisfied that the scheme is reasonable and equitable and accords full recognition –

(a) To the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable expectations relate to service prior to the date of transfer;

[21] Schutte v Powerplus Performance (Pty) Ltd (1999), 20 ILJ 672C-F (LC.
[22] Du Toit et al, Labour Relations Law: A Comprehensive Guide, 3rd Edition, Butterworths, 2000: 400-401.
[23] S 197 (1)(a) and (b)
[24] Grogan (Ibid).
[25] SAMWU & Others v Rand Airport Management Company (Pty) Ltd & Others (2002) 12 BLLR 120 (LC)
[26] Section 339 of the Companies Act 61 of 1973 provides that "In the winding up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis, in respect any matter not specially provided for by this Act."
[27] SAAPAWU HL Hall and Sons (Group Services) Ltd 18 [1999] 2 BLLR 164 LC at pars 16 and 18.
[28] Thompson Clive and Benjamin Paul, in South African Labour Law, Vol. 1, Revision 42, January 2001, Juta Law, Service No. 44 of 2003; AA1- 27
[29] Act 33 of 2002 of 6 November 2002.
[30] Unemployment Insurance Act no. 30 of 1966.
[31] Grogan John, Workplace Law, 7th Edition, Juta Law 2003: 78.
[32] National Union of Metal Workers v Barnard NO & Another (2001) 22 ILJ 2290 (LAC).
[33] Paragraph (c) substituted by s 3 of Act 54 of 1991, by s 21 of Act 83 of 1992 and by s 2 of Act 39 of 2001.

(b) To any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and

(c) To the payment of minimum benefits referred to in section 14A…"

Du Toit et al (Supra), at 401, when they state that:

"The approach in the Suzen case (above) was endorsed in Schutte v Powerplus [above; where Seady AJ accepted that outsourcing of work will only be regarded as a transfer of part of a business if there is some concomitant transfer of significant assets (tangible or intangible) or the taking over by the new employer of a major part of the business."

c. Is it mandatory under your national law that the employees' representatives be consulted or informed at the time of a transfer of an undertaking or parts thereof. If it is, what is the procedure for this consultation? Are the employees' representatives informed or consulted when the employer intends to outsource certain of its operations. Is there any obligation under your national law to negotiate on these topics?

It is mandatory for the employer to consult and inform the employees through heir representatives of an impending transfer of an undertaking. These rules are contained in section 198 of the LRA. What an employer needs to do if it wants to retrench employees on the basis of its operational requirements is a matter of law – particularly section 189 of the Labour Relations Act No. 66 of 1995 (LRA) as amended. In terms of Section 213 of the LRA, and Section 41(1) of the Basic Conditions of Employment Act No. 75 of 1997 (BCEA), the meaning of "Operational Requirements" entails "Requirements based on the economic, technological, structural or similar needs of an employer".

Sections 189 (1)(c) and (d) applies in this case. The employer has employees of whom 92% are members of the three trade unions, while 8% are not affiliated to any union. This section of the Act provides that the employer must consult with the employees who are not members of any trade union [189(1)(d)], while the employer also must consult with the registered trade unions whose members are likely to be affected by the proposed dismissals [189(1)(c)]. And the same Act also requires that the parties must attempt to reach a consensus on appropriate measures to avoid the dismissals; their number, to change their timing, to mitigate the adverse effects of the dismissals; [s189 (2)(a)]; the method of selecting the employees to be dismissed [s189 (2)(b) and the severance pay for the dismissed employees, once selected [s189 (2)(c).

Section 189(3) also provides that the employer must disclose in writing to the other consulting parties all relevant information including the reasons for the dismissals (substantive fairness)[34], alternatives considered, reasons for rejecting them, the number of employees likely to be affected, the proposed method of selection; time frames likely to be observed; severance pay proposed; assistance the employer may propose to offer those likely to be dismissed[35]; and the possibility of future employment. [S 189(3)(a)-(h).

Section 16(5) provides that for disclosure of information which is not legally privileged, that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court; that is confidential and if disclosed, may cause substantial harm to an employee or employer or that is private personal information, unless that employee consents to the disclosure of that information.

In Kotze v Rebel Discount Liquor Group (Pty) Ltd (2000) 9 LAC 5.2.4, the court held inter alia that:

(1) At some stage management may perceive or recognise that its business enterprise is ailing or failing, consider the causes and possible remedies, appreciate the need to

[34] SACWU v Afrox (1999) 8 (LAC) 9.3.2

[35] In the Public Sector, the Social plan has been used and it is based on a Code published by the Minister for Labour.

take remedial steps and identify retrenchment as a possible remedial measure. See Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA (1994) 15 ILJ 1247 at 1252F ("the ADE case").

(2) Having foreseen the need for retrenchment, and while still contemplating it, the duty to consult the employees or their union then arises. See ADE case (supra) at 1252G.

(3) Such consultation becomes an integral part of the process leading to the final decision on whether or not retrenchment is inescapable. The need to consult before a final decision is taken has its rationale in pragmatism, in principle and now also in the Constitution.

The Labour Appeal Court further referred to Section 23(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that 'everyone has the right to fair labour practices.' This entrenched fundamental right is a further basis for the need to consult. See SA Clothing & Textile Workers Union & Others v Discreto- A Division of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC) at 1454G-H.

d. How are the relations between the transferor and the transferee enterprises organized when the latter continues to operate in the former's premises?

The Constitutional Court seems to have brought finality regarding the main issues in the question. In NEHAWU v University of Cape Town (CCT) 2002 of 6 December 2002, the court held inter alia that:

(1) Section 197 exists to protect workers in the event of a transfer of the business; since it was inserted within a Chapter that deals with unfair dismissals; and there is a right of the workers not to be dismissed unfairly;

(2) The safe guarding of employee rights is part of foreign jurisprudence;[36]

(3) The common law provided little protection to workers in these situations. Under common law the sale of business, whether as a going concern or not, often resulted in the loss of employment;

(4) The meaning of "going concern" should be read to mean that "what is transferred must be a business in operation 'so that the business remains the same but in different hands;[37]'"

(5) It is not essential for the old and the new employers to agree on the transfer of workers for the transfer to be a "going concern" transfer (at 58);

(6) While the old section(s)197(1)(a) and 197(2)(a) contained different words from those in the new section 197, and the old section(s) 197(1)(b) and (2)(b) contents are still the same as those of section 197A; and provides that the new employer is substituted for the old employer in respect of all contracts of employment, [s 197(2)(a)]; and

(7) "The fact that there was no agreement to transfer the workforce or part of it between the UCT and the contractors did not, as a matter of law, prevent a finding that the outsourcing was a transfer of a business as a going concern".

a. How are the relations between the transferred employees and the transferor enterprise organized when the transferee enterprise continues to operate in the

[36] Landsorganisatioen I Danmark for Tjerforbundet I Danmark v Ny Molle Kro (1987) ECR 5465. Also see the Acquired Rights Directive, 77/187 adopted by the European Commission in 1997.

[37] Factors to be considered in this regard, the Court held, should include:
(a) Substance and not form of the transaction;
(b) The transfer or otherwise of assets (both tangible and intangible);
(c) Whether workers are taken over by the new employer;
(d) Whether customers are taken over by the new employer;
(e) Whether or not the same business is being carried out by the new employers; while noting that none of these factors are exhaustive or decisive by themselves.

transferor's premises. Who of the transferor or the transferee assign tasks and determines wages and conditions of employment?

See above

(8) The legal situation of the employees of contractors and other affiliated enterprises vis a vis the principal/parent enterprise

a. Under which conditions can the principal/parent enterprise be held liable for the obligations of its contractors or other affiliated companies vis a vis employees of the latter in respect to the following:

i. Health, safety and occupational hazards;

The parent enterprise has responsibility for safety

ii. Wages and other terms and conditions of employment;

The employing sub-contractor takes responsibility of wages and conditions of employment towards its contract employees even while working on the premises of the principal entity.

iii. Social Security and other employee benefits insurance contributions;

The employing sub-contractor takes responsibility of wages and conditions of employment towards its contract employees even while working on the premises of the principal entity.

iv. Others?

b. Is it mandatory to inform the employees of the contractors and other affiliated enterprises of the identity of the principal company for which their employer works?

It is not necessarily mandatory, but common sense as certain rules such as on safety and security on access to premises and the like, will be those of the principal company. Many illiterate employees of contractors working on premises of the contractors tend to cite the principal company on labour disputes as they do not know the difference between the employer and the employer's client.

c. Please, describe any judicial decisions whereby the existence of a direct employment relationship between a principal company and the employees of its contractors or other affiliated companies has been established. What have been the legal effects of these decisions?

There are no such instances known in South African law. Where the employees mistakenly cite the principal company as an employer, inadvertently, hat gets corrected at the dispute resolution for a that are set up to handle labour disputes. At times evidence has to be ed to prove that the alleged employer is or is not an employer.

(9) Lease of workers and other forms of supply of workers

a. Can two or more legally distinct enterprises lease workers between them? If they can,

They can only do this if they form a joint venture and that joint venture is contracted to those employees.

i. how does the law protect the rights of leased employees?

De definition of an employee I South Africa does not discriminate or differentiate between the temporary or contract employees. They all have the same privileges and rights save as may be contained in the terms of their contracts.

ii. Who keeps the authority of the employer vis a vis the leased employees. Is it the user entreprise or the enterprise which formally employs them?

See above

iii. Who determines the assignment of tasks, wages and other conditions of employment of the leased employees, and may terminate their employment if the case may be. Is it the user entreprise or the enterprise which formally employs them?

Already covered above

a. Please describe how the supply of workers through temporary work agencies (TWA) is regulated in your country. In particular:

b.

i. Cases in which leasing temporary workers is permitted;

In the South African situation, the broker is the de facto employer. That is according to section 198 (2) of the Labour Relations Act No 66 of 1995 (LRA). Section 82 of the Basic Conditions of Employment Act (No. 75 0f 1997) (BCEA) also echoes this point.

Section 37(1)(a) of the BCEA requires that an employee of 6 months or less should be given at least one week's notice of termination of employment. And in the event that you wish and decide to take action to remedy this situation, it appears that the options open to you are not too many. But according to section 198(4)(c) of the LRA and section 82(3) of the BCEA, both your employer and his client are jointly and severally liable in the event of any failure on their part, to comply with the provisions of the sections alluded to.

While the LRA deems the TES liable for dismissal, the same laws deems the client also jointly and severally liable in case of public liability – in the event such employee were to get injured on duty as a result of instructions issued by the management of the client organisation without the active participation of the TES.

Section 198(1) of the LRA defines TES as "any person who, for reward, procures for or provides to a client other persons … who render services to, or perform work, for the client; and … who are remunerated by the TES". However, both sections 198 (2) of the LRA and 82 of the BCEA do not apply in the case of Independent contractors – even where the latter may have been procured by a TES or its equivalent – recruiting agency. This was held by the Labour Court in Mandla v LAD Brokers (Pty) Ltd (2000) 9 BLLR 1047 (LC) at par 12.

While the client may be responsible for making the life of an employee in this situation intolerable, the TES is responsible for the dismissal of the employee if it obeys the wishes of the client and also terminates the services of that employee. This was held in NEHAWU v Nursing Services of South Africa (1997) 10 BLLR 1387 (CCMA) and in Buthelezi v Labour for Africa (Pty) Ltd (1991) 12 ILJ 588 (IC).

ii. Industries or activities for which the supply of temporary workers is forbidden;

We are not aware of any categories of industries in which temporary employment workers may be or are forbidden. Where these limitations may exist, they will be based on each individual employer rather than the law.

iii. Is it mandatory in your country that TWAs be licensed? If it is, under which conditions are licenses issued?

No. There is no such requirement

iv. What kind of contract governs the respective relations among the principal company (user enterprise), the TWA and the temporary workers who are dispatched to the user?

The contracts between the parties may exist. But the relationship is regulated mainly in the statutes and in case law. There are no collective agreements addressing this angle. But the law is quite clear and has already been mapped out above.

v. Is the despatching of a temporary worker subject to time limitations?

This may be so in terms of the contracts of employment signed. But there is still a need, here the contract has already been renewed, that there could be a legitimate expectation to have the contract renewed further. The employer is therefore duty bound to serve notice of the intention not to renew the contract before the expiry of that contract.

vi. What other restrictions are there on the use of temporary workers?

None

vii. How are the temporary workers' wages and other conditions of employment determined?

Unless there is a sectoral determination by the Minister for Labour in terms of section 51 of the LRA; the determination of wages and conditions of employment are determined by the parties through individual or collective bargaining.

viii. Under which conditions may a user enterprise be held liable for the obligations of a TWA vis a vis the dispatched employees?

See above

ix. How are the collective labour relations between a TWA and its despatched temporary workers structured? How are the collective labour relations between a user enterprise and despatched workers structured?

There are no real collective bargaining mechanisms between these employee categories and their employers. That is what the union has been lambasting as casualization or externalisation of the employees.

x. Please indicate the sanctions envisaged by the legislation of your country for the illegal use of temporary workers.

There is no specific provision of this nature under labour law. This does not preclude other laws such as the laws against terror and military interference ion other countries. But these fall outside the scope of this address.

c. Please describe any judicial decisions holding that there was a direct employment relationship between a user enterprise and employees supplied to it either under the form of a lease (a) or at that of a temporary posting (b), and the legal effects of such decisions.

See above

1. Franchising

If available, please provide some general information on franchising regulation and practice in your country.

a. What is, in your country, the legal position of a fanchisee vis a vis a franchisor? Is the franchisee considered an independent entrepreneur or as a subordinated agent of the franchisor? Please describe any judicial decisions holding that a franchisee was in fact a subordinated agent to a franchisor and the legal effects of such decisions.

The term "employer" is not defined in the South African Labour law. Its common law roots may be determined from the Roman Law received in South Africa such as the locatio condictio operis. A franchise situation would have to be determined in terms of the incorporated status of the party employing the employees. If a long chain of shops were to open its branch at a certain town, the entity would still be that entity with a branch. But a franchise would ordinarily mean the franchisee (a person other than the franchisor) operating as an own legal entity employing the employees while having a separate franchise agreement with franchisor.

b. What is the legal position of the franchisee's employees? Can they be also regarded as workers dependent on the franchisor?

There is no relationship between the franchisor and the employees of the franchisee, unless the franchisor also owns in part or in full the business of the franchisee.

2. Collective action and collective bargaining in a context of productive decentralization

a. What is the position of your country's unions vis a vis productive decentralization;

It has already been alluded to above that the unions are more centrist in South Africa. And that gives them the requisite muscle to collectively bargain with organised business or the individual employers.

b. does the law provide for the collective representation of employee's at a group's level? If it does, how is such representation structured;

There is complete freedom of association for all employees. There is no restriction whatsoever. But employees, who are also managers, are advised by the courts to exercise this right with caution as they have to also observe the confidentiality clause towards the employer's privileged information that may be crucial during negotiations.(IMATU v Rustenburg Transitional Local Council [1999] BLLR 1299 (LC))

c. are there in your country trade unions which represent the whole of the workers of a group of companies or of several enterprises working in close partnership;

It has already been intimated that there is complete freedom of association for all employees. There is no restriction whatsoever. One employer may even deal with several trade unions. And the trade unions may organise and attain organisational rights with several employers.

d. has there been collective bargaining covering the all of a group of enterprises or several enterprises working in close partnership. If so, which subjects has the bargaining addressed;

See above

e. have you had strikes or other forms of collective action addressed against a group of enterprises or several enterprises working in close partnership?

This happens only if the employers are all in the same sector or bargaining council or when the whole country is plunged into protest action which is a type of strike but based on section 77 of the LRA and addressing policy or socio-economic interests of the labour, not necessarily focussed in any industry in particular.

1. Other questions

Please present any other issue which in your country's law or practice relates to this topic and has not been addressed in this questionnaire.