

# Namibia's Labour Hire Debate in Perspective

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The issue of labour hire in Namibia, i.e. the usage of labour brokers to employ workers, has become a topic of heated debate in Namibia during the past few years. The issue first surfaced in the late 1990s, when workers demonstrated against labour hire companies in Walvis Bay. Research undertaken by the Labour Resource and Research Institute (LaRRI) in 1999 and published in 2000 provided a first picture of labour hire practices in Namibia. It pointed to some of the reasons why companies use labour hire workers and to the conditions of employment offered at such companies. Following deliberations by the tripartite Labour Advisory Council (LAC) an Employment Services Bill was drafted with the aim of providing adequate regulations for labour hire companies. Namibia's Labour Act of 2004 also contained a clause on labour hire. However, trade unions and some politicians called for legislation to outlaw such companies. During the congress of the National Union of Namibian Workers (NUNW) in 2006, union leaders as well as President Hifikepunye Pohamba stated that labour hire was reminiscent of the colonial migrant labour system and should therefore be abolished.

When Namibia's new Labour Bill of 2007 was debated in the National Assembly, lawmakers made a significant amendment to clause 128. This amendment stipulated that labour hire will be prohibited in the Republic of Namibia: "No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party" (clause 128[1]).

Trade unions enthusiastically welcomed this amendment, which seemed to pave the way for the abolition of a labour practice. Employers on the other hand, opposed the amendment and argued that the Bill would not only outlaw labour hire but also other practices such as outsourcing and sub-contracting. The Namibia Employers Federation (NEF) announced that it wanted the Labour Bill halted and the amendment on labour hire removed. The biggest labour hire company in Namibia, Africa Personnel Services (APS), went a step further and took the Namibian government to court, claiming that the ban on labour hire was an unconstitutional infringement on its right to do business. A High Court decision of November 2008 upheld the ban on labour hire but the Supreme Court decided otherwise and declared the ban unconstitutional in December 2009. Consequently, the Namibian government decided to amend legislation to severely limit or prevent labour hire companies from operating in the country.

This background paper aims to put the debate and the sharply different views on labour hire in perspective by outlining Namibia's labour hire practices and the court judgements.

### **What is labour hire?**

The ILO categorises 2 forms of subcontracting, namely job contracting (where a subcontractor supplies goods or services) and labour-only contracting where the sub-contractor supplies merely labour. Most of Namibia's labour hire companies fall into the second category as they merely supply labour to their clients. Referring to international experiences, Kenny and Bezuidenhout (1999) described such practices as "the most exploitative form of labour broking". It is therefore hardly surprising, that the emergence of labour hire companies has led to such heated debates in Namibia.

The most comprehensive study on labour hire in Namibia was carried out by the Labour Resource and Research Institute (LaRRI) in 2006. The study found that labour hire as a particular form of outsourcing had emerged in Namibia in the late 1990s. This labour-only form of outsourcing forms part of a global trend towards more "flexible" forms of employment, which are implemented by employers in the pursuit of higher profits. Labour hire companies supply labour to third parties (the client companies) with whom they have a commercial contract. This practice does not only apply to workers that are required for short periods, but increasingly also to those who work on a full-time and ongoing basis for the client company.

### **Global trends**

Global experiences have shown that employers use labour hire workers for a variety of reasons. These include coping with peaks in demand, reducing costs, avoiding industrial relations problems, greater flexibility, as well as avoiding retrenchment procedures and trade unions. Labour hire workers on the other hand are faced with job insecurity, low wages and substandard working conditions, limited training and skills development and low levels of unionisation. In addition, labour hire workers are sometimes not sure who their actual employer is: the labour hire company or the client company where they work?

Namibia's labour hire practices conform with global trends to a large extent. The country's labour hire industry is dominated by one large company, which originated in South Africa and now operates across Namibia. In addition, there are several smaller labour hire companies most of whom are limited to serving a few clients, mostly in one particular town. Overall, at least 10 labour hire companies are currently operational in Namibia. They all supply mostly unskilled and semi-skilled workers to client companies in various industries, including mining, fishing, and retail. Their clients include private companies but also state-owned enterprises (SOEs). Almost all labour hire companies retain a substantial part (15-55%) of workers' hourly wage rates as their fee.

### **Why do Namibian companies use labour hire?**

LaRRI's study (2006) entailed wide-ranging interviews with companies who used labour hire workers. They provided the following reasons for employing labour hire workers instead of employing all their staff directly:

- 1. Reducing the impact of strikes*

Several companies indicated that they started using labour hire workers following a strike by permanent workers. A retail manager pointed out that *“after an illegal strike, we decided to bring in the labour hire services so that it spreads the risks if ever there would be another strike. If the permanent staff went on strike, we could still continue with the labour hire staff”*.

## 2. Flexibility and cost cutting

Labour hire companies provide workers on demand for specific hours, days or weeks. They thus allow companies to order workers when they are needed and to send them home when there is no work. Labour hire also allows companies to replace staff quickly for short periods, e.g. during holidays and peak seasons, in case of sickness and for seasonal work. Client companies only pay for the hours actually worked, as they do not pay for workers who do not come to work. In such cases, the labour broker will provide a replacement. A director of a manufacturing company explained that *“It is cheaper for us to employ workers through a labour broker as we don’t have to pay the benefits such as housing medical aid etc. We also don’t have to pay if a worker does not come to work”*.

## 3. Avoiding disciplinary cases

A widespread reason for the use of labour hire workers is to avoid the procedures for disciplinary action as set out in the Labour Act. A company director pointed out that *“If we have trouble with a labour hire worker, we simply phone the broker and they take care of it. Disciplinary cases are quite a burden in the case of permanent staff while it is easy for us in the case of labour hire workers. We lodge a complaint with the broker who reacts promptly. If no solution can be found, the worker will be replaced. This saves us the trouble of dealing with workers who sometimes come to work drunk or are simply absent without a valid reason. This is an advantage for us although it is not positive from a worker’s perspective”*.

## 4. Concentrating on “core business”

Linked to the above argument is the practice of outsourcing labour relations to a labour broker so that the clients can concentrate on other aspects of their business: *“The broker will take over the management of the staff so that we can concentrate on our core business”*, said a manager of a retail store.

## 5. Replacing “unproductive” workers

The manager of a manufacturing company outlined this argument:

*“If a labour hire worker does not perform well, we can inform the labour hire company not to send that worker back again and instead provide us with a hard working worker. This allows for high productivity for the company, as only hard working workers will be deployed at our company. Thus you get more out of a labour hire worker than your own permanent worker”*.

Some other client companies also indicated that they experienced labour hire workers as more productive, possibly because they wanted to be appointed as permanent workers in future. However, not all companies shared this view as shown in the following statement:

*“The disadvantage of using labour hire workers is that we don’t have an influence over the choice of workers. We have to take whomever the broker sends us...Also I have the impression that labour hire workers don’t take their work that seriously. They regard themselves as temporary employees and don’t see much of a future with us...there is a kind of a ‘could not care less’ attitude, which is a pity. Also we loose trained people overnight due to the high levels of staff turnover at labour brokers”.*

#### *6. Access to skilled and qualified workers*

One company pointed out that their labour brokers supplied them with highly skilled workers at short notice when the need arose. This saved them the costs associated with employing skilled workers on a permanent basis. However, the disadvantage was that the company had *“to use different people all the time and risk injury on the job and lack of skills or expertise”.*

#### *7. Avoiding trade unions*

The owner of a construction company stated that: *“I started using labour hire because of the unreasonable requests and foolishness of the trade unions. You have to deal with unreasonable requests for very high salary increases. The problem with unions is that they don’t request, they demand for these increases and they always want to have meetings... As a one-man business I did not have the time to sit in meetings with the unions all the time, otherwise this would affect my business in a negative way...” (LaRRI 2006)*

### **Impact of labour hire on workers**

Labour hire workers are paid significantly less than permanent workers and they usually do not enjoy any benefits. Many labour hire workers suffer from violations of the provisions of the Namibian Labour Act. Although most are registered with social security, many do not receive any paid leave and not even severance pay in case of retrenchment. Even if they worked for the same labour hire company and the same client company for several years, they have no job security and are employed on the basis of “no work – no pay”. Their employment contract with the labour hire company is terminated as soon as the commercial contract between the labour broker and its client ends.

Although the legal provisions on employment termination apply (in theory) to labour hire companies as well, the usual practice is to hire and fire workers at will. Client companies can request the removal of any labour hire worker at any time. The labour hire company will then have to send a replacement. Labour hire thus contributes to the “commodification” of labour as an easily exchangeable and replaceable commodity.

The use of labour hire in Namibia is not limited to peak periods and specific tasks only. Over the past few years, labour hire has become an established practice and in some instances permanent workers were retrenched and replaced by labour hire workers. Labour hire thus poses a threat to permanent workers, especially in the lower skills categories. It accentuates the division of labour into core (permanent) and peripheral workers.

### **Employment creation?**

Labour hire employment is hardly a springboard to permanent jobs. Although a few labour hire workers were taken over by client companies as permanent staff, such practices are rather exceptional. Some labour hire companies explicitly prevent their workers from taking up employment at a client company. The employment creation effect of labour hire is limited as almost all jobs are created by the client companies. Overall just over 100 people are employed as administrative and supervisory staff on a permanent basis by labour hire companies.

Most labour hire companies describe themselves as black economic empowerment companies. While they may create business opportunities and profits for a small group of labour hire shareholders and managers, it is debateable if they contribute to socio-economic development and the creation of decent work. Given the very high levels of unemployment in Namibia (standing at 51% in 2008), labour hire companies seem to utilise widespread unemployment to their own advantage.

### **Trade unions**

Although several labour hire workers have joined trade unions, recognition agreements between unions and client companies usually cover permanent staff only and exclude labour hire workers. In general, unions experience huge challenges to organise labour hire workers and to represent them through collective bargaining. The insecurity of their jobs coupled with potential shifts between workplaces makes union organising difficult. Some unions are even reluctant to organise labour hire workers, as they do not want to recognise labour hire companies as their employers. Instead they want labour hire to be abolished.

### **Workers' problems**

The LaRRI study of 2006 found that most labour hire workers earned N\$ 3 – N\$ 6 per hour but in some cases wages were be as low as N\$ 2 per hour. Better wages were the exception, such as skilled artisans who can earned around N\$ 40 per hour, particularly if they worked at mining companies. Labour hire workers enjoyed very few benefits and most work 37 – 46 hours per week. In many cases, overtime was not performed on a voluntary basis as workers are forced to do so by managers and supervisors.

LaRRI's study also found a clear sexual division of labour with men being employed as drivers, artisans, loss controllers and truck assistants while most women are employed as shop assistants and operators. Even the wages reflect a gender bias, as most women were concentrated in the lowest income categories.

The biggest problems experienced by labour hire workers were the lack of benefits, low wages and job insecurity. The Labour Act of 1992 had little impact on their working conditions and failed to grant them protection against abuses.

## **Regulations?**

A few years before the new Labour Act of 2007 was passed, the Ministry of Labour had developed 'proposed guidelines for labour hire employment and operating standards' in an attempt to regulate the labour hire industry. The registration of labour hire companies, the obligation to set up training programmes, grievance and disciplinary procedures, records of employees were prescribed and might have helped to prevent the operation of illegal labour brokers who violated the Labour Act. However, the concerns expressed by the labour movement about labour hire were unlikely to be addressed through the proposed regulations. Even the question of minimum conditions of employment were left vague and the proposed regulations were silent on the question of permissible fees that labour hire companies could charge. The guidelines also contained no limitations on the period for which an employee could be treated as a casual worker. Thus the proposed regulations were unlikely to resolve the fundamental conflict regarding the operations of labour hire companies in Namibia.

## **The ban of 2007**

The perceived similarities between the colonial migrant labour and post-colonial labour hire, coupled with the hardships experienced by labour hire workers today, prompted Namibia's parliamentarians to outlaw labour hire in 2007. One of the challenges to overcome in this regard is that labour hire constitutes only one form of outsourcing that co-exists with other forms such as cleaning and security sub-contractors. Outlawing labour hire while allowing other forms of outsourcing to continue could result in labour hire companies re-constituting themselves as service providers with little change in the employment conditions of their workers. Thus the Labour Act of 2007 tried to define labour hire broadly without drawing a clear line with other forms of outsourcing. The aim was to compel employers to rather employ their staff directly and to shoulder some social responsibility for their workers. Employers were, however, still able to employ staff on a temporary basis (if they could not be employed permanently) as the Labour Act contained no restrictions in this regard.

Some labour hire companies have claimed that the abolition of labour hire would lead to thousands of job losses, but this argument is based on the assumption that client companies will reduce their operations and staff-levels if they cannot use labour hire workers any longer. This is debatable. What seems certain is that labour hire companies themselves are not job creators and therefore make a very limited contribution to Namibia's development and the creation of decent work.

## **The High Court Case**

Namibia's largest labour hire company, Africa Personnel Services (APS) immediately appealed against the ban of labour hire and thus the ban on labour hire could not be implemented alongside the other provisions of the Labour Act of 2007. APS argued that its constitutional right to do business was undermined by Article 128 of the Labour Act. The High Court case took place on 24-25 November 2008 and pitted APS and the Namibia Employers' Federation (NEF) against government and trade unions. The 3 judges

delivered their unanimous verdict on 1 December 2008. They found that “labour hire is not lawful in Namibia because it has no legal basis in Namibian law”. This view was justified on the basis that contracts of employment are based on Roman law, i.e. “the letting or hiring of personal services in return for monetary return”. The judges further argued that Roman law recognised slavery of persons who are not Roman citizens and therefore such persons (slaves) could be hired or rented to another person for whom the slaves performs a personal service. Thus the hiring or renting out of employees to another person, for reward, falls outside the law of contract of employment and “smacks of the hiring of a slave by his slave-master to another person”.

The court thus found that there was no law in Namibia under which a company could enter a contract of employment with persons and then hire them for reward to third parties. The judges argued that labour hire “has no legal basis at all in Namibian law, and, therefore, is not lawful”. Furthermore, the court found that labour hire “violates a fundamental principle on which the ILO is based, namely that ‘labour is not a commodity’”.

### **Supreme Court Appeal**

APS appealed immediately against this decision and the appeal was heard in the Supreme Court on 3 March 2009. Judgement was finally delivered shortly after the parliamentary and presidential elections on 14 December 2009. The judges noted that labour hire “evokes powerful and painful memories of the abusive ‘contract labour system’”, which was “deeply resented by the majority of Namibians”. Referring to the High Court judgement, the Supreme Court judges argued that the employment relationship had changed drastically from classical to modern times and thus that the situation found in Roman times was no longer applicable today. They also argued that workers today entered freely into contracts with labour hire companies and that freedom of contract was not only a matter of public policy but also “a fundamental principle of our law” (paragraph 27).

The Supreme Court judges believed that the fundamental right to “practice any profession, or carry on any occupation, trade or business” as set out in Article 21 of the Constitution was applicable not only to natural persons but also to “juristic persons” such as companies. They argued that “the freedom is essential to the social, economic and political welfare and prosperity of our society” (paragraph 35).

The Supreme Court pondered at length on the differences between the colonial migrant worker system and labour hire today. The court found that placement agencies (and not labour hire companies) were similar to the services provided by SWANLA as they matched “offers of and applications for employment” without becoming “a party to the employment relationship that may arise therefrom” (Paragraph 78). The judges thus argued that unlike the colonial migrant labour agency SWANLA, which acted as a link between the contract labourers and their actual employers, labour hire companies employed their workers directly and assumed their contractual and statutory obligations (paragraph 79). The judges further found that the contract labour system and labour hire (referred to as “agency work”) “have very little in

common under our current constitutional dispensation” (paragraph 80). While not outright denying the abuses suffered by labour hire workers in Namibia, the judges believed that these offenses could be addressed through regulations and did not require an outright ban of labour hire. The judges further cited ILO Convention 181 on private employment agencies and the Private Employment Agencies Recommendation of 1997 which provide for the operations of private employment agencies and the protection of their workers. They concluded that “Both the Convention and the Recommendation supplementing it, urge the regulation of agency work – not the prohibition thereof” (paragraph 102).

The judgement concluded (almost enthusiastically) that “If properly regulated within the ambit of the Constitution and Convention No 181, agency work would typically be temporary of nature; pose no real threat to standard employment relationships of unionisation and greatly contribute to flexibility in the labour market” (paragraph 117).

### **Controversy continues**

Critics pointed out that the judges’ view contradicted all empirical evidence about labour hire practices in Namibia and thus they questioned whose interests this judgement would actually serve (Jauch 2009). Following the Cabinet meeting of 26 January 2010, the Namibian government announced that it would tighten the screws on labour hire through a range of amendments to the Labour Act of 2007 and even the Constitution. These are meant to either ban labour hire or eliminate exploitative aspects of the labour hire system. Government seems to regard new legislation as the practical solution in the short term with one aspect being to legislate that labour hire workers receiving the same pay and benefits as permanent workers doing the same kind of work. Labour hire workers are also envisaged to be entitled to written employment contracts signed by both the labour hire company and the client company where the worker is deployed (Menges 2010).

It remains to be seen whether the proposed amendments and regulations will prevent the abuses and exploitative practices that have characterised labour hire in Namibia during the past 12 years. The debate on labour hire will certainly continue...

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