

**Two is a Party, Three is a Crowd: An Appraisal of Temporary
Employment Services in South Africa**

by

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SUMMARY

The Labour Relations Amendment Act 39 of 2014 introduced mechanisms aimed at providing improved protection for non-standard forms of employment. Section 198 and 198A of the amended Labour Relations Act 66 of 1995 (LRA) now provides a regulatory framework for Temporary Employment Services (TESs), with increased protective mechanisms for employees that fall below the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

In this dissertation, I explore how the deeming provisions of section 198A affect the rights and obligations of the TES, its client and the employee in the triangular relationship. The manner in which the courts have interpreted the deeming provisions introduced by section 198A(3)(b) of the LRA, and the implications of the recent constitutional court judgment in the matter of *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others (Casual Workers Advice Office Amicus Curiae)*,¹ will also be examined in order to determine the extent to which the Constitutional Courts judgment has resolved the interpretational conflict surrounding section 198A.

Consideration is further given to the various international instruments adopted by the International Labour Organisation (ILO) on TESs. A comparative analysis of regulatory developments applicable to TESs in the European Union (EU), United Kingdom (UK) and Namibia is also provided in order to determine what guidance for South Africa can be gleaned from these jurisdictions.

¹ 2018 JDR 1190 (CC).

CHAPTER 1 INTRODUCTION

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1. BACKGROUND

The Labour Relations Act 66 of 1995 (“1995 LRA”)² comprehensively restructured South African labour law and sought for the first time to provide all employees in South Africa with protection consistent with international labour standards.³ However, changes and developments in the labour market over the last century have resulted in a significant increase in the use of non-standard forms of employment,⁴ in both developed and developing countries.⁵

As a result of the tenuous provisions and lack of regulation in the 1995 LRA many employers in South Africa embarked on a strategic process aimed at circumventing the regulatory provisions of South African labour legislation by exploiting non-standard forms of employment.⁶ Employers proceeded to develop various strategies aimed at hiding the true nature of the employment relationship by presenting the relationship in a different legal form or disguising the actual identity of the employer.⁷

² The Labour Relations Act 66 of 1995 as at 11 November 1996.

³ Benjamin (2010) *ILJ* 845.

⁴ The term ‘non-standard employment’ is used in this dissertation to refer to temporary employment services, fixed-term employment and part-time employment.

⁵ Smit & Fourie (2009) *TSAR* 517.

⁶ Botes (2015) *SALJ* 100.

⁷ Benjamin (2010) *ILJ* 846.

One of the most common forms of non-standard employment utilised by employers to deprive workers of basic labour law protections was temporary employment services (TESs).⁸ The 1995 LRA contained a definition for TESs in terms whereof a triangular employment relationship was established when a TES provided a client with an employee.⁹ Within the aforesaid relationship, two distinct contracts, namely the commercial contract between the TES and the client, and an employment contract between the TES and the employee existed.¹⁰ The 1995 LRA further provided that the TES was the employer of the worker placed with the client, and not the client.¹¹

The 1995 LRA had various shortcomings such as the failure to regulate the duration of the triangular employment relationship and failure to extend joint liability to the TES and the client in cases of unfair dismissal and unfair labour practices. This provided fertile ground for exploitation.¹² The LRA further failed to impose an obligation to provide employees placed by TESs with equal conditions of service when compared to workers in the permanent employ of the client.¹³ This lack of regulation contributed to TESs becoming the most contentious form of non-standard employment in South Africa.¹⁴

As a result of mounting pressure by various stakeholders a lengthy consultation process was embarked on, which culminated in the promulgation of the Labour Relations Amendment Act 6 of 2014 (“2014 LRA Amendment Act”). The amendment provided improved protection to employees earning below the specified threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act (“BCEA”)¹⁵ in non-standard forms of employment. The focus of this dissertation is the impact of section 198A of the LRA on TESs in the South African labour market and whether or not the improved regulation of the triangular employment relationship has strengthened the position of workers in this non-standard form of employment.

⁸ *Ibid.*

⁹ S 198 of 1995 LRA.

¹⁰ Botes (2015) *SALJ* 103.

¹¹ S 198(2) of the 1995 LRA.

¹² Van Eck (2013) *De Jure* 605.

¹³ *Ibid.*

¹⁴ Theron (2012) *Acta Juridica* 58.

¹⁵ S 198A to 198D of the Labour Relations Act 66 of 1995 (“LRA”).

2. DEMARCATION OF RESEARCH

In this dissertation, I consider the implication of the provisions of section 198A on the rights and obligations of the TES, its client and the employee in the triangular relationship. As part of the aforesaid examination, I will focus on how the courts have interpreted the deeming provisions introduced by section 198A(3)(b) of the LRA and the implications of the recent constitutional court judgment in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others (Casual Workers Advice Office Amicus Curiae)*.¹⁶

As part of my examination, I will consider whether the decision by the constitutional court in *Assign Services* has assisted in clarifying the uncertainty regarding the rights and obligations of the TES, client and employee subsequent to the expiry of the three-month period provided for in section 198A of the LRA.

I will argue that the interpretation afforded to section 198A(3)(b) by the constitutional court in *Assign Services* has provided a measure of much needed certainty, but that many questions still remain regarding the implications of the judgment. In so doing, I will highlight the practical complications of integrating the *Assign Services* judgment with the current provisions of the LRA. I will conclude that the constitutional court's judgment has left fertile ground for the cultivation of further uncertainty regarding the rights and obligations of the TES and the client *vis-à-vis* the employee. The solution to the uncertainty does not lie with the judiciary, but rather with the legislature that should be tasked with amending the provisions of section 198A to provide the required certainty.

3. SIGNIFICANCE OF STUDY

The use of TESs and regulation of this non-standard form of employment has remained a contentious issue in South Africa for more than a decade, with various stakeholders arguing for the total abolishment of TESs as a result of the exploitation

¹⁶ 2018 JDR 1190 (CC).

of poor workers in South Africa. The need for flexibility in today's labour market can, however not be ignored when consideration is given to factors such as globalisation and the impact thereof on the economy.

Legal practitioners in South Africa share the burden of ensuring the development of policies and legislation that will aid in the development of employment that facilitates growth and redistribution in our historically unequal society.¹⁷ The importance of providing regulation for non-standard forms of employment, such as TESs, in ways that enhance income generating employment opportunities, while still providing an emphasis on social protection and fundamental rights, cannot be over-stated.¹⁸

The introduction of section 198A constitutes an attempt to stem the exploitation of poorer workers in South Africa. The interpretation and implications of the constitutional court's decision in *Assign Services* is of great import and will undoubtedly serve as a starting point for the development of a substantial amount of jurisprudence in the future.

4. METHODOLOGY

In this dissertation, I have adopted an approach based on a theoretical evaluation involving a qualitative analysis of literature and jurisprudence. When considering the development of legal principles applicable to TESs in South Africa and other jurisdictions, I have adopted a comparative analysis.

5. STRUCTURE

I commence chapter 2 by providing a brief overview of the ILO, its structure and the nature and importance of its international labour standards. Consideration will then be given to the ILO's standards on temporary agency work and the extent of South

¹⁷ Hepple (2012) *Acta Juridica* 1.

¹⁸ *Ibid.*

Africa's compliance therewith. South Africa's obligations to consider international law in the development of its jurisprudence will also be considered.

In chapter 3, I consider the historical development and establishment of TESs in South Africa and adoption of legislation aimed at curbing the exploitation of workers. A discussion of the development of the current legislative framework applicable to TESs is essential to understanding the various questions raised surrounding the implementation of section 198A, and the future of the TESs in South Africa.

In chapter 4, a discussion of the constitutional courts judgment in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others (Casual Workers Advice Office Amicus Curiae)*¹⁹ is provided. The implications of the judgment will be considered in order to determine whether the judgment has assisted in providing clarity regarding the deeming provisions of section 198A(3)(b) and the respective rights and obligations of TES and client.

Lastly, in chapter 5 I discuss the development and regulation of TESs in the EU, UK and Namibia in order to determine whether there are any lessons that South Africa can learn from these foreign jurisdictions.

¹⁹ 2018 JDR 1190 (CC).

CHAPTER 2

INTERNATIONAL NORMS AND STANDARDS

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1. INTRODUCTION

The International Labour Association (ILO) was established in 1919 on the fundamental belief that universal and lasting peace can be accomplished only if it is based on social justice.²⁰ In an attempt to address the prevailing concerns raised regarding “conditions of labour exist involving such injustice, hardship and deprivation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled”²¹ the ILO established a system of international labour standards.²² In establishing this system, the founding members of the ILO recognised that clear rules and guidelines were needed to ensure that economic progress was not made at the cost of social justice.²³

As a founding member, it should therefore come as no surprise that the social injustice of South Africa's apartheid policies generated intense criticism during the 1950s and 1960s. The mounting international pressure and criticism eventually resulted in South

²⁰ Preamble of ILO Constitution (1919).

²¹ *Ibid.*

²² ILO Workshop Discussion Paper (2009) 9.

²³ *Ibid.*

Africa's resignation from the ILO in 1964²⁴ and South Africa's membership to the ILO was only restored shortly before its first democratic election in 1994.²⁵

Prior to the adoption of the 1995 LRA, the ILO's Fact-Finding and Conciliation Commission visited the country in 1992²⁶ and prepared a report containing recommendations for the reform of labour law in democratic South Africa.²⁷ The report played an important role in the drafting of the 1995 LRA²⁸ and the ILO's international labour standards further acted as a decisive point of orientation for the Cheadle Task Team²⁹ in its attempts to align South Africa with international standards in order to achieve global recognition for South African labour law.³⁰

In this chapter, consideration will be given to the manner in which the ILO standards on "private employment agencies"³¹ have influenced the South African labour law. In order to contextualise the discussion provided in this chapter, I will firstly provide a synopsis of the structure of the ILO and the nature of its various standards. Consideration will subsequently be given to the most important ILO standards that apply to private employment agencies and the extent of South Africa's compliance therewith.

2. STRUCTURE OF THE ILO

The ILO consists of three main bodies: The International Labour Conference, the Governing Body, and the International Labour Office.³² The International Labour Conference meets annually in Geneva and is responsible for setting international labour standards and the broad policies of the ILO.³³ The Governing Body is charged

²⁴ Van Niekerk *et al* (2017) 23-24.

²⁵ Van Niekerk *et al* (2017) 26.

²⁶ Saley and Benjamin (1992) *ILJ* 737.

²⁷ *Ibid.*

²⁸ Aletter & Van Eck (2016) *SA Merc LJ* 298.

²⁹ Weiss (2018) *ILJ* 694.

³⁰ *Ibid.*

³¹ The ILO standards use the term "private employment agencies" to refer to temporary employment agencies and these terms will be used interchangeably in this chapter.

³² Van Niekerk *et al* (2015) 20.

³³ *Ibid.*

with deciding what matters are to be included on the Conference Agenda and is further responsible for making decisions on ILO policy and the budget. The International Labour Office is the permanent secretariat of the ILO and is responsible for the day-to-day work of the ILO which seeks to give effect to the ILO mandate.³⁴ In performing its functions the Governing Body and International Labour Office are assisted by various tripartite committees covering major industries, as well as committees of experts on matters such as occupational health and safety, problems impacting women and young workers and industrial relations.³⁵

The ILO is further based on the principle of tripartism.³⁶ ILO standards are therefore created by a system that fosters negotiations and cooperation between governments, employers and workers³⁷ and the three regulatory bodies of the ILO discussed above therefore compromise governments, employers and workers representatives.³⁸

3. NATURE OF ILO STANDARDS

The ILO standards are the cornerstone of the organisation and set-out the actions to be taken and the principles that are to be respected by governments and others in the ILO's fields of action.³⁹

The most important of the ILO's various standards are conventions, which are adopted at the ILO's annual International Labour Conference. Conventions are not automatically binding on member states.⁴⁰ Once a convention is adopted member states are required to submit the convention to in terms of competent authority for ratification. If the convention is ratified by the member state, the member is to "take such action as may be necessary to make effective the provisions" of the convention.⁴¹

³⁴ Van Niekerk *et al*, (2017) 25.

³⁵ ILO "How the ILO Works" (2018).

³⁶ C144 Tripartite Consultation (International Labour Standards) Convention, 1976.

³⁷ ILO "Rules of the Game" (2014).

³⁸ ILO "How the ILO Works" (2018).

³⁹ Rodgers *et al* (2009) 19.

⁴⁰ Van Niekerk *et al*, (2015) 25.

⁴¹ Article 19(5)(d) of ILO Constitution, 1919.

Members that have ratified a convention are further required to take the necessary steps to implement the convention in their national law. Members are also required to report to the ILO on regular intervals on the status of the convention's implementation. Violations of the ratified convention may lead to representation and complaint procedures against a member.

In contrast, recommendations cannot be ratified, and they are further not binding on member states.⁴² In general, recommendations act as non-binding guidelines on how members may regulate certain labour law matters and they can serve to supplement a ratified convention by providing guidelines on the implementation of the convention. A convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the convention by providing more detailed guidelines on how it could be applied.⁴³

The International Labour Conference is also empowered to adopt declarations, which are formal instruments that express universal and important principles. Some of the most important declarations included: Declaration of Philadelphia (Freedom of Association) adopted in 1944, the Declaration on Fundamental Principles and Rights at Work, adopted at Conference in 1998 and the Declaration on Social Justice for a Fair Globalisation, which consolidated the Decent Work Agenda as the framework for the ILO's action.⁴⁴

The ILO further adopts codes of practice which are not legally binding but serve as practical guides to members for the development of national law and practice.

4. APPLICATION OF ILO STANDARDS IN SOUTH AFRICAN LAW

Over the years ILO standards have played an important formative role in South Africa labour law⁴⁵. Customary international law is given a particular status in our

⁴² Van Niekerk *et al* (2017) 26.

⁴³ ILO "Rules of the Game" (2014) 15.

⁴⁴ Van Niekerk *et al* (2017) 26.

⁴⁵ Basson *et al* (2017) 17.

constitutional democracy.⁴⁶ In this regard, section 232 of the Constitution states that international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament.⁴⁷ Section 232 of the Constitution further acts as a regulatory provision for the application of international law by providing that:

“when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

When considering the interpretation of the term “international law” the Constitutional Court has held⁴⁸ that international instruments that bind South Africa, as well as those to which South Africa is not a party, must be used as tools of interpretation.⁴⁹ The LRA further gives recognition to the obligations imposed on South Africa, by virtue of its ILO membership. Section 1 of the LRA confirms that the compliance with obligations incurred by South Africa, as a member of the ILO, are part of the object of the LRA. Section 3(c) further provides that any person applying the provisions of the LRA must interpret the Act “in compliance with the public international law obligations of the Republic”.⁵⁰

In confirming the importance of ILO conventions and recommendations as a source of international labour law the Constitutional Court, in the matter of *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,⁵¹ held as follows:

“This court has acknowledged in *South African National Defence A Union v Minister of Defence and Another* that in interpreting s 23 of the Constitution an important source of international law will be the conventions and

⁴⁶ Aletter & Van Eck (2016) *SA Merc LJ*, 298.

⁴⁷ S 232 of the The Constitution, 1996.

⁴⁸ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁴⁹ Van Niekerk *et al* (2017) 32.

⁵⁰ *National Union of Metalworkers of SA on behalf of Members v Aveng Trident Steel (A Division of Aveng Africa) (Pty) Ltd & Another* (2018) 39 *ILJ* 1625 (LC), para 48 the court held: “South Africa is a signatory to the ILO Conventions. In terms of s3 of the LRA any person applying this Act must interpret its provisions in compliance with the public international law obligations of the Republic ... Section 3 also enjoins an interpretation in compliance with the Constitution. In terms of s23(1) of the Constitution everyone has the right to fair labour practices ...”

⁵¹ 2009 (1) SA 390 (CC).

recommendations of the International Labour Organisation (ILO). An important source of international law for the purpose of this case is ILO Convention B 158 of 1982. Article 4 of Convention 158 lays the foundation for South African legislation regarding unfair dismissal based on misconduct, incapacity and operational requirements...⁵²

The ILO conventions and recommendations, binding or not, continue to guide and shape the development of our legislature. The courts further continue to use ILO standards as a point of reference in labour disputes resulting in a continuous contribution to the development of South African labour law jurisprudence.⁵³ In addition, minority trade unions in South Africa have further effectively utilised the ILO's complaint mechanism to lodge disputes directly with the ILO in order to place pressure on the state, in its capacity as employer in the public sector, in collective bargaining disputes.⁵⁴

5. ILO STANDARDS AND AGENCY WORK

Historically, the ILO's standards on agency work fluctuated between the restriction and the prohibition of "Fee-Charging Employment Agencies". From as early as 1919⁵⁵ non-profit employment agencies were allowed on the basis that they were strictly controlled by the members central state authority.⁵⁶ However, the ILO Recommendation on Unemployment 1919 specifically provided for a ban on fee-charging employment agencies. The ban on Fee-Charging Employment Agencies was latter formally included in the Fee-Charging Employment Agencies Convention, 1933⁵⁷ in order to prevent abuse and improve labour market organisation.⁵⁸

⁵² *Idem* para 22.

⁵³ For examples of the application of ILO Standards see: *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 ILJ2549 (CC) para 58-59; *Association of Mineworkers & Construction Union & others v Chamber of Mines of SA & (Pty) Ltd* (2017) 38 ILJ 831 (CC) (2017) 38 ILJ 831 (CC) para 56 and footnote 55; *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* (2018) 39 ILJ 415 (LC) para 2; *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA) para 6-7.

⁵⁴ *SA Correctional Services Workers Union v Police & Prisons Civil Rights Union & others* (2017) 38 ILJ 2009 (LAC).

⁵⁵ C002 ILO Convention on Unemployment, 1919; R001 ILO Recommendation on Unemployment, 1919.

⁵⁶ Aletter & Van Eck (2016) *SA Merc LJ* 299.

⁵⁷ CO34 Fee-Charging Employment Agencies Connection, 1933.

⁵⁸ Budlender ILO Working Paper No. 291 (2013) 304.

The Fee-Charging Employment Agencies Convention, 1949⁵⁹ relaxed the prohibition and afforded member states the discretion to either prohibit or regulate employment agencies.⁶⁰ During the development of the ILO's Decent Work Agenda in the 1990s, the ILO recognised that although there is a need to be vigilant in ensuring that all work is "decent", non-standard forms of employment are categorised by a higher degree of decent work deficits.⁶¹ "Decent work" is defined as "work that is productive and delivers a fair income, with a safe workplace and social protection, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men."⁶²

In order to balance the growing need for flexibility in the labour market with the need for protection of agency workers, the ILO adopted the Private Employment Agencies Convention 1997⁶³ and the Private Employment Agencies Recommendation, 1997.⁶⁴

5.1 *Private Employment Agencies Convention, 1997*

The Private Employment Agencies Convention, 1997⁶⁵ (the Convention) attempts to ensure that workers placed by employment agencies receive adequate protection under labour law and are further "not denied the right to freedom of association and the right to bargain collectively."⁶⁶ South Africa has not ratified the Convention. The Convention defines "private employment agency" as a natural or legal person, independent of public authorities, which provides:

⁵⁹ C0096 Fee-Charging Employment Agencies Convention (Revised), 1949.

⁶⁰ *Ibid.*

⁶¹ ILO Report: "Non-Standard Employment Around the Work: Understanding the Challenges, Shaping Prospects (2016) 247.

⁶² *Ibid.*

⁶³ R188 Private Employment Agencies Recommendation, 1997.

⁶⁴ C181 Private Employment Agencies Convention, 1997.

⁶⁵ C181 Private Employment Agencies Convention, 1997.

⁶⁶ *Idem* Art 4.

- “(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
- (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;
- (c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.”

The Convention attempts to ensure that workers placed by employment agencies receive adequate protection under labour law and are further “not denied the right to freedom of association and the right to bargain collectively.”⁶⁷ The Convention is silent on the allocation of responsibility in the triangular relationship and fails to provide guidance on how the obligations imposed by said relationship should be divided.⁶⁸ Determining the allocation of employers’ responsibilities remains problematic⁶⁹ and it is therefore left up to the member state to determine how responsibilities should be allocated in the triangular relationship.

The Convention requires governments to take steps to prohibit discrimination by private employment agencies in accordance with national law and practice. The Convention makes provision for special services or programmes to assist the disadvantaged. This can be compared to the Constitution of South Africa that allows for affirmative action.⁷⁰ In terms of article 11, members are further required to ensure that mechanisms are put in place “in accordance with national law and practice”, to protect workers with regards to: freedom of association, collective bargaining, minimum wages, working time and working conditions, statutory social security benefits, access to training, occupational health and safety, compensation in case of

⁶⁷ *Ibid.*

⁶⁸ Benjamin ILO Working Paper No 292 (2013) 7.

⁶⁹ Aletter & Van Eck (2016) *SA Merc LJ* 304.

⁷⁰ Budlender ILO Working Paper No 291 (2013) 7.

occupational accidents or diseases, maternity protection and benefits, and parental protection and benefits.

An obligation is placed on the government of member states to specify who bears the responsibility between the agency and the client for the above-mentioned.⁷¹

5.2 *Private Employment Agencies Recommendation, 1997*

The Recommendation seeks to supplement the provisions of the Convention by strengthening the protection afforded to agency workers in certain respects. Member states are required to take necessary measures to eliminate unethical practices by employment agencies.⁷² Employment agencies are also required to provide workers with written contracts of employment, where appropriate.⁷³

Article 10 places an obligation on private employment agencies to promote equality through affirmative action programmes. In addition, Article 15 provides that private employment agencies should not prevent a client from hiring an employee that has been placed with it, by the employment agency, or restrict the mobility of an employee. These provisions are aimed at preventing employment agencies from entering into contracts with employees which prohibit them from accepting permanent employment with the client at which they have been placed. Lastly, article 16 and 17 contain provisions that address the relationship between public employment service and private employment agencies.

6. SOUTH AFRICA'S COMPLIANCE

As mentioned above, South Africa has yet to ratify the Employment Agencies Convention, 1997, however, a constitutional and statutory obligation is imposed to consider the Convention when interpreting South African labour law. In the next

⁷¹ Art 12, Private Employment Agencies Convention, 1997.

⁷² Art 1, Private Employment Agencies Recommendations, 1997.

⁷³ *Idem* Art 5.

chapter, the historical development of the South African legislative framework of TESs will be discussed. The aforesaid will show that the 1995 LRA exhibited various shortcomings when compared to the provisions of the Convention and Recommendation. The 2014 LRA Amendment Act has now introduced various provisions that directly, or indirectly, aligned the LRA with the Convention.

In accordance with the principle of “regulated flexibility” increased protection has been provided to vulnerable workers that earn below the prescribed threshold by the incorporation of section 198A.⁷⁴ These employees now have the right to equal treatment when compared to the client’s direct employees.⁷⁵ As will be discussed more fully in chapter 4, the amendments failed to provide the much needed clarity regarding the allocation of the employer’s rights and duties between the TES and the client. Although provision has been made for joint and several liability in circumstances where the provisions of the BCEA, sectorial determinations and collective agreements have been contravened,⁷⁶ the LRA is silent on the question of liability in cases of unfair labour practices and dismissals.

The introduction of a “temporary services” definition is welcomed insofar as it sets the parameters of the exact nature of “temporary services” in order to provide certainty.⁷⁷ However, the three-month restriction has sparked substantial debate and flamed the fires of uncertainty when regard is had to the deeming provision of section 198A(3)(b). I am of the view that although much fault can be found in the ambiguous nature of the deeming provisions of section 198A, and the failure to provide a clear allocation of responsibility, as required by the Private Employment Recommendations, the lack of clarity should in these circumstances be favoured above on absence of responsibility all together.

It should also be noted that the LRA may not have addressed cases where employees are prohibited from being employed directly by clients after placement, but the

⁷⁴ Van Eck (2013) *De Jure* 604 mentions that “Regulated flexibility amongst others represents a policy framework which provides for selective application of legislative standards, depending on the remuneration earned by workers and the size of the employers undertakings.”

⁷⁵ S 198A(5) of LRA.

⁷⁶ S 198(4) of LRA.

⁷⁷ S 198A(1) of LRA.

provisions of section 198A essentially render the need for such regulation unnecessary insofar as the placed employee is deemed to be in the employ of the client after three months.

7. CONCLUSION

As we have seen above, the ILO's standards have influenced the development of South African labour law and courts have turned to the ILO's standards in the interpretation and application of the LRA. The provisions introduced by the 2014 LRA Amendment Act were definitely a step in the right direction when considering the provisions of the Private Employment Agencies Convention, 1997 and Private Employment Agencies Recommendations, 1997.

The alignment has, however, been largely restricted to employers falling below the prescribed threshold in accordance with the principle of regulated flexibility. Although one might be tempted concluded that higher income earning employees are at a disadvantage, the courts obligation to have regard to international law in developing South African labour law should not be forgotten. A strong argument exists that a court may be convinced to consider the provisions of the ILO standards when adjudicating disputes for employees above the threshold in order to provide increased protection by the setting of precedents.⁷⁸

⁷⁸ Aletter & Van Eck (2016) *SA Merc LJ* 310.

CHAPTER 3

LEGISLATIVE FRAMEWORK

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1. INTRODUCTION

The use of TESs or labour brokers in South Africa dates as far back as the 1950s,⁷⁹ however, TESs only obtained statutory recognition with the adoption of the Labour Relations Amendment Act 2 of 1983 (“1983 LRA Amendment Act”).⁸⁰ The 1995 LRA was implemented shortly after South Africa’s first democratic elections and included provisions aimed at regulating TESs in South Africa.⁸¹ During the course of the next twenty years the inability of 1995 LRA to regulate the TESs complex triangular relationship was increasingly at the forefront of many a debate, and continued pressure from various parties in the labour market eventually resulted in the promulgation of the 2014 LRA Amendment Act.⁸²

The amendments to the 1995 LRA introduced various new provisions aimed at balancing the need for flexibility in the labour market, with the need for increased regulation and additional protection for TES employees. The legislative framework applicable to TESs today has been shaped by South Africa’s unique socio-political

⁷⁹ Botes (2014) *SA Merc LJ* 110.

⁸⁰ Benjamin (2016) *ILJ* 29.

⁸¹ S 198 of the 1995 LRA.

⁸² The Labour Relations Amendment Act 6 of 2014 came into effect on 1 January 2015.

history and it is therefore helpful to consider the historical development of TESs in South Africa, before considering the current legislative framework.

In this chapter, I will embark on a brief summation of the chronological development of the statutory regulation applicable to TESs in South Africa, in order to determine how said development influenced the current legislative framework. I will subsequently consider the provisions of the current LRA that seek to regulate TESs, with specific reference to the provisions of s 198A. This chapter will further provide the necessary context for the discussion of the Constitutional Court's judgment in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa (Casual Workers Advice Office Amicus Curiae)*.⁸³

2. THE PREVIOUS DISPENSATION

2.1 *The Pre-Constitutional Era: 1983 to 1994*

The Labour Relations Act 28 of 1956 ("1956 LRA") did not contain any provisions referring to TESs. The 1983 LRA Amendment Act introduced the concept of "labour broker" and provided statutory definitions for the term "labour broker"⁸⁴ and "labour brokers office."⁸⁵ The 1983 LRA Amendment Act further attempted to eliminate confusion regarding the identity of the employer in the triangular relationship, by providing that labour brokers were "deemed" to be the employers of workers placed with their clients, and further providing that the labour broker was responsible for the employees remuneration.⁸⁶ The introduction of this provision were motivated by the fact that firms in the labour sector had started structuring their employment relationship with the employees in such a way that they appeared as independent contractors. The

⁸³ (2018) 34 *ILJ* 1911 (CC).

⁸⁴ S1 of the 1983 LRA Amendment Act defined "labour broker" as "any person who conducts or carries on a labour brokers office".

⁸⁵ S1(c) of the 1983 LRA Amendment Act defined "labour brokers office" as "any business whereby a *labour broker* for reward provides a client with persons to render service to or perform work for the client or procures such persons for him, for which service or work such persons are remunerated by the *labour broker*."

⁸⁶ S1(3)(a) of the 1983 LRA Amendment Act.

aforesaid resulted in a situation where employees were denied the protection of the statutory wage-regulating measures.⁸⁷

Although the deeming provision provided clarity regarding the identity of the employer in the triangular relationship, it also provided fertile ground for the exploitation of employees placed by labour brokers. The labour broker remained liable for the employee's remuneration, but the employees were effectively deprived of recourse against the clients in cases where labour brokers failed to pay their remuneration. If employees were not able to locate the labour broker or the labour broker had no assets there was no mechanism to recover the wages owed to them.⁸⁸

The deeming provision therefore promoted the need for flexibility in the labour market at the expense of the rights of employees. The inequality and lack of rights afforded to the vast majority of South Africans in this pre-constitutional era further made them ideal targets for exploitation in the labour market. The provision may have been a step in the right direction, but it did not take into account the risk to employees in the racially divided and politically charged labour market at that time. These disadvantaged employees simply did not have the means or ability to hold the fly-by-night labour brokers referred to as the "bakkie-brigade"⁸⁹ liable in most cases.

2.2 *The Constitutional Dispensation: 1994 to 2015*

The 1995 LRA was implemented shortly after South Africa's first democratic elections and it constituted a decisive attempt to dispose of South Africa's apartheid legacy.⁹⁰ The drafting of the 1995 LRA was guided by international labour law principles and the ILO's standards were used as points of reference by the ministerial task team during the drafting.⁹¹

⁸⁷ Brassey & Cheadle (1983) *ILJ* 37.

⁸⁸ Benjamin (2010) *ILJ* 849.

⁸⁹ *Ibid.*

⁹⁰ Weiss (2018) *ILJ* 694.

⁹¹ *Ibid.*

Section 198(1) of the 1995 LRA provided a definition for TESs⁹² and section 198(2) further attempted to provide certainty regarding the identity of the employer by providing that in circumstances where a TES procures other persons to render services for a client, and the TES is responsible for the remuneration of the workers placed with the client, the TES is the *de facto* employer of the workers. Section 198(3) excluded independent contractors by providing that independent contractors are not employees of the TES. Section 198(4) introduced a limited form of joint and several liability for the TES and its clients in instances where a TES has failed to comply with: collective agreements concluded at bargaining councils, the provisions of the BCEA, and arbitration awards that regulated the terms and conditions of service.

Section 198 did not extend joint and several liability to cases of unfair dismissal and unfair labour practices⁹³ and this resulted in a situation where recognition was given to TESs, without actually providing any form of effective regulation. Employees placed by TESs were therefore deprived of the majority of protections when compared to employees in standard or traditional forms of employment under the 1995 LRA. The lack of regulation facilitated the exploitation of TES employees, and generally resulted in situations where employees placed by TESs earned less and were deprived of benefits that the comparative employees of the TESs client received.⁹⁴

The period 1993 to 2002 marked a time of “exponential growth” in the existence of the TES⁹⁵ and the regulation of TESs remained a topic of significant controversy in the South African Labour market. In 2010 proposed amendments to the South African labour legislation⁹⁶ were published by the Minister of Labour and a Regulatory Impact Assessment Report was compiled to consider the proposed amendments.⁹⁷ Shortly after the proposals were published the Labour Relations Amendment Bill of 2010 was

⁹² Section 198 defined a TES as “any person who, for reward, procures for or provides to a client other persons-

- (a) Who render services to, or perform work for, the client; and
- (b) Who are remunerated by the temporary employment service.”

⁹³ The initial proposal in the draft 1995 LRA Bill to make provision for joint and several liability in such cases was removed during negotiations at the National Economic Development and Labour Council (NEDLAC). See Benjamin (2016) *ILJ* 30.

⁹⁴ Aletter & Van Eck *SA Merc LJ* 289.

⁹⁵ Theron (2005) *ILJ* 618.

⁹⁶ Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010.

⁹⁷ Benjamin *et al* (2010) RIA Report 14-16

withdrawn. The withdrawal was influenced by the Regulatory Impact Assessment Report.

In 2012 the Minister of Labour presented a new set of proposed amendments to the Cabinet Committee. The proposed amendments were approved by the cabinet in the same month and in February 2013 the amendments were still open for debate. In March 2013 further amendments were proposed regarding the duration of TESs employment relationships⁹⁸ and parliament subsequently adopted the Labour Relations Amendment Bill in August 2013.⁹⁹ The 2014 LRA Amendment Act was subsequently promulgated with an effective date of 1 January 2015 and introduced a variety of new provisions aimed at removing uncertainty and reducing the vulnerability of TESs, particularly for employees earning below a particular threshold.

3. CURRENT LEGISLATIVE FRAMEWORK

The most extensive amendments by the 2014 LRA Amendment Act are to be found in Chapter 9 of the LRA. Section 198 has been extended to provide for better regulation of TESs and increased protection for employees in triangular employment relationships. In terms of section 198, the TES remains the employer and the client is therefore intended to be the person that enjoys the labour potential of the TES employee.¹⁰⁰ The words “*services*” has further been deleted by the 2014 LRA Amendment Act in order to remove any confusion as to the nature of the work done by an employee.¹⁰¹ Section 198(1) now defines a TES as:

“Any person who, for reward, procures for or provides to a client other persons-
(a) to perform work for a client; and
(b) who are remunerated by the temporary employment service.”

⁹⁸ The initial draft s 189A(1)(a) made provision for a period not exceeding 6 months. This period was reduced to 3 months.

⁹⁹ Botes (2015) SALJ 108.

¹⁰⁰ Botes (2014) SALJ 118.

¹⁰¹ Botes (2015) SALJ 109.

In balancing the need for flexibility with the need for increased protection the amendments are guided by the principle of “*Regulated Flexibility*”.¹⁰² A distinction between the protection afforded to higher earning employees and employees earning below the threshold prescribed by the Minister in terms of section 6(3) of the BCEA is therefore drawn. In this regard, section 198A affords employees earning below the prescribed threshold additional protection.

Section 198A(1) makes provision for the concept of “temporary service”.¹⁰³ Section 198A(3)(a) provides that where a TES employee is performing a temporary service the TES will be the employer and section 198(2) will continue to apply. The most controversial aspect of the definition of “temporary service” is the limitation of an employee’s term of placement with a client to a period of three months. If the period exceeds three months, the client is automatically deemed to be the employer of the employee and the employee is further deemed to be employed on an indefinite basis.

An employee that is deemed to be the employee of the client for the purposes of section 198A(3)(b) may further not be treated less favorably than employees of the client performing similar work unless the differentiation is justifiable. TESs and their clients are further prohibited from avoiding the deeming provisions of section

¹⁰² “Regulated flexibility amongst others represents a policy framework which provides for selective application of legislative standards, depending on the remuneration earned by workers and the size of employers undertakings” (Van Eck (2013) *De Jure* 604).

¹⁰³ S198A(1) to (5) provides as follows:

- “(1) In this section, a ‘temporary service’ means work for a client by an employee-
- (a) for a period not exceeding three months;
 - (b) as a substitute for an employee of the client who is temporarily absent; or
 - (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).
- (2) This section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.
- (3) For the purposes of this Act, an employee-
- (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198 (2); or
 - (b) not performing such temporary service for the client is-
 - (i) deemed to be the employee of that client and the client is deemed to be the employer; and
 - (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.
- (4) The termination by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3) (b) or because the employee exercised a right in terms of this Act, is a dismissal.
- (5) An employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.”

198A(3)(b) by terminating the temporary employment with the client. Subsequent to the effective date of these provisions various complications regarding the interpretation of these provisions arose. The provisions are ambiguous insofar as they lack the necessary clarity regarding the respective positions of the parties in a triangular relationship after the activation of the deeming provisions contained in section 198(3)(b) of the LRA.

Returning to the general provisions of section 198, it must be noted that section 198(4) supplemented by section 198(4A) further provides for the joint and several liability of TESs and their clients in cases where collective agreements, binding arbitration awards, the provisions of the BCEA or a sectorial determination of the BCEA has been contravened.¹⁰⁴ In cases where a TES or a client is found to be jointly and severally liable for the purposes of section 198(4) or deemed to be an employee for the purposes of section 198A(3)(b), employees are entitled to institute action against the TES, the client, or both. An award or order obtained against the TES or its client in terms of section 198(4A) may be enforced against either.¹⁰⁵

An obligation is also placed on TESs to provide employees with written employment contracts setting out all provisions relevant to the procurement of the employee.¹⁰⁶ TESs are also prohibited from employing any employees on terms and conditions not permitted by the LRA, any employment law or a collective agreement concluded in the Bargaining Council applicable to TESs clients or sectorial determination.¹⁰⁷

It is further important to note that section 82(1) of the BCEA provides that the TES is deemed to be the employer of the placed employee for the purposes of the BCEA. Although this may give rise to an assumption that a client cannot be liable for any contraventions of the BCEA, section 82(3) of the BCEA specifically provides for joint and several liability in cases where the provisions of the BCEA have been breached. The aforesaid liability is further reinforced by section 198(4) and 198A(4A) of the LRA.¹⁰⁸

¹⁰⁴ Le Roux (2018) *Contemporary Labour Law* 4.

¹⁰⁵ S198(4A)(a) and (c).

¹⁰⁶ S198(4B).

¹⁰⁷ S198(4C).

¹⁰⁸ Le Roux (2018) *Contemporary Labour Law* 10.

4. CONCLUSION

The controversial manner in which the legislature chose to frame the deeming provision contained section 198A sparked interest and concern even before the adoption of the 2014 LRA Amendment Act.¹⁰⁹ Questions regarding the interpretation and effect of this provision on the rights and obligations of the TES, client and employer were the subject of various academic publications subsequent to the amendment.¹¹⁰ A consideration of the opinions and views expressed by the various learned authors in these publications serves to emphasize legislature's failure to address the need for certainty, which certainty was ultimately left to the judiciary to provide.

The manner in which section 198(3)(b) was framed presented a problem from the outset. The words "for the purposes of this Act" meant that the client would only be considered to be the employer for the purposes of the LRA after 3 months. The client would therefore only be required to comply with the legislative provisions contained in the LRA.¹¹¹

This gave rise to uncertainty regarding the obligations of the TES. Was the TES still the employer at common law? Did the TES continue to retain its obligations under other labour legislation, such as the BCEA or Employment Equity Act 55 of 1998 ("EEA")?¹¹²

The fact that the section was silent and failed to make provision for a specific transfer of rights and obligations was viewed as an indicative factor that supported the argument for a forum of dual employment, with both the TES and client acting as employers.¹¹³ The question surrounding the exact nature of the surviving rights of the TES, subsequent to the trigger of section 198A(3)(b), featured prominently in argument before Courts.

¹⁰⁹ Van Eck (2013) *De Jure* 606; Theron (2013) *ILJ* 1639; Tshoose & Tsweledi (2014) *Law, Democracy & Development* 342; Botes (2014) *SA Merc LJ* 130-134.

¹¹⁰ Geldenhuys (2016) *SA Merc LJ* 425-428; Aletter & Van Eck *SA Merc LJ* 309; Benjamin (2016) *ILJ* 37-40.

¹¹¹ Botes (2014) *SA Merc LJ* 131.

¹¹² Employment Equity Act 55 of 1998 ("EEA")

¹¹³ Aletter & Van Eck (2016) *SA Merc LJ* 309

Section 198A further failed to provide any clarity as to the allocation of responsibility when considering unfair dismissals and unfair labour practices. Uncertainty remained as to whether the client and the TES were joint and severally liable once the client was deemed to be the employer.¹¹⁴

The interpretative dispute culminated in the recent case of *Assign Services (Pty) Ltd v National Union of Metal Workers of South Africa & Others*¹¹⁵, in which the Constitutional Court was asked to determine what the exact implications of section 198A(3)(b) were on the identity of the employer. The Court was called on to decide whether the client became the sole employer after the three-month period or whether a form of dual employment arose, in terms whereof the client and the TES were both considered to be the employer for the purposes of the LRA. The importance of this judgment and implications thereof will form the subject of the next chapter.

¹¹⁴ *Ibid.*

¹¹⁵ (2018) 39 ILJ 1911 (CC).

CHAPTER 4

ANALYSING ASSIGN SERVICES

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1. INTRODUCTION

In the case of *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others (Casual Workers Advice Office Amicus Curiae)*¹¹⁶ the Constitutional Court was asked to determine the correct interpretation of section 198A(3)(b) in order to establish what the effect of the section was on the employment relationship once the three-month deeming provision was triggered. Did section 198A(3)(b) give rise to a dual employment relationship, where the employee is deemed to be in the employ of the TES and the client, or did the client step into the shoes of the TES effectively becoming the sole employer of the employee?

In this chapter, I will discuss the development of the litigation and the different decisions reached by the Commission for Conciliation, Mediation and Arbitration (“CCMA”)¹¹⁷, Labour Court (“LC”)¹¹⁸ and Labour Appeal Court (“LAC”)¹¹⁹ leading up to the appeal before the Constitutional Court. Consideration will be given to the

¹¹⁶ (2018) 39 ILJ 1911 (CC).

¹¹⁷ *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another* (2015) 36 ILJ 2408 (CCMA).

¹¹⁸ *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2015) 36 ILJ 2853 (LC).

¹¹⁹ *National Union of Metalworkers of SA v Assign Services & Others* (2017) 38 ILJ 1978 (LAC).

arguments advanced by Assign Services (Pty) Ltd (“Assign Services”) and the National Union of Metalworkers of South Africa (“NUMSA”) and the manner in which the courts considered the arguments in the respective judgments.

I will lastly consider the judgment of the Constitutional Court. I will argue hereunder, that the Constitutional Courts judgment may have provided clarity regarding the identity of the employer for the purposes of section 198A(3)(b), but it has left many questions regarding the practical implications on the rights and obligations of the respective parties in the triangular employment relationship.

2. CONTEXTUAL BACKGROUND

Assign Services was contracted to supply labour to Krost Shelving and Packing (Pty) Ltd (“the client”). Assign Services supplied the client with approximately 22 to 40 workers at any one time, depending on the client’s project needs, in supplementation of the client’s salaried employees. As at 1 April 2015 Assign Services had placed 22 workers with the client for a period exceeding three months on a full-time basis. Several of the placed employees were members of NUMSA. These workers subsequently proceeded to render services to the client for a period exceeding three months.¹²⁰

A dispute between Assign Services and NUMSA arose regarding the effect of section 198A(3)(b) on the employment relationship. Assign Services took the stance that the provision created a dual employment relationship where the employees remained in the employ of Assign Services but were also deemed to be the employees of the client. NUMSA disputed this interpretation and advocated a sole employer relationship in terms whereof the employees were now employed by the client.

¹²⁰ *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another* (2015) 36 ILJ 2408 (CCMA) para 2.3.

3. DEVELOPMENT OF LITIGATION

3.1 *Proceedings before the CCMA*

Assign Services referred a dispute to the CCMA¹²¹ in terms of section 198D(1).¹²² The matter was enrolled for hearing on 22 May 2015 and the majority of the argument dealt with the interpretation of the word “*deemed*” and whether the provisions of section 198A(3)(b) give rise to a dual or sole employment relationship.

Assign Services’ submitted that the legislature had not intended to ban TESs. It was argued that for the first three months the TES was the sole employer, however thereafter the contractual relationship between the client and the TES, as well as the TES and the employee, remained intact. Within this framework, Assign Services argued that the deeming provision also gave rise to an employment relationship between the client and the employee under the provisions of the LRA, which afforded the employee greater protection.¹²³ NUMSA submitted that such an interpretation promoted uncertainty and effectively prejudiced employees.¹²⁴

In interpreting the provisions of section 198A(3)(b) the Commissioner found in favour of NUMSA and held that “*deemed*” meant that the client became the sole employer of the placed employees for the purposes of the LRA after the lapse of the prescribed three-month period.¹²⁵

3.2 *Proceedings before the Labour Court*

Assign Services proceeded to institute a review application in the LC. As its fundamental ground of review, Assign Services alleged that the Commissioner had

¹²¹ *Idem* para 2.4

¹²² S198D(1) of the LRA provides:

“Any *dispute* arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a *bargaining council* with jurisdiction for conciliation and, if not resolved, to arbitration.”

¹²³ *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another* (2015) 36 ILJ 2408 (CCMA) para 4.4.

¹²⁴ *Idem* para 5.11

¹²⁵ *Idem* para 6.1.

made material errors in law in his award, with reference to the interpretation afforded to section 198A(3)(b).

NUMSA argued that the its position could be characterised as one of “sole employment”. During argument NUMSA was forced to concede that the contractual relationship between the placed employee and the TES remained intact, despite the deeming provision, and that nothing deprived the employee or the TES of their rights and obligations arising from their contract.¹²⁶ The Court therefore found NUMSA’s characterisation to be misleading and came to a similar conclusion when regard was had to Assign Services stance of “dual employment”.¹²⁷

The term “dual employment” implied two sets of employment relationships, namely a relationship between the placed employee and the TES, and another between the employee and the client. The court found that this should be differentiated from Assign Services actual stance that the client became invested with parallel rights along with the TES. Section 198A(3)(b) therefore had no bearing on the contractual relationship between the TES and the placed employee and the party’s contractual obligations therefore continued to exist, subject to the overriding statutory regime.¹²⁸

In considering the interpretation of section 198, the Court confirmed that it could not be in doubt that the TES was the employer for the purpose of the common law and the provisions of the LRA. The provisions of section 198A(3) therefore resulted in the client being the employer for the purpose of the LRA and no other purpose. In addition, nothing in the deeming provision postulated that the contract between the TES and worker terminated once the deeming provision was triggered. The court found that there was nothing in principle or practice to suggest that TES was relieved of its statutory obligations as a result of the client’s parallel obligations.¹²⁹ When considering the use of the word “deemed” the court found that it simply reminded a person to consider the provision as a whole and within the proper context.

¹²⁶ *Idem* para 3.

¹²⁷ *Idem* para 4.

¹²⁸ *Idem* para 5.

¹²⁹ *Idem* para 12.

The court was satisfied that the correct interpretation of section 198A(3) was that the employees were “placed dually” for the purpose of the LRA. The court proceeded to find that the Commissioner had erred in finding that the client was the sole employer of the placed employees and that this constituted a material error in law.¹³⁰ The court further expressed reservations regarding the Commissioners jurisdiction to decide the question in the first place as the question should have been before the labour court as a court of first instance.¹³¹

3.3 *The Labour Courts Judgment Through the Lens of LAD Brokers*

Before considering the LAC courts judgment, I wish to briefly digress to consider whether the LC’s judgment in *Assign Services* constituted a contradiction of the LAC’s judgment in the matter of *LAD Brokers (Pty) Ltd v Mandla*,¹³² with specific reference to the LAC’s contractual and statutory interpretation.¹³³

In LAD Brokers the LAC found that for the purposes of the common law, a TES is not necessarily regarded as the employer. A TES can in truth operate without concluding contracts of employment with the workers it places.¹³⁴ A TES is therefore simply required to place a worker with a client for a fee, and remunerate the worker, to be considered as the statutory employer for the purpose of section 198. The LAC held that this was less onerous than the test for establishing conventional employment at common law and it was therefore incorrect to contend that a TES is usually in an employment relationship with the workers it places.

¹³⁰ *Idem* para 22.

¹³¹ *Idem* para 23.

¹³² (2002) (6) SA 43 (LAC).

¹³³ Benjamin (2016) *ILJ* 34-35. The author argues that the findings by the LAC in *LAD Brokers (Pty) Ltd v Mandla* (2002) (6) SA 43 (LAC) resulted in a conclusion that s198 was not a confirmation of the common law position and that the approach of the LC in *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2015) 36 *ILJ* 2853 (LC) contradicted the LAC’s finding on issues of both contractual and statutory interpretation.

¹³⁴ *LAD Brokers (Pty) Ltd v Mandla* (2002) (6) SA 43 (LAC) para 33.

The existence of a triangular relationship was a separate issue from the question of whether the common law test for employment had been met. Section 198(2) does not simply act as a confirmation of the common law contract between the TES and the placed worker.¹³⁵ In *Assign Services* the LC adjudicated the matter on the basis that a TES employment relationship presupposed a common law contract of employment between a TES and a placed employee, which contract was subject to the relevant statutory employment obligations. This interpretation is clearly in conflict with the LAC's findings in *LAD Brokers*.

I am of the opinion that the failure to fully appreciate the distinction effectively derailed LC's interpretive exercise before it even began and directly resulted in a fundamentally flawed interpretation of section 198A(3)(b). In approaching the interpretation of section 198A(3)(b) in such a manner, *Assign Services* and the LC were attempting to bake a cake without a key ingredient of the interpretive process, a flop was inevitable.

3.4 *Proceedings before the Labour Appeal Court*

NUMSA applied for leave to appeal, which was refused by the Labour Court. NUMSA subsequently petitioned the Labour Appeal Court, who granted leave to appeal.¹³⁶ The Casual Workers' Advice Office (CWAO) and the Confederation of Associations in the Private Employment Sector (CAPES) were further admitted as *amici curiae* in the proceedings before the LAC.¹³⁷

The court noted that the issue on appeal concerned the interpretation of s 198A(3)(b).¹³⁸ In considering the provisions of section 198 and section 198A, the Court found it particularly significant that that section 198A(1) gives special meaning to the term "temporary service".

¹³⁵ Benjamin (2016) *ILJ* 35.

¹³⁶ *National Union of Metalworkers of SA v Assign Services & Others* (2017) 38 *ILJ* 1978 (LAC).

¹³⁷ Before the LA, CWAO supported NUMSA's argument regarding the creation of a sole employment relationship and further submitted that a contextual plain language reading did not support *Assign Services* dual employment interpretation. CAPES in turn supported *Assign Services* and argued that a reading of the LRA and BCEA gave rise to the conclusion that a dual employment relationship was created.

¹³⁸ *National Union of Metalworkers of SA v Assign Services & Others* (2017) 38 *ILJ* 1978 (LAC) at para 29.

This placed an emphasis on the nature of the services as the determining factor for the identity of the employer, instead of an emphasis on the person rendering the service or recipient of said service, the Court found.¹³⁹ Therefore, service by a placed employee that falls outside the defined category of “temporary service”, and exceeds a period of three months, does not constitute “temporary service” for the purposes of s 198A(1) of the LRA.

In such circumstances, a person is enjoined to resort to the provisions of section 198A(3)(b) in order to determine the identity of the employer for the purposes of the LRA. As a result, the placed employee is deemed to be in the employee of the client, on an indefinite basis, subject to the provisions of s 198B.¹⁴⁰

The Court further held that the sole employer interpretation does not result in a ban on TESs.¹⁴¹ In this regard, the Court found that the sole employer interpretation regulates TESs by restricting TESs to genuine temporary employment arrangements.¹⁴² The Court noted that the LRA does not contain any provisions confirming that the contract of employment was transferred from the TES, to the client, or a provision that the TES and the client became joint employers after the prescribed three month period. The Court found that the purpose of section 198A(3)(b) was not the transfer of the contract of employment from the TES to the client, but rather the creation of a statutory employment relationship between the client and the placed employee.¹⁴³

As a result, although the contract between the TES and the placed employee continued to exist, the LRA created a single statutory employer, namely the client.¹⁴⁴ The LAC proceeded to uphold NUMSA’s appeal.

¹³⁹ *Idem* para 36.

¹⁴⁰ *Idem* para 37.

¹⁴¹ *Idem* para 42.

¹⁴² *Idem* para 43.

¹⁴³ *Ibid.*

¹⁴⁴ *Idem* para 46.

4. THE CASE BEFORE THE CONSTITUTIONAL COURT

4.1 *Submissions of Assign Services*

In determining the proper interpretation of section 198A(3)(b) Assign Services argued that regard must be had to the section's language, context, purpose and alignment with the BCEA, as well as the constitutional implications.¹⁴⁵

With reference to the language of the section Assign Services submitted that the worker is an “*employee*” for the purposes of section 213 and the TES is the employer. Reference was also made to the provisions of section 198(2), which confirms that the TES is the employer of the employee.¹⁴⁶ In support of its argument that the language of section 198A(3)(b) pointed to a dual employer interpretation, Assign Services contended that the failure of the provision to specifically refer to the termination of the employment relationship between the TES and the employee, as well as the failure of the sections to specifically override or qualify the worker status in section 213 and section 198(2), specifically pointed to a dual employer interpretation.¹⁴⁷

With reference to the context of section 198A(3)(b), Assign Services argued that under the dual interpretation employees will continue to enjoy the protection provided by the joint and several liability prescribed by section 198(4). In contrast, so the submission went, under the sole employer interpretation employees forfeited the protection once the 3-month limitation was enacted.¹⁴⁸

If a sole interpretation approached was adopted the deeming provision in section 198A(3)(b) would result in a situation where the worker ceased to be an employee of the TES in terms of the LRA. The TES and the employee's contract would remain in force and the parties would still be in an employment relationship for the purpose of the common law, but no longer for the purposes of the LRA. As a result, the employee would forfeit all the unfair dismissal and retrenchment protection against the TES

¹⁴⁵ Assign Services Written Submissions (2017) para 8.

¹⁴⁶ *Idem* para 10.

¹⁴⁷ *Idem* para 12.3.

¹⁴⁸ *Idem* para 16.

under the LRA. It was further submitted that the employee was transferred into the employee of the client involuntarily, and that such a transfer occurred without the transfer of the employment rights from the TES to the client. This was based on the fact that no provision was made for the transfer of the employee's accrued leave, annual bonus and pension.¹⁴⁹

Assigns Services concluded that the absence of any transitional provisions in section 198A, which provided for the transfer of the employment relationship, fortified a contextual inference that the section did not contemplate such a transfer and that the legislature therefore intended for both employment relationships to exist in tandem.¹⁵⁰ Turning to the purpose of the provision, Assign Services relied on the explanatory memorandum of the Labour Law Amendment Bill B16D2012 to suggest that the intention behind the amendments were as follows:

“Section 198 (including section 198(2)) ‘continues to apply to all employees’.

The purpose of the new section 198A is ‘to introduce additional protection’ for vulnerable employees.

This is achieved by treating them as employees of the client (in addition to the protection they already enjoyed as employees of the TES).”¹⁵¹

Assign Services submitted that the dual interpretation of the deeming provision achieved this purpose and that the sole employer interpretation did not, as it stripped the employee of the statutory protection and gave rise to an involuntary transfer of employment.

When considering the alignment of the provisions of the LRA and the BCEA, Assign Services argued that section 1 of the BCEA defines employee and TES in the same manner as the LRA. Section 82(1) was further identical to section 198(2) of the LRA and the BCEA did not contain the equivalent of section 198A(3)(b). A sole employer interpretation would therefore result in a disjunct between the BCEA and the LRA under the circumstances. In this regard, Assign Services relied on the judgment of the

¹⁴⁹ *Idem* para 18.1 -18.6.

¹⁵⁰ *Idem* para 20.

¹⁵¹ *Idem* 22.

Labour Appeal Court in the matter of *Ekurhuleni Metropolitan Municipality v SAMWU*¹⁵² in which the Court held:

“In terms of the basic terms of our law on the interpretation of statutes, the BCEA cannot be interpreted in a manner which conflicts with the LRA. They must be interpreted as being in harmony with each other.”

Lastly, *Assign Services* argued that the sole employer interpretation brought the deeming provision into conflict with the Constitution. The involuntary transfer of employment amounted to a contravention of the employee’s rights to a fair labour practice under section 22(1) of the Constitution and also further infringed on the employee’s right to choose his/her trade, occupation and profession freely.

As a result, *Assign Services* submitted that the LAC decision was tantamount to a ban on labour broking and that the LAC did not consider the language of the provisions and rather focused on the purpose of the provisions to the exclusion of other necessary considerations.

4.2 NUMSA’s Submissions

NUMSA disputed *Assign Services* characterisation of the employment relationship between a TES and an employee and it contended that the TES did not ordinarily “employ” an employee before it places them with its clients.¹⁵³ The contractual relationship between the TES and an employee only becomes an employment relationship upon the placement and remuneration of the employee with a client. NUMSA contended that the common law terms and conditions of employment, shift with the statutory responsibility when the employment relationship transfer from the TES to the client.¹⁵⁴

¹⁵² (2015) 1 BCLR 34 (LAC) at para 30.

¹⁵³ NUMSA Written Submissions (2017) 31.

¹⁵⁴ *Ibid.*

It was further argued that the absurdities that *Assign Services* read into sections 198A(4) and (5) and 198(4A) should be disregarded. These sections provided additional protection to placed employees and applied only in instances where a TES continued to provide some service to a client. NUMSA submitted that once section 198A(3)(b) was triggered it did not alter the contract of employment, rather there was simply a change in the “statutory attribution of responsibility within the same triangular employment relationship”. The triangular relationship would continue for as long as the commercial contract between the TES and the client remained in force and required the TES to remunerate the workers.

NUMSA further disputed that employees could be forced to accept terms and conditions of employment that were less favourable on the basis that they had not agreed thereto, as that would activate section 198A(5), in cases where circumstances were less favourable than those of the client’s employees. NUMSA submitted that the terms and conditions of employment in the triangular relationship were the terms of conditions applicable at the workplace and that two sets of conditions of employment did therefore not exist.¹⁵⁵

NUMSA referred to *Assign Services* acknowledgement of the abuses traditionally associated with triangular employment relationships, and that these abuses had informed the need for the amendments enacted by the 2014 LRA Amendment Act. The amendments were therefore aimed at remedying the abuses by providing for indefinite employment, on terms and conditions not less favourable than those enjoyed by the client’s employees, where the placed worker has been employed at the premises of the same client for more than 3 months.¹⁵⁶

In support of its mutually exclusive argument, NUMSA submitted that section 198(2) and section 198A(3)(b) were both deeming provisions and that it must be accepted

¹⁵⁵ *Idem* 32. In this regard NUMSA submitted that:

“Just as there is a single contract of employment in the triangular employment relationship, there is a single set of terms and conditions of employment. The applicant’s contention that once section 198A(3)(b) is triggered, the workers concerned do not have a contract of employment with the client⁴, is wrong. The terms of the contract are the same as that applied between the TES and the workers before section 198A(3)(b) had been triggered unless they are upgraded - pursuant to section 198A(5) - to the terms of those employees directly employed by the client.” (para 64).

¹⁵⁶ *Idem* 33.

that they could not operate together. NUMSA highlighted Assign Services' failure to engage with the fundamental purpose of the amendment which was the restriction of TESs to genuine temporary work. In support of the aforesaid, NUMSA contended that the LAC had correctly found that the sole employer interpretation is consonant with the afore-mentioned purpose.¹⁵⁷

It is important to note that NUMSA further disputed the applicant's contentions that under the sole employer interpretation vulnerable employees lost the protection of section 198(4), because they ceased to be employees of the TES as a result of the deeming provision of section 198A(3)(b). There was no anomaly, according to NUMSA, and Assign Services contention in this regard did not support a "dual employer interpretation".¹⁵⁸

When considering Assign Services' alignment with the BCEA argument, NUMSA contended that the two statutes were not out of alignment. If section 198A(3)(b) was triggered and the TES maintained its contractual relationship with the client, and the TES further continued to remunerate the employee, both the client and the TES could be held liable for any contravention of both the LRA and the BCEA. It was further not significant that no reference to section 198A(3)(b) was made in the BCEA and Assign Services reliance on said omission did not support a dual employer interpretation.¹⁵⁹

5. THE CONSTITUTIONAL COURT'S JUDGMENT

In considering the manner in which the legislative provisions are structured, the Court held that section 198 provides for the general legislative position applicable to TESs,

¹⁵⁷ *Idem* 36.

¹⁵⁸ *Idem* 37.

NUMSA submissions in this respect were as follows:

"...loses sight of the fact that under the sole employer interpretation, the TES cannot contravene any of the measures specified in section 198(4) applicable to employees who became employed by the client in terms of section 198A(3)(b) and accordingly neither the TES nor the client can become liable under section 198(4) on the basis of the actions of the TES. These employees can however still under section 198(4A) enforce a contravention of these measures by their employer (the client) against the TES if the TES continues to pay them." (para 76).

¹⁵⁹ *Idem* 41.

and that 198(2) constitutes a deeming provision that creates a statutory employment relationship between the TES and the placed employees.¹⁶⁰

Section 198A deals with how section 198 should be applied to workers that fall below the prescribed threshold of the BCEA. If a vulnerable employee is performing a “temporary service”, section 198A(3)(a) operates to confirm that the aforementioned workers are the employees of the TES. If an employee is not performing a “temporary service”, section 138A(3)(b)(i) will then take over as the operative clause and the employees are deemed to be in the employee of the client.

The deeming provisions of section 198(2) and section 198A(3)(b)(i) are therefore not capable of operating at the same time. If employees that fall below the threshold are not performing temporary services, then section 198A(3)(b)(i) will replace section 198(2) as the clause tasked with determining the identity of the employer.¹⁶¹

The Court furthermore rejected Assign Services argument that the sole employer interpretation forced an employee into a new employment relationship, without their consent, as section 198A(3)(b) simply altered the employment relationship between the TES and employee. It is important to note that the Court examined the nature of the triangular relationship and concluded that the functions of the TES seldom relate to the actual work of the employee, as the client is responsible for the employees working conditions at the client’s premises. With reference to the *LAD Brokers* judgment, the court held that it was incorrect to contend that a TES is usually in an employment relationship with the workers it places with client. A TES could further operate without concluding contracts of employment with the workers it places.¹⁶²

The Court concluded that the sole employer interpretation would further not hamper by section 198(4A). The section merely provides that while the client is deemed to be the employer an employee may still claim against the TES, as long as there is a contract between the TES and the employee. Section 198(4) and (4A) therefore purported to

¹⁶⁰ *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others (Casual Workers Advice Office Amicus Curiae)* (2018) JDR 1190 (CC) para 83.

¹⁶¹ *Ibid.*

¹⁶² *Idem* para 72-75.

carve out specific areas of liability for a TES before and after the activation of the deeming provision. A TESs liability lasted as long as its relationship with the client, and for as long as it continued to remunerate the employee, instead of the client. Nothing in law prevented the client from terminating its relationship with the TES and assuming the responsibility for the remuneration of the employee after the three-month period. If this were to take place the TES would cease to be the TES for the employee as it no longer met the requirements of section 198(1).¹⁶³

The Court proceeded to find that the language used in section 198A(3)(b) was plain and supported the sole employer interpretation. Assign Services appeal was therefore dismissed.¹⁶⁴

6. DISCUSSION AND OBSERVATIONS

I am of the opinion that the court was correct in its finding that section 198(A) gives rise to a sole employment relationship between the client and the placed employee in terms of the LRA. The court correctly distinguished between the common law contract of employment and the new statutory contract of employment created between the client and the employee after the prescribed three months. However, the judgment does give rise to certain practical implications and questions that I will now briefly discuss below.

No obligation is placed upon the client or the TES to terminate their contractual relationship and there is therefore no reason why the TES cannot continue to assume the responsibility of paying the employee. The Court further held that section 198A(3)(b) effectively held that there is still a contract between the TES and the placed employee. The nature of such a contract and the ramifications for the TES in the event that the client dismisses the employee after the three-month period are still uncertain. A single employment relationship is therefore a misnomer, insofar as a common law

¹⁶³ *Idem* para 58-64.

¹⁶⁴ *Idem* para 85.

contractual relationship continues to exist between the TES and the placed employee. The continued existence still contains a hint of dual employment.

The commercial agreement between the TES and the client is further not terminated and the client will therefore be faced with a business decision to either continue with the commercial contract or terminate it. Questions regarding the manner in which the agreement is terminated in such circumstances arise.

If the client terminates the agreement with the TES, is it obligated to provide the employee with a written contract of employment containing standard terms as provided for in the LRA? In this regard, the Constitutional Court held that the deeming provisions do not result in a transfer to the client, but rather a change in the statutory attribution of the responsibility as employer. A contract of employment between the client and the employee further automatically comes into existence, in the absence of normal recruitment of negotiations.

I would therefore argue that the client would indeed be required to do so, and in circumstances where the client has direct employees, the contract will have to contain provisions that allow for an employee to be treated “on the whole not less favourably than an employee of the client performing similar work”.¹⁶⁵

When considering the obligation to treat a placed employee on the whole not less favourably, this provision is rendered toothless if the client does not have any direct employees performing similar work. In the event that there are no employees of the client performing the “same or similar work” it must follow that the same terms and conditions of employment that prevailed prior to the activation of the deeming provision will continue to apply, now incorporated into the new statutory contract of employment between the client and the employee.

In consideration of the above-mentioned, it must be noted that after three-months a client will be faced with logistical and economic implications of having to assume responsibility for the placed employees under the new statutory contract. It cannot be

¹⁶⁵ S 198A(5).

doubted that this may have far ranging effects on the feasibility of a client's business model, which in turn might result in dismissals based on operational requirements. The actual application of the LRA's obligatory consultation process in such circumstances, and the possible redundancy of the general selection criteria of "first-in-last-out principle", will be interesting in cases where the client has no similar employees.

In a strange twist of fate, one must wonder what the position will be in the exceptional case where the TESs employee's conditions of employment are more favourable than the client's direct employees. Is the client now obligated to continue to provide the employees with employment on the same terms and conditions, and what is the implication for the client's direct employees?

In terms of the Constitutional Courts judgment section 198A(5) will only apply in the event that the conditions of employment applicable to the placed worker are less favourable than the conditions applicable to the client's employees. As the Court specifically found that there was not a "transfer", but the creation of a new statutory employment relationship, it can be argued that the employee will lose any additional benefits and commence employment "on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows"¹⁶⁶

I argue that the court should have opted for a cleanly severed approach that provides for an absolute termination and transfer of all rights and duties to the client. An obligation to include provisions in the contracts concluded between the TES, client and employee prior to placement, specifically aimed at regulating the rights and obligations of the parties after the three-month period, should go a long way to providing such certainty. Prevention is surely better than cure in these circumstances.

¹⁶⁶ *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others (Casual Workers Advice Office Amicus Curiae)* para 69

7. CONCLUSION

The certainty provided by the judgment is undoubtedly welcomed, but it remains a reactive response to a problem created by the manner in which the legislature has drafted the provisions of section 198 and 198A of the LRA.

The Constitutional Courts judgment has highlighted the inefficiency of section 198 and 198A to provide the necessary regulatory framework required. The practical implications of the judgment and extensive legal complexities will continue to provide fertile ground for litigation and clients may be discouraged to use TESs in the future, which will undoubtedly impact the South African labour market.

It must, however, be remembered that the Constitutional Court was called on to clarify the interpretation of Section 198A(b) and assist in the clarification of the fundamental ambiguity of the provision when considering the practical application thereof. It is argued that this responsibility rests on the legislature and it is reiterated that a timely intervention will go a long way to avoid the looming mountain of litigation that dots the horizon of the TES regulatory framework in South African labour law.

CHAPTER 5

COMPARATIVE STUDY OF FOREIGN POSITION

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1. INTRODUCTION

As discussed in chapter 2, the development of South African legislation and jurisprudence is guided by international law. In this chapter, I will attempt to firstly provided a brief overview of the international developments surrounding TESs. Specific consideration will then be given to the legislative developments in the European Union (EU), United Kingdom (UK) and Namibia and the manner in which these countries have attempted to regulate TESs in their respective jurisdictions.

Lastly, consideration will be given to the question of whether South Africa can find guidance in the approaches adopted by the aforementioned countries and if there are lessons to be learnt for the future development of South Africa's legislature and jurisprudence on TESs.

2. INTERNATIONAL OVERVIEW

Internationally, TESs are characterised by the “triangular” relationship between the worker, the TES and the client. Different jurisdictions have different legal terms for

TESs. In Asian countries such as China, Japan and the Republic of Korea the term “labour dispatch” is used. In Namibia the term “labour hire” is used and in Europe the term “temporary agency work” is widely utilised.¹⁶⁷ In this chapter these terms will be used interchangeably to refer to TESs.

In European countries like the Netherlands, Spain, Portugal and Poland the use of TESs exceeds 20 percent of their labour market. Some countries have in turn experienced even more dramatic increases in the use of TESs, for example Ireland whose use has tripled over the last decade and in Canada where the use has doubled. In Asia the use of TESs is also considered to be high by international standards.¹⁶⁸

The reasons for the increased use of TESs and other forms of non-standard employment are multifaceted and differ from country to country. In the ILO report “Nonstandard Employment Around the World , Understanding the Challenges” the following is put forward as an explanation for the increase:

“Yet several overarching and interrelated tendencies can be discerned that are linked to profound changes in the world of work observed over the past half-century. Continuing transformation of economic structures away from agriculture to manufacturing and then to services (and sometimes directly from agriculture to services), the development of new production activities, the proliferation of global supply chains and the internationalization of the world’s production system, the evolving demographic structure of the labour force, the advent of new technologies all intertwined with evolving cultural norms, with labour regulations that need to adapt to these changes, and with uneven business cycles – are among the key reasons for both this proliferation and its unevenness. Indeed, some of these forces have created fertile ground for development or else for a re-emergence of those forms of non-standard employment (NSE) that have always existed, such as temporary and part-time

¹⁶⁷ ILO Report “Non-Standard employment around the world: Understanding challenges, shaping prospects” (2016) 30.

¹⁶⁸ *Idem* 103

work, and have subsequently led to the development of alternative forms, such as contract work and temporary agency work (TAW).”¹⁶⁹

The increase has resulted in jurisdictions adopting different approaches to the regulation of TESs. The position in most international jurisdictions is that two agreements exist: an employment contract between the TES and the worker and different commercial contract between the TES and the client. The client is required to pay a fee to the TES, and the TES is then responsible for the payment of the workers remuneration. In general, no direct employment relationship comes into existence between the client and the worker. Nevertheless, some jurisdictions impose legal obligations on the client, with specific reference to the provision of joint and several liability between the TES and the user client in certain circumstances.¹⁷⁰

3. THE EU REGULATION ON TEMPORARY AGENCY WORK

Historically, the regulation of temporary agency work at European level has been controversial issue. The debate at community level began in the early 1980s¹⁷¹ and the controversy centred mainly around the different regulatory frameworks utilised at a national level by each Member State.¹⁷² In this regard, the essential point of dispute was the level of protection that was to be afforded to temporary agency workers¹⁷³ and the most ardent objector was the UK, who initially opposed any regulation of temporary agency work at a European level.¹⁷⁴ Negotiations were initially locked in a stalemate, however, in May 2008 an agreement was eventually reached in terms whereof the UK

¹⁶⁹ *Idem* 47.

¹⁷⁰ *Idem* 30.

¹⁷¹ Spattini (2012) *ADAPT* 173.

¹⁷² Frenzel (2010) *Eur Lab LJ* 120.

¹⁷³ *Ibid.*

¹⁷⁴ Forde & Slater (2014) *ACAS Research Paper* 12 mentions that “The Directive was opposed by the UK, on the basis that the equal treatment provisions threatened the government’s desire to maintain a ‘balance between flexibility and protection’ (DTI 2002), and could have negative effects on an industry that was one of the fastest growing in the UK. After lengthy discussion and continual pressure from trade unions, a compromise was reached between the UK business and trade union social partners (the TUC and CBI) in May 2008, providing for equal treatment for agency workers in the UK to be effective after a period of 12 weeks continuous employment in a client firm. The falling away of the UK opposition paved the way for a revised EU Directive, which was accepted by the EU Council in June 2008, with the UK Agency Working Regulations formulated soon thereafter.”

government finally withdrew its opposition to the proposed directive aimed at regulating temporary agency work.¹⁷⁵

In consideration of the above-mentioned, the EU legal framework on temporary agency work is predominantly shaped by the EU Directive on Temporary Agency Work¹⁷⁶ (“Directive”), which was adopted in June 2008. Member states were given until 1 December 2011 to implement the directive.¹⁷⁷ The Directive was motivated by the need to ensure better protection for temporary agency workers by the application of the equal treatment principle.¹⁷⁸ It further provides a framework for the use of agency work as a contributor to effective job creation and to facilitate the development of flexible forms of work.¹⁷⁹ Article 2 stipulates that the aim of the directive is:

“The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.”

It is important to note that the Directive does not specifically address the problem of employment status and the related rights and obligations imposed in terms thereof. The question of the exact nature of the “contract of employment” is left to the laws of the Member States.¹⁸⁰ As referenced above, article 2 clearly provides “...by recognising temporary-work agencies as employers”. The aforesaid provision is, however, not contained in any of the substantive provisions of the Directive and accordingly does not impose an obligation on Member States to recognise the temporary employment agencies as the employer.¹⁸¹

¹⁷⁵ Spattini (2012) *ADAPT* 173.

¹⁷⁶ EU Directive 2008/104/EV on Temporary Agency Work, (2008).

¹⁷⁷ *Idem* Article 11.

¹⁷⁸ Countouris *et al* (2016) ILO Report 31.

¹⁷⁹ EU Summary of Legislation, (2008).

¹⁸⁰ Arnold (2013) *BLR* 27.

¹⁸¹ *Ibid.*

The Directive also provides that temporary agency workers must be free to conclude an employment contract with the user undertaking at the end of their assignment. It is therefore required that workers are provided with information regarding vacancies for permanent employment with the client. Member States are required to take action to ensure that clauses contained in the contract between the worker and temporary employment agency prohibiting, or having the effect of preventing, the conclusion of a contract of employment between the client and the placed worker after his assignment are null and void or may be declared null and void.¹⁸²

The principle of equal treatment further applies to the “basic working and employment conditions.”¹⁸³ In this regard, article 5(1) of the Directive defines the principle of equal treatment as:

“The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job”

Access to the amenities and collective services of the client (specifically canteens, childcare facilities and transport) must further be open to placed workers, under the same conditions as workers of the client.¹⁸⁴ Workers also receive equal treatment with regard to: the protection of pregnant women and nursing mothers, the protection of children and young people, equal treatment for men and women, protection against discrimination based on sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation.¹⁸⁵

The Directive does, however, allow EU Member States to adopt various derogations.¹⁸⁶ Of great significance is the deviation provision in article 5.4. This

¹⁸² Article 6(3), EU Directive on Temporary Agency Work, (2008)

¹⁸³ Article 3(1)(f) of the EU Directive on Temporary Agency Work, (2008) defines “basic working and employment conditions” as:

“means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to:

(i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays;
(ii) pay.”

¹⁸⁴ *Idem* Article 6(4).

¹⁸⁵ EU Summary of Legislation, (2008).

¹⁸⁶ Article 5(2) to (5), EU Directive on Temporary Agency Work, (2008).

provision allows members states to derogate from the equal treatment principle after consultation with social partners. It is argued that this deviation provision was created mainly for the benefit of the UK¹⁸⁷, who utilised this provision to adopt a 12-week qualifying period.

4. UNITED KINGDOM

In compliance with the directive, the UK adopted the Agency Workers Regulations 2010 No.93 (“Agency Regulations”) in October 2011. The Agency Regulations apply to “*agency workers*”¹⁸⁸ finding temporary work through a “temporary work agency”¹⁸⁹ and they do not extend to those who are genuinely self-employed, working through their own limited liability company or employed on a managed service contract.

Regulation 5 provides that agency workers have the right to receive “basic working and employment conditions” as those granted to a “comparable employee” working for the client that is “engaged in the same of broadly similar work”.¹⁹⁰ In this regard, the regulations distinguish between comparable rights that are available on the first

¹⁸⁷ Frenzel (2010) *Eur Lab LJ* 120.

¹⁸⁸ S 3(1) to (2) of the Agency Work Regulations 2010 No.93 provides: “3.—The meaning of agency worker

- (1) In these Regulations “agency worker” means an individual who—
 - (a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
 - (b) has a contract with the temporary work agency which is—
 - (i) a contract of employment with the agency, or
 - (ii) any other contract with the agency to perform work or services personally.
- (2) But an individual is not an agency worker if—
 - (a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or
 - (b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.”

¹⁸⁹ S 4 of the Agency Work Regulations 2010 No.93 provides as follows:

- “(1) In these Regulations “temporary work agency” means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of—
 - (a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or
 - (b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers.
- (2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers.

¹⁹⁰ Countouris *et al* (2016) ILO Report 59.

day to an agency workers, and rights that only become available after a 12-week qualifying period.

From the first day of placement an agency worker is entitled to the same access as comparable employees of the client, to facilities such as staff canteens, childcare and transport. An agency worker further has the right to be informed of job vacancies.¹⁹¹ Subsequent to the 12-week qualifying period, agency workers are entitled to the same “basic conditions of employment” that they would have received from the client on day one, had they been employed by the client directly. Regulation 6 specifically makes provision for key elements regarding pay, duration of working time, night work, rest periods, rest breaks, annual leave. In addition, pregnant agency workers who have completed the 12-week qualifying period, will be entitled to time off to attend off for ante-natal appointments.¹⁹²

The Agency Regulations only apply to relationships predicated on contracts of employment or “any other contract with the agency to perform work or services personally”.¹⁹³ The Agency Regulations further exclude contractual relationships where the temporary employment agency or client appear as a client or customer of the placed worker.¹⁹⁴

A controversial derogation is contained in regulation 5.2, that provides for a specific type of contractual arrangement generally referred to as the “Swedish Derogation”.¹⁹⁵ This type of derogation occurs when a temporary work agency offers an agency worker an ongoing or permanent contract of employment. The temporary work agency accordingly assumes the responsibility for paying the agency worker between assignments. This effectively means that after the qualifying period of 12-weeks, the worker will not be entitled to the same pay, as they would have received had they been recruited directly. Workers must further be informed that entering into such a contract would result in a waiver of their entitlement to equal pay.¹⁹⁶

¹⁹¹ Forde & Slater (2014) *ACAS Research Paper* 13.

¹⁹² Agency Workers Regulations, Guidance (2011) 18.

¹⁹³ S 3(1)(ii), Agency Work Regulations 2010.

¹⁹⁴ *Idem* S 3(2).

¹⁹⁵ Forde & Slater (2016) *Work, Employment and Society* 600-606.

¹⁹⁶ Forde & Slater (2014) *ACAS Research Paper* 15.

Establishing equal treatment in terms of the Agency Regulations is usually a matter of common sense and requires that a worker be treated as if he had been recruited to the job directly.¹⁹⁷ Regulation 5 further provides the framework for identifying what “basic working and employment conditions” an agency worker is entitled to in terms of the regulations.¹⁹⁸

Temporary Work Agencies and their clients are both liable for any breach of regulation 5, to the extent that they were responsible for the breach, in terms of regulation 14(1). A worker who feels aggrieved as a result of the agency or client’s contravention of regulation 5 is entitled to lodge a written request to the temporary work agency for relevant information regarding the infringing treatment in question.¹⁹⁹ Once such a request is received, a temporary work agency is obligated to provide the worker with a written statement in 28 days setting out: the relevant information relating to the basic employment conditions of the employees of the client; the factors that the temporary work agency took into account when determining the workers employment conditions that applied at the time the alleged contravention of regulation 5 occurred.²⁰⁰

In general, the temporary employment agency will initially be held responsible for the breach of the equal treatment principle, however, it will have a defence if it can show that it took “reasonable steps” to obtain information from the client regarding the basic employment conditions of the client and treated the worker accordingly. The client will be liable for any breach where it is responsible for the infringement. If the client failed to provide the correct information to the temporary employment service regarding the basic conditions of employment and the agency worker was not receiving appropriate treatment in terms of the regulations, the client will be liable. The exchange of information regarding the working conditions of the employee is therefore of utmost importance.²⁰¹

¹⁹⁷ Agency Workers Regulations, Guidance (2011) 25

¹⁹⁸ *Ibid.*

¹⁹⁹ Ebrahim (2017) *PER/PELJ* 13.

²⁰⁰ *Ibid.*

²⁰¹ Agency Workers Regulations, Guidance (2011) 25.

5. NAMIBIA

As in the case of South Africa, TESs were not initially recognised by Namibia's labour legislation. The Namibian Labour Act of 1992 did not contain any reference to labour brokers.²⁰² Namibian labour brokers therefore continued to operate without any formal regulation and TESs employees remained vulnerable to exploitation. In 2007, the Namibian government attempted to address this issue, not by regulation, but rather by implementing an outright ban in terms of section 128 of the Namibian Labour Act of 2007.

In the matter of *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*²⁰³ the Supreme Court of Namibia held that section 128 of the Namibian Labour Act of 2007 was unconstitutional, as it limited the right to carry on trade or business as envisaged in section 21 of the Constitution of Namibia. A regulatory vacuum was once again left, and after a length consultation process, the Namibian government promulgated the Namibian Labour Amendment Act of 2012 in an attempt to regulate TESs.

In contrast to South Africa, the amended section 128 designates the client to be the employer of the worker and not the TES. It was therefore not necessary to include provisions dealing with the specific rights and obligations of the various parties.²⁰⁴ A Namibian client is saddled with all the traditional employer responsibilities in terms of section 128(2). A client is further prohibited from subjecting TES employees to terms and conditions, which are on the whole less favorable than those of the client's permanent employees performing similar work.²⁰⁵

²⁰² Botes (2013) *PER/PELJ* 514.

²⁰³ (2011) 32 *ILJ* 205 (NMS).

²⁰⁴ Botes (2015) *SALJ* 113.

²⁰⁵ S 128(1) to (5) of the Namibian Labour Act 11 of 2007, as amended by the Labour Amendment Act 2 of 2012 provides as follows:

“(1) In this section-

“place” and “private employment agency” bear the meanings assigned to them in section 1 of the Employment Services Act, 2011 (Act 8 of 2011); and

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

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

The Namibian Labour Amendment Act further introduced various provisions such as the prohibition of the use of TES employees during strikes and lock-outs. In addition, a restriction is placed on the use of TES employees during the first six months after large scale retrenchments by a particular business.²⁰⁶ Section 128(6) further provides for various sanctions in the cases where contraventions of the aforementioned provisions are identified.

6. DISCUSSION AND OBSERVATIONS

The EU Directive is clearly aimed at providing increased protection for agency workers and further contains various provisions to ensure that workers are afforded the opportunity to obtain permanent employment with a client. The requirement to provide workers with information regarding employment opportunities and prohibition of contractual provisions that prohibit an employee from accepting employment with a client are clearly provisions aimed at providing workers with the best possible opportunity to obtain job security by obtaining permanent employment. The equal treatment principle is further aimed at avoiding the exploitation of agency workers. South Africa could learn from this approach when considering the treatment of employees that earn above the prescribed threshold. Although certainty has now been achieved for employees that fall below the threshold, by providing that they are considered to be indefinite employees of the client after a period of three months, employees above the threshold have been left out in the cold. Provisions aimed at

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

(4) A user enterprise must not-

- (a) employ an individual placed by a private employment agency on terms and conditions of employment that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value;
- (b) differentiate in its employment policies and practices between employees placed by a private employment agency and its incumbent employees who perform the same or similar work or work of equal value.

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

- (a) during or in contemplation of a strike or lockout; or
- (b) within six months after the user enterprise has, in terms of section 34, dismissed employees performing the same or similar work or work of equal value."

²⁰⁶ *Ibid.*

facilitating permanent employment and the protection of higher earning employees by adopting the approach of the EU could be of great value.

In adopting the EU directive, the UK has elected to impose time restriction of 12 weeks (three months) before a placed worker can claim certain rights. It is further interesting to note that joint liability for the client and the TESs is provided for in the Agency Regulations in cases where a worker alleges that his/her rights have been infringed in terms of regulation 5. The emphasis on an exchange of information to avoid such liability is a principle that could serve South Africa well. A TES employee in South Africa is generally not provided with all the information applicable to the working conditions at a client's premises nor is there any statutory obligation imposed on the TES to furnish the employee with such information.

A greater emphasis on communication and the timeous exchange of information between the parties in the TESs triangular relationship in South Africa could benefit all parties concerned. In addition, the UK strategy is worth considering when regard is had to higher paid TES employees. Increased regulation of this sector by the confirmation and recognition of specific rights after certain periods of time will undoubtedly go a long way to avoiding the exploitation of all TES employees. The obligation to exchange information and establish the exact nature of the contractual rights and obligations at the outset will also be of great value when considering the effects of deeming provisions of section 198A(3)(b) on the rights of the employee after the three-month period.

When considering Namibia's legislative development, it is interesting to note that South Africa initially adopted a polar opposite approach, by deeming the TES to be the employer and not the client, as is the case in Namibia. Under the current LRA it would seem as if a hybrid of the two legislative systems has developed in the case of employees that fall below the threshold. Firstly, providing that the TES is the employer and then by stipulating that the client is deemed to be the employer after three-months. The value of the Namibian systems lies in the certainty it provides, as the legislation reflects the reality of the true employment situation and not the fictional employment

relationship that is entertained by providing that the TES is deemed to be the employer.²⁰⁷

The detrimental aspect of the Namibian legislative system is the limitation it imposes on the degree of flexibility in the labour market. The main purpose of TESs is to maintain a degree of flexibility by allowing employers to place employees for a limited time in cases of need, in other words the rendering of true temporary services. It is here where the South African does seem to be taking a step in the right direction when compared to Namibia. The current LRA attempts to balance the need for flexibility while protecting the needs of the most vulnerable employees.

7. CONCLUSION

The legislative developments regarding TESs in South Africa has been shaped by its unique past. Although helpful to consider international developments they should always be viewed through the lens of the historical disadvantages and inequalities that still plague South Africa today. Nevertheless, when one considers the international drive for the regulation of TESs in order to provide increased protection to TES workers, South Africa legislative system has clearly taken a step in the right direction with the 2014 LRA Amendment Act.

The adoption of principles such as equal treatment and increased employment security in section 198A(3)(b), although limited to employees below the threshold, serve to illustrate that South Africa is not lagging behind when considering the international developments discussed above. It is suggested that for higher earning employees the various developments in the EU and UK, aimed at regulating temporary agency work, could be of great value and might serve to be instructive when considering the protection of all TESs employees in South Africa.

²⁰⁷ Botes (2015) SALJ 114.

CHAPTER 6

CONCLUSION

In this dissertation, I have attempted to provide an overview of the unique development of TESs in South Africa, with an emphasis on the geographic specific challenges that the regulation of TESs has presented within the South African labour market.²⁰⁸ South Africa's political history and socio-economic development has resulted in a distinct development of TESs that has largely been motivated by the need to promote flexibility through the exploitation of grey areas in the legislative framework. In other words, flexibility through lack of restriction.²⁰⁹ These grey areas are generally to be found in the uncertainty regarding the allocation of rights and obligations within the triangular employment relationship, with specific reference to the identity of the employer.

Although the development of labour law over the last twenty years in South Africa has been guided by the ILO's international standards,²¹⁰ I submit that there is simply no magical labour law template for South Africa's unique socio-economic and socio-political reality. It is undoubtedly so that there are various lessons to be learned from other jurisdictions and their attempts to regulate TESs in their countries²¹¹, but none of their regulatory measures and legislative frameworks developed with the burden of historical inequality and racial segregation that continues to influence and permeate the South African labour market to this day.

I venture to suggest that the development of TESs in South Africa is by its very nature a balancing exercise between the need to address inherent inequalities of the past and the need for a flexible labour market that is capable of meeting the needs of the current demands of the economic and global markets. The 2014 LRA Amendment Act

²⁰⁸ See discussion on legislative development in chapter 3 para 2.

²⁰⁹ *Ibid.*

²¹⁰ See discussion on ILO Standards and South Africa's compliance in chapter 2 para 4 and 6

²¹¹ See discussion and observations on legislative developments in EU, UK and Namibia in chapter 5 para 6.

illustrates a clear intention on the part of the legislature to discourage the use of TESs and further provide protection to vulnerable employees earning below the prescribed threshold.²¹²

In writing this dissertation, I have concluded that in an ideal world “flexibility” presupposes a change in regulatory measures aimed at promoting the ability to adapt to changing circumstances. However, the use of TESs in South Africa has flourished by exploiting the uncertainty and lack of regulation, while attempting to hid behind the need for a flexible labour market. Flexibility presupposes a balancing action, and I argue that the debate on the need for flexible labour market should not forget that:

“The law does and to some extent must conceal the realities of subordination behind the conceptual screen of contracts considered as concluded between equals. This may partly account for the propensity of lawyers to turn a blind eye to the realities of the distribution of power in society.”²¹³

The amendments introduced by the 2014 LRA Amendment Act were undoubtedly guided by a need to curb the exploitation of vulnerable TES employees. The introduction of the definition for “temporary services”²¹⁴ should be lauded, however, the ambiguous nature of the empowering provisions of section 198A(3)(b) were always going to give rise to an interpretive tug of war between the need for “flexibility”, (largely promoted by the employer and the client) and the need for regulation aimed at curbing exploitation and promoting the protection of vulnerable employees.

The deeming provisions of section 198A(3)(b), and the practical effects on the rights and obligations of all the parties involved in the triangular relationship, will undoubtedly remain a topic of much debate despite the Constitutional Courts judgment in the matter *Assign Services (Pty) Ltd v National Union of Metal Workers of South Africa & Others*.²¹⁵

²¹² Le Roux (2018) *Contemporary Labour Law* 4.

²¹³ Davies *et al* (1983) 15.

²¹⁴ S 198A(1) of the LRA.

²¹⁵ 2018 *JDR* 1190 (CC).

The Constitutional Court's finding that the client is the sole employer after three-months for the purposes of the LRA is undoubtedly correct, however, this does not illuminate the uncertainty regarding the actual nature of the rights and obligations that such an employment relationship will have.²¹⁶ It cannot be doubted in the bubbling cauldron of uncertainty regarding the practical implications of the judgment will continue to fan the flames of litigation and the Courts will undoubtedly once again be left to provide the direction.

This dissertation serves as support for the conclusion that the judiciary should not be tasked with cleaning up the uncertainty created by the ambiguous legislative provisions in the current LRA, by attempting to give effect to section 198 and 198(A) on a case by case interpretative exercise, until well-established legal principles have developed that provide certainty. The legislature should step in at this stage and consider amending Section 198 and 198(A) in light of the Constitutional Courts judgment.

This will allow for a situation where courts are rather tasked with the application of legislative provisions grounded in certainty and not an interpretative exercise in which the meaning of the current legislative provisions is first to be deciphered before it can be applied. Amending the provisions of Section 198 and 198A in this way will assist in avoiding the development of conflicting judgments, which will in turn require the LAC and Constitutional Court to step in again to provide certainty.

²¹⁶ See discussion and observations on Constitutional Courts judgment in chapter 4 para 6.

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