

THE SHIFT TO SERVICES AND TRIANGULAR EMPLOYMENT:

Implications for labour market reform

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The impact of labour legislation on the South African economy, and the politically vexed question of the 'reform' of labour legislation or, more broadly conceived, labour market reform, continues to be a focus of debate. It is a debate informed by both global and local perspectives. At a global level, as well as the economic imperative to cut costs imposed by trade liberalization, there is the ideological imperative to reduce the costs of 'doing business' imposed by global institutions such as the World Bank, through its 'Doing Business' survey.¹ At a local level, labour legislation is called upon to adapt to an economy that has changed, structurally, in the decade or so since it was introduced.

Statistically speaking, the clearest indication of this structural change has been in a shift to employment in services. Thus whereas formal employment in manufacturing has been largely stagnant, and employment in mining has declined, just over a million jobs are reported to have been created in services over this period. In fact jobs in the services sector account for three-quarters of the increase in employment since 1995 (Bhorat and Oosthuizen, 2006: 181) even if this has not been enough to keep pace with population growth, or to reduce unemployment.²

The retail sector is now the largest single contributor to employment in South Africa, followed by community, social and personal services.³ However it is "financial intermediation, insurance, real estate and business services" (which is somewhat misleadingly abbreviated as the 'finance' sector) which have shown the most marked growth.⁴ There is also significant employment of domestic workers in private households and in transport, each of which employs more people than mining and quarrying. In total, well over half of people employed are in some form of service. It

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¹ The full title of the survey is '*The Cost of Doing Business*'. It is an annual survey by the World Bank, and its first report was published in 2004. The report has been criticised on methodological and other grounds by a number of authorities. For a critique of the survey report with particular reference to South Africa see P. Benjamin and J. Theron, 2007. 'Costing, comparing and competing'. Working paper, Development policy research unit, University of Cape Town (forthcoming).

² According to the authors, 1,1 million jobs were created between 1995 and 2002. Three sectors added jobs at a 'higher than the tertiary sector average' namely the finance sector, which expanded by three quarters over the period, representing an increase of 440 000 jobs, the wholesale and retail, which grew by 500 000 jobs, and domestic work. However it is argued that the increase in domestic work reflected the improved ability of the surveys to collect the relevant data.

³ See Statistics SA, Labour Force Survey, March 2006. The percentages for these two sectors were 24,1 and 17,5 percent respectively. Community and personal services includes government employees. The next most significant sectors providing employment are manufacturing, followed by agriculture.

⁴ See note 2 above.

is also noteworthy that the two sectors identified for “special priority attention” in government’s Accelerated and Shared Growth Initiative (Asgisa), namely business process outsourcing (BPO) and tourism, are services targeted primarily at consumers or clients from the global North.⁵

But what, precisely, does this growth of services signify? In the global North it has been welcomed as representing the advent of a post-industrial society (Bell, 1973).⁶ Yet its dark aspect is a lowering of real wages levels and skills (Braverman, 1974). A more recent analysis of services in the United States suggests it is not useful to talk of services as an undifferentiated whole. It identifies four categories, according to the work system utilised in each. The first is ‘tightly constrained’. The second is characterised as ‘unrationalised labour intensive’. There has indeed been a decline in wage levels and skills in the ‘tightly constrained’ and ‘unrationalised labour-intensive’ categories, but not in the others (Herzenberg, Alic and Wial, 1998).⁷

Clearly then the shift to services locally is also part of a global phenomenon. Its corollary is the relocation of mass-manufacturing to a handful of low-wage countries, notably China. Endeavours to prove or disprove that labour legislation has had a particular impact on the South African economy are likely to prove fruitless in this context. A more fruitful line of enquiry is rather to consider the impact these changes in the structure of the economy have had, or should be having, on law and legal discourse. It is a question the amendments to labour legislation eventually adopted in 2002 gave rise to. Realising that despite these amendments significant numbers of workers were still without effective legislative protection, the Department of Labour (to its credit) commissioned research concerning ‘the changing nature of work and atypical forms of employment’. However the debate regarding the outcome of this research, summarised in a ‘synthesis report’, has largely taken place behind closed doors.⁸ A recent addition to the debate that has been public is a series of articles by lawyers about the reform of labour legislation (Cheadle, 2006; Van Niekerk, 2007; Roskam, 2007).

2. Points of departure

To consider the capacity of law to respond to social change necessitates a consideration of legal theory. However “because law is *an aspect of society*, a part of a larger social field, this theory must, itself, be informed by- and a part of- social theory” (Cotterrell, 1992). Social theory in this instance is tasked with understanding

⁵ See www.info.gov.za/asgisa.

⁶ “If an industrial society is defined by the quantity of goods as marking a standard of living, the post-industrial society is defined by the quality of life as measured by the services and amenities – health, education, recreation and the arts – which are now deemed desirable.” Bell, 1973, xvi.

⁷ Examples of tightly constrained workers are telephone operators. The care professions and domestic workers would fall in the second category. The work is ‘unrationalised’ because it is not standardised in any way. Clerical workers and lower level management might fall in the ‘semi skilled autonomous’ category while professionals and higher level managers would be examples of workers in the ‘high skill autonomous’ category.

⁸ The writer was co-author with S.Godfrey of the synthesis report, which has been published in the 2005 edition of Contemporary Labour Law, Lexisnexis-Butterworths.. The recommendations flowing from the report are still being debated at Nedlac. The relatively superficial level of debate regarding labour market reform is contrasted with the debate in the European Union, as reflected in the 1999 Supiot report.

the character of the structural shift that has occurred, and its implications for labour legislation. It is not possible to do so if labour law is conceived as a discrete, self-referential system of communication, as lawyers tend to do.⁹

Take for example Cheadle's paper. It sets out to identify the conceptual underpinnings of the post-1994 labour legislation, and "to consider the effect of the changes to the labour market since then and whether the conceptual structure is capable of accommodating those changes." (Cheadle, 2006,1). However the only reference to the changes in the labour market is at the end of the paper, and only after canvassing the primary reform the author is advocating.¹⁰ This is the abolition of the 'unfair labour practice' remedy provided in the Labour Relations Act.¹¹ This is not an appropriate 'reform' if one is concerned to protect vulnerable workers.¹² There is also no basis for believing it bears any relation to the changes in the labour market that have in fact taken place.

The essential problem with the analysis that leads to such a result is the author's notion of a 'conceptual structure underpinning labour relations'. It is not entirely clear what he conceives this to be: however it is clearly more conceptual than structural, with concepts derived from the legal domain rather than founded in social and economic reality.¹³ The point of departure here is that labour legislation is premised on social and economic assumptions that prevailed when the primary and secondary sectors were seen as the engines of the economy. To understand the 'conceptual underpinnings' of labour legislation, it is necessary to identify these social and economic assumptions.

In the section that follows, section 3, four key assumptions informing the structure of our labour relations system are identified. I argue that the validity of each of these assumptions is compromised by the growth of services. To validate this argument, I present a historical account of the growth of services in section 4, identifying the triangular character of all employment in services, and honing in on three 'new' services in which there is, strictly speaking, a triangular employment relationship: contract cleaning, security services and temporary employment services (TESs).

⁹ Autopoiesis theory holds that law is such a system.

¹⁰ The changes in the labour market are depicted as an increase of non-standard employment due to externalisation, casualisation and informalisation. The remedy the author proposes is to extend collective bargaining to cover workers in non-standard employment. However one of the implications of the shift to services we shall later consider is that it will not be possible to do so, without far-reaching changes to the collective bargaining system. Cheadle, 42-43.

¹¹ Section 186 (2), LRA.

¹² Take the real enough example of a worker in standard employment that is unilaterally placed on a fixed-term contract. She or he could of course allege constructive dismissal. But first she or he would have to resign, a step no vulnerable worker will easily take. The effect of this 'reform' is to compel a worker to do so, instead of referring an unfair labour practice to the CCMA. Such worker will also bear the onus of proving she or he was dismissed, a course fraught with legal difficulty. See for example *Albany Bakeries v. Van Wyk and others* (2005) 26 ILJ 2142 (LAC). It appears that both Van Niekerk and Roskam support this 'reform'.

¹³ Much is made of the notion of regulated flexibility, which is said to have informed the recommendations of the Labour Market Commission and the then Minister of Labour's approach to labour law reform. See Cheadle, 6-9. Without detracting from the usefulness of such a notion in justifying legislative reform, it surely cannot be said to be a concept informing the structure of the labour relations system.

The growth of services in general, and the ‘new’ services in particular, represents a process of informalisation, in terms of which the formal workplace is increasingly unregulated by labour legislation. This process, which I have elsewhere characterised as ‘informalisation from above’, is synonymous with the externalisation of employment and the establishment of a triangular employment relationship in the formal workplace.¹⁴ Section 5 concerns the hype about services creating new jobs. I go on to consider a case study in the cleaning sector to demonstrate, in sections 6 and 7, in what respects the key assumptions identified in section 3 no longer apply.

The question as to how labour regulation should respond to the growth of services and the triangulation of employment falls to be addressed at both a global and local level. Section 8 concerns how international labour regulation has responded to the triangular employment relationship, or rather has failed to respond to the problem. I then consider, in section 9, in the context of domestic regulation, the adequacy of South Africa’s response to the triangular employment relationship, and the recently adopted presumption as to who is an employee. I conclude in section 10.

3. Four key assumptions underpinning labour regulation

The proposition that South Africa’s system of labour relations has been developed primarily on the basis of its experience in the primary and secondary sector is historical fact. The first labour legislation was introduced following a period of heightened trade union militancy in the early 1920s, primarily in mines. So too, the labour legislation introduced in the post-apartheid era follows a period of heightened trade union militancy in the 1980s, primarily in the manufacturing sector and mines. At the same time it is generally acknowledged trade unionism is a response to a particular form of labour market organisation. In what has been characterised as the Fordist mode of production, large numbers of workers working for the same employer are massed in the same workplace. The Fordist workplace thus lent itself to trade union organisation, and the rules of engagement between organised labour and employers were developed there. These rules are also the basis of which the legislation regulating labour relations has developed.

The first key assumption on which these rules of engagement were based is thus the notion that the workplace is the place where workers actually work, and that their employer controls the workplace. Thus worker rights, such as the right to belong to a trade union, are exercised first and foremost in the workplace. Similarly trade union rights, such as the right to negotiate on behalf of members, or access to members, are exercised first and foremost in respect of the workplace. This notion found legislative expression with the adoption of the definition of the workplace in the Labour Relations Act of 1995 (LRA).¹⁵ The shift to services has, as I shall argue below, eroded its coherence.

A second key assumption on which the rules of engagement were premised was that employment is a binary relationship between employer and employee, and that there is a clear distinction between employment and self-employment. Employees were in a

¹⁴ Informalisation from above is contrasted with ‘informalisation from below’, which corresponds with the notions of the informal economy (or informal sector), which takes place in the informal workplace. The informal workplace is by definition not regulated by labour legislation.

¹⁵ See section 213, LRA of 1995 and note 43 below

position of economic vulnerability *vis a vis* their employers, whereas the self-employed were able to fend for themselves. This distinction found legal expression in the common law distinction between employees and independent contractors. This distinction was reaffirmed and re-inforced in the definition of employee in the LRA (Theron, 2002). However in services the interests of the consumer or client are paramount. This gives the employment relationship a triangular character. All services exhibit this character to a greater or lesser extent, but in some there is, strictly speaking, a triangular employment relationship. A working definition of the triangular employment relationship is where there are workers employed by an enterprise who perform work for another (although the matter is more complex, as we shall argue below.)

Trade unions have always argued that the economic vulnerability of employees is best addressed through collective bargaining, and a right to bargain collectively is now entrenched in South Africa's constitution.¹⁶ The role of legislation is to set out the rules that give effect to this right. However these were rules developed in the 1920s, and were calculated to encourage industry-based bargaining by trade unions and employers in industrial councils. Services such as security and even transport were generally performed in-house, and each industry was defined to include operations incidental or ancillary to its main business. Although there were industrial councils (now known as bargaining councils) in services, these tended to be in relatively discrete services, such as hairdressing or passenger transport.

The third key assumption thus relates to the centrality of industry-based bargaining in our labour relations system. Part and parcel of this assumption is the belief that different industries in the economy could be systematically demarcated according to the nature of the business or undertaking conducted at that workplace, taken as a whole, and without state intervention.¹⁷ This is essentially the system adopted in the LRA of 1995, albeit that NEDLAC was entrusted with the responsibility of demarcating sectors.¹⁸

The question of employment security is critical in any rules of engagement, since without it all other rights are ineffective. Until the establishment of an Industrial Court, employment security was largely a privilege associated with being white or, in the case of coloured workers, having scarce skills or being employed in the public sector. For unskilled workers, and African workers, the only form of security that existed was through resort to the wild-cat strike. The Industrial Court provided an alternative to the wild-cat strike, but was perceived as biased in favour of employers. Consequently the major institutional innovation of the 1995 LRA was a new disputes resolution tribunal, the Commission for Conciliation Mediation and Arbitration (CCMA).

However the system the CCMA administers assumes employment that is ongoing, or permanent, or long-term (which all commentators agree is one of the defining characteristics of the standard employment relationship). This is a fourth key

¹⁶ Section 27(3) of the Constitution.

¹⁷ The leading case is *R.v Sidersky* 1928 TPD 109.

¹⁸ As a matter of fact NEDLAC has been ineffective in demarcating sectors. This, as we shall see, is probably because of the growth of 'new' services that are unwilling to accept the status of being ancillary or incidental to another industry.

assumption. For if a worker is employed for a fixed-term, and the term expires, there is no dismissal. The CCMA thus lacks jurisdiction to consider a dispute concerning such termination.¹⁹ Significant numbers of workers in services are employed on a fixed-term basis. Also, while there is no necessary relation between the triangular employment relationship and employment on a fixed-term contract, in practice they commonly coincide.

4. The rise of services in South Africa

The rise of the services sector must be understood in the context of a process of economic restructuring that commenced in the 1980s. At the level of the state this process incorporated endeavours under the old regime to 'modernise' the economy, by dismantling protectionist measures and liberalising tariffs.²⁰ This process accelerated in the 1990s, during the period of transition and under the post-1994 regime. At the level of the firm, there was thus increased competition at the same time as new technologies opened up new possibilities for restructuring. The form this restructuring took was influenced by ideological and political considerations. The appeal of a notion of the 'flexible' firm, focussed on its core-business, was undoubtedly enhanced by the emergence of militant trade unions.²¹

There was also a shift in power relations between retail and manufacturing in the 1980s, at about the same time a similar shift in Northern countries occurred (Wrigley and Lowe, 2002).²² Less than a handful of big retail chains emerged as the dominant force in the retail market. These began establishing more and more, and larger and larger, stores. Manufacturers began complaining about the potentially devastating consequence of having their products blacklisted by Pick 'n Pay, if they could not deliver product at the prices the retailer stipulated.²³ In the case of Woolworths, manufacturers were required to modify their plants to meet its exhausting specifications.

More is probably known about employment in retail than any other part of the services sector. Yet most studies have focused on the large retail chains, where the major component of the work force is now employed in various forms of part-time

¹⁹Section 192(1) of the LRA of 1995 requires an employee to establish the existence of a dismissal, in any unfair dismissal proceedings. Dismissal is defined in terms of section 186(1). The only basis on which an employee whose contract expires could be considered dismissed is in terms of section 186(1)(b): where there is a reasonable expectation the employer would renew the contract "on the same or similar terms."

²⁰ The first attempt at deregulating the labour market was in 1986, with the adoption of Temporary Removal of Restrictions on Economic Activity Act

²¹ The notion of the 'flexible' firm is generally associated with Atkinson. See for example Atkinson, J. 1985. 'Flexibility: Planning for an uncertain future', *Manpower, policy and practice*, Vol 1 pp 26-29.

²² Wrigley and Lowe describe the concentration of capital that commenced in economies of the North post-World War 2, as a result of which independent retailers were progressively eliminated and the retail sector came to be increasingly dominated by 'big capital', in the form of the retail mega-chain (exemplified by Wal-mart in North America). This has resulted in a shift in bargaining power between retailers and their suppliers. See N.Wrigley and M.Lowe, 2002. 'Reading retail: A geographical perspective of retailing and consumption spaces', Arnold, London, 22-25 and 52-55.

²³ The writer was personally informed of this by representatives of major food manufacturers, in the course of collective negotiations at a centralised level in the 1980s.

work. (Kenny, 2005; Kenny, 2003; Bezuidenhout et al, 2003).²⁴ Nevertheless externalisation has had a major impact, even in retail.²⁵ Firms providing merchandising services to major retailers have emerged, reducing employment in certain operations at the stores. Also at least two of the major retailers have over the last several years also embarked on a strategy of franchising.²⁶ This has far-reaching consequences for labour relations in the sector, and the exercise of trade union rights and collective bargaining generally.²⁷ At the same time at least some of the growth in employment in retail has been as a consequence of ‘informalisation from below’. A relatively high proportion of employment in the sector (34,7 percent) is categorised as ‘informal’.²⁸ These, one can only suppose, include hawkers, spaza shops and door-to-door salespersons, many of whom are in the survivalist category.

At about the same time as the retail sector became increasingly ascendant, firms in manufacturing and the primary sector began to externalise employment. As a consequence certain forms of triangular employment relationship began to assume prominence. TESs loom large in the literature on triangular employment relationships. A TES can only be regarded as constituting a triangular employment relationship if it is regarded as the employer of the workers it provides to a client, as opposed to a mere intermediary. In the United States, where temporary employment agencies originated, employers in the industry succeeded in establishing the notion of TESs as employer after a protracted series of legal and political struggles at state level in the 1950s and 1960s (Gonos, 1997).

It would be incorrect to suppose that TESs in the United States emerged as a secondary outcome of the more generalised process of labour market restructuring. Rather the industry “has been an *active institutional presence* in the restructuring process itself. It has played a decisive role, inter alia, in the proliferation of two-tier compensation system, especially in manufacturing...” (Peck and Theodore, 2002). The same is true of South Africa. Agencies such as Manpower, Kelly and Quest opened up shop in South Africa in the late 1960s (Theron, Godfrey and Lewis, 2005). However uncertainty about the legal status of TESs was clearly a critical constraint on their growth. In 1983 an amendment of the Labour Relations Act was introduced, purportedly to regulate labour broking (as TESs were then known). In fact it encouraged it, by designating the broker as the employer (Theron, 2005).

TESs were not the only ‘active institutional presence’ shaping the process of restructuring. Mention has already been made of franchising, which was introduced from the North at about the same time and entails the institution of another form of triangular employment relationship. Indeed an agency such as Manpower was established in South Africa as a franchise. (Theron, Godfrey and Lewis, 2005) In franchising, the franchisor is able to determine the terms on which the franchisee

²⁴ In a country with chronic high unemployment part-time work should be encouraged. This is one of the recommendations of the 2005 ‘Synthesis report’ put out by the Department of Labour. See note 8 above.

²⁵ Outsourcing, in this analysis, is a form of externalisation, and is not to be equated with it.

²⁶ Pick ‘n Pay and Woolworths.

²⁷ The employees of franchisees are typically unorganised. They are also excluded from collective bargaining at a company level involving the major retailers.

²⁸ Stats SA. This compares with 25 percent of employment in transport, storage and communication, 8,84 percent in community social and personal services, and 5.3 percent in financial intermediation, insurance, real estate and business services.

employs staff without assuming the responsibilities of an employer. In the 1980s there were a number of unsuccessful attempts, notably by the union organising in the retail sector, to compel franchisors to bargain in respect of outlets controlled by franchisees.²⁹

The period at which trade union militancy was at its zenith, in the second half of the 1980s, coincided with a period of heightened political instability.³⁰ At the same time employers were concerned to limit the potential impact of collective bargaining. There was thus not the political will for employers and unions to negotiate a more consensual approach to the problems that confronted firms, in a situation of increased global competition. Political and ideological imperatives were paramount, and firms increasingly adopted a course of externalisation rather than casualisation (Theron and Godfrey, 2000).

Similar constraints applied in the period of political transition, ushered in by the 1990 'Laboria Accord' between organised business and trade unions, and the unbanning of political parties. For both trade unions and organised business the overriding concern was how to influence the political process to their advantage. And for organised business externalising employment was an opportunity to kill two birds with one stone, by reducing its workforce and 'empowering' its ex-employees at the same time. Truck drivers were encouraged to become owner-drivers. Shop-stewards and supervisors were encouraged to become 'entrepreneurs', providing services to their former employers.

The adoption of the new LRA, and the establishment of the CCMA, provided added incentive to firms to externalise, to avoid the contingent costs of an adverse finding in unfair dismissal proceedings.³¹ At the same time it provided a new selling point for TESs and other service providers, who implicitly or explicitly offered to assume the risk of an adverse finding in the CCMA. This risk was much reduced because of the difficulties in proving unfair dismissal in a triangular employment relationship.³² In the case of security services, the perceived instability of the state in transition was an additional factor fuelling their growth. All indications are there was a proliferation of service providers in the 1990s. The consequence has been the emergence of 'new' service industries, discussed below.

5. Old wine in new skins? The claim that services create employment

²⁹ Personal experience. A case I point was a dispute between SACCAWU and the company holding one of the Kentucky Fried Chicken franchises. Although such disputes were the subject of litigation, the writer has not been able to locate reported cases in this regard.

³⁰ The formation of COSATU in 1985, premised on a policy of one union for one industry, and the declaration of a state of emergency in 1986, followed by the 1988 amendments to the LRA, are landmark events of the period.

³¹ Section 192(2) of the new LRA introduced a requirement that in unfair dismissal proceedings an employer was required to prove that the dismissal was fair, putting paid to a tendency in the jurisprudence of the Industrial Court toward the adoption of a 'reasonable employer' test.

³² These difficulties have been summarised as follows: The difficulty in identifying the correct employer, the related difficulty of identifying the correct procedure, the difficulty in defining dismissal and the difficulty in determining the reason for dismissal (Theron, 2005: 635).

It has been suggested there is a trend in Northern economies for manufacturers to reinvent themselves as service providers, particularly in the IT sector, based on the realisation that physical products provide little margin for profits, and far higher margins can be realised by providing a service (Rifkin, 2000: 92-95). But there is little evidence of new services of this kind creating employment in South Africa. Indeed the frequently heard claim that services create employment needs to be treated with caution. To the extent there may be higher profit margins in services, it seems self-evident that this can only relate to the fact that fewer employees are required to provide them, or employees with less skills.³³

For the foregoing reason it is on the face of it anomalous that of the one million or so jobs said to have been created in services between 1995 and 2002, 440,000 were in the finance category, which expanded by three quarters.³⁴ This anomaly is compounded when the skills profile of the finance sector is analysed. There is a massive increase (83 percent) in the number of unskilled workers between 1995 and 2004, whereas the numbers of skilled and semi-skilled are more or less unchanged over the same period (Oosthuizen, 2006). However 'finance', as already indicated, is a misleading abbreviation, that includes business services. Residing under business services are new services such as call-centres, or BPOs. So too are contract cleaning, security services and TESs, although their categorisation as business services is (as we shall see) misleading.

However the dramatic expansion of 'finance' can have little to do with computer-related technologies.³⁵ True, there were call-centres established by domestic financial institutions. Yet the point of their doing so was presumably to consolidate employment in one location, consistent with a strategy of down-sizing, rather than to increase the numbers in employment overall. Call centres for clients from the North also do not account for this expansion.³⁶

The only credible explanation for this increase of employment in 'finance' is the contribution made by contract cleaning, security services and TESs. These are of course services that existed in some form prior to the 1990s, and are thus not altogether new. Yet all three grew dramatically in the 1990s and the early years of this century. Indeed if current estimates by representatives of the respective employer associations are accepted then it may well be that a growth in these 'new' services compensates for job losses elsewhere.³⁷ The number currently estimated to be in some

³³ It is *inter alia* to avoid being the employer of large numbers of unskilled workers, for example, that major construction companies in this country have reinvented themselves as service providers, providing the service of project management. Project management is defined as a service in terms of the demarcation of sectors by the Minister of Labour for the purposes of South Africa's skills development legislation, and it appears that most large construction companies are registered as project managers with the Services Sector Training and Education Authority (SSETA).

³⁴ See note 2 above.

³⁵ In terms of the Standard Industrial Classification, computer related activities are included under the financial intermediation category.

³⁶ It is not clear whether any such call-centres were established in the period in question, but even if they were, it is probable they were staffed by TESs, as already mentioned, and it would in any event not explain the change in the skills profile of the finance sector.

³⁷ There is little option but to accept these estimates in the absence of data from a more objective source. The Labour Force Survey (LFS), Statistics SA's primary survey of the labour market, would be the obvious source for this data. However, it is not possible to get data beyond the SIC three-digit level from the LFS. This means that one can obtain employment data on category 889: Business Activity Not

form of temporary employment (TESs and other agencies, such as nursing agencies) is between 300 000 and 400 000 on any one day.³⁸ The number of security officers as at 2006 was 306,434.³⁹ About 100,000 workers are estimated to be employed in contract cleaning.⁴⁰

The growth of these ‘new’ services would also explain the changes in the skills profile of the finance sector. In contract cleaning one can safely assume virtually all workers are unskilled. There is no reliable data concerning the numbers of workers employed by TESs in manufacturing, mining and agriculture, but anecdotal evidence suggests it is significant. As well as contract cleaners employed in these sectors, it is probable that the majority of such temporary workers are unskilled. It is unclear how security officers employed in the security services industry would be categorised in terms of skills, in official surveys. However a large proportion of these must be employed on manufacturing sites and mines as well. The categorisation ‘business services’ does not hint at this reality. At the same time the growth of these services is in fact a consequence of externalisation, as a result of which jobs once regarded as ancillary or incidental to operations in the primary or secondary sector are now provided as services. It is thus questionable to what extent their expansion represents a growth of ‘new’ jobs at all.

6. A prototype of the contemporary workplace

What contract cleaning services, security services and TESs have in common is that in each instance the client is the dominant economic entity, which determines the parameters on which employment is provided, and controls the actual workplace. A case study of contract cleaning in a contemporary workplace, the ‘greenfields’ development of a state-of-the-art steel mill in the proximity of the town of Saldanha Bay, illustrates the profound implications of the shift to these particular services.⁴¹

The workforce of the mill comprises highly trained and multi-skilled people, who are computer literate and are required to have, as an entrance qualification, a matriculation certificate, preferably with mathematics. The ‘philosophy’ of the company, as it describes its labour relations policy, is to have a flat organisational structure, resulting in effective communication and maximally delegated responsibility. At the same time ‘necessary non-core activities’ are to be outsourced.⁴²

Elsewhere Classified, within the Finance sector but cannot get data on the activities within this category, i.e. amongst others: “Labour recruitment and provision of staff”; “Activities of employment agencies and recruiting organisations”; “Hiring out of workers (labour broking activities)”; “Investigation and security activities”; “Disinfecting and exterminating activities in buildings”; and, “Building and industrial plant cleaning activities”. It is also unclear whether employees in these sectors are correctly reflected in this data.

³⁸ Presentation, Confederation of Associations in the Private Employment Sector.

³⁹ Interview, Security Services Employers Organisation.

⁴⁰ Interview, National Contract Cleaning Association.

⁴¹ I choose a greenfields development such as this to illustrate why it is preferable not to conflate the term ‘outsourcing’ with externalisation. Amongst other considerations, outsourcing has the connotation of a process that occurs as a consequence or retrenchment, which is not necessarily the case. The plant in question was developed by ISCOR, then a South African owned company, with funding from government’s Industrial Development Corporation. The parent company is now Arcelor Mittal South Africa. See www.mittalsteel.com.

⁴² Untitled, unpublished document provided by the Metal and Engineering Industry Bargaining Council.

One such ‘necessary’ non-core activity is the service provided by a contract cleaning company. Whereas the workers of the steel plant are locals, the workers who do the cleaning come from the same places in the Eastern Cape from which industry in this area used to draw its labour in the apartheid era, under the contract labour system. A matriculation certificate is not required. The cleaning they do is with picks, shovels, wheelbarrows, buckets, and jack-hammers. By any standard it is heavy physical work. In some localities it is hazardous. So much so that the mill provides a specialised induction, and the tasks are performed under their direct supervision.

Clearly, then, the service these contract cleaners provide is an integral part of the production process in the mill. Equally, their workplace is that of the client. So it is not surprising that the workers, when looking for a union to represent them, should want to be represented by the same union the employees of the client company belongs to, namely the union organising the metal sector. Or that their primary demand should be to be paid in accordance with the same wage agreement that applied to these workers.

But labour legislation, as we have seen, assumes the workplace to be that of the employer. It is the place or places where the employees of an employer work. Moreover where an employer carries on or conducts more than one operation, it is all the places where such employees work.⁴³ The only office of their employer the cleaning workers are likely ever to have sight of is located in an area of the client’s premises, designated the contractor village. However their employer is in fact a national company, with branches in all provinces. This means that to exercise any of the organisational rights for which the legislation provides, such as to elect trade union representatives in the workplace, the workers would have to be sufficiently representative of the employer’s workforce nationally.

8. A prototype of a ‘triangular’ contract of employment’

As it happens the cleaning company at the mill was prepared to recognise a union organising cleaning workers, even though it was not sufficiently representative nationally. But it would not countenance a demand that the cleaning workers be paid the same as the workers of the client. Simply put, the client would terminate the contract, and the workers would be without a job, without recourse to the CCMA. The legal instrument by which this is achieved is a fixed-term contract in which, in the final analysis, the client is able to determine the term.

The website of the dominant employers’ association in contract cleaning provides a precedent of such a contract. The first part of a clause dealing with the duration of employment states as follows: The “contract shall be for a definite period, terminating at the termination and/or part termination of the contract which exists between the employer [the contract cleaner] and the client.” The notion of ‘part-termination’ is presumably intended to cater for the situation in which a client, for whatever reason, does not want a particular worker or group of workers on its premises, but intends to retain the cleaning service that employs them.

⁴³ Section 213, LRA. There is an exception, where operations “are independent of one another by reason of their size, function or organization...”. However it is difficult to attach a sensible meaning to this exception.

Lest there be any doubt in this regard, the second part of the clause goes on to state: “He/she [ie. The worker] fully understands the employer’s contract may be revised by the client from time to time and for any cause whatsoever....and that in consequence thereof, the nature of the employee’s employment and **its duration is totally dependent upon the employer’s contract with the client**, and that **the employee’s contract of employment will terminate at any time** as and when the event referred to [in the first part] occurs.” (Author’s emphasis)⁴⁴ The worker is further required to undertake to acknowledge that in such event the contract terminates automatically, and shall not be construed as a dismissal.

It would of course be possible to challenge the validity of such a contract. But the worker doing so would not be assisted in any way by labour legislation. The requirement that the employer prove there was a fair reason to dismiss does not apply.⁴⁵ Contracts can be terminated at will by clients who do not scruple at taking advantage of wage competition between service providers, and the employer is able to rely on contractual ‘fine print.’⁴⁶ Instead of labour legislation achieving a status for such workers in terms of which the individual contract of employment is of diminished significance, the contrary has occurred.⁴⁷

Wage competition and the fact that contract cleaning employers are relatively well organised probably explains why ‘contract cleaning’ was the first ‘sector’ for which government has legislated minimum wages, by way of a sectoral determination.⁴⁸ The legal basis on which the employment relationship is constituted, one might have supposed, had no place in such a definition. For the employers, however, it is clearly regarded as critical.⁴⁹ The sector is defined as that “in which employers and employees are associated **on a fixed term or fixed project contract** for the purpose of cleaning or washing by hand or machine ..” (Author’s emphasis. The definition goes on to list the variety of items cleaners clean)⁵⁰.

The question the triangular employment relationship raises is whether it serves any purpose to maintain what is essentially a fiction, that workers in such relationships

⁴⁴ See www.ncca.co.za.

⁴⁵ See section 188(1)(a), LRA. If however the worker is able to prove s/he was dismissed, the employer will have to prove there was a fair reason.

⁴⁶ Most if not all cases of what is called ‘second generation’ outsourcing can be ascribed to wage competition.

⁴⁷ The same is true of security services and TESs.

⁴⁸ Sectoral determination 1: Contract cleaning sector, Gov notice No 622 of 14 May 1999, as amended.

⁴⁹ The question this gives rise to is whether a ‘sector’ that defines itself by reference to the legal basis on which the employment relationship is constituted be regarded as such at all? It appears there was in fact some contestation amongst employers as to whether contract cleaning was not part and parcel of temporary employment services. The most probable explanation for the degree of acceptance of its status as a sector, and indeed for the title of the sectoral determination, is the efficacy of the employers’ association in lobbying to this end.

⁵⁰ The list starts with furniture and the like and moving on to “machinery, under supervision at industrial and commercial premises” and ending with “buses, trains or any other vehicle requiring to be cleaned.” A “cleaner” is defined as a worker performing any of the foregoing tasks, with no distinction drawn between cleaning an office and industrial cleaning. In the case of the ‘cleaners’ in the steel plant, the title ‘labourer’ (which was once used in apartheid era wage determinations) seems a more accurate designation. See Sectoral determination 1: Contract cleaning sector, 14 May 1999.

have the same organizational rights as those in standard employment, and can bargain collectively with their employers, when in fact it is the client that controls the workplace where they work, and who determines the employers capacity to pay. In fact there is collective bargaining in contract cleaning, as is also the case in security services. In each case collective bargaining takes place in a national forum established in terms of the draft constitution of a bargaining council. In each case the reason the council has not come to fruition is because the trade unions are not sufficiently representative to have wage agreements extended to non-parties.⁵¹ In each case the imperative to bargain is the employers' need to eliminate wage competition. Consequently an expedient has evolved whereby the Minister is requested to make a sectoral determination in the same terms as the parties have agreed upon in their bargaining forum. A sectoral determination is in theory binding on all employers, even if the capacity to enforce such determinations is lacking.

8. The triangular employment relationship and international labour regulation

For the past decade or more the ILO has been concerned about the situation of workers who find themselves outside the protection of labour legislation. A 2003 report describes two such categories. One category is self-employed workers "who are only apparently self-employed, or whose status is ambiguous, somewhere between dependent and independent."⁵² A second category is workers employed in a triangular employment relationship, which it conceived as occurring when "employees of an enterprise ('the provider') perform work for a third party (the 'user enterprise') to whom their employer provides labour or services."⁵³

This definition is problematic. It assumes that the workers of the provider are its employees, rather than the employees of the client. This is precisely what is at issue, insofar as the client determines the terms on which services are provided. At the same time, it characterises the client as a third party. This characterisation is at odds with economic reality, since the client is necessarily the economically dominant party.⁵⁴ By the same token it disregards where control of the employment relationship resides. Indeed if labour legislation's purpose is to provide redress in a situation in which workers are economically vulnerable, then it is necessary that the concepts it uses correspond with economic reality.

The same definition was used in a report presented at the 2006 International Labour Conference, where a recommendation concerning the employment relationship (the Recommendation) was adopted (ILO, 2006). The Recommendation does not address the triangular employment relation. It concerns the category of unprotected worker whose status is ambiguous, and the so-called disguised employment relationship. Indeed there are only two ILO instruments that do relate to a triangular employment

⁵¹ Section 32(3) of the LRA requires that before extending an agreement the Minister satisfy himself that the majority of employees who, upon extension, fall within the scope of the agreement, are members of the trade unions that are party to the bargaining council.

⁵² Report V, the Scope of the Employment Relationship, 91st session, International Labour Conference, page 5.

⁵³ Report V, note 52 above, 37-40.

⁵⁴ There are of course service providers that are large corporations. Some indeed are national and multi-national companies. At the same time they are competing with other service providers offering similar services, and cannot afford to price themselves out of the market.

relationship. One is the Homework Convention.⁵⁵ However a far more significant convention was adopted in 1997, on private employment agencies (PEAs).

The significance of the PEAs convention is that it legitimated the designation of the agency or TES as the employer of workers it provides to a client. Moreover this was in the same year as the ILO attempted to adopt a convention on contract labour. Contract labour was understood at the time to comprise, on the one hand, workers in so-called triangular employment relationships. On the other, it referred to workers who perform work or provide services to other persons “within the legal framework of a civil or commercial contract, but who in fact are dependent on or integrated into the firm for which they perform the work or provide the service in question.”⁵⁶

What these two categories of workers had in common was that their conditions of work were determined by ordinary commercial contracts, rather than contracts of employment. Thus in the case of triangular employment relationship it was suggested that the contract between the provider and user, or client, sets the parameters for the employment relationship between the provider/employer and his workers. It follows that any attempt to regulate contract labour, as envisaged in the proposed convention, implied regulating commercial contracts. Employer opposition to any such attempt was one of the reasons a convention was not adopted.⁵⁷ It was the first time in its long history that the ILO’s standard generating machinery had failed.

The Recommendation is the sequel to this failure. Its focus on disguised employment, then, can be seen as a form of displacement, whereby a relatively marginal phenomenon becomes the focus of attention.⁵⁸ Nevertheless, the Recommendation does allude to the central problem. It proposes that national policy on the protection of workers in an employment relationship should “ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties.” Moreover it should ensure these standards “establish who is responsible for the protection contained therein.”⁵⁹ This of course begs the question as to how this is to be achieved.

⁵⁵ Homeworkers are ostensibly self-employed but frequently work to the order of a client, via an intermediary. In 1996 a convention was adopted that seeks to extend labour standards to homeworkers working to the order of someone else. Homework convention, No 177 of 1996. Only four countries have ratified the convention to date.

⁵⁶ Report V, note 52 above, 6.

⁵⁷ Report V, note 52 above, 6.

⁵⁸ Disguised employment occurs “when the employer treats an individual as other than an employee in a manner that hides his or her true legal status.” See Article 4(b), Recommendation. In the report presented at the Conference, it is distinguished from what is termed ‘objectively’ ambiguous employment relationships, where work is performed or services rendered under conditions that give rise to an actual and genuine doubt about the existence of an employment relationship. This is in turn distinguished from triangular employment relationships. See Report V(1), paragraphs 39 – 57. It appears that what differentiates a disguised employment relationship from an ambiguous one is the intention of the employer. Intention, in law, is notoriously difficult to determine. At the same time the notion of an objectively ambiguous employment relationship is at best unhelpful. In terms of the traditional enquiry one is either in an employment relationship or one is not. Either the traditional enquiry still holds, or it is no longer possible to regard employment in a dichotomous way. If the latter is the case, the existence of an intermediate status must be acknowledged.

⁵⁹ This last provision goes no further than the provisions of the PEAs convention in relation to TESs, requiring parties to take steps to determine whether client or agency is responsible in respect of a range of issues, including collective bargaining. Significantly, the final paragraph of the Recommendation states that it does not revise the PEAS convention, nor can it revise that convention.

8. A note on the ‘presumption as to who is an employee’ and the Code of Good Practice

One of the steps the Recommendation proposed, in the context of determining whether an employment relationship exists, is to provide for a legal presumption that an employment relationship exists when certain indicators is present.⁶⁰ Such a presumption already existed in South African labour legislation, in terms of amendments adopted in 2002 to both the LRA and BCEA⁶¹ It is created if any one of seven factors listed are present in an employment relationship, ‘regardless of the form of the contract’. One of the factors, whether the ‘person is economically dependent on the other person for whom he or she works or renders services’, seemed to presage the development of an economic dependence test for employment.⁶²

However the problem that confronts a worker in a triangular employment relationship is not whether or not s/he is in an employment relationship. It is that the nominal employer, whom labour legislation has designated the legal employer, is not the real employer. Clearly a presumption does not address this situation. It is in any event not clear how much a presumption assists even those in a disguised employment relationship. It is, after all, rebuttable. Further, the procedure for formally invoking it is for a “contracting party” to approach the CCMA for an advisory award.⁶³ Given that the more powerful economic entity generally sets the terms for any such employment arrangements, it is unlikely an alleged employer will do so. It is similarly unlikely the applicant will be an alleged employee, for the simple reason that he or she is in a less powerful position and vulnerable. Unsurprisingly there have been practically no advisory awards since this procedure was adopted.⁶⁴

In any event the prospect of an economic dependence test being developed was all but destroyed by a late amendment to the presumption, limiting its scope to persons earning less than a stipulated earnings threshold.⁶⁵ For anyone who supposed there was a more optimistic reading regarding the new presumption, the recently promulgated ‘Code of good practice: Who is an employee’ makes depressing reading.⁶⁶ Evidently this is a document drafted by lawyers for lawyers, that serves to confirm that, notwithstanding the new presumption, it is business as usual. For as already noted, it

⁶⁰ Article 11(b), Recommendation.

⁶¹ ‘Presumption as to who is an employee.’ Section 83(1) of the BCEA and section 200A(1) of the LRA.

⁶² Sub-section (1)(e).

⁶³ Section 200A(3).

⁶⁴ Reference has been made to section 200A primarily in cases of unfair dismissal, where there is a dispute as to whether the applicant was an employee. Even in such cases, there are surprisingly few instances where section 200A is relied on, and no reported cases where the criteria of ‘economic dependence’ that the writer is aware of. See *Taljaard and Basil Read Estate* (2006) 27 ILJ 861 (CCMA); *Rodgers and Assist u Drive* (2006) 27 ILJ 847 (CCMA); *Miskey and Others v. Maritz N.O. and Others* (2007) 28 ILJ 661 (LC).

⁶⁵ The threshold is determined by the Minister in terms of section 6(3) of the BCEA. See sections 83A(2) of the BCEA and 200A(2) of the LRA. There can be no valid conceptual rationale for an earning threshold in such a presumption. If the factors introduced are valid indicators of an employment relationship, they must hold for employment relationships of any kind. The amendment thus fundamentally undermined the integrity the new presumption.

⁶⁶ Code of good practice: Who is an employee. Government gazette Vol 498, No. 29445, 1 December 2006.

is a rebuttable presumption. Where rebutting evidence is lead (and this is the critical point) it appears that the factors contained in the presumption are of no relevance whatever. Instead the 'dominant impression' test is revived.⁶⁷

Given the breadth and subjective nature of the 'dominant impression' test, it is difficult to see what purpose the presumption serves. An already complex enquiry has merely been made more complex. A similar result could have been achieved simply by placing an onus on a party disputing the existence of an employment relationship. The same criticism applies to the Code's commentary on employees of temporary employment services. Section 198 is the section of the LRA that designates the TES as the employer of the workers it provides to its client.⁶⁸ In order to determine whether or not the section applies, the Code states, it is necessary to determine "whether the relationship between the client is a genuine arrangement and not a subterfuge entered for the purpose of avoiding any aspect of labour legislation."⁶⁹

It would be of considerable value if this provision of the Code could be used to disclose the terms of an agreement between the client and the temporary employment service. Yet it seems unlikely this will happen. In any event this provision of the Code misses the point about section 198. By designating the TES as employer, and constituting a triangular employment relationship, section 198 in effect legitimates avoidance of aspects of labour legislation.⁷⁰ There is thus no need for a resort to subterfuges.⁷¹

8. Conclusions

This analysis suggests that much of the supposed growth in employment in services in this country is simply the consequence of economic restructuring, and specifically externalisation, in which jobs formerly defined as part of the primary or secondary sector are now regarded as services. To this extent, it is something of a euphemism to talk of a shift to services. What is indisputable, however, is that there has been a growth in triangular employment relationships, and that the effects of this on labour regulation are radical. If workers' rights are to be protected, new models of regulation have to be developed, or existing models will have to be adapted.

⁶⁷ Section 22(b), Code.

⁶⁸ The equivalent section in the BCEA is section 83.

⁶⁹ Section 55, Code.

⁷⁰ If the designation of the TES as employer is regarded as artificial, and at odds with economic reality, so too (for much the same reasons) is the designation of a contract cleaning firm as the employer. However in contract cleaning there is at least an argument that the employer provides specialised training, and the worker has a career path, albeit a very limited one. The same argument is probably more persuasive in the case of security services. To this extent one could argue that the triangular employment relationship comprises a spectrum, according to the extent to which rights provided by labour legislation have been eroded, with franchising occupying a place at the more secure end of the spectrum.

⁷¹ Thus the Code states as follows: "Whether or not an individual supplied to a client by a TES is an employee of the client or an independent contractor", the Code states, "must be determined by reference to the actual working relationship between the worker and the 'client' ... If it is found that the individual has an employment relationship with the client, then for the purposes of the LRA and the BCEA (a) the individual is an employee of the TES; (b) the TES is the individual's employer." To the layperson this is legal-speak of the most obfuscating kind.

It is not possible within the scope of this article to explore specific proposals in this regard. However clearly the existing definition of a workplace will have to change. The question of employment security in a triangular employment relationship, and more generally the question of the employment security of workers under fixed term contracts, will have to be addressed. So too, the current models of collective bargaining needs to be revisited. In this regard, there needs a broader and more critical debate, locally and globally.

Some will say this is not the moment to open up such a debate. It is therefore appropriate to remind ourselves why labour regulation is needed. In the course of 2006 there were also protracted strikes in the cleaning and security services. The cost to the parties has no doubt been calculated in person-hours of lost work, unpaid wages and the like. The costs to society are incalculable. More lives were lost in the course of the security services strike than in any previous strike, including the so-called Rand Revolt that precipitated the first labour legislation.

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