Building & Wood Workers' International

BWI ▪ BHI ▪ BTI ▪ IBB ▪ ICM

EXPLORING LABOUR BROKING IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY

BY PAMHIDZAI H. BAMU and SHANE GODFREY

LABOUR AND ENTEPRISE POLICY RESEARCH GROUP,
UNIVERSITY OF CAPE TOWN

REPORT COMMISSIONED BY THE LABOUR RESEARCH SERVICE ON BEHALF OF BWI

What is BWI?

The BWI is the global union federation grouping of free and democratic unions, with members in the building, building materials, wood, forestry and allied sectors.

The BWI groups together around 318 trade unions representing around 12 million members in 130 countries. The headquarters is in Geneva, Switzerland. Regional and Project offices are located in Panama and Malaysia, South Africa, India, Australia, Burkina Faso, Bulgaria, Lebanon, Kenya, South Korea, Russia, Argentina, Peru and Brazil.

Our mission is to promote the development of trade unions in our sectors throughout the world, and to promote and enforce workers' rights in the context of sustainable development.

The President of the International is Klaus Wiesehügel from the Building and Forest Workers Union in Germany. The Deputy President is Stefaan Vantourenhout from the Building and Wood Workers union in Belgium and the General Secretary is Anita Normark from Sweden.

BWI • BHI • BTI • IBB • ICM

Building and Wood Workers International – BWI
Southern Africa Project Office
P.O. Box 30772, Braamfontein, 2017
South Africa
Telephone: +27 (0) 11 339 44 17/9
Facsmile: +27 (0) 11 339 39 10
Email: sapo@bwint.org

Labour Research Service
PO Box 376, Woodstock, 7915,
South Africa
Telephone: + 27 (0)21 447 1677
Facsimile: + 27 (0)21 447 9244
Email: lrs@lrs.org.za
Web: www.lrs.org.za

Edited by Joanne Bloch
2009

sask
Trade Union Solidarity Centre of Finland

Schweizerisches Arbeiterhilfswerk SAH
Org. Suiça de Entre-ajuda Operária OSEO
Swiss Labour Assistance SLA

TABLE OF CONTENTS

LIST OF ACRONYMS

AUBTWSA	Amalgamated Union of Building and Allied Workers of South Africa
APS	African Personnel Services
APSO	Association of Personnel Service Organisations
BCAWU	Building, Construction and Allied Workers' Union
BCEA	Basic Conditions of Employment Act
BIBC	Building Industry Bargaining Council
BIFSA	Building Industry Federation of South Africa
BWI	Building and Wood Workers International
BWAWUSA	Building, Wood and Allied Workers' Union of South Africa
BWU	Building Workers' Union
CAPES	Confederation of Associations of Employment Services
CC	Closed corporation
CEA	Constructional Engineering Association
CEA- LBD	Constructional Engineering Association (Labour Broking Division)
CETA	Construction Education and Training Authority
CIDB	Construction Industry Development Board
COIDA	Compensation for Occupational Injuries and Diseases Act
DTI	Department of Trade and Industry
EPWP	Extended Public Works Programme
ILO	International Labour Organisation
LDC	Limited Duration Contract
LOSC	Labour-Only Subcontractors
LRA	Labour Relations Act
MBA	Master Builders' Association
MBSA	Master Builders South Africa
NEDLAC	National Economic Development and Labour Council
NUM	National Union of Mineworkers
NBF	National Bargaining Forum
SACOC	South African Chamber of Commerce
SASCA	South African Subcontractors' Association
SAFCEC	South African Federation of Civil Engineering Contractors
SAWWU	South African Woodworkers' Union
SBA	Small Builders' Association
SETA	Sector Education and Training Authority
SSETA	Services Sector Education and Training Authority
TES	Temporary Employment Service
VAT	Value Added Tax
UIF	Unemployment Insurance Fund
VBF	Voluntary Bargaining Forum
ZAR	South African Rand

GLOSSARY

Bargaining council	A bargaining forum established by one or more registered trade unions and one or more registered employers' organisations in compliance with the Labour Relations Act. It must be registered with the Department of Labour and is subject to regulation by the Minister of Labour.
Casualisation	The trend to reduce permanent, full-time employment and use more part-time and temporary employment.
Collective agreement	A written agreement concerning terms and conditions of employment and/or matters of mutual interest concluded by trade unions, on the one hand, and employers and/or employers' organisations, on the other hand.
Collective bargaining	Negotiations between trade unions, on the one hand, and employers and/or employers' organisations, on the other hand, with the objective of reaching agreement on terms and conditions of employment or other matters of mutual interest.
Externalisation	The trend to reduce the number of direct employees by increasing the number of workers engaged via third parties such as labour brokers and labour only subcontractors.
Full-time employment	An employment relationship where the employee works for at least 40 hours per week for the same employer.
Labour broker	Also referred to as a temporary employment service (TES). A person who (for the fee) assigns a specified number of workers possessing specified skills to a client for a fixed period of time. While the labour broker is deemed to be the employer, the worker is subject to the client's control, as the client determines what, how and when the work will be done.
Labour-only subcontractor	A person who undertakes to perform a specified task within a specified period for a client. The labour-only subcontractor retains some discretion as to how the work will be completed and may employ his or her own workers to assist in completing the tasks. These workers are not subject to the client's control.
Part-time employment	An employment relationship where the employee works for less than 40 hours per week for the same employer.
Permanent employment	An employment relationship for an indefinite period of time until either party terminates it by giving notice to the other party.

Temporary employment	An employment relationship where the parties agree that the relationship will last for a fixed period of time or until the employee completes a specified task. Also referred to as “fixed-term” or “limited duration contract” employment.
Voluntary bargaining forum	A collective bargaining forum established by trade union and employer parties. It is not registered with the Department of Labour or subject to the Minister’s control, but is regulated by mutually determined rules.

List of tables

List of diagrams

List of case studies

1 INTRODUCTION

Competition among businesses has increased over the past few decades. This has taken place in the context of globalisation, which encompasses a number of interlinked processes resulting in the lowering of barriers between states through enhanced communication and technology, and the opening up of commodity, labour and financial markets.

“Flexibility” has become the buzzword in business circles, and has been used to explain employers' needs to make changes to their workforces to adjust to changes in the market. Employers and institutions promoting neo-liberal ideals argue that labour laws should not unduly constrain employers’ ability to make decisions that enable them to be more responsive to markets and remain competitive.

South Africa is no stranger to these debates. Following the transition to democracy in 1994, the country enacted a new labour law regime to give better protection to workers and improve labour relations. This legislation covers matters such as collective bargaining, minimum conditions of employment and skills development. It also protects employees from unfair labour practices, unfair dismissal and unfair discrimination.

Employers argue that South Africa's labour laws are too rigid, and hinder their ability to adapt to rapidly changing markets. They argue that the “standard employment relationship” (SER) characterised as a full-time, long-term or indefinite relationship between an employer and an employee is inflexible and costly. Of particular concern are the protections against dismissal in our labour legislation. As a result, many employers are restructuring employment arrangements to ensure greater autonomy and flexibility. In most cases, these “flexible” work arrangements have the effect of taking work relationships outside the protective scope of labour law.

1.1 Objectives of the research

The construction industry presents a good case study to examine changes in working arrangements in the quest for greater flexibility.

The main objective of this research is to establish the various forms of labour flexibility that have emerged in the construction sector, and to identify the benefits of each for the employer. The primary focus is on labour broking and how it relates to other forms of flexibility in the industry.

The second objective is to provide a rough measure of the number of people involved in each of these forms of flexibility, including labour broking. Large-scale

data is not helpful in this regard, and a largely qualitative approach will be taken, based on estimates given by key informants in the sector.

The third objective is to focus on labour broking in order to identify the characteristics of labour brokers operating in the construction industry. This objective includes investigating why firms use labour brokers as opposed to other forms of labour flexibility.

The fourth objective is to outline the challenges that labour broking poses for union organisation, collective bargaining and labour regulation. An aspect of this part of the research will be to examine some examples of labour brokers' contracts with workers, in order to check whether or not these comply with all the requirements of the labour statutes.

The fifth objective is to make recommendations as to the steps government should be taking to improve the regulation of labour brokers. Recommendations will also deal with how unions can better respond to the threats posed by labour brokers to organisation and collective bargaining.

1.2 Notes on the Methodology and Samples

After a review of the relevant literature, and an Internet search, the researcher consulted some knowledgeable individuals in the industry to identify players, trends and possible informants for interviews. Semi-structured questionnaires were then drafted for the different respondents identified.

A list of 40 potential informants representing various institutions was drawn up, and informants were approached to participate in the interviews. The institutions included bargaining councils, building trade unions, Master Builders' Associations (MBAs), the Construction Education and Training Authority (CETA), and the Services Sector Education and Training Authority (SSETA). Of the key informants who agreed to participate, six were representatives of the building bargaining councils. One was an executive of a regional Master Builders' Association. Seven were from large trade unions organising in the construction industry, namely the National Union of Mineworkers (NUM), the Building Construction and Allied Workers' Union (BCAWU), the Building Wood and Allied Workers' Union of South Africa (BWAWUSA), the Amalgamated Union of Building Trade Workers of South Africa (AUBTWSA) and Building Workers Union (BWU). The interviews were conducted between October 2008 and February 2009.

Most informants were quite willing to participate in the survey and made themselves available for interviews. A few were unavailable or unresponsive, despite numerous attempts to contact them. Others declined to participate, as they said they did not have (and were unable to obtain) a mandate to speak on

behalf of their organisations. Some were suspicious of the researcher's motives and had concerns that the outcome of the research would have a negative impact on their organisations.

In addition, interviews were held with various people working in the construction industry. 30 labour broking firms were approached, but in the end only 11 participated in the survey. The researcher was unable to obtain a comprehensive list of labour brokers in the industry registered with the SSETA. The sample was therefore drawn from a variety of sources, including Internet searches, the yellow pages and referrals from key informants and other contacts. The researcher limited the sample to firms in Gauteng and the Western Cape, as preliminary research indicated that this is where labour broking is most predominant. While care was taken to ensure that the brokers approached operated in the construction industry, representatives of eight of them claimed that they did not operate in the industry and could therefore not participate.

All 22 of the labour brokers that were operating in the construction industry agreed to participate in the research. However, in five cases, there were problems with obtaining authority from the relevant officer. Six others were unavailable at the agreed time and rescheduling proved to be difficult, despite attempts to do so. In the end, 11 questionnaires were completed.

In addition to the key informants, interviews were held with 16 building subcontractors on three building sites. Of these, seven were subcontractors that provide materials, while nine were labour-only subcontractors (LOSCs). The researcher also interviewed 16 construction workers. Of these, nine were job seekers at a well known "pick up spot" in the Cape Town CBD area, and seven were workers who were taking a break from their work on site. Most of these interviews were facilitated by visits to three commercial building sites in the Western Cape and the efforts of the researcher's contacts working in the industry.

The sample of interviews was clearly not representative in statistical terms. However, this was not the objective. The interviews were intended to be exploratory and qualitative, drawing on the views and experiences of persons well placed to identify the general trends in the industry.

1.3 Overview of the report

The remainder of the report proceeds as follows:
Part 2 begins with an overview of the construction industry, and then proceeds to map out the flexible working arrangements within the industry. These include increased subcontracting, and labour-only subcontracting, the use of limited duration contracts and labour brokers.

Part 3 then focuses on labour broking in the construction industry. It presents the findings gathered from the interviews with representatives of labour brokers that operate in the construction industry. The section tries to map out the characteristics of the labour broking firms and operational and other trends. The objective is to gain insight into the nature and extent of the role of labour broking in the construction industry.

Part 4 of the report examines the regulation of labour broking in the construction industry. It begins by examining the labour law provisions governing labour brokers (or temporary employment services, referred to as TESs, in the legislation). It then examines the arrangements governing terms and conditions of employment in the construction industry. This is followed by a thematic discussion of certain issues raised by critics of labour brokers.

Part 5 discusses the roles of institutions involved in the regulation of labour broking in the construction industry. These include the building industry bargaining councils, trade unions and employer organisations representing labour brokers.

Part 6 considers the future of labour broking in the construction industry. This is examined against the backdrop of the ongoing debate on the future of labour broking in South Africa. Finally, part 7 makes some brief conclusions.

2 MAPPING FLEXIBILE WORKING ARRANGMENTS IN THE CONSTRUCTION INDUSTRY

The construction industry covers work falling within the building, civil engineering and manufacturing sectors. The latter relates to the manufacture of materials used in the building and civil engineering sectors. Broadly speaking, the building industry comprises activities involved in the erection, completion, maintenance, alteration and renovation of buildings and structures, and the making of articles used for these activities.[1] This takes place predominantly in the private sector, with the public sector accounting for only 25 per cent of money spent in the building sector.[2]

Civil engineering involves the design and construction of public works such as dams, bridges, roads, waterworks, earthworks and other structures excluding buildings. This research mainly focuses on the building and civil engineering sectors as opposed to the manufacturing sector. According to the Construction Industry Development Board (CIDB), most work in civil engineering is

[1] From the definitions clause of the Bloemfontein Building Industry Bargaining Council collective agreement. Other collective agreements contain similar definitions.

[2] The *CIDB Quarterly Monitor*, October 2008 p 2.

commissioned by the public sector, which accounts for about 80 per cent of civil engineering works.[3]

Statistics South Africa classifies construction enterprises into four groups according to the value of their annual turnover. These are large, medium, small and micro enterprises defined as per the table below:

Table 1: Size of enterprises for the construction industry

Size	Turnover (ZAR)	Percentage of total employment
Large	More than R 26 m	35.6 %
Medium	More than R 13 m but less than R 26 m	23.4 %
Small	More than R 6 m but less than R 13 m	10.2 %
Micro	Less than R 6 m	30.8%

Source: Statistics South Africa, *Construction Industry*, 2007

Stats SA's last large-scale construction industry survey reported that large enterprises employ the greatest percentage of people working in the industry. This is followed by micro enterprises, which employ 30.8% of the workforce. Medium and small enterprises employ 23.4 per cent and 10.2 per cent respectively. This shows that small and micro enterprises collectively command a significant portion of the labour force in the industry (41 per cent).

Following a slump in the industry in the 1990s, the construction industry underwent a boom. Statistics South Africa reports that the sector grew by 14, 2% in the third quarter of 2007 (Stats SA 2007, 7). Earnings increased from R 6, 73 bn in June 2006 to a high of R 9, 39 bn in December 2007. After a decline to R 8, 32 bn in March 2008, earnings increased and peaked at R 9, 75 bn in September 2008. Growth in the industry accelerated after 2006 due to 2010 FIFA World Cup construction projects.

The Construction Industry Development Board reports that large construction companies have been the greatest beneficiaries of the construction boom. Large companies have seen their share prices increase and have increased shareholder dividends. Four of the largest construction companies in South Africa (the Aveng Group, Murray and Roberts, Group 5 and WBHO) recorded significant growth in their profits post-2006.

[3] The *CIDB Quarterly Monitor*, October 2008 p 2.

Table 2: Construction Giants' Profits before Tax ZAR (millions)

Company	Aveng Group	WBHO	Murray and Roberts	Group 5
2004	170	128	415	118
2005	493	198	523	134
2006	788	305	658	141
2007	7 953	446	1 284	373
2008	3 321	1 081	2 558	666

Source: Calculations by the Labour Research Services, 2009

Firms have not benefited equally from the boom. The majority of firms are emergent firms that would struggle ever to win a project. A tiny minority of contractors (about 0.2% of the contractors registered with the Construction Industry Development Board) tend to win the big, lucrative government tenders (*Engineering News*, 2-8 November 2007).

Industry reports indicate that activity in the construction industry has been declining since 2008. A number of challenges face the industry. Work opportunities are decreasing, and this has resulted in tougher competition to win projects. The impact of the global financial crisis is becoming evident, as some projects are being suspended indefinitely or cancelled when clients review their infrastructure spending. For instance, Murray and Roberts reported the cancellation of projects worth R 10 billion over a three month period.[4] Demand for construction, particularly in the private sector, has been hampered by slower economic growth and weaker business confidence in the industry.[5]

While larger firms are surviving, small construction firms seem to be struggling to cope in the industry. This trend is confirmed by industry reports that the number of liquidations amongst small construction firms (closed corporations) increased by 54% in 2008.[6] On the other hand, liquidations amongst construction companies reduced by 66% in the same period.[7] In addition, those closed

[4] Creamer, Terence. M &R's order book resilient at R 60 bn, despite project cancellations of R 10 bn", *Engineering News*, 25 February 2009.
[5] "Contractors grappling with rising costs" reported on 4 June 2008 at www.industryinsight.co.za accessed on 20/02/2009.
[6] "Small Construction businesses struggle in cash strapped industry" reported on 26 September 2008 on www.industryinsight.co.za accessed on 20/02/2009.
[7] "Small Construction businesses struggle in cash strapped industry" reported on 26 September 2008 on www.industryinsight.co.za accessed on 20/02/2008.

corporations liquidated or insolvent as a percentage of total liquidations increased from 48% in 2007 to 81% in 2008.[8]

2.1 Changing work arrangements in the construction industry

The construction industry operates on a project basis, and work is allocated through a process of tendering by contractors. A project is awarded to a main contractor, who is responsible for the overall completion of the project.

The majority of main contractors do not have all the skills necessary to complete their projects. As a result, sub-contracting has always been necessary for certain specialist tasks. Plumbing, electrical installation, air conditioning, joinery, tiling and roofing have traditionally been carried out by specialist subcontractors in the building industry. Traditional sub-contracting "is characterised by specialist skills and the supply of materials by the sub-contractor".[9]

Most construction companies (whether main contractors or subcontractors) in the past directly employed their own labour for the functions that they carried out. Goldman argues that employment in the construction industry has always been "precarious and short-term" for the duration of the project, as opposed to permanent employment.[10] She argues that this is due to the project-based nature of the building industry and constant variations in the demands for labour.[11] On the other hand, interviews with key informants indicate that in the past, the majority of workers employed in the industry were employed on a full-time, permanent basis and that the higher incidence of short-term and precarious employment is a more recent phenomenon. The truth probably lies in the middle ground: certainly, most construction companies have tried to retain highly skilled workers either as permanent workers or on limited duration contracts that were repeatedly renewed, resulting in long-term relationships.

Although the organisation of work in the industry has been changing over the past two decades, the changes seem to have accelerated in the last decade. The literature identifies two main forms of flexible arrangements, namely casualisation and externalisation. These changes have taken place in most industries in South Africa. We begin by defining the processes, and then outline how they have unfolded in the construction industry.

---

[8] "Small Construction businesses struggle in cash strapped industry" reported on 26 September 2008 on www.industryinsight.co.za accessed on 20/02/2008.

[9] Buzuidenhout et al .Non-standard employment and its policy implications. Unpublished report submitted to the Department of Labour (2003).

[10] Goldman, T .Organising in the Informal Economy: A case Study of the Building Industry in South Africa. ILO SEED Working Paper No. 38 (Geneva, ILO: 2003), p 1, 11.

[11] Goldman, T .Organising in the Informal Economy: A case Study of the Building Industry in South Africa. ILO SEED Working Paper No. 38 (Geneva, ILO: 2003), p 1, 11.

Casualisation concerns a change in the make-up of an employer's workforce, and can have two possible outcomes. One is the reduction of permanent employees and a corresponding increase in the number of non-permanent or temporary employees.[12]The other outcome is that workers work on a part-time or flexible -time basis, instead of on a full-time basis.[13] Apart from this change to temporary, part-time or flexi-time work, casualisation does not change their status as employees in any other way.

Externalisation is more radical, and is facilitated either by subcontracting or by labour broking. Subcontracting or outsourcing occurs when an employer retrenches employees and hires an external contractor to do their jobs. Labour broking involves the engagement of labour through an intermediary, who supplies a specified number of workers for an agreed period of time or the performance of a particular task. Workers assigned by a labour broker remain the employees of the labour broker, despite the fact that they report to and are subject to the control of the client or core enterprise. Externalisation is therefore a "process of economic restructuring, in terms of which employment regulated by an employment contract is being displaced by employment that is regulated by a commercial contract."[14]

Externalisation differs from casualisation in that it leads to a reduction in the number of people directly employed by the core enterprise.[15] However, the two processes are interlinked. For example, employees engaged through labour brokers and subcontractors are usually employed on temporary contracts.

---

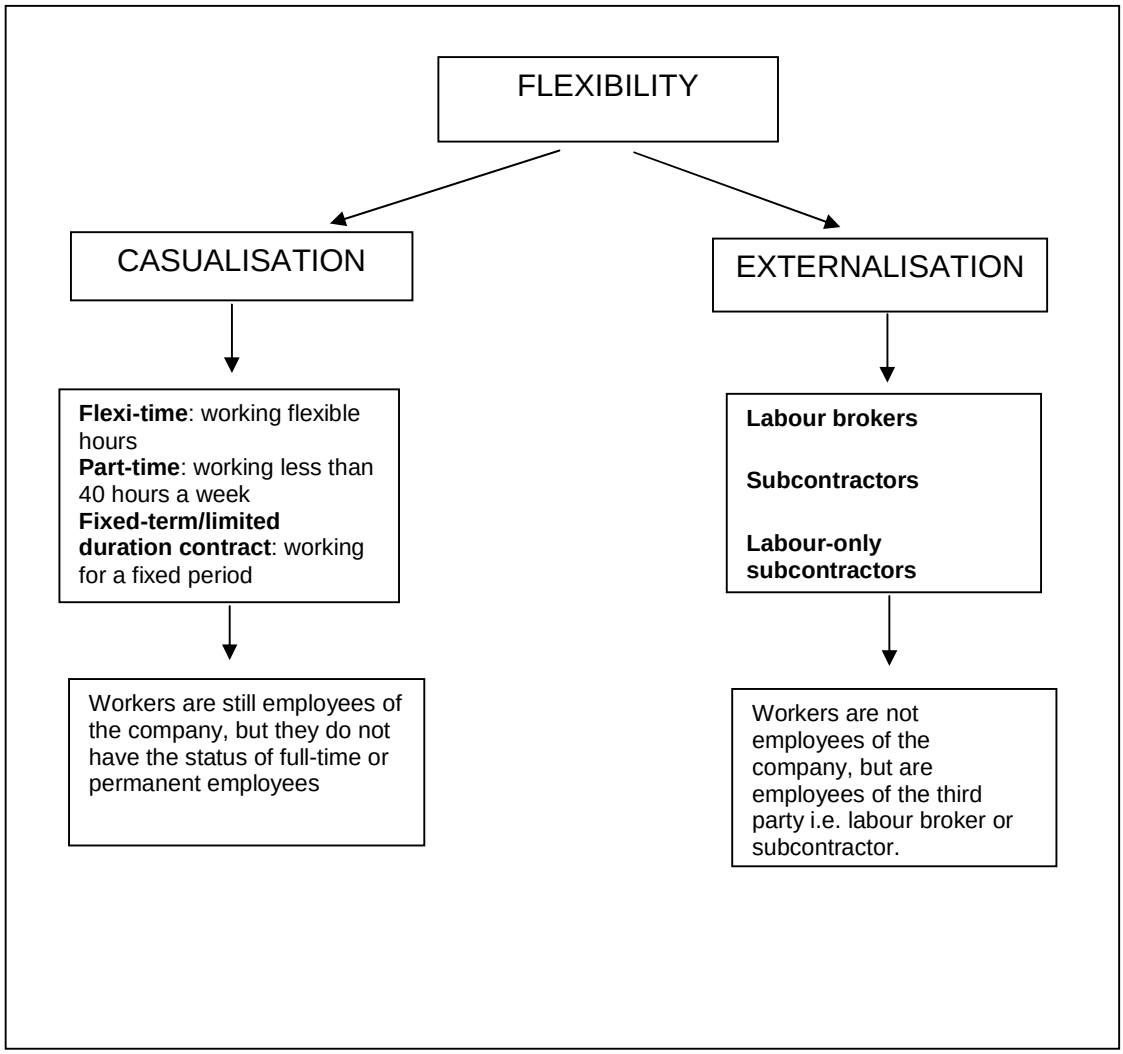
12 Theron, J and Godfrey, S. *Protecting Workers at the Periphery* Development and Labour Law Monograph 1/2000 (Cape Town, Institute of Development and Labour Law: 2000) p 11, 17.

13 Theron, J and Godfrey, S. *Protecting Workers at the Periphery* Development and Labour Law Monograph 1/2000 (Cape Town, Institute of Development and Labour Law: 2000) p 11, 17.

14 Buzuidenhout et al p 4.

15 Theron and Godfrey (2000) p 11.

Diagram 1: Flexible work arrangements



How have these changes manifested themselves in the construction industry? The general trend has been for construction companies to downsize their workforces to fewer core site employees. These employees are generally quantity surveyors, site managers, foremen, health and safety officers and a few artisans and semi-skilled workers. A well-placed source in the industry said that three of the largest national firms employed only 300 to 400, 400 to 500 and 1 500 permanent staff respectively who worked on construction sites.

The general trend seems be that many construction firms are reducing the extent to which they perform general functions that they performed in the past, such as bricklaying, plastering and carpentry. Others have styled themselves as “project management firms”, which are mainly responsible for the co-ordination and management of the various contractors on projects.

Externalisation in the construction industry has increased significantly in a number of ways. The first is the increased subcontracting of work at various levels. Main contractors are subcontracting more of the general functions that they used to perform, for instance bricklaying, plastering and carpentry. Some of the firms to which these functions are being subcontracted are now well established, and are able to supply their own materials. Most of these firms specialise in one particular function, as will be shown in the case studies below. This shows that a new species of subcontracting has emerged, which is similar to traditional subcontracting in two respects, namely concentration (or "specialisation") on one function and the supply of materials. This newer form of subcontracting differs from traditional subcontracting in that traditionally, the main or general contractor has performed the tasks.

Main contractors also directly subcontract general functions to smaller operations that are unable to supply materials and are referred to as labour-only subcontractors (LOSCs). In addition to the increased subcontracting of general functions, there is an increasing number of layers of subcontracting, as more subcontractors subcontract to other subcontractors. Labour-only subcontractors occupy the bottom layers of these so called "cascading subcontracting" arrangements.

The second form of externalisation in the construction industry is labour broking. Despite assumptions that labour broking is virtually non-existent in the industry, it is actually a common practice, and has increased exponentially in recent years. Labour brokers provide a full range of workers in the industry, from unskilled labourers to skilled workers and artisans in various trades. Labour brokers provide labour to a broad range of firms working as contractors or subcontractors.

Because there is a tendency to confuse the two, it is necessary to distinguish between labour-only subcontracting and labour broking. Subcontracting involves engaging a sub-contractor to complete a defined task within a specified period of time. The subcontractor is responsible for the completion of the task, but need not perform the work personally. If the subcontractor hires workers to assist with the completion of the task, they are subject to his or her control, and not to the control of the contractor who engages that subcontractor.

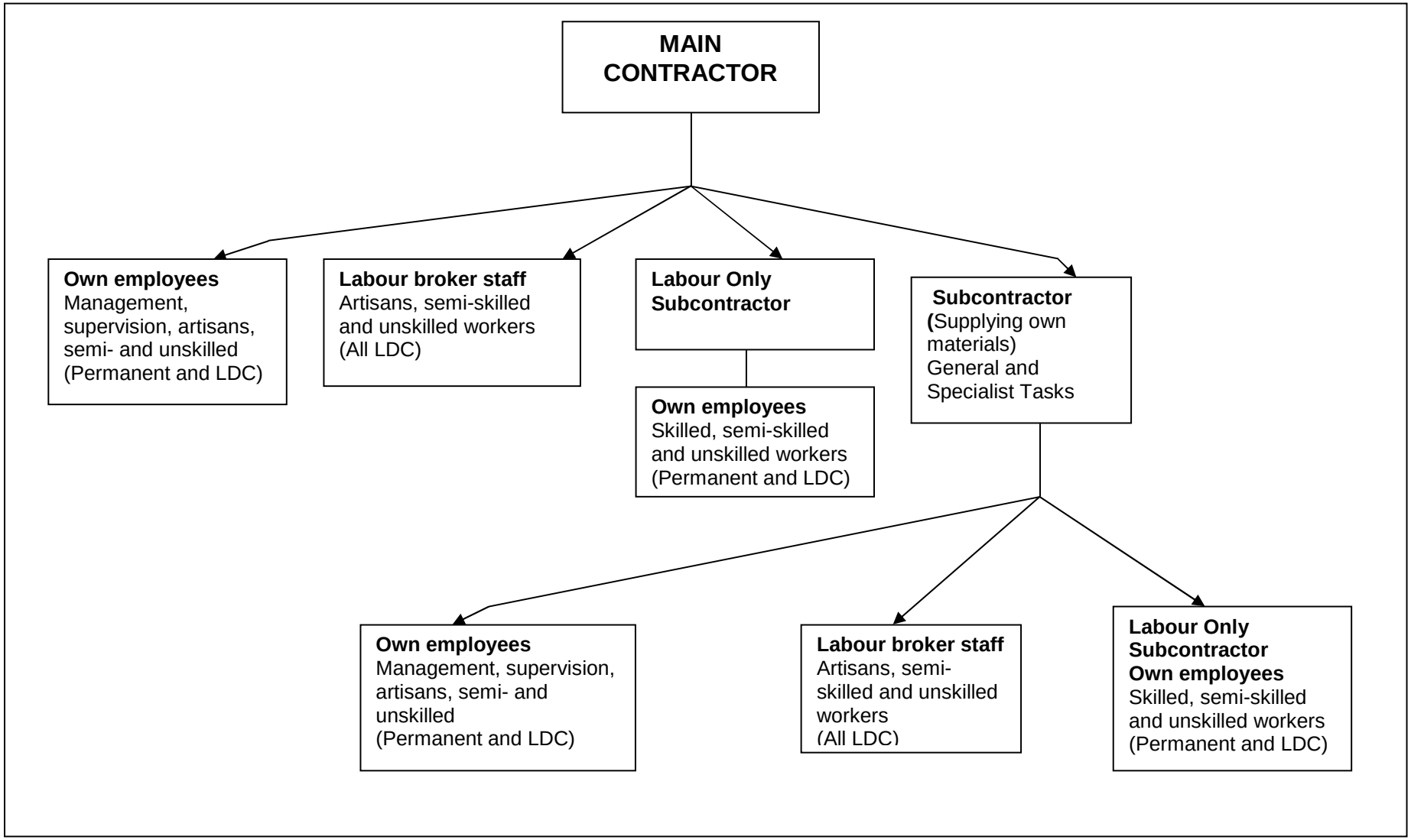
In the case of labour broking, the contractor approaches a broker to supply a specified number of workers possessing certain skills and qualifications. The workers are placed at the disposal of the contractor, who controls and supervises their work. The labour broker is not given a specific task to complete, and is therefore not directly responsible for the outcome of the work performed by the workers.

Casualisation in the industry has largely taken place via temporary employment facilitated by fixed- or short-term contracts. These are commonly referred to as limited duration contracts (LDCs) in the construction industry. While there is evidence of the use of part-time and flexible time arrangements to achieve flexibility in the construction industry, this report does not examine this in detail.

Employers are increasingly using LDCs to engage workers on a project-to-project basis to avoid having to pay them when work is unavailable. The duration of these contracts varies from a few years to a few months or weeks, with evidence that some workers are employed on LDCs that are constantly renewed by employers. Casualisation of this kind occurs at all levels in the industry, as main contractors, subcontractors including LOSCs and labour brokers all use LDCs.

What does the construction industry look like under these flexible working arrangements? Figure 2 illustrates the various working arrangements that can be used on a typical building site. This information is drawn from interviews with key informants and workers in the industry, as well as from visits to building sites in the Western Cape. Although the combination of flexible work arrangements differs from contractor to contractor and from site to site, the basic structure remains essentially the same.

Figure 2: Flexible work arrangements in the construction industry



The following case studies highlight the variety of flexible working arrangements that can be used. They are drawn from observations at three building sites and interviews with subcontractors, LOSCs and workers on the various sites. Most of the informants have been in the industry for a long time and were willing to share their knowledge and experience, to enable the researcher to understand working arrangements in the industry.

The first building site (Site 1) is a multi-billion Rand commercial project just outside the Cape Town CBD. The second and third building sites (Site 2 and Site 3) are multi-million Rand luxury apartment complexes in the Cape Town area.

Case Study 1: A main contractor

Company P (one of the top ten construction companies in the country) was awarded a large commercial building project worth close to R 2 billion. The project began in 2007, and is due to be completed in the middle of 2009. A total workforce of about 2 500 has worked on the site. Of these, the company directly employs less than ten per cent. These employees are mainly foremen, supervisors, safety officers, site managers, and a few artisans. The firm has not engaged workers through labour brokers for the project. It has subcontracted most functions for the project to over 30 subcontractors. All the subcontractors are reportedly fairly well established medium to large construction companies that supplied materials for their parts of the project. Some of these subcontractors have contracted labour brokers to supply them with labour for the project. Other subcontractors have, in turn, subcontracted some or all of their work to subcontractors, some of which are LOSCs. A few subcontractors, who provide highly specialised technical functions such as air condition installation, have performed their work without resorting to subcontracting.

Case Study 2: Two subcontractors

A and C are building subcontractors specialising in plastering and bricklaying respectively. Both A and C entered the construction industry over 15 years ago and trained as apprentices for three years. They both worked in construction companies prior to establishing their own businesses, which are registered as close corporations.[16] At one stage they worked for the same company.

[16] A worked for a main contractor, performing several functions, including bricklaying and plastering. The company decided to specialise in plastering as it was "bringing in the most money". That company is presently one of the most prominent plastering firms in the Western Cape.

A started his business four years ago, and employs four permanent skilled employees. C started his company seven years ago, and has eight permanent, skilled and semi-skilled employees. They both claimed to be registered with the Cape Building Industry Bargaining Council (CBIBC). They both supply materials for all the projects they undertake. A and C were both appointed as the subcontractors for all the plastering and bricklaying work for the building of a multi-million Rand apartment complex.

They both supply their own materials for the work. A has a total of 60 people working for him on the project. Four of them are “permanent” while the other 54 are “on contract” for the duration of the project. They comprise skilled plasterers, semi-skilled and unskilled workers. He cannot afford to employ a full team of workers permanently, and mainly has to rely on hiring limited duration contract workers on a project-by-project basis. Contracts typically last for six months to a year. It is hard to retain the same workforce, but he tries to “keep the good guys” to ensure the quality and consistency of the work. He has never used a labour broker and prefers to hire workers who are referred by people he has worked with. The hourly rates he pays his employees correspond with those prescribed by the bargaining council, and he pays artisans R 5 more than the prescribed hourly rate. However, he does not make benefit contributions for his workers.

In addition to his 60 workers, A engaged two LOSCs to assist him with the project. Each of the LOSCs is a qualified plasterer with considerable experience. The LOSCs each have 12 workers working for them on the project. According to A, all the LOSCs' workers are employed on LDCs and earn R 2 to R 3 per hour less than A's workers for the same work.

C has eight permanent employees and a pool of 15 workers whom he regularly employs on LDCs. He pays labourers
R 90 to R 110 per day and skilled workers R 220 to R 250 per day. These rates are significantly less than the Cape BIBC rates. He does not make benefit contributions for these workers. C has built up a stable workforce and does not use labour brokers or subcontract to LOSCs.

Case Study 3: A subcontractor

Y is a closed corporation (CC) that specialises in scaffolding tasks. The CC has been in existence for nine years. It is a relatively small operation, which subcontracts from several medium to large contractors. It provides the materials required for all of its projects.

Y employs a core of foremen, supervisors and skilled workers on a permanent basis. It relies heavily on a labour broker to provide the semi-skilled and unskilled workers who do the bulk of the work for its projects. It has a long-standing

relationship with a particular labour broker that supplies all the additional labour it requires. It is responsible for the scaffolding work on Site 2. It has deployed one of its own foremen on the site, but the labour broker has supplied the rest of the workers on the site (15 in total). A representative of Y says that this is generally how the business operates.

Case Study 4: A Labour-Only Subcontractor

F is a qualified carpenter and joiner who has been in the building industry for about ten years. After working for a prominent construction company for several years, he started his own LOSC business over a year ago. It is not registered as a company or a CC, although he is in the process of registering with the CIDB.

F has been subcontracting from a small company (X) that specialises in carpentry and scaffolding. X supplies the materials required for all its projects. X has 16 permanent employees and regularly subcontracts to eight LOSCs. All the LOSCs know each other and meet and talk regularly. One has a team of 48 workers, while another has 21. Yet another has 12 workers and another has 16. All the LOSCs hire their workers on a project-by-project basis.

F has been working exclusively for X for approximately a year. X has had many projects and this has kept F continuously busy. His current contract with company X is for a luxury apartment complex. F has 21 skilled, semi-skilled and general workers who regularly work for him, although none of them are permanently employed. All of them are currently working on the apartment complex project.

F is paid per unit of work done, irrespective of how many people he employs to complete the work. He therefore has to establish how many workers to employ and how much to pay them to meet the deadlines. F is not registered with the Cape BIBC and does not comply with the provisions of the collective agreement. He pays R 80 per day for unskilled labourers, and sometimes gives a R 30/day incentive to encourage workers to meet tight deadlines. He pays semi-skilled and skilled workers R 250 to R 400 per day. He does not make any deductions for benefits or provide holiday pay or inclement weather pay.

F's main challenge is that he cannot afford to employ enough skilled workers to work on his projects. He has to rely on semi-skilled workers who are trained on-the- job and usually have no formal qualifications. Although this has enabled him to reduce the wages, it has compromised quality and efficiency and resulted in several mistakes.

The case studies highlight the diversity of firms and work arrangements used in the building industry. Key informants indicate that the trends are similar in the civil engineering industry. The case studies are by no means representative of the entire construction industry. However, they do highlight the nuances of what is happening in the industry.

2.2 Statistics on employment in the construction industry

Statistics SA's employment reports indicate a steady increase in employment in the construction industry since 2001, as depicted in the table below.

Table 3: Employment in the Construction Industry (thousands)

Year	2001	2002	2003	2004	2005	2006	2007	2008(3)*	2008(4)**
Total empl.	642	627	620	685	875	929	1010	1102	1191
Formal empl.	342	300	377	427	427	544	650	812	877
Informal empl.	299	327	243	258	258	385	360	290	314
% informal	46.5	52.2	39.2	37.7	39.2	45.6	35.6	26	26

Sources: Stats SA, *Labour Force Survey Historical Revision*, 2007 and *Quarterly Labour Force Survey, quarter 4*, 2008.
* Denotes figures for the third quarter of 2008.
** Denotes figures for the fourth quarter of 2008.

Stats SA distinguishes between formal and informal employment, and defines the latter as encompassing persons who are in precarious employment situations.[17] The definition includes the following:

- All persons in the "informal sector", that is, employers, own-account workers and unpaid workers in household businesses that are not registered for VAT or income tax. It also includes employees who work in enterprises with less than five employees, that do not deduct income tax from their remuneration;[18]
- Persons helping in their family businesses who are not paid for their work; or
- Employees in the formal sector[19] and persons employed who are not entitled to basic benefits from their employer, such as pension or medical aid, and who also do not have a written contract of employment.

[17] Stats SA Explanatory Notes to the Quarterly Labour Force Survey, 2008, p 18.
[18] Stats SA Explanatory Notes to the Quarterly Labour Force Survey, 2008, p 17.
[19] These are enterprises that are registered for VAT or income tax that employ more than five employees.

After a decline between 2001 and 2003, total employment has increased since 2004, with the most significant increase (of about 190 000) occurring between 2004 and 2005. Thereafter, it has increased steadily to 1 191 000 at the end of the fourth quarter. Between the last two quarters, the industry saw an increase of about 8 per cent. Incidentally, construction was the largest industry contributing to employment growth during that period. On the whole, total employment in the industry has almost doubled since 2001.

After a decline between 2001 and 2002, formal employment has increased steadily from 300 000 in 2002 to 877 000 at the end of 2008. Formal employment has accounted for the greatest percentage of employment in the industry since 2003. At the end of 2008, it accounted for 76% of employment in the industry. Informal employment, on the other hand, has fluctuated over the last eight years. The number of people in informal employment in the industry peaked at 399 000 in 2005 and declined to 314 000 at the end of 2008. Informal employment as a percentage of total employment has also fluctuated, from a high of 52.2 per cent in 2002 to a low of 26 per cent at the end of 2008.

The statistics on employment do not give an accurate picture of the extent to which the different flexible working arrangements are used in the construction industry. In addition, the more recent figures indicating a decline in informal employment seem to be at odds with the trends as identified by industry informants.[20] They estimate that about 40 to 50 per cent of workers are employed by micro and small enterprises, most of which generally do not comply with labour regulations, nor provide employee benefits such as pensions and medical aid. These estimates seem plausible given the lower rates of unionisation and the collapse of building industry bargaining councils in the past decade.

3 LABOUR BROKING IN THE CONSTRUCTION INDUSTRY

This section sketches the characteristics of labour broking firms operating in the industry. It draws together the results of the interviews with representatives of labour brokers operating in the industry.

We begin by showing the difficulty in measuring the extent of labour broking in the construction industry. We then examine the size of labour broking firms that participated in the research. Next, we consider how long the labour brokers have been providing temporary employment in the construction industry. The following two sections consider the clientele serviced and the profile of workers provided by the labour brokers. Next, we examine operational issues, particularly, the

[20] The figures are also questionable given the fact that, in 2007, Stats SA expanded the meaning of informal employment to include those working in formal enterprises but not receiving any benefits. One would have expected an increase in the level of informal employment as a result of its wider scope.

registration process, the duration and termination of temporary employment contracts and supervision on site. We then discuss the perceived benefits of using labour brokers and the challenges labour brokers operating in the construction industry are currently facing. Finally, we describe the labour brokers' attitudes towards participating in the research.

Before proceeding with the discussion, it is necessary to highlight the fact that the research involved labour brokers at the formal end of the spectrum - that is, labour brokers that comply with some or all of the relevant regulations. These include registration as a company or closed corporation (CC), registration for tax, and registration in terms of legislation such as the Unemployment Insurance Act and the Compensation for Occupational Injuries and Diseases Act. It therefore excludes informal, unregistered labour brokers operating in the industry, notoriously known as the “bakkie brigade”. These labour brokers are characterised as operating at the lower end of the spectrum, using a bakkie to collect work seekers at street corners, and paying very low wages with no benefits.

3.1 The extent of labour broking in the construction industry

Industry statistics for the labour broking (or temporary employment services/TES) industry show that it accounts for about 4% of South Africa's economically active population, and contributes between R17 billion and R 20 billion per annum to South Africa's gross domestic product (GDP). According to the Confederation of Associations of Private Employment Services (CAPES), the industry makes approximately 400 000 temporary placements per day. However, there is no data indicating how many of these jobs are in the construction industry.

It was difficult to estimate the number of labour brokers operating in the construction industry for several reasons. Firstly, there is no central database listing the labour brokers operating in the construction industry. Secondly, because most labour brokers operate in a variety of industries, one would have to conduct investigations to ascertain whether a particular labour broker operated in the construction industry. With over 3 500 recruitment firms registered with the Services SETA, this exercise would have proved extremely time-consuming. Thirdly, a significant number of labour brokers are unregistered and therefore difficult to identify and locate.

Of the 3 500 labour recruitment firms registered with the Services SETA, over 2 000 are temporary employment services. The Services SETA was unable to give a breakdown of the number of employment agencies by industry. The only estimate is from the Constructional Engineering Association Labour Broking Division, which has about 170 members, representing between 40 and 50 per cent of the labour brokers operating in the constructional engineering industry, meaning that there are about 350 in total. However, the emphasis of the

organisation's activities is on the engineering sector, although some members may provide both engineering and building workers to contractors.

A spokesperson of one of the top national construction firms speaking at the Building and Wood Workers' International/FIFA Local Organising Committee inspection of the Green Point Stadium in Cape Town indicated that most firms relied on labour brokers to provide labour for fixed periods.[21] This was necessary, given the fact that construction firms were unable to employ workers with the full range of skills that are needed permanently. In response to questions about the impact of a potential ban on labour broking, he said it would be a significant challenge for construction companies, as they would have to rethink their employment strategies. This indicates that the use of labour brokers is quite an important part of flexible employment arrangements in the industry.

3.2 Size of the Labour Broking Firms that participated

As indicated in part 1 above, the researcher eventually interviewed only eleven labour brokers. They covered a broad spectrum in terms of size, functions, locality of operation and clientele.

According to the SSETA representative interviewed, the number of staff members working in their offices determines the size of labour broking firms. A firm with less than 50 employees is regarded as small, while one with between 50 and 150 employees is regarded as medium sized. A firm with over 150 employees is classified as large. According to this classification, the four above firms qualify as medium to large operators, as indicated below.

These four labour broking firms were blue collar divisions or subsidiaries of large corporations operating in the personnel services industry. These corporations were formed through mergers and acquisitions largely initiated by well-established labour broking firms. The groups have several specialist divisions, divided according to level of workers sought (white -collar workers, blue collar workers, management and executives) and others according to industries and skills (call centre agents, office administration, engineering, hospitality, health care). In many cases, the divisions trade under different brand names to distinguish themselves in their market, making it hard to associate them (at least on the face of it) with their principal company. The blue collar divisions that participated in the survey operate in various industries, but have some presence in the construction industry. Three have headquarters in Johannesburg and regional and local offices all over the country. The other has only one office in Johannesburg.

[21] The inspection was supposed to take place on 23 March 2009 at Green Point Stadium. It was a joint initiative of Building and Wood Workers' International and FIFA LOC.

Two of the firms were reluctant to say exactly how many workers were registered with them and how many were placed with clients. It was also difficult to ascertain how many of the assigned workers were in the construction industry. One firm indicated that it could not access that kind of information on its database. Another indicated that it had a pool of 12 000 job seekers and 5000 to 6000 workers placed with clients, but could not indicate how many were in construction. The other could not tell how many jobseekers it had registered on its database, but was able to say that it had 3 500 current placements. About 2 500 of them were in construction.

Table 4: Medium to large firms

Company	**Size of pool of workers (all industries)**	**Current placements**	**Current placements in construction**	**Number of office employees**
A	N/A	N/A	N/A	1000*
B	N/A	N/A (several thousand)	N/A	350
C	12 000	5000 - 6000	N/A	150 - 200
D	N/A	3 500	2 500	55

Notes
***** This represented the total number of employees working for the corporation as a whole, as no employment figures were available for the blue collar division in question.
N/A denotes information that was not available, either because the informant did not know or was unwilling to disclose it.

The rest of the firms could be classified as small operations, employing between one and 15 office staff members. Most of these firms were based in the Western Cape or Johannesburg, and did not have offices elsewhere in the country. With the exception of two firms specialising in construction, all of these firms operate in a number of industries. The pool of job seekers registered with each firm ranged from 100 to 5 000 workers, with about 1 000 on the databases of quite a few firms. The number of workers assigned varied widely, from 50 in some cases to 3 500 in others. Below is a table indicating staff levels at firms, the pool of workers and number of current placements.

Table 5: Small labour broking firms

Company	Pool of job-seekers (all industries)	Current placements	Current placements in construction	Number of office employees
E	1 000+	N/A	50	2
F	N/A	N/A	145	2
G	1 000+	200	0	5
H*	150	70	70	1
I	N/A	N/A	N/A	4
J	5 000	3 500	1 500	15
K*	2 000	220	220	N/A

Notes
***** Denotes the companies that specialise exclusively in construction
N/A denotes information that was not available either because the informant did not know or was unwilling to disclose it.

3.3 Time of Operation in the Industry

In general, the medium to large labour broking firms that participated in the research had a long history in the labour broking industry. The oldest had been in the industry for 40 years. The youngest of these firms was established in 1995, and later became part of a large corporation. Since these larger firms were part of large corporations formed through mergers and acquisitions of smaller firms, it was difficult to determine when they had entered the construction industry. However, informants indicated that the blue collar divisions concerned could be traced back to a labour broking firm that had some presence in the construction industry.

All of the small labour broking firms were less than ten years old and were still trying to grow in the market. With the exception of two firms, most of them had entered the construction industry soon after they began operating. The mean (average) number of years of operation as a labour broker for these small firms is 6.5 years and the median is 6 years. The mean number of years in construction is 6 years, with the median being 7 years.

The above, and discussions with informants, indicate that labour broking in the construction industry is not a new phenomenon, but is an established means of securing flexible labour. There has, however, been a significant increase in the number of labour broking firms operating in the construction industry in recent years. This corresponds with research highlighting the trend that labour broking

in general has grown exponentially post- 1995, when the new Labour Relations Act[22] came into force.[23]

Below is a table indicating time of operation in the labour broking industry and in the construction industry in general.

Table 6: Time of operation in labour broking

Company	Number of years in labour broking	Number of years labour broking in construction
A	37	37
B	12	N/A
C	40	N/A
D	14	14
E	6	6
F	2	2
G	3	2
H	7	7
I	5	5
J	12	9
K	11	11

Note:
N/A denotes information that was not available because the informant did not know

3.4 Labour brokers' clientele

Informants were asked how many clients they were currently servicing in total, and how many were in the construction industry. In most cases, it was impossible to find out how many clients the labour broking firms were servicing. Three informants (representing two large firms and one small firm) declined to give this information on the grounds that it was competitive information. In some cases, the informants did not have the information on hand and declined to give estimates.

A few small firms were willing to provide this information. One indicated that it had three clients in construction, one being a project management company and the other two being building contractors. Another said it had two construction clients. Another said it had between 15 and 20 clients, but did not have any construction clients at the time of the interview. Firm D was the only large firm

[22] Act 66 of 1995.

[23] Theron, J and Godfrey, S *The Rise of Labour Broking and its Policy Implications* (Cape Town, Institute of Development and Labour Law Monograph Series: 2005).

willing to state that it had eight clients, five of which were in the construction industry. The labour broker had provided 1 500 and 1 800 workers respectively to two clients. It had provided 30, 40 and 50 workers respectively to the other three clients.

The most interesting case was that of a labour broker that had serviced only one client exclusively since it was established. The woman who owned the labour broking firm (a close corporation) was closely related to the owner of the client firm, a project management company. The project management company was in turn servicing several construction companies. The labour broker was registered as a compliant employer with the Cape Building Industry Bargaining Council (which is where the researcher obtained its contact details). The CC had been established to find workers and take care of compliance with regulatory requirements, including the provisions of the bargaining council agreements.

The large firms indicated that most of their clientele were medium to large construction companies, although two of them indicated that some of their clients were small-scale operations. The majority of small labour brokers indicated that they serviced small to medium operations, many of which came onto projects as subcontractors. Both large and small labour brokers indicated that they provided workers to project management companies, although these did not make up the bulk of their clients.

Significantly, quite a few of the founders (or senior employees) of the small labour broking firms had a background in the construction industry, either as building contractors or as labour brokers servicing construction companies. According to the website of one of the labour brokers, one of its executives had worked for a national labour broking firm which had serviced some of the biggest construction companies in the country (names provided). Another executive of the same firm had previously owned a specialist subcontracting company. This labour broking firm claimed only to service medium to large construction companies. On the other hand, the owner of the CC mentioned above had no experience in the construction industry, but a close relation owned the project management company that was her sole client.

The above indicates that (at least in the case of smaller firms) experience in the construction industry is an asset to labour broking firms operating in the industry. One informant indicated that technical knowledge was invaluable, as it enabled the labour broker to understand the client's requirements and find suitable workers. A background (or close relations) in the industry also provided important business contacts and connections that could be leveraged to obtain and retain clients. However, it was more difficult to trace the history of the larger firms, as they had undergone changes over the years.

Nine of the labour broker informants confirmed that they had long-standing relationships with their clients, spanning several years in some cases (13 years

in one case). This shows that the engagement of workers through labour brokers is becoming entrenched as a flexible employment strategy used by construction companies.

3.5 Profile of the workers assigned by labour brokers

The larger labour broking firms indicated that the workers they contracted were drawn from a broad spectrum of skills levels (general workers, semi-skilled and skilled workers) and building trades such as bricklaying, plastering and carpentry. The smaller firms tended to concentrate on the provision of semi-skilled and general or unskilled labourers. Several informants representing small firms said this was because most of their clients directly hired and retained their own skilled workers and merely required "add-ons" to assist them. Most labour broker informants indicated that attracting skilled staff was a serious challenge due to the skills shortage. On the other hand, semi-skilled and general workers were more readily available.

3.6 Process of registration with a labour broker

The labour broker informants were asked what procedures a person had to comply with to be registered on their database of available workers. All of them indicated that basic information such as an ID document (either South African ID or proof of legal immigrant status), address, next of kin and bank details was essential. Workers with qualifications and experience had to provide proof in the form of certificates and references. Some firms indicated that they also required police clearance as proof that the applicant did not have a criminal record. Some of the labour broking firms said they administered written tests to determine an applicant's competency and aptitude for fulfilling the tasks required.

If the applicant fulfils all the requirements and criteria, he or she is placed on the labour broker's database or pool of job seekers available for assignment. This does not create an employment relationship between the labour broker and the worker. A contract of employment between the broker and worker is only created when the worker is assigned to a client for a project or for a stipulated period of time.

3.7 Duration and termination of contract of employment

There were mixed responses to the question of whether labour brokers assign workers for a specified period of time (such as two months) or until the completion of the tasks or projects to which they are assigned. Four informants, representing both large and small labour brokers, said that the contract assigned the workers to the client for the duration of the project or until the worker had

completed the tasks required by the client. The rest said that a fixed period of time was stipulated.

The respondents all indicated different lengths of assignments, depending on the client's requirements, the tasks to be completed and the skills levels of the workers. One informant representing a small labour broker (providing mainly semi-skilled and unskilled labour) said that most of the contracts were short-term contracts lasting between one day and a few weeks. Another said their contracts were for any period less than 18 months at a time. Another small labour broker indicated that contracts generally were for two weeks to two months for general workers and six months to a year for skilled workers.

The representative of a large labour broking firm said short-term contracts were for three to four months on average, while longer term contracts were typically for between one year to 18 months and in some cases up to three or four years. Informants made it clear that contracts could be extended if the client required a worker for a longer period. One informant from a small labour broker said that she made an effort to renew contracts in good time, because it would be impossible to claim compensation for injuries and accidents if there was no valid contract of employment.

Only two informants (from a small and a large broker respectively) were willing to provide the researcher with their standard contract of employment. Both of these contracts made it clear that the contract of employment between the broker and the client only existed for the duration of a placement with a particular client, and ceased to exist when that placement ended. Each contract stated that the worker could not argue that the termination of a placement (either at the end of the agreed period or prematurely at the client's request) was a dismissal or retrenchment. By signing the contract, the workers agreed that they would not claim severance pay and benefits from the broker.

Another important term was that the worker was not entitled to expect that a contract would be renewed, even if the broker had previously renewed it.

These provisions seem to be standard in most employment contracts between labour brokers and their employees.[24] When questioned about the fairness of such clauses, some respondents said that they placed workers on standby and made the best efforts to reassign workers to other clients. They argued that it was in their best financial interests to have as many workers assigned for as long as possible. The legality of such contractual provisions is discussed in part 4 below.

[24] Theron et al op cit p 30.

3.8 Supervision on site

Informants were asked whether they merely placed workers at the disposal of the client or whether they provided someone to supervise their workers on site. Most of them said that the client supervised the work onsite. Informants said that in some cases, they are required to provide a foreman or supervisor to monitor the workers on site. Even in cases where the labour broker provides a supervisor, s/he would still be subject to the specifications and requirements set by the client. The majority of respondents indicated that their role was merely to place workers at the disposal of the client, and that they did not supervise their own employees on site.

3.9 Benefits of using labour brokers

All the labour broking firms indicated that while they mostly arranged temporary placements, they also arranged some permanent placements. Most of the companies also provided payroll facilities for clients, and made the necessary deductions required by law.

The labour broker informants indicated that they helped clients by enabling them to have the flexibility to adjust the sizes of their workforce according to their needs. The website of one firm explains this as follows:

> "Seasonal industries are able to use … workers without the problems involving (sic) in laying them off in the off-season, or having to incur the cost of carrying non-productive workers in the off-season. Project based industries, such as construction, have the ability … To closely monitor their demands for workers at specific times during the project and to change the number of workers on site easily and quickly at any time. In other industries, should demand suddenly drop, [the firm] would immediately be able to reduce the workforce without the lengthy and expensive process of retrenchment."

As discussed in part 2 above, a senior representative of a large national construction firm said labour brokers played an important role because the labour requirements of construction companies differ from project to project. It was therefore impossible for construction companies to employ the right numbers of workers possessing the necessary skills for their projects permanently.

Related to the benefit of flexibility is the notion that labour brokers enable construction companies to obtain the labour they require, and may get rid of workers that they do not require. Using labour brokers dispenses with the problem of unfair dismissal and retrenchment costs and procedures, as the client has complete freedom to circumscribe the duration of the contract. Moreover, clients are not bound to keep workers for the stipulated periods, as labour

brokers promise to replace a worker who the client is unhappy with. Replacements can be found very quickly, with one labour broker promising to find a replacement within 24 hours where possible.

A further benefit is that the labour brokers provide a holistic service with regard to the workers they provide to clients. They promise to "take care" of all labour matters and administration in respect of the workers without the client's involvement, to enable the client to concentrate on their core business. While assurances of compliance with all the relevant legislation are made, promises to "deal with unreasonable unions, strikes, unfair dismissal cases, annual wage negotiations", raise questions about the methods used to solve these problems.

Finally, and importantly, labour brokers undertake all the obligations of the employer, while the client is able to direct and control the workers' day-to-day activities. One website claims that the client retains "total control of the worker…as if [the client] directly employed the worker". Commentators argue that by doing this, labour brokers enable the "true employer" to pull the strings behind the scenes, while at the same time escaping the obligations of being an employer. In this way clients can "have their cake and eat it".

3.10 Challenges faced by labour brokers in the construction industry

Most informants complained that labour broking in construction is highly competitive. This has been worsened by the growing decline in the amount of work available and the growth of labour broking in the construction industry over recent years. One informant also noted that generally, their clients were trying to cut costs by reducing the number of workers hired through labour brokers, thus reducing their income.

The majority of labour broker informants (and several other informants) added that there is a severe skills shortage, and that the "new" training programmes are producing a "sub-standard" workforce that is a far cry from the calibre of workers who underwent the three-year apprenticeship training in the past. This makes it difficult to attract and retain suitable temporary workers for clients.

Two informants from large labour broking firms said that another challenge is that research and media reports portray labour brokers as unscrupulous, exploitative and non-compliant. One of the major challenges faced is to address these negative perceptions, and distance the compliant labour brokers from the notorious "bakkie brigade".

3.11 Willingness to participate in the survey

While the majority of labour brokers were willing to participate in the survey, several were suspicious and raised certain concerns. One of the most pressing concerns was that some of the information requested was competitive information. The disclosure of this information to “the wrong people” would be detrimental to their businesses. Some raised concerns about whether they would be reported to the Department of Labour. Presumably, they were concerned with penalties for non-compliance. A few asked if the research would be used to support calls for the banning of labour brokers in the country. The researcher had to reassure the respondents that the purpose of the research was to explore the nature and extent of labour broking for policy reasons, and that they need not answer any questions that they were unwilling to answer.

However, most were willing to answer all the questions, with only three refusing to disclose the number of workers registered on their database, the number of workers placed with clients and the number of clients serviced. Ironically, some of this information was prominently displayed on many labour brokers’ websites (including two that refused to provide it) and used as a selling point.

4 THE REGULATION OF LABOUR BROKING IN CONSTRUCTION

This section examines the means by which labour broking is regulated in the construction industry. We begin with the current legislative provisions that relate specifically to labour brokers (referred to as temporary employment services or TESs in the legislation). The main import of these provisions is that labour brokers are the employers of workers assigned to clients, while the client may be held jointly and severally liable for the labour broker's non-compliance with certain employer obligations.

We then examine the arrangements governing the terms and conditions of employment in the construction industry. These are divided between the building and civil engineering sectors.

The controversy surrounding labour broking has been fuelled by claims that labour brokers exploit their employees and do not comply with labour legislation and regulations. There are also arguments that labour broking does not promote the skills development of employees, and that employment by labour brokers is precarious and insecure, as clients can easily dispense with the workers. The remaining sections highlight how some of these issues are manifested in the construction industry. We also highlight some programmes and initiatives that attempt to address these issues, and examine their strengths and limitations.

4.1 Current legislative provisions governing TESs

The Labour Relations Act, Basic Conditions of Employment [25] and Employment Equity Act regulate the position of temporary employment services. The relevant provisions of each are discussed below.

Section 198 of the Labour Relations Act defines a temporary employment service as "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". In other words, the TES provides its clients with temporary workers and pays these workers. Section 198 further provides that the TES (as opposed to the client) is the employer of a person whose services are provided to a client by a TES (provided the worker is not an independent contractor).

The section also holds the TES and the client liable if the TES contravenes a collective agreement that regulates terms and conditions of employment; a binding award that regulates terms and conditions of employment; the BCEA or a wage determination. These terms and conditions mentioned typically regulate working hours and overtime, annual leave, sick leave, family responsibility leave, maternity leave, notice periods for termination of employment and retrenchment provisions.

Section 1 of the BCEA has a similar definition of a TES to that found in section 198 of the LRA. It also designates the TES as the employer of the worker and the worker as the employee of the TES. In addition, the section provides that a client is jointly and severally liable for a TES's non-compliance with the BCEA or any sectoral determination.

Section 57 of the Employment Equity Act provides that for the purposes of Chapter III of the Act (relating to affirmative action measures), a person provided to a client by a TES is deemed to be the employee of the *client* if the person's employment with the client is for an indefinite period or for three months or longer. It also provides that the TES and the client are jointly and severally liable if the TES commits an act of unfair discrimination on the express or implied instructions of a client.

Section 57 of the EEA attempts to ensure that workers provided by labour brokers are included in measures to eliminate unfair discrimination and to ensure the equitable representation in the client's workplace. It differs from the TES provisions in other legislation in three respects. Firstly, it provides that in certain cases, the client will be deemed to be the employer of the worker provided through the TES in matters relating to affirmative action. However, this is subject to the limitation that the worker works for the client for at least three months or for an indefinite period (the second distinguishing feature). Thirdly, it provides for

[25] Act 75 of 1997

joint and several liability if the unfair discrimination by the TES is committed on the *express or implied instructions* of a client. While this acknowledges the reality that, in many cases, the client determines the actions of a labour broker, it seems to require the worker to show that the client gave the broker instructions to discriminate. Since the worker is usually not privy to the dealings between the client and the labour broker, this would be very difficult to prove in most cases.

The use of a labour broker creates a triangular employment relationship involving the worker, the TES, which is designated as the employer in law, and the client or core enterprise, which makes use of the worker's services. This is problematic: in most cases, the client makes decisions and takes actions that directly impact on the employment relationship between the worker and the "employer", that is, the TES. Theron argues that:

> "The employer assumes the legal risk of employment but it is the client who calls the shots by determining the work to be done, and, in most practical respects, the terms on which workers are employed to do so. In many instances it would be appropriate to refer to nominal and real employers. The contract of employment between the nominal employer and workers, if indeed there is one, is practically irrelevant."

The legislative provisions outlined in the above section partly address the problem by holding the client jointly and severally liable for unfair discrimination or contraventions of collective agreements, binding awards, the BCEA or sectoral or wage determinations. However, these provisions do not hold the employer jointly and severally liable for unfair labour practices and dismissals.

4.2 The regulation of terms and conditions of employment in the construction industry

Having outlined the legislative provisions that govern labour broking, it is necessary to turn to the arrangements that govern terms and conditions of employment in the construction industry, which are applicable to labour brokers operating in the industry. Terms and conditions of work govern issues such as pay, benefits, leave, hours of work and overtime. There are separate arrangements for the building and civil engineering sectors of the construction industry. These are examined in turn.

The regulation of conditions of employment in the building industry is very fragmented. The industry does not have a national bargaining council, and regional bargaining councils have regulated certain parts of it. Four out of ten of the building industry bargaining councils (BIBCs) have collapsed, largely due to insufficient representivity. Of the six councils that are currently operational, only four (the Western Cape BIBC, the North and West Boland BIBC, the Kimberley BIBC and the Bloemfontein BIBC) have collective agreements in place. All four

collective agreements have been extended to non-parties to the bargaining councils. All of the bargaining councils require labour brokers to register as employers with the councils and comply with the collective agreements.

Voluntary bargaining forums (VBFs) have been established in Gauteng and in the Southern and Eastern Cape, where no bargaining agreements are in place. Collective agreements are reached within these forums, but these are only binding upon the employer and trade union parties to the forums. According to trade union representatives in Gauteng, the collective agreements reached in the VBFs are only binding on employer parties in respect of the workers they directly employ, and do not bind labour brokers.

The coverage of bargaining councils and voluntary bargaining forums is very limited. Trade unions must bargain with individual employers in areas where no BIBCs or VBFs exist. The Basic Conditions of Employment Act provides a minimum floor regarding matters such as working time, overtime, public holidays and leave, but it does not stipulate minimum wages.

The civil engineering industry has a national bargaining forum (NBF) comprising the South African Federation of Civil Engineering Contractors (SAFCEC), the National Union of Mineworkers (NUM) and the Building and Construction and Allied Workers' Union (BCAWU). The collective agreement reached in the NBF is an important input document used by the Minister of Labour in making a sectoral determination to govern issues such as pay and leave for all workers in the civil engineering industry. Labour brokers are bound by the sectoral determination, and must apply its terms to their employees in the civil engineering sector.

Provisions of the collective agreement that are not incorporated into the sectoral determination remain binding only between members of SAFCEC and the trade unions. Arguably, these provisions do not bind labour brokers, as they are not members of the federation or parties to the collective agreement.

Having outlined the legislation governing labour broking in general and the arrangements regulating terms and conditions of employment in the construction industry, we now examine some of the areas of non-compliance that are cited by critics of labour brokers. Four areas have been selected, namely the underpayment of wages, the provision of social security, skills development and dismissals.

4.3 Payment of wages

One of the most common criticisms of labour broking is that labour brokers pay their employees much less than their counterparts that are directly employed. The logic behind this is that the only way labour brokers can serve as a viable alternative to direct employment is if their fees are not significantly higher than

what clients would pay if they directly employed the workers. Labour brokers also argue that stiff competition means that brokers must find ways to undercut their competitors while still making a profit.

Representatives of labour brokers interviewed responded that this was not necessarily the case. They claimed that their clients did not see them as a mere alternative to direct employment, but perceived labour broking as a service that was convenient and relieved them of employer obligations. They were willing to pay more than what they would have paid for direct employment. As a result, labour brokers received enough to pay their employees the required wages while still making a "decent profit".

Which theory holds true in the construction industry? There is no simple answer to this question, as there were mixed responses from the different respondents. The researcher did not ask labour brokers how much they paid their employees, as this is a sensitive issue and the question is unlikely to be answered truthfully. The researcher relied on the views of trade union and bargaining council representatives, as they were willing to give this information.

As far as the building industry was concerned, we examined the position in the bargaining councils that still operate in the industry. Representatives from the North and West Boland, Kimberley and Bloemfontein BIBCs said they did not have serious problems with the (few) labour brokers who operated and were registered within their areas. They said that they had encountered a few instances of underpayment of wages, but these were usually resolved through the use of the normal enforcement channels.

The position in the Western Cape was very different, as there were many more labour brokers operating in the industry. However, in contrast to the other three regions, very few of the labour brokers had made attempts to register with the bargaining council and still fewer (five) were listed as being compliant. Representatives of the Western Cape BIBC said that while a few labour brokers paid the required wages, the overwhelming majority (including those not registered with the council) underpaid their employees.

The trade union representatives said there was general non-compliance with the minimum wages in building industry bargaining councils and the civil engineering sectoral determination by labour brokers. Some said it was more likely that labour brokers would comply with collective bargaining agreements in BIBCs, as there were enforcement measures in place. The representative of the BWU that operates in the Western Cape and Boland painted a slightly more positive picture. He said that the union had established good relationships with some labour brokers, and that most of them complied with the collective agreement. The union and the bargaining council tackled those that did not comply, and were usually successful in ensuring compliance.

4.4 Leave pay and social security provision

Critics of labour brokers argue that they only pay for work done and do not provide for social security benefits for workers. These include contributions towards pension funds, and statutory funds for unemployment insurance and occupational injuries and diseases. Critics also argue that labour brokers do not pay for annual leave, family responsibility leave and sick leave.

An argument can certainly be made that some unscrupulous brokers avoid providing for social security benefits and leave in order to maximise their profit from fees paid by clients. It is also plausible that the temporary and assignment-based operation of the labour broking industry is a disincentive for labour brokers to make such investments in their workforces. Some trade union and labour broker representatives indicated that many labour brokers do not pay for leave or make benefit contributions.

The CAPES website details the rights of TES employees in terms of labour legislation. These include the right to a written contract, the right to annual leave, sick leave and family responsibility leave, the right to allowances for night work, and the right to premium rates for overtime and work on public holidays and Sundays. It sets out the obligations relating to deductions for the Unemployment Insurance Fund (UIF), Skills Development Levies (SDL) and the Compensation for Occupational Injuries and Diseases Act (COIDA). TES are required to comply with terms and conditions of employment as provided for in any relevant collective agreement.

CAPES also includes a detailed breakdown of the contributions for TES to build into their charges to clients:

Annual leave	5.88%
Sick leave	4%
Family responsibility leave	1.25%
UIF	1.25%
COID	1%
Skills Dev.	1%

It was difficult to establish the extent to which labour brokers actually build these contributions into their costing and actually pay for leave and pay towards the UIF and COIDA. However, there was evidence that in some cases, labour brokers operating in the construction industry do make such provisions.

Bargaining councils enforce employer obligations relating to leave pay and administer contributions to social security funds such as pensions. A number of labour brokers are registered with the building industry bargaining councils in the industry, that is, the Western Cape, North and West Boland, Kimberley and

Bloemfontein Building Industry Bargaining Councils. Representatives of the latter three councils said that the few labour brokers operating in their areas were registered and for the most part complied with requirements to pay for leave and benefit contributions. These representatives said that they considered labour brokers to be "just like any other employer in the industry" and that labour brokers were not necessarily predisposed to be non-compliant.

Trade union and bargaining council representatives in the Western Cape painted a mixed picture of compliance in these areas. They indicated that while some labour brokers were generally compliant with regard to leave and benefit fund contributions, these were a mere drop in the ocean, given the large numbers of labour brokers operating in the region. At the time of research, only five labour brokers were registered as being compliant. Estimates from key informants show that these five labour brokers represent well below ten per cent of the labour brokers operating in the industry in the Western Cape.

Case Study 5: A national labour broking firm

One national labour broking firm incorporates the leave and benefit provisions of the national bargaining councils for the industries in which it operates into its standard contract of employment. Although it operates in the construction industry, it does not include construction industry provisions because there is no national bargaining council in the building and civil engineering sectors. The firm's standard contract of employment states that the firm provides paid annual leave, sick leave and family responsibility leave to employees who meet the relevant criteria. It also makes contributions in terms of the UIF and COIDA for employees.

It also has several benefit funds for those who are not covered by bargaining council arrangements. It provides personal accident cover providing a benefit in the event that an employee dies or becomes permanently disabled. It also has a programme to provide advice, counselling and anti-retroviral treatments in the event of accidental exposure to HIV/AIDS. These two funds are fully funded by the labour broker. It also provides elective benefits including a funeral plan, hospital plan and provident fund. These are funded by employee contributions.

The above firm can be commended for its efforts to have a comprehensive policy to provide for leave and social security. However, it does not seem that the labour broker itself makes a contribution to the funeral, hospital and provident funds in addition to the employee's contributions. It is also unclear how widespread the practice of establishing benefit funds for employees is amongst labour broking firms in the industry. Arguably, large firms would be more likely to provide such funds than smaller operations.

4.5 Skills development

Critics of labour broking also have misgivings about the extent to which the industry contributes to skills development. This is a pertinent question in the construction industry, which already suffers from an acute skills shortage, as identified by representatives of all stakeholders. While all the representatives of labour brokers interviewed identified the skills shortage as a challenge for them in the construction industry, very few of them had or were participating in training programmes for the workers assigned to clients. This section examines the formal arrangements for skills development in the labour broking industry.

The Skills Development Act provides for the regulation of employee training through SETAs, which have been established for each sector. The Construction Education and Training Authority (CETA) facilitates the training of employees of employers operating in the construction industry. All employers are required to pay skills development levies of 1% of their payroll. 80% of this amount is given to the relevant SETA, and the remaining 20% goes to the Skills Development Fund.

The position regarding labour brokers is different, as they are not required to register with the SETAs in the industry or industries in which they make temporary placements. Thus, labour brokers operating in the construction industry cannot register with the CETA. All labour brokers are required to register with the Labour Recruitment Chamber of the Services SETA. The Services SETA facilitates the training of labour brokers' employees who are responsible for carrying out the labour recruitment functions in their offices, as opposed to the workers placed with their clients.

However, several informants (one from the Services SETA and two from large labour broking firms) said that labour brokers may facilitate the training of workers that they place with clients in the relevant industries. A labour broker is entitled to include these workers in its workplace skills plan, which sets out the training the broker intends to undertake each year. Bursaries that the Services SETA may grant to labour broking firms facilitate this training. These bursaries can be redeemed with a training provider recognised by another SETA, such as the CETA. The labour broker may then claim back for the training provided. The two labour broker representatives said that clients can also train the employees and invoice the labour broker, who then pays the client for providing training, and claims the amount paid from the Services SETA. This is referred to as the "Client-TES Claim Programme." In this way, labour brokers were encouraging clients to train workers.

The representatives were at pains to show that it is in labour brokers' best interests to ensure that their employees have the currency of skill to remain in employment. CAPES estimates that the temporary employment sector has contributed R 112 million to the annual skills levy, and has introduced over 4 000

out of 80 000 learnerships created, constituting about five per cent of all learnerships. Again, it is impossible to ascertain what proportion of these levies and learnerships contributed to actual skills development in the construction industry.

While the training programme is a commendable initiative, it is doubtful that many construction workers would benefit from it, for various reasons. Firstly, several small labour broker informants said that their firms were not registered with the Services SETA, and it is likely that a significant proportion of labour brokers operating in the industry are not registered.

Secondly, the majority of informants said that they did not provide or facilitate any training for workers placed with clients, as the latter only required workers with the requisite skills and knowledge to perform their work. One representative went so far as to say that the workers they placed with clients (predominantly unskilled labourers) were not interested in participating in training programmes, as they were concerned with more pressing matters of survival.

Thirdly, although it is not impossible that clients would invest their time and effort in training workers who are working for them temporarily via an intermediary, it is less likely that they would do so. Any training provided by the client would probably be geared towards enabling the worker to perform the assigned tasks, as opposed to facilitating upward mobility.

4.6 Security of employment: dismissals

There is a general perception that labour broking provides very little security of employment. This is largely due to the fact that assignments are of a fixed-term nature. South African labour law allows and does not place restrictions on fixed term contracts. In the normal course, the expiry of a fixed -term contract (whether in a direct employment relationship or a labour broking arrangement) does not in itself amount to a dismissal and does not give rise to any remedies.

The real problem with security in employment lies in the perception that labour brokers' employees are more dispensable than direct employees, and do not have recourse to remedies for unfair dismissal when contracts are cancelled on the instructions of the client. Dismissals in the context of labour broking arrangements are problematic and usually arise in two situations.

The first is the cancellation of a fixed-term contract before the agreed time. This happens when the labour broker removes and replaces a worker because the client is unhappy with his or her conduct or performance or no longer requires the worker. The second arises when the employment contract is not renewed, despite the employee's legitimate expectation of renewal. This usually applies in situations where an assignment with a particular client has previously been

renewed several times. Both these cases constitute dismissals in terms of section 186(1) of the LRA, and give rise to liability if the employer cannot give a fair reason or failed to follow a fair procedure.

The question is whether an employee has a remedy when dismissed in the context of a labour broking arrangement. Because there is no contract between the worker and the client and no provision holding the client liable for dismissal, the worker cannot proceed against the client. Trade union representatives interviewed said that it was common for labour brokers to deny liability for dismissals including retrenchment, on the basis that the decision to dismiss was made by the client and therefore beyond the labour broker's control. Some labour brokers include terms to that effect in their employment contracts. Representatives of labour brokers said that this was how the industry operated, and that the best they could do was to try to reassign the worker to another client, which was in their own best financial interest.

This approach taken by some labour brokers violates the law as stated in a number of labour court decisions and arbitration awards. The Labour Appeal Court has held that the cancellation of an employment contract amounts to a dismissal by a temporary employment service, and the latter must do so for a fair reason and according to a fair procedure.[26] In the case of redundancy, the broker must follow retrenchment procedures in terms of the LRA.[27] In the case of misconduct, the broker must conduct a disciplinary enquiry.[28] Brokers may not simply rely on a clause in an employment contract that states that employment will automatically terminate if the client no longer requires employees' services.[29] If the client no longer requires the worker, the labour broker must find alternative employment or retrench the workers.[30] Two arbitration awards have also held that placing an employee "on standby" indefinitely after cancellation of a contract amounts to unfair dismissal.[31]

Another problem highlighted is the fact that some labour brokers choose to define the duration of an employment contract according to the completion of a specific task or project, as opposed to a fixed date. This goes against the provisions of section 29(1)(m) of the BCEA, which requires that an employer must provide a written contract of employment that stipulates the date of termination of the contract. A term that the worker will be employed "for the duration of project X" does not meet this requirement. Furthermore, the absence

---

26 *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 983 (LAC).

27 *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 983 (LAC).

28 *NEHAWU & Another v Nursing Services of South Africa* [1997] 10 BLLR 1387 (CCMA); *Labuschagne v WP Construction* [1997] 9 BLLR 1251 (CCMA).

29 *NUMSA obo Majoro and Others/ Purple Moss 1309 t/a Kopano Therman Insulation* [2008] BALR 342 (MEIBC).

30 *NUMSA obo Majoro and Others/ Purple Moss 1309 t/a Kopano Therman Insulation* [2008] BALR 342 (MEIBC).

31 *NUMSA obo Daki/Colven Associates Border CC [2006] 9 BALR 877 (MEIBC); Smith/ Staffing Logistics* [2005] 10 BALR 1078 (MEIBC).

of a specified date of termination gives a labour broker leeway to dismiss a worker prematurely under the pretext that the contract has come to an end.

5 INSTITUTIONS REGULATING LABOUR BROKERS IN THE CONSTRUCTION INDUSTRY

Section 4 discussed the regulation of labour broking in the construction industry. This involved a discussion of the legislative provisions relating to labour broking and the laws governing the terms and conditions of employment in the construction industry in particular. It examined how these regulations translate in practice, with a focus on certain issues raised by critics of labour brokers.

This section considers the non-state institutions involved in the regulation of labour brokers in the industry. These are trade unions, bargaining councils and employer associations regulating the labour broking industry. While some of the information presented in this part overlaps with that discussed in part 4, we believe it is necessary to explain the role of these organisations and outline their experiences and attitudes relating to labour broking and the construction industry. We highlight the strengths and shortcomings of these institutions and the challenges they face in regulating labour broking.

5.1 The role of the bargaining councils

The Cape, North and West Boland, Kimberley and Bloemfontein Building Industry Bargaining Councils require all employers to register with councils if they operate within their jurisdiction. As labour brokers are employers, they must register with the relevant bargaining council and comply with the provisions of the collective agreements. However, they are not members of the Master Builders' Associations, and therefore do not directly participate in collective bargaining.

Clause 6A of the Cape bargaining council collective agreement states that no person may use a temporary employment service for work in the building industry unless both the client and the TES are registered and in good standing with the council. It also provides that the client and the TES shall be jointly and severally liable if the TES contravenes the collective agreement.

According to trade union and bargaining council representatives, several labour brokers have at some stage been registered with the Cape bargaining council. These labour brokers are a mixture of large national firms and medium and small operations. However, only five labour brokers were registered as being compliant with the collective agreement at the time of registration.

One official at the Cape bargaining council said that 50 complaints were brought against labour brokers in 2008. Most of them related to the non-payment of

benefit contributions. The bargaining council has innovatively used the joint and several liability clause to hold clients liable for the non-compliance of the labour broker. In one case, a registered labour broker had not paid benefit contributions to the council because its client had not paid fees for workers that had been assigned to them. After failing to secure payment by the labour brokers, the bargaining council approached the client and asked it to pay the outstanding fees directly to the council instead of the labour broker. After deducting the overdue contributions, it paid the rest of the money to the labour broker.

Another official at the Cape bargaining council said that while the council tried its best to ensure the compliance of labour brokers, it recognised the need to have a compliance agent dealing solely with labour brokers, due to the unique problems presented by the triangular relationship. The council was considering creating a post for this purpose.

The experiences of the other three bargaining councils were different. In Kimberley, only one labour broker, employing about 100 construction workers, was registered with the bargaining council. The North and West Boland reported that four labour brokers were registered with the council, one classified as large and the other three as small. The latter placed ten to twenty workers with clients. Two labour brokers are registered with the Kimberley bargaining council: a large labour broker servicing six clients and a small labour broker. The representatives of these three bargaining councils said that they were not aware of any other labour brokers operating in their areas. They did not believe that labour broking had grown exponentially in their areas. It may be that there are fewer brokers in the smaller towns because there is less work available than in the large cities.

The representatives of these three bargaining councils also said that the labour brokers generally complied with the provisions of the collective agreement, and that no complaints had been brought against them in 2008. Their general approach was to treat labour brokers in the same way as building (sub) contractors - approach them in the case of a complaint and use the normal procedures to ensure compliance. Generally the labour brokers were quite co-operative with the council. It was evident that all three bargaining council representatives had personally interacted with the owners of the labour broking firms.

While bargaining council agreements are (theoretically) binding on labour brokers and can be enforced against clients, they are likely to have a limited impact, due to the fragmented and partial coverage of the bargaining councils in the building sector.

Collective bargaining with labour brokers operating in the civil engineering sector was not a major issue, as the sector is governed by a sectoral determination. Labour brokers do not seem to have much influence in the collective bargaining

process that precedes the making of a sectoral determination, as they do not belong to SAFCEC.

5.2 Challenges for trade union organisation

Trade union membership has declined over the last two decades. This is due to changes in the organisation of work, notably through outsourcing, the use of labour brokers, and the increasing use of fixed term contracts and part time workers. Labour broking presents a challenge to trade union organisation, not least in the construction industry.

A representative of the BWU, a large building union operating in the Western Cape, Boland and North and West Boland, painted a slightly positive picture in relation to labour broking in the industry. He could not give the exact number of workers employed through labour brokers, but said that about five to ten per cent of their members are employed through labour brokers. He said that quite a few labour brokers operating in the area recognised the union as a collective bargaining agent and granted organisational rights such as deductions for trade union subscriptions. The union had established good working relations with some of them. These comprised a broad spectrum of labour brokers, ranging from very small to large national firms.

The BWU representative said that the Cape BIBC had been very active in its attempts to ensure that labour brokers were registered with the council and complied with the law. The council had issued compliance orders compelling them to register as required by the collective agreement. He said one of the challenges of organising amongst the workers of labour brokers was the high rate of staff turnover amongst labour broking firms. In addition, workers were rotated frequently, making it difficult to make contact and maintain relations with them. He said that there were some labour brokers that did not pay the stipulated wages or make benefit contributions for workers. He said the unions and the bargaining council took measures to ensure compliance ("They *must* comply with the legislation and collective agreement, and if they don't we *make* them comply") and he mentioned the use of the joint and several liability clause against the client to ensure compliance.

A representative of another trade union representing construction workers in the Western Cape, BWAWUSA, said that about a third of the trade union's members were employed through labour brokers. Three labour brokers recognised the trade union and granted it organisational rights, such as deductions for trade union subscriptions. However, large labour broking companies only recognised the trade unions as representatives of workers *assigned to a specific project*. The union therefore had to show representivity in respect of each project to which a labour broker had assigned workers. This made it very difficult to ensure continuity of the recognition of the unions.

Some of the other labour brokers that employed BWAWUSA's members were unregistered “fly by night” operations and were uncooperative with the union. Some of the labour brokers operating in the industry refused to recognise the union on the grounds that they were not construction contractors. He argued that an overwhelming majority of the labour brokers refused to comply with labour laws and the collective agreement, and that the union’s efforts to enforce the agreement were usually unsuccessful.

The Western Cape co-ordinator for NUM indicated that 25 per cent of its membership in the region was engaged through labour brokers. He said it was often difficult for a trade union organiser to distinguish between the contractor’s employees and those of a labour broker when they were working on site. An organiser would typically approach the contractor/sub-contractor on site to initiate the process of gaining recognition. At this point, the employer would direct the trade union to the labour broker that employed the workers involved. In many cases, it was difficult to track down the labour broker because it was not registered and did not have a fixed address. Once the labour broker was located, the union engaged with the broker.

According to this informant, labour brokers typically used various “dirty tricks” to frustrate the unions (except in the case where the contractor had a “sweetheart union” and facilitated the recognition process). The most common of these tricks was to argue that the union was not sufficiently representative of the workers, which usually included all the labour broker’s employees, including permanent office staff.

The union had been recognised by about five labour brokers. The official said that it is often difficult to get an audience with the labour broker, and it takes a longer time to resolve issues because the broker always has to consult with the employer. Workers are often laid off with little or no notice. This affects the union’s finances, as they cannot deduct union subscriptions from laid off workers. The labour brokers specifically tell the workers that they have not been dismissed or retrenched, but that they have merely been laid off, and cannot approach another company to look for a job.

The position in Gauteng was different. The largest trade unions, NUM and BCAWU, said that they recruited members amongst labour brokers’ employees, but could not give estimates as to what proportion fell into this category. The unions do not seem to approach and engage with the labour brokers directly to seek recognition and organisational rights. It therefore did not appear that the unions engaged directly in collective bargaining with the labour brokers. This was strange, given the fact that they said that the voluntary bargaining agreement did not bind the labour brokers. It did not appear that efforts were being made to ensure that members employed through labour brokers received treatment equal to that received by those covered by the VBF agreement.

However, the Gauteng unions had entered into a project labour agreement setting conditions of employment for workers on a large civil engineering project in Lepalale. A large national labour broker is said to have provided some of the workers for the project. All the parties had agreed that the project agreement would cover all the workers on the project, including those of the labour brokers.

There is a divergence in the approaches followed by the trade unions operating in Gauteng and those in the Western Cape. While unions operating in both regions have members who are employed by labour brokers, the unions in Gauteng do not seem to engage the labour brokers to reach agreements regarding employment conditions.

In contrast, the trade unions in the Western Cape seem to have accepted the reality that labour brokers command a significant portion of the workforce and are a permanent fixture in the construction industry. Despite the fact that the Western Cape has a collective agreement that is binding on all labour brokers, they have sought directly to engage and be recognised by labour brokers. However, in attempting to do so, trade unions have experienced various challenges.

The consensus amongst trade unions is that the best policy solution would be to ban labour brokers and require construction firms to hire their workers directly. As one trade unionist put it, "We would rather engage directly with the construction companies because labour broking opens up too many loopholes that can be used to exploit workers."

5.3 Employer Organisations Representing Labour Brokers[32]

Confederation of Associations in the Private Employment Sector (CAPES)

The confederation was formed in 2002 after the need was identified for a unified body to serve as a single voice for the industry. CAPES has an association chapter comprising four staffing associations, namely the Association of Personnel Services Organisations of South Africa (APSO), the Association of Nursing Agencies of South Africa (ANASA), the Information Technology Association of South Africa (ITA) and the Constructional Engineering Association of South Africa Labour Broking Division. In addition, it has a corporate chapter comprising ten large national labour broking companies: Adcorp Holdings, Adecco Recruitment Services, Kelly Group (Pty) Ltd, Callforce Direct, Drake International SA (Pty) Ltd, Landelahni HR (Pty) Ltd, Manpower SA, Primeserv Employment Solutions, Transman (Pty) Ltd and Workforce.

[32] The researcher did not interview representatives of the relevant employer organisations. The information presented in this section was gathered from the websites of employer organisations, media reports and representatives of labour broking firms that were members of the organisations.

CAPES acknowledges the fact that some "unscrupulous operators and clients abuse assignees by using TES in order to pay below minimum wages, and avoid compliance."

The temporary employment industry has therefore self-regulated for decades. Each of CAPES' four staffing associations requires members to comply with certain membership criteria as well as with codes of ethics and other regulations, failing which, corrective and/or punitive action is taken. The website claims that its member associations "have done outstanding work in protecting the rights of clients, assignees and the industry alike, albeit on a voluntary basis." As a result, many clients now require that the private employment agencies are members of the associations as a precondition to signing service agreements.

The CAPES website details the rights of TES employees in terms of labour legislation. These include the right to a written contract, the right to annual leave, sick leave and family responsibility leave, the right to allowances for night work, and the right to premium rates for overtime and work on public holidays and Sundays. It sets out the obligations relating to deductions for the Unemployment Insurance Fund, Skills Development Levies and Compensation for Occupational Injuries and Diseases. TES are required to comply with terms and conditions of employment as provided for in any relevant collective agreement. CAPES also includes a detailed breakdown of the contributions for TES to build into their charges to clients.

One of the aims of CAPES is to professionalise the industry, to ensure the competence of labour recruitment companies to conduct work in the industry. It envisages the development of a programme aligned to quality assurance, certification and related requirements of the skills legislation. This programme is being developed in discussion with relevant stakeholders such as the Services SSETA.

Key informants noted that CAPES did not have enough "teeth" to regulate the industry adequately, due to the voluntary nature of the current regulatory regime. The confederation is lobbying for a move from self-regulation to co-regulation by a board comprised of all the social partners (government, the industry and labour). This would also involve provisions for a statutory right to regulate the industry, and the ability to impose severe sanctions on private employment agencies that contravene legal or ethical requirements.

CAPES launched a code of conduct in March 2008. [33] The Services SETA hosted the launch of the code of conduct. In a statement to the media, its Chief Operating Officer said that this was one of the steps in a multi-tiered approach to

[33] "Labour recruitment Code of Ethics Launched" reported on http://www.iol.co.za/index.php?set_id=1&click_id=594&art_id=nw20090327115417848C56542, accessed on 28/03/2009.

professionalise the industry. In conjunction with the Services SETA, CAPES was also in the process of establishing an institute to certify labour brokers. It also launched an industry pension fund to ensure that temporary workers who were not covered by collective agreements had some form of social security coverage.

APSO

APSO was established in 1977 to represent its members in their dealings with government and other related bodies. Its role is to promote and ensure "for the benefit of clients and candidates, the adherence to high ethical and professional standards of business." Members may provide permanent or temporary employment services, or both .

The following documentation is required when applying for membership of APSO:

- Company/CC registration documents;
- Registration with the Department of Labour (although presently there is no statutory requirement that labour brokers register with the department);
- Income Tax reference number from SARS;
- Skills Development Levy, Unemployment Insurance Fund, Pay As You Earn reference numbers from SARS;
- Workmen's compensation reference;
- VAT registration number;
- Company profile;
- Details of all branches and subsidiary companies;
- Application form that candidates must complete when registering with the agency;
- Terms and conditions of business which the client must sign when dealing with the agency;
- Temporary contract that the temporary employees must sign (if operating as a TES); and
- Service level agreement that clients must sign (if they are provided with temporary employees).

Members of APSO must abide by its constitution. The latter regulates various aspects of the operation of employment services, including disclosure of information to clients and candidates, the advertisement of positions and the levying of fees for recruitment services. Clause 7 of the constitution deals with temporary employment services. It requires TESs to observe fair labour practices and pay the employer's portion of statutory benefits and other insurances and taxes required by law. It also requires that TESs should only provide replacement labour during a strike if the requirements of the Labour Relations Act are fulfilled. It also prohibits TESs from approaching and luring away their competitors' clients

and employees. Members are also prohibited from advertising their services on the basis that using a TES would circumvent labour laws.

An ethics committee hears and makes decisions regarding complaints brought against members. The committee can issue a sanction against a member found to have contravened the code of ethics, including a fine, a reprimand, a written warning, the suspension of membership for up to one year and the cancellation of membership. This is subject to a right of appeal to the national executive committee, which may confirm or set aside the ethics committee's findings.

Constructional Engineering Association, Labour Broking Division (CEA-LBD)

The CEA is the national umbrella body for labour brokers, providing constructional engineering workers of all levels. The CEA is also one of the 37 organisations within the Steel and Engineering Industries Federation of South Africa (SEIFSA). While the CEA provides temporary workers for *constructional* engineering work, its members seem to operate more within the metal and engineering industry than in building or civil engineering. There are, however, indications that some members of the association provide employees in the building and civil engineering industries.

The CEA has two divisions, namely the Labour Broking Division (LBD), which governs labour brokers providing blue collar workers, and the Temporary Employment Services Division (TESD), which provides white collar workers to clients.

13 labour brokers established the CEA-LBD in 1949.Its membership has grown to 168 in 2009. It is estimated that the CEA-LBD represents less than half of the labour brokers operating in constructional engineering. While the members also facilitate the permanent placement of workers with clients, they predominantly provide temporary workers. The membership is drawn from a wide range of labour brokers, from small to large, and predominantly services medium to large construction companies. The members draw their workers from a broad range of skills levels and trades. The majority of the founders of these labour broking firms enter labour broking with technical experience in construction.

In order to register with the CEA-LBD, a labour broker must show proof of compliance with relevant legislation. The broker must provide SARS clearance and proof of registration with the Services SETA, the Unemployment Insurance Fund, Skills Development Act and the Compensation Commissioner. The labour broker must also be registered with the Metal and Engineering Industry Bargaining Council (MEIBC). In addition, the members must vote in favour of the labour broker being granted membership.

The CEA-LBD has a code of ethics regulating the conduct of its members. This is enforced by a disciplinary and ethics committee, which has the power to suspend

or terminate a labour broker's membership for non-compliance. In addition, the association also encourages workers and clients to lodge complaints with the MEIBC, whose enforcement machinery applies to labour brokers. SEIFSA's disciplinary machinery also applies to the labour brokers.

The CEA-LBD provides a number of benefits to members. One is an educational service to update them on developments in the law and in the industry in general. It informs the members of minimum labour standards, and provides a pro forma contract of employment for members to use. It represents members, and lobbies on their behalf when interacting with institutions such as government, trade unions, NEDLAC, the MEIBC, and the South African Chamber of Commerce (SACOC). It also promotes its members, by encouraging clients to use them.

The CEA-LBD engages with trade unions on a number of matters. The association has negotiated with one of the trade union federations on the development of a system to facilitate the deduction of trade union subscriptions by member labour brokers. In addition, they negotiate project labour agreements to determine the terms and conditions of work for large projects such as Gautrain. It was also instrumental in the establishment of the client-TES claim programme, which enables labour brokers to facilitate industry-specific training to workers that they place with clients.

Conclusion

While the efforts of the employer associations in regulating labour broking are praiseworthy, there are several limitations.

The first is that they focus on formal, registered entities, to the exclusion of smaller, unregistered labour brokers. As a result, to the extent that they ensure compliance, this is only in respect of the formal segment of the labour broking industry. The challenge remains to identify informal labour broking operations and encourage them to comply.

The second limitation is that, despite their intentions to secure compliance with labour legislation and other regulations, the employer associations cannot guarantee compliance by their members. This applies to members operating both within and outside the construction industry.

The third limitation is that, because APSO and CAPES encompass labour broking firms operating in various industries, they do not focus on compliance with industry-specific labour regulations, such as the collective bargaining agreements in the building industry and the civil engineering sectoral determination.

To the extent that the CEA-LBD operates in the construction industry, it seems to concentrate more on metal and engineering work, as the MEIBC is the only

bargaining council that it engages with. It does not seem to focus on civil engineering and building, which is the focus of this research. However, the CEA LBD provides a good model for a potential association drawing together labour brokers that supply workers in the building and civil engineering industries.

6 THE FUTURE OF LABOUR BROKING IN THE CONSTRUCTION INDUSTRY

The future of labour broking in the construction industry must be examined in light of the ongoing debate about the future of labour broking in South Africa. While labour broking has always been a contentious issue, it has come to the fore as a result of Namibia's recent ban on labour broking.

The main objection to labour broking is that deeming the labour broker to be the employer of the worker is a legal fiction - the client controls the worker and the workplace where work is done. The argument is that the client is the true employer, and the broker is merely an intermediary between the two parties. The legal recognition of labour broking therefore legitimises the client's delegation of its employer duties to this third party. This explains why labour broking has increased so dramatically in South Africa.

Key informant interviews and existing research highlight several problems arising in the context of labour broking arrangements.[34] Firstly, there is some evidence that employees of labour brokers are more likely to be paid significantly less than standard employees. In addition, there is evidence that many workers employed through labour brokers do not receive social security benefits, and are not granted paid leave in terms of collective agreements and the BCEA. Despite the labour broking industry's significant contribution to skills development, there is evidence that many labour brokers do not see the need to provide training for their workers. Thus, some have argued that labour broking has facilitated the creation of an “underclass” of workers, whose conditions of employment are inferior to those of standard employees.[35]Arguably, these inferior conditions are a result of labour brokers' efforts to undercut their competitors and maximise their profits.

In addition to encouraging the inequality of working conditions, labour broking creates insecurity of employment. This is largely because employment can be summarily terminated at the request of the client, who is not held responsible for the consequences of dismissal. Despite the fact that the labour broker is the employer and is legally responsible for the consequences of dismissal, it seems common for labour brokers to require workers to “sign away” their rights to recourse in the event of the termination of an assignment. There is also little

[34] Theron and Godfrey (2005) and Labour Resource and Research Institute Labour Hire in Namibia: Current Practices and Effects (2006) accessed on www.larri.com

[35] Theron and Godfrey (2005) p 35.

evidence to support the assertion that temporary placements are an avenue towards acquiring permanent employment. This would run contrary to the financial interests of labour brokers, whose continued profitability depends on having as many workers on temporary assignments for as long as possible.[36]

The following sections consider the possibilities for the future of labour broking in South Africa, and possible implications for the construction industry. We begin by considering banning labour broking, which has been argued for in some quarters. We then consider the option of allowing labour brokers to operate under stricter regulations.

6.1 Banning labour broking

Labour broking has increasingly come under the spotlight in South Africa. Trade unions have argued strongly for its banning on the basis that it amounts to modern slavery and provides little security or benefits to workers. Some politicians made promises to end to labour broking after the 2009 elections.

Although labour broking has always been unacceptable in some quarters, the banning of labour brokers in Namibia has fuelled recent debates. We begin by examining the case in Namibia.

Section 128 of The Namibian Labour Act of 2007 prohibits "labour hire" (as it is known in Namibia) in the following terms: "No person may, for reward, employ any person with a view to making that position available to a third party to perform work for the third party." The prohibition excludes the matching of offers of and applications for employment where the service-provider does not become a party to the ensuing employment relationships.

African Personnel Services, (APS, a labour broking firm operating in Namibia) applied for an order declaring section 128 of the Labour Act unconstitutional. APS argued that the prohibition violated its constitutional right to carry on any trade or business in terms of section 21(1) of the Namibian Constitution. The Namibian Court denied the application and found that the prohibition did not violate the applicant's constitutional right.

The Court's decision rested on its finding that the right to carry on any trade or business was not absolute, and that it only encompassed lawful trades or businesses. The Court found that although labour hire was not a crime, it had no legal basis in Namibian law. Namibian employment law was based on the Roman law, which defined a contract of employment as existing between two persons and excluded third parties, such as labour brokers. On these grounds, labour hire was not a lawful business or trade entitled to protection in terms of section 21 of the Constitution.

[36] Theron and Godfrey (2005) and LaRRI (2006).

Although the Court's decision was based on the fact that labour broking was foreign to Namibian labour law, the Court was also influenced by moral objections to labour broking. It went as far as to say that labour hire amounted to modern slavery:

"It is my view that this third party interposition creates an unacceptable situation that has no legal basis in our law of contract of employment. In this regard, I accept [the] submission that the whole core nature and character of labour hire is to hire out or rent labour. In my opinion, it is letting or hiring of persons as if they were chattels."[37]

The Court also found that the labour hire system violated a fundamental principle on which the ILO was based, namely that "labour is not a commodity."

The decision can be criticised on a number of grounds. Firstly, the Court's reliance on the Roman law of contract disregards the fact that law is not static and evolves to meet the changing needs of society. The Namibian legal system itself had condoned labour hire for years. The Court failed to explain the legal basis on which labour broking had operated, and why it was no longer acceptable.

Ngiishililwa argues that the Court's reliance on Roman law was an attempt to shy away from the real question of balancing the benefits of the labour hire system against its disadvantages, including allegations of non-compliance and the exploitation of workers.[38] Both sides in the matter had presented extensive evidence and argument regarding the role and impact of the labour hire system. By avoiding this critical issue, the Court missed out on an opportunity to examine other regulatory options for addressing labour hire, for instance the imposition of strict regulations requiring labour brokers to comply with labour legislation.

Reading the judgment gives the impression that, with respect, the Court had already made its decision on the position of labour brokers, and was seeking justifications for it. For instance, it placed emphasis on the fact that labour broking violated the ILO's fundamental principle that labour is not a commodity. However, the Court did not acknowledge that even the ILO recognises labour broking, and has chosen to regulate their position in the Private Employment Agencies Convention of 1997. In this way, the Court failed to consider the possibility of regulating labour hire to ensure non-exploitation of workers. African Personnel Services has lodged an appeal against the decision with the Supreme Court of Appeal, which is yet to decide on the matter.

---

[37] *African Personnel Services v Government of Namibia and Others* (Case No: A 4/2008) NAHC 148 (1 December 2008) Para 26.

[38] Ngiishililwa, F (Deputy Dean, Faculty of Law, University of Namibia) Labour Hire in Namibia: Looking at a different angle unpublished Mimeo, 2009.

Does the Namibian ban on labour broking signal the end of labour broking in South Africa? This certainly appeared to be the case in the run-up to the 2009 elections, when the ruling party adopted a stance in favour of banning labour broking. More recently, there seem to be indications that the government may consider less drastic measures, such as introducing more controls over labour broking. The remainder of this section considers the potential implications of a ban on labour broking.

The only means to effect a ban on labour broking would be through legislation passed by Parliament. This legislation would essentially amend existing labour legislation that recognises labour broking, including the LRA, BCEA and EEA. Undoubtedly, such legislation would be challenged in the courts, as it would infringe on labour brokers' right to freedom of trade, occupation and profession enshrined in section 22 of the Constitution. A court would have to determine whether it met the requirements of section 36 of the Constitution. This section sets out the criteria for the limitation constitutional rights. Section 36 reads as follows:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors:
> - The nature of the right;
> - The importance of the purpose of the limitation;
> - The nature and extent of the limitation;
> - The relation between the limitation and its purpose; and
> - Less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The onus would rest on the party supporting a ban on labour broking to persuade a South African court that it was "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". A court considering the matter would have to consider the factors outlined in section 36(1). The court would first have to establish whether there was a justification for the limitation (sections 36(1) (b) and (d)). The second stage would involve a balancing act to ensure that there was proportionality between the limitation and its purpose (sections 36(1) (c) and (e)).

Establishing a justification for the limitation to section 22

Extensive evidence and argument would be required to show that there was a valid reason for banning labour broking (thereby limiting labour brokers' section 22 rights). Arguably, the justification would lie in preventing the exploitation of workers and unfair practices associated with labour broking. Of great concern is the disparity between the working conditions of labour brokers' employees and

standard employees. The establishment of uniform working conditions for similar work performed under similar conditions would certainly qualify as an acceptable objective for banning labour broking.

In addition to finding a good reason for the limitation, the court would have to be convinced that there was a sufficient link between the limitation and its purpose. In other words, the court would have to find that there was some rational connection between banning labour broking and the elimination of disparities in working conditions. Arguably, a rational connection could be established by showing that banning labour broking would encourage clients to employ all their workers directly under equal terms and conditions of employment.

Balancing the limitation and the purpose of the limitation

The second stage of the limitation analysis would involve a proportionality enquiry to ensure a balance between the limitation and the purpose of the limitation. Importantly, it would involve considering the nature and extent of the limitation, to ensure that it was not overly invasive; rights should only be limited to the extent that is necessary to achieve the stated purpose. A ban on labour broking would have to be narrowly defined and limited to temporary placements, thus excluding other labour recruitment practices.

The proportionality enquiry would also have to determine whether there were less restrictive means to achieve the same purpose. This is in keeping with the principle that rights should only be limited to the extent necessary to achieve the stated purposes. The court would have to determine whether the disparity in working conditions could be eliminated by measures that fell short of banning labour brokers.

It is likely that this factor would pose a challenge, as less restrictive means to ensure parity of working conditions between direct employees and labour brokers' employees do exist. One is to increase the barriers to entry into the labour broking industry by establishing strict registration and accreditation criteria for labour brokers. Another is more comprehensive legislation governing all aspects of the labour broking relationship, and allocating responsibilities between clients and brokers. This would be supported by dedicated enforcement and compliance mechanisms to ensure adherence to the regulations.

Presently, the government has not initiated a comprehensive programme to regulate labour broking, and the current (inadequate) legislative provisions have not been well enforced. Therefore, proponents of a ban would have to present compelling evidence to show that the adoption of such measures would be ineffective, and that the more drastic solution of banning is required.

Could proponents of banning persuade a South African court that banning labour broking would be a “reasonable and justifiable” limitation on the right to freedom of trade, occupation and profession? Our response is that while this would be a significant challenge, it would not be impossible. A ban could be adopted to prevent the perceived abuses that occur in labour broking relationships, subject to several caveats. Firstly, the legal provision would have to be narrowly limited to temporary placements and exclude more benign labour recruitment practices, such as permanent placements. Secondly, a ban on labour broking would be meaningless without effective enforcement measures to prevent clandestine operations. These would require the commitment of significant resources. Thirdly, a ban would have to be considered within a broader programme to address “flexible” working arrangements that undermine the labour regulation. This would prevent the re-emergence of labour broking in disguised forms such as “labour only subcontracting” to avoid the penalties that would be attached to labour broking.

6.2 Regulating labour broking

The above discussion shows that proponents of a ban on labour broking would have to show the futility of less restrictive measures to address the abuses arising in labour broking relationships. This section considers the possibility of allowing labour broking to continue, while introducing regulations to control the possibilities for abuse.

At present, the provisions deeming labour brokers to be employers do not give the clients any incentive to ensure that the labour broker is compliant with labour standards and regulations. It is suggested that their application be made dependent on the registration of labour brokers with a regulatory body and compliance with labour regulations. In the absence of proof of registration and compliance by the labour broker, the client would be held liable as the employer of the workers involved. This would provide an incentive for clients to deal only with compliant labour brokers.

Currently the employer organisations regulate their members under codes of ethics and have their own enforcement mechanisms. However, this system is voluntary and weak, because the employer organisations do not have statutory power to regulate the industry. Given the far-reaching consequences of labour broking, it is not advisable to leave its regulations in the hands of labour brokers alone.

It is suggested that co-regulation by a joint regulatory body comprising representatives of government, labour and employers would be the most appropriate form of regulation of the industry. It is submitted that co-regulation of the industry would be beneficial for the industry, as it would ensure balancing the

needs of the different stakeholders. The regulatory body would be established in terms of an Act of Parliament empowering it to regulate the industry.

This would involve the registration of labour brokers meeting certain minimum criteria. They would also have to comply with a code of ethics governing all aspects of labour broking relationships. Most importantly, matters relating to dismissal of workers, trade union recognition and collective bargaining would have to be addressed in such a code of conduct. Labour brokers would be required to declare the industries in which they operated and to register with and comply with the applicable collective bargaining arrangements and agreements. Monitoring mechanisms would have to be put in place to deal with non-compliance with the code of ethics, legislation and collective bargaining agreements, with deregistration as the ultimate sanction.

In addition, the provision deeming the TES to be the employer could be made subject to a certain time period, after which a worker assigned to a client would become an employee of the client. This would prevent the employee from being employed in perpetuity under a triangular employment relationship.

Concerted efforts would have to be made to identify and engage with the so-called “bakkie brigade”, to better understand their circumstances and the factors preventing them from complying. They would need to be educated about the benefits of compliance with labour regulations. Support measures to assist them to register and comply with regulations would have to be devised and implemented.

It would also be appropriate to establish an association such as the CEA-LBD for labour brokers operating in the building and civil engineering industries, to engage on an industry level. This has been successful for constructional engineering, which falls within the ambit of the MEIBC, the national council governing the entire industry in South Africa. It would not be as easy to do this in the construction industry, since, as discussed above, there is no national bargaining council and the arrangements determining terms and conditions of employment are fragmented.

These proposals would require the commitment of significant time, energy and resources on the part of the stakeholders. Their success would also depend on stakeholders’ willingness to co-operate with each other to ensure decent work for all temporary employees.

7 CONCLUSION

This report undertook to identify and map the different flexible working arrangements that are being employed in the construction industry, namely casualisation through the use of limited duration contracts and externalisation through subcontracting and labour broking. The research was essentially qualitative, and sought to draw from the views and experiences of a broad range of informants with knowledge and experience in the industry. It cannot be said to represent what is happening in the entire industry, although there are indications that some of the trends identified arewidespread.

This report paid special attention to labour broking, as there is currently little (if any) extensive research about its prevalence in the construction industry. Due to a number of constraints, it was impossible to conduct a large-scale survey of labour brokers operating in the construction industry, which raises questions and issues for further research and debate. Since it was impossible to measure the number of people working under the different flexible arrangements, future research in the area should focus on a more quantitative approach, to gain more clarity on the extent of these operations.

The report does not answer all the questions regarding the future regulation of flexible employment arrangements in the industry, and has focused its recommendations on the future of labour broking in the industry. It is hoped that it will give insights on the interplay between the different flexible working arrangements and the regulatory framework in place and the challenges raised therein. This, and further research in the area, should guide stakeholders and policy-makers in charting the way forward.

REFERENCES

Legislation

South Africa

Basic Conditions of Employment Act 75 of 1997

Constitution of the Republic of South Africa Act 108 of 1996

Employment Equity Act of 1998

Labour Relations Act 66 of 1995

Namibia

Constitution of Namibia

Labour Act of 2007

Case Law

South Africa

LAD Brokers (Pty) Ltd v Mandla [2001] 9 BLLR 983 (LAC)

Labuschagne v WP Construction [1997] 9 BLLR 1251 (CCMA)

NEHAWU & another v Nursing Services of South Africa [1997] 10 BLLR 1387 (CCMA)

NUMSA obo Daki/Colven Associates Border CC [2006] 9 BALR 877 (MEIBC); Smith/ Staffing Logistics [2005] 10 BALR 1078 (MEIBC)

NUMSA obo Majoro and Others/ Purple Moss 1309 t/a Kopano Therman Insulation [2008] BALR 342 (MEIBC)

Namibia

African Personnel Services v Government of Namibia and Others (Case No: A 4/2008) NAHC 148 (1 December 2008)

Research and Industry Reports

Buzuidenhout et al *Non-standard employment and its policy implications.* Unpublished report submitted to the Department of Labour (2003).

Construction Industry Development Board, *The CIDB Quarterly Monitor*, October 2008

Cottle, E *2010 Stadia Inspection Dossier* compiled for the Building and Woodworkers' International/ FIFA LOC inspection of the FIFA World Cup Stadia in South Africa

Jauch, H Namibia bans labour brokers in *Amandla!* Double Issue No. 5 & 6, December 2008

Goldman, T *Organising in the Informal Economy: A case Study of the Building Industry in South Africa* ILO SEED Working Paper No. 38 (Geneva, ILO: 2003)
Ndungu, S K and Theron, with Godfrey, S and Rakgosi, S and Visser
What kind of jobs? Creating opportunities for decent work Unpublished Research Report submitted by NALEDI and LEP (2008)

Ngiishililwa, F, (Deputy Dean, Faculty of Law, University of Namibia) *Labour Hire in Namibia: Looking at a different angle* unpublished Mimeo, 2009.

Statistics South Africa *Construction Industry*, 2007

Statistics SA *Labour Force Survey Historical Revision*, 2007

Statistics SA *Quarterly Labour Force Survey,* quarter 4, 2008

Statistics SA *Explanatory Notes to the Quarterly Labour Force Survey,* 2008

Theron, J and Godfrey, S *Protecting Workers at the Periphery Development and Labour Law* Monograph 1/2000 (Cape Town, Institute of Development and Labour Law: 2000)

Theron, J and Godfrey, S *The Rise of Labour Broking and its Policy Implications* (Cape Town, Institute of Development and Labour Law Monograph Series: 2005)

News Reports

Creamer,M M &R's order book resilient at R 60 bn, despite project cancellations of R 10 bn, *Engineering News*, 25 February 2009

Ferreira Ban brokers, says COSATU *Business Times Careers*, 2 November 2008

"Labour recruitment Code of Ethics Launched" Reported on http://www.iol.co.za/index.php?set_id=1&click_id=594&art_id=nw20090327115417848C56542, accessed on 28/03/2009

"Contractors grappling with rising costs" Reported on 4 June 2008 at www.industryinsight.co.za ,accessed on 20/02/2009.

"Small Construction businesses struggle in cash strapped industry" Reported on 26 September 2008 on www.industryinsight.co.za ,accessed on 20/02/2009.

"Temporary agencies can supply ready-made skills in scarce areas" *The Star*, 29 March 2006

Internet Resources

Association of Personnel Services Organisations (APSO) website, www.apso.co.za

Confederation of Associations in the Private Employment Sector (CAPES) website, www.capes.co.za

Constructional Engineering Association, Labour Broking Division (CEA-LBD) website, www.cea.org.za