

**The World of Work: Forms of Engagement in South Africa**  
**Rochelle Le Roux**  
University of Cape Town  
[rochelle.leroux@uct.ac.za](mailto:rochelle.leroux@uct.ac.za)

## INTRODUCTION

Non-standard employment is, like elsewhere, growing in South Africa. For instance, the 2006 Labour Force Survey suggests that at least 30% of those in employment are in non-standard employment (<http://www.statssa.gov.za/publications/P0210/P0210March2007.pdf>). No comparable statistics have been published since, but anecdotal evidence suggests a growth in this percentage.

The two most important reasons for the growth of non-standard employment distilled by scholars appear to be, first, the need to have greater temporal and numerical flexibility to cope with varying demands and, second, to reduce human resource management responsibilities and cost. In the latter regard, while not the only cause, the costs or risk associated with termination of employment is seen as an important consideration. (Theron and Godfrey 2000; Theron 2007.) In achieving these objectives, part-time or casual employment ought to be an attractive and flexible proposition to employers. Yet, indications are that employers in South Africa disregard this option in favour of externalisation. This paper endeavours to explain this tendency.

In order to understand the argument developed in this paper, it is necessary to reflect on the unitary nature of the contract of employment in South Africa. This is followed by a review of the forms of non-standard work in South Africa and the role of labour brokers. Finally, the possible nexus between externalisation and the unitary nature of the contract of employment is explored.

## THE UNITARY CONCEPT OF THE CONTRACT OF EMPLOYMENT

Deakin has argued (in the context of England) that the unitary model of the contract of employment which envisages the same or universal treatment of all wage earners, arrived in England only during the 1940s. (Deakin 1998, 2000a, 2000b, 2006.) There is evidence that in South Africa this model arrived even later, probably as a result of the divisive racial laws of the pre-1994 era. However, under the influence of human rights and equality law, post-1994 labour legislation clearly aimed at removing these differences and developing a model that applied universally to all wage earners. However, the most important group of wage earners reserved for different treatment, as has traditionally been the case, continued to be public sector employees.

The judgment of the South African Constitutional Court (CC) in *Chirwa v Transnet & others* (2008) 29 ILJ 73 (CC) was supposed to have been the last word on the long debate whether public sector employees, despite the fact that they are now subject to the comprehensive dispute-resolution structure created by the Labour Relations Act 66 of 1995 (LRA), are nonetheless entitled to pursue their dismissal in the civil courts on the basis that it (dismissal) constitutes administrative action. (The implication of this being that, unlike non-public sector employees, they are not limited to pursuing their dismissal claims via the Labour Courts created by the LRA.) The CC in its majority judgment held that there is no reason to treat public sector employees

differently and that they no longer have the option of turning to the civil courts to pursue their unfair dismissals claims as unjust administrative action.

Judged by subsequent jurisprudence and academic reactions, the CC did not succeed in settling this debate. The correctness of this judgment and the responses to it, are not explored in this paper. However, the underlying premise of the majority judgment that state and other employees should be treated *in the same way* is the concern of this paper. While there may well be compelling reasons for treating public sectors employees differently, it is not necessarily suggested that the CC was wrong in its conclusion to the opposite effect. However, it is suggested that this sentiment, which signals a strong inclination towards the unitary concept of employment, should be approached with caution. There may well be broader labour market reasons for not treating employees the same.

## **NON-STANDARD EMPLOYMENT**

Standard employment which is premised on an open-ended and relatively secure (and long-term) employment relationship, despite declining, still remains the norm in the South African labour market and has traditionally been premised on the common law contract of employment. Non-standard employment can be examined by focusing on the two broad processes associated with it, namely casualisation and externalisation. The former is regarded as a diluted version of standard employment and the latter involves workers providing goods and services to the end-user via a commercial arrangement, often, but not always, involving a satellite enterprise or an intermediary.

### **Casualisation**

Casualisation primarily concerns those workers who are in an employment relationship in the strict sense, but who are not in standard employment. In other words, not unlike those in standard employment, they generally only have one employer, work on the premises of the employer and their employment is regulated by a contract of employment. The most important distinguishing factor is that they either do not work full time or, if they do work full time, they work on a fixed-term contract. (Theron 2003.)

Typically, workers falling in this category consist of casuals (working less than 24 hours per month), part-time workers (working only a percentage of the time worked by the permanent employees and sometimes selected using a pool system), temporary workers (working a fixed term) and seasonal workers. The significance of the 24-hour requirement relates to the Basic Conditions of Employment Act 75 of 1997 (BCEA), in terms of which the provisions dealing with working time (including payment for overtime), all forms of leave, particulars of employment and notice do not apply to those employees who work less than 24 hours per month for an employer. The Unemployment Insurance Act 63 of 2001 (UIA) also excludes employees employed for less than 24 hours per month by a particular employer from the application of the Act. No similar exclusion is found in the workmen's compensation legislation and these employees are covered by the Occupational Health and Safety Act 85 of 1993 (OHSA). While the option of employing a casual for less than 24 hours per month is simply not practicable in many sectors and industries, anecdotal evidence suggests that it is a common one, for instance, domestic services. These workers labour completely unprotected by the law.

Apart from those working less than 24 hours per month, there is in theory no reason why all casual workers should not be entitled to the same legislative benefits as

those in standard employment, at least on a pro rata basis. The BCEA, for instance, provides for proportionate (but similar) benefits for those who are not in standard employment and the LRA's dismissal provisions do not discriminate between temporary, part-time and permanent employees. This 'sameness' of treatment will be reverted to below. Furthermore, there is no reason, in theory, why casual workers should not benefit from collective bargaining and trade union membership. In practice, however, trade union recruitment is problematic, but this is caused by the nature of casualisation and not by casual workers' status as employees. The need for the publication of a sectoral determination in the wholesale and retail sector is testimony to this. A sectoral determination is the means to provide basic conditions and minimum wages appropriate for a particular sector not regulated by collective bargaining, where the nature of the industry negates collective bargaining or where workers are extremely vulnerable (Section 51 of the BCEA). Unions once had a strong foothold in the wholesale and retail sector, but the sector, now notorious for casualisation, currently has very weak union representation, to the extent that the main union in this sector is no longer recognised by some retail chains.

Casualised employees, since they are still employees, also have the protection offered by the LRA's unfair dismissal provisions. However, since casualised employees often work on relatively short fixed-term contracts, many employers, instead of following pre-dismissal procedures, simply opt not to renew the contract when it expires since termination of a contract of employment as a result of the effluxion of time is not defined as a dismissal in the LRA. (Section 186(1) of the LRA.) This practice is only partly addressed by the definition of dismissal in the LRA which provides that a dismissal also includes the failure to renew a fixed-term contract when an employee reasonably expected the employer to renew it on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it at all. In any event, casual employment is often so transient that dismissal claims simply do not arise most of the time.

In conclusion, it is difficult to blame the limitations associated with casualised labour on the contract of employment as such, even in the case of, for example, domestic workers. The contract of employment does not obfuscate the status of casual workers as employees. They are clearly employees and it is relatively easy to identify them as such. However, it can be asked whether the sameness of regulation (the unitary nature of the contract of employment) that applies to casualised labour (and the complete lack of regulation in the case of those who work for less than 24 hours per month for a specific employer) referred to earlier, are not important stimuli for the process of externalisation. In order to explore the answer to this question, it is necessary to consider the process of externalisation.

### **Externalisation**

Externalisation is a process that escapes precise definition, but it essentially involves the provision of services or goods in terms of a commercial contract instead of an employment relationship, thus placing a legal distance between the user of the services and the risk associated with the employment relationship. Externalisation can be divided into two broad categories. The first is the provision of goods and services to a core business via an intermediary, often at a workplace removed from the intermediary's premises. While the intermediary becomes the nominal employer of the workers, the terms and conditions of their employment are wholly determined by the terms of the commercial contract between the intermediary and the core business. (Theron 2003.) Some manifestations of externalisation are discussed in more detail below.

The second category involves the substitution of the contract of employment between the employer and the worker with a commercial contract which attempts to convert the legal status of the worker to that of an independent contractor and this process can broadly be called the '*commodification of the individual employment relationship*'. It essentially involves an attempt to convert employees into independent contractors by presenting the relationship between the employer and the worker as a pure commercial arrangement.

Independent contractors are generally not regarded as beneficiaries of the protection offered by labour legislation; hence the desire by employers to convert the worker who would normally be an employee into an independent contractor.

The most graphic example of this is the retrenchment of (mostly unskilled and therefore vulnerable) employees and their immediate re-engagement (or even engagement from the outset) as independent contractors despite the fact that they continue to work under the same circumstances as before their retrenchment. These sham practices, which enable employers to bypass protective legislation and collective agreements, have now been curtailed by the combination of the courts' insistence that substance should trump form (*Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC)), and the presumption as to who is an employee. (Section 200A of the LRA.) More difficult to curtail is the emergence of arrangements in the nature of owner-driver schemes. These schemes usually enable the former employee to own the tools of the trade (for instance, a vehicle) and to render his or her service to the former employer in terms of a commercial contract. These workers are therefore no longer employees and not able to claim the benefits of protective labour legislation or collective agreements. On the other hand, because of the incentives offered by productivity-based payments and because labour standards are no longer relevant, drivers work much longer hours than they did prior to the conversion to the scheme. However, they are not necessarily less dependent than before since the vehicle is either acquired from the former employer or financed with its help. The former employer not only benefits from the increased productivity, but also from the reduced costs of not having to maintain the vehicle and the reduced labour costs. The owner-driver, however, in reality no less dependent than before and with only some prospect of earning more, is saddled with the financial responsibility of ownership and is deprived of the protection offered by labour legislation. (Cheadle and Clarke 2000.)

Importantly, while casualisation merely dilutes the standard employment relationship, externalisation camouflages the employment relationship. In other words, while the worker may have a clearly identifiable employer (or may even, on the face it, be an independent contractor), the terms and conditions of employment (or work) are determined by the terms of the commercial contract to which the worker is often not a party. One of the consequences of externalisation via an intermediary is that unskilled workers, in particular, are transferred from productive sectors to the services sector, where continuously increased competition places downward pressure on wages. (Theron 2007.)

The finer manifestation of these two broad categories will be discussed below.

Externalisation via intermediaries occurs via subcontracting, outsourcing and homeworking and more recently franchising has become another commercial device used to achieve externalisation. (Van der Westhuizen 2005; Godfrey 2005.) However, in South Africa the engine driving externalisation is, according to Benjamin, labour broking. (Benjamin 2006)

**Labour broking.** Since engagement with the help of a labour broker often results in temporary employment, this form of engagement clearly intersects with casualisation on many levels. However, since it also involves engagement via an intermediary and on the basis that the statutory regulation of labour brokers creates 'legal distance' between the worker and the user of the service, it is suggested, that it is more appropriate for purposes of this paper to view it as a form of externalisation. Statistics on the number of workers employed via a labour broker in South Africa are not available, but Theron has illustrated that the number of labour brokers established have increased from about 40 in 1994 to more than 120 in 2004. (Theron 2005b.) This supports anecdotal evidence that a substantial number of employees are placed via labour brokers.

Essentially labour broking involves the supply by brokers of labour contracted to them to clients who pay an all-inclusive fee for the service to the broker who, in turn, pays the worker. It was first formally regulated in South Africa by means of an amendment to the Labour Relations Act 28 of 1956. The essential features of this amendment required the broker to register with the Department of Labour and deemed the labour broker to be the employer of the workers supplied by it to the client. In terms of the 1995 LRA the registration of labour brokers (now called temporary employment services (TES)) with the Department is no longer required, but their status as deemed employers is reinforced by s 198(2) of the LRA which provides that:

*For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.*

This peculiar situation (Theron claims that 'one would be hard pressed to say in what respects a TES is the employer, other than that the TES remunerates the employee' (Theron 2005b)) is complicated by a further provision that the TES and the client are jointly and severally liable if the TES contravenes a collective agreement concluded in a bargaining council that regulates terms and conditions of employment, a binding arbitration award that regulates terms and conditions of employment, or the BCEA. Based on the definition of the TES in the LRA it is clear that the workers must be provided to the client for reward; hence non-profit organisations providing such workers are not covered. The definition further requires that the worker must be remunerated by the TES. The BCEA defines a TES in the same terms as the LRA does, and the TES must therefore observe the BCEA. The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) (the equivalent of workmen's compensation legislation elsewhere), which defines an employer to include a labour broker, requires the labour broker, as employer, to register in terms of the Act, and it is obliged to report an accident to the Compensation Commissioner. The client therefore has no liability in terms of COIDA, but as was confirmed by the Supreme Court of Appeal (SCA) in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* [2007] 1 BLLR 1 (SCA), remains delictually liable to the employee placed with it by the TES.

While those employed by TESs on the face of it seem to be well protected by legislation, the protection is more apparent than real. Despite being at least structurally part of the client's enterprise, the following conspire to create what Theron calls 'an underclass in the formal workplace': the fact that an employee's terms and conditions (in particular wages, duration and notice) are wholly dependent on the terms of the commercial contract between the TES and the client, the fact that there is no obligation that workers placed by TESs are remunerated on the same

basis as the client's employees and the difficulties which the temporary nature of the placements present for trade union participation and collective bargaining. (Theron 2005b.) Theron (2005b) explains the predicament of workers placed by TESs in this regard as follows:

*The notion that wages and minimum standards are amenable to a process of collective bargaining between an employer and its workers has no practical application, unless the TES is able to prevail upon the client to vary its contract with the TES. It will obviously not be easy to do so. On the contrary, it is more likely that one TES will displace another by offering the same service at a lower price, and will take over the workforce employed by the former TES.*

The client, apart from delictual liability for injuries negligently caused by its employees, is legally removed from most of the risks associated with employment. However, on the basis that occupational injuries and diseases are taken care of by the Compensation Commissioner in terms of COIDA, the only real risk for the TES is unfair dismissal. While still awaiting critical pronouncement by the Labour Courts, no clear message is emanating from CCMA awards either on the responsibility of the TES once a client terminates the placement of the employee. One view, recently favoured in *National Union of Metalworkers v SA Five Engineering (Pty) & others* (2007) 28 ILJ 1290 (LC), is that employment simply terminates and that the TES has no further responsibility. Another view suggests that the TES has a duty to find alternative employment or to retrench the redundant employee. While the latter appears to be consistent with what one would expect from an employer in terms of the LRA, the former view appears to be on firm common-law ground. The complication is the result of s 186(1)(a) of the LRA which defines a dismissal to mean termination of the contract of employment by the employer with or without notice. This is taken to mean a positive act by the employer aimed at ending the contract. Termination because the term of placement has ended will thus, as was held in *SA Five Engineering*, not constitute a dismissal. Normally the duration of fixed-term contracts is expressed in terms of time, but at common law it is possible to link the duration to the wish of the parties and the term of employment will simply end when the party so decrees. Furthermore, there seems to be nothing temporary about the placements made by TESs, and reinforcing the notion of temporary by limiting the duration of placements may also help to stem the destabilising tide of externalisation.

## **PRÉCIS**

In the context of externalisation via intermediaries it is still possible to identify an employer that is theoretically responsible for the risks of employment. However, the reality is that another party, by remote control from behind the façade of a commercial arrangement, dictates the employment relationship between that employer and the worker. This camouflaged employment relationship and the fact that this form of externalisation often occurs in association with casualisation result in a workforce that is deprived of protective labour legislation and collective bargaining.

It was noted above that labour broking in South Africa has been called the engine driving externalisation and thus the erosion of protective laws. However, it may well be that the unitary concept of the contract of employment or the desire to treat all employees the same (the underlying sentiment in *Chirwa*) is the key that starts the engine. The solution may well be, as suggested by Theron and Godfrey (2000) to address the lack of differentiation between the different forms of employment which may represent a strong incentive to externalise.

Their argument can be summarised as follows: The previous BCEA (the Basic Conditions of Employment Act 3 of 1983) specifically defined a casual as a person employed for not more than three days (27 hours) per week. In respect of these workers no unemployment insurance contribution was made and this resulted in payments being recorded differently. Also, unlike the casuals under the new BCEA, their daily maximum hours were limited to the same number of hours that applied to other employees, they were entitled to overtime, they had to be paid no less than the rate that applied to other employees, and the employer was obliged to keep a record of time worked and remuneration paid, but they were not entitled to benefits such as paid sick and annual leave. Thus casuals under the old BCEA had less protection than other employees, but they were not completely without protection either. The point is that they were regulated differently. The inability of employers to treat certain employees differently under the new BCEA and the obvious limitations of using employees who are regarded as casuals under the new BCEA are more than likely the reasons why seek alternatives which provide them with the flexibility similar to what the old BCEA provided (in respect of casuals as therein defined). The alternatives include the many manifestations of externalisation. Thus, while the new BCEA is instrumental in confirming the contract of employment as a unitary concept, this unification is also responsible for the erosion of worker rights. (Theron and Godfrey 2000.)

Whether it was by happenstance or design is not clear, but the reintroduction of the '27 hour per week casual', albeit in a more sophisticated form, by Sectoral Determination 9 (made in terms of the BCEA), which established conditions of employment and minimum wages for employees in the Wholesale and Retail Sector and which came into effect from 1 February 2003, is an example of how this trend may perhaps be reversed by a process of diversification. This determination provides that employees may by agreement be employed for 27 hours per week or less at an increased rate of pay, but the paid annual leave entitlement is reduced and the employer is not required to pay an allowance for night work or to pay paid sick leave or family responsibility leave.

## **CONCLUSION**

The possible impact of diversification can only firmly be substantiated by empirical evidence and the research entity with which I am associated with at the University of Cape Town is currently undertaking research to establish the validity of this claim. However, even if empirical evidence is found supporting this claim, legislative amendments accommodating such diversification, it is suggested, will not necessarily stem the tide of externalisation. An amendment accommodating diversification of this nature will have to be adopted in tandem with an amendment addressing TESs. As it stands, the legal distance that section 198 of the LRA creates between the user of the service and the worker is simply too attractive to the user of the service. One way of addressing this is to make the user of the service jointly and severally liable for dismissals. This is in effect what was envisaged by our neighbouring country, Namibia, when their Labour Bill 2007 was drafted. However, shortly before the adoption of the Bill it was amended to outlaw labour broking completely. This amendment is currently subject to a Constitutional challenge, but irrespective of its outcome, it is difficult to see the South African policy makers following a similar approach. (*Africa Personnel Services (Pty) Ltd v Government of Namibia and others* Case No A 4/2008.) Apart from the fact that such a ban will only result in labour brokers reinventing themselves as service providers, it is difficult to dispute that there are genuine operational needs for labour broking. For that reason, it is suggested that regulation that 'shortens' the legal distance between the user and the provider of the service is a far more sensible approach to labour broking. In addition to liability

for (some) dismissals, limiting the term of the placement via labour brokers, requiring the use of only registered labour brokers and ensuring remuneration similar to the permanent workforce of the user of the service, are all means of narrowing the legal gap between the parties

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