

threat to job security and minimum conditions.²⁵⁵ Moreover, the insecure and unstable nature of the employment of most of the atypical employees makes it difficult to organize them in both countries.²⁵⁶

Under the Ethiopian labour proclamation, too, non-standard employees, who are included within the definition of ‘employee’, have the right to form trade union and engage in collective bargaining. However, trade unions can only be formed in an undertaking that employees at least ten workers and they must have at least ten members.²⁵⁷ In addition in cases where there are multiple trade unions at a workplace only the one having 50+1 majority membership of the total workers of that undertaking can engage in collective bargaining.²⁵⁸ This, it is submitted, makes it difficult for non-standard employees to form trade unions and bargain collectively.

Regarding workers placed by TESs, both the LRA and BCEA designate the TES as the employer regardless of how long the employee is placed with the client and the ‘client’ is the one actually making important decisions affecting the terms and conditions of employment and the continuity of the employment.²⁵⁹ The joint and several liability of the ‘client’ do not extend to instances of contravention of the LRA.²⁶⁰

Under the Ethiopian law, too, it is the TEA that is, regarded as employer and there is also no time limit on the expiry of which the employee becomes an employee of the ‘client enterprise’.²⁶¹ It also does not matter that the agency’s role is no more than ‘pay rolling’ and the actual determination of all aspects of the work is made by the ‘client’.

Moreover, the shared responsibility of the client is also limited to instances of contravention of the contract of employment of the worker by the agency.²⁶² It does not extend to instances of contravention of the proclamation.

²⁵⁵ For example, see the discussion on page 23

²⁵⁶ Ibid.

²⁵⁷ The Labour proclamation No. 377/2003 art 114 (1)

²⁵⁸ The Labour Proclamation No. 377/2003 art 115 (a)

²⁵⁹ The Labour Relations Act 66 of 1995, s 198 (2) and the Basic Conditions of Employment Act 75 of 1997, s 82 (1)

²⁶⁰ The Labour Relations Act 66 of 1995, s 198 (3)

²⁶¹ See the discussion on page 45

²⁶² Private Employment Agency Proclamation No. 104/1998, art 17

TEAs are required to register and get their licenses renewed every two years under Ethiopian law, while there is no such requirement under South African law. Registration, if submitted, will assist in monitoring whether temporary employment agencies/services, as the case may be, are complying with the laws or not.

The Ethiopian labour proclamation provides an exhaustive list of circumstances under which employment for a definite period is permissible.²⁶³ In all other cases a contract of employment shall be for an indefinite period of time.²⁶⁴ Under the South African law, however, employers are at liberty to employ workers on a fixed-term contract in all circumstances. There is also no time limit, in South Africa, upon the expiry of which an employee must be regarded as a permanent employee. Under the Ethiopian labour proclamation, however, in a case where the reason for employing an employee on a fixed-term contract is either to replace a permanent employee who suddenly and permanently vacated his post or temporary placement to fill a vacant position in the period between the study of the organizational structure and its implementation, the contract must not be for more than 45 days and can only be done once. However, there is no protection against non-renewal of the contract by the employer. The South African labour law defines refusal by the employer to renew a fixed-term contract or an offer to renew on less favourable terms, while the employee has a reasonable expectation of renewal on the same terms, as dismissal.²⁶⁵ This is not available under the Ethiopian labour proclamation.

Concerning minimum conditions of employment the BCEA generally applies to all employees both standard and non-standard. Nonetheless there are certain minimum conditions that are made unavailable to certain employees such as those who work less than 24 hours a month for an employer. In Ethiopia minimum conditions are also regulated by the same proclamation and as such, except for the problem associated with the meaning of 'employee' to accommodate some categories of non-standard employees, are applicable to all employees (as defined under the proclamation) standard and non-standard alike.

Based on the problems identified above, I recommend the following to strengthen the protection of atypical employees in both countries;

- In both countries a test, which is primarily based on the economic reality of the relationship between the parties, should be adopted to distinguish an employee from an independent

²⁶³ The Labour proclamation No. 377/2003 art 10 (1) (a-i)

²⁶⁴ The Labour proclamation No. 377/2003 art 9

²⁶⁵ The Labour Relations Act 66 of 1995 s 186 (1) (b)

contractor. The definition of an employee, under the Ethiopian proclamation, should also be expanded to include unpaid workers who are really in need of protection as is the case in South Africa.

- Judges or arbitrators should primarily rely on the surrounding facts rather than on the label attached to the contract by the parties in determining whether a person is an employee or independent contractor.
- A presumption comparable to the one introduced in the 2006 amendments to the LRA and the BCEA in South Africa, which is also in tandem with ILO's stand, should also be introduced into Ethiopian labour law.
- The exclusion of home workers, under the Ethiopian labour proclamation, should be done away with for all purposes. I also recommend that the principle of equality of treatment with regard to conditions of work such as that which is promoted by the ILO convention be adopted in both countries. In this regard to allow flexibility employers should also be allowed to derogate from the principle of equality of treatment as long as it is done by collective agreement and the collective agreement accords comparable treatment.
- As regards employees placed by TESs or TEAs, as the case may be, there should be a time limit upon the expiry of which the employees should be regarded employees of the client. In addition to this regard should be had to the real nature of the relationship between the 'client' and the TES/TEA. I suggest that the 'client' should be regarded an employer if the role of the TES/TEA is no more than pay rolling. The joint liability of the 'client' under the LRA and the BCEA, in South Africa, should also be extended to cases of contravention of the LRA. Under Ethiopian law also the shared responsibility of the client should be extended to instances of contravention of the labour proclamation.
- In order to strengthen the protection of fixed-term employees in South Africa, I recommend that, like the case in Ethiopia, circumstances under which a fixed-term contract is permissible should be listed. There should also be, in both countries, a time limit upon the expiry of which an employee who is on fixed-term/temporary contract should graduate into permanent employment. There should also be in Ethiopia, as is the case in South Africa, protection of an employee on a fixed-term contract in instances of non renewal or renewal

on less favourable terms while they have reasonable expectation of renewal on the same terms.

- I also suggest that certain minimum conditions which are not made available to those who work less than 24 hours a month for a worker, in South Africa, should be extended to them. I also recommend that the principle of pro rata should be used, as in Ethiopia, to make some of the benefits that are calculated on the basis of 'cycle' or 'period' such as annual leave, available to those who work for less than the qualifying period.
- I also recommend that sectoral determinations of minimum conditions including minimum wages, as per section 54 of the BCEA, should be made in sectors where atypical employees are prevalent. The Ethiopian labour proclamation, however, does not provide for sectoral determination of minimum conditions. Therefore, I recommend that the Ministry of Labour and Social Affairs, in Ethiopia, be enjoined with the same power enjoined to the Minister of labour by section 51 of the BCEA.
- The notion of workplace, in South Africa, should also be redefined in such a way that all places where an employer operates constitute a separate workplace regardless of the fact that they are not independent in terms of size or function. In cases where there are employees who work in a workplace which is controlled by an employer other than their own employer, they should be allowed to enforce their rights both against the employer who is in charge of the workplace and their own employer. In such cases I also suggest, as is the case under the EU directive on temporary agency workers, there should be protection, in both countries, that at least ensures that these workers do not get less favourable treatment than they could have got had they been directly employed by the person who is in charge of the workplace.
- Extension of collective agreements to non parties is totally unknown in Ethiopia. It, however, can be used to enhance the protection of atypical employees. In this regard I suggest that there should be a mechanism, in Ethiopia, to allow extension of collective agreements to non parties.
- The requirement that an enterprise must employ at least ten workers and a trade union must at least have ten members, in Ethiopia, should be done away with.

- I also suggest the requirement, in Ethiopia, that only the trade union with 50+1 membership shall enter into collective bargaining in instances where there are multiple trade unions in an enterprise be done away with.

I believe the implementation of the above proposed points will promote social well-being in the society, which in fact is one of the main purposes of labour law, by enhancing the protection of atypical employees and without much direct investment from the employer's side.



Bibliography

Books

- Basson, A et al (2005) *Essential Labour Law*, (4th combined ed) Labour Law Publications
- Bramble, T and Barchiesi, F (2003) *Rethinking the Labour Movement in the 'new South Africa'* Ashgate Publishing, Ltd
- Buhlungu, S (2007) *State of the Nation*, (4 ed) HSRC Press
- Carré, J et al (2000) *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements*, Cornell University Press
- Cheadle, H et al (2004) *Current Labour Law*, Durban: LexisNexis Butterworths.
- Cheadle, H et al (2006) *South African Constitutional Law: The Bill of Rights*, Durban: LexisNexis Butterworths.
- Chen, M et al, (2005) *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Hand- Book for Policy Makers and Other Stake Holders*, published by common wealth secretariat.
- Conaghan, J et al, (2002), *Labour Law in an Era of Globalization*, Oxford university press
- Du Toit, D et al, (2003) *Labour Relations Law: A comprehensive Guide* (4th ed) Durban: LexisNexis Butterworths, Interpak Books Pietermaritzburg
- Grogan, J (2007) *Workplace Law* (9th ed) Juta & Co., Ltd
- Lundahl, M et al (2004) *Globalization and the Southern African Economies*, Nordic Africa Institute
- Nienhuser et al, (2005) *Flexible Work – Atypical Work – Precarious Work?* Rainer Hampp Verlag
- Rycroft, A and Jordan, B (1992) *A Guide to South African Labour Law* (2nd ed) Cape Town: Juta 7 Co., Ltd.
- Spoonley, P et al (2004) *Work and Working in Twenty-First Century New Zealand*, Thomas Learning Nelson
- Standing, G et al (1996) *Restructuring the Labour Market: The South African Challenge*, International Labour Organization
- Supiot, A et al, (2001) *Beyond Employment: Changes in Work and the Future of Labour Law in Europe*, Oxford University Press.
- Van Neikerk, A *Law @ Work*, Durban: LexisNexis
- Van Wezel Stone, K (2004) *From widgets to digits: Employment regulation for the changing workplace*, Cambridge University Press.
- Vettori, S (2007) *The Employment Contract and the Changed World of Work*, Corporate Social Responsibility Series, Ashgate publishing

Vosko, L and Stanford, J (2003) *Challenging the Market: The Struggle to Regulate Work and Income*, Montreal: McGill-Queen's University Press.

Journals

Baskin, J 'South Africa's Quest for Jobs, Growth and Equity in a Global Context' (1998) 19 *ILJ* 986

Benjamin, P 'An accident of history: who is (and should be) an employee under South African labour law.' (2004) 25 *ILJ* 787

Blanpain, R 'Work in the 21st century' (1997) 18 *ILJ* 185

Christianson, M 'Defining who is an "employee": A review of the law dealing with the differences between employees and independent contractors' (2001) 11 (3) *Contemporary Labour Law* 21

Collins, H 'Independent contractors and the challenge of vertical disintegration to employment laws' (1990) 10 *Oxford Journal of Legal Studies* 353

Davidov, G 'Who is a worker?' 2005 *ILJ* 34

Dicks, R 'The growing informalization of work: Challenges for labour-recent developments to improve the rights of atypical employees' (2007) 11 *Law, Democracy & Development* 39

Fenwick, K et al 'Labour law: A Southern African perspective' (2007) *IILS*, Geneva 15

Hutchinson, W and Le Roux, P 'Temporary employment services and the LRA: Labour brokers, their clients and the dismissal of employees' (2000) 9(6) *Contemporary Labour Law* 56.

Kahn-Freund, O 'Servants and independent contractors' (1951) 14 *Modern Labour Review* 504

Kenny, B et al, 'Contracting complexity and control: An overview of the changing pattern of subcontracting in the South African mining industry', (1999) *The Journal of the South African Institute of Mining and Metallurgy*, 185

Kohler, T 'Labour law and labour relations: Comparative and historical perspective' (1996) *International Journal of Comparative Labour Law and Industrial Relations* 213

Mills, S 'The situation of the elusive independent contractor and other forms of atypical employment in South Africa: balancing equity and flexibility.' (2004) 25 *ILJ* 1203

Mureinik, E 'The contract of service: An easy test for hard cases' (1980) 97 *SALJ* 246

Theron, J 'Employer or intermediary: labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618

Theron, J 'who's in and who's out: labour law and those excluded from its protection.' (2007) 11 *Law, Democracy and Development* 25

Theron, J 'The erosion of workers' rights and the presumption as to who is an employee' (2002) 6, *Law Democracy and Development*, 27

Theron, J 'Employment is not what it used to be.' (2003) 24 *ILJ*, 1247

Theron, J 'The shift to service and triangular employment; implications for labour market reform' 2008 *ILJ*

Thompson, C 'The changing nature of Employment' (2003) 24 *ILJ* 1793

Legislation

The Constitution of the Federal Democratic Republic of Ethiopia, 1995

The Constitution of the republic South Africa, 1996

Labour Relations Act 66 of 1995

Basic Employment Conditions Act 75 of 1997

The Employment Equity Act 55 of 1998

The skills Development Act 97 of 1998

Ethiopian Labour proclamation No 377/2003

Ethiopian Federal Civil Servants Proclamation No 262/2002

Private Employment Agency Proclamation No. 104/1998

Sectoral Determination Seven: Domestic worker sector, Government Gazette, No. 2373215, August, 2002,

ILO Conventions and recommendations

C181 Private Employment Agencies Convention, 1997

R188 Private Employment Agencies Recommendation, 1997

C177 Home Worker Convention, 1996

R198 Employment Relationship Recommendation, 2006

EU Directives

Council Directive 97/81/EC

Council Directive 1997/70/EC

The Draft Directive of the European Parliament and the Council on temporary work, 2002/0072 (COD)

Links

Esselaar, J "The debate over outsourcing in South Africa: Evidence from a case study"

<http://www.commerce.uct.ac.za/Research_Unit/DPRU/Conf2002pdf/Esselaar.pdf> (2002)

International labour conference report I (C) 95th session "The changing patterns in the world of work" International labour office, Geneva, ILO 2006

<www.ilo.org/public/english/standards/relm/ilc/ilc95/reports.htm>

International labour conference report V (1) 95th session “The employment relationship”

International Labour office, Geneva, ILO 2006

<www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf> (2006)

Monika, S “National labour law profile: Federal Democratic Republic of Ethiopia”

<www.ilo.org/public/english/dialogue/ifpdial/info/national/eth.htm> (2003)

“Quarterly Labour Force Survey”

<<http://www.statssa.gov.za/PublicationsHTML/P02112ndQuarter2008/html/P02112ndQuarter2008.html> September 10> (2008)

Rogerson, C “Globalization or informalization? African urban economies in 1990s”

<<http://www.unu.edu/unupress/unupbooks/uu26ue/uu26ue0q.htm>> (1997)

“Country trading profile South Africa- labour market”

<<http://emporikitrade.com/uk/countries-trading-profiles/south-africa/labour-market>>

World Commission on the Social Dimensions of Globalization, “A fair globalization: Creating opportunities for all” (2003)

<<http://www.presidentti.fi/netcomm/ImgLib/9/101/WCSDG%20report%20final.pdf>>

Yehenew, T “Labour market flexibility and employment income insecurity: Legal and institutional frame work” (2005) < www.ilo.ch/public/english/employment/strat/download/bg2.pdf>

Other

Bezuidenhout, A et al ‘Non-standard employment and its policy implications’, Report submitted to the Department of Labour, 30 June 2004.

Clarke, M and Kenny, C ‘Falling out of the loop: Protecting Casual Workers in South Africa’s Retail Sector’ *LRS*, Cape Town: South Africa, 2002.

Committee on Techniques for the Enhancement of Human Performance: Occupational Analysis; National Research Council (CBASSE), ‘The Changing Nature of Work’ (1999) 14

Council of the European Union, ‘Employment, Social Policy, Health and Consumer Affairs’, 2876th council meeting, Press release 9-10 June 2008

Davis, R and Thurlow, J ‘Formal-informal linkages and their policy implications in South Africa’ (2008) *IFPRI*, DPRU Conference 27-29 October 2008, 3

De Gobbi, M ‘Labour market flexibility and employment and income security in Ethiopia: Alternative considerations’ (2006) International Labour Office, Geneva

Godfrey, S & Clarke, M ‘From formal to informal: the restructuring of employment through labour broking and home working’ (2003) at the LexisNexis Butterworths 16th Annual Labour Law Conference, Johannesburg.

Godfrey, S et al 'On the outskirts but still in fashion: home working in the South African clothing industry' (2005) *Development and Labour Law Monographs 2/2005*, Institute of Development and Labour Law: University of Cape Town.

Hanzelova, E 'Non-standard employment in Slovak Republic', (2007) *Institute for Labour and Family Research*, Slovak republic

International Labour Office, 'Contract Labour' (1997), Geneva

Kenny, B & Bezuidenhout, A 'Fighting sub-contracting: Legal protections and negotiating strategies', (1999) *South African Labour Bulletin 23* (3)

National Labour Force Survey, (2005) *Central Statistical Agency*, Ethiopia

Negaligne, M 'Rapid assessment on home work contract', (2008) Ministry of Labour and Social Affairs, Industrial Relation Department.

'Report on the 2005 national labour force survey' Central Statistical Agency (2006) *statistical bulletin 365*

Selelshi, L 'Subcontracting strategy for the Ethiopian Micro and Small Enterprises' (2001) Ethiopian Micro and Small Enterprises Development Program

Theron, J et al 'The rise of labour broking and its policy implications' (2005) *Development and Labour Law Monographs 1/2005* Institute of Development and Labour Law: University of Cape Town.

Theron, J et al 'Globalization, the impact of trade liberalization, and labour law: The case of South Africa' International Institute for Labour Studies, Discussion paper, Geneva, 2007

Urban employment unemployment survey, (2006) Central Statistical Agency, Ethiopia

Valodia, I et al, 'A review of labour market in South Africa: Low-waged and informal employment', (2005) School of Development Studies University of KwaZulu-Natal

Visser, J and Kaminska, M 'Globalization and managing change in the world of work' (2008) AIAS 3 paper prepared for the ILO High Dialogue on the EU Social Model in the Context of Globalization, Turin, 1-3 July 2008

Table of cases

SANDU v Minister of Defence & others (1999) 20 *ILJ* 2265 (CC)

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A)

SA Broadcasting Corporation v McKenzie [1999] 1 *BLLR* 1 (LAC)

LAD Brokers (Pty) Ltd v Mandla [2001] 9 *BLLR* 993 (LAC)

Colonial Mutual Life Association v Macdonald 1931 AD 412

Bank voor Handel en Scheepvaart NV v S latford [1953] 1 *QB* 248 (CA)

BAWU v Umgeni Iron Works 1990 11 ILJ 589 (IC)

Basha Alemayehu & others v Ethiopian Electric Power Company (2000) Federal First Instance Court, Case Number 24182.

Ato Gelana & others v Hayat Share Company (2007) Federal First Instance Court, Case Number 37016

Interviews

Ato Birhanhiwot Libanos, Senior Expert of Industrial Relations in the unionisation department of Confederation of Ethiopian Trade Unions (CETU) [July 5, 2008]

Ato Gobeze Asebe, head of the human resource division of the sunshine construction company. [July 20, 2008]

Ato Kifle beyen, Administration Department Head, Alpha University College. [July 10, 2008]

W/o Fantaye Awash, Personnel Department Head, Unity University College. [July 10, 2008]

Ato Desalegne berihe, Assistant Administrator of the Law Faculty, Saint merry college. [July 10, 2008]

Hiruy Girma, A Cite Agent for Kharafi Construction Company and Fantaye Awash, Personnel Department Head, for Unity University College. [August 3, 2008]

