

## **International Labour Standards and Private Employment Agencies –Are South Africa’s Recent Legislative Amendments Compliant?**

By Candice Aletter

(Doctoral Candidate at the University of Pretoria and Associate at Rödl & Partner Germany)

### **1. Introduction**

“Labour broking”<sup>1</sup> or “employment agencies” as used in this paper, constitute a growing proportion of the labour market in South Africa. According to Adcorp, one of the country’s largest providers of agency workers to client companies,

“Labour broking is the fastest-growing sector of the South African labour market. According to the Adcorp Employment Index for May labour brokers constitute a R44 billion industry employing around 19 500 internal staff and just over one million agency workers or temps in South Africa. Agency work now constitutes 7.5% of total employment in South Africa, and it is likely to grow further.”<sup>2</sup>

Ironically this is in despite of 2015 changes to legislation regulating employment agencies, which many thought may spell the end to such agencies altogether. However, also to be acknowledged are those who have forecasted massive job losses and increased unemployment in South Africa due to the changes which have come about this year.<sup>3</sup>

---

<sup>1</sup> Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 1 states that “The term ‘labour broker’ is used in South Africa to refer to what are more commonly referred to as labour hire firms or temporary employment agencies in other countries. Although the statutory terminology was changed to ‘temporary employment services’ in 1995, the term ‘labour broker’ has stuck and is often used with a pejorative meaning in public discourse. The broader category of labour market intermediaries are, in keeping with international practice, referred to as private employment agencies.” The term “employment agency” will be used here, which refers to private employment agencies and not public employment agencies –which fall outside of the scope of this paper. The term “client” is used for the user company and the term “agency worker” refers to the employee of the employment agency.

<sup>2</sup> <http://www.adcorp.co.za/Pages/Temporaryworkgrowingdespiteoveralldownwardtrend.aspx> accessed on 23 June 2015.

<sup>3</sup> As an example see <http://www.staffingindustry.com/row/Research-Publications/Daily-News/South-Africa-Jobs-will-be-lost-and-unemployment-will-rise-following-labour-act-amendments-33618> accessed on 23 June 2015. Here it is stated that “Free Market Foundation economist Loane Sharp said labour brokers are the biggest channel for unemployed individuals to enter the labour market, but the amended Act will have a ‘disastrous impact on employment.’ Mr Sharp said a survey of close to 500 labour brokers, representing 90% of job placements in South Africa, revealed that changes to the Act will cost the economy jobs. To put the expected job losses into perspective, Mr Sharp explained that before 30 April this year, 254,000 jobs are expected to be lost and of this figure, 192,000 have already been lost.”

Irrespective of these differing views, one thing remains for certain – that employment agencies in the country have formed and currently form a large proportion of the labour market, with the use of such agencies having grown substantially since their first inception. Accordingly, any changes in the space of the regulation of such agencies are of importance and have an effect on the agency workers, the employment agencies and their clients.

Amidst the changes in the regulation of employment agencies in South Africa, a question of value is to ask whether such amendments are compliant with the international standards which South Africa seeks to meet. In order to attempt to answer this question, here at the outset the changes will be laid out. Then, after illustrating the relevance of the International Labour Organisation (ILO) to South Africa the content of the current ILO standards, being a convention and a recommendation dealing with agency work, will be analysed.

Thereafter the question is posed as to whether South Africa's recent legislative amendments are compliant. This is answered by identifying a concrete list of international norms as derived from the ILO convention and recommendation and comparing the amendments thereto. Particular shortfalls are identified in the amendments. Here the question arises as to what further guidance, if any, South Africa could ultimately gain from international standards.

## **2. South Africa's Legislative Changes in respect of Private Employment Agencies**

South Africa is currently experiencing a great deal of change in the labour law field with the introduction of several amendments to legislation recently. The amendments include the following: the Labour Relations Amendment Act,<sup>4</sup> the Basic Conditions of Employment Amendment Act<sup>5</sup> and the Employment Equity Amendment Act.<sup>6</sup> Coupled with these changes is the Employment Services Act<sup>7</sup> which will create further change in the labour law space and particularly in respect of the registration of employment agencies.

There has been much debate and media attention surrounding the various drafts of the Bills which were first published in the Government Gazette<sup>8</sup> in December 2010. The process to finalisation has been a protracted four year process. Rycroft summarises that after the first

---

<sup>4</sup> Labour Relations Amendment Act 6 of 2014.

<sup>5</sup> Basic Conditions of Employment Amendment Act 20 of 2013.

<sup>6</sup> Employment Equity Amendment Act 47 of 2013.

<sup>7</sup> Employment Services Act 4 of 2014.

<sup>8</sup> No 33873, 17 December 2010, Notice 1112 of 2010.

Labour Relations Amendment Bill was published for comment in 2010, the second was published in 2012, a third in 2013, and then a final Bill was published in 2014.<sup>9</sup> The one aspect of all of the aforementioned changes which was most debated was regarding the amendments regulating employment agencies.

The regulation of employment agencies in South Africa was first included in legislation in 1983. At this time South Africa was not a member of the ILO, but was instead excluded due to its Apartheid policies. The concept of a “labour broker” was introduced in amendments to the Labour Relations Act, 28 of 1956. At the time, labour brokers were “deemed” to be the employers of individuals whom they placed to work with their user companies, provided that they were responsible for paying their remuneration.<sup>10</sup> Benjamin points out that South Africa adopted a rule permitting employment agencies to be classified as the employers of those whom they placed to work with a client more than a decade prior to this type of arrangement being reflected in international standards with the adoption of ILO Convention No. 181 of 1997.<sup>11</sup>

The 1983 legislation also contained a legal requirement for employment agencies to register with the Department of Labour and provided that the client’s premises were deemed to be the place of work of the workers. Benjamin further states that the justification given for enacting the amendments was that firms were structuring their employment relationships to prevent agency workers receiving the protection of statutory wage-regulating measures and other minimum conditions of employment.<sup>12</sup>

In 1996 regulation changed with the Labour Relations Act, 66 of 1995 (“LRA”). This legislation came at a time of re-joining membership of the ILO as South Africa’s democracy was born and the Constitution<sup>13</sup> was adopted. The legislation was also a result of drafting assistance by experts including ILO advisors. However, according to Van Eck there are no

---

<sup>9</sup> Rycroft (2015) 4.

<sup>10</sup> Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 2. Note that as is mentioned later in this paper, the most recent changes to legislation also create such a “deeming” provision in terms of which a client is viewed as the employer of the agency worker. Recent CCMA rulings on the interpretation of the particular provision, being Section 198(3)(b)(i), reflect the current confusion in terms of which it is unclear as to whether, after the client is deemed the employer of the agency worker, the employment agency is still also an employer of the agency worker or not.

<sup>11</sup> Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 2.

<sup>12</sup> Benjamin Sector Working Paper No. 292, International Labour Office Geneva (2013) 2. However the author also states that the 1983 legislation enabled employers to avoid aspects of labour law such as collective bargaining and protection against unfair dismissal.

<sup>13</sup> The Constitution, 1996.

indications that ILO instruments at the time played any role in the drafting of the 1996 provisions dealing with employment agencies.<sup>14</sup>

The 1996 legislation provides that the employment agency is the employer in the triangular relationship.<sup>15</sup> Only the employer, being the employment agency, was liable for unfair labour practice or unfair dismissal of the agency worker, whereas for transgressions in respect of wage regulation or basic conditions of employment, both the agency and the client were jointly and severally liable. Several reasons were identified which showed that those employed directly by a client were better off than those employed through an employment agency, which led to the long process of recent reform of the law regarding agency work.<sup>16</sup>

Increasing pressure on government, especially from trade unions, resulted in an eventual reform leading to the Labour Relations Amendment Act which became effective as from 1 January 2015. The preamble to the Amendment Act states that the purpose of the legislation is to, among other things, provide greater protection for agency workers. There has been great debate as to whether employment agencies should in fact be banned.<sup>17</sup>

The purposes of the changes and what the legislature seeks to achieve through changing the scheme of labour law regulation seems to be encapsulated within the Department of Labour's mandate and the words of the 2009 African National Congress election manifesto. In a Budget vote Address of the National Assembly in May 2013<sup>18</sup> the Speaker of the House highlighted the mandate of the Department of Labour and how this links to the Bills which were before Parliament. The Speaker stated:

---

<sup>14</sup> Van Eck (2012) 36. Here the author refers particularly to the 1933 and 1949 ILO Conventions which have since been replaced by the 1997 Convention on Private Employment Agencies.

<sup>15</sup> Ss 189(1) and (2) of Labour Relations Act 66 of 1995.

<sup>16</sup> The following summary of such reasons was identified by Van Eck (2012) 37 and 38: studies show agency workers are paid significantly less than their counterparts at the same workplace who are employed directly by a user company; sometimes those who were permanently employed were transferred to independent contractor status or an entire workforce of a big company was employed through a private employment agency; the agency is responsible for unfair dismissal and unfair labour practice without the user company being jointly and severally liable, it was held in some instances that were there is a termination of the agreement between the agency and the user company same does not constitute a dismissal of workers for operational reasons and they are therefore not entitled to bring a claim of unfair dismissal; even though agency work is meant to be temporary in nature it was widely used for employment that was indefinite in nature; it has often been difficult for agency workers to identify their employer as they have been working under the supervision and control of a user company.

<sup>17</sup> Van Niekerk *et al* (2015) 68. Here it is pointed out that trade union COSATU called for an outright ban of employment agencies.

<sup>18</sup> Budget vote Address by National Assembly in May 2013 <http://www.labour.gov.za/DOL/media-desk/speeches/2013/budget-vote-address-by-the-hon-minister-of-labour-ms-mildred-n-oliphant-mp-national-assembly> (accessed on 02/09/2013)

“Our mandate directs us: ‘To regulate the labour market through policies and programmes developed in consultation with social partners, which are aimed at: improved economic efficiency and productivity; employment creation; sound labour relations; eliminating inequality and discrimination in the workplace; alleviating poverty in employment; enhancing occupational health and safety awareness and compliance in the workplace; as well as nurturing the culture of acceptance that worker rights are human rights’”.<sup>19</sup>

At the same Budget vote Address the Speaker stated that

“[t]his is in keeping with the promises made in the African National Congress election manifesto in 2009 which promised that ‘In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, (we will) introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices. Provisions will be introduced to facilitate the unionisation of workers and conclusion of sectoral collective agreements to cover vulnerable workers in these different legal relationships and ensure the right to permanent employment for affected workers’”.<sup>20</sup>

The definition of employment agency is,

“In this section, "temporary employment service" means any person who, for reward, procures for or provides to a client other persons-

- (a) who render services to, or perform work for, the client; and
- (b) who are remunerated by the temporary employment service.”<sup>21</sup>

This definition applies to all agency workers, irrespective of the rate at which they are remunerated. However, as will be discussed below, employees earning below a particular threshold, have since January 2015 received special, new protective measures.

An important aspect which is introduced is the referral to the temporary nature of such work, however, as discussed below, this only applies to employees earning below a specified threshold.<sup>22</sup> From this it would seem that to some extent agency work should maybe be seen

<sup>19</sup> Budget vote Address by National Assembly in May 2013 <http://www.labour.gov.za/DOL/media-desk/speeches/2013/budget-vote-address-by-the-hon-minister-of-labour-ms-mildred-n-oliphant-mp-national-assembly> (accessed on 02/09/2013)

<sup>20</sup> Budget vote Address by National Assembly in May 2013 <http://www.labour.gov.za/DOL/media-desk/speeches/2013/budget-vote-address-by-the-hon-minister-of-labour-ms-mildred-n-oliphant-mp-national-assembly> (accessed on 02/09/2013).

<sup>21</sup> S 198(1)(a).

<sup>22</sup> S 198A(1) “In this section, a ‘temporary service’ means work for a client by an employee—

- (a) for a period not exceeding three months;
- (b) as a substitute for an employee of the client who is temporarily absent; or
- (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by

as a stepping stone to permanent employment.<sup>23</sup> It is clear that it was the intention that agency work should remain temporary in nature and should not be an arrangement for an extended period. If anything, it should serve as a ‘stepping stone’ into indefinite employment. However, it remains to be seen whether the three month period introduced is appropriate for this purpose.

An employment agency and a client are jointly and severally liable for contravention of a collective agreement that regulates terms and conditions of employment; or a binding arbitration award that regulates terms and conditions of employment; or the Basic Conditions of Employment Act<sup>24</sup> (“BCEA”) and/or a sectoral determination made in terms of the BCEA. The amendments provide that they can also be jointly and severally liable where the client is deemed to be the employer.<sup>25</sup> Furthermore, an employee in such instance can of course claim against either party or both and enforce an order or award against either party or both. This is made clear in the new Section 198(4A).<sup>26</sup>

As is the case with standard employees, the employment agencies are required to provide agency workers with written particulars of employment.<sup>27</sup> Section 198(4B)(a) states;

“A temporary employment service must provide an employee whose service is procured for or provided to a client with written particulars of employment that comply with section 29 of the Basic Conditions of Employment Act, when the employee commences employment.”

An agency worker may not be employed by an agency on terms and conditions not permitted by the Act, or any employment law, sectoral determination or collective agreement applicable to the employees of the client to whom the agency worker renders services.<sup>28</sup>

the Minister, in accordance with the provisions of subsections (6) to(8).”

<sup>23</sup> The idea of such transition may have come from an influence of the European flexicurity labour market policy where the European Expert Group on Flexicurity in 2007 drafted a list of “pathways”, being different roads countries can take to improve their labour markets. One of the pathways concerns promoting upward transitions in the labour market of non-standard employment, and the integration of non-standard contracts of employment into labour law, collective agreements, social security and systems of life-long learning. For further detail see Bovenberg and Wilthagen (2008).

<sup>24</sup> Act 75 of 1997, as amended.

<sup>25</sup> S 198(4A).

<sup>26</sup> “S 198(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b)—

(a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;

(b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and

(c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.”

<sup>27</sup> S 198(4B).

The most important amendments of all are found under a new section under the heading “Application of section 198 to employees earning below earnings threshold”.<sup>29</sup> Herein all agency workers, not performing temporary services and earning below the threshold amount will be deemed to be the permanent employees of the client to which they have been assigned; and they may not be treated less favourably than employees of that client who perform same or similar work, unless such differentiation is justifiable.<sup>30</sup>

The wording of the aforementioned amendment is as follows –

“(3) For the purposes of this Act, an employee—

...

(b) not performing such temporary service for the client is—

(i) deemed to be the employee of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.”

Just months after the coming into operation of these changes, it has become clear that there is no certainty about the interpretation of the “deeming provision”. In the first Commission for Conciliation, Mediation and Arbitration (“CCMA”) arbitration dealing with the matter, *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd with National Union of Metal Workers of South Africa (NUMSA)*<sup>31</sup> the commissioner held that the client becomes the sole employer of the agency worker, rather than establishing a dual employer-employee relationship.<sup>32</sup>

---

<sup>28</sup> S 198(4C). The Section states as follows; “An employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by *this Act*, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services.”

<sup>29</sup> S 198A(3)(b). The threshold amount is determined on a year to year basis in terms of S 6(3) of the BCEA. At the time of writing the threshold amount is R205 433,30. In Euro this is approximately an annual salary of 15 028,04 EUR.

<sup>30</sup> S 198(5) contains the reference to treatment which is on the whole not less favourable. “An employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.”

<sup>31</sup> ECEL 1652-15.

<sup>32</sup> In considering the interpretation of the section, the Commissioner turned to the explanatory memorandum of the amendments where the Commissioner noted that the “main thrust of the amendments is to restrict the employment of more vulnerable, lower paid workers by a TES to situations of genuine and relevant temporary work and to introduce various further measures to protect workers employed in this way.” Based on this the

However just a few days later, in the bargaining council decision of *Refilwe Esau Mphirime and Value Logistics Ltd / BDM Staffing (Pty) Ltd*<sup>33</sup> the Commissioner, considering the same aspect, finds that section 198(4) is in respect of non-compliance in relation to the BCEA and the joint and several liability created for the employment agency and the client. And that section 198A(3)(b) has been created, put simply, so as to cater for the situation of liability for LRA contraventions. The Commissioner also mentions that the word “deem” means to consider in a specific way. The Commissioner does not find that there is dual employment after three months, but instead finds that the client is liable in the particular case to prove that the dismissal of the agency worker by the employment agency was fair.

It is likely that with such vastly differing interpretations, there will be appeals to higher courts and perhaps even as far as the Constitutional Court. It is submitted, in light of the lack of clarity from the wording of the amendments and whilst awaiting precedent from courts of higher instance, that dual employment is not what the legislature intended to create. If same was intended, surely a clearer division of duties between the employment agency and the client towards the agency worker would have been provided for. A lack of this allocation of duties leaves all of the parties in a situation of confusion and certainly opens the agency worker up to being even more vulnerable than beforehand. If the legislature intended for agency work to be temporary in nature, and it seems that is the understanding of the legislature, then it is more feasible that the agency worker becomes permanently employed directly with the client. This interpretation would mean that the agency work then upgrades to standard employment, leaving atypical employment through an employment agency behind.

### **3. Relevance of International Labour Standards**

South Africa was one of the founding members of the ILO when it was established in 1919. Since the ILO’s creation international labour standards have played a role in South Africa.

---

Commissioner noted that “I am convinced that the correct interpretation is the one that will provide greater protection for the vulnerable class of employees.” The Commissioner finds that a situation of dual employment would be confusing as to which employer would be responsible for which employer-duties. Therefore in this case, it is found that the client becomes the sole employer of the agency worker after 3 months, when the other conditions are met as per the amendments.

<sup>33</sup> FSRFBC34922.



Even during South Africa's lengthy exclusion from membership of the ILO, due to its Apartheid regime, the ILO played a role in South Africa's labour law.<sup>34</sup>

Despite having not adopted the convention and recommendation pertaining to employment agencies, South Africa is a current member of the ILO and international labour standards have a direct influence on South Africa's formulation of its labour policies.

The consideration of international labour standards is imperative due to a constitutional obligation to consider international law when interpreting the Bill of Rights.<sup>35</sup> The South African Bill of Rights provides for labour rights.<sup>36</sup> The relevance and importance of international standards is reinforced in the LRA. This makes it obligatory, when applying the LRA, to interpret the Act's provisions in compliance with public international law obligations of the Republic.<sup>37</sup>

The South African Constitution<sup>38</sup> is the supreme law of the land<sup>39</sup> and it gives "customary international law" a significant status. Section 232 states that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". Shortly after the adoption of the final Constitution, Dugard noted that this "constitutionalization" of the common law rule on "customary international law" gives the rule additional weight and ensures that customary international law is no longer subject to

---

<sup>34</sup> In 1988 COSATU lodged a complaint against the Apartheid Government with the ILO. The Government refused to accept the jurisdiction of the ILO, until 1991, when it allowed a fact-finding mission from the ILO on freedom of association to come to South Africa. The ILO mission drew up a number of recommendations on how South Africa could improve its labour laws to be consistent with international standards. Also, see Van Niekerk et al (2015) 20 where it was stated that an ILO Special Committee on Apartheid produced annual reports to the ILO Conference on the labour-related aspects of Apartheid. These reports highlighted the effects of the policy of the government on black workers.

<sup>35</sup> S 39(1)(b) of the Constitution, 1996.

<sup>36</sup> S 23 provides the following: "(1) Everyone has the right to fair labour practices. (2) Every worker has the right— (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right— (a) to form and join an employers' organisation; and (b) to participate in the activities and programmes of an employers' organisation. (4) Every trade union and every employers' organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

<sup>37</sup> S 3.

<sup>38</sup> The Constitution, 1996.

<sup>39</sup> S 2 of the Constitution, 1996.

subordinate legislation.<sup>40</sup> Furthermore, section 233 provides that when interpreting any legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any interpretation which is not consistent with international law.

Section 39 of the Constitution, which deals with the interpretation of the Bill of Rights, further draws a distinction between “international law” and “foreign law”. It directs that international law “must” be considered and that foreign law “may” be taken into account.<sup>41</sup>

The Constitution provides no definition for either international law or foreign law. Megret states that international law is most often understood as law which is fundamentally different from domestic law.<sup>42</sup> He states that “international law’s mode of emergence was traditionally highly peculiar, and had more to do with the diffuse and bottom-up crystallization of norms over time”.<sup>43</sup> In other words, international law is applicable between states and is the result of norms which have developed over time and been given the status of law. Foreign law, it is submitted, is the domestic law of other countries.

The question has come before the courts as to whether international law refers only to international standards which South Africa has assented to and ratified or also to instruments which are not binding on the Republic. In a seminal Constitutional Court decision *S v Makwanyane and Another*,<sup>44</sup> it was held that both binding and non-binding international instruments are to be used in interpretation.<sup>45</sup> This is especially relevant as South Africa has

---

<sup>40</sup> Dugard (1997) 79. For a general picture of the application of international law in South Africa and International Law before the end of Apartheid in South Africa, see Dugard’s book entitled *International Law: A South African Perspective* (1994) Juta Chapter 4. Also see 4<sup>th</sup> edition (2011).

<sup>41</sup> S 39(1)(b) and (c).

<sup>42</sup> Megret (2012) 64. International law is also law between states as opposed to between individuals. At 70 the author states that most significantly regarding international law, it lacks some of the key hallmarks of a functioning domestic legal order being a centralized legislative body, a compulsory court system, and centralized enforcement.

<sup>43</sup> Megret (2012) 70. This is as opposed to a centralized legal framework, as is the case typically with domestic law. For a discussion on where international law comes from see Charlesworth (2012) 187 – 200.

<sup>44</sup> 1995 (3) SA 391.

<sup>45</sup> At paragraph 35 it was stated “(c) customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include *non-binding as well as binding law* (my emphasis). They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised

not assented to the relevant ILO Convention which will be discussed below. In terms of international law's meaning, ILO conventions and recommendations constitute international law.<sup>46</sup>

The LRA also confirms the importance of international standards. One of the primary objects of the LRA is to give effect to obligations of the Republic which it has incurred as a member state of the ILO.<sup>47</sup> Furthermore section 3 provides that any person applying the LRA must interpret the provisions of the Act in compliance with the public international law obligations of the Republic.

As will be seen, the international labour standards have also gone a long way in influencing the drafting and wording of national legislation, such as the LRA itself and amendments thereto. The Court has stated that “(t)he International Labour Organisation has through a large number of Conventions and Recommendations, such as the International Labour Organisation Convention, 158 of 1982, played a formative role in the development of South African labour law.”<sup>48</sup>

Before the enactment of the Constitution and the LRA, an ILO fact-finding team, namely the “Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa” which visited South Africa in 1992, drafted a report in which they made specific recommendations on the reform of South African labour law, and importantly this ILO report was used in the drafting of the current LRA.<sup>49</sup> The LRA was drafted by the Cheadle Task Team through negotiations at NEDLAC<sup>50</sup>, where the ILO findings were taken into account.<sup>51</sup> This shows the influence of international standards, and the ILO in particular, on national labour law.

After the end of Apartheid and the re-joining of South Africa as a member of the ILO, the ILO compiled a book on the findings of an independent review of labour market trends and

---

agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three”.

<sup>46</sup> *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C). In this decision the Court gave the example of ILO Conventions and Recommendations in respect of international law. At 1358 it was stated “Section 39(1) of the Constitution obliged the Court to consider international law such as the ILO Conventions and Recommendations when interpreting any right to fair labour practice.”

<sup>47</sup> S 1(b) of the LRA.

<sup>48</sup> *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) at para 23.

<sup>49</sup> Van Niekerk *et al* (2015) 20. The Commission's Report is available on the ILO Website at [http://www.ilo.org/public/libdoc/ilo/GB/253/GB.253\\_15\\_7\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/GB/253/GB.253_15_7_engl.pdf).

<sup>50</sup> NEDLAC is the National Economic Development and Labour Council in South Africa.

<sup>51</sup> Satgar (1998) 50. The author states that the Cheadle Task team was assisted by the ILO in the drafting of the new labour legislation for South Africa.

policy developments as per the request of the Minister of Labour.<sup>52</sup> The findings also consist of recommendations. The ILO's review has been the catalyst in Benjamin developing the term "regulated flexibility" for South Africa which forms the crux of South Africa's current labour market policy. Therefore the link between South Africa's labour legislation and the ILO's standards and policies is strong historically and today.

#### 4. ILO Standards on Agency Work

##### 4.1 Introduction

Conventions are legally binding instruments that may be ratified by member states.<sup>53</sup> Recommendations on the other hand are non-binding guidelines.<sup>54</sup> They may be described as morally binding. They supplement conventions and provide policy direction to member states, making them, if submitted, equally important in terms of a state's labour policy development. Both instruments are tools for governments to use, in conjunction with employers and workers, in drafting and implementing labour law and social policy.<sup>55</sup>

##### 4.2 Early Conventions and Recommendations

The history of agency work and ILO instruments show that already in 1919 there was mention of agency work in the Unemployment Convention and Recommendation.<sup>56</sup> It is

---

<sup>52</sup> Standing *et al* "Restructuring the Labour Market: The South African Challenge – An ILO Country Review" (1996) International Labour Office.

<sup>53</sup> <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed on 22 August 2014.

<sup>54</sup> <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed on 22 August 2014. Also, see Waugh (1982) 188 where the author states that ratification of an ILO convention by a member state of the ILO binds it to the provisions therein and this is usually achieved through bringing national law and practice into conformity.

<sup>55</sup> <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> accessed on 22 August 2014. Also see Waugh (1982) 188 where the author states that recommendations are usually more detailed than conventions and represent model, ideal or optimum objectives.

<sup>56</sup> ILO Convention on Unemployment, 1919 (No. 2) and ILO Recommendation on Unemployment, 1919 (No. 1). Article 2 of the Convention states that "1. Each Member which ratifies this Convention shall establish a system of free public employment agencies under the control of a central authority. Committees, which shall include representatives of employers and of workers, shall be appointed to advise on matters concerning the carrying

significant to note that at that stage employment agencies that were not for profit were permitted to exist but were to be controlled by a central state authority. The accompanying Recommendation however states that fee-charging agencies for profit should be prohibited.<sup>57</sup> Van Eck identifies that in 1933 the prohibition of fee-charging agencies for profit was elevated from the status of a recommendation to a convention in which member states were encouraged to abolish employment agencies in terms of the 1933 Fee-Charging Employment Agencies Convention.<sup>58</sup>

The regulation by the ILO of employment agencies amounted to over-regulation and this resulted in the ILO revising its Convention.<sup>59</sup> The 1949 Convention on Fee-Charging Agencies provided that member states could either abolish such agencies or regulate them.<sup>60</sup> As Valticos pointed out though, most member states still chose the option of abolishing fee-charging agencies.<sup>61</sup>

Thereafter in 1973 Valticos explains that with the rise in the number of non-standard forms of work, and of agency work especially, there were recommendations by some that specific standards for such work should be developed.<sup>62</sup>

Therefore in 1997 agency work was legitimised, with the 1997 Private Employment Agencies Convention. O' Donnell and Mitchell state that by the time the ILO had enacted this new standard, it was merely reflecting what had already become an established policy position in many European countries.<sup>63</sup> The ILO recognised the need for particular standards and

---

on of these agencies. 2. Where both public and private free employment agencies exist, steps shall be taken to co-ordinate the operations of such agencies on a national scale.”

<sup>57</sup> ILO Recommendation on Unemployment, 1919 (No. 1) stated that all practical measures should be taken to abolish such agencies.

<sup>58</sup> Van Eck (2012) 32. Also see Van Eck (2014) 54 and 55. The author refers to the ILO Convention on Fee-Charging Agencies, 1933 (No. 34). He points out that the limitation was later relaxed with the revision of the Convention in 1949.

<sup>59</sup> Van Eck (2012) 33.

<sup>60</sup> ILO Convention on Fee-Charging Agencies, 1949 (No. 96) Article 3 stated “1. Fee-charging employment agencies conducted with a view to profit as defined in paragraph 1 (a) of Article 1 shall be abolished within a limited period of time determined by the competent authority.” Provision was made for supervision and control of agencies in the period before abolition. Article 6 regulated fee-charging agencies not conducted with a view to profit. The article provided for supervision by an authority.

<sup>61</sup> Valticos (1973) 50.

<sup>62</sup> Valticos (1973) 56. Valticos suggests in his article that general standards in existence do apply to temporary employment agencies and address some social problems, however he states that particular standards with more precise provisions would fill some gaps that exist. Waas (2012) 49, writing about the German context in particular, states that agency work was in history forbidden and even a criminal offence, but that this changed with a court decision in 1967 when such work became admissible.

<sup>63</sup> O' Donnell and Mitchell (2001) 9. Also, in terms of the European Union in particular, Waas (2012) 49, states that within the EU member states may only prohibit or restrict the use of agency work on the grounds of

introduced conventions and recommendations relating to particular groups of atypical workers, being part-time work<sup>64</sup>, employment agency workers, home workers<sup>65</sup> and domestic workers.<sup>66</sup>

The history of ILO standards on agency workers shows a change in policy from prohibition or restriction of employment agencies' operation, to allowing employment agencies to exist but at the same time providing for protection of agency workers.<sup>67</sup>

#### 4.3 Private Employment Agencies Convention, 1997<sup>68</sup>

The introduction to this Convention states that the General Conference of the ILO is “aware of the importance of flexibility in the functioning of labour markets”.<sup>69</sup> It also states that they recognise “the role which private employment agencies may play in a well-functioning labour market”.<sup>70</sup> The Convention therefore does not try to prevent or prohibit employment agencies, as some countries have done in their national labour legislation and as was the case in the past, but rather recognizes their place in the labour market. In a positive development, Article 2 in fact provides that the purpose of the Convention is “to allow for the operation of private employment agencies and to protect workers”.<sup>71</sup> The introduction places an emphasis on the need to prevent abuses and to protect workers, thus showing a rights' based approach of the ILO towards agency workers.

The definition of employment agency is very broad and encompasses 3 types of agencies: a recruitment type agency, a labour broker or private employment agency and also all other services related to jobseeking.<sup>72</sup> The Guide states that the Convention makes reference to all

---

general interest. The author states that restrictions or prohibitions by member states will not be tolerated anymore.

<sup>64</sup> ILO Convention on Part-Time Work.

<sup>65</sup> ILO Convention on Homework.

<sup>66</sup> ILO Convention on Domestic Work.

<sup>67</sup> Van Eck (2012) 35 states with regards to the purpose of the Convention, that the ILO recognises the role that such agencies play in job creation however the Convention aims to ensure that workers who gain employment through employment agencies are not exploited.

<sup>68</sup> Private Employment Agencies Convention, 1997 (No 181).

<sup>69</sup> Introduction of ILO Convention on Private Employment Agencies.

<sup>70</sup> Introduction of the ILO Convention on Private Employment Agencies.

<sup>71</sup> Article 2 of ILO Convention on Private Employment Agencies.

<sup>72</sup> Article 1 of ILO Convention on Private Employment Agencies. The Article states as follows: “1. For the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

of these types of agencies as they all have placement as their main function.<sup>73</sup> However, this can create problems in that these services are very different and therefore should not necessarily be covered by one convention and the same set of rules. For example, the employer party in the instance of a recruitment agency and the employer party in the instance of an employment agency are not the same party.

Article 4 states that measures should be taken to ensure that workers recruited by employment agencies “are not denied the right to freedom of association and the right to bargain collectively.” The challenge herein is how such workers are meant to organise themselves, if they are employed by the employment agency, and then placed at different user companies. Practicalities around organisational rights also become challenging in that the workers do not work at the workplace of their employer but rather at client workplaces. Also rights of access to the employer’s workplace, being that of the employment agency, would also serve no function.<sup>74</sup>

Article 5 provides for equal treatment in respect of treatment by the employment agency without discrimination “on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability.”<sup>75</sup> The Guide reflects on the importance of this particular Article by making mention of a statement made by a large employment agency which stated that employment agencies “can either promote equal opportunities and improve transparency in the labour market or perpetuate discriminatory practice”.<sup>76</sup> They indeed have the power to perpetuate inequality. A shortcoming here is that there is no express mention of equal treatment of workers of an employment agency with those employees employed directly by a client. Therefore there could be different treatment of these groups of employees, even

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.

2. For the purpose of this Convention, the term workers includes jobseekers.

3. For the purpose of this Convention, the term processing of personal data of workers means the collection, storage, combination, communication or any other use of information related to an identified or identifiable worker.”

<sup>73</sup> ILO Guide to Private Employment Agencies 2007 10.

<sup>74</sup> Benjamin (2013) 13.

<sup>75</sup> The following bases are stated in Article 5: race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age and disability.

<sup>76</sup> ILO Guide to Private Employment Agencies 2007 25.

though they may be working side by side at the same workplace. Such inequality is likely, as those employed directly by a client may have benefits such as medical aid, death and disability cover, company pension schemes and so forth, which the workers of the employment agency are less likely to have. Whilst equality is key, it is submitted that this Article does not address this need sufficiently but provides the bare minimum.

Article 7 states that “(p)ivate employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers”. This right of the worker, not to be charged costs, is important in prevention of exploitation of the worker and therefore it is submitted it is a helpful provision contained within the Convention. This of course is positive in that it aids in the protection of the workers, who are already in a more precarious position due to their employment by way of an employment agency.

In the situation of an employment agency the question of which party has particular obligations in respect of the workers is a constant one. In this regard Article 12 states that the member state shall allocate the respective responsibilities of employment agencies and the client.<sup>77</sup> There are specific responsibilities listed such as those around collective bargaining, training, social security benefits and compensation for occupational health and safety claims. In this regard it is positive that the Convention places the obligation on the member state to determine and allocate these important obligations. This allows for clarity and certainty for workers and the other parties in the triangular relationship as well. However, should a state fail to specify or specify in ambiguous terms, then it can be seen as a shortcoming in the Convention for the state to be left with the power to allocate responsibilities of the parties.

The ILO’s Guide to Private Employment Agencies was drafted with the purpose of providing guidance to national legislators in drafting legal frameworks in line with the Convention<sup>78</sup> drafted in 1997.<sup>79</sup> The Guide states that this Convention was drafted to replace earlier standards which were aimed at abolition of employment agencies, and that such Convention

---

<sup>77</sup> Article 12 reads as follows: “A Member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to: (a) collective bargaining; (b) minimum wages; (c) working time and other working conditions; (d) statutory social security benefits; (e) access to training; (f) protection in the field of occupational safety and health; (g) compensation in case of occupational accidents or diseases; (h) compensation in case of insolvency and protection of workers claims; (i) maternity protection and benefits, and parental protection and benefits.”

<sup>78</sup> ILO Convention on Private Employment Agencies, 1997 (No. 181).

<sup>79</sup> ILO *Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement* Geneva, International Labour Office 2007.



recognises that employment agencies can contribute to the functioning of the labour market.<sup>80</sup> Despite the on-going debate regarding whether there should be regulation of employment agencies, it is clear that the ILO has adopted the view that regulation is necessary, with the main justification thereof being for the purposes of protection of employees of employment agencies. At the same time, the Guide does make mention of the fact that regulation, however, should improve the functioning of the labour market and not serve as a tool to restrain competition or create unnecessary burdens for employment agencies.<sup>81</sup>

In the past the ILO was opposed to the operation of employment agencies in that they would undermine the principle of labour not being a commodity, and therefore their operation was prohibited or limited.<sup>82</sup> The ILO in 1997 changed this policy and allowed for the operation of employment agencies and provided for the regulation of them. It is submitted that the reason for the ILO's change was due to the need to allow flexibility for employers and also due to the widespread practice of labour broking.<sup>83</sup>

#### 4.4 Private Employment Agencies Recommendation, 1997<sup>84</sup>

The main thrust of the Recommendation is protection of workers. Article 4 provides that member states should adopt measures to prevent unethical practices.<sup>85</sup>

The Recommendation suggests that workers should also have a written contract of employment.<sup>86</sup> A written employment contract can provide agency workers with some security as to the particulars of their rights and duties and at the very least it can provide clear evidence of their employment.

Reference is also made to health and safety of workers and prohibition of discrimination, as well as promoting equality through affirmative action programmes. Measures should be taken

---

<sup>80</sup> ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007 1.

<sup>81</sup> ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007 2.

<sup>82</sup> Raday (1999) 413. In this regard the ILO Convention on Unemployment and the ILO Convention on Fee-Charging Employment Agencies are relevant.

<sup>83</sup> Raday (1999) 413.

<sup>84</sup> Private Employment Agencies Recommendation, 1997 (No 188).

<sup>85</sup> Article 4 states “Members should adopt all necessary and appropriate measures to prevent and to eliminate unethical practices by private employment agencies. These measures may include laws or regulations which provide for penalties, including prohibition of private employment agencies engaging in unethical practices.”

<sup>86</sup> Article 5 states “Workers employed by private employment agencies as defined in Article 1.1(b) of the Convention should, where appropriate, have a written contract of employment specifying their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment.”

to promote the usage of proper, fair and efficient selection methods.<sup>87</sup> An important aspect of the Recommendation is Article 15 which states that employment agencies should not “prevent the user enterprise from hiring an employee of the agency assigned to it”, “restrict the occupational mobility of an employee”, or “impose penalties on an employee accepting employment in another enterprise.” These rights are crucial in allowing for an agency worker to transition from atypical work to standard employment.

The last part of the Recommendation deals with the relationship between the public employment service and private employment agencies. Measures to promote cooperation are encouraged. This will become relevant in the South African context with the establishment of a public employment service.<sup>88</sup>

Article 16 states that such cooperation should be encouraged in relation to the implementation of a national policy on organising the labour market. This reflects that public employment services and the private employment agencies have an effect on labour market policy, which shows the increase in agency work worldwide and the significance thereof.

## **5. Conclusion – Are South Africa’s Recent Legislative Amendments Compliant?**

In summation, after consideration of both the Convention and the Recommendation, it is submitted that the following principles can be considered current international standards in terms of the regulation of employment agencies:

- Flexibility in the functioning of the labour markets is important;<sup>89</sup>
- Employment agencies should be allowed to operate;<sup>90</sup>
- Agency workers need to be protected;<sup>91</sup>
- Agency workers should not be denied the right to freedom of association and the right to bargain collectively;<sup>92</sup>

---

<sup>87</sup> Article 13 states “Private employment agencies and the competent authority should take measures to promote the utilization of proper, fair and efficient selection methods.”

<sup>88</sup> Employment Services Act. Herein the public employment service is established, being a type of match-making service between job-seekers and potential employers.

<sup>89</sup> See introduction to the Convention.

<sup>90</sup> See Article 2 of the Convention.

<sup>91</sup> See Article 2 of the Convention as well as Article 4 of the Recommendation.

<sup>92</sup> See Article 4 of the Convention.

- Agency workers should be entitled to equal treatment by employment agencies, without discrimination on various grounds;<sup>93</sup>
- Fees or costs should not be charged to agency workers by employment agencies;<sup>94</sup>
- Agency workers should not be prohibited from being employed directly by a client, not have their occupational mobility restricted nor be penalised for accepting employment elsewhere;<sup>95</sup>
- Measures should be adopted to prevent unethical practices;<sup>96</sup>
- Agency workers should have a written contract of employment;<sup>97</sup>
- Responsibilities of the employment agency and of the client should be allocated respectively.<sup>98</sup>

The question now is whether South Africa's recent legislative amendments are compliant with these international labour standards which have been distilled. In short, the majority of the amendments do align with the standards listed above, even though expressed in different words or even tacitly. The principles of protection and the importance of flexibility in the labour market can be deduced from the Department of Labour's Deputy Director-General's words regarding the changes;

“There are also some who are clearly of the view that our labour legislation is too restrictive and that the South African labour market is over-regulated. It will not be helpful, at this time, to fall back on old debates about labour law being the actual or perceived rigidity in the labour market. As government, we are committed to a policy and legislative approach that is captured by the concept of regulated flexibility. Regulated flexibility accepts the necessity of regulation, but also accepts the need for flexibility. The key issue is finding the right balance”.<sup>99</sup>

From the amendments it is clear that the legislature intends on creating additional protection for lower income earners, who are in greater need of security as they are likely more vulnerable. Furthermore, there is a larger degree of flexibility for employers of higher income

---

<sup>93</sup> See Article 5 of the Convention as well the ILO Guide to Private Employment Agencies 2007.

<sup>94</sup> See Article 7 of the Convention.

<sup>95</sup> See Article 15 of the Recommendation.

<sup>96</sup> See Article 4 of the Recommendation.

<sup>97</sup> See Article 5 of the Recommendation.

<sup>98</sup> See Article 12 of the Convention.

<sup>99</sup> Esterhuizen “Changing SA's labour law not the answer, says DDG” (31 July 2013) Polity.org.za [www.polity.org.za](http://www.polity.org.za) (accessed on 02/09/2013).

earners, as they do not enjoy the additional protections afforded by the amendments. The additional protections here refer to the right of equality and the “deeming provision” in respect of permanent employment with the client. Worth mention here is that the international instruments discussed do not provide for differing treatment of high income versus lower income earners.

In respect of the standard of fees or costs being charged to agency workers, the amendments to the LRA do not cover this aspect. But there is a saving grace, as despite the amendments to the LRA being silent on this issue, the Employment Services Act accounts therefore.<sup>100</sup> As soon as this Act has commenced, the South African labour law will meet the international standards in this regard.

It is submitted that there are two points where South Africa’s amendments fail to meet the aforementioned international standards identified in the ILO instruments, being that:

- Agency workers should not be prohibited from being employed directly by a client, not have their occupational mobility restricted nor be penalised for accepting employment elsewhere;
- Responsibilities of the employment agency and of the client should be allocated respectively.

A great opportunity has been missed by the lawmakers through their exclusion of the international standard which prevents agency workers from being prohibited from direct employment with a client. There is no express provision outlawing restriction on an agency worker’s occupational mobility nor preventing penalisation for accepting employment elsewhere. Agency workers in South Africa are therefore still vulnerable to abuse in this area, which then limits their ability to find more secure, direct employment.

---

<sup>100</sup> s15 states “(1) No person may charge a fee to any work seeker for providing employment services to that work seeker. (2) Despite subsection (1), the Minister may, after consulting the Board, by notice in the Gazette permit private employment agencies to charge fees in terms of a specified fee to specified categories of employees or for the provision of specialised services. (3) A notice in terms of subsection (2) may specify categories of employees by reference to the work performed or to the earnings of such employees. (4) A private employment agency must not deduct any amount from the remuneration of an employee or require or permit an employee to pay any amount in respect of the placing of that employee with an employer. (5) Any agreement between a private employment agency and a client in terms of which employees perform work for the client, must specify separately the remuneration that employees will receive and the fee that the client is paying to the private employment agency. (6) A provision in any agreement concluded with an employee that is in breach of this section is invalid and of no force and effect.”

In respect of the allocation of responsibilities of the employment agency and the client, the amendments cover the instances where these parties are jointly and severally liable and also goes further in explaining the agency worker's options where joint and several liability occurs. To an extent the issue of respective responsibilities is also touched on in the "deeming provision", where the client is deemed to be the employer of the agency worker, and such employment is deemed to be on an indefinite basis. This may appear to mean that once the conditions are met, all employer obligations in respect of the agency worker then are placed on the shoulders of the client. Or, due to interpretational challenges discussed earlier, this could mean that perhaps there is a situation of "dual employment" and this surely means that there is even a greater need for the allocation of responsibilities between the parties to be spelt out.

In conclusion, international labour standards have had an influence on the South African policy-makers and legislature in relation to the regulation of agency work. South Africa's policy of "Regulated Flexibility" also draws upon aspects of employee protection and employer flexibility, much like the international instruments seek to do. The recent amendments in respect of agency work are for the most part compliant with international standards. However, an important shortfall of the amendments are that they have failed to include the particular aspects identified above. And these omissions, it is submitted, will result in lower protection for agency workers than is the case under the international standards of the ILO. One hope for agency workers is that the courts may be able to set precedents which can bring agency workers closer to the realisation of the international standards not accounted for in legislation.

## **Bibliography**

<b>Books and Chapters in Books</b>	<b>Mode of Citation</b>
------------------------------------	-------------------------

Charlesworth “Law-Making and Sources” in Crawford and Koskenniemi <i>International Law</i> (2012) Cambridge University Press	Charlesworth (2012)
Collier and Bamu “Linking trade to labour standards: A promising synergy of a double-edged sword?” in Le Roux & Rycroft (eds) <i>Reinventing Labour Law</i> (2012) Juta	Collier and Bamu (2012)
Hepple <i>Labour Laws and Global Trade</i> (2005) Hart Publishing	Hepple (2005)
Megret “International Law as Law” in Crawford and Koskenniemi <i>International Law</i> (2012) Cambridge University Press	Megret (2012)
Rodgers, Lee, Swepston and Van Daele “Decent Work and a Fair Globalization” in <i>The ILO and the Quest for Social Justice, 1919 – 2009</i> (2009) ILR Press	Rodgers <i>et al</i> (2009)
Standing, Sender and Weeks <i>Restructuring the Labour Market: The South African Challenge; An ILO Country Review</i> (1996) International Labour Office	Standing <i>et al</i> (1996)
Van Niekerk, Christianson, McGregor, Smit and Van Eck <i>Law@work</i> (2015) 5th edition LexisNexis	Van Niekerk <i>et al</i> (2015)

<b>Journal Articles</b>	<b>Mode of Citation</b>
Basu “Compacts, Conventions and Codes: Initiatives for Higher International Labour Standards” <i>Cornell International Law Journal</i> (2001) 487	Basu (2001)
Benjamin “Law and Practice of Private Employment Agency Work in South Africa” <i>International Labour Office, Sectoral Activities Department</i> (2013)	Benjamin (2013)
Bovenberg and Wilthagen “On the Road to Flexicurity: Dutch	Bovenberg and

Proposals for a Pathway to Towards Better Transition Security and Higher Labour Market Mobility” <i>European Journal of Social Security</i> (2008) 10 4 325 - 346	Wilthagen (2008)
Brown and Stern “What Are the Issues in Using Trade Agreements to Improve International Labor Standards?” <i>World Trade Review</i> (2008) 7 2 331 - 357	Brown and Stern (2008)
Cohen and Moodley “Achieving ‘Decent Work’ in South Africa?” <i>PELJ</i> (2012) (15) 2	Cohen and Moodley (2012)
Cox “The International Labour Organisation and fundamental rights at work” <i>European Human Rights Law Review</i> (1999) 451 - 458	Cox (1999)
Dugard “International Law and the South African Constitution” <i>EJIL</i> (1997) 1 77 - 92	Dugard (1997)
Gould “Labor Law for a Global Economy: The Uneasy Case for International Labor Standards” <i>Nebraska Law Review</i> 715	Gould (2001)
Helfer “The future of the International Labour Organization” <i>American Society of International Law Proceedings</i> March 2007 391	Helfer (2007)
Hyde “The International Labor Organization in the Stag Hunt for Global Labor Rights” <i>Law &amp; Ethics Human Rights</i> September (2009)	Hyde (2009)
Landy “The Effective Application of International Labour Standards” <i>Int’l Lab. Rev.</i> (1953) 346 68	Landy (1953)
Langille “Imagining ‘post-Geneva consensus’ Labour Law for Post ‘Washington consensus’ Development” <i>Comparative Labour Law and Policy Journal</i> (2010) 523 – 552	Langille (2010)
Mansoor “Laughter and Tears of Developing Countries: the WTO and the Protection of International Labour Standards” <i>International Trade Law Journal</i> (2005) 60 - 68	Mansoor (2005)

McGregor “Globalization and Decent Work (part 1)” <i>The Quarterly Law Review for People in Business</i> (2006) Vol 14 Part 4 150 – 154	McGregor (2006)
Milman-Sivan “Shared Responsibility and the International Labour Organisation” <i>Michigan Journal of International Law</i> (2013) 34 675	Milman-Sivan (2013)
O’ Donnell and Mitchell “The Regulation of Public and Private Employment Agencies in Australia: An Historical Perspective” <i>Comparative Labor Law &amp; Policy Journal</i> Vol 23 Issue 1 (2001) 7 - 44	O’ Donnell and Mitchell (2001)
Potter “The Growing Significance of International Labor Standards on the Global Economy” <i>Suffolk Transnational Law Review</i> (2005) 243	Potter (2005)
Raday “The Insider-Outsider Politics of Labor-Only Contracting” <i>Comparative Labour Law and Policy Journal</i> (1999) 413 – 445	Raday (1999)
Rycroft “Strikes and the Amendments to the LRA” <i>Industrial Law Journal</i> (2015) 36 1 - 20	Rycroft (2015)
Satgar “The LRA and Workplace-Forums: Legislative Provisions, Origins, and Transformative Possibilities” <i>Law, Democracy and Development</i> (1998) 2 1 43 - 62	Satgar (1998)
Smit and Fourie “Perspectives on Extending Protection to Atypical Workers, Including Workers in the Informal Economy, in Developing Countries” <i>TSAR</i> (2009) 3 516 – 547	Smit and Fourie (2009)
Supiot “The Position of Social Security in the System of International Labor Standards” <i>Comparative Labor Law and Policy Journal</i> (2006) 113	Supiot (2006)
Trebilcock “Putting the Record Straight About International Labor Standard Setting” <i>Comparative Labour Law and Policy Journal</i> (2010) 553 - 570	Trebilcock (2010)



Valticos “Temporary Work Agencies and International Labour Standards” <i>Int’l Lab. Rev.</i> (1973) 107 43	Valticos (1973)
Van Eck “Employment Agencies: International Norms and Developments in South Africa” <i>International Journal of Comparative Labour Law and Industrial Relations</i> (2012) 28 1 29 - 44	Van Eck (2012)
Van Eck “Regulated Flexibility and the Labour Relations Amendment Bill of 2012” <i>De Jure</i> (2013) 600	Van Eck (2013)
Van Eck “Revisiting Agency Work in Namibia and South Africa: Any Lessons from the Decent Work Agenda and the Flexicurity Approach?” <i>International Journal of Comparative Labour Law and Industrial Relations</i> (2014) 30 1 49 - 66	Van Eck (2014)
Van Staden “Towards a South African Understanding of Social Justice: the International Labour Organisation perspective” <i>TSAR</i> (2012) 1 91	Van Staden (2012)
Waas “A Quid Pro Quo in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment – Lessons to be Learnt from European and German Labour Law” 34/1 <i>Comparative Labour Law &amp; Policy Journal</i> 47 48 (2012)	Waas (2012)
Waugh “ILO and Human Rights” <i>Comparative Labor Law</i> (1982) 5 2 186 - 196	Waugh (1982)
Weiss “International Labour Standards: A Complex Public-Private-Policy-Mix” <i>Stellenbosch Conference</i> (2011)	Weiss (2011)
Wells “Best Practice in the Regulation of International Labor Standards: Lessons of the US – Cambodia Textile Agreement” <i>Comparative Labor Law and Policy Journal</i> (2006) 357	Wells (2006)
Wisskirchen “The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience” <i>International Labour Review</i> (2005) Vol 144 (3) 253 - 289	Wisskirchen (2005)

<b>South African Statutes, Statutory Instruments, Regulations</b>	<b>Mode of Citation</b>
Basic Conditions of Employment Amendment Act 20 of 2013	Basic Conditions of Employment Amendment Act
Constitution Act 108 of 1996	Constitution
Employment Equity Amendment Act 47 of 2013	Employment Equity Amendment Act
Employment Services Act 4 of 2014	Employment Services Act
Labour Relations Amendment Act 6 of 2014	Labour Relations Amendment Act

<b>International Standards or Regulations</b>	<b>Mode of Citation</b>
ILO Declaration on Social Justice for a Fair Globalization 2008	ILO Declaration on Social Justice for a Fair Globalization
ILO Convention No 181 Private Employment Agencies 1997	ILO Convention on Private Employment Agencies
ILO Recommendation No 188 Private Employment Agencies 1997	ILO Recommendation on Private Employment Agencies
ILO Convention No 175 Part-Time Work 1994	ILO Convention on Part-time Work

ILO Recommendation No 182 Part-Time Work 1994	ILO Recommendation on Part-Time Work
ILO Convention No 177 Homework 1996	ILO Convention on Homework
ILO Convention No 189 Domestic Work 2011	ILO Convention on Domestic Work
ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement <i>International Labour Office</i> 2007	ILO Guide to Private Employment Agencies 2007

### Electronic Resources

1. <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed on 22 August 2014
2. <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> accessed on 22 August 2014
3. <http://www.leeswepston.net/supersys.htm> accessed on 12 October 2014
4. <http://www.adcorp.co.za/Pages/Temporaryworkgrowingdespiteoveralldownwardtrend.aspx> accessed on 23 June 2015
5. <http://www.staffingindustry.com/row/Research-Publications/Daily-News/South-Africa-Jobs-will-be-lost-and-unemployment-will-rise-following-labour-act-amendments-33618> accessed on 23 June 2015

**Case Law**

Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and National Union of Metal Workers of South Africa (NUMSA) ECEL1652-15 CCMA

Murray v Minister of Defence (2006) 11 BCLR 1357 (C)

Refilwe Esau Mphirime v Value Logistics Ltd / BDM Staffing (Pty) Ltd

S v Makwanyane 1995 (3) SA 391

**Working Papers**

Benjamin “Law and Practice of Private Employment Agency Work in South Africa” Sector Working Paper No. 292, International Labour Office Geneva (2013)