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Non-standard workers, collective bargaining and social dialogue: The case of South Africa

Jan Theron

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Foreword

This paper is one of a series of national studies on collective bargaining, social dialogue and non-standard work conducted as a pilot under the Global Product on 'Supporting collective bargaining and sound industrial and employment relations'. The national studies aim at identifying current and emerging non-standard forms of work arrangements within which workers are in need of protection; examining good practices in which those in non-standard forms of work are organized; analyzing the role that collective bargaining and other forms of social dialogue play in improving the terms and conditions as well as the status of non-standard workers and identifying good practices in this regard.

The paper provides valuable analysis on social dialogue and collective bargaining developments as well as challenges in respect of non-standard workers, based on the differentiation between two inter-related processes which are generating different forms of non-standard employment: casualization, which describes a weakening of labour standards in a context in which employment remains a binary relationship; and externalization, in which employment has been externalized, resulting in a triangular employment relationship.

It shows that while collective bargaining in South Africa is still confined to workers in standard employment, some sectoral as well as non-sector specific attempts have been made to organize and bargain on behalf of non-standard workers. The paper highlights the ways in which social dialogue and collective bargaining have helped improve the employment security for workers in the public sector, facilitating direct and regular employment of these workers by local government.

The study concludes that collective bargaining in South Africa is still confined to workers in standard forms of employment and the concerns of these organized workers about the increase in non-standard work. The author argues that given that the issue of labour broking features so prominently in these demands, the focus of attempts to regulate non-standard work should be on externalization. It suggests that there is a need to encourage and promote the collective representation of non-standard workers and that multiple initiatives are required in this regard. This could include the establishment of workplace forums, envisaged by the Labour Relations Act of 1995, but which have proved controversial (premised on a reconsideration of the definition of a 'workplace'). It might allow scope for participation of other forms of organization.

DIALOGUE working papers are intended to encourage an exchange of ideas and are not final documents. The views expressed are the responsibility of the author and do not necessarily represent those of the ILO. I am grateful to Jan Theron, Co-ordinator of the Labour and Enterprise Policy Research Group (LEP), Law Faculty, University of Cape Town for undertaking the study and commend it to all interested readers.

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Contents

1. Introduction

This is one of a series of country studies commissioned by the Industrial and Employment Relations Department of the ILO concerning "current and emerging non-standard forms of work arrangements within which workers are in need of protection". The objective is, amongst other things, to examine innovative ways in which those non-standard workers are organized" and the role of social dialogue, and in particular collective bargaining, in improving the conditions of work of non-standard workers.

There is no consensus as to how either standard or non-standard employment should be defined, either in South Africa or elsewhere, and the notion of non-standard work (as opposed to employment) is broader still. In this paper the distinction between standard and non-standard work will therefore not be emphasised. The focus will rather be on the different categories of workers that are perceived to be in need of protection in a South African context.

It is useful at the outset to differentiate two kinds of reasons workers may be regarded as in need of better protection, or vulnerable, in the South African context. Firstly there are workers who are not covered at all by existing labour regulations or collective bargaining arrangements because they are not employees. Secondly there are workers who are ostensibly covered by existing labour regulations, or are in theory able to bargain collectively, but are effectively not able to exercise their rights in terms of labour legislation, or are not able to exercise their rights to bargain.

The latter category comprise workers in sectors that are for various reasons not amenable to organization or collective bargaining, such as domestic work in private households and agriculture, and workers whose employment has been externalised. In this regard, it is important to differentiate between two inter-related processes which are generating different forms of non-standard employment: casualisation, which describes a weakening of labour standards in a context in which employment remains a binary relationship (what some commentator have referred to a direct employment) and externalisation, in which employment has been externalised, resulting in a triangular employment relationship (or indirect employment) (Theron and Godfrey, 2000; Theron, 2005). The latter process has also been described as vertical disintegration (Collins, 1990).

The reason this distinction is critical in the context of collective bargaining is, firstly, because in South Africa and elsewhere rights safeguarding job security are predicated on a binary employment relationship, and these rights are not applicable or effective in a triangular employment relationship.[1] Without job security, the exercise of organizational rights is difficult, and that in turn makes it difficult for workers to contemplate the possibility of collective bargaining.

Secondly, organizational rights are in the main exercised in the workplace, which in South African labour law is the place(s) where the employees of the employer work, whereas the place where workers in a triangular employment relationship work is in most instances a "workplace" that is controlled by the client (or user enterprise). Without access to that workplace, or facilities such as the right to hold meeting there, it is difficult to see how there could ever be effective collective bargaining.

Thirdly, collective bargaining is problematic in a triangular employment relationship, and arguably an exercise in futility, insofar as the wages and conditions of work of workers are literally or in effect determined by the client (or user enterprise). The consequence of

[1] In a triangular employment relationship the employment of a worker can be (and frequently is) terminated by the client without him or her necessarily being dismissed; similarly, the worker can be deprived of his income without necessarily losing his or her job (where for example the labour broker seeks to assign him or her to another client).

externalisation is that the contract that effectively governs such workers is no longer a contract of employment but a commercial contract between the client and legal employer of the workers concerned.

Based on the above analysis, the demands of workers in a binary employment relationship must necessarily differ from the demands of workers in a triangular employment relationship. It would therefore not be appropriate to have one strategy regarding non-standard work. An innovative approach to collective bargaining would encompass a package of strategies, which differentiated between workers in casualised and externalised employment, and that was neutral or even sought to promote forms of non-standard work in which the binary character of employment was retained, such as part-time work.

There are also various ways in which one might attempt to assess whether any specific strategy in respect of organization or collective bargaining was truly innovative or not. The starting point, logically, would be to consider who is being organized and what their demands are. Here it would be important to differentiate between demands put forward by one or other category of non-standard work (part-timers, for example, or agency workers) on their own behalf, and demands by organized workers in standard employment.

In this regard, as is well-known, trade union have a tendency to represent the sectional interests of their members, and the members in standard employment may well regard unorganized workers in non-standard employment as a threat. To discourage such tendencies, one would have to be particularly vigilant about demands in respect of non-standard work which the workers most affected have no part in formulating. The object should always be to include the workers most affected. The workers employed by temporary employment agencies, or labour brokers, which are referred to here as agency workers, are a case in point. Therefore the object ought to be to gauge from the substantive provisions of collective agreements the extent to which specific forms of non-standard work have benefited.

It may also be appropriate to look at attempts to extend the concept of collective bargaining, and to create new and more inclusive forums where bargaining could take place. Also on the theme of the procedural as opposed to the substantive provisions of collective agreements, it would be useful to consider the procedural rights that need to be established if the organization of workers in triangular employment relationships is to be realistic, and collective bargaining meaningful, and the extent to which collective agreements are establishing such rights.

At the same time it is necessary to consider forms of organization other than trade unions, notably cooperatives, as the only form of membership-based organization that is also an enterprise, and therefore capable of representing workers that are not employees (Birchall, 2001). Although cooperatives represent the interests of their members and negotiate on their behalf, they do not engage in collective bargaining as it is conventionally understood. However, they do represent a means of promoting social dialogue.

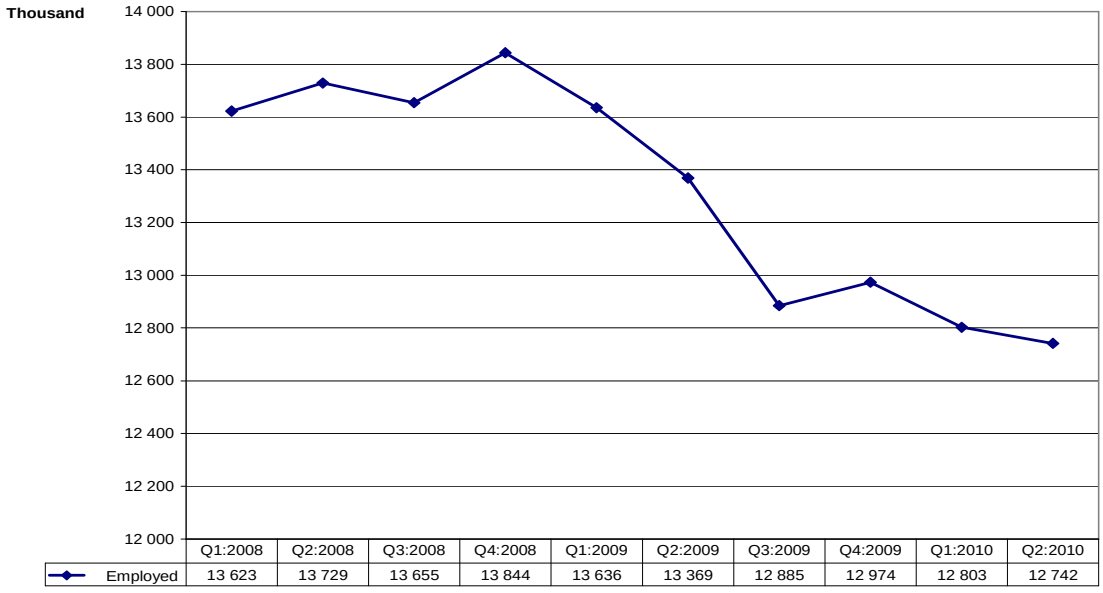
I will return to the above themes in the discussion below.

2. Recent developments in the economy, labour markets and labour market regulation

Employment in South Africa had peaked at 13,8 million in the fourth quarter of 2008, but in the first quarter of 2009 South Africa entered a recession, with growth estimated at minus 7.4 per cent.[2] During the recession of 2009, 208 000 jobs were lost in the first quarter of 2009. By the end of the third quarter, the economy had shed about 959 000 net jobs. Although there were some signs of recovery in the fourth quarter of 2009, with an increase of employment of 89 000 jobs, these jobs and more were lost in the first quarter of 2010, with employment contracting by 171 000 jobs.[3]

Graph 1 below illustrates the decline in employment. Job losses affected all industries except transport and community and social services, which is where the public sector is located. The drop in employment was accompanied by an increase in unemployment (up by 126 000 persons) and another increase by 624 000 of discouraged work-seekers. According to Statistics SA, these patterns suggest that there was a shift from employment into unemployment and discouragement. The contraction of employment led to an increase in the unemployment rate by 1.7 percentage points to 25.2 per cent.[4] The unofficial rate of unemployment in the second quarter of 2010, as calculated by Unisa's Bureau for Market Research, rose to 41 per cent (up by 1 per cent since the first quarter).

Graph 1.
Total employment,
quarter 1:2008 – quarter 2:2010



	Q1:2008	Q2:2008	Q3:2008	Q4:2008	Q1:2009	Q2:2009	Q3:2009	Q4:2009	Q1:2010	Q2:2010
Employed	13 623	13 729	13 655	13 844	13 636	13 369	12 885	12 974	12 803	12 742

Graph 2 shows the contribution to employment by the different sectors of the economy (excluding agriculture and private households) at three points in time over the last ten years. There have been job losses in mining and manufacturing, as well as retail

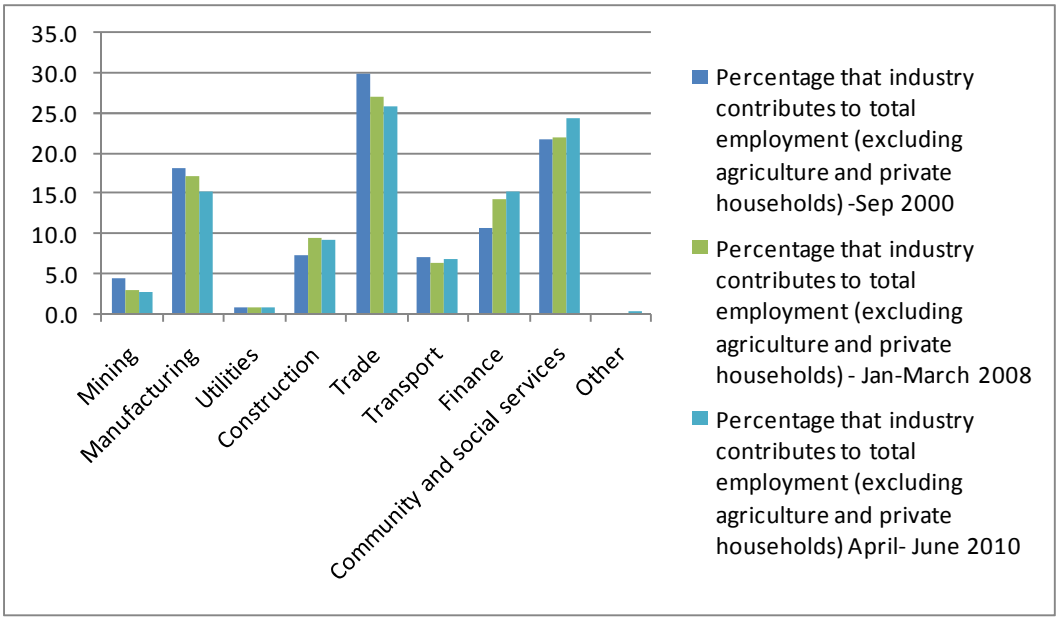
[2] Source: Business Report, 9 May 2010. www.busrep.co.za/index.php?fSectionId=553&fArticleId=5461128

[3] Source: BR, 9 May 2010; Stats SA, QLFS Q2.

[4] Business Report, 4 May 2010. www.busrep.co.za/index.php?fSectionId=552&fArticleId=5455706

(referred to as trade). The sector that appears to show the most consistent growth is the financial sector.

Graph 2.
Contribution towards total employment per industry (excluding agriculture and private households), Sep. 2000, Jan. – Mar. 2008, Apr. – June 2010 (expressed as percentages)



The above data reflect employment in what is regarded as the "formal sector." The definition of what is referred to as the "formal sector" in official statistics has changed over time, but has always turned on the concept of a registered business. Prior to the introduction of the QLFS, the LFS defined a registered business as one that was registered for tax purposes and which had a VAT number. Conversely, an unregistered business was one that did not.[5]

The QLFS defines the informal sector somewhat differently: it comprises businesses that are unregistered; do not have a VAT number; are generally small in nature, and are seldom run from business premises but often run from homes, street pavements or other informal arrangements.[6]

Table 1 below present the most recent available data relating to the proportion of persons employed in the formal and informal sectors, as well as the percentage of men and women that are employed and unemployed.

[5] The distinction between the LFS and QLFS is explained in Section 3 below. The problem with the definition of informal sector on the basis that a business is registered is that a business may be registered for one purpose and not another, and how this requirement is interpreted will either skew the measure towards formal or informal.

[6] Source: LFS, September 2000: xi. However the QLFS's definition appears to be work in progress, since in later reports it introduces what seems to be a refined version, in which It defines the informal sector as: i) Employees working in establishments that employ less than five employees and do not deduct income tax from their salaries/wages; ii) Employers, own-account workers and persons helping unpaid in their household business who are not registered for either income tax or value-added tax. Source: QLFS: Q1 &Q2, 2008.

Table 1.
Gender breakdown of employed/unemployed
(expressed as percentages)

Situation at July – Sep. 2010	Women	Men	Total
Total labour force	100	100	100
% of labour force that is employed	72.0	76.9	74.7
% of employed in formal sector (non-agriculture)	64.6	73.6	69.7
% of employed in informal sector (non-agriculture)	24.9	17.2	16.7
% employed in agriculture	5.5	5.9	4.9
% employed in private households	24.3	3.2	8.6
Unemployed	28.0	23.1	25.3

Source: Statistics South Africa: Quarterly Labour Force Survey, Quarter 3, 2010.

In appendix 1, the age of the employed, unemployed and not economically active is analysed. As indicated, 31 percent of the unemployed are in the 15 to 24 years old age-group, and 40.7 percent in the 25 to 34 years old age-group. This is an alarming situation.

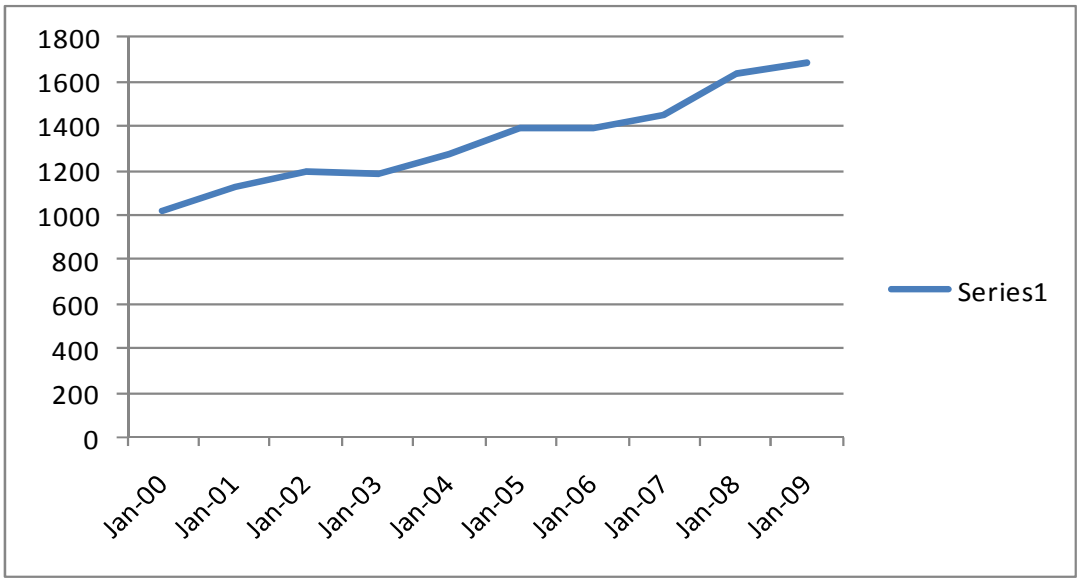
Moreover, the official unemployment rate of South African youth (those between 15 and 24 years) rose to 51.3 per cent during the first quarter of 2010. Some suspect that this percentage is an underestimate.[7] According to one commentator, 75 percent of the job losses during the recession were experienced by people under the age of 34.[8]

Graph 3 confirms that there has been a steady growth of jobs in the finance sector. However, this title for the sector is arguably misleading, as it includes so-called "business services", where three very large categories of externalised employment are located: temporary employment agencies, or labour brokers, as they are more commonly known in South Africa, cleaning services and security services.

[7] Source: www.sake24.com/Ekonomie/SA-verloor-steeds-poste-20100728)

[8] Miriam Altman, the executive director of the Centre for Poverty, Employment and Growth at the Human Sciences Research Council.

Graph 3.
Employment in the finance sector
2000 – 2009
(per thousand)



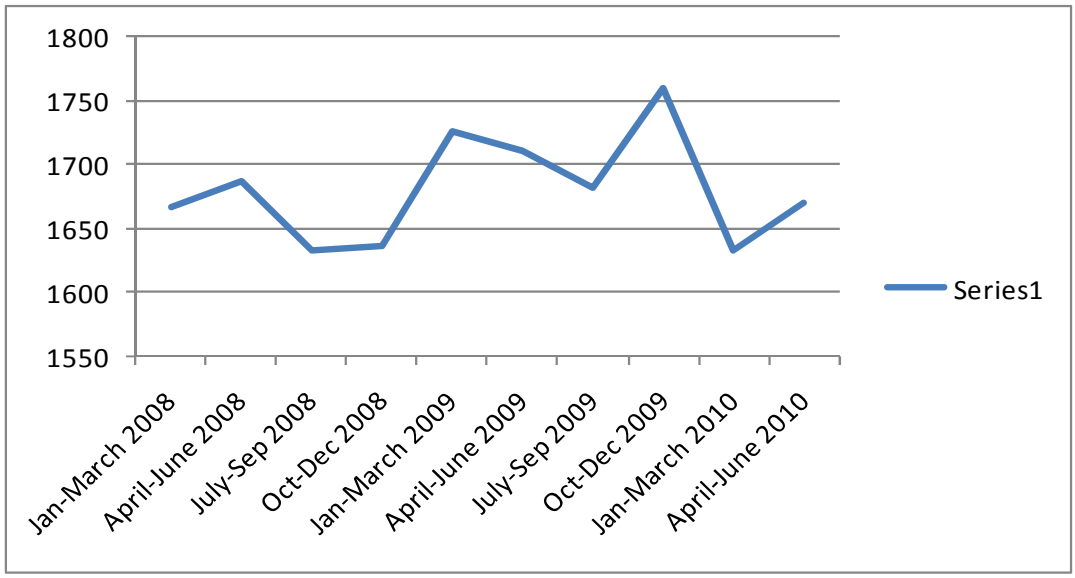
Source: LFS (Historical Revision September Series 2000 to 2007) and QLFS, **Stats SA**

I have previously argued that the most plausible explanation for the growth of jobs in finance sector is that it is largely or solely attributable to a growth in "business services" as a direct consequence of externalisation. Moreover since externalisation typically involves the shedding of jobs in productive sectors such as mining and manufacturing, and the re-establishment of what are to all in intents and purposes the same jobs in services, it is questionable whether these jobs can properly be described as "new".[9]

If indeed the growth of the finance sector is due to externalisation, and a significant percentage of these jobs is in fact with labour brokers, one would expect a high degree of volatility during a recession. Graph 4 illustrates that is indeed the case, in the period since 2009.

[9] Theron, 2008.

Graph 4.
Employment in the finance sector,
Jan.–Mar. 2008 to Apr.–June 2010
(per thousand)



Source: QLFS, Stats SA

The state of organization

The above data suggests the most immediate victims of the recession have been workers in temporary employment, or those employed in industries such as construction where employment is cyclical. This is of course what one would expect. However, it is also clear that job losses extend well beyond these categories.

Given the job losses, it is no surprise that South Africa's trade union federations should all report a loss of membership. In the case of the biggest trade union federation, affiliated unions are estimated to have lost about 230 000 members – with the biggest loss being experienced by the Southern Africa Clothing and Textile Workers' Union, SACTWU. According to SACTWU, almost 11 000 jobs were lost in the industry between the start of the global economic crises in October 2008 and March this year. [10]

Unions affiliated to FEDUSA are estimated to have lost 25 000 members in 2009, and NACTU's membership declined by 15 000. On the other hand Solidarity, the most important affiliate of CONSAWU, reported having signed on about 10 000 new members, but in the same period having lost 5 000 members.[11]

There is a dearth of reliable data about other forms of organization apart from trade unions, but in terms of 2005 legislation there has been a proliferation of cooperatives established, which can be considered as a response to a situation in which the prospects of formal employment are diminishing or non-existent. However, insufficient consideration has been given to ensuring the viability of these cooperatives, and a large proportion of newly established cooperatives have failed.

There have been reports of bogus cooperatives being established in the clothing industry in Kwazulu-Natal by certain employers, as a means of evading the provisions of

[10] Business Report, 30 November 2009.

[11] Source: Business Report, 13 October 2009. See: www.busrep.co.za/index.php?fArticleId=5200376

the bargaining council. However, although cooperatives (like any other legal entity, including trade unions) may be abused, the indications are that this is not seen as a significant problem by the bargaining council or trade union concerned, and pales into insignificance compared to the flagrant disregard of the collective agreement by certain employers in KwaZulu-Natal, discussed more fully below.

There are also various initiatives to organize self-employed or own-account workers, including street traders or vendors, waste collectors and fishermen. There are probably more of these initiatives than is generally recognised (Bamu and Theron, 2010). However, they are by and large undocumented and uncoordinated. One organization that is providing coordination is the international NGO, Streetnet International.

The state of collective bargaining

The officially preferred forum for collective bargaining in South Africa has been the bargaining council, and there are bargaining councils in both the public and private sectors. However, bargaining is voluntary in the South African labour relations system, and in sectors where there is no bargaining council, bargaining takes place at plant level, or sometimes at private fora established at company or industry level. However, data regarding developments outside the bargaining council system are not readily available.

The bargaining council system has undergone significant restructuring over recent years. As Table 2 shows, the number of bargaining councils has declined steeply in recent years, but the number of workers covered by bargaining councils has increased. Much of the increase is made up of the addition of the five public service councils after the new LRA incorporated coverage of the public service (adding a huge number of workers to the total covered by the council system). If one excludes the employees covered by the latter councils, the number of employees covered by the private sector councils only in 2004 was 1 282 043.

Table 2.
Bargaining councils and employee coverage

Year	Number of councils	Total registered employees covered
1983	104	1 171 724
1992	87	735 533
1995	80	823 823
2004	48[12]	2 358 012

Du Toit et al, 2006: 43

The decrease in the number of bargaining councils is firstly due to a series of amalgamations of councils that took place to form bigger councils, e.g. the regional clothing councils and some related councils merged to form a single national clothing council, and much the same thing happened in the textile, electrical and the local government sectors. These developments contributed to a decline in the number of bargaining councils but did not alter the number of workers covered. So, it represents a tendency toward increased centralisation (Du Toit et al, 2006: 44; Godfrey 2007).

[12] This figure excludes six bargaining councils that were in the process of being deregistered by the Department of Labour as well as two registered councils that were defunct. Two councils that have to all intents and purposes merged have been counted as one council.

The second reason has been the collapse and deregistration of a number of councils. The building sector has been one of the worst hit, with most of the regional bargaining councils in the industry disappearing over the past decade, including the Gauteng Building Industry Bargaining Council. The building sector has been closely followed by the liquor and catering sector (i.e. hotels, restaurants, pubs, etc.) as far as collapse of councils is concerned. There are also a number of councils that continue to exist but are on very shaky ground, and it is probable that more councils will collapse in the years ahead, particularly smaller local councils.

In terms of the number of employees covered the public sector[13] bargaining councils are probably equal to or of slightly greater importance than the private sector bargaining councils. This development could see collective bargaining in South Africa following the international trend that has seen private sector bargaining decline in importance relative to public sector bargaining. The only evidence of growth in the private sector is the establishment of a few new bargaining councils (other than the amalgamations referred to above) in the chemical industry, the wood and paper sector, the fishing industry, and in the motor ferry industry.

All are national councils but the latter two are quite small in terms of the number of workers covered, while the chemical council and the wood and paper council have yet to extend their collective agreements. This refers to a mechanism the legislation provides whereby bargaining council agreements can be extended to non-parties by the Minister. This mechanism is not available in the case of other types of collective agreement, and some would regard it as representing the *raison d'etre* of bargaining councils.

The question of extension raises a particular dilemma for this enquiry. Reliance on the extension of bargaining council agreement is one of the most controversial aspects of the labour relations system, so far as employers are concerned. Employers who are not members of an employers' association that is party to the agreement are thereby bound by its provisions. On the other hand the extension of bargaining council agreements has proved one of the most effective means of regulating certain forms of non-standard work, such as labour broking. In the metal and engineering industry, for example, labour brokers are required to register with the bargaining council, and comply with its provisions. This does not mean, however, that employees of such brokers have any voice in the negotiation of the agreement.

The representativity of bargaining councils is usually measured relative to the records the council itself maintains regarding employers that have registered with it. However, given the tendency of employers in increasing number to avoid registering, it is also important to compare bargaining council coverage with the available data regarding employment. This is what Table 3 shows.

[13] The public sector would include the public service bargaining councils and the bargaining council at a state-owned enterprise such as Transnet.

Table 3.
Bargaining councils and employee coverage by sector, 2004

Sector	Total employees (grades 4–9)[14]	Number of councils	Employees (grds 4–9) covered by councils and extensions	
Agriculture	688 620	2	10 522	(385)
Mining	376 501	0	0	(0)
Manufacture	1 230 177	18	569 441	(189 253)
Utilities	59 207	0	0	(0)
Construction	594 780	6	47 052	(20 485)
Trade	1 333 239	5	192 026	(63 968)
Transport	397 669	4	286 116	(54 245)
Finance, etc.	671 601	1	10 543	(1 290)
Community	1 890 157	13	1 285 568	(5 79(335 420)4)
Total	7 241 951	49[15]	2 401 268	

Godfrey et al., 2006: 22-23

While the bargaining council system is important, it covers only about 20 per cent of all employees and a third (33 per cent) of all workers that would normally fall within a collective bargaining unit (i.e. in grades 4 to 9). Four of the nine major sectors of the economy do not have a bargaining council, or the councils that do exist are tiny and cover only a very small proportion of the workers in the sector. These sectors are agriculture and fishing; mining and quarrying; utilities; and, finance and business. A number of bargaining councils are present in another two sectors but their coverage is very low (less than 15 per cent in both cases), i.e. construction and trade. So, bargaining councils cover a significant proportion of employees in only three sectors, i.e. manufacturing; transport and storage; and, community services. The strength of the system in the latter two sectors is mainly because of the Transnet Bargaining Council and the five public service councils respectively, whereas the manufacturing sector comprises a quite large number of councils across a number of industries.

Clothing manufacture

At the time of writing a dispute of critical importance for the future of the bargaining council system is playing out in the clothing industry. It concerns wage levels in the clothing industry, and the future of one of the most important bargaining councils in the private sector. Non-standard work has always been prevalent in clothing, where it takes the form of out-work, homework and sub-contracting. It is also an industry associated with "sweat-shop" conditions. Minimum wages and the efficacy of regulation are important determinants of its extent.

Historically wages in the industry have been set by regional bargaining councils. These amalgamated to form a national bargaining council, the National Bargaining Council for the Clothing Manufacturing Industry. However, this council has effectively been unable to set a national minimum wage because of the number of employers

[14] Grades 4–9 cover those occupations that would normally be included in the bargaining unit, i.e. clerks; service workers and shop and market sales workers; skilled agriculture and fishery workers; craft and related trades workers; plant and machine operators; and, elementary occupations.

[15] This figure includes the Wood and Paper Bargaining Council that was registered in 2005.

operating outside its scope, or that are not registered with the council, and because of job losses.

At least 80 000 jobs are estimated to have been lost in the clothing and textile industry over the past six years as companies continue to downsize or close their doors due to a dramatic rise in imports from the Far East as well as "massive trade and industrial policy imbalances" between South Africa and China.[16] Nearly 50 clothing establishments within the jurisdiction of the council have ceased to exist in the past year.

At the same time there are many employers that have failed to register with the council or that flout the minimum wage levels and conditions of work laid down by the council, claiming that these regulations impede their competitiveness. It is estimated that there are over 31 000 employees in the clothing industry at unregistered firms, approximately one-third of the number employed at registered firms (Godfrey, 2010: 40).

According to recent press reports, firms registered with the council also flout council standards, and only 558 out of 1034 registered firms are paying the minimum wage. In an attempt to increase compliance, the bargaining council has obtained judgements against 386 non-complying firms, affecting 15 000 jobs.[17] Fourteen factories in Qwa-Qwa, Thaba Nchu and Botshabelo in the Free State had effectively been closed by the bargaining council.

This led to retaliation by employers. Thirty factory owners closed their doors on 25 August 2010 and refused to pay their workers on the days that their factories were shut. About a week later, on 30 August 2010, all 85 Chinese and Taiwanese-owned clothing factories in the Newcastle closed their doors.[18] The outcome was that the council had given non-compliant employers a 30-day reprieve, apparently to give the government a chance to resolve the matter.[19] While the union appears to be hoping that the outcome will be increased government assistance for the industry, including a more effective clampdown on illegal imports, employers would probably hold out for flexibility on minimum wages, with far-reaching implications for the bargaining council.[20]

The state of labour market regulation

The bargaining council system is an element of a broader system in terms of which the labour market is regulated, enshrined primarily (but not exclusively) in a suite of labour laws that were adopted in the post-1994 period, and which by and large ignored the process of externalisation that was already established. Consequently, it has failed to address most of the anomalies this process has given rise to, some of which have already been referred to in the introduction.

This failure is perhaps most stark in the case of South Africa's employment equity legislation. The factories and mines that in the 1980s were the workplaces in which the trade union movement in South Africa rose to prominence are today a more unequal place than they were then, as a result of a proliferation of service providers, labour brokers and others that operate there. These satellites of the core business may employ up to half, or

[16] Outgoing chairperson of the Cape Clothing Association, Graham Choice said that local clothing manufacturers are "out-subsidised" by the Chinese authorities, referring to the 70 plus direct and indirect support measures that the Chinese clothing and textile industries receive from Beijing.

[17] Business Report, 30 August 2010.

[18] This led to the South African Clothing and Textile Workers' Union (SACTWU) instituting legal action against the Newcastle Chinese Chamber of Commerce for shutting its factories, which they claimed amounted to an illegal lock-out.

[19] Business Report, 31 August 2010. According to Business report of 5 September 2010 manufacturers will lobby for changes to the wage model, including the introduction of a lower entry wage and the allowance of piece work in order to survive foreign competition. In the mean time, SACTWU national organising secretary Wayne van der Rheede, said that the union would push government for higher import tariffs on clothing.

[20] Sunday Times, 3 October 2010, "Crucial decision looms for clothing workers- The hunt is on for a new model."

more than half, the workers on the site, sometimes at less than half the wages of workers employed by the core employer doing the equivalent work (Theron, 2009).

This is manifestly an inequitable situation. However, employment equity legislation does not address it adequately or at all, since it is only concerned with the workplace of the core employer. It is also not possible to address this situation through collective bargaining or social dialogue unless and until the workplace is recognised as a place where the employees of different employers, and self-employed, may work. This is also the obstacle to utilising the other institutional mechanism provided by South African labour legislation, the workplace forum.[21]

By the same token, the official dispute resolution system has failed to come to terms with or satisfactorily address cases of unfair dismissal in externalised employment. Thus although most commentators would regard the Commission for Conciliation, Mediation and Arbitration (CCMA) as an example of a successful labour market institution, it has failed to establish guidelines providing security to agency workers, amongst others. As a consequence the massive investment of resources in the CCMA has largely gone to protecting workers in standard work, pushing up the costs of unfair dismissal for employers. This has arguably been one of the prime drivers of externalisation. The investment of resources in the CCMA has also to be contrasted with a depleted labour inspectorate lacking in resources.

There was a belated attempt to address the aforegoing problems by the adoption of a "presumption as to who was an employee", in 2002. However, this attempt was misconceived, and has in fact proved ineffective. The problem that the presumption sought to address was evidently one of disguised employment. However, disguised employment, whilst it occurs under certain circumstances, is a marginal phenomenon. It should go without saying that there is no need for an employer to resort to subterfuge when it may engage a labour broker or other service provider to meet its occasional labour requirements.

Since the adoption of the 2002 amendments to labour legislation there has been no further amendment to labour market regulation. There has, however, been a major controversy about labour broking, in the wake of the ruling party's Polokwane conference in 2009. South Africa's pre-eminent trade union federation, COSATU, with strong support from elements in the ruling party, and at one juncture the Minister of Labour himself, called for a ban of labour broking.[22] The precise form this ban should take was never spelled out, but there are reasons to believe that it was inspired by Namibia's equivalent of the Labour Relations Act,[23] which introduced such a ban, and a decision of the Namibian High Court to uphold the legislation in the face of a constitutional challenge to the ban.[24] That decision of the Namibian High Court has now been reversed on appeal.[25]

The call to ban labour broking was always unrealistic, for at least two reasons. Firstly, although agency work represents most graphically the problems externalisation gives rise, and the anomalies associated with the designation of the agency or labour

[21] Section 79, LRA of 1995. The workplace forum is a structure that can only be established at the request of a trade union, and is intended to provide a forum for all employees in a workplace. However, for historical reasons trade unions have boycotted the structure.

[22] Prior to the national elections in 2009, the Minister of Labour was reported as having called for the banning of labour broking, which he said amounted to human trafficking and was against the Constitution. Towards the end of 2009, following Parliamentary hearings, this still appeared to be government's position. See for example Business Report, 22 October 2009, "Labour broking set to be banned early next year."

[23] Section 128 of the Labour Act of 2007.

[24] Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others, unreported, Case A4/2008, 1 December 2008.

[25] Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others, Supreme Court of Namibia, SA 51/2008, 14 December 2009.

broker as an employer, it cannot be viewed in isolation. There are other triangular employment relationships, such as between a core employer and other service providers, that exhibit similar characteristics.

It is in fact difficult to define labour broking apart from certain other services. This is particularly the case, as in the South African legislation, where the use of task contracts is not regulated, and where the period for which a person may be "temporarily" employed is not regulated in any way. It is this lack of regulation that is in fact responsible for the most flagrant abuses associated with the practice.

Secondly, the Private Employment Services (PEAS) Convention permits the designation of the labour broker as employer, and this can be regarded as representing a new international consensus on the matter.[26] Although the PEAS Convention does permit agencies to be prohibited "under specific circumstances, in respect of certain categories of workers or branches of economic activity" a comprehensive ban would fly in the fact of this consensus.[27] It is also difficult to conceive of banning being regarded as justifiable in terms of the country's constitution, which requires laws to be interpreted in conformity with international law. [28]

Social dialogue regarding labour market policy, as well as social and economic policy in general, takes place at the National Economic Development and Labour Council (NEDLAC), which comprises representatives of government, organized labour and business as well as a "fourth chamber" which is supposed to represent the community. However, the problem of how the community is represented in this fourth chamber has not been satisfactorily addressed. Whereas there is a procedure whereby organizations purporting to represent organized labour and business may apply for admission to NEDLAC, there is no equivalent procedure for civic society bodies, and it is also not clear on what basis such a procedure could be devised, given the uncoordinated nature of existing organizations. There is also little or no articulation between social dialogue at NEDLAC and at a regional or local level.

3. Trends in non-standard working arrangements

But for externalisation and the establishment of a triangular employment relationship, there would be no problem conceptually in categorising the different forms that non-standard work takes. If work is understood to include both employment and self-employment, it is first of all necessary to differentiate between these two categories. The category 'employment' can in turn be sub-divided into full-time, temporary and part-time employment, with the last two representing non-standard forms of work; the category of 'self-employment' can be sub-divided into independent and dependent forms of self-employment, with the latter form being akin to non-standard work, in that it is a form of work that is in need of protection.

However, as a consequence of externalisation, and the failure to differentiate between casualisation and externalisation, or even to devise the tools to do so, this enquiry has become very much more complicated. Externalisation has amongst other things resulted in an increase in dependent self-employment, and a corresponding increase in employment in enterprises that are dependent on a client (or user enterprise), which I prefer to term the "core employer". At the same time, because workers can be employed on a full time or part-time or temporary basis in a triangular employment relationship as easily as in binary relationship, the potential for confusion between the two is compounded.

[26] Article 1(b), Convention 181 of 1997.

[27] Article 4(a), Convention 181 of 1997.

[28] Section 233, Constitution of the Republic of South Africa, 1996.

In practice, the potential for confusion is greatest in respect of workers that are temporarily employed. Depending on the term, temporary employment in a binary relationship may range from employment that approximates standard employment (where the period is five years, for example) to casual employment (as a day labourer). But in the case of South Africa and other countries in the Anglo-American legal tradition the term in a triangular employment may be and often is determined by the core employer. This results in a situation in which the worker believes he or she is continuously employed (in a standard employment relationship) when in fact he or she is not.

The debate about how to respond to non-standard work is severely constrained by the paucity of reliable data about its extent. This is partly as a result of the problems outlined above. However, in addition there have been at least three significant changes in the manner in which labour market data has been collected by the agency concerned (now known as Statistics South Africa) since 1994. This sometimes makes it difficult to draw comparisons, or establish trends.

Thus from 1994 until 1999 there was an annual October Household Survey (OHS), which collected information from respondents about a diverse range of issues as well as labour market information. In 2000 Statistics South Africa introduced the Labour Force Surveys (LFS), conducted twice a year, in March and September.[29] Then, in response to criticisms by data users, the LFS was redesigned, and conducted on a quarterly basis from 2008. It is now known as the Quarterly Labour Force Survey (QLFS).[30]

The difficulties with measuring non-standard work can be illustrated by considering the various attempts to determine the tenure of employment. The LFS survey distinguishes six categories of employment: "permanent", "fixed period contract", "temporary", "casual", "seasonal" and "don't know". However, it is not clear on what basis a respondent is expected to distinguish between these categories since all, except "permanent" and "don't know", are different forms of temporary employment.[31] The approach adopted by the QLFS is hardly less confusing. Instead of six categories, there are now three: "limited duration", "permanent nature" and "unspecified duration". However, it is unclear on what basis "unspecified duration" is distinguished from "permanent."[32] Perhaps for this reason the QLFS do not formally report the numbers captured in these three categories.

Apart from Statistics SA, the only other source of data is from the private employment services group Adcorp, which recently estimated the number of worker in "atypical (temporary, part-time)" employment as representing 41,8 percent of formal employment. Although this probably only represents an informed guess, its figure for the number of workers employed by labour brokers is probably accurate, as it is itself the largest of these agencies, and is likely to have reliable data in this regard. This is a figure of 997 237, which amounts to 10,8 percent of the number in formal employment.[33]

The concept of informal employment

The dichotomy between formal and informal does not precisely correspond with the distinction between standard and non-standard. Nevertheless there should be some

[29] The LFS was more focused on labour issues than the OHS. The bulk of the non-labour questions in the OHS were channelled into the General Household Survey (GHS).

[30] Source: Guide to the Quarterly Labour Force Survey August 2008.

[31] See Question 4.6 of LFS

[32] See Question 4.12 of QLFS. (Source: Derek Yu, The comparability of Labour Force Survey (LFS) and Quarterly Labour Force Survey (QLFS), Stellenbosch Economic Working Papers: 08/09. Department Of Economics, University of Stellenbosch and the Bureau For Economic Research at the University of Stellenbosch.

[33] On the other hand because it is itself a major role player, it may have a motive to exaggerate the extent of agency work. See Adcorp Employment Index, www.adcorp.co.za/Industry?Documents/Adcorp%20Employment%20Index_April_2010_Release_10%20May202011.pdf.

correspondence. A worker in standard employment should generally be in formal employment, and although the converse will often not apply, informal employment provides some indication of non-standard work, depending on how it is defined and measured.

Since Quarter 3 in 2008, the QLFS has attempted to differentiate between employment in the formal or informal sector, and informal employment, which encompasses vulnerable workers employed in the formal sector. Thus informal employment is regarded as identifying "persons who are in precarious employment situations irrespective of whether or not the entity for which they work is in the formal or informal sector. Persons in informal employment therefore consist of all persons in the informal sector; employees in the formal sector; and persons working in private households who are not entitled to basic benefits such as pension or medical aid contributions from their employer, and who do not have a written contract of employment." This definition excludes own-account workers who are employed in the formal sector that do not have a medical aid or a pension plan.[34]

The most recent available data reflecting informal employment is set out in Table 4.

Table 4.
Formal and informal employment
Apr. – June 2010
(expressed in %)

Employed (both sexes)	**100**
Formal employment	62.3
Informal employment	33.2
Other employment	4.5
Employed (women)	
Formal employment	59.4
Informal employment	38.3
Other employment	2.2
Employed (men)	
Formal employment	64.6
Informal employment	29.2
Other employment	6.2

Source: Information provided by StatsSA, 2010

[34] Personal communication: Malerato Mosiane, Chief Survey Statistician, Stats SA, 27 July 2010. However this definition appears to be a recipe for further confusion. Commendable as it might be to seek to determine the number of persons who are covered by private pension funds or medical aid contributions, this is hardly a proxy for "informal employment." As regards the "existence of a written contract of employment", labour broking and certain other service providers would generally be regarded as being formal on this criteria, since it suits the employer to have such contracts, to facilitate terminations. It is perhaps just as well that Statistics SA has stopped formally reporting on this measure while the definition of informal employment is being revised, in conjunction with the ILO.

4. Attempts (and non-attempts) to address issues pertaining to non-standard work through collective bargaining and social dialogue

The last year, from 2009 until the third quarter of 2010, at the time of writing this report, has seen a succession of significant and high profile disputes. Perhaps the most notable amongst them has been the public sector strike, because it involved an estimated 1.3 million workers, and because of the symbolical importance of such a strike, given that most members of the public sector are supporters of the ruling party.

While the Public Service Wage Memorandum & Demands 2010/11 acknowledged that a "staggering 4.192 million South Africans are now without work" as well as the fact that South Africa is one of the most unequal societies in the world, nowhere in its list of substantive demands does it raise any issue concerning the conditions of work of non-standard workers. In fact government directly or indirectly employs an unknown but significant number of such workers, who are evidently unorganised.

The demand of the public sector unions was for an across the board wage increase of 8.6 per cent, about double the rate of inflation. They also stated their determination to "reduce the widening wage gap in the Public Service…", and have pointed out the wage gap between a Level 16 and Level 1 employee in the public sector is 30:1. However, this determination evidently does not extend to non-standard workers in the public sector, who are not designated part of the public service. [35]

In what has by now become a failure routine defence of above-inflation wage increases, Zwelinzima Vavi, Cosatu secretary general, stressed that employed workers (meaning in this instance workers in standard employment in then public sector) are having to support more and more dependents as the unemployment rate continues to rise. While this is certainly correct, it is not an appropriate defence in the light of the apparent failure of public sector unions to organise non-standard workers.

In the remainder of this section, I consider sectors in which there has either been organization or bargaining in respect of non-standard workers, starting with another sub-sector of manufacturing, and proceeding to two services, transport and local government. I go on to consider recent developments in squid fishing and agriculture. Although the former is not a significant employer, it does represent an innovative approach in a situation that is not conducive to collective bargaining. The case of agriculture, on the other hand, represents a sector that is a significant employer, in which innovative approaches are needed.

Automobile manufacture and the motor industry

Automobile manufacture is perhaps the most important sub-sector of manufacturing in South Africa and benefits from a measure of government support in the form of the Motor Industry Development Plan (MIDP), which helps ensure that it is still globally competitive. The workforce it employs is also amongst the best remunerated in South Africa. This is not surprising, given that the plants where production is located are large and eminently amenable to trade union organization.

[35] An agreement in the public sector has still not been formally concluded. On 6 September 2010, with still no resolution reached, the unions decided to suspend their 20-day strike and go back to work. They made it clear however that this did not mean that they accepted government's offer.

Even so, it is also an industry that employs non-standard workers. Following a strike involving the trade union NUMSA (the National Union of Metal Workers of South Africa), an agreement was concluded for a wage increase of ten per cent (again, well above inflation).[36] Further, the agreement contained a provision stating that the use of labour brokers will be discontinued with effect from 1 January 2010 "in respect of the bargaining unit", with the sole exception of pre-existing labour broker contracts which will be allowed to run their course .[37]

Also important are the concessions made to "short term "workers, meaning workers on fixed term contracts of short duration.[38] Previously, these workers enjoyed few benefits. However, in terms of the agreement reached between AMEO and NUMSA short-term contract employees shall be paid at the entry rate of the appropriate skill level. They will be entitled to participate in the industry's multi-skilling programme; in company specific arrangements for retirement, death and disability benefits and in established company medical aid arrangements. If the latter is impractical, they may be given the cash equivalent of the company's medical aid contribution to fund an alternative medical aid arrangement. If that is not possible, then a cash equivalent will be payable to them. They will also be entitled to receive a separation allowance upon termination of services of two weeks for every one year of completed service.

It is not clear whether the "short term" workers on whose behalf these provisions were entered into were members of NUMSA, but there is no reason why they should not be, given that they are directly employed. In terms of the typology outlined above, this would then represent a form of casualisation, and the provisions the union has negotiated would represent a justifiable attempt to mitigate the effects of casualisation on behalf of these workers. However, one may safely say that the agreement reached in respect of agency workers was not on their behalf. The question arises whether this provision is justifiable, and whether it is effective.

According to the employers, the phasing out of labour brokering is unlikely to have a major effect on the industry, as only one of the seven employers who are party to the employers' organisation currently uses a labour broker.[39] However, it may have a limited effect for an altogether different reason, namely the difficulty in defining labour broking, as has already been noted, and the difficulty in differentiating between labour broking and certain other service.

In the case of automobile manufacture it appears labour broking services are provided by firms providing logistical functions, including the warehousing and distribution of parts and accessories, to contractors.[40] One such logistical firm is Schnelleke, which is contracted to supply parts and accessories to Volkswagen, amongst others (This is also not the employer which employers' organisation referred to as using labour broker). Although Schnelleke would argue that the services it provides are not "core" to the company's operation, this is debatable.[41] It is also known that Schnelleke had

[36] The minimum wage of the industry at Skills Level 1, i.e. the entry rate, is now R34.88/hour. In the case of a plant working a 40 hour week this would represent R1295.20 a week, more than the monthly minimum wage determined by government for workers in services like contract cleaning.

[37] Press release, Automobile Manufacturers Employers Organisation (AMEO), 20 August 2010.

[38] According to AMEO's Mr Thexton between 5-30% of workers at automobile companies are employed on short-term contracts in order to allow the companies with flexibility. Interview with Margareet Visser, 30 August 2010)

[39] Telephonic interview, Margareet Visser with Mr Chris Thexton, chairman of the Automobile Manufacturers Employers Organisation, 30 August 2010

[40] Interview, Margareet Visser with Alex Mashilo, Head of Department: Organising, Campaigns and Collective Bargaining (OCCB) at NUMSA, 6 September 2010

[41] Schnelleke describes itself as "logistics service provider", and also provides services to Nissan and Ford Motors in South Africa. However from their website, it is clear that they provide more than just logistics. As Schnelleke itself puts it "On behalf of automotive manufacturers we assemble loose components into pre assembled or completely assembled units thereby

hired a significant number of workers who were dismissed by Volkswagen following a strike, to work in the plant. It is precisely this kind of activity that has made labour broking so controversial. It remains to be seen what effect the agreement will have on its activity.[42]

The manufacture and supply of parts and accessories can also be regarded as one of the ways in which externalisation has occurred, and non-standard employment is generated. Currently bargaining in automobile manufacture takes place in a voluntary forum, and the agreement can therefore not be extended to non-parties such as the suppliers of parts and accessories, or logistics firms. However, the parties have now committed themselves to the establishment of a bargaining council, whose agreements could be extended. It appears, however, that the employers and union have a different conception of the proposed council.

For the employer, a bargaining council would allow for more robust governance than the present voluntary bargaining forum. They also feel that they carry the bulk of the administrative costs of the forum.[43] What the union has in mind, however, is the creation of a mega-bargaining council that would allow centralised bargaining for the whole motor industry value chain, including the manufacture of tyres and the motor retail industry, where the manufacture and supply of parts and accessories is located, along with certain other operations.[44]

Further to its goal, NUMSA has been involved in a series of strikes across the motor industry value chain, and are hoping this will also get employers to recognize the union's "logistical power" and try and force them into centralized bargaining.[45] On 7 September 2010 it was reported that five of the seven vehicle production plants in the country were standing completely idle because of the shortage of automotive components due to the strike in the automotive component manufacturing sector.[46] Workers in the tyre and rubber industry were also on strike at about the same time.

There is a bargaining council in the retail motor industry, which also covers pump attendants at petroleum filling stations, or garages as they are commonly known. The case of the pump attendants is an example of a category of worker that by most definitions would be regarded as "standard", in that employees are continuously employed, but are nevertheless generally regarded as vulnerable because of the ease with which their function could be mechanized.

The union's demands in respect of the motor industry strike included eliminating what it viewed as discriminatory clauses in agreements with employers, such as that petrol pump attendants earn time and a third for overtime while mechanics received up to double the normal rate for overtime; a ban on labour brokering particularly in car component companies, a specified increase in night-shift allowance, cashiers' pay raised from grade one to grade five, a 4.3 per cent increase in bonuses and a 40-hour working week without loss of pay.[47]

eliminating non-core activities and optimising production processes for our customers." See www.schnellecke.co.za/content.asp?PageID=602&MenuID=7

[42] Another is Kuehne and Nagel, which provides warehousing services, parts and accessories to BMW. See www.kn-portal.com/industries/automotive/

[43] Interview, Margareet Visser with Mr Thexton, AMEO, 30 August 2010

[44] Interview, Margareet Visser with Mr Alex Mashilo, 6 September 2010

[45] Interview, Margareet Visser with Mr Alex Mashilo, 6 September 2010

[46] Business Report : 7 September 2010

[47] Argus, 8 September 2010; Cape Times, 9 September 2010

Transport

Transport is a service that has frequently been externalised. The transport sector itself also provides employment to a significant number of non-standard workers including, in the road transport component, the so-called owner-drivers. An owner-driver is a person who is both owner and driver of a vehicle that typically has been acquired from a core employer to whom he (it is rarely, if ever, she) renders services.

Although there are no published studies to this effect, owner-drivers are perhaps the one form of employment where the introduction of a presumption as to who is an employee may have had some effect, albeit only insofar as it may have deterred some employers from persisting with, or introducing, owner-driver schemes. On the other hand other employers have persisted with such schemes, confident that they will be able to establish that such owner-drivers are not employees to whom labour legislation applies, if called upon to do so.

The road freight transport component of the sector is regulated by the Road Freight Bargaining Council. Although the council's agreement excludes owner-drivers from its scope, it contains the most far-reaching precedent thus far of a council seeking to regulate labour broking. This agreement was adopted in 2006 but only extended to non-parties in 2007, and has since expired. It is in the process of being re-negotiated.

One of the provisions in this agreement imposed a limitation on employers not to engage more than thirty per cent of their workforce through labour brokers over a period of 12 months.[48]There was a further limitation to address the anomalous situation already alluded to, that there is no limit in the legislation on the period for which a worker may be temporarily employed, and it is therefore possible for an agency worker to be employed indefinitely. Thus the agreement provided that a worker who was supplied "to one or more clients on a continuous basis for a period in excess of two months shall be deemed to be an ordinary employee…"[49] All the provisions of the collective agreement would then be applicable to such employee, including membership of the provident fund.

As it happens the implementation of these provisions was frustrated by a wide-ranging challenge in the High Court, brought by, amongst others, an employers' organization representing labour brokers.[50] This application was subsequently withdrawn, and it remains to be seen whether the council will enact the same or similar provisions in the new agreement.

In the meantime it appears that the attitude of the pre-eminent trade union in the sector, SATAWU, has hardened. It is now seeking to eliminate labour broking entirely,[51] and has already succeeded in getting South African Airways (SAA) to phase out the use of labour brokers. SAA previously engaged about 700 workers through more than one labour broker to work in several of its divisions, including in the cargo section as well as in passenger operations. According to the union, one of the brokers was paid R10 000 per worker placed per month, of which the workers received R4000 in remuneration, with no medical aid or pension fund benefits.[52]

Following a 21-day strike in February 2009, an agreement was reached to phase out labour broking, although this only occurred on 31 August 2010. In this case the workers

[48] Section 18(23), Main Collective Agreement, NBCRFI, 2007.

[49] Section 18(2), NCBRI Agreement.

[50] The applicants alleged, amongst other things, that the Bargaining Council is now seeking to restrict the right of employers (the clients of the labour brokers) as to whom they may employ. Further, they allege that the Bargaining Council is violating the rights of the labour brokers to freedom of association, amongst other rights. See *CAPES, Workforce Group Limited, Transman (Pty) Ltd v NBCRFI and others* Case 2008 / 2223. Witwatersrand Local Division.

[51]Interview, Margareet Visser with Evan Abrahamse, provincial secretary, SATAWU Western Cape, 2 September 2010.

[52] Interview, Margareet Visser with Andile Nomlala, provincial chairperson, SATAWU Western Cape, 2 September 2010.

that were previously employed via a labour broker have now been directly employed by SAA. It is not clear whether the agency workers themselves were members of the union, or part of the negotiations, but SATAWU is one of the few unions that have recruited agency workers, and this was clearly an agreement for their benefit.

SATAWU has also succeeded in negotiating with the para-statal enterprise Metrorail to cut its use of workers employed on fixed term contracts. Because these workers did not receive the same benefits as permanent workers, the union launched a campaign to have them employed on a permanent basis in 2006, and in April 2009 succeeded in respect 1 063 workers on fixed term contracts on a permanent basis. Some of these workers had been employed on a fixed term basis for as long as 10 years. The workers are now members of the medical aid and pension fund.

It is however, probably not a coincidence that these two successes in converting a number of non-standard workers to standard workers occurred in state-owned enterprises, with which trade unions have political clout, as opposed to employers in the private sector in general. The employers in road transport are all private.

Road passenger transport in South Africa is also in private hands, with a large and notoriously weakly regulated minibus taxi industry. At the same time the minibus taxi industry has fiercely resisted attempts to extend the provision of bus passenger transport. However, with the introduction of a new Integrated Rapid Transit (IRT) system, coinciding with the 2010 FIFA World Cup, there has been a concerted attempt to engage in a process of social dialogue with the minibus taxi industry, by offering them opportunities as employees, operators and shareholders of the new system.

In the case of the City of Cape Town it is envisaged that an emphasis on customer safety and quality of services in the new IRT System will translate into increased overall employment in the public transport sector, and a substantially improved work environment for employees.[53] The operators will own the vehicles and take responsibility for their maintenance and care. The City will contribute at least 50 per cent of the cost of the vehicles as a form of capital subsidy to get the system started.

The local government sector

The provision of local government services such as cleaning provides an interesting example of the relationship between standard and non-standard workers, since they are in fact in almost all cases provided by both workers in a standard employment relationship with local government (local government employees), and by workers in externalised employment. However, this is not generally acknowledged, and there appears to be no accurate data reflecting the extent to which local government relies on externalised employment (Visser and Theron, 2008; Theron and Visser, 2010).

Thus the wages and conditions of work of local government employees are set by a national bargaining council on which all local authorities are represented, through an employers association (the SA Local Government Association, or SALGA). The two main unions are the SA Municipal Workers Union (SAMWU) and the Independent Municipal Workers Union (IMATU). In addition, there are workers provided by labour brokers, to fulfil certain functions. Specifically in respect of cleaning, local government have engaged waste management firms to fulfil certain functions, as well as smaller, independent firms or individuals, often under the mantle of “black economic empowerment”.

It appears that most of the large local authorities make extensive use of such individuals (sometimes described as “one man contractors”) and small firms in informal settlements, and the numbers employed are significant. Invariably employment is for the

[53] For example although the system will utilise fewer vehicles than at present, the system will run for longer hours every day and there will be multiple shifts for drivers, meaning more opportunities.

duration of the employer's contract with the local government, or shorter. The only instance of a different kind of arrangement existing in informal settlements that I am aware of is in Nelson Mandela Bay (formerly Port Elizabeth), where the local authority has assisted to establish both primary and secondary cooperatives to fulfil this function.

At the same time, local governments have a responsibility not only to collect waste, but to minimise it, and hence recycle. To fulfil this responsibility some local governments are, again, engaging established waste management firms. However, such firms are generally only interested in the most lucrative aspects of waste-minimisation, and there are significant numbers of self-employed people engaged in collecting waste which they sell, for a livelihood. There are various initiatives to organize these waste-pickers, or re-claimers, and some have also formed cooperatives.

It appears SAMWU has made some efforts to organize both agency workers and workers employed by some contractors. It has also argued that the bargaining council agreement should be interpreted to extend to non-parties, including contractors engaged by local authorities to perform services, and has most recently launched a court case to review tenders that were awarded to such contractors without following the Municipal Systems Act (MSA), as well as an Organisational Rights Agreement and agreement reached with SALGA at the conclusion of a strike in 2008. In terms of the MSA, a local government is obliged to consult with trade unions, amongst others, before contracting an external agency to provide a municipal service. Clause 7 of the 2008 strike agreement states that in the event of any service being outsourced, workers under the private provider shall enjoy the same benefits as provided for in the SALGBC, including salaries.[54]

In January and in March 2010 waste workers – apparently those contracted to labour broker Capacity Outsourcing – went on strike over Tshwane Metro's use of a labour broker. The cause of the strikes was that Capacity's contract with the local authority had expired on 31 July 2009, and was being renewed on a month-to-month basis. The demand was that these workers be appointed directly by the local authority. It seems the employer did in principle agree to phase out agency workers and did employ a significant number.[55]

Again, where in the case of local government trade unions have been able to get authorities to employ directly workers who were previously in externalised employment, it is probably due to political pressure. However, it seems unlikely that any amount of political pressure will result in all the workers engaged in externalised activities being employed directly, as the financial implications for local government would be huge.

Squid fishing

In June 2006 workers employed on boats and engaged in squid fishing went on strike in protest at the conditions of work in the squid fishing industry. At the time, the workers did belong to a trade union, and there were no negotiations between themselves and their employers until the Food and Allied Workers Union (FAWU) intervened, and recruited the workers (Hara, 2009b: 517).

Workers engaged in the squid fishing are regarded as employed on vessels at sea. Accordingly the Merchant Shipping Act applies, and not the Basic Conditions of Employment Act.[56] However, this Act is out of date, and the conditions of employment

[54] Source: SAMWU press release, 19 July 2010.

[55] Source: Independent Online, 10 January 2010 and 2 March 2010). A report on 22 March 2010 said that the "illegal strike" by Pretoria waste management personnel is over and employees have returned to their jobs. It was unclear from the report to which jobs they in fact returned and it was not possible to obtain clarification from SAMWU.

[56] The Merchant Shipping Act covers all fishing vessels that are registered to operate in South African waters. See Act 57 of 1951.

specified therein require substantial amendment to comply with international standards.[57] FAWU has called for the ratification of the ILO's 2007 Convention on the Work in the Fishing Sector by the end of August 2008, but to date this has not happened.[58]

As a result of the strike a statutory bargaining council was established in August 2007, and a draft agreement negotiated.[59] There are three parties to the council: as well as FAWU, there is the South African Fishermen's Trade Union (SAFTU) and the Employers' Organisation Cephalopod and Associated Fisheries (EOCAF).

The statutory bargaining council is a rarely-used forum created by the legislation to cater for situations in which one or both of the parties is not sufficiently representative to form a bargaining council. In this instance 65 out of 85 employers in the industry belong to EOCAF, which is clearly representative. However, the employers are mostly small, and in many cases are individuals who own a boat.

This is the kind of industry that trade unions have historically had little success in organizing, and the fact that fishing crews spend protracted periods at sea adds to the difficulty of doing so. Although FAWU claims it represents 90 per cent of the 2 400 workers work on squid boats and the additional 200 workers work in processing plants, employers maintain only 4 per cent of workers have signed stop order authorizations to deduct union subscriptions.

Although the draft agreement has yet to be finalized,[60] it already sets an informal standard for the industry, including basic conditions of work such as are provided in terms of the BCEA.[61] Furthermore, the agreement has set criteria for performance evaluation and non-performance. The council has also developed a universal disciplinary code that will apply on all members' vessels as well as a dispute resolution agreement. Moreover, the council has provided for the establishment of a provident fund for fishermen (employers and employers will contribute to the fund on a 50: 50 basis). A noteworthy innovation is that the agreement also provides for the provision of three meals per day for fishermen. To this end, the council has developed nutritional guidelines for the squid fishing industry.[62]

The legislation also provides that a statutory agreement may be extended to non-parties, by way of a ministerial determination.[63] The intention is that the final agreement is extended to non-parties. If this intention is realised, it will be the first of an agreement by a statutory council in South Africa to be extended.

[57] Interview, Margareet Visser with Mr Virgil Seafield, Department of Labour. 3 September 2010. See Chapter 4, Act 57 of 1951.

[58] See: www.fawu.org.za/show.php?include=docs/bargaining/2008/pr0624.html&ID=41&categ=Bargaining

[59] The Statutory Bargaining Council for the Squid and Related Fisheries of South Africa.

[60] According to Mr Andre Grobler, the secretary of the council, there are a few remaining points that have to be thrashed out by the parties before it is finalised.

[61] For example, requiring that workers are provided with written particulars of employment and regulating hours of work, overtime, work on Sundays and public holidays, meal intervals, and leave (including annual leave, sick leave and a family responsibility leave) and the procedure for termination of service.

[62] As the LRA does not give Statutory Bargaining Councils the power to extend an agreement on wages, no minimum wages have been set.

[63] Section 44 of the LRA states that "a statutory council that is not sufficiently representative within its registered scope may submit a collective agreement on any of the matters mentioned in section 43 (1)(a), (b) or (c) to the Minister. The Minister must treat the collective agreement as a recommendation made by the Employment Conditions Commission in terms of section 54(4) of the Basic Conditions of Employment Act. (2) The Minister may promulgate the statutory council's recommendations as a determination under the BCEA if satisfied that the statutory council has complied with section 45 (3) of the BCEA, read with the changes required by the context." See Section 44, Act No 66 of 1995.

Agriculture

Agriculture, along with fishing and forestry, are sectors in which both standard and non-standard workers are employed, but in which trade unions have had a minimal impact.

In a state-led endeavour to address what was described as the critical need to build good working relations and living conditions for vulnerable workers in these sectors, a national summit was convened in July 2010, comprising farm dwellers, farm owners, leaders of government, organized labour and civil society.[64]

The summit was preceded by four commissions that focused on the social determinants of health, working conditions; security of tenure; and empowerment and training for vulnerable workers, and adopted various resolutions including, inter alia, to:

- Ensure the right of freedom of association for workers will be realised and respected and support will be provided to enable them to exercise this right. A special fund administered by NEDLAC will be made available to assist trade unions in this sector to ensure that they are able to realize the right of workers to associate.
- Establish bargaining councils for vulnerable workers in the Agriculture, Forestry and Fisheries sectors to enable the workers to enjoy inflation related increases.
- Build and consolidate multi-stakeholder forums to address issues relating to working conditions and monitoring the implementation of these resolutions.
- A code of conduct for contract workers and standard contracts to be developed and implemented.
- Regulate labour brokerage and outsourcing to deter the abuse of workers.
- A NEDLAC process should look and negotiate the establishment of a minimum framework for the social protection of the vulnerable workers addressing such issues such as UIF, medical insurance and retirement benefits.

However, the usefulness of this kind of social dialogue is questionable, to say the least. At best it amounts to no more than a statement of good intentions. At worst, it raises unrealistic expectations on the part of participants. It is scarcely conceivable that suitable codes of conduct or forms of regulation can be developed in the least-resourced of sectors, when the same phenomena these codes and regulations seek to address exist in all sectors. To suggest the establishment of bargaining councils when trade unions are not remotely representative, and have yet to devise credible strategies to organize in the sectors, is similarly unrealistic.

What is arguably a realistic strategy to promote freedom of association, the formation of trade unions and a more genuine form of social dialogue, although also open to abuse, are the so-called “soft codes” and voluntary certification schemes operating in the agricultural sector, such as the Wine Industry Ethical Trade Initiative (WIETA) in the wine industry, and Fairtrade, an international ethical trade certification scheme launched by a conglomerate of NGOs.

There are also top-down initiatives by international supermarket chains, such as Tesco, who insists that their suppliers subject themselves to an ethical trade audit. While some of these certification schemes merely see to it that the labour regulation of a particular country is being followed (often as an exercise in “white washing” suppliers) other schemes, go much further, especially to promote collective bargaining. For instance, the Fairtrade Code considers any attempts to curb workers’ freedom of association or discrimination against union members as a major non-compliance that could lead to immediate suspension from the Fairtrade system.

[64] The Presidential Summit, Somerset West in Western Cape Province on 30 – 31 July 2010.

As part of the code, worker representatives must be given time during working hours to hold meetings among themselves and also to hold meetings with workers. Management must also provide a space for such meetings to take place. If there is no union present on the site, management must allow trade unions access to share information with the workforce at an agreed time and place, without interference. The code also requires employers to keep records for all cases of dismissals of union or workers' committee (leaders) members and make these available for the inspection by the Fairtrade auditor.

If no active and recognized union is able to work in the area, all the workers on the farm must democratically elect a workers' committee, which represents them and negotiates with management to defend their rights and interests.[65] The code also seeks to curb the use of labour brokers and/or contractors. The code states that within one year of certification, the company's management must undertake all contracting of seasonal workers directly rather than through a contractor. Where exceptions due to special circumstances have been granted by the certification body, the contractor must provide services that comply with certain criteria.[66]

The limitation of this kind of initiative is firstly its scope. Although there are obvious benefits for producers to be accredited, it is voluntary, and it is probable that the more established producers will opt for this, rather than the more marginal producers. Even so, it provides an additional strategy that can be utilised to promote collective bargaining and social dialogue, although it has thus far not been utilised.

Non-sector specific initiatives: Placement services

As the above case studies illustrate, the most common demand concerning non-standard work has been in relation to labour broking. However, the prevalence of labour broking can be attributed to the failure of the state to provide an effective public intermediation service. Although I would argue the proposal by the PEAS Convention to "determine and allocate…the respective responsibilities" of the labour broker and its client does not resolve the anomalies that the trianguIar employment relationship gives rise to, it is also true that the state has not done enough to regulate labour broking. It could, for example, have adopted the kind of measures proposed in the PEAS Recommendation "to eliminate unethical practices", including penalising offenders.[67]

There is also the possibility that intermediation services could be provided by associations and NGOs, as probably happens in an informal manner already. There are also some NGOs whose express objective is to provide intermediation or placement services on a non-profit basis. The best known of these is probably Men on the Side of the Road (MSR), a Cape Town based NGO which aims to place 157 000 people in jobs per year.

[65] To ensure that meetings happen on a regular basis, the Fairtrade system requires inter alia, that: a schedule of regular meetings amongst worker's representatives is in place and approved by management; similarly a schedule of regular meetings between worker's representatives and senior management has to be in place; regular meetings (at least every trimester) must be held between senior managers and the workers' organisations representatives during working hours; results of these meetings must be documented and shared with workers by their representatives;if no Collective Bargaining Agreement is in place for the sector, the worker's organization must start negotiations with management on conditions of employment. The agreement on conditions of employment must be negotiated and signed between management and workers' organization. For more information, see www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/04-10_EN_Generic_Fairtrade_Standard_HL_Aug_2009_EN_amended_version_04-10.pdf

[66] The employer must comply with national law, ILO Convention 181 and with certain criteria specified in the Fairtrade standard regarding conditions of work, working hours, wages, contracts, Freedom of Association, forced and bonded labour, child labour, and Health and Safety. If an exemption to use a contractor is allowed by the certification body, the contractor must declare in writing that it adheres to these criteria. The company is responsible for ensuring that such conditions are met and maintaining reasonable evidence of this.

[67] See Article 12, Convention 181 of 1997 and Article 4, Recommendation 188 of 1997.

MSR employs 12 placement officers who set-up gazebos at various strategic locations in the City every weekday morning from 7am until 11 am and on Saturdays from 8 am till 11 am. These persons actively engage with people who gather there, and encourage them to become members of MSR. The members are required to provide personal data such as identity numbers as well as contact details, a description of his (it appears to cater only for men) social situation, skills and work experience. The member's skills are then verified through an actual assessment, or via reference check from three known employers. The member is then rated on the basis of the skills, on a scale of between 1 and 5 points. The evaluation process helps to build credibility with potential employers, and independent confirmation of details as well as references also enhances the employability of the member. [68]

MSR's placement officers proactively look for work opportunities for the members with potential employers who include homeowners, building contractors, landscapers, events management companies, labour brokers and other companies requiring semi-skilled labour. It does not get involved in wage negotiations, but recommend a daily rate for the particular work. The services are free to its members and employers who use them, and it is funded from donations and from the government's Social Development Department.

Stakeholder forums

A propos the 2010 FIFA World Cup held in South Africa there was a proposal by the international NGO Streetnet together with SAMWU to establish stakeholders' forums in the seven host cities to try and ensure that some of the benefits of the event reached the "socially marginalised urban poor, such as street traders", and to enable their concerns to be addressed.

The membership of such a forum would be open to organized formal traders, the local authority, and any other organization it was agreed to admit and the objects include striving for a "free and friendly environment and sustainability for informal trading"…and "the removal of obstacles that threaten the homes and/or livelihoods of the urban poor, including informal traders."[69]

5. Conclusions

Collective bargaining in South Africa is still confined to workers in standard employment, and the demands put forward in the collective bargaining process in the main address the concerns of these workers about the increase in non-standard work. The fact that demands about the utilisation of labour-broking feature so prominently confirms the overall argument that the focus of attempts to regulate non-standard work should be on externalisation.

While there have been successes in getting employers in the public sector (including para-statals) to provide standard jobs to workers formerly employed by labour brokers, it seems naïve to suppose that demands aimed to eliminate labour broking will result in increased standard employment, particularly in the private sector. In fact these demands may have the unintended consequence of shifting employment from labour brokers to other kinds of service providers, as may already be occurring, without addressing the more fundamental problems that externalisation poses for a model of society that values collective bargaining and social dialogue.

[68] Business Report, 13 December2009.

[69] Proposal on the stakeholder forum and interview, Pat Horn, Streetnet, 7 September 2010.

The case of South Africa suggests that there is a great deal more that needs to be done to encourage and promote the organization and representation of non-standard workers, and that a multiplicity of initiatives are required. It also seems that what would be truly innovative is not so much demands that seek to "solve" the problem of non-standard work, as demands that will facilitate the organization and representation of such workers.

The idea of a forum where non-standard workers can be represented is useful, and the obvious place to seek to create such a forum is the workplace. However, if the situation of workers in externalised employment is to be addressed it will be necessary to re-consider a legislative definition of the workplace as the place(s) where the employees of an employer work, as opposed to the place(s) where workers actually work, irrespective of who employs them, or whether they are in fact legally employed.[70]

The provision for workplace forums in the Labour Relations Act of 1995 has been controversial, due to its particular connotations in the South African context, and because of concerns that it would undermine collective bargaining. However, in a context where collective bargaining is any event not feasible for workers in externalised employment, a distinction between collective bargaining and social dialogue may be a useful way of addressing these concerns. At the same time it would allow scope for the participation of other forms of organization, such as self-help organizations (the waste cooperatives in the local government sector, for example).

The creation of some such structure at a local level is needed both to change perceptions amongst standard workers, and to begin to bridge the gap between an institution created to foster social dialogue at a national level, in the form of NEDLAC, and the sporadic and ad hoc forms that social dialogue takes at a local and regional level.

[70] The Labour and Enterprise Policy and Research Group (LEP) is currently engaged with a project aimed at extending the existing notion of a workplace.

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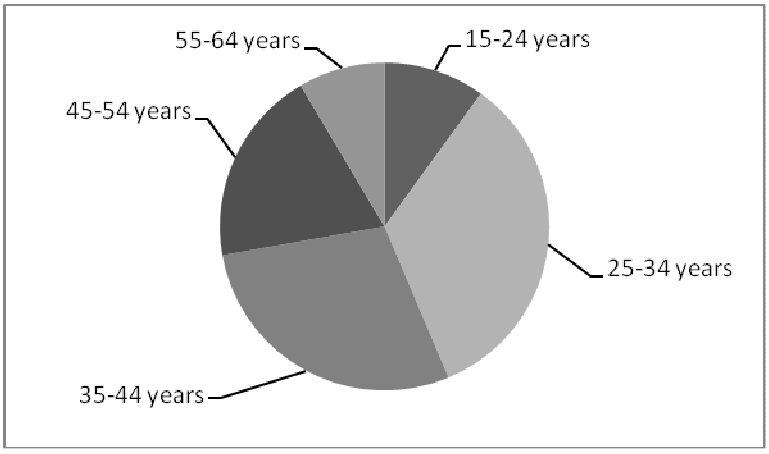
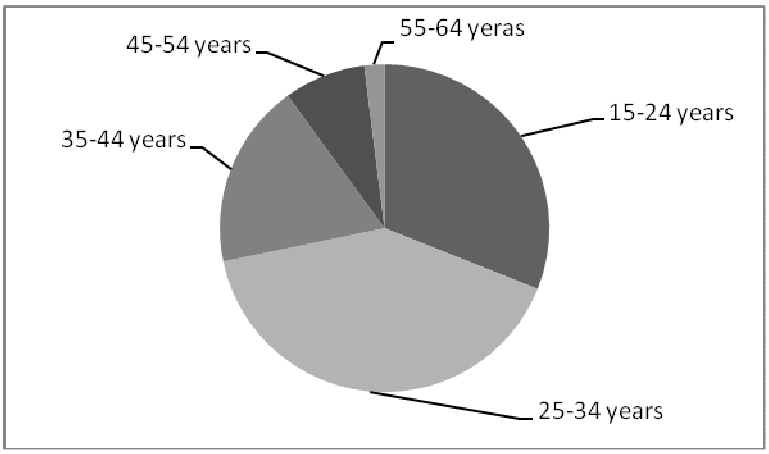
Appendix.

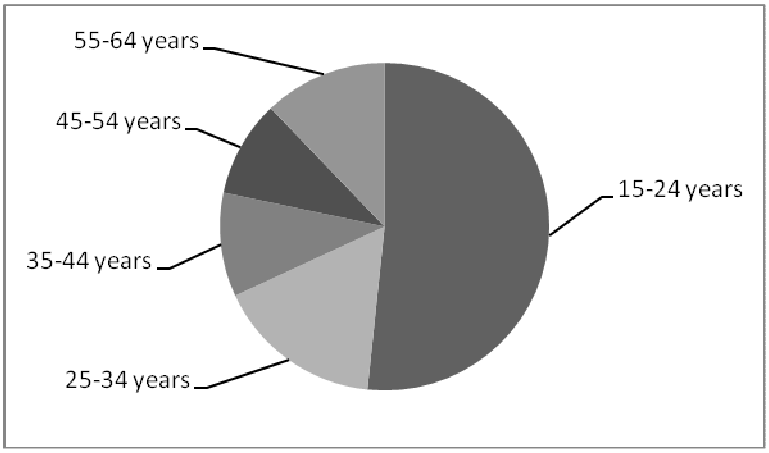
Total employed (15-64) in Jul.–Sep. 2010



Total unemployed (15-64) in Jul.–Sep. 2010



Total not economically active (15-64) in Jul.–Sep. 2010



Source: Statistics SA, Quarterly Labour Force Survey, Quarter 3.