REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 163/2012

In the matter between:

AFRICA LABOUR SERVICES (PTY) LTD **APPLICANT**

and

THE MINISTER OF LABOUR AND SOCIAL WELFARE **1ST RESPONDENT**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **2ND RESPONDENT**

Neutral citation: *Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (A 163/2012) [2013] NAHCMD 179 (27 June 2013)

Coram: LIEBENBERG J *et* GEIER J
Heard: **27 September 2012**
Delivered: **27 June 2013**

Flynote: Constitutional law - Regulation of labour hire in terms of amended s 128 of Labour Act 11 of 2007 and Employment Services Act 2011 - Whether regulation contrary to art 21(1)(j) of Constitution, freedom to carry on economic activity – court applying three step enquiry prescribed in *Africa Personnel Services v Government of Namibia*: the first is to determine whether the challenged law constitutes a rational regulation of the right to practice or to trade; if it does, then the next question arises which is whether even though it is rational, it is nevertheless so invasive of the right to practise that it constitutes a material barrier to the practice of a profession, trade or business. If it does constitute a material barrier to the practise

of a trade or profession, occupation or business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of art 21(2)

Constitutional law - Regulation of labour hire in terms of amended s 128 of Labour Act 11 of 2007 and Employment Services Act 2011 - Applicant in business of providing agency work – applicant challenging amendment legislation on the ground that regulation contrary to art 21(1)(j) of Constitution, freedom to carry on economic activity – Court adopting a deferential role in the acceptance that economic regulation usually involves policy choices by the government and the Legislature. Once it is determined that those choices were rationally made, there would be no further basis for judicial intervention. The courts cannot sit in judgment on economic issues. They are ill-equipped to do this and in a democratic society it is not their role to do so –

Constitutional law - Regulation of labour hire in terms of amended s 128 of Labour Act 11 of 2007 and Employment Services Act 2011 - Applicant in business of providing agency work – applicant challenging amendment legislation on the ground that regulation contrary to art 21(1)(j) of Constitution, freedom to carry on economic activity – Court finding that the challenged law constitutes a rational regulation of the right of a labour hire agency to practice or to trade – court also holding that regulation was not so invasive of the labour hire entities' right to trade or carry on business so that it constitutes a material barrier to the practice of that profession, trade or business – respondents accordingly absolved from having to establish that amendment legislation is nevertheless a form of regulation that falls within the ambit of art 21(2) of the Constitution - Regulation of labour hire in terms of the amended s 128 of Labour Act 11 of 2007 and Employment Services Act 2011 accordingly held not to be in conflict with art 21(1)(j).

Summary: The applicant, a labour hire business, applied to strike down s 128 of the Labour Act 2007, as amended by the Labour Amendment Act No 2 of 2012, as being unconstitutional and contrary to art 21(1)(j). The respondents contended, inter alia,

that the amendment legislation constituted ordinary labour legislation which passed the deferential test of rationality review and that the amendment legislation was not a material barrier to the practice of the regulated business of labour hire.

Held: That the scheme which was created by the new section 128 was indeed a response to the APS case. It is also a response which is connected to - and is indeed aimed at the curing of the perceived 'mischief' - in that it obviously attempts to close the gap in the existing legislative framework, which has allowed the circumvention of the Labour Act, in the past. The amendment legislation achieves the abovementioned goals in its own peculiar way. That is a far cry from being irrational. On the contrary nothing in these sections indicates in my view that the regulation is not rational, even though it might amount to an 'overkill'.

Held: From the analysis of the legislative structure created by the amendment legislation complained of the conclusion must be drawn that it is not so invasive of the applicant's article 21(1)(j) rights that such restrictions are to be regarded as an impermissible material barrier to the applicant's business. In such circumstances it did not become incumbent on the respondents to justify them.

Held: Although the particular manner in which the regulation of labour hire was structured exposed that many facets of such regulation could have been moulded in a different or even better fashion - and in the circumstances and while dealing with the question of freedom of economic activity - it became particularly important to keep in mind that the courts in most modern democratic countries proceed from the premise that it is not for the courts to dictate economic policy and regulation.

Held: As the language employed in sub-section (10) revealed that the Minister's power to make regulations is discretionary - the failure to promulgate regulations prior to the putting into operation of the Act – could thus not be regarded as an ultra vires act by the first respondent which would entitle the applicants to have the Act set aside.

The application did therefore have to be dismissed with costs.

ORDER

1. The application is dismissed with costs, such costs to include the costs of two instructed and one instructing counsel.

JUDGMENT

GEIER J:

[1] The applicant in this matter seeks to strike out certain amendments to section 128 of the Labour Act 2007, alternatively that sub-sections 128 (2), (3), (4), (6), (8) and (9) be struck. In the further alternative the applicant also seeks to set aside the applicable Government Gazette that brings these amendments into operation.

[2] It is by now a notorious fact that the Supreme Court did strike down the original section 128 of the Labour Act 2007 as unconstitutional.[1]

[3] The original section 128 of the Labour Act 2007 contained an outright ban of 'labour hire'.[2]

[1] *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC) at 669 H - I para [118]
[2] '128 Prohibition of labour hire (1) No person may, for reward, employ any person with a view to

[4] As 'labour hire'[3] was at the core of the applicant's business it does not take much to fathom that the said statutory prohibition then directly affected the applicant's business over night. The validity of the section was thus challenged and eventually declared unconstitutional by the Supreme Court in *Africa Personnel Services v Government of Namibia* 2009(2) NR 596 (SC), (hereinafter referred to as the 'APS case').

[5] The Supreme Court however made it clear that a total ban substantially overshot the permissible restrictions, which could in terms of sub-article 21(2) of the Namibian Constitution be imposed on the freedom to carry on any trade or business, as protected by article 21(1)(j) of the Constitution, and, as the absolute prohibition was tailored much more widely than that what would have been reasonably required for the achievement of the objectives enumerated in the Labour Act - the total prohibition was considered to be disproportionately more severe than what was reasonable and necessary in a democratic society.[4] The appeal was thus allowed with costs.[5]

[6] It should be noted that the judgment however emphasised at the same time that there could be no objection to the Legislature regulating the relevant framework within which private employment agencies could be allowed to operate and thereby ensuring, at the same time, that workers, utilized in these services, would be adequately protected.[6]

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making that person available to a third party to perform work for the third party'.

[3]'With the entire range of employment relationships rooted in the law of letting and hiring and their content as diverse as the terms of the consensual contracts (contracti consensu) underlying them, the expression 'labour hire' is not a definitive term of art with exclusive legal content which, by itself, conveys the scope and meaning of the prohibition in s 128 of the Act with legal clarity'. See *Africa Personnel Services v Government of Namibia* op cit at [11]

[4] See for instance *Africa Personnel Services v Government of Namibia* at para [88] and [118]

[5]*Africa Personnel Services v Government of Namibia* at [118]

[6]See for instance *Africa Personnel Services v Government of Namibia* at para [96] –[97] and para's [117] – [118] for instance

THE STATUTORY REGULATION OF LABOUR HIRE

[7] The Legislature, in heeding the Supreme Court's decision, consequentially passed two pieces of legislation, namely the Labour Amendment Act, Act No of 2012 and the Employment Services Act 2011 No. 8 of 2011, through which it now intended to regulate this sector of the labour market.

[8] The purpose of the amendment legislation was declared in the preamble of the Labour Amendment Act 2012 as follows:

> '… to regulate the employment status of individuals placed by private employment agencies to work for user enterprises; to provide for protection for individuals placed by private employment agencies; to prohibit the hiring of individuals placed by private employment agencies in contemplation of a strike or look-out or following collective termination; --- to substitute certain provisions in order to align them with the definition of private employment agency; … ".

[9] The corresponding portion of the Preamble of the Employment Services Act reads as follows:

> "--- to provide for the licensure and regulation of private employment agencies; ---."

[10] The new section 128 reads as follows:

> "(1) In this section –

“place” and “private employment agency” bear the meanings assigned to them in section 1 of the Employment Services Act, 2011 (Act No 8 of 2011); and

“user enterprise” means a legal or natural person with whom a private employment agency places individuals.

(2) For the purposes of this Act and any other law, an individual, except an independent contractor, whom a private employment agency places with a user enterprise, is an employee of the user enterprise, and the user enterprise is the employer of that employee.

(3) An individual placed by a private employment agency with a user enterprise has the same rights as any other employee in terms of this Act, including the right to join a trade union and to be represented by a trade union in collective bargaining with his or her employer.

(4) A user enterprise must not –

(a) employ an individual placed by a private employment agency on terms and condition of employment that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value;

(b) differentiate in its employment policies and practices between employees placed by a private employment agency and its incumbent employees who perform the same or similar work or work of equal value

(5) A user enterprise must not employ an employee placed by a private employment agency –

(a) during or in contemplation of a strike or lockout; or

(b) within six months after the user enterprise has, in terms of section 34, dismissed employees performing the same or similar work or work of equal value.

(6) Any person aggrieved by a contravention of subsection (3), (4) or (5) may refer a dispute to the Labour Commissioner in terms of section 86 to seek a remedy, including –

(a) reinstatement;

(b) back pay or other monetary relief;

(c) an order to take action or refrain from certain action; and

(d) any other remedy that the arbitrator considers to be appropriate.

(7) A user enterprise that contravenes subsection (4) or (5) commits an offence and is liable to a fine not exceeding N$80,000 or to be imprisoned for a period not exceeding two years or to both fine and such imprisonment.

(8) Where the Minister is satisfied that the rights of any employee in terms of this Act or any other employment law will be satisfactorily protected without the operation of subsection (2), he or she may, on application made by a user enterprise and supported by both the private employment agency and the affected employee, exempt a user enterprise, in whole or in part, from the provisions of subsection (2), subject to subsection (9) and to any conditions that the Minister may impose.

(9) If the Minister grants an application of a user enterprise for exemption in terms of subsection (8) –

(a) the private employment agency and the user enterprise are each deemed to be the employer of the individual placed with the user enterprise and are jointly and severally liable for contraventions of this Act;

(b) in case of a contravention of this section, the employee has the option to seek relief provided herein against either the private employment agency or the user enterprise or both.

(10) The Minister may prescribe regulations concerning the implementation or enforcement of any part of this section and without derogating from the generality of this subsection the regulations may provide for –

(a) the allocation of responsibilities under this Act between a private employment agency and a user enterprise; or

(b) categories of employment relationships that may be exempted from this section”

[11] The definition section of the Labour Act was amended to add:

" 'employee' means an individual, other than an independent contractor, who - -

(a) works for another person and who receives, or is entitled to receive, remuneration for that work; or

(b) in any manner assists in carrying on or conducting the business of an employer."

" 'employer' means any person, including the State and a user enterprise referred to in section 128(1) who –

(a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or

(b) permits an individual to assist that person in any manner in carrying on or conducting that person's business;"

" 'independent contractor' means a self-employed individual who works for or renders services to a user enterprise or customer as part of that individual's business, undertaking or professional practice;

(10) Section 128A creates a presumption of employment where certain factors are present and reads as follows:

"128A. For the purposes of this Act or any other employment law, until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if any one or more of the following facts is present:

(a) the manner in which the individual works is subject to the control or direction of that other person;

(b) the individual's hours of work are subject to the control or direction of that other person;

(c) in the case of an individual who works for an organization, the individual's work forms an integral part of the organization;

(d) the individual has worked for that other person for an average of at least 20 hours per month over the past three months;

(e) the individual is economically dependent on that person for whom he or she works for renders services;

(f) the individual is provided with tools of trade or work equipment by that other person;

(g) the individual only works for or renders services to that other person; or

(h) any other prescribed factor."

(11) Section 128C creates a presumption of indefinite employment as follows:

"128C. (1) An employee is presumed to be employed indefinitely, unless the employer can establish a justification for employment on a fixed term.

(2) Subsection (1) does not apply to managerial employees."

(12) As certain definitions of the Employment Services Act are incorporated into the Labour Act, it is necessary to refer to these definitions in order to obtain a complete picture of the provisions of section 128:

12.1 " 'place' means to place, engage, refer, recruit, procure or supply an individual, to work for an employer or a prospective employer; and"

12.2 " 'private employment agency' means any natural or juristic person, except the State, which provides one or more of the following labour market services –

(a) services for matching offer of and applications for employment, without the private employment agency becoming a party to the employment relationship which may arise therefrom;

(b) services consisting of engaging individuals with a view to placing them to work for an employer, which assigns their tasks and supervises the execution of those tasks; or

(c) other services relating to job-seeking that do not set out to match specific offers of and applications for employment, such as providing of information;".
…'.

[12] The applicant's challenge of these amendments demonstrates that the issue of 'labour hire' in Namibia, and the way in which it is to be regulated, has not come to rest and continues to occupy the courts, seemingly also for all the historical reasons as set out more comprehensively by the Supreme Court.[7] One gets this impression from the papers filed of record which show that the emotions around this issue have not settled.

[13] The applicant, in support of its case, set out why it considered that these amendments had a 'deleterious effect' on its business. It stated that nine user enterprises had, so far, cancelled their agreements with applicant since the advent of the Amendment Act and that applicant's number of employees had already declined from 1618 to 319. It was alleged that the legislative interference with the 'labour hire' entities' business was intended to- and in actual effect - put them out of business. It was submitted that the new enactments amounted to a total 'overkill'.

[14] The applicant thus contended that the newly introduced legislation has sounded the 'death knell' to 'labour hire' in Namibia and that the new legislation was deliberately designed to make the environment, in which the applicant operates, so hostile so as to, for all practical purposes, force it to close down on its business, and that under the guise of exercising its regulatory powers the Legislature was actually intending to achieve its initial objective, namely to prohibit the practice of 'labour hire' altogether.

[15] The respondents on the other hand proclaim in the main that the amendments were not aimed at 'labour hire' entities at all, but instead aimed at regulating the relationship between user enterprises and the persons made available to work for

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[7] *Africa Personnel Services v Government of Namibia* at paras [1] to [9]

them by the 'labour hire' entities and that the section thus permissibly regulates that particular activity and does not breach the applicant's constitutional rights at all.

[16] The applicant conceded in this regard, that it recognizes, that the freedom, to partake in economic activity, does not entail the right to insist that a particular field of endeavor should be free from regulation, but it insisted that there may come a point where regulation itself becomes so onerous so as to infringe impermissibly upon the fundamental right to trade or do business and this is precisely what had occurred here, so it was argued.

[17] Ultimately the crux of applicant's case is that the section and its effect is such that it constituted a material barrier to the applicant's right to do business.

[18] As the battle lines between the parties were drawn along such general lines it now becomes apposite, for purposes of deciding this matter, to consider the arguments, mustered on behalf of the parties, in greater detail.

THE APPLICANT'S CASE

[19] Mr Frank SC, who appeared together with Ms Schimming-Chase, on behalf of the applicant, submitted more particularly that:

'prior to the coming into operation of sec 128 the applicant was treated on par with all other employers in terms of labour legislation. It was thus free to exercise its Article 21(1)(j) rights in this context on an equal footing with all other employers … that applicant had established its right to conduct its business as this had been accepted by the Supreme Court which found "that the applicant's business as an agency service provider falls within the

ambit of economic activities protected by the fundamental freedom to carry on any trade or business under Article 21(1)(j) of the Constitution.' [8]

The extremely deleterious effect on applicant's business with the introduction of section 128 … was clear. Nine user enterprises have cancelled their agreements with applicant so far, and since the advent of the section. Applicant's number of employees have already declined from 1618 to 319…

The introduction of the legislative interference with labour hire entities' businesses was intended to and in effect put them out of business. This was not only to be inferred from the obtuse refusal by respondents to admit that labour hire entities will be affected by the legislation, but by the enactments themselves, which amount to a total overkill. By way of example, when the ILO through its Recommendations or Conventions suggested regulation or licensing, the Namibian Legislature did both. When the ILO suggests the allocation of responsibilities between the three parties involved, the Legislature allocated all the responsibilities to both the employer (labour hire entity) and the user enterprise, even criminal liability. In actual effect a dual employer system was created, one contractual and one statutory, with joint and several responsibility for everything. All three parties to the tripartite arrangement now have to apply for exemption which is, as the ILO points out, unique in the world. An exemption is provided for on application (subsection (8).) This is however subject to subsection (9) which again imposes joint responsibility. The exemption is nothing but 'smoke and mirrors'. To get round this a further ameliorating feature (subsection (10) is introduced but not utilised – again 'smoke and mirrors'.

It was submitted that it was clear that the Minister cannot, pursuant to his powers to exempt (subsection (8)), get around the liabilities imposed on both labour hire entities and user enterprises by subsection (9). This is so because the exemption granted is explicitly stated to be "subject to subsection (9)":

Applicant accepted that the freedom to partake in economic activity does not entail an absolute right to insist that the particular field of endeavour should be totally free from regulation, but so it was submitted further, there comes a point where the regulation itself becomes so onerous so as to infringe on the fundamental right to trade or do business[9]. The court was referred to what the Namibian Supreme Court had stated in the *Trustco* case, were the position was put as follows:

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[8] *Africa Personnel Services v Government of Namibia* at [60]

[9] *Namibia Insurance Association v Government of the Republic of Namibia* 2001 NR 1 (HC) at 18 B-D, *Africa Personnel Services v Government of Namibia* op cit at par [97]

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"[26] As the High Court observed in Namibia Insurance Association, any regulation of the right to practise must be rational but that is not the end of the enquiry. Even if the regulation is rational, if it is so invasive that it constitutes a material barrier to the right to practise the profession, the regulation will be an infringement of the right to practise that will have to be justified under art 21(2). In determining whether a regulation that does constitute a material barrier to the right to practise is permissible under art 21(2), a court will have to approach the question as set out in Africa Personnel Services.

[27] The approach thus has three steps: the first is to determine whether the challenged law constitutes a rational regulation of the right to practise; if it does, then the next question arises which is whether even though it is rational, it is nevertheless so invasive of the right to practise that it constitutes a material barrier to the practice of a profession, trade or business. If it does constitute a material barrier to the practice of a trade or profession, occupation or business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of art 21(2)."

Against the background of this authority and with reference to their below mentioned analysis counsel then submitted that the effect of the section was such that it constituted a material barrier to applicant's right to do business:

a) Labour hire employers are tasked, under pain of criminal sanction, to police user enterprises in respect of the latter's compliance with the Affirmative Action (Employment) Equity Act, No 29 of 1998. This is so while this is not a requirement between the user enterprises and their employees.[10]

b) Labour hire employers are tasked, under pain of criminal sanction, to police user enterprises in respect of the latter's contributions to the Social Security Commission. This is so while this is not a requirement between the user enterprises and their employees.[11]

c) User enterprises are jointly and severally liable with labour hire employers for any contravention of any labour related legislation serving as a disincentive to use labour hire services.[12]

[10] Section 26(b)(ii) and (iii)
[11] Section 26(b) of the Employment Services Act
[12] Section 128(9) of the Labour Act

d) User enterprises must afford labour hire employees the same benefits as their own employees, thus undermining labour hire employers agreements with their own employees with regard to, for example, pension contributions, medical aid contributions and payment to unions.[13]

e) Labour hire employees must be remunerated the same as the existing employees of user enterprises resulting in the user enterprises rather using temporary employees of their own as then they can appoint on probation and make a distinction based on inexperience and no record of loyalty.[14]

f) Where application is made for exemption from the section it is for the user enterprise to make such application and not the labour hire company. Furthermore, the consent of the employees must also be obtained. This would mean that the labour hire company must appoint employees and obtain their consent in respect of an application by a separate entity prior to even knowing whether the exemption will be granted.[15]

g) Employees of the labour hire company are by operation of law transferred to the user enterprise without any relevant party's concurrence and in total disregard of the relevant agreements concluded between the parties.[16]

h) Employees of the labour hire company are entitled to join the union and (where it is the exclusive bargaining unit) are compelled to be represented by the union of the user enterprise. The labour hire company will be subject to the results of the collective bargaining process at the user enterprise, despite not being a party to such process.[17]

i) Subsection (2) does not pass constitutional muster in that it does not even deem the employees of applicant to be the employees of a user enterprise but makes it a legal fait accompli. In this subsection there is an interference with applicant's contractual arrangement with its employees, and not only with its employees, but also with the freedom of contract of the user enterprise which we submit is overbroad and for which there can be no justification. In any event respondents' stance is that none is necessary as the legislation does not apply to applicant and

[13]Section 128(4) of the Labour Act
[14]Section 128(4) of the Labour Act
[15]Section 128(8) of the Labour Act
[16]Section 128(2) of the Labour Act
[17]Section 128(3) of the Labour Act

other labour hire companies. This section is neither reasonable nor rationally connected to the objective which can only be aimed at regulating the labour hire services industry so as to protect employees.

j) The same applies to subsection (4) for the reasons already advanced. Its vagueness is such that there is no way in which the subject can understand it and it will have no meaning unless and until interpreted by a Court of law…

k) Subsection (6), read with subsection (9), is a gross interference with rights in that it allows an employee to take either the applicant or the user enterprise to task with the Labour Commissioner / Labour Court and seek relief from either of them, the one contractually the employer and the other the statutory employer by virtue of section 128 … the relief would in any event be competent in respect of such an employees' real employer and there is no need or justification for the creation of two employers.

l) Subsection (9) further makes both applicant and the user enterprise liable for any contraventions of the Labour Act and again allows the "employee" to look at either of his two employers for the relief sought. This subsection … is overbroad in that it refers to any contravention of the Labour Act which would include any contraventions relating to record keeping or other innocuous provisions. In addition it would include those contraventions that are criminal offences. In this respect a burden is placed on the user enterprise which one must remember is not a labour hire company but an ordinary employer, to basically monitor and police the labour hire company in order to ensure that it complies with labour legislation otherwise it would be liable and thus again just placing another barrier to the use or companies like the applicant.

With reference to this legislative structure counsel then submitted that this structure was restrictive to such an extent that such restrictions constituted a barrier to its business and that it was therefore incumbent on the Legislature imposing such a barrier to justify them.[18] In casu there was however no attempt to justify the restrictions (regulation).

In such circumstances and once it would be found that the section does constitute a material barrier to applicant's business that would be the end of the matter and, apart from

[18] *Africa Personnel Services v Government of Namibia* at paras [66] and [51] and [65] – p 640 G-H

the issue of severability of certain unobjectionable subsections, (128(5) for example), it follows that the relief sought by the applicant should be granted.

Counsel added that insofar as it may be submitted that the power to regulate provided for in subsection (10) may save the constitutionality of the section as a whole - no regulations have been promulgated. It was added that this subsection further demonstrated the intention of the Legislature not to discern, which recommendations of the ILO should be made applicable, but to include all its recommendations. Thus subsection (2) provides for certain exemptions and so does subsection (9). The amendments regulated by way of legislation (subsections (2) to (9) and also make provision for regulations by the Minister (subsection 10).

In so far as the respondents might contend that the power to regulate provided for in sub-section (10) would save the constitutionality of the section as a whole the point was made that no regulations were promulgated – and thus - to have put the Amendment Act into operation without the regulations in place to ameliorate the (unconstitutional) effect on labour hire entities and thus to render the section constitutional thereby was ultra vires the Act and contrary to Article 18 of the Constitution.[19]

Even if the incorporation of subsection (10) saved section 128 from being unconstitutional on the fact thereof that the implementation of the section without the regulations envisaged in subsection (10) amounted to an invalid administrative act which must be set aside.

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[19]*S v Lofty-Eaton & Others* 1993 NR 370 (HC) at 389 were O'Linn J stated : 'In conclusion on this issue I must point out that the provision in an Act of Parliament that the date of operation is to be decided on and promulgated by an organ of the Executive may be regarded as an administrative function or as delegated legislation or a combination of both. In all instances, however, the decision to declare operative, and the declaration itself, must comply with the provisions of the enabling Act, and must in itself be reasonable and not ambiguous, particularly where it provides for criminal offences and criminal sanctions for non-compliance with the provisions of the Act.
To declare an Act operative, when essential organs or procedures for complying with the law and for avoiding a contravention and avoiding criminal sanctions are not yet established, appears to me not only to be ultra vires the enabling Act but in conflict with art 18 of the Namibian Constitution. See also art 21 of the Namibian Constitution; Steyn Die Uitleg van Wette 5th ed at 238-49.
Even if the State President, or the Administrator-General in this instance, declared the Act as a whole or parts of it operative at any point in time, when the organs and procedures to be set up under s 16 were not yet established, it seems to me that such declaration would in itself be ultra vires or unconstitutional, particularly insofar as it purported or purports to make s 16(1) and 16(2)-(8) of the said Act operative.'

In the premises it was submitted that applicant was entitled to have section 128 declared unconstitutional, alternatively to have the Government Gazette bringing the Labour Amendment Act 201 in operation be set aside with costs."

THE RESPONDENTS'CASE

[20] Mr Chaskalson SC, who appeared with Mr Markus on behalf of the respondents, summarized both parties cases as follows :

'The applicant business consists of making its "employees" available to other persons to perform work for such persons at their premises ("the user company"). This forms the thrust of the applicant's business and accounts for more than 90% of its revenue and work force. The recruited personnel are engaged to work for a fixed period on a particular project, to work for a fixed period in the context of seasonal employment or, to fill temporary vacant positions in the client's structure.

The applicant purports to assume the responsibility of "employer" in terms of the agreement that it concludes with its workers, yet it structures its contracts with its employees so that they do not need to be paid when they are not engaged by user companies. This is what is described on the papers as the "no work no pay principle". The applicant also enters into a separate agreement with the user company, in terms of which its obligations towards the user company are set out. Although the user company utilizes the placed workers services on a daily basis and in most instances supervises and controls their work at the workplace there is no contractual privity between the user company and the workers placed by the applicant.

This arrangement enables the user company contractually to avoid the creation of an employment relationship with the worker. This means that the user enterprise is contractually relieved of all obligations of an employer and the worker also has no enforceable rights against the user enterprise. Operating in tandem with the "no work no pay principle" this arrangement also deprives the worker of any labour law protection against unfair dismissal. If the user enterprise wants to get rid of the worker it merely calls upon the applicant to remove him/her. The worker then remains indefinitely on the books of the applicant as its nominal "employee" but is not paid anything unless and until another user enterprise chooses to engage the employee.

The applicant contends that section 128 of the Labour Amendment Act 2 of 2012, which regulates the relationship between the user enterprise and the placed workers, puts in place measures that from a business perspective make it “sheer lunacy” for user enterprises to use the services of the applicant. This, the applicant contends, in turn restricts the applicant from carrying on its trade and business in violation of its right in terms of Article 21(1)(i) of the Namibian Constitution. Summarised the thrust of applicant’s argument is: because the parties have privately decided who the employer is, the Legislature cannot simply make the user enterprise an employer or the decision to do so is unreasonable.

The applicant also contends that its right to equality guaranteed by Article 10 of the Constitution is violated by section 128 and its right to fair administrative action in terms of Article 18 are also violated. The latter right, applicant contends, is violated by the failure of the first respondent to issue Regulations. It also makes the putting into operation of the Amendment Act ultra vires the powers of the first respondent.

The respondents, on the other hand, deny that section 128 of the Amendment Act infringes any fundamental rights and freedoms of the applicant. Section 128 regulates the relationship between the user enterprises and the individuals placed by private employment agencies to work for the user enterprises. Its object is to ensure non-discrimination and equal treatment of employees placed by a private employment agency, fair labour practices and the protection of their collective bargaining rights. The means employed by the Legislature are rationally connected to the attainment of this legitimate governmental objective.

Section 128 protects the following constitutional rights of the labour hire workers: the right to human dignity (Art 8); the right to equality and freedom from discrimination (Art 10); the right to a fair trial (Art 12) and the freedom of association, which includes the freedom to form and join trade unions (Art 21(1)(e)). It was put into law based on the duty imposed on the Legislature by the Constitution, to pass laws that give effect to the fundamental objectives of the Principles of State Policy contained in Art 95.

Nor does section 128 constitute a material barrier to the entry of any legitimate business of labour providers, in so far as it is designed for a purpose other than the circumvention of worker protections under the Labour Relations Act. On the applicant’s own publicly stated version:

> "[The amended section 128] will have a negative impact for both client companies and brokers operating outside the confines of the law…
> [However, the amended section] won't change APS existing operations much, as it has already put measures in place to comply with the changes, focusing on value addition to both its employees and clients.

In the event that this Court finds that section 128 restricts any of the applicant's fundamental rights and freedoms (which is denied), the respondents submit that any such restriction is justified by the purpose served by Section 128 in protecting the fundamental rights described in the paragraph 6.2 above and in advancing the Principles of State Policy set out in Art 95 and that Section 128 accordingly represents a permissible legislative choice taken by Parliament.

In this regard the respondents point out that section 128 affords protection to labour hire workers, who form an 'underclass' of workers and are the weakest in the triangular employment relationship and therefore most deserving of protection. It prevents persons bypassing the Labour Act 11 of 2007 (the Labour Act") through a scheme of arrangement that undermines or renders ineffective the rights afforded to employees by the Act.

After reiterating the background to the enactment of the Labour Amendment Act and after referring to the Supreme Court's[20] express acknowledgement of the propriety of regulating the labour hire relationship[21], it was submitted that the user enterprises continued to utilize labour hire as a vehicle to avoid their legal obligations as employers, while workers placed with user enterprises remained vulnerable to arbitrary termination of employment and denials of their rights as employees.

It was pointed out that it was common cause that labour hire was used by employers in order "to be relieved of being subject to the Labour Act". The manner in which labour hire was used to deprive workers of their labour rights under the Act is well illustrated by the

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[20] *Africa Personnel Services v Government of Namibia* op cit

[21] "[110] … Between the employer's need for flexibility to stay competitive and survive economically challenging times and the employee's need for employment security as a human being and to provide for his or her dependants, the debate on where the socio-economic balance is to be found, rages on.
[111] It is a debate which must inform the court, not to decide which regulative measures will strike that balance, but whether the legitimate objectives which the Legislature sought to achieve by the prohibition of agency work could not have been attained by less restrictive means, such as by the regulation thereof.'

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contractual arrangements that the applicant enters into with the user company and its "employees" in that :

a) The contract of employment that the applicant enters into with its employees provides for the acceptance of the principle of "no work, no pay" and the employee is required to agree to indemnify the applicant against any loss of income which the employee may incur when no work is available. The application of this principle allows the applicant to remove troublesome or unwanted employees from a user enterprise –

    i) without incurring any obligation to remunerate the employees in question, after they have been removed from the user enterprise; and
    ii) simultaneously maintaining the fiction that the employees' now unpaid "employment" by the applicant is continuing and thus freeing the applicant from any obligation to comply with retrenchment procedure provided for in the Labour Act.

b) The contract with the employee unlawfully requires an employee to agree to waive mandatory conciliation procedures in terms of the Labour Act when referring a dispute to arbitration;
c) The agreements and the disciplinary procedures do not require the labour hire employees to comply with the requirements or procedures of the user company and make no mention whatsoever of misconduct or dereliction of duty in relation to the user;
d) Certain obligations imposed by the Labour Act on the employer are shifted in terms of the contract to the applicant; although in many instances the applicant will be unable to comply with them. This is done in order to formally comply with the Labour Act and to give the applicant the appearance of an employer thereby enabling the user enterprise to avoid its obligations. In this regard:

    i) the applicant concedes that most of its "employees" are placed under the control and supervision of the user enterprise and receive their instructions from the user enterprise;
    ii) It is also unlikely that the applicant does in fact supply all tools and equipment to the employees, especially in cases where employees are hired out to fill

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temporary vacant positions within the user's structure or are supplied to work on a particular project;

e) Disciplinary rule 10 of the applicant's operational procedures provides that "no employee may say or do anything that will cause any form of labour unrest among the employees of the company" with a penalty of summary dismissal for the first offence;

f) The contractual arrangement that the applicant enters into with the user companies does not provide the placed workers with any security of employment. Employment of the placed worker at the user enterprise is entirely at the user's discretion, leaving the placed employee with no remedy as against the user company if that company chooses not to renew its contract with the applicant. To suggest that the worker could hold the applicant liable is illusory, especially where the claim of the worker is one for reinstatement to his or her position at his former workplace. Without the client's cooperation the applicant would be unable to grant such relief. Moreover, given that the contractual arrangement between the applicant and the worker incorporates the "no work no pay" principle, a worker who is removed from his/her place of work by the applicant when the applicant's contract with the user company terminates (or even if that contract continues but the user company requests the removal of the worker), will have no ongoing claim against the applicant for remuneration.

THE MANNER IN WHICH THE AMENDMENT ACT SEEKS TO REMEDY THE SITUATION

In approaching the situation anew from a regulatory perspective, the Ministry pinpointed what it considered to be the major gap in the then-existing law, namely, that private parties – the labour hire agency and the user enterprise— were able to enter into contracts that placed the relationship between the user and the employees performing its work beyond the reach (and the protections) of the labour laws.

The purpose of labour law has always been to cut back the exercise of contractual power by employers and to provide employees with rights which they could not obtain through contract. The common law of master and servant was regulated exclusively through contract and was premised on the fiction of bargaining equality between employer and employee. Given the bargaining strength of employers relative to employees, the regime of the common law contract of employment was calculated to protect employers' powers at the expense of employees interests.

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It was submitted that the Amendment Act is ordinary labour legislation in this nature. It is designed to protect workers from the consequences of contracts that are designed to place the relationship between an employee and the user company who is his/her de facto employer beyond the reach (and the protections) of the labour laws. The amendments to section 128 achieve this purpose in the following manner:

i) Subsection (2) provides that for the purposes of the Act and any other law, a labour hire employee (ie a worker other than an independent contractor who is placed by a labour hire company) with a user enterprise is the employee of the user enterprise, and the user enterprise is the employer of that employee. Thus the user enterprise attracts all the statutory obligations of an employer in relation to the labour hire employee who is placed with it;

ii) Subsection (3) merely confirms that, as against his/her employer, the labour hire employee has all the rights of other employees under the Act including the right to join a trade union and the right to be represented by the trade union in collective bargaining with the employer;

iii) Subsection (4) protects equality of employment rights by prohibiting a user enterprise from :

  a) employing a labour hire employee on terms and conditions that are less favourable than those of comparable employees who are not labour hire employees; or

  b) otherwise discriminating between labour hire employees and other employees in its employment policies and practices.

iv) Subsection (5) prevents a user employee from employing labour hire employees to break strikes or to enforce lockouts or to casualise the workforce. Thus

  i) paragraph (a) prevents the engagement of labour hire employees during or in contemplation of a strike or lockout; and

  ii) paragraph (b) prevents the engagement of labour hire employees to replace existing workers who have been dismissed within the previous six months.

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v) Subsection (6) provides employees with labour law remedies in relation to disputes arising from an alleged contravention of subsections (3) to (5);

vi) Subsection (7) also creates criminal liability for a user company that contravenes subsections (4) or (5);

vii) Subsections (8) and (9) provide for exemptions from the provisions of subsection (2), to be granted on application with the support of all three parties, for a user enterprise. If an exemption is granted, the user enterprise and the labour hire employer become jointly and severally liable for contraventions of the Act;

viii) Subsection (10) empowers the Minister to make regulations concerning the implementation or enforcement of the section.

When formulating the provisions of section 128 of the Amendment Act the Ministry relied on two important international instruments: the ILO Private Employment Agencies Convention 181 of 1997 ("Convention 181") and the ILO Recommendation 198 of 2006 on the Employment Relationship.

Convention 181

Convention 181 states that its purpose is to allow the operation of private employment agencies as well as the protection of the workers using their services. It allows members to prohibit, under specific circumstances, private employment agencies from operating in respect of certain categories of work or branches of economic activity.

Convention 181 also provides for the following:

i) Protection of freedom of association and the right to bargain collectively for employees recruited by private employment agencies;

ii) A requirement that Member States shall take the necessary measures to ensure adequate protection for the workers employed by private employment agencies in relation to inter alia:

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(a) freedom of association;
(b) collective bargaining;
(c) minimum wages;
(d) working time and other working conditions;
(e) statutory social security benefits;
(f) occupational safety and health;
(g) maternity protection and benefits.

iii) A requirement that Member States allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies and of user enterprises in relation to, among others:

(a) collective bargaining;
(b) minimum wages;
(c) working time and other working conditions;
(d) statutory social security benefits;
(e) protection in the field of occupational health and safety;
(f) maternity protection and benefits.

ILO Recommendation 2006

ILO Recommendation 2006 states that the nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, taking into account international labour standards. The law or practice should be clear and adequate to ensure effective protection for workers in an employment relationship.[22]

National policy adopted by members should at least include measures to:

(a) To provide guidance to employers and workers on establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;
(b) Combat disguised employment relationships such as the use of forms of contractual arrangement to hide the true legal status: disguised employment relationships occurs when the employer treats an individual as other than an employee in a manner that

[22] Clause 4

hides his or her true legal status as an employee which can have the effect of depriving workers of fhe protection they are due;

(c) Insure standards applicable to all forms of contractual arrangements. Including those involving multiple parties, so that employed workers have the protection they are due;

(d) Ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) Provide effective access to employers and workers to appropriate speedy, inexpensive, fair and efficient procedures for settling disputes regarding the existence and terms of an employment relationship;

(f) Insure compliance with, and effective application of, laws and regulations concerning the employment relationship.

SECTION 128 DOES NOT LIMIT ARTICLE 21(1)(j) OF THE CONSTITUTION

It was submitted further that in addressing the mischief which it sought to remove, the Legislature chose not to prohibit labour hire in any industries, but rather to permit labour hire to continue, subject to the requirement that it did not free a user enterprise from any of its statutory obligations to the labour employees who were employed at its instance because these employees were, *de facto* its employees and ought therefore *de jure* to be treated as such.

At best for applicant, so it was argued, section 128 regulates the relationship between labour hire employees and user enterprises in a manner that may affect labour hire companies to their detriment because some user companies will not renew contracts with labour hire companies if they no longer be able to circumvent their responsibilities as employers under the Labour Act through these contracts.

The Supreme Court has held[23] that where regulatory legislation does not prohibit a particular profession an applicant alleging a violation of section 21(1)(j) must show either :

i) that the regulatory legislation is irrational, or

ii) that the regulatory legislation although rational, is so invasive as to constitute a material barrier to the practice of that profession.

[23] *Trustco Ltd t/a Legal Shield Namibia & Ano v Deeds Registries Regulation Board & Others* 2011 (2) NR 726 (SC) at paras [24]-[27]

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Even if the applicant can show that the regulatory legislation is so invasive as to constitute a material barrier to the practice of that profession, the legislation will pass constitutional muster if the Government can justify it under Article 21 (2).

When assessing whether there is a rational relationship between the purposes of regulatory legislation and the means chosen by that legislation and in assessing whether regulatory legislation is so invasive as to amount to a material barrier to the practice of a profession, Courts will adopt a deferential approach to the legislative choice. The reasons for this approach have been set out in *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*[24] where the Supreme Court stated:

> [27] Before I wrap up on this issue of equality before the law, let me specifically deal with the applicant's complaint that when it obtains a licence, as it is required to do, it consequentially becomes subject to the regulatory regime of the Government's watchdog, namely the Namibian Communications Commission. Courts have recognised that in matters involving a country's economy, it is normal and usual that a government will legislate to regulate the actors, who are usually in the private sector, as to how such actors will carry on a given economic activity. In such a situation, the attitude of the courts is that it is not in their province to interfere — provided that certain conditions are present — on the basis that the courts would have handled the situation differently. That was the view of the High Court in *Namibia Insurance Association v Government of the Republic of Namibia and Others* 2001 NR 1 (HC). In expressing that view, Teek JP sitting in full court with Silungwe J had this to say at 12J – 13A: G
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> *'Economic regulation inevitably involves policy choices by the government and the Legislature. Once it is determined that those choices were rationally made, there is no further basis for judicial intervention. The courts cannot sit in judgment on economic issues. They are ill-equipped to do this and in a democratic society it is not their role to do so. . . .'*
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> [28] I fully endorse the view taken by the judges who presided in the *Namibian Insurance Association* case supra as supported by the quotations from cases they cited. In the circumstances, I also hold that it is improper for this court to impose its

[24] 2011 (2) NR 670 (SC)

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own judicial decision in supersession of the government's political judgment of legislating for the introduction of the regulatory regime against which Mweb is complaining in this matter.

In *Namibia Insurance Association v Government of Namibia & Others*[25] the Court stated:

> *'The danger for the courts and for constitutionalism of the approach to regulatory legislation emerges clearly from the experience of the courts in India, Japan, Germany, Canada and the United States of America. When dealing with the question of the freedom of economic activity courts in these countries proceed from the premise that it is not for the courts to dictate economic policy. This approach is encapsulated in the US case of Furgeson v Skrupa 372 US 483 as follows: 'We emphatically refuse to go back to a time where the courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions because they might be unwise, improvident or out of harmony with the particular school of thought whether the Legislature takes for its text book Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours.'*
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> *In other words it is not for the courts to say that they would do it differently because they do not like the economic structure of a particular provision passed by Parliament because there are economic reasons or reasons of policy which dictate the fact that there may eg be a state controlled airline, transport agencies, electrical and water utilities and the like.*
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> *It is nowadays the attitude of the courts in a number of countries to allow the elected Legislatures a large degree of discretion in relation to the form and degree of economic regulation selected by a democratic Legislature. Therefore the determination of the merits or wisdom of an Act is the task of the elected representatives of the people wherever applicable. Cf Reynolds v Sims 377 US 533 (1964). In Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at para [180] the majority of the South African Constitutional Court stated that in a modern state the question whether or not there should be regulation and redistribution (in the public interest) is essentially a political*

[25] 2001 NR 1 (HC)

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question which falls within the domain of the Legislature and not the courts. It is not for the courts to approve or disapprove of such policies.'[26]

Similarly the Supreme Court stated in *Trustco Ltd t/a Legal Shield Namibia & Ano v Deeds Registries Regulation Board & Others :*

[31] What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.[27]

THE AMENDMENT ACT PASSES RATIONALITY REVIEW

It was then submitted that the Amendment Act passes the deferential test of rationality review as it is permissible for the State to seek :

a) to protect the Labour Law rights of labour hire employees;
b) to ensure equality of treatment between labour hire employees and employees directly engaged by a user company without the intermediation of a labour hire company.
c) to prevent the use of labour hire employees to break strikes or enforce lockouts;
d) to promote permanent employment as opposed to the casualization of labour, and

[26] At p11G – 12D cited with approval in *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* at [38]
[27] At p736

e) to prevent user companies from avoiding their Labour Law responsibilities to persons who are de facto their employees.

The manner in which the Amendment Act pursues these objectives has been set out above. The applicant may have preferred Parliament to have chosen other means of regulation, but this is not the test.[28] It cannot be said that the means chosen by Parliament in the Amendment Act do not rationally advance the purposes set out in the previous paragraph.

THE ACT DOES NOT CONSTITUTE A MATERIAL BARRIER TO THE PRACTICE OF THE PROFESSION OF A ‘PRIVATE EMPLOYMENT AGENCY’

It was then contended that once the Amendment Act had passed the rationality review, the applicant could not show a limitation of Article 21(1)(j) unless it could prove that the Act had created a material barrier to the practice of the profession of labour hire. Here, according to respondents, the applicant was ‘hoisted by its own petard’ because its publicly stated position is that: *‘While the amended section 128 will have a negative impact for both client companies and brokers operating outside the confines of the law… [it] won’t change APS existing operations much, as it has already put measures in place to comply with the changes, focusing on value addition to both its employees and clients… ‘.*

It was then argued that the high water mark of the applicant’s case was that its workforce had declined from 1618 to 319 since the launch of the application and that nine of its clients had cancelled agreements allegedly because of the Amendment Act. It was pointed out that the applicants cannot show that a material barrier to practising the profession has been created by pointing only to their individual experience and that they have to show that the effect of the legislation, objectively, created a material barrier to anyone who wants to practise the profession. Even on the facts specific to the experience of the applicants’ there was no case made out of a violation of Article 21(1)(j). The decline in employee numbers did not advance the applicant’s case in this regard. On its own version, the applicant’s employee numbers had already dropped by more than two thirds from 6685 to 1618 in advance of the commencement of the Amendment Act. The employment numbers of the applicant were accordingly in steep decline without any effect caused by the Amendment Act. The Applicant

[28]“The question to be decided is not whether the policy underlying tne Liquor Act Is an effective policy; it is whether there is a rational basis for such policy related to the purpose of the legislation.’ See :S v Lawrence: S v Negal; S v Solberg 1997 (4) SA 1176 (CC) at para [68]. See also: *Trustco Ltd t/a Legal Shield Namibia & Ano v Deeds Registries Regulation Board & Others* at para [28] where the Supreme Court approached the rationality test on the basis that all the Government had to show was whether it’s purpose was legitimate and the legislation met that purpose.

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ascribes the subsequent drop in employment numbers from 1618 to 319 to the misdirected intervention of unions who allegedly persuaded the applicant's workers to resign from their jobs and, in the process, left many of these workers unemployed. The consequences allegedly caused by misplaced union intervention should not be treated as consequences that flowed objectively from the Act.

As far as the applicants' loss of some contracts was concerned it was submitted that such loss does not make out a case that the Act creates a material barrier to the practice of its business. Although some of the applicant's historical clients might see no continued value in their relationship with the applicant if they will be unable to avoid statutory obligations to their employees by interposing the applicant contractually between themselves and those employees, this does not amount to a material barrier to practice of the Applicant's profession.

The effect of the Amendment Act is that there will no longer be any inherent market value in the bare rental of workers' labour. But on the Applicant's version it has never been engaged in a business that was about the bare rental of workers' labour. Rather, it states that its services provide the following benefits to its clients:

a) the clients are provided with properly trained personnel and an entity to which it can report any labour issues it may have with a placed employee, which are then dealt with by the applicant;
b) Many clients prefer not to engage employees for an indefinite and permanent basis, when they are only required for a fixed period to meet seasonal demands. It is more cost effective to engage the applicant to provide temporary workers to perform the work when and if they are needed;
c) Clients prefer to avoid employing placed employees, thus saving on the direct and indirect costs associated with employment such as:

    i) attending to labour complaints;
    ii) Recruitment of employees;
    iii) Retaining employees that are only required on a temporary or fixed term basis;
    iv) dealing with the employees' conditions of employment and termination when they are no longer required;

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v) the applicant also performs advisory services specializing In providing labour and human resource assistance to various business entities concerning labour issues;

vi) applicant also provides customized training courses which it develops for its clients. The income received for these services is significantly less than what the applicants gets for hiring out its "employees" to user enterprises.

In so far as the alleged advantages of labour hire consist in more than the constitutionally impermissible "advantage" of allowing user companies to circumvent the Labour Act, there is nothing in section 128 which prevents private employment agencies from continuing to offer to its clients these advantages:

a) Section 128 will not deprive user companies of the flexibility of being able to use private employment agencies to recruit workers on short term contracts to deal with seasonal fluctuations, short terms peaks or demands, or to replace full time workers who are away on annual leave or maternity leave;
b) Section 128 will not prevent user companies from using private employment agencies to relieve them of the cost and burden of recruiting employees;
c) While section 128 will render user enterprises potentially vulnerable to labour complaints raised by labour hire workers, there is nothing to prevent the user company from contracting with private employment agencies to assume responsibility for dealing with any labour proceedings involving labour hire workers that they have provided or to indemnify the user enterprise.

What the Amendment Act does is to remove one constitutionally offensive market opportunity which labour hire companies had in the past: the opportunity to provide user companies with a means of avoiding responsibility to workers under the Labour Act. In the Trustco case, the Supreme Court held that fixed prices which prevented competition on price in the profession of conveyancing were not a material barrier to the practice of that profession. By parity of reasoning, the inability to offer user companies a means of avoiding responsibility to workers under the Labour Act cannot be seen as a material barrier to the practice of the regulated business of labour hire.

Ultimately and with reference to the *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para [660][29] this argument was rounded off by submitting that legislation that deprives a business of its competitive edge does not, for that reason, amount to a constitutional violation.

THE AMENDMENTS JUSTIFIABLE ito ARTICLE 22(2)

In regard to the possibility that the limitations imposed by the amendments could be held to limit Article 21(1), (which remained denied), it was contended that any such limitations would be justifiable in terms of Article 22(2) as, so the argument ran further, the amended Section 128 represented a proportional legislative response to the needs :

a) to protect the Labour Law rights of labour hire employees;
b) to ensure equality of treatment between labour hire employees and employees directly engaged by a user company without the intermediation of a labour hire company;
c) to prevent the use of labour hire employees to break strikes or enforce lockouts;
d) to promote permanent employment as opposed to the casualization of labour, and
e) to prevent user companies from avoiding their Labour Law responsibilities to persons who are de facto their employees.

AMENDMENT ACT NOT ULTRA V IRES

In this regard it was finally submitted that section 11 provides that the Amendment Act comes into operation on a date that is determined by the Minister by notice in the Gazette. Section 128(10) gives the Minister the discretion to make regulations. This is not a case where an Act could not be put into operation without regulations, necessary for the operation of the

[29] [660] ‘In this respect I would tend to agree with Moseneke J that the mere fact that a government measure could result in service-providers losing their competitive edge so as to face being driven out of business would not in itself be enough to make a measure legally inappropriate (unreasonable). The maintenance of 'business as usual' is not a constitutional principle, and the concept of reasonableness should not be used as an apparently neutral instrument which, regarding the status quo as the settled norm, serves to block transformation and freeze challengeable aspects of our public life’.

Act, having first been promulgated[30]. The contention that the Minister acted ultra vires in bringing the act into operation is therefore without basis.'

For these reasons the respondents asked that the application be dismissed with costs.

DOES THE SECTION 128 CREATE A MATERIAL BARRIER TO THE APPLICANT'S CONSTITUTIONAL ARTICLE 21(1)(j) RIGHTS

[21] Counsel were agreed that in the determination as to whether or not a regulation constitutes a material barrier to the right to trade or carry on any profession the court will have to approach the question as set out in the *APS* case. The so laid down approach entails a three step enquiry: the first is to determine whether the challenged law constitutes a rational regulation of the right to practise any profession, or carry on any occupation, trade or business; if it does, then the next question arises which is whether even though it is rational, it is nevertheless so invasive of the right to practise, that it constitutes a material barrier to the practise of a profession, trade or business. If it does constitute a material barrier to the practise of a trade or profession, occupation or business, then the government will have to establish that it is nevertheless a form of regulation that falls within the ambit of article 21(2).[31]

IS THE AMENDMENT LEGISLATION RATIONAL?

[22] The focus of applicant's case was not really aimed at this leg of the enquiry. The high-watermark of the applicant's argument in this regard was that the amendment legislation amounted to a 'total overkill'. This characterization is already revealing: implicit in the term 'overkill'' is the intention to 'kill'. It is also implicit in this

[30] *Pharmaceutical Manufacturers Association of SA & Another: In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) at [79] – [86]
[31] *Trustco Ltd t/a Legal Shield Namibia & Ano v Deeds Registries Regulation Board & Others* at paras [26]- [27]

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term that this intention is then used to make more than sure that the original intention is achieved. There is nothing irrational in this.

[23] Also the closer analysis of the factors, on which applicant's submissions regarding the averred overkill were mounted,[32] reveals that : - just because 'the ILO has suggested 'regulation' and 'licensing' and 'the allocation of responsibilities between the said three parties involved' and Legislature has then both 'regulated' and 'licensed' and deemed it fit to allocate certain 'responsibilities' to both the 'labour hire entity' and 'the user enterprise' instead of allocating the responsibilities in a different manner, - it cannot be said that these facets of the manner of such regulation are irrational or not connected to the underlying purpose.

[24] In this regard the respondents have contended that the amendment legislation constitutes a rational and legitimate response to the *APS* case and that the means employed by the Legislature are rationally connected to the attainment of legitimate government objectives.

[25] I accept, as was more particularly argued, that the amendment legislation gives effect to one of the fundamental objectives of state policy which is aimed at the protection of workers and more importantly which is aimed at preventing persons from bypassing the Labour Act 2007. It should not be overlooked that it was the respondent's case that the Labour Ministry had 'pinpointed what it considered to be the major gap in the then-existing law, namely that private parties – such as the

[32]ie. " … when the ILO through its Recommendations or Conventions suggested regulation or licensing, the Namibian Legislature did both. When the ILO suggests the allocation of responsibilities between the three parties involved, the Legislature allocated all the responsibilities to both the employer (labour hire entity) and the user enterprise, even criminal liability. In actual effect a dual employer system was created, one contractual and one statutory, with joint and several responsibility for everything. All three parties to the tripartite arrangement now have to apply for exemption which is, as the ILO points out, unique in the world. An exemption is provided for on application (subsection (8).) This is however subject to subsection (9) which again imposes joint responsibility …"

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labour hire agencies and user enterprises – were able to enter into contracts which placed the relationship between the user and the employees performing its work – beyond the reach - and more importantly - beyond the protection afforded to such employees by the labour laws.

[26] All this is correctly viewed against the general purpose of labour law which is usually aimed at cutting back the exercise of the more dominant contractual power of employers and to provide employees with rights which they normally cannot obtain at the time of concluding their contracts of employment. I am also inclined to agree with Mr Chaskalson's submission that, viewed against this background, the amendment legislation is ordinary labour legislation, aimed at achieving the said objective and at curing the lacuna mentioned above.

[27] It is clear that the purpose of the amendment legislation and particularly section 128 is to regulate the framework within which labour hire entities will be allowed to operate in Namibia.

[28] On a closer examination of this framework it appears that the Amendment Act essentially brings about a situation that has the following impact on the situation of the labour hire entities and user enterprises: once a labour hire entity has placed one of its employees at the disposal of a user enterprise the user enterprise attracts all the normal statutory obligations of an employer in respect of that individual. The user enterprise is then prohibited from employing a labour hire employee on terms and conditions that are less favourable than those of comparable employees already in its employment and who are not labour hire employees or from otherwise discriminating between labour hire employees and other employees in its employment through its policies and practices. Subsection (5) prevents a user employee from employing labour hire employees to break strikes or to enforce lockouts or to casualise the workforce. Thus the engagement of labour hire employees during or in contemplation of a strike or lockout is prohibited. In addition the user enterprise is prevented from engaging labour hire employees to replace existing workers who have been dismissed within the previous six months.

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[29] On the other hand the position of the employees of the labour hire entities, who are made available to user enterprises, is improved upon as follows: these temporary workers are now employed on the same terms and conditions as the comparable employees already in the employment of the user enterprise - no discrimination between labour hire employees and other employees through the user enterprises policies and practices is allowed. Subsection (3) merely confirms that, as against his/her employer, the labour hire employee has all the rights of other employees under the Act including the right to join a trade union and the right to be represented by the trade union in collective bargaining with the employer; Subsection (4) protects the aforesaid equality of employment rights; Subsection (6) provides employees with labour law remedies in relation to disputes arising from an alleged contravention of subsections (3) to (5).

[30] The remaining sections relate to criminal liability created for a user enterprise for the contravention of subsections (4) or (5) and provide for exemptions from the provisions of subsection (2), to be granted on application with the support of all three parties, for a user enterprise. If an exemption is granted, the user enterprise and the labour hire employer become jointly and severally liable for the labour related contraventions of the Act; Subsection (10) empowers the Minister to make regulations concerning the implementation or enforcement of the section, if deemed necessary.

[31] It appears that the scheme which was so created by the new section 128 is indeed a response to the *APS* case. It is also a response which is connected to - and is indeed aimed at the curing of the perceived 'mischief'[33] - in that it obviously attempts to close the gap in the existing legislative framework, which has allowed the circumvention of the Labour Act, in the past. The amendment legislation achieves the abovementioned goals in its own peculiar way. That is a far cry from being

[33]'that labour hire agencies and user enterprises – were able to enter into contracts which placed the relationship between the user and the employees performing its work – beyond the reach - and more importantly - beyond the protection afforded to such employees by the labour laws.'

irrational. On the contrary nothing in these sections indicates in my view that the regulation is not rational, even though it might amount to an ‘overkill’.

ARE THE AMENDMENTS TOO INVASIVE?

[32] The applicant’s complaint is in essence that the amendment legislation has put in place measures which have sounded the ‘death knell’ for labour hire in Namibia as the effect of the regulation is such that it would make it ‘sheer lunacy’ for user enterprises to continue to make use of the applicant’s services. It is contended that the legislation is so onerous that it infringes on the applicant’s constitutional right to trade and do business.

[33] The infringement of this right occurs, according to applicant, as the amended section 128 - through the particular way in which it has changed the environment, in which the applicant is to operate - has created a material barrier to the applicant to trade and do its business. This situation was evidenced by the rapid decline in applicant’s workforce and the number of user enterprises which have already indicated that they would no longer make use of the applicant’s services.

[34] The material barrier complained of - as per the analysis of applicant is achieved by – what is characterized as - a ‘total overkill’ which is so restrictive on the applicant’s business that it constitutes a material barrier to its business.

[35] The general complaint in this regard is for example that the Namibian Legislature allocated all the responsibilities to both the employer (labour hire entity) and the user enterprise, even criminal liability - that in actual effect a dual employer system is created, one contractual and one statutory, with joint and several responsibility for everything and that all three parties to the tripartite arrangement now have to apply for exemption, which is unique in the world.

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[36] The particular complaints in this regard emerge from the applicant's specific analysis of the regulatory scheme created by the amendment legislation - which has already been quoted above and which are considered in detail below.

[37] The applicant has however conceded that the amendment legislation and section 128 do not prohibit the applicant from conducting its business as a labour hire agency. It however nevertheless contended that section 128 of the regulatory legislation violates its Article 21(1)(j) and Article 10 constitutional rights.

[38] Respondents on the other hand disputed that the amendment legislation posed a material barrier to the applicant's carrying on of its business. It was submitted that the relied upon decline in the applicant's workforce was not supportive of applicant's case, which reflected the applicant's individual situation, whereas it had to show, objectively, that a material barrier had been created for anyone wanting to ply that particular trade.

[39] It was pointed out that on applicant's own version its workforce had already declined prior to the commencement of the Amendment Act, which decline had been attributed to some 'misguided union intervention', the effect of which could not be regarded as a consequence flowing from the Act. In any event the loss of some contracts did also not make out a case.

[40] Although it was conceded that the Amendment Act removed the inherent market value of the bare rental of the work of labourers it was pointed out that, according to the applicant, its business was not simply about the bare rental of worker's labour only as the applicant also provided a host of other services to the user entities. In this regard the applicant had publicly proclaimed that: *'… [it]* (the Amendment Act) *won't change APS existing operations much, as it has already put measures in place to comply with the changes, focusing on value addition to both its employees and clients… '.*

[41] In my view these conflicting positions of the parties are best adjudged by analysing the specific arguments against the backdrop of the individual sections of the, to be impugned, legislation. I will conduct my analysis accordingly.

[42] In doing so I am mindful that the court is to adopt a deferential approach.[34]

THE ASPECT OF THE CRIMINAL SANCTIONS – SUB – SECTION (7) and SECTION 26(3) of the EMPLOYMENT SERVICES ACT 2011

[43] The particular complaint in this regard is that : 'Labour hire employers are tasked, under pain of criminal sanction, to police user enterprises in respect of the latter's compliance with the Affirmative Action (Employment) Equity Act, No 29 of 1998. This is so while this is not a requirement between the user enterprises and their employees'; and that 'Labour hire employers are tasked, under pain of criminal sanction, to police user enterprises in respect of the latter's contributions to the Social Security Commission. This is so while this is not a requirement between the user enterprises and their employees'.

[44] I cannot see how these provisions, desireable or not, constitute a material barrier for the applicant to conduct its business. There is also no policing done as is argued. Section 26(1)(b) of the Employment Services Act 2011 merely sets as a pre-condition, for the placement of workers with any user enterprise, that such user enterprises have complied with its obligations set by the Social Security Act of 1994 and the Affirmative Action Equity Act of 1998 – put differently - the Legislature has deemed it fit to require user enterprises to be in compliance with the Social Security- and Affirmative Action Equity Acts – before any person may be referred by a private employment agency to a user enterprise. Section 26(3) then criminalises the contravention of sections 26 (1) and (2) of the Employment Services Act 2011 by private employment agencies. It would seem that this pre-condition for the referral of

[34] *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others* at paras [27] to [28] and *Namibia Insurance Association v Government of the Republic of Namibia and Others* at p11G to 12D

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individuals is essentially a protective measure taken in order to socially protect the 'pawns' in the 'placement game'. It is also correct, as pointed out by Mr Chaskalson, that entities, such as the applicant, do not attract any criminal liability under section 128(7) of the Labour Act. It is the user enterprises that do. It is also the user enterprises that can be exempted from criminal liability through the exemption from sub-section (2) as provided for in sub –section (8). This distinction was lost sight of in the argument mustered on behalf of applicant.

THE ASPECT OF JOINT AND SEVERAL LIABILITY – SUB - SECTION (9)

[45] User enterprises, so it is argued, are jointly and severally liable with labour hire employers for any contravention of any labour related legislation which provisions serve as a disincentive to use labour hire services.

[46] The obvious and self-proclaimed aim of the amendment legislation is to reel in those private entities which in the past were able to enter into contracts which placed the relationship between the user and the employees performing its work beyond the reach of the labour laws. The sub-section clearly ensures legislatively that these employees now have the right to seek redress for any contraventions of the Labour Act from both the employee's 'deemed employers'. This provision thus brings about a situation that is not at all alien to a labour context and where any other category of employee would quite normally be able to hold an employer liable for a contravention under the labour legislation.

[47] In any event any resultant liability would be joint and several. Any such liability will thus be in accordance with an accepted and established legal principle, which clearly delineates the scope and limitations thereof. How the sharing of this burden, which is joint and several, can thus serve as a disincentive to use labour hire services is not understood.

THE ASPECT OF THE SAME BENEFITS – SUB – SECTION (4)

[48] Here the complaint is that 'the requirement, that user enterprises must afford labour hire employees the same benefits as their own employees, will undermine labour hire employers agreements with their own employees with regard to, for example, pension contributions, medical aid contributions and payment to unions'.

[49] This argument, with respect, firstly loses sight of the purpose with which the Amendment Act was passed, namely to close a loophole in the existing statutory framework which allowed labour hire entities and user companies to contractually circumvent the provisions of the Labour Act. The message is clear - labour hire is no longer to come at the expense of the most vulnerable link in the chain, the worker. The Legislature has signaled its intentions: from now onwards labour hire comes with a package - that is the same package that comes with the engagement of all labour. Surely the raising of the bar to this extent – which merely ensures that this exploited sector of the workforce benefits equally, on par, with all other employees under the Labour Act - does not and cannot amount to a material barrier to the trade in the hiring out of workers.[35]

[50] In any event this argument also loses sight of the fact that the labour hire workers, placed at the disposal of a user enterprise, would only enjoy the benefits of the user entity for the duration of their placement with such user entity. There is nothing in the Act that suggests that these benefits would also accrue to the labour hire employees thereafter or would impact on the governing conditions of employment already in existence between the labour hire entity and its employees prior to any placement. If there would be any undermining of labour hire employers

[35] In this regard it is interesting to note - as is reflected in the APS case at para [114] G that ' … Eight countries (Australia, Belgium, France, Italy, Luxembourg, the Netherlands, Portugal and Spain) have laws guaranteeing that (agency workers) enjoy the same pay and conditions . . . as similar permanent employees working in the same host organisation.'

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agreements with their own employees, in the sense that there would be dissatisfaction with the benefits conferred by them, the normal channels for such grievances created by the Labour Act could be followed to improve such benefits and the governing conditions. Any dissatisfaction brought about by the placement of any worker with a user enterprise would be no different to one brought about by the reading of an article in a newspaper in which, for instance, it would have been reported that the employees of a particular company were able to achieve better salary-pension- or medical benefits through industrial action. The argument that the Legislature, in its endeavour to improve the conditions of labour hire employees – may – as a by-product - create dissatisfaction with existing conditions of employment, can in my view, never validly found an argument that a legislative provision is too invasive of a parties' right to trade. Dissatisfaction, unfortunately, is a human frailty which can never be discounted altogether.

[51] It was also submitted that 'because labour hire employees must be remunerated the same as the existing employees of user enterprises that this would result in the user enterprises rather using temporary employees of their own as then they can appoint on probation and make a distinction based on inexperience and no record of loyalty'.

[52] The referred to option for user enterprises to make use of temporary employees is obviously real and will always be available. But hasn't that option always existed, even before the promulgation of the Amendment Act? On the other hand, it is also without doubt that a user enterprise will never be able to obtain the same overall benefits from a temporary employee that it would get if it were to secure the services of the applicant, who admittedly provides the broad spectrum of additional services listed above. Also from this example it becomes clear that the provisions of sub-section (4) do not support the applicant's case.

THE ISSUE TAKEN WITH SUB – SECTION (2)

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[53] The criticism here is that 'employees of the labour hire company are by operation of law transferred to the user enterprise without any relevant party's concurrence and in total disregard of the relevant agreements concluded between the parties'. It was also submitted that 'subsection (2) does not pass constitutional muster in that it does not even deem the employees of applicant to be the employees of a user enterprise but makes it a legal fait accompli. In this subsection there is an interference with applicant's contractual arrangement with its employees, and not only with its employees, but also with the freedom of contract of the user enterprise which, so it was submitted, was overbroad and for which there can be no justification. In any event respondents' stance is that none is necessary as the legislation does not apply to applicant and other labour hire companies. This section is neither reasonable nor rationally connected to the objective which can only be aimed at regulating the labour hire services industry so as to protect employees'.

[54] On behalf of the respondents it was however argued that the constitutionality of sub-section (2) was established with reference to what the Supreme Court had said in the *APS* case:

'[100] We have discussed the principle that 'labour is not a commodity' earlier in this judgment and pointed out that, unlike a commodity, it may not be bought or sold on the market without regard to the inseparable connection it has to the rights and human character of the individual who produces it. We emphasised the importance of labour legislation in bringing about social justice at the workplace, to redress bargaining imbalances between employers and employees and to protect employees, especially those who are most vulnerable, against exploitation. The numerous regulative requirements proposed in the Convention are intended to ensure that the labour of agency workers is not treated as a commodity and that their human and social rights as workers are respected and protected in the same respects as the protection accorded in labour legislation to employees in standard employment relationships. It is self-evident from a reading of the text as captured in the summary above that the purpose of the Convention is to create a framework within which private employment agencies may operate and, at the same time, to ensure that workers using their services are protected. If the proposed regulative framework for the protection of

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the workers and their rights is put in place by Member States and it is supervised and enforced, it would not allow for the labour of agency workers rendered within its protective social structure to be treated like a commodity. This is so, not only because their engagement by agency service providers and placement with agency clients are subject to their consent, but also because the social protection provided for in those regulative measures, which is inseparably attached to their person and labour, is by legal implication part of the terms and conditions of the triadic employment relationships which arise as a consequence …'.

[55] It does indeed appear from sub-section (2) and the section as a whole that regulative requirements are imposed by law on the contractual relationships between the parties. There is nothing untoward in this.[36] It appears further that the Legislature has intended to ensure thereby that the labour of agency workers can no longer be treated as a commodity and that their human and social rights as workers are respected and protected in the same respects as the protection afforded in labour legislation to employees in standard employment relationships. The amendment legislation clearly creates a framework within which private employment agencies may operate, at the same time, ensuring that workers using their services are socially protected.

[56] Sub-section (2) also creates the so-called 'triadic employment situation' which, by legal implication, imports the terms and conditions through which the protection of the agency workers is brought about. This provision thus lies at the heart of the amendment legislation and through which the ultimate object, for which it was created, is essentially achieved.

[57] The fact that the Legislature has thus ensured that agency workers are to be afforded the same protection as is accorded, in labour legislation, to employees in standard employment relationships, surely cannot be regarded as more invasive of the applicant's rights than the impact that normal labour legislation has on the rights

[36]See for instance Sections 9(1) and (2) of the Labour Act 2007

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of any other employer.[37] Standard labour legislation is surely burdensome on any employer and is obviously also invasive of an employer's rights, albeit to a permissible extent. It does however not follow that the mere extension of the standard protection so afforded – and although invasive to the said extent – automatically also constitutes a material barrier to the applicant practising it's trade.

[58] In any event I also have to agree with respondent's counsel that the related argument mustered on behalf of applicant to the effect that subsection (2) does not pass constitutional muster cannot be reconciled with what the Supreme Court has stated in the *APS* case, as cited above, and from which it appears that the Supreme Court does indeed consider legislative interference with the 'triadic contractual arrangement' as warranted in order to ensure that the labour of agency workers will no longer be treated as a commodity only. It further cannot be ignored that the Supreme Court has held in no uncertain terms that the creation of a legislative framework to achieve this purpose is justified and necessary in order to ensure that 'private employment agencies may operate and, at the same time, to ensure that workers using their services are protected to the same extent as the protection accorded in labour legislation to employees in standard employment relationships'. It is for these reasons that the applicant's arguments made in respect of sub-section (2) cannot be upheld.

THE ISSUE TAKEN WITH SUB – SECTION (3)

[59] In regard to sub-section (3) it was submitted that 'employees of the labour hire company are entitled to join the union and (where it is the exclusive bargaining unit) are compelled to be represented by the union of the user enterprise and that the labour hire company will be subject to the results of the collective bargaining process at the user enterprise, despite not being a party to such process'.

[37] In this regard it is to be kept in mind that sub-section (2) does not immediately apply to labour hire entities but to the user enterprise in the first instance - the labour hire entity is only affected once the provisions of sub-section (9) apply -

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[60] It must immediately be stated that sub-section (3) does not oblige the individual placed by a private employment agency with a user enterprise to make use of the right conferred by the sub-section. The section is clearly regulatory only in respect of the rights conferred. The labour hire employee, who as a result of any placement with a user enterprise becomes entitled to the same conditions of employment as any other employee of the user enterprise surely has a direct and substantial interest in the outcome of any collective bargaining process from which he or she may also benefit during the period of placement with that user enterprise. For this purpose the individual concerned may elect to rely on the rights conferred by sub-section (3) to be represented by a trade union in collective bargaining with his or her employer, ie. here the user enterprise. It goes without saying that such employee already has those rights also in respect of the labour hire entity through which he or she is placed and where such individual is in any event already employed. Again it does not appear how the extension of the rights, afforded by this sub-section and which regulate this fundamental aspect of the triadic relationship, in a clear manner, should be regarded as being too invasive of the applicant's freedom to trade.

[61] The fundamental importance and constitutional correctness of this facet of the regulation was also borne out by the respondents' counter-argument which was raised on the strength of paragraph [107] of the *APS* judgment where the Court stated:

'[107] … The role of independent trade unions in protecting the rights and interests of workers and in promoting sound labour relations and fair employment practices by collective bargaining, industrial action and action to influence political policies bearing on labour related issues is so trite that it need not be restated. That role is clearly recognised: on an international level in numerous Conventions and Recommendations of the ILO;[38] on a

[38] eg. the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948; the Right to Organise and Collective Bargaining Convention 98 of 1949; the Workers' Representatives Convention 135 of 1971; the Collective Bargaining Convention 134 of 1981; the Collective Agreements Recommendation 91 of 1951 and the Collective Bargaining Recommendation 163 of

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national level by the Constitution and Chs 6 and 7 of the Act and on an institutional level by the numerous other statutory provisions institutionalising union participation and consultation on labour related matters. The role of unions in the context of agency work is also repeatedly emphasised in the Convention. The preamble to the Convention expressly recognises 'the need to guarantee the right to freedom of association and to promote collective bargaining and social dialogue as necessary components of a well-functioning industrial relations system'. Article 4 of the Convention requires of Member States to take measures 'to ensure that the workers recruited by private employment agencies . . . are not denied the right to freedom of association and the right to bargain collectively'. Article 11 imposes on Member States the duty to 'take the necessary measures to ensure adequate protection for the workers employed by private employment agencies . . . in relation to: (a) freedom of association; (b) collective bargaining' and, in addition, to determine and allocate the respective responsibilities in respect of collective bargaining between agency service providers and agency clients.[39] These provisions allow for ample scope to regulate agency work, to facilitate union membership and organisation and to determine collective bargaining responsibilities. If, as some suggest, collective bargaining will only be effective if it involves the person that determines the parameters of agency workers' employment,[40] regulation may allocate responsibility for collective bargaining either to the agency client or to the agency service provider and agency client jointly. Moreover, collective bargaining may potentially ensure that agency workers receive the same remuneration as that which an agency client pays to permanent employees for doing the same work.'

[62] Nothing needs to be added in this regard, save to reiterate that this dictum confirms the conclusion already reached in paragraph [60] above.

SUB – SECTION (5)

[63] No issue was taken with the prohibition to utilize agency workers during or in contemplation of a strike or lockout; or within six months after the user enterprise

1981, to mention a few.

[39] See art 12(a)

[40] Jan Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship'

has, in terms of section 34, dismissed employees performing the same or similar work or work of equal value.

SUB – SECTION (6)

[64] Subsection (6), read with subsection (9), so it was contended, ' … amounts to a gross interference with rights in that it allows an employee to take either the applicant or the user enterprise to task with the Labour Commissioner / Labour Court and seek relief from either of them, the one contractually the employer and the other the statutory employer by virtue of section 128 … the relief would in any event be competent in respect of such an employees' real employer and there is no need or justification for the creation of two employers.'

[65] This section quite clearly now makes the usual labour law remedies available to an individual placed by a labour hire agency with a user enterprise. Historically both the labour hire entities and the user enterprises were always seperately open to complaints which could be raised by the workers on their respective payrolls. The amendment legislation has now created a situation where all agency workers placed with a user enterprise are not only guaranteed the same conditions of employment as any other employee of the user enterprise, but are also afforded the labour law remedies that come with such placement together with the right to enforce such remedies against both the private employment agency[41] and the user enterprise. The right of a placed employee - aggrieved by a contravention of subsections (3), (4) or (5) of section 128 - to seek relief for any such contravention - through the remedies listed in sub-sections (6)(a) to (d) - and the indirect exposure of the labour hire agency and the direct exposure of the user enterprise - to the potential liability that was so created – will however obviously always be joint and several. Although possibly amounting to an 'overkill', as conceded above, I cannot detect the complained of 'gross interference with rights' in this provision of the scheme created

[41] In the event of exemption as provided for in sub- sections (8) and (9)

by the Legislature just because an agency worker has now obtained the right, by statute, to possibly proceed against both his 'deemed' employers, but always subject to the principle of joint and several liability. Ultimately the outcome, in the event of liability, will be the same – although both deemed employers are then potentially liable jointly, the payment or performance of what may have become due by the one, will absolve the other. I am thus unable to detect how the provisions of sub-section (6) read with sub-section (9) are then so restrictive that they constitute a material barrier to the applicant to conduct its trade in a field of business that occurs in any event in an environment that is highly regulated by statute and where employers will always be exposed to the potential liability created by labour legislation.

[66] In the end result and from the aforegoing in-depth analysis of the legislative structure created by the amendment legislation complained of, the conclusion must, in my view, be drawn that it is not so invasive of the applicant's fundamental constitutional freedom relied on that the restrictions imposed by the amendment legislation are to be regarded as an impermissible material barrier to the applicant conducting its business. In such circumstances it does not become incumbent on the respondents to justify the form of the regulations in terms of Article 21(2).

[67] This conclusion is reinforced by what was said by the learned judges of the Supreme Court in *Mweb Namibia Pty Ltd v Telecom Ltd & Others*[42] when they endorsed what was stated in the *Namibia Insurance Association* case:

> *'Economic regulation inevitably involves policy choices by the government and the Legislature. Once it is determined that those choices were rationally made, there is no further basis for judicial intervention. The courts cannot sit in judgment on economic issues. They are ill-equipped to do this and in a democratic society it is not their role to do so. ' …*
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> [28] I fully endorse the view taken by the judges who presided in the *Namibian Insurance Association* case supra as supported by the quotations from cases they

[42] At para's [27] – [28]

cited. In the circumstances, I also hold that it is improper for this court to impose its own judicial decision in supersession of the government's political judgment of legislating for the introduction of the regulatory regime against which Mweb is complaining in this matter.'

[68] Also in this case the applicant has complained of the fact that its operations will from now onwards be affected by the particular manner in which parliament has chosen to regulate the players in the field of labour hire. It has not gone unnoticed from the close scrutiny of the particular manner in which this regulation was structured that many facets of such regulation could have been moulded in a different or even better fashion. In such circumstances and while dealing with the question of the applicant's freedom of economic activity it became particularly important to keep in mind that the courts in most modern democratic countries proceed from the premise that it is not for the courts to dictate economic policy and regulation. Ultimately the adjudication of this matter had to occur in the acknowledgement that also this court has recognized :

' … that in matters involving a country's economy, it is normal and usual that a government will legislate to regulate the actors, who are usually in the private sector, as to how such actors will carry on a given economic activity. In such a situation, the attitude of the courts is that it is not in their province to interfere — provided that certain conditions are present — on the basis that the courts would have handled the situation differently.'

[69] Once it was then shown in this matter that no grounds existed on the application of the applicable 'three-step' approach to set aside the amendment legislation or part thereof, any basis, to judicially interfere therewith, fell away due to the premise that the court will not interfere in this sphere, merely for the reason that it would have handled the regulation differently.

THE ALLEGED VIOLATION OF THE APPLICANT'S ARTICLE 10 RIGHTS

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[70] Finally it should be mentioned that the applicant initially also mounted its constitutional attack on the alleged infringement of article 10 of the Constitution. This ground was not persisted with and is accordingly not dealt with herein.

THE ALLEGED VIOLATION OF THE APPLICANT'S ARTICLE 18 RIGHTS

[71] The applicant's attack based on Article 18 was always conditional on the respondents relying on sub-section (10) in order to save the constitutionality of section 128. This scenario has not arisen. In any event it would appear from the language employed in sub-section (10) that the Minister's power to make regulations is discretionary and the failure to promulgate regulations prior to the putting into operation of the Act cannot thus be regarded as an ultra vires act by the first respondent which would entitle the applicants to have the Act set aside. [43]

[72] In the result the application falls to be dismissed with costs, such costs to include the costs of two instructed counsel and one instructing counsel.

H GEIER

Judge

[43] *Pharmaceutical Manufacturers Assoc of SA: In re Ex p President of the RSA* at [69] and *Trustco Ltd t/a Legal Shield Namibia & Ano v Deeds Registries Regulation Board & Others* at [39]

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J.C. LIEBENBERG

Judge

APPEARANCES

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