

**INTERNATIONAL LABOUR OFFICE
NATIONAL STUDIES ON WORKERS=PROTECTION**

COUNTRY STUDY:

South Africa

HALTON CHEADLE^{*}
and
MARLEA CLARKE^{}**

^{*} Professor of Public Law, Faculty of Law, University of Cape Town (UCT), South Africa

^{**} Visiting researcher, Institute of Development and Labour Law, Faculty of Law, UCT

CONTENTS

Introduction

Section One: Socio-Economic and Legal Context2

1.1 Brief Overview of Labour Market Policies2

1.2 Legal Framework 7

Section Two: Employment Relationships11

2.1 Identifying the contract of employment11

2.2 Law on casual and temporary work16

2.3 New patterns of employment: current trends18

2.4 Enforcement mechanisms22

Section Three: Triangular Relationships25

Temporary Employment Agencies25

Section Four: Self-Employment (not dependent)26

Section Five: Self-Employment (dependent)28

Section Six: Sectoral Case Studies29

Transport29

Clothing and Textile33

Engineering36

Hospitality39

Retail40

Construction42

Small Business43

Conclusion44

Appendix

Cape Town, South Africa. 2000.

International Labour Office
National Studies on Workers= Protection
South Africa

Halton Cheadle

Marlea Clarke

Introduction

It barely needs stating that the changes wrought during the last decade in South Africa have been momentous. Alongside social and political processes of democratisation has been the restructuring of the labour market and increasing assimilation of the economy into the global market economy. This shift in macro-economic policy from a regulatory to a more market-oriented one began in the 1980s and has accelerated in recent years. Increased involvement of global economic forces in the South African economy and the formulation of its economic policy is one indication of this shift from economic and political isolation to increasing involvement in the global market.

Trade and industrial policy has also undergone significant changes. Tariffs that once protected the domestic manufacturing industry have under GATT been drastically reduced. Local content rules in the automobile industry have been abrogated, and subsidies for agriculture have fallen away. At the ideological level, the discourse is premised on increased competition as South African companies compete in other markets and compete with foreign companies in the domestic market. This premise is used to justify the adoption of new strategies in both the workplace and the labour market.

While the present government=s labour market policy ^{**} endorses this analysis of the South African labour market, it has concentrated on training and the development of skills rather than dismantling the legal protections for workers and worker organisations. Employers, on the other hand, have increasingly demanded greater flexibility in both the nature and structure of the employment relationship ^{***}. In practice, employers have

^{**} See the Comprehensive Labour Market Commission, *Restructuring the South African Labour Market*, (Pretoria: Government Printer, 1996). See also, Growth, Employment and Redistribution (1996), South African Government Macroeconomic Strategy document.

^{***} See for example, submissions from Business on the Green Paper on the Employment Standards Act, A Business South Africa=s Comments on the Green Paper on an Employment Standards Act@ (April 1996), Business South Africa; AResponse to the Employment Standards Act@ (June 1996), Business National Study, Workers= Protection South Africa
Page 4 of 44

developed a spread of strategies ranging from the use of fixed term contracts, the creation of permanent pools of casual employees, the employment of temporary employment agencies, the recasting of employment contracts into independent contracts to the use of home-work. Some of these strategies are outlawed B many though are not. The crisis in law enforcement means that even those employment practices that are prohibited flourish.

SECTION ONE: SOCIO-ECONOMIC AND LEGAL CONTEXT

1.1 Brief Overview of Labour Market Policies

Labour market policy in the 1980s.

In response to increased pressure from business, and the growing economic and political crisis facing the country in the 1980s, the apartheid government began introducing policies of trade liberalisation, privatisation and de-regulation. Policies were aimed at increasing flexibility and >promoting the expansion of the small business sector=. This thrust towards de-regulation took three forms: legislative change; administrative exemption; and a steady de-emphasis in the monitoring and enforcement of labour legislation.

The early 1980s witnessed the formal inclusion of African workers into the legislative framework for collective bargaining. However, gains made by trade unions organising African workers through the use of this framework led to a set of amendments in 1988 which sought to curtail the rights of workers to use economic power and the courts to protect and advance worker interests. These amendments led to widespread protest culminating in an agreed roll-back of the changes in the 1992 amendments. In a less conspicuous way, the apartheid government systematically exempted small business from protective labour legislation B the effects of which remain even though the enabling legislation is no longer in existence. Further, the Basic Conditions of Employment Act, 3 of 1983 permitted the Minister to grant exemptions from the provisions of the Act B a

South Africa. See also AAddressing the Needs of Small Business@, Issue paper on the Basic Conditions of Employment Bill (1997), Small Business Issues Paper on the BCEB, Small Business Project.

A.J. Naude, AThe Creation of An Enabling Environment for Small Business through De-regulation: the South African Example@, unpublished paper, 1993.

This was done by the blanket exemption of small business from wage determinations, industrial agreements and provisions of protective labour legislation. It was also done through legislation such as the Temporary Removal of Restriction on Economic Activity Act, 87 of 1986. This Act permitted the suspension of labour legislation if it impeded competition, the creation of job opportunities or economic progress B the suspensions made in terms of that Act remain in force even though the Act itself is no longer in existence. Southern African Labour Development Research Unit, *Wage Determination in South Africa*, Vol II (1978-1988). (Cape Town: SALDRU, 1989), pages 70-1.

facility the Minister was not shy to use during the 1980-s. Similar provisions existed in the Wage Act, 5 of 1957.

At the heart of any effective law is the commitment to monitor and enforce. The 1980s witnessed a steady slowing down of enforcement. The inspectorates were divided into different functions and different departments. The annual budgets did not give priority to these inspectorates and as a result, the new democratic government inherited dispirited and divided inspectorates with minimal impact.

Labour Market Policy in the 1990s

After the historic elections in 1994, the new government boldly committed itself to its election platform - the Reconstruction and Development Plan (RDP). As Saul argues, the RDP emphasized both the centrality of basic needs and the importance of the mobilization and empowerment of the mass of South Africans for both democratic and developmental purposes. Although the Plan's proposals on macro-economic strategy were broad in outline, they clearly advanced a Keynesian paradigm. In general, the RDP proposed growth and development through reconstruction and redistribution, and sought a leading and enabling role for government in guiding the economy through reconstruction and development. It supported the idea of a mixed economy and argued for a living wage as a pre-requisite for sustained economic growth.

It was within this framework that the Minister of Labour developed a five-year plan for labour market reform involving the systematic review of all labour legislation. Legislative reforms aimed to remove the vestiges of the apartheid labour system through extending and protecting the rights of workers, standardising terms and conditions of employment, and creating institutions and mechanisms for the enforcement of labour legislation and the resolution of conflict. To this end, the new Government enacted a number of pieces of legislation. The Labour Relations Act (LRA) overhauled the legislation on collective labour relations extending organisational and collective bargaining rights to all employees. The next statute to be introduced was the Basic Conditions of Employment Act (BCEA). That statute set the minimum standards of employment and extended its protective embrace to all employees including casual

John Saul, *AMagical Market Realism and the South African Transition*® paper presented to the annual meeting of the American African Studies Association, Chicago, October, 1998.

Act, 65 of 1995

Act, 75 of 1997

employees. The Employment Equity Act followed with the Skills Training and Development Act hard on its heels. After the 1999 elections, the ANC government stated its commitment to extending existing legislation, and creating mechanisms to address outstanding labour issues. One of the key areas identified for reform is the social welfare system. As a result, the social welfare legislation is presently under review.

Alongside the government's commitment to economic equity and distributive justice has been the overall aim of stimulating growth and attracting foreign investment through increasing flexibility in some areas of the labour market. This is evident in the new legislation. Each law explicitly articulates a polarity with social justice at one pole and flexibility at the other. Indeed the defining theme of the five year plan was 'regulated flexibility'. Although in both the LRA and the BCEA there were significant gains in protection for workers, these laws explicitly promote economic development, restructuring, competitiveness and increased flexibility. The BCEA, for example, tries to strike a balance between the conflicting goals of increased equality in the labour market and international competitiveness through greater flexibility. It does this by setting a floor of rights, then allowing for the variation of these rights by collective bargaining, employee consent and a system of sector specific standards determined by the Employment Standards Commission.

Economic Restructuring and the Jobs Crisis. South Africa's economy has been in decline for over a decade, with rising unemployment the most apparent manifestation of the crisis. National statistics reveal that out of the economically active population, 8.7 million are workers in the formal sector, 2.1 million work in the informal sector, and 2.5 million (22%) are unemployed. The total unemployment rate increases significantly using the expanded, rather than official definition of unemployment. If discouraged job seekers are

Act, 55 of 1998

Act, 97 of 1998

A new Unemployment Insurance Bill is being prepared by the Department of Labour for presentation to Cabinet in the near future.

See section 1 of the LRA which describes as the law's purpose the advancement of 'economic development, social justice, labour peace and the democratisation of the workplace'. Section 1 of the BCEA states that the purpose of the Act is: 'to advance economic development and social justice by Y establishing and enforcing basic conditions of employment; and, by regulating the variation of basic conditions of employment'.

October Household Survey, 1997. Central Statistical Services of South Africa.

The October Household Survey is an annual survey, based on a probability sample of a large number of households, and covering a range of development indicators. Information from this survey, along with other government statistics is available on the Central Statistical Service web page <http://www.statssa.gov.za>.

Unemployment is calculated in two ways. The official definition calculates unemployment as: people within the economically active population who (a) did not work during the 7 days prior to the interview; (b) want to work

included in the unemployment rate, it increases to 5.2 million (37.4%). Jobs are being lost in every sector faster than they are being created, with the added pressure of 350 000 new work seekers entering the labour market every year.

In response to economic stagnation and the ongoing jobs crisis, the government released the draft National Growth and Development Strategy in February 1996. This strategy departed from the original thrust of the RDP framework of development, with increased emphasis placed on macro-economic stability. Four months later, in June 1996, the government released another document, Growth, Employment and Redistribution, a Macroeconomic Strategy (GEAR). This strategy's focus represented a further shift from the RDP, moving from goals such as job creation, reduction in poverty and equitable economic growth to trade liberalisation, monetary targets and reduced social and capital expenditure. For example, GEAR commits the government to the rapid reduction in the budget deficit to reach a target of 3% by 1999/2000, the further liberalisation of exchange controls and the acceleration of tariff reductions. Further, its emphasis on the overall concentrate of redistribution efforts is the revenue side of fiscal policy rather than the taxation side.

Continuing High Unemployment. Nearly one million jobs have been lost in formal sector, including both agricultural and non-agricultural sectors, over the last decade. Since 1994 the formal sector has shed about half a million jobs. For example, between 1996 B 1999 there was a net loss of over 365 000 jobs in the non-agricultural sector (excluding agricultural and the public sector). If the public sector is added to these figures the number increases substantially because this sector employs 170 000 fewer workers than it did four years ago B probably due to a combination of voluntary severance packages, retrenchments and attrition. The jobs crisis in the mining sector is reaching a critical stage with the recent notification to the Gold Crisis Committee by six mines of intended retrenchments adding to already high numbers of job losses in this sector - over 150 000 mineworkers have lost their jobs in the last two years.

Economic and industrial policies haven't been successful in addressing rising unemployment B in some cases possibly contributing to the problem. Factory closures and retrenchments have been some of the consequences of tariff reductions and economic

and are available to state work within a week of the interview; (c) have taken active steps to look for work or to start some form of self-employment in the 4 weeks prior to the interview. The expanded definition excludes criterion (c), thus includes as unemployed those individuals who did not look for work in the 4 weeks prior to the interview. The expanded definition provides a fuller picture of the unemployment rate and jobs crisis in South Africa.

Andrew Levy Annual Report on Labour Relations in South Africa, 1999/2000. Andrew Levy and Associates, Pty. Ltd. Johannesburg, South Africa.

liberalisation embraced by the country's macro-economic policy. While high unemployment in the country is not new, GEAR's failure to create jobs has contributed to the jobs crisis in the country. This crisis is very apparent in the manufacturing sector, with over 110 000 jobs lost between 1996 B 1999, including: 22 000 jobs in the clothing, textile and leather industry last year alone and approximately 2 000 jobs per month being shed in the engineering sector. Finance is the only sector generating jobs since 1994, however nearly 10 000 jobs were lost in this sector in the last year. Overall, unemployment remains very high and heavily skewed along racial, gender and geographic lines. Not surprisingly, the labour market inherited from the apartheid era remains segmented.

Another significant feature of the post-apartheid labour market is the changing nature of work and employment. As with many other industrialised and semi-industrialised countries where the proportion of part-time and casual employment has risen, employment trends in South Africa show an increasing rate of 'non-standard' work. In recent years there has been an increase in casualisation as larger companies contract out work or employ larger numbers of casual, temporary and seasonal workers. Reforms to labour legislation have attempted to address the existence and rise of non-standard work, inadequate coverage for some workers, and inferior wages and working conditions of vulnerable workers by expanding the net of protection. Newly regulated sectors include agricultural and domestic workers, and some forms of casual employment. However, a large number of workers remain outside coverage, due either to their exclusion from regulation (i.e. homework and the informal sector), or to a lack of enforcement. Thus, despite the inclusion of these vulnerable workers, many non-standard workers will continue to be excluded from protection and benefits.

Proposed Labour Law Reforms. Business has continued to point to rigidities in the labour market as one of the key problems contributing to economic stagnation and high unemployment. And, since the election of the government in June this year, has called for reforms to labour legislation introduced during the ANC's first term in office. President Thabo Mbeki, in his opening address to parliament suggested that there would be a review of labour legislation and outlined a number of areas for review B some at the instance of the trade union movement and some at the instance of organised business. But the most important

areas for review focused on the regulatory framework B the extension of bargaining council agreements to non-party employers and the variation of core rights entrenched in the BCEA. During the recent opening of parliament the Minister of Labour reiterated this commitment to reviewing the legislation, stating a review would address the A negative and unintended consequences@ of new legislation. Some of the areas highlighted for review include: the restrictions and premiums placed on Sunday work and the ability of sectoral determinations and the Minister to vary core rights.

Unfortunately, the proposed legislative amendments do not appear to address the issue of casualisation or the development of atypical forms of employment whether initiated by new technology or ways of working or the simple endeavor to avoid the obligations imposed by labour legislation.

1.2 Legal Framework

South African law generally. The South African legal system comprises four sources of law:

- * *The Constitution.* The Constitution was passed by the Constitutional Assembly elected by all South Africans in the historic 1994 elections. It was the result of the negotiated transition of power from apartheid to a non-racial democracy.
- * *Legislation.* These are laws passed by national, provincial and municipal legislatures and include regulations made in terms of those laws by the executive.
- * *The common law.* Roman-Dutch law was introduced and imposed as the prevailing system of law during colonisation of the Cape by the Dutch in the 17th century.

The regulatory framework is in essence a legislative platform provided by the BCEA and a collective bargaining system that operates sectorally B although the sectoral coverage is far from complete. The BCEA both limits the degree of variation permitted to collective bargaining in respect of core rights and provides coverage for those employees not covered by sectoral collective bargaining agreements.

Section 32 of the LRA provides for the extension of sectoral collective agreements to employers who do not belong to the employers' organisations party to the collective agreement. If the parties to the agreement are representative, the extension is to all intents and purposes automatic. The proposed review will consider the introduction of a discretion based on labour market considerations.

Briefing to Parliament, Minister of Labour, Membathisi Mdladlana, February 8, 2000.

Act 108 of 1996.

* *Customary law.* This is the law of the indigenous societies of Southern Africa.

The Constitution. The constitution contains a Bill of Rights which entrenches a range of labour rights for workers and employers. Section 23 reads:

- ×(1) Everyone has the right to fair labour practices.
- (2) Every worker has the right-
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of an employers-organisation;
 - (c) to strike.
- (3) Every employer has the right B
 - (a) to form and join an employers- organisation;
 - (b) to participate in the activities and programmes of an employers-organisation.
- (4) Every trade union and employers- organisation has the right-
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers- organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) *National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).=*

The rights contained in section 23 apply to all workers B irrespective of where they may be employed, how they are employed or for how long. It is at least arguable that the right, particularly in respect of the right to fair labour practices, applies to persons who work but who may not be employed under contracts of employment such as home workers, labour tenants etc.

The Bill of Rights does not bind the State only. It may be applied horizontally to persons such as employers. Section 8 of the Constitution permits the courts to develop common law rules and remedies to give effect to the rights contained in the Bill of Rights, but only to the extent that there is no legislation giving effect to the right. In other words if a statute such as the Labour Relations Act does not apply to a category of

Section 36 of the Constitution permits legislation to limit a right provided that it is reasonable and justifiable in an open and democratic society based on the human dignity, equality and freedom.

See the note above for the reference to section 36 of the Constitution.

Labour Relations Act, 66 of 1995.

workers either because they are not employed under a contract of employment or because they are specifically excluded from the ambit of the statute, it may be possible for a worker in such a category to approach the courts on the grounds of a violation of her constitutional right to fair labour practices.

This has some significance for atypical employment. To the extent that the different forms of dependent labour do not fall within the protective ambit of the labour legislation, the right to fair labour practices in section 23(1) of the Constitution may be developed under the common law giving workers in these forms of employment some protection.

Legislation. Employment is extensively regulated. The principal statutes are as follows:

- * *The Labour Relations Act*. This Act regulates collective bargaining although it does have provisions protecting employees against unfair dismissal and unfair labour practices.
- * *The Basic Conditions of Employment Act*. This Act sets minimum employment standards such as hours of work, leave etc. The Act applies to most workers.
- * *The Occupational Health and Safety Act*. This Act sets the minimum health and safety standards in most workplaces.
- * *The Compensation for Occupational Injuries and Diseases Act*. This Act establishes a Compensation Fund to which all employers are obliged to contribute and from which loss of wages and medical expenses of employees injured at work or suffering from an occupational disease are paid out.
- * *The Unemployment Insurance Fund Act*. This Act establishes an Unemployment Insurance Fund to which both employers and employees contribute. The Fund provides benefits to unemployed contributors for a limited period.

Employee is defined in s213 as any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and any other person who in any manner assists in carrying on or conducting the business of an employer@.

Section 2 of the Labour Relations Act excludes members of the National Defence Force, National Intelligence Agency and the South African Secret Service.

Act 75 of 1997.

Act 85 of 1993.

There is specific legislation for mining operations and merchant shipping.

Act 130 of 1993.

Act 30 of 1966

- * *The Employment Equity Act* . This Act prohibits discrimination in the workplace and places an obligation on employers who employ more than 50 employees to implement affirmative action measures to achieve equity in the workplace.
- * *The Skills Development Act*. This Act seeks to improve the skills of South African workers by imposing a training levy on all employers, which is paid into different funds for the purpose of providing training and education of employees.

Other than the health and safety statutes, these statutes are based on a common law conception of employee. Although the definitions are worded differently, they have all been drafted or interpreted to exclude independent contractors from the protection of these laws. Because it is often difficult to distinguish between independent contractors and employees working in terms of a contract of employment, this approach to the ambit of the legislation has wide ramifications for worker protection, as the discussion on the common law will demonstrate.

The common law. The common law imposed by the early European settlers in the Cape was Roman Dutch law, the common law of Holland before the introduction of the Napoleonic Code. That system of common law with its roots in Roman law was developed by the South African courts.

The common law of contract regards the employment contract as a species of lease B the letting and hiring of services. The courts apply the general rules of contract and more specific rules of lease to the employment contract. There are also more specific rules relating to the employment contract itself. Those common law rules for the most part regard contracting parties as formally equal, including employers and their employees.

One of the justifications for the retention of the common law is its alleged innate capacity to accommodate changing social mores and policy in an evolutionary manner. But the courts do not regard the dynamic nature of the common law as justification for the propounding of an aggressively intrusive philosophy of judicial intervention in the

Employees and employers each contribute 1% in respect of their earnings. Certain categories of workers are excluded from the application of the Act, including: domestic, casual, seasonal workers and part-time employees who are employed for less than eight hours or one working day per week. (see Application of the Act, Section 2).

Act 55 of 1998.

Act 97 of 1998.

See generally *Borchers v C W Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 (LAC) at 1269.

common law relating to employment. The unequal relationship that characterises most employment contracts is also not a basis for a court to intervene in the common law in order to protect the employee:

>The oft cited analysis of their relationship between employer and employee as one in which the hapless employee is in the employer's power is said by some to be the reason why the courts should be more assertive in extending the reach of the common law to protect the employees from having their employment terminated in an arbitrary manner, and without their point of view being heard. The argument is linked to the notion that security of employment is a societal value which the common law should protect as a matter of public policy. With respect to the protagonists of these schools of thought, they rest upon shaky foundations. The unequal power relationship is not a legal argument; it is a social comment and not particularly accurate at that. As long as both employer and employee enjoy the same right in law to bring the relationship to an end by the giving of notice, there can be no talk of inequality of power *in law*.

The common law has accordingly not been at the forefront of worker protection, instead this role has been played by protective legislation. However, although it hasn't played a significant role in this area, common law continues to perform an important function in legislation designed to protect workers because of the legislative policy of basing protective legislation on the common law contract of employment. The existence of a contract of employment has become fundamental to determining whether a worker is protected. That in turn depends on the common law categorisation of work relationships by agency, partnership and contracts for work.

SECTION TWO: EMPLOYMENT RELATIONSHIPS

2.1 IDENTIFYING THE CONTRACT OF EMPLOYMENT

MAXIMUM PROTECTION IS PROVIDED FOR EMPLOYEES WHO PROVIDE WORK UNDER THE COMMON LAW CONTRACT OF EMPLOYMENT. THE PROTECTIVE LEGISLATION REFERRED TO ABOVE EXTENDS ON THE WHOLE TO EMPLOYEES WORKING UNDER SUCH A CONTRACTUAL REGIME. ACCORDINGLY IT IS NECESSARY FIRST TO DESCRIBE THE NATURE OF THE CONTRACT OF EMPLOYMENT AND THEN TO ANALYSE THE DIFFICULTIES IT POSES FOR EFFECTIVE REGULATION OF DEPENDENT LABOUR.

Martin v Murray (1995) 16 ILJ 589 (C) at 600.

Martin's case at 602. The judge in this case does not however argue against legislative intervention in order to protect vulnerable employees but his argument is limited to looking to the common law to do so.

A contract with a so-called independent contractor is dealt with in more detail below.

THE COMMON LAW REGARDS THE CONTRACT OF EMPLOYMENT AS SPECIES OF LEASE
B THE LETTING AND HIRING OF PERSONAL SERVICES. ITS MAIN CHARACTERISTICS MAY BE
SUMMARISED AS

FOLLOWS:

- * THE OBJECT OF THE CONTRACT IS THE PLACING OF ONE-S PRODUCTIVE CAPACITY AT
THE DISPOSAL OF ANOTHER-. THIS PROPOSITION HAS THREE COROLLARIES:
 - * THE OBLIGATION NORMALLY EXTENDS TO NO MORE THAN THE DUTY TO TENDER
SERVICES
 - * THE SERVICES ARE PERSONAL AND CANNOT BE SUBSTITUTED WITHOUT THE
CONSENT OF THE EMPLOYER
 - * THE EMPLOYER ASSUMES >SOME MEASURE OF CONTROL OVER THE MANNER IN
WHICH THAT CAPACITY IS TO BE DEPLOYED-
- * THERE IS AN OBLIGATION TO WORK WHEN CALLED UPON TO DO SO. THIS MEANS
THAT THE EMPLOYEE CANNOT CHOOSE WHETHER TO WORK OR NOT.
- * THE EMPLOYEE IS REMUNERATED FOR THE LEASE OF HER SERVICES.

THE CONTRACT OF EMPLOYMENT IS TYPICALLY DISTINGUISHED FROM THE
CONTRACT FOR WORK, A CONTRACT WITH THE SO-CALLED INDEPENDENT CONTRACTOR.

Also called the >contract of service-

The *locatio conductio operarum* B a lease in terms of which the employee (the lessor) leases her personal
services to the employer (the lessee of those services).

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

Liberty Life Association of Africa Ltd v Niselow [1996] 7 BLLR 825 (LAC) at 831.

There is no right to work only to remuneration on due tender B *Faberlan v McKay & Fraser* 1920 WLD 23. See
also *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court & others* 1986 (3) SA 786
(A). The right to work can be inferred however from the following circumstances associated with the contract:
the need to preserve status and reputation; payment by results; the obligation to provide training; and the
maintenance of skills. See generally the commentary in *Brassey Employment and Labour Law* Vol 1, Juta, 1998
at E2:5 to E2:31.

Hammond, Harvey & Newton v Union Textile Mills, Ltd 1949 (3) SA 398 (E).

Liberty Life case at 832. In *Smit*-s case it is put more graphically B the employee is at the >beck and call- of the
employer (at 61).

Pobane v R 1908 EDL 230: >The idea of a contract of service seems to me, from its very essence, to imply
continuous employment for some definite period, and not an agreement uder which the person employed can
work or not as he chooses.-(at 232). See also *Dennis Edwards & Co v Lloyd* 1919 TPD 291 and *Lichaba v*
Shield Versekeringsmaatskappy Bpk 1977 (4) SA 623 (O).

Remuneration may be in cash or kind.

It is still an open question as to whether remuneration is an essential characteristic of the contract of
employment. Although it is consistent with the ordinary rules of lease that there should be rent, the Appellate
Division has not considered remuneration as an invariable feature of the contract of employment B *Rodrigues &*
others v Alves & others 1978 (4) SA 834 (A).

THIS TOO IS REGARDED AS A SPECIES OF LEASE. BECAUSE THE CONCEPT OF EMPLOYMENT PERFORMS DIFFERENT FUNCTIONS UNDER BOTH COMMON LAW AND STATUTE, THE DISTINCTION BETWEEN THE EMPLOYMENT CONTRACT AND THE CONTRACT FOR WORK IS FRAUGHT WITH DIFFICULTIES AND GIVES MUCH ROOM FOR MANIPULATION. DUE TO THE FACT THAT THE LABOUR LAW REGIME IN SOUTH AFRICA IS PREMISED PRIMARILY ON THE CONTRACT OF EMPLOYMENT, THERE IS AN INDUCEMENT FOR EMPLOYERS TO ARRANGE THEIR CONTRACTUAL RELATIONS WITH THOSE WHO PERFORM WORK IN SUCH A WAY AS TO AVOID THOSE OBLIGATIONS. THE DISTINCTION HAS GENERALLY BEEN CHARACTERISED AS A DISTINCTION BETWEEN A CONTRACT OF SERVICES, THE OBJECT OF WHICH IS TO RENDER SERVICES, AND A CONTRACT FOR WORK, THE OBJECT OF WHICH IS TO PRODUCE SPECIFIED RESULT. MORE GRAPHICALLY THE DISTINCTION HAS BEEN DESCRIBED AS ONE BETWEEN AN INDEPENDENT CONTRACTOR WHO >SELLS THE JOB= AND THE EMPLOYEE WHO >SELLS HIS HANDS=.

THE DISTINCTION BETWEEN A CONTRACT FOR SERVICES AND ONE FOR WORK IS NOTORIOUSLY DIFFICULT TO MAKE IN SPECIFIC FACTUAL SITUATIONS. THIS DIFFICULTY WILL BECOME EVEN MORE PREVALENT AS EMPLOYERS SEEK TO REDEFINE THEIR CONTRACTUAL REGIME IN ORDER TO AVOID THE STRICTURES AND COSTS ARISING FROM THE APPLICATION OF LABOUR LEGISLATION AND EMPLOYEES SEEK MORE FLEXIBLE WORK ARRANGEMENTS OR MORE TAX EFFECTIVE FORMS OF EMPLOYMENT. THE DISTINCTION IS DIFFICULT TO MAKE FOR THE FOLLOWING REASONS:

- * THE CONCEPT OF EMPLOYMENT PERFORMS DIFFERENT LEGAL FUNCTIONS AND AS A RESULT, AS ONE COMMENTATOR HAS DESCRIBED IT, >[B]EING TUGGED IN SO MANY DIFFERENT DIRECTIONS, THE CONCEPT HAS BEEN BENT OUT OF SHAPE AND BECOME WARPED AND TWISTED. THE RESULTS HAVE BEEN STRANGE AND SOMETIMES QUITE GROTESQUE=.

The *locatio conductio operis* B a lease in terms of which the employer (the lessor) leases work to the independent contractor (the lessee).

Smit v Workmen=s Compensation Commissioner 1979(1) SA 51 (A) at 56E-57F.

Brassey Employment Law, Juta, 1998 at B1:14.

In the *CMS Support Services (Pty) Ltd v Briggs* [1998] 5 BLLR 533 (LAC), the respondent employee worked for the applicant employer but arranged her affairs in a tax effective way by being employed through a closed corporation which she owned. The Labour Appeal Court found that the arrangement was not a sham B she had arranged her affairs in order to reduce her tax burden B that arrangement took her outside the protections afforded employees under the labour legislation.

It is the basis for vicarious liability, the application of protective labour legislation, administrative convenience for the deduction of tax from remuneration, preferential claims for wages in insolvency, a stricter test for the validity of restraints of trade etc.

Brassey at B1:17.

- * THE COURTS SHY AWAY FROM ANY DEFINITION OF THE CONCEPT OF EMPLOYMENT AND REGARD IT AS IMPOSSIBLE TO LAY DOWN ANY RULE OF LAW DISTINGUISHING EMPLOYMENT FROM OTHER WORK RELATIONSHIPS.
- * EACH TEST EMPLOYED BY THE COURTS TO DETERMINE THE EXISTENCE OF THE CONTRACT OF EMPLOYMENT RAISES DIFFICULTIES IN ITS APPLICATION TO THE FACTS.
- * THE TEST ADOPTED BY THE APPELLATE DIVISION OF THE SUPREME COURT AND FOLLOWED BY THE LABOUR APPEAL COURT, NAMELY THE ›DOMINANT IMPRESSION TEST‹, RELIES ON *INDICIA* THAT ARE THEMSELVES EITHER SELF-FULFILLING OR CAPABLE OF MANIPULATION.

THE LABOUR APPEAL COURT HAS FOLLOWED THE APPROACH ADOPTED IN *SMIT V WORKMEN'S COMPENSATION COMMISSIONER* 1979 (1) SA 51 (A) IN DISTINGUISHING BETWEEN CONTRACTS OF EMPLOYMENT AND CONTRACTS WITH INDEPENDENT

Cloete & Cloete v R 1945 OPD 204: ›All past attempts to compose a concise definition of the terms servant or agent have failed so lamentably as to curb even the most impetuous: at the most it seems possible in fairly general terms to enumerate the more usual incidents and salient characteristics which by their presence or absence in any given instance may serve as an element tending to determine the relations of the parties‹ (at 205).

De Beer v Thompson & Son 1918 TPD 70 at 76; *Dennis Edwards & Co v Lloyd* 1919 TPD 291 at 294.

The ›organisation test‹ was rejected by the Appellate Division of the Supreme Court as ›of such a vague and nebulous nature that more often than not no useful assistance can be derived from it in distinguishing between and employee and an independent contractor‹ (*Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 63). The ›control test‹, which was extensively used in the earlier cases, proved to be circular in reasoning: the right of control was inferred from the relationship and the relationship from the right of control. See by E Mureinik in ›The Contract of Service: An Easy Test for Hard Cases‹ (1980) 97 SALJ 246. As a result the control test was demoted and although considered an important indication of the existence of a contract of employment it should not be the ›sole determinative factor‹ (*Smit's* case at 63). The ›dominant impression test‹ adopted by the Appellate Division in *Smit's* case has been rigorously criticised by E Mureinik as ›[citation]. Brasseley in *Employment Law*, while seeking to rescue some of the reasoning in *Smit*, nevertheless concludes that it is no ›[s]mall wonder‹ that the courts and academics continue to regard the law on this point as uncertain and confused. (at B1:16). Even on the test proposed by Brasseley, he concedes that ›[d]ifficulties will doubtless arise in applying the principle [providing a personal service as opposed to providing a result] to the facts of a particular case. For instance, does an independent computer consultant become an employee if he contracts to work full-time for a customer until a three year project is completed? What of an auditor who spends all her working hours on one client's audit or a partner performing services for which he is paid a salary? What of a travelling salesman who is paid solely by commission? How does his status differ from insurance agents‹ (at B1:17).

Now called the Supreme Court of Appeals.

For example, the presence of payment by commission and that fact that there are no set hours of work are regarded as *indicia* in favour of the existence of a contract with an independent contractor. Payment by commission is really payment by result, which is a prevalent form of remuneration in modern employment. Such as piece rate, productivity-related pay and performance related pay systems. Reliance on the fact that there is no set working hours is reliance on the very feature of employment that labour legislation regulates for the protection of employees which the employer seeks to avoid. The act of not stipulating hours of work becomes a self-fulfilling prophecy.

CONTRACTORS. THAT TEST OUTLINES THE FOLLOWING OPPOSING CHARACTERISTICS OF THE TWO CONTRACTS:

>1. THE OBJECT OF THE CONTRACT OF SERVICE IS THE RENDERING OF PERSONAL SERVICES BY THE EMPLOYEE TO THE EMPLOYER. THE SERVICES ARE THE OBJECT OF THE CONTRACT. THE OBJECT OF THE CONTRACT OF WORK IS THE PERFORMANCE OF A CERTAIN SPECIFIED WORK OR THE PRODUCTION OF A CERTAIN SPECIFIED RESULT.

2. ACCORDING TO A CONTRACT OF SERVICE THE EMPLOYEE WILL TYPICALLY BE AT THE BECK AND CALL OF THE EMPLOYER TO RENDER HIS PERSONAL SERVICES AT THE BEHEST OF THE EMPLOYER. THE INDEPENDENT CONTRACTOR, BY WAY OF CONTRAST, IS NOT OBLIGED TO PERFORM THE WORK HIMSELF OR TO PRODUCE THE RESULT HIMSELF, UNLESS OTHERWISE AGREED UPON. HE MAY AVAIL HIMSELF OF THE LABOUR OF OTHERS AS ASSISTANTS OR EMPLOYEES TO PERFORM THE WORK OR TO ASSIST HIM IN THE PERFORMANCE OF THE WORK.

3. SERVICES TO BE RENDERED IN TERMS OF A CONTRACT OF SERVICE ARE AT THE DISPOSAL OF THE EMPLOYER WHO MAY IN HIS OWN DISCRETION SUBJECT, OF COURSE, TO QUESTIONS OF REPUDIATION DECIDE WHETHER OR NOT HE WANTS TO HAVE THEM RENDERED. THE INDEPENDENT CONTRACTOR IS BOUND TO PERFORM A CERTAIN SPECIFIED WORK OR PRODUCE A CERTAIN SPECIFIED RESULT WITHIN A TIME FIXED BY THE CONTRACT OF WORK OR WITHIN A REASONABLE TIME WHERE NO TIME HAS BEEN SPECIFIED.

4. THE EMPLOYEE IS SUBORDINATE TO THE WILL OF THE EMPLOYER. HE IS OBLIGED TO OBEY THE LAWFUL COMMANDS, ORDERS OR INSTRUCTIONS OF THE EMPLOYER WHO HAS THE RIGHT OF SUPERVISING AND CONTROLLING HIM BY PRESCRIBING TO HIM WHAT WORK HE HAS TO DO AS WELL AS THE MANNER IN WHICH IT HAS TO BE DONE. THE INDEPENDENT CONTRACTOR, HOWEVER, IS NOTIONALLY ON A FOOTING OF EQUALITY WITH THE EMPLOYER. HE IS BOUND TO PRODUCE IN TERMS OF HIS CONTRACT OF WORK, NOT BY THE ORDERS OF THE EMPLOYER. HE IS NOT UNDER THE SUPERVISION OR CONTROL OF THE EMPLOYER. NOR IS HE UNDER ANY OBLIGATION TO OBEY ANY ORDERS OF THE EMPLOYER IN REGARD TO THE MANNER IN WHICH THE WORK IS TO BE PERFORMED. THE INDEPENDENT CONTRACTOR IS HIS OWN MASTER.

5. A CONTRACT OF SERVICE IS TERMINATED BY THE DEATH OF THE EMPLOYEE WHEREAS THE DEATH OF THE PARTIES TO A CONTRACT OF WORK DOES NOT NECESSARILY TERMINATE IT.

6. A CONTRACT OF SERVICE TERMINATES ON EXPIRATION OF THE PERIOD OF SERVICE ENTERED INTO WHILE A CONTRACT OF WORK TERMINATES ON COMPLETION OF THE SPECIFIED WORK OR ON PRODUCTION OF THE SPECIFIED RESULT.=

ALTHOUGH THERE MAY BE A LIMIT TO HOW FAR AN EMPLOYER MAY GO IN CONSTRUCTING HOW WORK IS PERFORMED FOR IT, THERE REMAINS SUBSTANTIAL LEEWAY FOR GETTING WORK DONE WITHOUT ENTERING INTO CONTRACTS OF EMPLOYMENT WITH THOSE THAT PERFORM THE WORK. BECAUSE THE WHOLE EDIFICE OF LABOUR PROTECTIVE LEGISLATION IS BASED ON THE EXISTENCE OF THE CONTRACT OF EMPLOYMENT, EMPLOYERS

ARE ABLE TO AVOID THE OBLIGATIONS PLACED ON EMPLOYERS BY THAT LEGISLATION IF THEY REARRANGE THE CONTRACTUAL REGIME IN SUCH A WAY AS TO HAVE WORK PERFORMED FOR THEM THROUGH SO-CALLED INDEPENDENT CONTRACTS. THE FOLLOWING CASES DEMONSTRATE THE EXTENT OF THE LEEWAY:

INSURANCE AGENTS. INSURANCE AGENTS HAVE ALMOST ALWAYS BEEN FOUND NOT TO BE EMPLOYEES EVEN THOUGH THEY SHARE MANY OF THE CHARACTERISTICS ASSOCIATED WITH EMPLOYEES SUCH AS BEING REQUIRED TO REPORT TO WORK; HAVING OFFICES AT THE EMPLOYER-S PREMISES; BEING BOUND TO A CODE OF ETHICS IN RESPECT OF THE MANNER IN WHICH INSURANCE IS SOLICITED; AND HAVING TO GET PERMISSION FROM THE EMPLOYER WHEN TAKING ANNUAL LEAVE ETC.

FREELANCE JOURNALISTS. ALTHOUGH A JOURNALIST WAS INTEGRATED INTO THE DAY TO DAY BUSINESS OF THE NATIONAL BROADCASTER AND THE BROADCASTER RETAINED A MEASURE OF CONTROL OVER THE CONTENT OF THE JOURNALIST-S RADIO PROGRAMMES, THE FOLLOWING FACTS WEIGHED AGAINST A FINDING THAT THE JOURNALIST WAS AN EMPLOYEE: HE HAD SIGNED THE STANDARD CONTRACT PREPARED FOR FREELANCERS WHICH WAS A CONTRACT OF WORK; HE WAS PAID FOR EACH PROGRAMME HE PRODUCED, IRRESPECTIVE OF HOW MUCH TIME IT TOOK TO PREPARE; HE WAS NOT A MEMBER OF THE BROADCASTER-S PENSION OR MEDICAL FUNDS; AND HE REPRESENTED HIMSELF AS AN INDEPENDENT CONTRACTOR FOR TAX PURPOSES.

THERE IS INCREASING EVIDENCE OF EMPLOYERS REARRANGING THEIR CONTRACTUAL REGIMES IN RESPECT OF THE PERFORMANCE OF WORK. MUCH OF THE BASIS FOR DETERMINING WHETHER OR NOT A WORKER IS AN EMPLOYEE IS DETERMINED ON A CONSTRUCTION OF THE CONTRACT ITSELF AND THE INCIDENTALS TO THAT CONTRACT. THEREFORE IT SHOULD BE EXPECTED THAT MORE AND MORE EMPLOYERS WILL RE-ARRANGE THEIR CONTRACTUAL REGIMES TO AVOID THE OBLIGATIONS IMPOSED BY THE LABOUR LEGISLATION, PARTICULARLY WHEN FORMS OF WORK THEMSELVES ARE IN FLUX. THIS IS A PRESSING REASON FOR REFORM OF THE LEGISLATION. BUT THE DEFEAT OF THE OBJECTIVES

Colonial Mutual Life Assurance Society Ltd v MacDonald 1931 AD 412; *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A); *Smit v Workmen-s Compensation Commissioner* 1979 (1) SA 51 (A); *Liberty Life Association of Africa v Niselow* [1996] 7 BLLR 825 (LAC) confirmed on appeal *B Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA).

SABC v McKenzie [1999] 1 BLLR 1 (LAC).

South African Breweries, the dominant presence in the South African beer market, has systematically converted the employee drivers of its trucks into owner-drivers B i.e. independent contractors. There is also widespread evidence, the extent of which is still not quantifiable, that certain employer associations, particularly small business associations, are advising and assisting employers in changing their contractual regimes in respect of work.

OF THE LEGISLATION, NAMELY THE PROTECTION OF EMPLOYEES, IS NOT THE ONLY REASON FOR REVIEW. THE PRESENT REACH OF THE LEGISLATION IS BOTH TOO NARROW AND TOO WIDE. BASED AS IT IS ON THE DISTINCTION BETWEEN THE EMPLOYMENT CONTRACT AND THE CONTRACT OF WORK, THE LEGISLATION DOES NOT PROTECT WORKERS WHO, THOUGH IN LAW ARE INDEPENDENT CONTRACTORS, ARE IN REALITY DEPENDENT WORKERS. AT THE SAME TIME LEGISLATION PROTECTS EMPLOYEES WHO HAVE NO NEED OF PROTECTION B SUCH AS SENIOR MANAGERS, PROFESSIONALS ETC. THIS REFORM CANNOT BE ACHIEVED BY SIMPLY SUBSTITUTING THE CONCEPT OF EMPLOYMENT - WHICH ALTHOUGH CAPABLE OF MANIPULATION DOES AT LEAST HAVE SOME CORE ASSUMPTIONS - WITH THAT OF >DEPENDENT LABOUR<, A VAGUE TERM AGAIN INVITING DISCRETIONARY APPLICATION BY THE COURTS. PART OF THE ANSWER MAY LIE IN THE APPROACH ADOPTED IN THE BASIC CONDITIONS OF EMPLOYMENT ACT. AN APPROPRIATE MEANS MAY BE TO RETAIN THE CONTRACT OF EMPLOYMENT AS THE CENTRAL CONCEPTION BUT PERMIT THE EXECUTIVE BY ADMINISTRATIVE ACTION TO EXPAND THE AMBIT OF THE LEGISLATION TO INCLUDE CATEGORIES OF WORKERS WHO ARE INDEPENDENT IN TERMS OF THE LAW, BUT NOT IN FACT B SUCH AS HOME WORKERS, OWNER-DRIVERS, INSURANCE AGENTS ETC.

2.2 LAW ON CASUAL EMPLOYMENT AND TEMPORARY WORK

THE BROAD APPROACH TO CASUAL EMPLOYMENT IN THE PROTECTIVE LEGISLATION IS TO INCLUDE CASUAL EMPLOYEES WITHIN THE DEFINITION OF EMPLOYEE. CERTAIN CATEGORIES OF CASUAL EMPLOYEES ARE HOWEVER EXCLUDED IN SOME OF THE LEGISLATION. ALTHOUGH CASUAL EMPLOYMENT IS NOT DEFINED, CERTAIN PROVISIONS IN THE BASIC CONDITIONS OF EMPLOYMENT ACT DO NOT APPLY TO EMPLOYEES WHO WORK LESS THAN 24 HOURS IN ANY ONE MONTH. BOTH THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT AND THE UNEMPLOYMENT INSURANCE ACT EXCLUDE CASUAL

Section 83 of the BCEA gives the Minister the power to deem a category of persons as employees for the purpose of the Act or a sectoral determination promulgated in terms of the Act.

The Basic Conditions of Employment Act already makes provision for such process. It should be expanded to all labour legislation B see s 83.

The predecessor to the Basic Conditions of Employment Act, Act 3 of 1983, defined casual employee in section 1(1) as an employee who works for a particular employer on not more than three days in any one week. The present statute, Act 75 of 1997, does not define casual employee but does exclude employees who work less than 24 hours in a month from certain of its provisions.

Section 6(1)(c).

Employee is specifically defined in section 1 to include a >casual employee employed for the purpose of the employer's business'.

The definition of contributor in s2(2)(e) excludes >persons employed casually and not for the purpose of the National Study, Workers= Protection
South Africa
Page 20 of 44

EMPLOYEES WHO ARE NOT EMPLOYED FOR THE PURPOSE OF THE EMPLOYER-S BUSINESS. THE UNEMPLOYMENT INSURANCE ACT GOES FURTHER AND DOES NOT APPLY TO EMPLOYEES WHO WORK LESS THAN ONE FULL WORKING DAY OR LESS THAN 8 HOURS IN ANY CALENDAR WEEK.

IN ORDER TO UNDERSTAND THE CONTRACTUAL FORM THAT CASUAL AND TEMPORARY WORK TAKE, IT IS NECESSARY TO BRIEFLY DISTINGUISH BETWEEN THE TWO TYPES OF DURATION CONTEMPLATED IN A CONTRACT OF EMPLOYMENT: THE FIXED TERM CONTRACT AND THE INDEFINITE CONTRACT. THE FIXED TERM CONTRACT IS ONE THAT LASTS FOR A DEFINED PERIOD OR UNTIL A SPECIFIC JOB HAS BEEN DONE. AN INDEFINITE CONTRACT IS ONE IN WHICH THERE IS NO SPECIFIED DURATION AND CONTINUES UNTIL IT IS TERMINATED ON PROPER NOTICE. MOST CONTRACTS OF EMPLOYMENT ARE PREMISED ON AN INDEFINITE BASIS, THE TERMINATION OF WHICH IS REGULATED BY AN AMALGAM OF COMMON LAW RULES, LEGISLATIVE RESTRAINTS IN RESPECT OF THE DURATION OF THE NOTICE AND THE FAIRNESS OF THE DISMISSAL. A FIXED CONTRACT TERMINATES ON THE EXPIRY OF THE DURATION. ITS TERMINATION DOES NOT CONSTITUTE DISMISSAL UNLESS THERE IS A REASONABLE EXPECTATION OF RENEWAL.

ALTHOUGH THERE IS A TENDENCY TO CALL ALL PART-TIME OR TEMPORARY WORK >CASUAL EMPLOYMENT=, IT IS BEST TO DISTINGUISH BETWEEN DIFFERENT FORMS OF ATYPICAL EMPLOYMENT AND TO LIMIT THE CONCEPT OF >CASUAL= TO EMPLOYEES WHO ARE EMPLOYED ONCE OFF OR AN INTERMITTENT BASIS:

- * *CASUAL EMPLOYEES* ARE THOSE EMPLOYED ON SEPARATE FIXED TERM CONTRACTS NORMALLY FOR A DAY EACH TIME. IF THEY WORK MORE THAN ONCE FOR AN EMPLOYER THEY ARE NORMALLY OFFERED EMPLOYMENT ON AN INTERMITTENT BASIS, WHICH IF THE PERSON ACCEPTS EACH TIME, CONSTITUTES A SERIES OF SEPARATE CONTRACTS.
- * *TEMPORARY EMPLOYEES* ARE THOSE WHO ARE EMPLOYED FOR A SPECIFIC PERIOD. THE REASON FOR EMPLOYMENT IS NORMALLY A SHORT-TERM NEED, SUCH AS AN URGENT ORDER OR THE TEMPORARY ABSENCE OF A PERMANENT EMPLOYEE. THESE CONTRACTS ARE ALSO FIXED TERM CONTRACTS.
- * *PART-TIME EMPLOYEES* ARE THOSE EMPLOYED ON A CONTINUOUS BASIS ALTHOUGH NOT A FULL TIME BASIS. THESE ARE NORMALLY INDEFINITE

employer-s business.

Section 2(2)(h) excludes employees who work less than one full working day or 8 hours in any calendar week.

See s 37 of the Basic Conditions of Employment Act.

See the provisions on unfair dismissal in Chap VIII of the Labour Relations Act.

That is if there is no provision in the contract to the contrary.

CONTRACTS IN TERMS OF WHICH THE EMPLOYEE IS REQUIRED TO WORK FOR LESS THAN A FULL DAY EACH DAY OF THE WORKING WEEK, OR FOR A FULL DAY OR DAYS AT A TIME, BUT SHORT OF A FIVE DAYS A WEEK.

THE IMPORTANCE OF THE FORM THAT THESE CONTRACTS TAKE BECOMES APPARENT WHEN THE PROTECTIONS CONTAINED IN THE BASIC CONDITIONS OF EMPLOYMENT ARE APPLIED TO THESE CATEGORIES OF ATYPICAL EMPLOYEES. TAKE SICK LEAVE FOR EXAMPLE. SECTION 19 STATES THAT THE LEAVE PROVISIONS DO NOT APPLY TO >AN EMPLOYEE WHO WORKS LESS THAN 24 HOURS A MONTH FOR AN EMPLOYER=. SECTION 22, WHICH DEALS WITH SICK LEAVE, STATES THAT THE SICK LEAVE CYCLE IS >36 MONTHS EMPLOYMENT WITH THE SAME EMPLOYER=. THAT SECTION GOES ON TO STATE THAT AN EMPLOYEE IS ENTITLED TO >AN AMOUNT OF PAID SICK LEAVE EQUAL TO THE NUMBER OF DAYS THE EMPLOYEE WOULD NORMALLY WORK DURING A PERIOD OF SIX WEEKS=. THAT ENTITLEMENT IS NOT IMMEDIATELY AVAILABLE TO AN EMPLOYEE B DURING THE FIRST SIX MONTHS OF EMPLOYMENT THE EMPLOYEE IS >ENTITLED TO ONE DAY=S PAID SICK LEAVE FOR EVERY 26 DAYS WORKED. THE WHOLE CONSTRUCTION OF THESE PROVISIONS SUGGESTS THAT THE EMPLOYEE IS IN CONTINUOUS EMPLOYMENT AND THAT THE ENTITLEMENT TO SICK LEAVE ARISES ONLY *WHILE* THE EMPLOYEE IS IN EMPLOYMENT.

ACCORDINGLY, IF A CASUAL EMPLOYEE WORKS FOR THE SAME EMPLOYER FOR 25 DAYS OVER THE PERIOD OF A YEAR IN THE FORM OF SEPARATE ONE DAY CONTRACTS ENTERED INTO AFRESH ON EACH OCCASION, IS THAT WORKER ENTITLED TO SICK LEAVE WHEN SHE IS NOT ABLE TO ENTER INTO A FURTHER ONE DAY CONTRACT? OR, DOES THIS ENTITLEMENT APPLY ONLY IF THE EMPLOYEE IS ILL DURING ONE OF THE ONE DAY CONTRACTS? IS THERE A CONTINUOUS EMPLOYMENT RELATIONSHIP? HOW ARE THE NUMBER OF DAYS >NORMALLY=WORKED CALCULATED FOR DETERMINING THE NUMBER OF DAYS OF PAID SICK LEAVE? THESE QUESTIONS ALL POINT TO THE FACT THAT THESE PROVISIONS AND OTHER PROVISIONS OF THE BASIC CONDITIONS OF EMPLOYMENT ACT APPEAR TO APPLY ONLY TO CONTINUOUS EMPLOYMENT WHETHER PART-TIME OR FULL TIME AND NOT TO CASUAL LABOUR, NOTWITHSTANDING THE ACT=S FORMAL COVERAGE OF ALL EMPLOYEES INCLUDING CASUAL WORKERS. ACCORDINGLY THE CREATION OF POOLS OF TEMPORARY AND CASUAL LABOUR BASED ON SINGLE SELF STANDING CONTRACTS SEPARATELY ENTERED INTO ON A REGULAR BASIS PROVIDE AN EFFECTIVE WAY OF AVOIDING MANY OF THE OBLIGATIONS CONTAINED IN THE BASIC CONDITIONS OF EMPLOYMENT.

Section 186(b) of the Labour Relations Act.

30 days in respect of 5 day a week workers and 36 days in the case of 6 day a week workers.

THIS POTENTIAL BYPASS OF THE BASIC CONDITIONS OF EMPLOYMENT ACT IS TO SOME EXTENT LIMITED BY THE PROVISION IN SECTION 186(B) OF THE LRA WHICH EFFECTIVELY PREVENTS AN EMPLOYER ENTERING INTO A SERIES OF CONTRACTS BACK TO BACK IN ORDER TO AVOID ITS STATUTORY OBLIGATIONS.

2.3 NEW PATTERNS OF EMPLOYMENT: CURRENT TRENDS

EMPLOYMENT, ITS TERMS AND CONDITIONS, HAS UNDERGONE SIGNIFICANT CHANGES IN SOUTH AFRICA OVER THE LAST DECADE OR SO. AS HAS BEEN HIGHLIGHTED EARLIER IN THIS REPORT, UNEMPLOYMENT HAS INCREASED (WITH NEARLY A MILLION JOBS LOST IN THE LAST DECADE) AND FULL-TIME JOBS ARE INCREASINGLY BEING REPLACED BY CASUAL WORK. THESE CHANGES ARE SIMILAR TO THE GLOBAL TREND OF 'NON-STANDARD' OR A-TYPICAL EMPLOYMENT REPLACING 'STANDARD EMPLOYMENT' FORMS OF EMPLOYMENT. HOWEVER, SOME OF THE KEY TRENDS IN SOUTH AFRICA DIFFER FROM GLOBAL PATTERNS. FOR EXAMPLE, WHILE THERE HAS BEEN AN INCREASE IN HOMEWORKING IN SOME SECTORS (CLOTHING FOR EXAMPLE) AND PART-TIME WORK IN OTHER SECTORS (RETAIL FOR EXAMPLE), THESE DON'T APPEAR TO BE AS SIGNIFICANT AS THEY ARE IN OTHER COUNTRIES. OTHER TRENDS SEEM TO BE MORE WIDESPREAD IN SOUTH AFRICA. THE KEY TRENDS IN SOUTH AFRICA INCLUDE: OUTSOURCING 'NON' CORE FUNCTIONS; INCREASED USE OF TEMPORARY AND CASUAL WORKERS; AND THE CONVERSION OF WORKERS INTO INDEPENDENT CONTRACTORS. ALTHOUGH THERE IS LIMITED DATA ON THE NUMBER OF CONTRACT LABOURERS EMPLOYED IN MOST SECTORS, THERE IS A GROWING TENDENCY TO RETRENCH PERMANENT WORKERS AND EMPLOY WORKERS ON FIXED-TERM CONTRACTS. FOR EXAMPLE, ON AVERAGE, THE MINING SECTOR HAS CONTRACTED 32% SINCE 1987 WHILE THE USE OF CONTRACT LABOUR (MAINLY FOREIGN, FROM LESOTHO AND MOZAMBIQUE) HAS INCREASED. EVIDENCE SUGGESTS THAT THIS TREND IS CONTINUING IN THE MINING, CONSTRUCTION AND OTHER SECTORS.

WHY ARE THESE NEW FORMS OF WAGE EMPLOYMENT INCREASING? EMPLOYERS, IN MANY CASES, ARE LOOKING FOR WAYS OF REDUCING EXPENSES IN ORDER TO BECOME MORE NATIONALLY AND INTERNATIONALLY COMPETITIVE. IN ADDITION, FIRMS ARE GOING BACK TO 'CORE BUSINESS FUNCTIONS' IN ORDER TO TAKE AWAY SOME OF THE RISKS OF MANAGING. AS A RESULT, SUB-CONTRACTING (THROUGH 'OUTSOURCING' OR, AS IS

That section deems the failure to renew a fixed term contract as a dismissal if the employee had a reasonable expectation of renewal. Past renewals constitute the basis of such an implication.

Department of Labour Study for Employment Strategy Workshop, Mining Sector Summary Report, November 1996, p.1. See also, A. Bezuidenhout and B. Kenny, *Subcontracting in the Mining Industry*, The Innes Labour Brief, Vol.10. No. 1.

EMERGING IN THE HOSPITALITY INDUSTRY ('IN-SOURCING') OF NON-CORE ACTIVITIES (SECURITY, CLEANING, MAINTENANCE) IS WIDESPREAD IN MANY SECTORS, WITH THE HOSPITALITY SECTOR IMPLEMENTING SUCH CHANGES AS EARLY AS 1991. A RECENT SURVEY FOUND 68% OF COMPANIES INTERVIEWED HAD SUBCONTRACTED OVER THE PAST FIVE YEARS. BETWEEN 1989 - 1990, SUBCONTRACTING RESULTED IN 6% OF JOB LOSSES, INCREASING TO 16% BETWEEN 1995 AND 1997.

EMPLOYERS OFTEN ARGUE THAT SUB-CONTRACTING ALLOWS THEM TO BRING IN MORE SKILLED WORKERS TO THE INDUSTRY. HOWEVER, THIS SURVEY AND OTHER RESEARCH REVEALS THAT THE VAST MAJORITY OF SUBCONTRACTED WORKERS WERE BLUE-COLLAR WORKERS. RATHER THAN BRINGING IN SKILLS, THE KEY REASONS FOR SUBCONTRACTING GENERALLY APPEAR TO BE TO REDUCE COSTS AND REDUCE MANAGEMENT RESPONSIBILITIES BY SHIFTING THE BURDEN OF RECRUITING, HIRING/ FIRING ELSEWHERE. INDEED, THERE IS MUCH EVIDENCE TO SUPPORT THE ARGUMENT THAT OUTSOURCED AND CASUAL WORKERS RECEIVE LOWER WAGES AND FEWER BENEFITS. FOR EXAMPLE, RESEARCH ON THE EMPLOYMENT CONDITIONS ON FARMS IN THE WESTERN CAPE ARGUES THAT FARMERS ARE MAKING MORE USE OF TEMPORARY LABOUR AND LABOUR SUB-CONTRACTORS TO REDUCE COSTS. OFTEN, LABOUR CONTRACTORS HIRE OUT TEAMS OF WORKERS TO DO SPECIFIC, TEMPORARY JOBS ON FARMS, SUCH AS PRUNING AND THINNING OF TREES. SEASONAL AND TEMPORARY WORKERS ARE RECRUITED FROM NEARBY TOWNSHIPS OR ECONOMICALLY DEPRESSED TOWNS IN ORDER TO BRING IN LABOUR AT CHEAPER RATES. TAYLOR'S RESEARCH REVEALS THAT THESE WORKERS AREN'T PROVIDED WITH HOUSING ON THE FARM AND AREN'T GIVEN ANY OF THE BENEFITS THAT PERMANENT EMPLOYEES RECEIVE.

SUB-CONTRACTED WORKERS IN MANY OTHER SECTORS ALSO COMPLAIN OF LOWER WAGES AND FEWER BENEFITS COMPARED TO THOSE OF PERMANENT WORKERS. FOR EXAMPLE, RECENT RESTRUCTURING INITIATIVES AT THE UNIVERSITY OF CAPE TOWN (UCT) RESULTED IN THE RETRENCHMENT OF APPROXIMATELY 300 WORKERS WHEN GARDENING, MAINTENANCE, CLEANING AND DUTIES ASSOCIATED WITH CLEANING WERE OUTSOURCED. SUPERCARE CLEANING, THE COMPANY AWARDED THE CONTRACT, HIRED STAFF (MANY OF

In sourcing is the label used for a practice that has emerged in the hotel industry. The employer effectively subcontracts work out to its own employees. This is done by assisting employees to establish a business and then contracting the work done by those employees to that business. Put another way B the employees do the same work but through another vehicle B one that they own.

Andrew Levy and Associates, *Wage Settlement Survey* (Andrew Levy and Associates, South Africa, 1999).

Ibid

Nicky Westgarth-Taylor, *Regulating New Employment Norms -- A Focus on the Agricultural Sector*. Unpublished Paper.

THEM RETRENCHED UCT STAFF) AT THE MINIMUM WAGE (R 6.00 PER HOUR) SET OUT IN THE SECTORAL DETERMINATION FOR THE CONTRACT CLEANING SECTOR, WITH NO ADDITIONAL PROVISION MADE FOR A RETIREMENT FUND OR A MEDICAL FUND. UCT STAFF, IN COMPARISON, WERE NOT PAID BY THE HOUR BUT WERE PAID A MONTHLY PACKAGE MADE UP OF A BASIC SALARY COMPONENT, A BONUS CHEQUE (PRO-RATA OF A 13TH CHEQUE), A HOUSING ALLOWANCE, AND UCT'S CONTRIBUTION TO THE PROVIDENT FUND AND MEDICAL AID. EMPLOYEES WHO DO NOT OWN A HOUSE OR BELONG TO A MEDICAL AID SCHEME ARE PAID AN ALLOWANCE IN LIEU OF THE SUBSIDY OR EMPLOYERS' CONTRIBUTION. CONVERTED INTO AN HOURLY RATE, UCT CLEANING STAFF RECEIVED BETWEEN R11.00 - R14.00 PER HOUR. THUS, UCT STAFF EARNED ALMOST DOUBLE WHAT SUB-CONTRACTED WORKERS EMPLOYED BY SUPERCARE ARE BEING PAID.

THE OTHER SIGNIFICANT TREND IN EMPLOYMENT RELATIONSHIPS OVER THE LAST TEN YEARS IS THE INCREASED USE OF 'INDEPENDENT CONTRACTORS'. THIS RISE IN DISGUISED EMPLOYMENT RELATIONSHIPS HAS BEEN MOST DRAMATIC SINCE THE NEW LRA WAS PASSED, PARTLY BECAUSE OF THE TEETHING PROBLEMS ASSOCIATED WITH THE INTRODUCTION OF THE NEW PROCEDURES OF ENFORCEMENT. IN SOME CASES THE CONVERSION OF 'WORKERS' INTO INDEPENDENT CONTRACTORS IS NOT MOTIVATED BY AN ATTEMPT TO AVOID THE OBLIGATIONS OF LABOUR LEGISLATION, THOUGH IT ALWAYS HAS THAT AS A CONSEQUENCE. FOR EXAMPLE, SOUTH AFRICAN BREWERIES (RESPONSIBLE FOR ABOUT 95% OF THE BEER MARKET IN SOUTH AFRICA) HAS SYSTEMATICALLY CONVERTED THE EMPLOYEE DRIVERS OF ITS TRUCKS INTO OWNER-DRIVERS (I.E. INDEPENDENT CONTRACTORS). THIS PROCESS BEGAN IN 1987 IN THE WESTERN CAPE WHEN SA BREWERIES OPENED A NEW DEPOT IN BELLVILLE (CAPE TOWN) AND CONVERTED ABOUT 7 B 8 DRIVERS INTO OWNER-DRIVER. ALL THE DRIVERS (APPROXIMATELY 30) IN THE WESTERN CAPE ARE NOW INDEPENDENT CONTRACTORS (OWNER-DRIVERS). IT IS ARGUED THAT THIS PROCESS OFFERS ENORMOUS BUSINESS OPPORTUNITIES FOR DRIVERS FURTHER, COMPANIES GAIN SUPPORT FROM THE PUBLIC AND MANY EMPLOYEES, AS SUCH A MOVE CAN BE PACKAGED AS FACILITATING 'BLACK EMPOWERMENT' AND THE GROWTH OF SMALL BUSINESS. WHILE SOME DRIVERS REPORT THAT THERE HAVE BEEN SIGNIFICANT FINANCIAL BENEFITS FOR THEM, MOST CLAIM NOT TO HAVE BENEFITED.

Details drawn from court documentation (*NEHAWU v University of Cape Town & others* in the Labour Court:C399/99) and interviews with permanent and subcontracted workers, November 1999 - January 2000.

The owner-drivers take on the responsibility of employing crews for their trucks. When employee drivers were converted to owner-drivers, both employee drivers and the crew were retrenched, owner-drivers then either hired retrenched workers back or hired new people to work as their crew. According to the union, it appears that in many cases, owner-drivers hire their crew (some of them migrant or illegal workers) on a casual basis to keep their labour costs low. (Information drawn from interviews with SAB, and union,FAWU interviews. November B February, 2000).

IN OTHER SECTORS THE CONVERSION OF WORKERS INTO INDEPENDENT CONTRACTORS IS NOTHING MORE THAN A SCAM. FOR EXAMPLE, SOME EMPLOYERS IN THE CLOTHING AND TEXTILE INDUSTRY AVOID BARGAINING COUNCIL AGREEMENTS BY CONVERTING WORKERS INTO INDEPENDENT CONTRACTORS. HOWEVER, IN MOST CASES, THE TERMS OF THEIR EMPLOYMENT REMAINS THE SAME: EMPLOYERS CONTINUE TO PAY WORKERS COMPENSATION, AND DEDUCT UIF AND PAYE (INCOME TAX, 'PAY AS YOU EARN') FOR WORKERS THEY CLAIM ARE INDEPENDENT CONTRACTORS, BUT DO NOT PAY THE BARGAINING COUNCIL LEVY OR COMPLY WITH BARGAINING COUNCIL AGREEMENTS. WHILE THE FAILURE TO CONTRIBUTE TO WORKERS COMPENSATION, AND DEDUCT UIF AND PAYE IS A CRIMINAL OFFENCE FOR EMPLOYERS, FAILURE TO REGISTER AND COMPLY WITH BARGAINING COUNCIL AGREEMENTS IS NOT. WHEN BARGAINING COUNCILS TRY TO ENFORCE AGREEMENTS, EMPLOYERS ARGUE THAT "WE DON'T FALL UNDER COUNCIL AGREEMENTS, WE DON'T HAVE ANY WORKERS ONLY INDEPENDENT CONTRACTORS." IN THESE CASES EMPLOYERS MERELY USE THIS CONVERSION OF EMPLOYEES INTO INDEPENDENT CONTRACTORS AS A WAY OF AVOIDING COMPLIANCE WITH WAGES AND WORKING CONDITIONS STIPULATED IN BARGAINING COUNCIL AGREEMENTS.

THE CONFEDERATION OF EMPLOYERS OF SOUTH AFRICA (COFESA), OPENLY PROSELETIZES THIS CONVERSION AND HELPS FACILITATE THIS PROCESS THROUGH A NATIONAL ORGANISATION OF EMPLOYERS, WITH DISPUTE RESOLUTION OFFICERS AND OFFICES IN EVERY PROVINCE. THEY SEE THEIR ROLE AS HELPING TO RESTRUCTURE COMPANIES INTO NETWORKS OF INDEPENDENT ENTERPRISES / CONTRACTORS. THE GOAL OF RESTRUCTURING SHOULD BE TO CREATE MICRO-ENTERPRISES. COFESA CLAIMS TO HAVE 5000 DIRECT MEMBERS (PAID UP MEMBERS, MOSTLY INDIVIDUAL FACTORIES), PLUS AFFILIATES AND CONTRACTORS (UP TO 6000 INDEPENDENT CONTRACTORS) ACROSS THE COUNTRY THEY PROVIDE SERVICES TO. MEMBERSHIP IS STRONGEST IN NATAL, WITH AN ESTIMATED 6000 MEMBERS (DIRECT MEMBERS AND INDEPENDENT CONTRACTORS), MANY OF THESE LOCATED IN THE CLOTHING SECTOR. FOR THESE MEMBERS THEY PROVIDE A 24 HOUR, 7 DAYS / WEEK HOTLINE AND ADVICE SERVICE, DISTRIBUTE THEIR 600 PAGE 'CODE BOOK' -- ALL AIMED AT ADVISING EMPLOYERS ON HOW TO REGULATE A COMMERCIAL WORKING RELATIONSHIP WHICH AVOIDS RATHER THAN EVADES THE REGULATORY FRAMEWORK.

Interview with Nigel Woodroffe, Shepstone and Wylie, a firm of attorneys acting for the bargaining council, Durban. February 2000.

Interview with Hein van der Walt, Director, COFESA. February 2000.

Many unions report that employers in their sector have been approached by COFESA to assist them in changing their workforce. For example, according to NUMSA, after the 1998 motor strike, COFESA wrote to employers and advised them on how to turn employers into independent contractors to "avoid future strikes".

COFESA CLAIMS TO HAVE CHANGED MORE THAN A MILLION EMPLOYEES INTO INDEPENDENT CONTRACTORS SINCE THEY STARTED THIS WORK IN 1994. A FULL-TIME TEAM OF ADVISORS WORKS TO SIGN UP FACTORIES AS MEMBERS AND ASSIST THEM IN TURNING EMPLOYEES INTO INDEPENDENT CONTRACTORS. COFESA ESTIMATES THAT IN NATAL ALONE, APPROXIMATELY FIVE FACTORIES A DAY JOIN AND CONVERT WORKERS INTO CONTRACTORS. THESE STATISTICS ARE HARD TO CONFIRM. THERE ARE ABOUT 47,000 WORKERS IN THE CLOTHING SECTOR IN NATAL. AN ESTIMATED 10,000 - 12,000 WORKERS IN THE CLOTHING INDUSTRY IN NATAL HAVE BEEN CONVERTED INTO INDEPENDENT CONTRACTORS UNDER THE STEWARDSHIP OF COFESA. WHILE COFESA IS MAKING INROADS IN THE AUTO SECTOR, MOST OF THEIR MEMBERSHIP CONTINUES TO BE IN THE CLOTHING INDUSTRY.

THESE EXAMPLES SUPPORT THE PERCEPTION THAT THERE HAS BEEN A DRAMATIC RISE IN THE NUMBER OF WORKERS BEING CONVERTED INTO INDEPENDENT CONTRACTORS. WHAT PERCENTAGE OF THESE ARE SCAMS AND WHAT PERCENT ARE LEGITIMATE IS DIFFICULT TO DETERMINE. IN MANY SECTORS, COPIES OF CONTRACTS WORKERS SIGN WHEN THEY BECOME INDEPENDENT CONTRACTORS ARE NOT MADE AVAILABLE TO THE UNION. FOR EXAMPLE, FAWU HAS REPEATEDLY REQUESTED COPIES OF COFESA CONTRACTS BUT HAS BEEN UNABLE TO OBTAIN ONE. ALTHOUGH COFESA CLEARLY INFLATES ITS NUMBERS AND OVERSTATES ITS SUCCESS, THERE IS NO QUESTION THAT THEY ARE CONTRIBUTING TO THE RESTRUCTURING OF EMPLOYMENT RELATIONSHIPS. AND, WHAT IS EVIDENT IS THAT THESE PROCESSES UNDERMINE BARGAINING COUNCIL STRUCTURES, UNION ORGANISING, AND (IN MANY CASES) THE FAIR APPLICATION OF LABOUR LEGISLATION.

2.4 ENFORCEMENT MECHANISMS

THE SUCCESS OF THE STRATEGIES OF CONVERTING EMPLOYEES INTO INDEPENDENT CONTRACTORS AND THE CASUALISATION OF THE WORKFORCE DEPENDS TO SOME EXTENT ON THE LACK OF EFFECTIVE ENFORCEMENT.

THE NEW LRA (1995) DE-CRIMINALISED ENFORCEMENT. BARGAINING COUNCIL AGREEMENTS ARE NO LONGER ENFORCEABLE BY CRIMINAL COURTS BUT CIVILLY THROUGH ARBITRATION. THE INTRODUCTION OF A NEW PROCEDURE WILL INITIALLY ATTRACT NEW CHALLENGES. AND, AS A RESULT, COUNCILS HAVE FOUND THE ENFORCEMENT OF AGREEMENTS THROUGH PRIVATE ARBITRATION DIFFICULT AND SLOW. THE NEW PROCESSES

Interviews with NUMSA (head office, shopstewards in the Western Cape), November 1999.

COFESA, Code Book.

Interview with Hein van der Walt, February 2000.

Interview with Hein van der Walt, COFESA, Director. February 2000; Interview with Brett Walker, Natal Clothing Bargaining Council; Interview with Nigel Woodroffe. February 2000.

REQUIRE CONCILIATION BEFORE THE RESORT TO ARBITRATION. ARBITRATION THEN FOLLOWS. IF AN EMPLOYER DOES NOT COMPLY WITH AN ARBITRATION AWARD, IT IS NECESSARY TO HAVE THE AWARD MADE AN ORDER OF COURT IN ORDER FOR THE AWARD TO BE EXECUTED. IN THE ORDINARY COURSE, MOST EMPLOYERS COMPLY WITH AN ARBITRATION AWARD GIVEN AGAINST THEM. BUT IN THE STRATEGY TO FRUSTRATE THE ENFORCEMENT OF COLLECTIVE AGREEMENTS, EMPLOYERS ARE ENCOURAGED NOT TO ATTEND THE CONCILIATION OR ARBITRATION HEARINGS AND TO CHALLENGE ANY APPLICATION IN THE LABOUR COURT TO MAKE THE AWARD AN ORDER OF COURT, AT THE SAME TIME SEEKING TO REVIEW THE ARBITRATION AWARD ON VARIOUS GROUNDS B MOST OF WHICH TURN ON THE UNTESTED WORDING OF THE LRA. EVEN IF THE AWARD IS MADE AN ORDER OF COURT, THERE ARE EMPLOYERS WHO REFUSE TO COMPLY. THIS REQUIRES THE BARGAINING COUNCIL TO INSTITUTE CONTEMPT PROCEEDINGS WHICH NOT ONLY TAKE TIME BUT ARE A SPECIES OF PROCEEDING BECAUSE OF THE POSSIBILITY OF IMPRISONMENT THAT ARE RELUCTANTLY GIVEN BY COURTS. IN MARCH 1999, THE LABOUR COURT IMPOSED IMPRISONMENT ON TWO EMPLOYERS FOR CONTEMPT OF COURT FOR REFUSING TO COMPLY WITH AN ARBITRATION AWARD. THESE CASES TOOK THREE YEARS TO REACH THIS STAGE.

AS THE TABLE BELOW ATTESTS, THE NUMBER OF INSPECTORS IN THE DEPARTMENT OF LABOUR TO MONITOR AND ENFORCE OCCUPATIONAL AND HEALTH LEGISLATION ARE MANIFESTLY INSUFFICIENT TO PROPERLY MONITOR AND ENFORCE THOSE LAWS. AND, DESPITE THE LACK OF CAPACITY ON THE PART OF THE DEPARTMENT AND OF PROVINCIAL OFFICES, MANY INSPECTOR-S POSTS REMAIN VACANT (AND HAVE BEEN VACANT FOR SEVERAL YEARS). FURTHER, THE EXTENSION OF COVERAGE IN THE NEW BCEA TO WORKERS PREVIOUSLY EXCLUDED FROM PROTECTION HAS NOT BEEN ACCOMPANIED BY AN INCREASE IN THE NUMBER OF INSPECTORS, AND GREATER CAPACITY TO ENSURE THE IMPLEMENTATION OF THE ACT. THEREFORE, WHILE FARM AND DOMESTIC WORKERS ARE NOW COVERED BY PROTECTIVE LEGISLATION, THE LEVEL OF ENFORCEMENT AND INSPECTION IN THESE SECTORS IS VERY LOW. PROVINCIAL OFFICES CONFIRM REAL

Interviews with the Bargaining Council in the Construction Industry, and Clothing and Textile Industry, December 1999 - February 2000.

The precise number of vacancies is not available from the Department of Labour. According to the Department of Labour, some offices report almost 50% of the posts remain vacant, and have been vacant for several years. Updated numbers were available from some, but not all provincial offices. For example, according to the East London office, 44 positions are vacant B each of these newly created posts from the restructuring process. However they cannot be filled until necessary funds are allocated by the Department of Labour. The provincial office reported that they were still waiting to hear if funds were available for these posts. Other provincial offices confirm they are significantly understaffed, and this problem is compounded with the inspectors at the lowest level really inspectors in training, not able to carry out most of the tasks of an inspector, thus mostly do administrative work in the offices. Information drawn from Department of Labour documents, and interviews with The Department of Labour, Pretoria; East London, Cape Town and Durban Provincial Offices.

DIFFICULTIES IN ACCESSING WORKERS ON PRIVATE PROPERTY (FARMS, AND HOUSEHOLDS FOR DOMESTIC WORKERS). THESE PROBLEMS ARE LIKELY TO CONTINUE WITH THE INCREASED WORKLOAD OF THE DEPARTMENT OF LABOUR AND PROVINCIAL OFFICES RESULTING FROM THE IMPLEMENTATION OF RECENTLY PASSED LEGISLATION. BOTH THE EMPLOYMENT EQUITY ACT AND SKILLS DEVELOPMENT ACT REQUIRE SUBSTANTIAL MONITORING AND ONGOING ADMINISTRATIVE WORK TO ENSURE THEIR IMPLEMENTATION AND EFFECTIVENESS. UNLESS CURRENT RESTRUCTURING PROCESSES IN THE DEPARTMENT ARE SUCCESSFULLY COMPLETED, AND PROVINCIAL OFFICES ADEQUATELY STAFFED WITH TRAINED INSPECTORS, IT IS UNLIKELY THAT THESE LAWS WILL BE EFFECTIVELY ENFORCED.

TABLE ONE: LABOUR INSPECTORS V NUMBER OF WORKPLACES

PROVINCIAL OFFICE	NUMBER OF INSPECTORS *	NUMBER OF WORKPLACES (EXCLUDING DOMESTICS)	NO. OF WORKERS (EXCLUDING DOMESTICS)
CAPE TOWN	112	+/- 80 000	+/- 1 374 175
EAST LONDON	96	+/- 29 278	+/- 548 928
KIMBERLEY	22	+/- 10 000	+/- 215 000
WITBANK	36	-	+/- 944 858
GAUTENG-SOUTH	122	-	+/- 3 431 126 (INCLUDING GAUTENG NORTH)
GAUTENG-NORTH	46	-	INCLUDED WITH GAUTENG SOUTH
BLOEMFONTEIN	49	-	+/- 1 056 828
DURBAN	104	+/- 1 606	+/- 315 756
MMABATHO	51	-	+/- 957 470
PIETERSBURG	47	-	+/- 810 117
TOTAL	685	+/- 120 884	+/- 9 654 258

* THE DIFFERENT INSPECTORATES (LABOUR RELATIONS, HEALTH AND SAFETY) HAVE BEEN RESTRUCTURED INTO A SINGLE INSPECTORATE. INSPECTORS ARE RESPONSIBLE FOR HEALTH AND SAFETY AND THE ENFORCEMENT OF ALL LABOUR LEGISLATION (I.E. BCEA, AND NEW LEGISLATION SUCH AS THE EMPLOYMENT EQUITY ACT AND SKILLS DEVELOPMENT ACT).

SECTION THREE: TRIANGULAR RELATIONSHIPS

TEMPORARY EMPLOYMENT AGENCIES

ONE OF THE FASTEST GROWING INDUSTRIES IN THE COUNTRY IS THE TEMPORARY EMPLOYMENT SECTOR. THIS INDUSTRY HAS DOUBLED IN THE LAST FIVE YEARS, NOW PROVIDING TEMPORARY WORKERS TO ALL OTHER SECTORS. ACCORDING TO ONE PERSONNEL AGENCY IN CAPE TOWN, TEMPORARY EMPLOYMENT AGENCIES PROVIDE FLEXIBLE STAFFING SUPPORT FOR LARGE AND SMALL BUSINESS, MANY OF THEM SPECIALISING IN PROVIDING WORKERS FOR SEASONAL, CYCLICAL EMPLOYMENT VARIATION IN BUSINESSES. THE NEED FOR INCREASED FLEXIBILITY IN BUSINESSES AND THE EMPLOYMENT INTERESTS OF MANY WORKERS IN SOUTH AFRICA -- TO PROVIDE THE ENVIRONMENT TO SUPPORT THE EXPANSION OF THESE AGENCIES. THE NEED FOR INCREASED FLEXIBILITY WAS CLEARLY ARTICULATED BY A HUMAN RESOURCE MANAGER OF QUEST PERSONNEL GROUP WHO BLAMED RISING UNEMPLOYMENT ON VERY RESTRICTIVE LABOUR LAWS. MANY TEMPORARY AGENCIES UNASHAMEDLY ADVERTISE THEIR SERVICES AS A WAY BUSINESSES CAN LOWER THEIR LABOUR COSTS AND BYPASS SOME OF THE RIGIDITIES IN EXISTING LEGISLATION, WHILE AT THE SAME TIME PROVIDING (IN THEIR VIEW) THE TYPE OF EMPLOYMENT SOUGHT BY MANY SOUTH AFRICANS (ESPECIALLY WOMEN). THIS SENTIMENT WAS EXPRESSED IN THE PRESENTATION AT THE BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA) HEARINGS BY THE ASSOCIATION OF PERSONNEL SERVICE ORGANISATION (1997):

THE MAJORITY OF TEMPORARY AND CASUAL WORKERS IN SOUTH AFRICA TAKE TEMPORARY WORK OUT OF CHOICE. TEMPORARY WORK PROVIDES A WONDERFUL OPPORTUNITY FOR PEOPLE TO GET TRAINING AND WORK FLEXIBLE HOURS... THIS IS A FAST GROWING INDUSTRY, GIVING WORKERS IN SOUTH AFRICA ACCESS TO SKILLS AND EMPLOYMENT THEY MIGHT NOT OTHERWISE HAVE HAD.

OPPOSITION TO THE BCEA WAS EXPRESSED BY SMALL BUSINESSES AND PERSONNEL SERVICES BEFORE THE ACT WAS PASSED AND SINCE ITS IMPLEMENTATION. ACCORDING TO SEVERAL TEMPORARY EMPLOYMENT AGENCIES, THEIR FEARS ABOUT THE IMPACT OF THE BCEA HAVE MATERIALISED. BRENT PERSONNEL SERVICES, FOR EXAMPLE, STATES THAT THE BCEA DOESN'T TAKE INTO ACCOUNT FLEXIBILITY NEEDS OF BUSINESSES AND ADDS A TREMENDOUS

of BCE Act.

Interview, November 1999.

Telephone interviews with human resource personnel at eight employment agencies. November 1999.

*COST BURDEN FOR TEMPORARY SERVICES= EXTENDED COVERAGE IN THE BCEA
FORCES AGENCIES TO PAY BENEFITS TO MANY WORKERS NOW, BUT HALF THE
TIME PEOPLE DON'T EVEN WANT THE BENEFITS!= SEVERAL AGENCIES NOTE THAT
MANY WORKERS NOW ARE REGISTERED FOR SEVERAL (OFTEN UP TO 6) DIFFERENT
AGENCIES AND SEVERAL AGENCIES ARE LOOKING AT WHAT OPTIONS EXIST FOR
REDEFINING WORKERS REGISTERED WITH THEIR AGENCY AS INDEPENDENT
CONTRACTORS.*

*THE LABOUR LAW IMPLICATIONS OF THIS TRIANGULAR STRUCTURE OF THE
PROVISION OF WORK ARE MANIFOLD. FIRSTLY, THE EMPLOYEE IS NORMALLY
HIRED ON A TEMPORARY BASIS WITH ALL THE IMPLICATIONS THAT THIS HAS FOR
RIGHTS TO SICK LEAVE AND ANNUAL LEAVE. SECONDLY, THE RELATIONSHIP IS
OFTEN CONSTRUCTED IN A WAY THAT THE EMPLOYER= CONTRACTS WITH THE
AGENCY WHO PAYS THE EMPLOYEE= AND, IN THIS WAY, CLAIM TO AVOID THE
OBLIGATIONS IMPOSED BY A COLLECTIVE AGREEMENT ON THE GROUND THAT THE
AGENCY IS NOT AN EMPLOYER COVERED BY THE AGREEMENT. THIRDLY, THE
EMPLOYEES WHO WORK IN THESE TRIANGULAR RELATIONSHIPS CHOOSE TO DO SO
BECAUSE OF THE FLEXIBILITY IT AFFORDS THEM OR BECAUSE THEY ARE
DESPERATE FOR WORK. THIS, TAKEN WITH THE DIFFICULT TO RECONSTRUCT
THESE RELATIONSHIPS FOR THE PURPOSES OF MONITORING OR ENFORCEMENT,
MEANS THAT CONTRAVENTIONS OF LABOUR STANDARDS ARE SELDOM DETECTED.*

SECTION FOUR: SELF-EMPLOYMENT (NOT DEPENDENT)

*SELF-EMPLOYMENT IS INCREASINGLY A FEATURE OF AN ECONOMY WITH A LOW
EXPECTANCY OF EMPLOYMENT IN THE FORMAL SECTOR COMBINED WITH LARGE-SCALE
RETRENCHMENTS. AT ONE END OF THE SPECTRUM, THE PROFESSIONS (LAW, MEDICINE,
AUDITING ETC.) ARE GENERALLY SELF-EMPLOYED THOUGH THEY MAY TAKE UP THE FORM
OF SELF-EMPLOYMENT IN THE FORM OF PARTNERSHIPS. AT THE OTHER END OF THE
SPECTRUM ARE THE UNEMPLOYED OR UNEMPLOYABLE WHO EKE OUT A LIVING THROUGH
HAWKING OR THE PROVISION OF CASUAL LABOUR BTHIS END OF THE SPECTRUM IS DEALT
WITH MORE EXTENSIVELY UNDER SECTION 5.*

*TRENDS CONCERNING SELF-EMPLOYMENT ARE DIFFICULT TO IDENTIFY
THROUGH QUANTITATIVE RESEARCH. WHILE THERE HAS BEEN SOME THOROUGH
RESEARCH RECENTLY CARRIED OUT ON THE SMALL BUSINESS SECTOR, LESS RESEARCH*

Interview with the Human Resource Department, Brent Personnel Services. November 1999.

Interview with the HR Manager, one of Cape Town's largest Temporary Employment Agencies. (They requested to not be directly named). November 1999.

HAS BEEN COMPLETE ON THE INFORMAL AND OTHER TYPES OF SELF-EMPLOYMENT. FURTHER, NATIONAL STATISTICS GENERATED THROUGH THE OCTOBER HOUSEHOLD SURVEY (OHS) HAVE BEEN AN INACCURATE ASSESSMENT OF THE NUMBER OF SELF-EMPLOYED PEOPLE IN THE COUNTRY, AND THE VARIOUS TYPES OF EMPLOYMENT WITHIN THIS SECTOR. IN EARLIER YEARS ONLY DOMESTIC WORKERS, THE SELF-EMPLOYED AND EMPLOYERS WERE INCLUDED WITH THE INFORMAL SECTOR, AND EMPLOYEES WERE NOT ASKED TO INDICATE WHETHER THEY WORKED IN THE FORMAL OR INFORMAL SECTORS. ALTHOUGH SOME QUESTIONS ARE STILL INADEQUATE IN THE 1997 OHS, IT WAS A GREAT IMPROVEMENT FROM PREVIOUS YEARS. HOWEVER, GIVEN THE DIFFICULTIES IN COLLECTING ACCURATE INFORMATION ON SELF-EMPLOYMENT (ESPECIALLY FOR THE INFORMAL SECTOR), AND THE WEAKNESSES IN THE OHS, NO ACCURATE STATISTICS EXIST.

INFORMATION GENERATED FROM THE 1997 OHS (AND SOON, FROM THE 1998 OHS) IS USEFUL AS AN OVERALL INDICATION OF THE CURRENT SITUATION BUT CANNOT BE COMPARED TO PREVIOUS STATISTICS TO IDENTIFY CLEAR TRENDS. IN 1997, 2.1 MILLION PEOPLE WERE REPORTED TO BE WORKING IN THE INFORMAL SECTOR, WITH THE VAST MAJORITY OF THESE IN ELEMENTARY OCCUPATIONS. WHILE ACCURATE STATISTICS AREN'T AVAILABLE, RESEARCH ON THE INFORMAL SECTOR AND SMALL, MEDIUM AND MICRO ENTERPRISES (SMMEs) SUGGESTS THE NUMBER IS INCREASING. FOR EXAMPLE, INFORMAL SECTOR STREET TRADING IN SOUTH AFRICA'S CITIES HAS GROWN IN RECENT YEARS, LARGELY A RESULT OF THE LIFTING OF RESTRICTIONS ON MOVEMENT AND STREET TRADING IN THE 1990s. HIGH LEVELS OF UNEMPLOYMENT AND ONGOING RETRENCHMENTS IN THE FORMAL SECTOR ALSO CONTRIBUTE TO THIS RISE. A RANGE OF ACTIVITIES ARE INCLUDED IN THIS SECTOR: SELLING OF CRAFTS, CLOTHES AND FOOD; HAIRDRESSING SALONS; CAR WATCHERS; REPAIR SERVICES; AND, VARIOUS OTHER PRODUCTIVE SERVICES AND ACTIVITIES.

INFORMAL SECTOR WORKERS FALL OUTSIDE DISPUTE RESOLUTION SYSTEMS, LABOUR LEGISLATION AND SOCIAL SECURITY PROVISIONS. RESEARCHERS INVOLVED IN INFORMAL SECTOR STUDIES ARGUE THAT WHILE THERE IS NO POINT PUSHING FOR A MINIMUM WAGE FOR WORKERS IN THIS SECTOR, THERE IS A DESPERATE NEED FOR THESE

Of these: 568 reported that they were employed by someone else in the informal sector and 549 reported that they worked for themselves. Workers in private households accounted for 989 of those included in the informal sector. Other sectors included: 187 000 in agriculture, hunting, forestry, and fishing; 119 000 in manufacturing; 158 000 in wholesale/retail/ catering and accommodation services; and 79 000 in transport. October Household Survey, 1997.

See for example: AInternational Migration, Immigrant Entrepreneurs and South Africa's Small Enterprise Economy®, Migration Policy Series No. 3, Southern African Migration Project. Cape Town; ATrading Places: Cross-Border Traders and the South African Informal Sector®, Migration Policy Series No. 6, Southern African Migration Project. Cape Town; AWomen Street Traders In Urban South Africa: A Synthesis of Selected Research Findings® CSDS Research Report No 15, University of Natal, September 1998.

WORKERS TO BE COVERED BY SOME FORM OF SOCIAL SECURITY, AND SOME FORM OF DISPUTE RESOLUTION SYSTEM. SUCH A SYSTEM WOULD HAVE TO ACKNOWLEDGE AND MAKE PROVISIONS FOR THE EMPLOYMENT RELATIONSHIPS TYPICAL IN THIS SECTOR. FOR EXAMPLE, THE RELATIONSHIP BETWEEN THE INFORMAL AND FORMAL SECTOR IS CLOSE IN MANY AREAS OF THE ECONOMY. STREET TRADERS AND HAWKERS OFTEN BUY THEIR GOODS FROM A SUPPLIER IN THE FORMAL SECTOR, AND WORK FROM THE FORMAL SECTOR CONTINUES TO BE SUB-CONTRACTED OUT TO WORKERS IN THE INFORMAL SECTOR. CURRENT DISPUTE RESOLUTION SYSTEMS AND SOCIAL SECURITY ARE BASED ON THE EXISTENCE OF EMPLOYERS AND EMPLOYEES. HOWEVER, DISPUTES IN THE INFORMAL SECTOR ARE OFTEN BETWEEN SUPPLIERS AND WORKERS, OR BETWEEN WORKERS AND THE COMPANY THAT IS CONTRACTING OUT THE WORK. THUS A MORE FLEXIBLE SOCIAL SECURITY AND DISPUTE RESOLUTION SYSTEM NEEDS TO DEVELOP AND BE IMPLEMENTED IN ORDER TO EXTEND PROTECTION TO INFORMAL SECTOR WORKERS.

SELF-EMPLOYMENT MEANS THAT THE PERSON WHO OWNS THE BUSINESS ALSO WORKS FOR IT. SELF-EMPLOYMENT IS ALSO NORMALLY CHARACTERISED BY BEING CONSTITUTED BY THAT PERSON ONLY BUT THOUGH THE SELF-EMPLOYED PERSON MAY EMPLOY OTHERS IN WHICH CASE THE BUSINESS BECOMES THE EMPLOYER AND THEY BECOME EMPLOYEES. BUT FOR THE SELF-EMPLOYED PERSON, THERE IS NO LABOUR LAW PROTECTION. THE SELF-EMPLOYED DO HAVE THE RIGHT TO FREEDOM OF ASSOCIATION BUT AS DO OTHER NATURAL AND JURISTIC PERSONS. TAXI PROPRIETORS, FOR EXAMPLE, HAVE FORMED FORMIDABLE TAXI ASSOCIATIONS FOR THE PURPOSE OF REPRESENTING THEIR INTERESTS TO GOVERNMENT. THE RIGHT TO FREEDOM OF ASSOCIATION HAS BEEN EXPRESSLY EXTENDED IN THE CONSTITUTION TO THE RIGHT TO ASSEMBLE, DEMONSTRATE, PICKET AND TO PRESENT PETITIONS. THIS RIGHT TOO HAS BEEN EXTENSIVELY USED BY THE SELF EMPLOYED.

SECTION FIVE: SELF-EMPLOYMENT (DEPENDENT)

THE DEPENDENT POLE OF THE SELF-EMPLOYMENT SPECTRUM IS CHARACTERISED BY PERSONS WHO:

- * DO NOT HAVE THE SKILLS OR THE RESOURCES TO ESTABLISH A BUSINESS THEMSELVES;*
- * ARE DRIVEN INTO SELF-EMPLOYMENT BECAUSE THEY HAVE EITHER LOST THEIR JOBS OR CANNOT FIND EMPLOYMENT AS EMPLOYEES; AND*

Interview with Pat Horn, Self-employed Women's Union (SEWU) Durban, February 2000.

Section 18 of the Constitution.

Section 17 of the Constitution.

** ACQUIRE WORK THROUGH LEGAL FORMS THAT PLACE THEM OUTSIDE THE PROTECTION OF THE LABOUR LEGISLATION IN LAW AND IN FACT.*

A PRACTICAL TEST TO DETERMINE WHETHER A SELF-EMPLOYED WORKER IS DEPENDENT OR NOT IS TO ASK WHETHER THE WORKER WOULD PREFER TO DO THE WORK THAT HE OR SHE IS DOING AS AN EMPLOYEE AS OPPOSED TO DOING SO AS AN INDEPENDENT CONTRACTOR. THE COMMON FORMS THAT DEPENDENT SELF-EMPLOYMENT TAKE ARE: HOME WORKERS, OUT-WORKERS, OWNER DRIVERS, TASK WORKERS, AN-SOURCED=WORKERS, CASUAL EMPLOYEES AND FREE-LANCERS.

THE LEGAL FORM THAT THESE CONTRACTS FOR WORK TAKE IS THAT OF THE INDEPENDENT CONTRACTOR. ACCORDINGLY, THEY FALL OUTSIDE THE PROTECTIVE AMBIT OF THE PROTECTIVE LABOUR LEGISLATION. INDEPENDENT IN LEGAL FORM BUT DEPENDENT IN PRACTICE. THAT IS WHY SO MANY OF THESE FORMS OF SELF-EMPLOYMENT ARE PROHIBITED BY COLLECTIVE AGREEMENTS AND SECTORAL DETERMINATIONS. BUT COLLECTIVE AGREEMENTS AND SECTORAL DETERMINATIONS DO NOT COVER THE WHOLE OF THE LABOUR MARKET AND ACCORDINGLY THESE FORMS OF EMPLOYMENT ARE INCREASINGLY USED. THE LACK OF ENFORCEMENT TOO HAS ALLOWED THESE FORMS OF EMPLOYMENT TO EXTEND MORE WIDELY.

THE FAILURE ON THE PART OF THE TRADE UNION MOVEMENT TO ORGANISE THIS SECTOR CONSTITUTES ANOTHER REASON FOR THEIR LACK OF PROTECTION. NOTWITHSTANDING THE PUBLIC COMMITMENT TO ORGANISE THESE WORKERS, THE NATIONAL FEDERATIONS HAVE FAILED TO MAKE ANY SERIOUS HEADWAY.

SECTION SIX: SECTORAL CASE STUDIES

TRANSPORT

ACCORDING TO OFFICIAL GOVERNMENT FIGURES, EMPLOYMENT IN THE TRANSPORTATION INDUSTRY ROSE SLIGHTLY BETWEEN 1994 - 1997, FROM 4.6% OF THE FORMAL SECTOR WORKFORCE IN 1994 TO 5.8% IN 1997. HOWEVER, LIKE OTHER SECTORS, THE NUMBER OF PERMANENT WORKERS HAS DECLINED. BETWEEN 1989 (A YEAR THAT RECORDED THE HIGHEST EMPLOYMENT LEVEL FOR 23 YEARS) AND 1995 THERE WAS A 15.2% DROP IN PERMANENT EMPLOYMENT IN THE ROAD TRANSPORT INDUSTRY (FROM 67 326 TO 57 093 EMPLOYEES). THE OCTOBER 1994 HOUSEHOLD SURVEY FOUND THAT THERE WERE 259 607 PEOPLE WORKING IN THE INFORMAL SECTOR OF THE TRANSPORT, STORAGE AND COMMUNICATION INDUSTRIAL SECTORS AND RESEARCH SUGGESTS THIS NUMBER CONTINUES TO INCREASE. THE 1997 OHS FOUND THAT THERE WERE 79 000 INFORMAL SECTOR WORKERS IN THE TRANSPORTATION

Section 55(4)(g) of the BCEA specifically authorises the prohibition of this kind of employment in a sectoral determination.

Central Statistical Services, South Africa. 1996.

SECTOR ALONE. ACCURATE FIGURES OF THOSE WORKING IN THE ROAD TRANSPORT SECTOR ARE DIFFICULT AS, DESPITE RECENT ATTEMPTS TO IMPLEMENT A REGULATORY FRAMEWORK FOR THE INDUSTRY, THE TAXI INDUSTRY REMAINS BY IN LARGE, A DE-REGULATED INDUSTRY. OVERALL, THREE NEW EMPLOYMENT RELATIONSHIPS ARE PREVALENT IN THIS SECTOR: OWNER-DRIVER SCHEMES, AND SUB-CONTRACTING TO SMALLER COMPANIES (ROAD TRANSPORT), AND CONTRACT LABOUR PROVIDED BY LABOUR BROKERS (MARITIME).

ROAD FREIGHT

GIVEN THE GROWING IMPORTANCE OF ROAD TRANSPORTATION OF GOODS IN SOUTH AND SOUTHERN AFRICA, AND THE POSSIBILITIES OF INDIVIDUAL OWNERSHIP OF VEHICLES, ROAD FREIGHT PROVIDES AN INTERESTING CASE STUDY OF NEW EMPLOYMENT SITUATIONS AND WORKER PROTECTION. OVERALL, INCREASED COMPETITION IN THE INDUSTRY HAS LED TO CHANGES IN EMPLOYMENT (DECLINE IN PERMANENT JOBS AND NEW OWNERSHIP SCHEMES), LONGER HOURS AND / OR MORE INTENSIVE WORK. EXISTING INFORMATION ON THE SECTOR, AND PROCESSES OF RESTRUCTURING UNDERWAY IS INADEQUATE. AS HENWOOD OUTLINES, CSS FIGURES ON ANNUAL TONNAGE TRANSPORTED FAIL TO CAPTURE PROCESSES OF CASUALISATION AS COMPANIES WITH ANCILLARY TRANSPORT SERVICES TRANSPORTING THEIR OWN GOODS (IN-HOUSE TRANSPORT) ARE NOT RECORDED. THUS, AVAILABLE STATISTICS DO NOT REFLECT THE TOTAL TONNAGE OF GOODS. HOWEVER, CHANGES ARE CLEARLY TAKING PLACE IN THE NATURE OF WORK AND FORMS OF EMPLOYMENT IN THIS SECTOR. WHILE THERE ARE NO AVAILABLE STATISTICS ON THE NUMBER OF CASUAL WORKERS, SUB-CONTRACTED SMALL TRANSPORT COMPANIES, AVAILABLE RESEARCH INDICATES THESE PROCESSES ARE LIKELY TO CONTINUE.

OWNER-DRIVER SCHEMES ARE AN IMPORTANT ISSUE IN THE TRANSPORTATION SECTOR. FOR THE PAST 6 - 7 YEARS DRIVERS HAVE BEEN ENCOURAGED TO 'BECOME THEIR OWN BOSS' AS OWNERS OF THE TRUCKS THEY DRIVE. THIS SCHEMES HAS BECOME MORE POPULAR OVER THE PAST 4 B 5 YEARS AS IT COMPLIMENTS OUTSOURCING INITIATIVES OF MANY LARGE COMPANIES. NO ACCURATE NATIONAL OR PROVINCIAL STATISTICS EXIST BUT RESEARCH SUGGESTS ABOUT 10% OF DRIVERS HAVE BEEN CONVERTED INTO OWNER-DRIVERS. IN GAUTENG THERE ARE APPROXIMATELY 500 OWNER-DRIVERS. ALTHOUGH IN THEORY EMPLOYEES HAVE BEEN CONVERTED INTO SELF-EMPLOYED BUSINESS PEOPLE, IN

October Household Survey, PO317, 1994.

Nick Henwood, AHours of Work on the Long Road@NALEDI Research Paper (NALEDI, Johannesburg, 1998).

Interview with Mr. Pierides, Road Freight Association, March 2000; Interview with the Transport and General Workers Union (TGWU), December 1999, March 2000. TGWU estimates that within their membership, approximately 500 drivers of the +/- 20,000 drivers nationally have been converted into owner-drivers.

REALITY MANY OWNER-DRIVERS ARE NOT REALLY INDEPENDENT RATHER ARE IN A SITUATION OF DEPENDENCY WITH FEW RIGHTS AS WORKERS.

SEEING THE OPPORTUNITY FOR EXPLOITING THE SYSTEM AND DRIVERS, MANAGEMENT COMPANIES HAVE BEEN FORMED TO ADMINISTER OWNER-DRIVER SCHEMES. THESE COMPANIES APPROACH LARGE CUSTOMERS WITH A PROPOSAL ON HOW TO CONVERT THEIR EMPLOYEES (TRUCK DRIVERS) INTO OWNER-OPERATORS. A CONTRACT IS THEN SIGNED BETWEEN THE MANAGEMENT COMPANY AND THE CUSTOMER, AND BETWEEN DRIVERS (USUALLY THE DRIVERS WHO WERE EMPLOYEES OF THE COMPANY, ALTHOUGH NEW DRIVERS MAY ALSO BE RECRUITED) AND THE MANAGEMENT COMPANY. MOST CONTRACTS ARE FIVE YEARS AND SPECIFY CERTAIN CONDITIONS. FOR EXAMPLE, MANY MANAGEMENT COMPANIES REQUIRE VEHICLES TO BE PARKED ON THEIR PROPERTY WHEN THE TRUCK IS NOT ON THE ROAD, CHARGE DRIVERS AN ADMINISTRATIVE FEE AND MAY REQUIRE PARTIAL OWNERSHIP OF THE VEHICLE (SOMETIMES AS HIGH AS 51%).

SO, WHILE ON PAPER EMPLOYEES HAVE BEEN CONVERTED INTO OWNER-OPERATORS, IN REALITY TRANSPORT FOR THE COMPANY HAS BEEN EFFECTIVELY OUTSOURCED TO A MANAGEMENT COMPANY THAT THEN SIGNS CONTRACTS WITH DRIVERS. DRIVERS, SINCE THEY ARE NOW ASSUMED TO BE >SELF-EMPLOYED=ARE THEREFORE NOT LONGER COVERED BY LABOUR LEGISLATION (SUCH AS THE BASIC CONDITIONS OF EMPLOYMENT ACT). IT IS ESTIMATED THAT APPROXIMATELY 20% OF THE >OWNER-DRIVERS= ARE IN REALITY (BUT NOT CURRENTLY RECEIVING PROTECTION UNDER THE LAW) EMPLOYEES OF THE MANAGEMENT COMPANY. ABOUT 33% OF THE OWNER-DRIVERS ARE LEGITIMATELY SELF-EMPLOYED AS OWNER-OPERATORS.

THE EXTENT OF THESE PRACTICES IS UNCLEAR, BUT WHAT IS KNOWN IS THAT IT IS A RISING PROBLEM IN THE SECTOR. IN RECENT MONTHS ALEX CARRIERS (A LARGE TRANSPORT COMPANY) BEGAN PUTTING PRESSURE ON DRIVERS TO BECOME OWNER-DRIVERS, THREATENING THAT IF THIS SCHEME WAS NOT TAKEN UP TRANSPORT WOULD BE COMPLETELY OUTSOURCED. THESE PRESSURES ARE NOT NEW FOR DRIVERS. FOR EXAMPLE, AFTER ONLY ABOUT 3 YEARS OF ENCOURAGING SUCH A PROCESS, SUNCOURIERS HAS COMPLETELY CONVERTED THEIR ENTIRE STAFF OF PERMANENT EMPLOYEE (DRIVERS) INTO OWNER-DRIVERS. THE ONLY PERMANENT STAFF THE COMPANY HAS LEFT IS THE

This is to correspond to the period of most bank loans to driver to purchase their trucks.

One management company is reported to charge 90,000 rand per month for the 18 drivers that it is administering contracts for (ie. 5000 rands per month for each driver B a huge amount given their earnings. Research suggests administrative fees are often 3/4 of the owner-drivers earnings). Given these fees and the high costs of maintaining vehicles, it is not surprising that many drivers report to be earning less as owner-drivers than as company employees. Interview, Road Freight Association, March 2000.

Interviews with Mr. Pierides, Road Freight Association, March 2000; Interview with TGWU December 1999, February 2000.

ADMINISTRATIVE STAFF. TRANSPORT AND GENERAL WORKERS UNION (TGWU) WERE OPPOSED TO THIS SCHEME AND, ONCE THE NATIONAL ROAD BARGAINING COUNCIL WAS ESTABLISHED (1995), PUSHED FOR AN AGREEMENT WITH EMPLOYERS ON THE ISSUE. SEVERAL PROBLEMS EMERGED FROM THIS SCHEME. FIRST, VEHICLE DRIVERS PURCHASED WERE OFTEN THOSE THEY HAD BEEN DRIVING, THUS THE TRUCK'S LIFE SPAN WAS SHORT AND DRIVERS (NEW OWNERS) WERE SOON FACED WITH HIGH EXPENSES FOR REPAIRS. SECOND, THE CLOSE LINK BETWEEN WORKING TIME, PRODUCTIVITY AND PROFITS HAS RESULTED IN DRIVERS WORKING LONG HOURS AND NOT TAKING ADEQUATE REST PERIODS. AS DATA FROM TGWU, AND HENWOOD'S RESEARCH REVEALS, WORK INTENSIFIED, DRIVERS WERE PUSHED TO WORK EVEN LONGER HOURS THAN THE LONG HOURS THAT ALREADY CHARACTERISED THE SECTOR, AND WAGES OFTEN DROPPED DUE TO HIGH EXPENSES OF MAINTAINING TRUCKS.

ESTABLISHED IN 1995, THE UNION HAS TRIED TO USE THE NATIONAL BARGAINING COUNCIL FOR THE ROAD TRANSPORT INDUSTRY TO ADDRESS PROBLEMS ARISING FROM THE RESTRUCTURING OF THE INDUSTRY AND STATE POLICIES AIMED AT REMOVING LEGISLATION WHICH CONTROLLED COMPETITION. SOME OF THESE PROBLEMS WERE ADDRESSED IN AN AGREEMENT REACHED AT THE NATIONAL BARGAINING COUNCIL. THREE PRINCIPLES WERE AGREED TO: OWNER/DRIVER SCHEMES WOULD NOW BE NEGOTIATED WITH THE UNION; ALL DRIVER/OWNERS COULD BE UNION MEMBERS; AND, CAPACITY-BUILDING AND EMPOWERMENT SKILLS NECESSARY TO MANAGE A BUSINESS WOULD BE PROVIDED. DESPITE GAINS MADE BY THE UNION IN REGULATING OWNER/DRIVER SCHEMES, AND EXCESSIVE WORKING HOURS FOR PERMANENT WORKERS (TO ACHIEVE A 40 HOUR WEEK, THE AVERAGE TRUCK DRIVER WOULD HAVE TO DECREASE THE CURRENT HOURS SPENT AT WORK PER WEEK BY 72.7%), THESE PROBLEMS PERSIST. PRODUCTIVITY-BASED WAGE SYSTEMS (WAGE PACKAGES ARE GENERALLY MADE UP OF DRIVERS=BASIC WAGE, NIGHT OUT ALLOWANCE PLUS EITHER OVERTIME OR KILOMETRE BONUS) AND PRESSURES TO MEET DESTINATION DEADLINES RESULT IN DRIVERS WORKING EXCESSIVELY LONG HOURS. FOR EXAMPLE, DRIVERS=TAKE HOME PAY IS USUALLY MORE THAN TWICE THEIR AVERAGE BASIC WAGE.

LIKE OTHER SECTORS, ALONG WITH THE RISE IN SMALL-SUB-CONTRACTORS, ROAD TRANSPORTATION HAS SEEN AN INTENSIFICATION OF THE ROLE OF LABOUR BROKERS. LABOUR BROKERS PROVIDED REPLACEMENT LABOUR DURING THE RECENT NATIONAL (1994) STRIKE IN THE INDUSTRY, AND CONTINUE TO BE VERY PREVALENT IN THE INDUSTRY. WHILE FREIGHT TRANSPORT HAS TRIED TO OUTSOURCE NON-CORE=FUNCTIONS, OVERALL THE UNION HAS BEEN SUCCESSFUL IN CURTAILING SUCH PROCESSES AND WAS ABLE TO

Nick Henwood, , Hours of Work on the Long Road@NALEDI Research Paper (NALEDI, Johannesburg, 1998. Interviews, TGWU, December 1999.

REACH AN AGREEMENT FROM EMPLOYERS THAT ANY EMPLOYERS WHO WANTS TO SUB-CONTRACT MUST INFORM THE UNION. IN ADDITION, AS HENWOOD'S RESEARCH ARGUES, AN UNKNOWN BUT GROWING NUMBER OF LONG DISTANCE ULTRA HEAVY DUTY VEHICLE DRIVERS ARE EITHER EXEMPTED FROM BARGAINING COUNCIL AGREEMENTS, OR ARE NOT SUBJECT TO LABOUR LEGISLATION SUCH AS THE BCEA.

ROAD PASSENGER (BUS)

RECENT RESTRUCTURING INITIATIVES AND GOVERNMENT POLICIES HAVE ESSENTIALLY TURNED ALL BUS DRIVERS FROM PERMANENT EMPLOYEES INTO CONTRACT WORKERS WITH FIVE-YEAR CONTRACTS. THE OLD SYSTEM, A LIFE-PERMIT SYSTEM PROVIDED MOST EMPLOYEES WITH PERMANENT, FULL TIME POSITIONS. IN COMPARISON, THE NEW REGULATED COMPETITION MODEL MEANS OPERATORS (BUS OWNERS) MUST TENDER FOR ROUTE CONTRACTS (USUALLY AWARDED ON A FIVE-YEAR BASIS). IF SUCCESSFUL, BUS EMPLOYERS THEN HIRE DRIVERS FOR THE DURATION OF THE ROUTE CONTRACT. IN LINE WITH THE ANC'S OBJECTIVE OF DERACIALISING THE ECONOMY AND THE OWNERSHIP OF PRODUCTIVE PROPERTY, ANY NEW TENDER FOR ROUTES MUST HAVE DEMONSTRATED THEIR COMMITMENT TO BLACK ECONOMIC EMPOWERMENT. AS A RESULT, MANY OF THE LONGER ROUTES AND NETWORKS ARE BEING DIVIDED UP AND NEW SMALL OPERATORS ARE EMERGING AND BEING AWARDED BUS ROUTES. FOR EXAMPLE, THE ESTABLISHED COMPANY PUTCO RECENTLY LOST IN THE TENDERING PROCESS TO A SMALL BLACK BUSINESS. THE IMPACT OF THIS ON EMPLOYMENT PATTERNS AND WORKING CONDITIONS IS LIKELY TO BE GREAT AS MANY OF THE SMALL OPERATORS WILL APPLY FOR, AND GET EXEMPTIONS FROM LEGISLATION AND BARGAINING COUNCIL AGREEMENTS.

ROAD PASSENGER: (TAXIS)

THE TAXI INDUSTRY (MINI-BUS TAXI INDUSTRY) HAS ALWAYS BEEN A DE-REGULATED INDUSTRY, WITH OPERATORS MOSTLY WORKING IN THE TOWNSHIPS AND ON REGULAR ROUTES BETWEEN CITY CENTRES (AND OTHER PLACES OF WORK) AND TOWNSHIPS. THIS SUITED THE APARTHEID REGIME WELL, AS IT DIDN'T HAVE TO CONCERN ITSELF WITH PROVIDING SAFE AND ACCESSIBLE PUBLIC TRANSPORTATION FOR THE MAJORITY OF THE COUNTRY'S CITIZENS. GROSSLY INADEQUATE (BUS AND TRAIN) PUBLIC TRANSPORTATION, COMBINED WITH EMPLOYMENT POSSIBILITIES WITHIN THE INDUSTRY HAVE RESULTED IN THE INCREASE OF MINI-BUS TAXI OPERATORS. CURRENT ESTIMATES ARE THAT THERE ARE OVER 120 000 TAXIS ON THE ROAD B MOST OF THEM ILLEGAL. ALTHOUGH ATTEMPTS HAVE

BEEN MADE TO DEVELOP A REGULATORY FRAMEWORK FOR THE INDUSTRY, IT LARGELY REMAINS UNREGULATED WITHIN THE INFORMAL SECTOR.

GIVEN THE LACK OF REGULATION, THERE IS NO CONTRACTUAL RELATIONSHIP BETWEEN OWNERS AND TAXI DRIVERS WITH PAYMENT USUALLY BASED ON THE 'QUOTA-SYSTEM' OR 'TARGET-SYSTEM' (NUMBER OF PASSENGERS TRANSPORTED). THUS, DRIVERS AREN'T ENTITLED TO UIF OR OTHER BENEFITS. HEARINGS ARE CURRENTLY TAKING PLACE BY THE EMPLOYMENT CONDITIONS COMMISSION (ECC) AND THE MINISTER WILL SOON MAKE A DETERMINATION ON CONDITIONS OF EMPLOYMENT FOR THIS SECTOR. DIFFICULTIES IN ENFORCING LEGISLATION (INCLUDING THE FACT THAT MANY TAXI OWNERS HIRE FRIENDS OR FAMILY AS DRIVERS), AND COMPETITION ON THE ROAD FOR PASSENGERS WILL CONTINUE TO MAKE THIS A DIFFICULT INDUSTRY TO REGULATE.

MARITIME:

CASUAL WORKERS HAVE BEEN A LONG-TIME FEATURE OF THE DOCKS IN SOUTH AFRICA. AND, THOUGH NOT NEARLY AS PERVASIVE AS THAT ON THE DOCKS, CASUAL WORKERS ARE BROUGHT IN ON A 'NEEDS ONLY BASIS' IN THE WAREHOUSES AND SHIPS. SIMILAR TO EMPLOYMENT TRENDS IN OTHER SECTORS, EMPLOYERS USE CASUAL WORKERS, OR OUTSOURCE TO THIRD PARTIES ON A CONTRACT BASIS IN ORDER TO SAVE LABOUR COSTS AND PAYING BENEFITS. ONE AREA OF WORK THAT EMPLOYERS HAVE RECENTLY TRIED TO OUTSOURCE IS THE MAINTENANCE OF FLEETS AND TRANSPORT IN THE DOCKS. EMPLOYERS HAVE JUSTIFIED THIS MOVE BASED ON THE ARGUMENT THAT OUTSOURCING IS NECESSARY AS THE INCREASINGLY SPECIALISED NATURE OF THIS WORK REQUIRES SKILLS THE CURRENT WORKFORCE DOESN'T HAVE. THE UNION (TGWU) HAS HAD SOME SUCCESS COUNTERING THIS ARGUMENT WITH THE DEMAND THAT THE CURRENT WORKFORCE MUST THEREFORE BE PROVIDED WITH TRAINING TO ENSURE ADEQUATE SKILL LEVELS ARE PRESENT.

IN ADDITION, TGWU IS TRYING TO SET UP A BARGAINING COUNCIL FOR THIS SECTOR AND HAS BEEN SUCCESSFUL (IN THE LAST YEAR) IN PUSHING EMPLOYERS TO AGREE TO A NATIONAL 'DOCK LABOUR SCHEME', WHEREBY A PERMANENT REGISTER OF CASUAL WORKERS IS DRAWN UP AND ALL OPERATORS IN THE DOCKS MUST USE THIS REGISTERED POOL OF LABOUR TO DRAW CASUAL WORKERS FROM. THIS PROCESS WILL SERVE TO BOTH 'REGULARISE AND REGULATE' CASUAL EMPLOYMENT IN THIS SECTOR, AND BEGIN TO GIVE CASUAL WORKERS SOME DEGREE OF SECURITY BY TRYING TO GUARANTEE THEM A CERTAIN NUMBER OF WORKING DAYS PER WEEK. STILL ON A TRIAL BASIS, THIS STRUCTURE HAS BEEN IN PLACE FOR APPROXIMATELY A YEAR.

CLOTHING AND TEXTILES

TARIFF REDUCTIONS, OUTDATED MACHINERY, AND A RISE IN IMPORTED CLOTHING (SECOND-HAND CLOTHING, CHEAP IMPORTS FROM ASIAN COUNTRIES AND ILLEGAL IMPORTS) HAVE PUT PRESSURE ON THE INDUSTRY, RESULTING IN FACTORY CLOSURES AND HUGE JOB LOSSES. APPROXIMATELY 180 000 WORKERS ARE FORMALLY EMPLOYED BY THE INDUSTRY AT A NATIONAL LEVEL, WITH THE MAJORITY BASED IN DURBAN AND CAPE TOWN. MASSIVE JOB LOSSES HAVE AFFECTED THE INDUSTRY. BETWEEN 1989 AND 1999, EMPLOYMENT IN THE TEXTILE SECTOR DROPPED FROM 100 300 TO 62 083; INCLUDING 22 000 JOBS LOST IN THE CLOTHING, TEXTILE AND LEATHER INDUSTRY LAST YEAR. THE WESTERN CAPE CLOTHING BARGAINING COUNCIL COVERS ABOUT 38,935 WORKERS (CLOTHING AND KNITTING), NATAL COVERS 22,624 (CLOTHING AND KNITTING), GAUTENG 8 800 (CLOTHING AND KNITTING), THE EASTERN CAPE 1, 2140 (CLOTHING), WHILE THE FREE STATE AND NORTHERN CAPE COVER ABOUT 1380 WORKERS IN THE CLOTHING SECTOR.

ALONGSIDE FACTORY CLOSURES AND RETRENCHMENTS HAVE BEEN SOME CHANGES IN EMPLOYMENT PRACTICES, AND STRATEGIES BY EMPLOYERS TO CHANGE THE NATURE OF THE EMPLOYMENT RELATIONSHIP. THREE TRENDS CAN BE NOTED: THE USE OF SHORT-FIXED TERM CONTRACTS; THE RISE IN HOMEWORKING; AND THE INCREASED IN DISGUISED EMPLOYMENT RELATIONSHIPS THROUGH CONVERTING EMPLOYEES INTO INDEPENDENT CONTRACTORS. THE USE OF CONTRACT LABOUR IN THIS SECTOR IS FAIRLY LIMITED, USUALLY ONLY USED TO REPLACE WORKERS ON LEAVE (ON MATERNITY LEAVE AND SOMETIMES ON SICK LEAVE). WORKERS (OFTEN WORKERS WHO WERE EMPLOYED IN THE SECTOR AND RETRENCHED) ARE EMPLOYED ON FIXED-TERM CONTRACTS, USUALLY SIX MONTH CONTRACTS TO COVER FOR THE WORKER ON MATERNITY LEAVE. THESE WORKERS ARE ENTITLED TO THE SAME WAGES AND BENEFITS OF FULL-TIME PERMANENT WORKERS. AGREEMENT HAS BEEN REACHED BETWEEN THE UNION (SOUTHERN AFRICAN CLOTHING AND TEXTILE WORKERS UNION, SACTWU) AND EMPLOYERS THAT CONTRACT LABOUR CAN ONLY BE USED TO REPLACE WORKERS ON LEAVE, OR IN PARTICULAR SITUATIONS (IE. IF A COMPANY HAS A BIG CONTRACT AWARDED THAT REQUIRES ADDITIONAL STAFF). HOWEVER, THAT IT APPEARS THAT THIS PRACTICE MAY BE INCREASING WITH MORE EMPLOYEES BEING HIRED ON SHORT FIXED-TERM CONTRACTS. CONTRACTS ARE OFTEN THEN ROLLED-OVER OR EXTENDED.

Yolande Pauline, Research Officer, Southern African Clothing and Textile Workers- Union (SACTWU), Cape Town. December 1999 figures.

Information suggests short-term contracts also allow Companies to meet orders within a certain timeframe. According to the Bargaining Council in the Western Cape, these practices aren't easy to detect as employers, especially small employers don't pay these workers benefits and Bargaining Councils only hear of practices when workers come to complain of unfair labour practices. (Interview, November 1999)

LIMITED INFORMATION IS AVAILABLE ON HOMEWORKING, BUT THERE SEEMS TO HAVE BEEN A STEADY INCREASE IN THE NUMBERS OF HOMEWORKERS WORKING IN THIS SECTOR. THIS PRESENTS A PROBLEM FOR THE INDUSTRY AS LARGE MANUFACTURERS USE HOMEWORKERS AS A WAY TO AVOID LABOUR COSTS. HOMEWORKING=INCLUDES QUITE A RANGE EMPLOYMENT RELATIONSHIPS AND ACTIVITIES WITHIN HOME INDUSTRIES B FROM SMALL FAMILY RUN BUSINESSES PRODUCING GARMENTS FOR FLEA MARKETS AND CRAFT SALES, TO UPMARKET CLOTHING PRODUCTION IN HIGH INCOME NEIGHBORHOODS, TO FAIRLY FORMAL NETWORKS OF SUB-CONTRACTING TO SMMES. OVER THE PAST FOUR YEARS IT APPEARS THAT THERE HAS BEEN A GROWTH IN COMMERCIAL AND LARGER MANUFACTURERS SUB-CONTRACTED WORK TO HOME INDUSTRIES IN INFORMAL / UNREGULATED AREAS NOT TRADITIONALLY COVERED BY BARGAINING COUNCIL AGREEMENTS. THESE HOME INDUSTRIES PROVIDE >CUT, MAKE AND TRIM=(CMT) WORK FOR COMMERCIAL CLOTHING COMPANIES.

AS OUTLINED EARLIER, ANOTHER SIGNIFICANT CHALLENGE FACING THE SECTOR IS THE CONVERSION OF WORKERS INTO INDEPENDENT CONTRACTORS, A PROCESSES FACILITATED BY COFESA. AS WAS ARGUED EARLIER, IN THE CLOTHING SECTOR THE VAST MAJORITY WORKERS CONVERTED INTO >INDEPENDENT CONTRACTORS= ARE A SCAM. MOST ARE ATTEMPTS ON THE PART OF THE EMPLOYER TO REDUCE COSTS AND GET AROUND LABOUR LEGISLATION. CLAIMS MADE BY COFESA OF HAVING CONVERTED OVER 25,000 CLOTHING WORKERS IN NATAL ALONE ARE CLEARLY INFLATED. STILL, IT IS A REALITY AND A GROWING PROBLEM, TO THE EXTENT THAT THE BARGAINING COUNCIL IN NATAL CLAIMS THAT THE VAST MAJORITY OF ITS TIME IS TAKEN UP DEALING WITH THE ISSUE OF

A research project has recently been initiated by the Union (SACTWU) to trace the rise and impact of homeworking in the clothing industry. One of the strategies of this project is to organise and unionise workers in order to regulate homeworking and ensure protection offered in legislation is extended to homeworkers.

Homeworking in these neighborhoods (previously designated >white= areas) have been granted exemptions from bargaining council agreements, are known to the council and are inspected regularly. The Western Cape Bargaining Council estimates that there are only about 5 of these home businesses in Cape Town. (Interview, Bargaining Council, November 1999).

Based on reports and complaints from workers to Bargaining Councils, it appears that there are at least 150 homes on the Cape flats, employing about 10 people each, doing homework for clothing manufacturers. (Interview: Western Cape Bargaining Council, November 1999).

Preliminary information on these practices in the Western Cape suggests that this can include everything from large factories outsourcing much of their work to small, unregulated businesses employing homeworkers (up to a dozen workers) in several different sites (homes or garages in townships), to one or two individuals (often women previously employed in the sector) working at home on their own sewing machines. In some cases, large companies claim workers are self-employed, yet supply machines and regulate hours of work, control production processes and are responsible for hiring and firing. In other cases, small, unregulated businesses hire workers and provide machinery to employees who come into their homes to work (ie. home owner is employer). The extent, organisation or these practices and working conditions of homeworkers will be better known once SACTWU's research is complete.

INDEPENDENT CONTRACTORS=AND COFESA. WHY DO WORKERS SIGN THESE CONTRACTS WHEN IT IS EVIDENT THAT THEIR WAGES WILL DROP? AS THE BARGAINING COUNCILS SEE IT, FACTORIES STRUGGLING TO SURVIVE DOWNLOAD PRESSURE ONTO WORKERS, OFFERING THE CHOICE OF ASIGN THIS CONTRACT AND BECOME AN INDEPENDENT CONTRACTOR=OR THE FACTORY MAY HAVE TO CLOSE AND YOU WILL BE RETRENCHED@. NOT MUCH OF A CHOICE. SOME OF THE ISSUES THAT NEED TO BE ADDRESSED INCLUDE: CAN A GENUINE INDEPENDENT CONTRACTOR EXIST IN THE CLOTHING AND TEXTILE INDUSTRY? IF SO, WHAT ARE THE CRITERIA? WHAT CONSTITUTES EMPLOYMENT? IF A DEGREE OF MANAGERIAL CONTROL OVER WORKING TIME, THE PRODUCTION PROCESS, MACHINERY, AND DISCIPLINARY ISSUES CONTINUES WHEN A WORKER BECOMES SELF-EMPLOYED= B CAN THIS BE A GENUINE INDEPENDENT CONTRACTOR?

ENGINEERING

THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL (MEIBC) CURRENTLY COVERS 240,811 WORKERS, A DROP FROM APPROXIMATELY 275,000 ONLY 18 MONTHS AGO. NOT SURPRISINGLY, THERE IS A STRONG CORRELATION BETWEEN THE SIZE OF THE BUSINESS AND THE LEVEL OF ORGANISATION. OF THE 8,926 EMPLOYERS, 2,476 ARE MEMBERS OF FORMAL EMPLOYER ASSOCIATIONS, EMPLOYING ABOUT 60% OF THE WORKFORCE (MOSTLY UNIONISED WORKERS), WHILE THE REMAINING 6,450 ARE (MOSTLY SMALLER BUSINESSES WITH LESS THAN 20 EMPLOYEES) ARE NOT MEMBERS AND ARE CHARACTERISED BY NON-UNIONISED WORKFORCES. THESE NUMBER REVEAL A WORRYING TREND: BIG EMPLOYERS ARE LOSING GROUND (ONLY 28% OF EMPLOYERS ARE NOW MEMBER OF EMPLOYMENT ASSOCIATIONS AND THE PERCENTAGE OF THE WORKFORCE THEY EMPLOY HAS DROPPED FROM APPROXIMATELY 65% A YEAR AGO TO 60%), WHILE SMALLER BUSINESSES ARE GROWING IN SIGNIFICANCE. THIS TREND PARALLELS EMPLOYMENT PATTERNS, LARGE NUMBERS OF RETRENCHMENTS ARE CONTINUING AND SKILLED WORKERS

This process is a problem for workers, the union and for Bargaining Councils. Workers wages drop below bargaining council agreements (reports are that wages drop to below R 1000.00 per month, when the average minimum wage for clothing and textile workers is R 1 658 per month). For Bargaining councils, this process undermines their ability to enforce agreements and makes it harder for both the union and council to reach and extend protection to unorganised workers.

Interviews with the Natal and Western Cape Clothing Bargaining Council. (November 1999 and February 2000).

Interview with David Levy, Secretary, Metal and Engineering Industries Bargaining Council (MEIBC), November 1999.

Interview with David Levy, November 1999; Interview with the National Union of Metal Workers of South Africa (NUMSA), November 1999, February, 2000.

ARE STARTING SMALL BUSINESSES OF THEIR OWN. IF THIS TREND CONTINUES, THE ABILITY TO EXTEND BARGAINING COUNCIL AGREEMENTS TO NON-PARTIES MAY BE CHALLENGED. AND, NOT SURPRISINGLY, WHILE THERE IS STRONG SUPPORT FOR CENTRALISED BARGAINING IN THE LARGER WORKPLACES (AND WITH UNIONISED WORKERS), THERE IS LACK OF SUPPORT (IF NOT STRONG OPPOSITION) FOR IT WITHIN SMALLER BUSINESSES. BOTH ISSUES NEED TO BE ADDRESSED IF BARGAINING COUNCILS ARE TO REMAIN STRONG AND EFFECTIVE.

ALTHOUGH THERE HAVE BEEN SOME NEW TRENDS EMERGE RECENTLY, CASUALISATION IN THIS SECTOR IS NOT PARTICULARLY NEW, NOR (ACCORDING TO THE BARGAINING COUNCIL) DOES IT PRESENT A HUGE PROBLEM. THE UNION MOVEMENT (LARGELY NUMSA) HAS CONTINUED TO OPPOSE THE OPERATION OF LABOUR BROKERS, HOWEVER THE BARGAINING COUNCIL HAS TAKEN THE STRATEGY OF USING NEGOTIATED AGREEMENTS TO ALLOW LABOUR BROKERS TO OPERATED MORE EFFECTIVELY, WHILE ENSURING THE RIGHTS OF WORKERS ARE PROTECTED. THIS STRATEGY EMERGES FROM THE SPECIFIC STRUCTURE OF THE INDUSTRY, AND THE KEY CHALLENGES NOW FACING THE SECTOR.

AT LEAST TWO CRITICAL CHALLENGES FACE THE SECTOR. FIRST, THE INDUSTRY IS STRUGGLING TO DEAL WITH INCREASED FOREIGN COMPETITION. AS A RESULT OF INCREASED COMPETITION, THE INDUSTRY HAS SHAD A HUGE NUMBER OF JOBS IN RECENT YEARS. ABOUT 260 000 (OVER HALF THE WORKFORCE) HAS BEEN RETRENCHED OVER THE LAST 12 B 15 YEARS. REDUCTION OF TRADE BARRIERS HAS MEANT THAT IT IS GENERALLY CHEAPER FOR BUSINESSES TO IMPORT MANY FINISHED OR SEMI-FINISHED GOODS. FOR EXAMPLE, TV TUBES AND MANY MOTOR CAR PARTS ARE MUCH CHEAPER TO IMPORT THAN PRODUCE IN SOUTH AFRICA. AS A RESULT, COMPANIES ARE STOPPING PRODUCTION OF GOODS THAT ARE CHEAPER TO IMPORT, AND RETRENCHING WORKERS PREVIOUSLY EMPLOYED IN THESE AREAS. A SECOND KEY ISSUE FACING THE ENGINEERING SECTOR IS THE INDUSTRY-S FAILURE TO ADEQUATELY DEAL WITH SMMES. REPRESENTATIVES FROM THE SMALL BUSINESS SECTOR HAVE BEEN INCORPORATED INTO COLLECTIVE BARGAINING, BUT WITHOUT DEALING WITH DIFFERENCES FACING SMALL BUSINESSES. THE TENSION OF HOW TO STIMULATE SMMES, WHILE PROTECTING THE RIGHTS OF WORKERS MUST BE ADDRESSED MORE CLEARLY.

LABOUR BROKERS AND INDEPENDENT CONTRACTORS ARE PRESENT IN THE INDUSTRY AND ARE PLAYING AN INCREASINGLY ACTIVE ROLE. HOWEVER, THEIR PRESENCE IS

High crime rates in the country benefit these workers as retrenched workers turn to the work within the security industry B starting little business of their own making burglar bars and secure garage doors.

The union is unsure of the extent of the problem, nor its increase in recent years. However, reports from some shopstewards suggest it may be increasing in some regions and to a greater degree than what is suggested by the Bargaining Council. Given the lack of research in the area, none of these claims could be supported.

Interview with Levy. November 1999.

CONSIDERED MORE OF AN IRRITANT THAN A THREAT TO COLLECTIVE BARGAINING IN THE INDUSTRY. AND, ACCORDING TO THE BARGAINING COUNCIL FOR THE SECTOR, "THERE IS NO POINT FIGHTING LABOUR BROKERS BECAUSE THEY ARE HERE TO STAY". LABOUR BROKERS HAVE ALWAYS BEEN PRESENT IN THE INDUSTRY BUT WHAT HAS CHANGED IS THE ROLE THEY ARE PLAYING. IN THE PAST, LABOUR BROKERS WOULD BE USED TO SUPPLY LABOUR DURING HOLIDAY PERIODS (IE. DECEMBER CLOSE-DOWN) TO CLEAN OUT THE FACTORIES. THIS WAS GENERALLY REFERRED TO AS SHUT-DOWN MAINTENANCE AND REPAIR WORK. AS THERE WERE NO ESTABLISHED FIRMS DOING THIS WORK, COMPANIES WOULD USE LABOUR BROKERS TO SUPPLY WORKERS FOR SUCH JOBS. AND, WITH AMENDMENT TO THE LABOUR RELATIONS ACT IN 1988, THE USE OF LABOUR BROKERS ROSE AS COMPANIES INCREASINGLY SAW THEM AS A WAY TO CIRCUMVENT WHAT WAS VIEWED AS MORE RESTRICTIVE LABOUR LAWS. THESE PRACTICES CONTINUED TO GROW DRAMATICALLY IN LATE 1980S AND EARLY 1990S UNTIL THE INTRODUCTION OF THE NEW ACT (1995 LRA). THE INTRODUCTION OF JOINT LIABILITY IN THE ACT HELPED CURTAIL THE INCREASED ROLE OF LABOUR BROKERS, ALTHOUGH MANY COMPANIES CONTINUE TO USE THEIR SERVICES. FOR EMPLOYERS, A KEY ADVANTAGE IS THE EASIER HIRING AND FIRING PRACTICES.

CURRENTLY, LABOUR BROKERS ARE STILL USED TO SUPPLY LABOUR DURING ANNUAL SHUTDOWN, DURING BUSY PERIODS, AND TO COVER SITE-WORK. FOR EXAMPLE, LABOUR BROKERS ARE VERY ACTIVE IN SUPPLYING WORKERS AT THE DOCKS FOR SHIP REPAIRS. DESPITE THE EXPECTATIONS THEY HAD FOR INCREASING THEIR ROLE IN FACTORIES WITH ONGOING WORK (THEY HAD ANTICIPATED BEING ABLE TO PROVIDE ENTIRE WORKFORCES), LABOUR BROKERS PLAY A VERY LIMITED ROLE CONVENTIONAL PRODUCTION SITES, EXCEPT FOR CYCLICAL WORK. UNSKILLED JOBS ARE STILL OFTEN FILLED BY WORKERS STANDING AT THE GATES LOOKING FOR A DAY, OR A FEW HOURS WORK, BUT THE NUMBER OF WORKERS DRAWN INTO CASUAL WORK IN THIS WAY IS FAIRLY LIMITED.

INCREASED COMPETITION FROM FOREIGN COMPANIES AND OTHER PROBLEMS HAVE LED TO MASSIVE RETRENCHMENTS. FOR MANY TYPES OF PRODUCTION AND JOBS WITHIN FACTORIES, LABOUR BROKERS INCREASINGLY SUPPLY TEMPORARY LABOUR TO BUSINESSES. HOWEVER, ACCORDING TO THE BARGAINING COUNCIL, THE STRUCTURE OF THE INDUSTRY AND RECENT CHANGES IN THE LRA LIMIT THE EXTENT TO WHICH THIS TREND CAN CONTINUE. A CORE GROUP OF SKILLED, WORKERS ARE STILL NEEDED IN THE PRODUCTION PROCESS AND, IN ORDER FOR THE COMPANY TO RETAIN CONTROL OF OUTPUT AND PRODUCTIVITY, THESE EMPLOYEES NEED TO BE PERMANENT. FURTHER, THERE APPEARS TO BE A SELF-LIMITING SITUATION WITH REGARD TO THE ROLE OF INDEPENDENT CONTRACTORS. OVER THE PAST FEW YEARS THERE HAVE BEEN REPORTS OF SMALL

BUSINESSES TURNING THEIR ENTIRE WORKFORCE INTO »INDEPENDENT CONTRACTORS«. WORKERS WOULD BE APPROACHED TO SIGN CONTRACTS, THEREBY CONVERTING THEM FROM EMPLOYEES TO INDEPENDENT CONTRACTORS. IN MANY CASES, WORKERS WERE INITIALLY SUPPORTIVE OF THE PROCESS AS THEY TOOK HOME A HIGHER WAGE (NO TAXES, OR EMPLOYEE CONTRIBUTIONS TO PENSION AND OTHER BENEFITS WERE NO LONGER DEDUCTED FROM SALARIES). PROBLEMS IN THIS TYPE OF EMPLOYMENT SOON BECAME EVIDENT, AND MOST WORKERS WHO NOW SIGN CONTRACTS TO TURN THEMSELVES INTO »INDEPENDENT CONTRACTORS« DO SO DUE TO VICTIMISATION OR PRESSURE FROM EMPLOYERS.

OVERALL, AS LEVY PUT IT, INDEPENDENT CONTRACTORS ARE A »SCAM« IN MOST PLANTS. IT IS A DELIBERATE ATTEMPT BY EMPLOYERS TO REDUCE COSTS AND HUMAN RESOURCE FUNCTIONS. AS NOTED ABOVE, WHILE SOME SMALL BUSINESSES HAVE SUCCESSFULLY CONVERTED EMPLOYEES INTO »INDEPENDENT CONTRACTORS«, THE INDUSTRY REALLY ISN'T FERTILE GROUND FOR SUCH PRACTICES. INDEPENDENT CONTRACTORS CAN DO TASKS SUCH AS CLEANING AND REPAIRS, BUT COMPANIES NEED TO RETAIN CONTROL OVER MOST WORK IN THE PRODUCTION PROCESS. ACCORDING TO LEVY, TURNING EMPLOYEES INTO INDEPENDENT CONTRACTORS (AS A SCAM TO DECREASED COSTS AND SHIFT LIABILITY) IS BECOMING MORE DIFFICULT AS WORKERS ARE AWARE OF SUCH SCHEMES AND INCREASINGLY DO NOT SUPPORT THEM.

FURTHER, THE INDUSTRY HAS HAD SOME SUCCESS WITH NEGOTIATING AGREEMENTS ON THE USE OF CASUAL LABOUR. AGREEMENT HAS BEEN REACHED TO ACCOMMODATE LABOUR BROKERS BY REMOVING THE COMPULSION TO PAY INTO RETIREMENT FUNDS FOR EMPLOYEES THAT HAVE CONTRACT OF LESS THAN 12 MONTHS. IN ADDITION, THE BARGAINING COUNCIL HAS AGREED TO »PACKAGE RATES« FOR WORKERS WAGES, RATHER THAN SALARIES. PACKAGES ARE MADE UP OF: BASIC WAGE + A COMPONENT FOR PUBLIC HOLIDAYS, OVERTIME AND SICKPAY. FOR CASUAL WORKERS, ALTHOUGH THIS AGREEMENT HAS MEANT WAGES (WHEN BUSINESSES COMPLY) HAVE INCREASED, THE DOWNSIDE IS THAT THESE WORKERS ARE NOW EXPECTED TO WORK OVERTIME AND PUBLIC HOLIDAYS WITHOUT THE PROVISIONS OUTLINED IN THE BCEA. IN GENERAL, THE »PACKAGE« IS FOR TEMPORARY WORKERS PROVIDED BY LABOUR BROKERS IS PERMANENT WORKERS NORMAL HOURLY RATE + 24%.

HOSPITALITY

SOUTH AFRICA'S HOSPITALITY INDUSTRY (HOTELS, RESORTS AND GAME RESERVATIONS), A LABOUR-INTENSIVE EXPORT SECTOR (EARNING FOREIGN EXCHANGE)

GENERATES ABOUT 3.4 BILLION A YEAR AND IS CURRENTLY THE FOURTH LARGEST INDUSTRY IN SOUTH AFRICA. THIS SECTOR HAS BEEN WIDELY HERALDED AS THE COUNTRY'S BEST ENGINE OF GROWTH. ACCORDING TO THE SOUTH AFRICAN FOUNDATION, TOURISM CONTRIBUTED (INCLUDING THE KNOCK-ON STIMULATION OF OTHER SECTORS) R80,6 BN TO GDP IN 1998. HOWEVER, ALTHOUGH THE NUMBER OF INTERNATIONAL VISITORS (FOR BOTH WORK AND HOLIDAY PURPOSES) HAS STEADILY INCREASED, SOUTH AFRICA IS LOSING GROUND TO RIVAL COUNTRIES. (FINANCIAL MAIL, SEPTEMBER 10) IN RESPONSE TO INCREASED COMPETITION, AND IN LINE WITH GENERAL TRENDS TOWARDS INCREASED FLEXIBILITY, THE HOSPITALITY SECTOR HAS BEGUN TO CASUALISED THEIR WORKFORCE THROUGH OUTSOURCING THEIR NON-CORE FUNCTIONS.

ONE OF THE LEADERS IN THIS PROCESS IS THE SOUTHERN SUNS HOTEL (ONE OF THE LARGEST HOTEL CHAINS IN SOUTH AFRICA). AS EARLY AS 1991 THE GROUP TOOK THE DECISION TO OUTSOURCE ALL NON-CORE ACTIVITIES. CORE AND NON-CORE AREAS OF BUSINESS WERE IDENTIFIED AND ALL NON-CORE FUNCTIONS CONTRACTED OUT. AS THE MANAGER OF ONE OF THE CAPE SUN HOTELS PUT IT: WE ARE IN THE BUSINESS OF SERVING OUR GUESTS, NOT OF DOING THE LAUNDRY OR LAWN. MARKETING & SALES, FOOD & BEVERAGE, AND PORTERS WERE THE FIRST TO BE OUTSOURCED FOLLOWED BY MAINTENANCE. HOUSEKEEPING, LAUNDRY AND MAINTENANCE TEND TO BE EITHER OUTSOURCED TO SMALLER COMPANIES, OR INSOURCED.

IN MANY CASES, THE SAME WORKERS PREVIOUSLY EMPLOYED BY THE HOTEL CAME BACK AS OUTSOURCED WORKERS WITH WORSE CONDITIONS. FOR EXAMPLE, THE HOTEL DECIDED IT DIDN'T HAVE ANY EXPERTISE IN BAGGAGE CARRYING, THUS OUTSOURCED PORTER SERVICES. IN MANY CASES, THE SAME EMPLOYEES WERE EMPLOYED BY THE OUTSOURCED COMPANY, THESE WORKERS HAVING TO PURCHASE THEIR OWN TROLLEYS AND EARN THEIR WAGES BY CHARGING GUESTS 5.00 RAND FOR TRANSPORTING LUGGAGE. BUT, SINCE GUESTS ARE ALSO ALLOWED TO USE THE TROLLEYS AND TAKE LUGGAGE TO THEIR ROOMS THEMSELVES, WORKERS OFTEN EARNED MUCH LOWER SALARIES ON THIS COMMISSION SYSTEM OF WAGES.

AFTER THE SUCCESSFUL OUTSOURCING OF THESE FUNCTIONS, THE HOTEL THEN TURNED ITS ATTENTION TO HOUSEKEEPING AND CLEANING. A NEW PATTERN OF SUB-

Only very preliminary and sketchy research currently exists on employment practices in the hospitality sector. Information for this report is drawn from initial research work carried out by Msokoli Qotole and Marlea Clarke (1998 B 1999) as part of a research project based at the International Labour and Resource Information Group, ILRIG, in Cape Town and carried out in conjunction with the South African Commercial, Catering and Allied Workers Union, SACCAWU. Research included interviews with shopstewards, union officials and workers in the hospitality sector. A much wider study on casualisation and new employment practices in the sector is currently underway. This Department of Labour funded study is being coordinated and carried out by the Labour and Enterprise Project, Institute of Development and Labour Law, University of Cape Town.

South Africa
National Study, Workers=Protection
Page 40 of 44

CONTRACTING EMERGED WHEREBY WORK WAS >IN-SOURCED=, RATHER THAN >OUTSOURCED=. CLOSED CORPORATIONS WERE ESTABLISHED (BY THE COMPANY), AND PREVIOUS EMPLOYEES WERE SET UP AS >OWNERS= OF THE COMPANY. WORKERS WERE THEN EMPLOYED (MANY OF THEM ALSO PREVIOUS EMPLOYEES WHO HAVE BEEN RETRENCHED FROM THEIR JOB AS CLEANERS). THE TERMS AND CONDITIONS OF THEIR CONTRACT OF EMPLOYMENT ARE UNCLEAR AS THE UNION, NOR ANYONE ELSE HAS BEEN ABLE TO GET COPIES OF CONTRACTS SIGNED. INDEED, WORKERS THEMSELVES HAVE NOT BEEN LEFT WITH COPIES OF THE DOCUMENT AFTER THEY SIGN THE CONTRACT. HOWEVER, RESEARCH (INTERVIEWS, WORKSHOPS WITH SHOPSTEWARDS AND CASUAL WORKERS) SUGGESTS CONDITIONS OF EMPLOYMENT AND WAGES ARE SUBSTANTIALLY COMPROMISED BY THESE EMPLOYMENT CONTRACTS. HOUSEKEEPING STAFF HAVE REPORTED THAT SALARIES OF 1,750 PREVIOUSLY PAID BY CAPE SUNS HAVE NOW DROPPED TO AS LOW AS R 450.00 PER MONTH (BASED ON A RATE OF R 3.20 PER ROOM CLEANED), AND WORKERS RECEIVE NO BENEFITS.

THESE EMPLOYMENT PATTERNS ARE LIKELY TO CONTINUE AS OTHER HOTEL CHAINS ARE BEGINNING TO IMPLEMENTING SIMILAR POLICIES. PERMANENT STAFF NUMBERS ARE DECREASING AND CASUAL WORKERS INCREASING IN OTHER HOTEL CHAINS. PERMANENT EMPLOYEES WHO QUIT OR ARE RETRENCHED ARE REPLACED BY CASUAL WORKERS, RESULTING IN THE NUMBER OF CASUAL WORKERS STEADILY INCREASING. CAPE SUN IS SEEN AS THE >TREND SETTER= IN EMPLOYMENT PRACTICES IN THE HOSPITALITY SECTOR, THUS WHILE OTHER HOTEL CHAINS (SUCH AS PROTEA) HAVE CASUAL STAFF BUT HAVE NOT YET OUTSOURCED THEIR FUNCTIONS, THEY ARE EXPECTED TO DO SO.

RETAIL

THE TREND TOWARDS REPLACING FULL-TIME PERMANENT STAFF WITH CASUAL WORKERS IS ESPECIALLY EVIDENT IN THE SERVICE SECTOR, WHERE EMPLOYERS INCREASINGLY RELY ON WOMEN'S LOW PAID LABOUR AND ON NON-STANDARD EMPLOYMENT. ONE OF THE LARGEST SECTORS, THE RETAIL INDUSTRY EMPLOYS OVER A MILLION WORKERS. IN RECENT YEARS HAVE SEEN AN EXPANSION OF FLEXIBLE WORK ARRANGEMENT. FURTHER, THE MAJORITY OF THE WORKFORCE IN MANY LARGE RETAIL STORES (SUCH AS PICK N' PAY, WOOLWORTHS, AND SHOPRITE) ARE NOW CASUAL, OR PART-TIME WORKERS (OFTEN STUDENTS OR YOUNG WOMEN). FOR EXAMPLE, APPROXIMATELY 80% OF THE STAFF AT WOOLWORTHS ARE NOW CASUAL, AND ONLY

These initial findings need to be supported by much wider research before they can be seen as overall trends.

See for example, Bridget Kenny 'The Casualisation of the Retail Sector in South Africa', *Economic Indicator*, South Africa. Vol. 15, No 4, 1998. Based at the Sociology of Work Project (SWOP), Wits University, Kenny has carried out extensive research into employment practices at Shoprite Checkers.

ABOUT 20% ARE PERMANENT. A SIMILAR THOUGH NOT AS DRAMATIC TREND IS EMERGING AT OTHER RETAIL STORES. PICK N=PAY (A LEADING GROCERY STORE IN SOUTH AFRICA), HAS RESTRUCTURED THEIR EMPLOYMENT PRACTICES, INTRODUCED NEW SHIFTS AND CATEGORIES OF WORKERS TO INCREASE FLEXIBILITY IN THEIR STORES. FOR EXAMPLE, A SURVEY OF 26 PICK N=PAY STORES IN THE WESTERN CAPE FOUND THAT THERE WERE 2119 PERMANENT EMPLOYEES, AND 2604 CASUALS.

PRIOR TO THE NEW BCEA, THESE PRACTICES REDUCED COSTS FOR EMPLOYERS AS CASUAL WORKERS WERE EXCLUDED FROM THE BENEFITS (SUCH AS LEAVE, SICK PAY, OVERTIME) AND PROTECTION GUARANTEED TO PERMANENT WORKERS. BUT, AS WE'VE ARGUED ABOVE, ALTHOUGH SOME GROUPS OF CASUAL WORKERS ARE NOW FORMALLY INCLUDED UNDER THE NEW BCEA, CERTAIN OF THE BENEFITS AFFORDED BY THE ACT DO NOT IN PRACTICE DEVOLVE ON THEM. FURTHER, SECTORAL AND COMPANY AGREEMENTS CONTINUE TO SPECIFY DIFFERENCES IN WAGES AND WORKING CONDITIONS OF PERMANENT IN COMPARISON TO CASUAL WORKERS. BOTH PICK N=PAY AND SHOPRITE HAVE SIGNED AGREEMENTS WITH THE SACCAWU TO REGULATE CASUALISATION AND FLEXIBILITY IN THEIR STORES. IN BOTH CASES, SOME GAINS WERE MADE FOR CASUAL WORKERS (I.E. THE EXTENSION OF SOME BENEFITS TO CASUALS), IN EXCHANGE FOR AGREEMENT FROM THE UNION ON INCREASED FLEXIBILITY AND THE CONTINUATION OF EMPLOYMENT PRACTICES AIMED AT CASUALISING STORES.

STUTTAFORDS HAVE FOR MANY YEARS NOW RUN A SYSTEM OF EMPLOYING CASUAL LABOUR TO SUPPLEMENT ITS PERMANENT STAFF WHEN ON LEAVE OR OVER WEEKENDS. THE SYSTEM INVOLVES A POOL OF CASUAL EMPLOYEES WHO ARE OFFERED WORK EACH WEEK. THIS WORK IS ON A REGULAR BASIS AND SOME OF THE EMPLOYEES IN THE POOL HAVE WORKED ALMOST EVERY WEEKEND IN THE YEAR. THE STRUCTURE OF THE TRANSACTION IS AS FOLLOWS:

- * THE EMPLOYEE IS TELEPHONED AND OFFERED THE JOB FOR THE WEEKEND, PUBLIC HOLIDAY
- * THE EMPLOYEE EITHER ACCEPTS OR REFUSES
- * IF THE EMPLOYEE REFUSES, THE EMPLOYEE RISKS NOT BEING OFFERED AGAIN
- * IF THE EMPLOYEE ACCEPTS, A CONTRACT IS CONCLUDED FOR THAT DAY OR THOSE DAYS

Jan Theron, Labour and Enterprise Project, Institute of Development and Labour Law.

Employment figures from October 1998. Casuals, for Pick n= Pay include categories of workers they call permanent and new part-timers, and fixed-term contract and casuals. Both categories really are part-time weekend= employees, with less job security and fewer benefits than permanent workers. Many are hired under fixed-term contracts. These statistics are drawn from research on casualisation in the retail industry carried out by Marlea Clarke as part of her doctoral research.

Stuttafords is a retail chain. The facts are drawn from the documents and court record in the proceedings in the

- * THE EMPLOYER IS ASTUTE TO ENSURE THAT THERE IS NO OVERARCHING CONTRACTUAL OBLIGATION BETWEEN THE COMPLETION OF ONE CONTRACT AND THE OFFER OF THE NEXT.

THE POOL IS MADE UP OF EX-EMPLOYEES WHO HAVE BEEN RETRENCHED FROM PERMANENT STAFF, STUDENTS, TEACHERS ETC.. TO GET INTO THE POOL, THE PERSON HAS TO MAKE APPLICATION AND BE INTERVIEWED. ACCEPTANCE IS TO THE POOL NOT TO EMPLOYMENT. THE OFFER OF EMPLOYMENT FROM THE POOL DEPENDS ON AVAILABILITY AND COMPLIANCE. A PERSON FROM THE POOL WHO JOINS A STRIKE RISKS NOT BEING OFFERED EMPLOYMENT FROM THE POOL. IT IS ALSO IMPORTANT TO NOTE THAT THE RECOGNITION AGREEMENT BETWEEN THE RECOGNISED TRADE UNION AND THE EMPLOYER EXCLUDES CASUAL EMPLOYEES FROM THE COVERAGE OF THE AGREEMENT.

CONSTRUCTION INDUSTRY

THE PROLIFERATION OF SMALL CONTRACTORS IN THE CONSTRUCTION INDUSTRY HAS HAD A VERY DAMAGING EFFECT ON FORMAL SECTOR EMPLOYMENT IN RECENT YEARS. TWO BARGAINING COUNCILS HAVE COLLAPSED OVER THE PAST THREE YEARS, AND THE GAUTENG BUILDING COUNCIL (GBBC) IS CURRENTLY GOING THROUGH THE PROCESS OF CLOSING, WITH INSPECTORS HAVING JUST BEEN GIVEN THEIR NOTICE OF TERMINATION. THE INDUSTRY, AND BARGAINING COUNCILS WHICH SERVE TO REGULATE IT, ARE IN DEEP CRISIS. SEVERAL FACTORS CONTRIBUTE TO THIS. FIRST, EMPLOYERS HAVE ARGUED THAT THE THREE-YEAR AGREEMENT (SIGNED IN 1998) PLACES EXCESSIVE PRESSURE AND RESPONSIBILITY ON THEM. CONDITIONS IN THE AGREEMENT ADD ADMINISTRATIVE AND BUREAUCRATIC WORK TO EMPLOYERS THAT AREN'T COMPATIBLE WITH THE CYCLICAL NATURE OF WORK IN THE SECTOR. SECOND, NON-COMPLIANCE WITH THIS AGREEMENT AND THE DIFFICULTIES IN ENFORCING IT RESULT IN MANY EMPLOYERS USE SMALL CONTRACTORS OR FIXED-TERM SHORT CONTRACTS TO REDUCE COSTS AND >ADMINISTRATIVE HASSLES=. THIRD, AVAILABILITY OF LARGE NUMBERS OF UNSKILLED, OR SEMI-SKILLED WORKERS FOR DAY OR SHORT-TERM CONTRACTS HAS RESULTED IN EMPLOYERS INCREASINGLY DRAWING ON THIS LABOUR POOL TO REPLACE PERMANENT WORKERS. THE MOBILE NATURE OF BUILDING WORKERS (TO THE EXTENT WHERE WORKERS ARRIVE AT BUILDING SITES WITH A

Labour Court - SACTWU v Stuttafords C435/98)

Although figures have not been drawn from the information provided in the court records of the Stuttafords matter, our interviews reveal that as an example.

J. Baskin, *South Africa's Quest for Jobs, Growth and Equity in a Global Context*, Presentation at the 11 Annual Labour Law Conference, Durban, July 1998.

Rob Rees, *Irregular Labour in the Manufacturing, Retail and Construction Sectors: A Review of Conditions and Policy*, Department of Labour Workshop on Regulating New Employment Norms.

PLASTIC BAG FULL OF TOOLS FOR DAY WORK OR SHORT-TERM CONTRACTS), FACILITATES
THE PROCESS OF CASUALISATION.

SMALL BUSINESS

THE LAST FEW DECADES HAVE WITNESSED A GROWTH IN SMALL-SCALE ENTERPRISES IN BOTH THE FORMAL AND INFORMAL SECTORS IN SOUTH AFRICA. IT IS OFTEN ARGUED THAT THE GROWTH OF SMALL, MEDIUM AND MICRO-ENTERPRISES (SMME) IS LARGELY THE DECLINE OF FORMAL SECTOR EMPLOYMENT AND THE INCREASING URBANISATION OF AN IMPOVERISHED RURAL POPULATION. LARGE NUMBERS OF RETRENCHMENTS IN RECENT YEARS HAVE CONTRIBUTED TO THIS PROBLEM. IN ADDITIONAL TO THE GROWING NUMBERS OF PEOPLE WORKING IN THE INFORMAL SECTOR AS A SURVIVAL MECHANISM, OTHER CRITICAL FACTORS ARE CONTRIBUTING TO THE GROWTH OF SMMEs. INDUSTRIAL AND WORKPLACE RESTRUCTURING, AND THE ABANDONMENT OF APARTHEID RESTRICTIONS HAVE FACILITATED THE EMERGENCE AND DEVELOPMENT OF MANY SMALL BLACK OWNED ENTERPRISES. LIKE OTHER COUNTRIES, INDUSTRIES IN SOUTH AFRICA ARE RESPONDING TO MORE COMPETITIVE MARKETS BY DECENTRALISING PRODUCTION INTO SMALLER, MORE SPECIALISED UNITS AND OUTSOURCING THEIR 'NON-CORE' FUNCTIONS (I.E. COOKING, CLEANING, SECURITY, MAINTENANCE) TO SMALLER FIRMS. INDEED, TEMPORARY AGENCIES ACKNOWLEDGE THAT A SIGNIFICANT REASON FOR THE GROWTH OF SMALL BUSINESSES AND TEMPORARY AGENCIES IS DUE TO OUT-SOURCING AND THE EMPLOYERS ATTEMPTS TO AVOID PERMANENT CONTRACTS. GOVERNMENT POLICIES AND PRACTICES AIMED AT ENCOURAGING SMALL BLACK BUSINESS ALSO FACILITATE THIS DEVELOPMENT.

OVERALL, THE TREND IN BOTH THE PUBLIC AND PRIVATE SECTOR IS TO CONTRACT OUT MANY SERVICES THAT USED TO BE CARRIED OUT BY PERMANENT FULL-TIME EMPLOYEES. FOR EXAMPLE, MANY HOTELS, HOSPITALS, FACTORIES AND UNIVERSITIES ARE NOW CONTRACTING OUT SECURITY AND CLEANING. SMALL COMPANIES (OFTEN SMALL BLACK OWNER COMPANIES) TENDER FOR THESE CONTRACTS, AND IF SUCCESSFUL, HIRE ENOUGH STAFF TO COVER THE CONTRACT. THE CLEANING INDUSTRY PROVIDES AN EXAMPLE OF THIS TREND. FIVE MAJOR CLEANING COMPANIES DOMINATED THE INDUSTRY IN THE WESTERN CAPE THIRTEEN YEARS AGO. OVER 150 CLEANING COMPANIES ARE NOW IN EXISTENCE, WITH ONLY 50 OF THEM MEMBERS OF THE NATIONAL CONTRACTOR CLEANING ASSOCIATION (NCCA). MEMBERS OF THE NCCA PAY GAZETTED WAGES (R 6.40 PER HOUR FOR MOST CLEANERS) AND BENEFITS TO EMPLOYEES. ALTHOUGH ACCURATELY INFORMATION IS DIFFICULT TO ATTAIN, SMALLER CLEANING COMPANIES ARE SAID TO PAY WAGES AS LOW AS R 4.00 PER HOUR AND OFTEN DON'T PROVIDE BENEFITS TO EMPLOYEES.

CONCLUSION

IT IS EVIDENT THAT THE SOUTH AFRICAN LABOUR MARKET IS UNDERGOING CHANGE. THERE IS PRESSURE ON THE TRADITIONAL MODEL OF PERMANENT EMPLOYMENT AND ITS UMBRELLA OF PROTECTIVE LABOUR LEGISLATION. INCREASINGLY, TECHNOLOGY AND MODERN FORMS OF WORK ORGANISATION ARE DRIVING EMPLOYMENT INTO LESS PERMANENT FORMS. THAT PRESSURE COMBINED WITH THE LIMITS OF THE PROTECTIVE LEGAL FRAMEWORK HAVE ACTIVATED EMPLOYERS TO RESTRUCTURE THEIR CONTRACTUAL REGIME WITH THOSE WHO WORK FOR THEM IN ORDER TO ESCAPE THE OBLIGATIONS THAT LEGAL FRAMEWORK IMPOSES ON EMPLOYERS. THESE FISSURES IN THE LEGAL FRAMEWORK REQUIRE LEGISLATIVE REVIEW BECAUSE THEY OPEN UP OPPORTUNITIES FOR THE EXPLOITATION OF DEPENDENT LABOUR B THE VERY MISCHIEF THE LEGAL FRAMEWORK WAS INTRODUCED TO PREVENT. BUT THE FAULT LIES NOT ONLY WITH THE LIMITS OF THE LEGISLATIVE FRAMEWORK, IT LIES TOO WITH THE LACK OF ENFORCEMENT CAPACITY IN THE DEPARTMENT OF LABOUR AND THE SIGNAL FAILURE ON THE PART OF THE TRADE UNION MOVEMENT TO ORGANISE AND DEFEND THE INTERESTS OF THESE MARGINALISED WORKERS.