It further argues that this is — counter-intuitively — a step in the right direction. It is proposed that this serves the overall imperative of creditor protection much better than the old regime’s provisions do, and uses a legal-economic policy analysis to justify such a more literal interpretation of these provisions of the Act.

Briefly, it derives its argument from the legal-economic theories of the firm and the function of juristic personality, as a standardised nexus of transaction- and agency-cost reducing contracts; but more importantly as a means with which to partition the assets of owners and managers from those of the firm itself to the benefit of creditors. If the legislature wanted to provide creditors with a direct remedy against directors for a breach of the reckless trading provisions, it is submitted that an appropriate amendment be made to s 218(2).

As the section currently reads, it is general in nature and not clear in terms of what is meant by ‘contravenes any provision of this Act’. Furthermore, the point of departure of company law is limited liability and only where the legislature explicitly provides for personal liability should this point of departure be ignored.

It also argues that a narrower, more unforgiving interpretation of the Act does not deprive creditors of remedial recourse n exceptional circumstances. It shows creditors may still rely (1) on the statutory derivative action; and surprisingly (2) on breach of the duty of care and skill via s 218(2). Moreover, it shows that is the most efficient, effective and justifiable manner in which to construe the law. In this sense, the most surprising outcome of the overall analysis is that the roles of these ‘remedies in flux’ have a limited degree reversed — the duty of care and skill serves individual creditors better than the company; the remedy against directors who allowed the company to trade recklessly serves the company better than individual creditors, which ultimately serves the overall body of creditors. Stranger still is the conclusion that this is for the best — whether an unintended consequence of the drafting of the 2008 Act, or an intentional and laudable realignment of policy objectives.

Lastly, in the context of companies already in winding up, it confirms that the provisions of the 1973 Act are in force, and that there is little to aid the concursus of creditors against a cleaning out of directors’ coffers before they can be brought to task by the liquidator.

EMPLOYMENT AGENCIES: ARE SOUTH AFRICA’S RECENT LEGISLATIVE AMENDMENTS COMPLIANT WITH THE INTERNATIONAL LABOUR ORGANISATION’S STANDARDS?

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1 INTRODUCTION
At the beginning of 2015 the Labour Relations Act (LRA) was amended to provide significantly improved protection to workers engaged in ‘non-standard work’. This term covers workers engaged in agency work, fixed-term contracts and part-time employment. The focus of this contribution is on ‘employment agencies’ which constitute a significant proportion of the South African labour market. There are differing views on the exact number of agency workers and the effects of the recent

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***This is confirmed by Benjamine, Law and practice of private employment agency work in South Africa, Sector Working Paper No. 292, International Labour Office, Geneva (2013) 1, the term “labour broker” is used in South Africa to refer to what are more commonly referred to as labour hire firms or temporary employment agencies in other countries. Although the statutory terminology was changed to “temporary employment services” in 1995, the term “labour broker” has stuck and is often used with a pejorative meaning in public discourse. The broader category of labour market intermediaries are, in keeping with international practice, referred to as private employment agencies. The term ‘employment agency’ is used in this contribution and we do not cover public employment agencies, which fall beyond the scope of this article. The term ‘client’ is used for the user company and the term ‘agency worker’ refers to the employee of the employment agency.
legislative amendments in South Africa. So for example, one of the
country’s largest providers of agency workers, Adcorp, states that:
‘Labour broking is the fastest-growing sector of the South African labour
market. According to the Adcorp Employment Index for May labour
brokers constitute a R44 billion industry employing around 19 500
internal staff and just over one million agency workers or temps in South
Africa. Agency work now constitutes 7.5% of total employment in South
Africa, and it is likely to grow further.’

However, this statement is contradicted by researchers who contend
that extensive job losses have occurred in the wake of the regulatory
changes and that agency work is rapidly declining. Bhorai, Magadla and
Steenkamp suggest that 50% of agency workers lost their jobs subse-
quent to the amendments while only 20% secured indefinite positions.
Despite this, commentators such as Benjamin and Budlender have
responded by stating that the abovementioned research is inaccurate in
so far as it is founded on a narrow foundation and does not provide a
basis for comparison with other periods.

Despite these differing views, one aspect remains uncontested:
employment agencies have formed and currently still form a large
proportion of the labour market and the industry has grown substan-
tially since its first inception. Therefore, any changes to the regulation
of these agencies are important and could have a significant effect on the
working lives of agency workers and the way in which employment
agencies conduct their business in South Africa.

Amidst the regulatory changes regarding employment agencies in
South Africa, an important question is whether these amendments are
compliant with the international labour standards that South Africa
strives to meet. The first part of the article provides an exposition of the
changes made to the regulation of agency work. The second part
considers the relevance of International Labour Organisation (ILO)
standards for South Africa and is followed by an overview of the
provisions of ILO conventions and recommendations in relation to
agency work. The third part considers the question whether South
Africa’s recent amendments are compliant with these international
standards. First of all, we identify a list of core international norms as
derived from the ILO conventions and recommendations and compare
the amendments to selected core indicators. Particular shortfalls are
identified and suggestions are made regarding future changes that
should be made in order to provide balanced reforms to the current
regulatory framework.

II SOUTH AFRICA’S LEGISLATIVE CHANGES IN RESPECT
OF PRIVATE EMPLOYMENT AGENCIES

(a) Introduction

In South Africa, agency work developed in three stages. During the first
phase, triangular employment relationships were for the first time
regulated in 1982. During the second phase, the current LRA of 1995
attempted, but failed, to regulate the industry during the post-
constitutional era. Finally, in 2015, policymakers attempted to improve
the plight of agency workers subsequent to lengthy and quarrelsome
debates which preceded the current amendments. We examine each of
the three phases in chronological order.

(b) The first phase: 1982–1994

The first statutory regulation of employment agencies in South Africa
occurred in 1982. At the time, South Africa was no longer a member of
the ILO as a result of criticism it had attracted due to the apartheid
policies of preceding years. Amendments to the LRA in existence at the
time introduced the concept of a ‘labour broker’ into the regulatory fold.
As pointed out by Brasey and Cheadle in 1983, employment agencies

4 http://www.adcorp.co.za/Pages/

5 So, for example, ‘Free Market Foundation economist Loane Sharp said ... the amended
Act will have a “disastrous impact on industry”’. Mr Sharp said a survey of close to 300
employment agencies, representing 90% of job placements in South Africa, revealed that
changes to the Act will cost the economy jobs. To put the expected job losses in perspective,
Mr Sharp explained that ‘before 30 April this year, 254,000 jobs are expected to be lost and of
this figure, 129,000 have already been lost’. See https://www.sanews.co.za/newspapers/2015-
05-06/employment-agencies-will-lose-jobs-amendments-33618, accessed on 23 June 2015.

6 Refered to by Paton, ‘Labour brokers changes “bled jobs”’, Business Day 7 September
2013 at 1.

7 Benjamin made this remark during a panel discussion at the 21st International Labour
Law and Social Security World Congress hosted in Cape Town between 15 and 18 September
2013. See also the reference to Budlender’s research in Paton, ‘Experts poke holes in claim
of labour-brokering cataclysm’, Business Day 18 September 2015. For a related discussion, see
http://www.businesslive.co.za/national/labour/2015/09/18/new-analysis-experts-poke-holes-in-

8 See information contained in link provided at n4.

9 The LRA 28 of 1956 was amended by the LRA 31 of 1982, which came into effect on 6
August 1982.

10 Van Nickerk & Smit (eds), Law@work 3 ed (LexisNexis 2015) 22.
made their enterprises viable by staying away from statutory wage regulating measures in that they structured the relationships of workers so placed in such a way that they appeared to be independent contractors. In an attempt to provide workers with more certainty the amendment ‘deemed’ employment agencies to be the employers of individuals whom they placed to work with their user companies, provided that they were responsible for paying their ‘remuneration.’ Benjamin refers to the fact that South Africa adopted a rule permitting employment agencies to be classified as the employers of those whom they placed to work with a client more than a decade prior to these arrangements currently being regulated in international standards by the adoption of the ILO’s Private Employment Agencies Convention, 1997.

The 1982 legislation also contained a legal requirement for employment agencies to register with the Department of Labour and provided that the client’s premises were deemed to be the place of work of the workers. It seems ironic that whereas the amendment at the time established a deeming provision, namely, that the employment agency was deemed to be the employer, the recent amendments during phase three of the evolution of the regulation of these arrangements contain a provision to the effect that the client is deemed to be the employer of some categories of agency workers.

(c) The second phase: 1995–2014

The LRA of 1995 was implemented shortly after South Africa had conducted its first post-apartheid elections and after it had rejoined the ILO. Even though the Cheadle Task Team was ably assisted by experts sponsored by the ILO, there are no indications that the ILO instruments, which were in place at the time, played any role in the drafting of the 1996 provisions dealing with employment agencies.

In its original format, the LRA of 1995 applied to all workers irrespective of their level of remuneration, and the size of the client where they rendered service. The LRA of 1995 provided that, in instances where a person (a ‘temporary employment service’) procures other persons, for reward, to render services for a client, and where the temporary employment service is responsible to remunerate the workers, the temporary employment service is the de facto employer of the workers. This original section is clear in its operation so far as it merely clarifies who the employer is in the triangular relationship and removes the deeming provision of the LRA of 1956. Furthermore, the worker only receives limited protection in so far as both the agency and the client are jointly and severally liable in respect of transgressions of collective agreements and the provisions of the Basic Conditions of Employment Act of 1997 (the BCEA of 1997). Amongst others, the major stumbling blocks in respect of the protection of agency workers are that only the employer, the employment agency, is liable for unfair labour practices or unfair dismissal of the agency worker; agency workers are often paid less than their counterparts employed directly by the client; they do not receive medical cover and they do not belong to the employer’s pension fund; even though agency work is meant to be temporary in nature it is widely used for employment that is indefinite in nature; and workers are unsure about who the employer is, namely, the employment agency or the client.

Quarrelsome debates among stakeholders between 2007 and 2014 resulted in eventual reforms that witnessed the Labour Relations Amendment Act 6 of 2014 (the LRA Amendment Act of 2014) becoming effective as from 1 January 2015. The governing African National Congress’ 2009 election manifesto provided momentum to the process and served as a guideline in relation to the content of the Bills which sought to improve the protection of workers’ rights. In an address to the
National Assembly in May 2013, the Speaker of the House highlighted the mandate of the Department of Labour and how this linked to the Bills that were before Parliament. The Speaker stated that:

“This is in keeping with the promises made in the African National Congress election manifesto in 2009 which promised that “In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, we will introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices. Provisions will be introduced to facilitate the unionisation of workers and conclusion of sectoral collective agreements to cover vulnerable workers in these different legal relationships and ensure the right to permanent employment for affected workers.”

(d) The third phase: 2015 and further

The LRA Amendment Act of 2014 has left the notion of an employment agency largely unchanged. The concept of ‘temporary employment service’ means

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

As in the past, the LRA still provides that the employment agency is the employer, and the above definition applies to all agency workers, irrespective of the rate at which they are remunerated or the size of the client’s business. The employment agency and the client also remain jointly and severally liable in respect of transgressions of the provisions of collective agreements, the BCA of 1997 and sectoral wage determinations. However, as is discussed below, employees earning below a particular threshold have received wide-ranging additional protection since January 2015.

As is the case with standard employees, the LRA Amendment Act of 2014 has introduced an obligation on employment agencies to provide agency workers with written particulars of employment. In addition, and in a significant development, agency workers’ protection, which is extended by means of collective bargaining, has been bolstered. The Amendment Act provides that an agency worker may not be employed by an employment agency on terms and conditions not permitted by the LRA of 1995, or sectoral determination or collective agreement applicable to the employees of the client to whom the agency worker renders services. This entails that, if, for example, employees in the motor industry are covered by a bargaining council main agreement which sets minimums pertaining to remuneration and pension or provident benefits, agency workers would be entitled to the same conditions of employment as contained in the agreement. This is the case irrespective of the fact that the employment agency, which is the employer, may not be covered by the scope of the bargaining council. These measures pertaining to contracts of employment and collective bargaining rights apply to all agency workers, irrespective of the quantum of their remuneration or the duration of their placement.

Before turning to the details of the improved protection to lower earning agency workers in South Africa, four points need to be made:

(a) The protective measures in respect of higher earning agency workers, as insufficient as they may have been before the amendments, have remained largely unchanged.

(b) South African policymakers are supposedly guided by the strategy


22 Ibid.

23 Section 198(1)(a) of the LRA of 1995.

24 Section 198(2)(a) of the LRA of 1995.

25 Section 198(4) of the LRA of 1995. Section 198(4A) of the LRA of 1995 further provides that if the client of a temporary employment service is jointly and severally liable in terms of

26 Section 198(4B) of the LRA of 1995 states that: “A temporary employment service must provide an employee whose service is procured for or provided to a client with written particulars of employment that comply with section 28 of the Basic Conditions of Employment Act, when the employee commences employment.”

27 Section 198(4C) of the LRA of 1995.
of ‘regulated flexibility’ when composing labour legislation. It includes the idea of ‘one shoe does not fit all’ when it comes to the regulation of the labour market.

(c) All workers, irrespective of whether they may be part-time, fixed-term or agency workers are protected by the Employment Equity Act (the ‘EEA’) which prohibits unfair discrimination on grounds such as race, colour, religion and age.

(d) It seems that the amendments could have been influenced by the European Union notion of ‘flexicurity’ in so far as labour policy promotes an upward transition of workers from non-standard forms of work (which are recognised) into more secure indefinite types of jobs. In other words, precarious jobs such as agency work are not prohibited and can serve as a stepping stone towards more decent forms of work.

Returning to the LRA Amendment Act of 2014, the most significant additional protection afforded to agency workers is found under a new section headed ‘Application of section 198 to employees earning below

293 ARESA’S RECENT LEGISLATIVE AMENDMENTS COMPLIANT earnings threshold’. In terms of the new provisions all agency workers not performing ‘emergent services’ (this is for a period not exceeding three months), and those earning below the threshold amount (which currently stands at R205 433.30):

(i) will be ‘deemed’ to be indefinitely employed employees of the client to which they have been assigned; and

(ii) may not be treated less favourably than employees of that client who perform similar work, unless such differentiation is justifiable.

There can be no doubt that lower earning agency workers do receive more protection after the amendments and this is welcomed. They are not only protected in respect of their right to equality in terms of the EEA and equal treatment in terms of the LRA of 1995, but also in respect of not being kept in precarious positions for indefinite periods. Despite this, it is regrettable that policymakers have decided to fall back on the deemed position of the previous era, which may give rise to interpretational problems. In respect of improving the plight of agency workers in general, the same, however, cannot be said of higher earning employees as their situation remains essentially the same as before the introduction of the amendments. The notable exceptions in this regard pertain to the right to be provided with contracts of employment and protection that may be extended by bargaining council agreements, sectoral agreements and ministerial determinations. An evaluation of whether the regulation of their position is in line with the protective measures envisaged by international norms follows later in the contribution.

Shortly after the coming into operation of the LRA Amendment Act of 2014 interpretational problems emerged regarding the phrase

46 De Jure 600-611 in this regard.

29 Act 55 of 1998. It is also significant that the principle of ‘equal pay for work of equal value’ has been introduced in the South African law in terms of this Act in 2014.

'deemed to be the employee of the client'. Does it mean that, after the three-month period, the client is the sole employer and that the agency worker is no longer the employee of the employment agency? Or does it entail that the agency worker remains the employee of the employment agency in terms of the contract of employment and that, in addition, a second employment relationship with corresponding rights and obligations is established with the former client?

Early indications are that the Commission for Conciliation, Mediation and Arbitration (the CCMA) and bargaining council arbitrators favour the first option. The bargaining council commission in the matter of Refilwe Esau Mphirime and Value Logistics Ltd / BDM Staffing (Pty) Ltd determined that joint and several liability only applies in respect of non-compliance in relation to non-compliance with collective agreements, the BCEA of 1997 and sectoral determinations. In respect of other claims, such as alleged unfair dismissal and unfair labour practices, the commissioner held that the

'correct interpretation ... of s186A(3)(b)(i) is therefore that the client is awarded the duties and obligations for the purposes of the LRA when the employee is not performing a temporary service and therefore any claim brought in terms of the LRA must be brought against the duty-bearer, which is the client'.

Although it is unfortunate that the commissioner said nothing about the continuance of the contract of employment with the employment agency, the commissioner is clear that while a temporary service is being rendered during the first three months of employment, the employment agency bears all responsibilities in relation to the LRA of 1995, but that after this period the client bears all responsibilities. It goes without saying that there are a number of common-law duties that exist beyond the sphere of the LRA of 1995 and the question remains who bears the responsibilities in this regard.

Soon after Refilwe Esau Mphirime, the CCMA in Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd with National Union of Metal Workers of South Africa (NUMSA), had to determine whether dual relationships with the agency worker come into operation. In other words, do both the employment agency and the client have an employment relationship with the agency worker? Here the commissioner quite correctly held that 'the correct interpretation ... [should be] the one that will provide greater protection for the vulnerable class of employees'. However, we are not convinced that the decision of the CCMA would have the mentioned effect. The commissioner concluded that 'deemed means that the client becomes the sole employer of the placed workers for purposes of the LRA, provided that they earn below the threshold and that the three months period has elapsed'.

The Labour Court was requested to pronounce on the dual employer question during review proceedings shortly after the decision by the CCMA. In his decision, acting Judge Brasey pointed out that the expression 'dual employment' is a 'fertile source of confusion', but he nonetheless set the decision of the CCMA aside and concluded that the agency worker acquires a parallel set of rights and obligations under the amendments.

The main conclusions of the Labour Court are, in essence, that the contract of employment remains in place with the employment agency beyond the three-month period and that two employment relationships are established after the three-month duration for the purpose of the LRA of 1995. The one aspect on which we agree with the Labour Court is that there is no provision in the LRA Amendment Act of 2014 to the effect that the contract of employment is transferred from the employ-

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36 In terms of s 186A(3)(b) of the LRA of 1995.
38 Para 12.
39 Refilwe Esau Mphirime and Value Logistics Ltd / BDM Staffing (Pty) Ltd at para 46.
40 At para 46 the commissioner held that the 'legislator awarded the duties and obligations in terms of the LRA to the TES only while the employee provides a temporary service ... Once the employee no longer performs a temporary service, the client is deemed to be the employer and the duty-bearer for purposes of the LRA'.
41 CCMA case number ECEL 1652–15 of 26 June 2015.
42 Para 4.1 states that counsel for the employment agency argued in favour of 'dual employment'. A summary of the arguments is in paras 4.1 to 4.6. At para 4.7 it is stated that counsel for the respondent supports the 'sole employment' argument based on the wording of the section which states that the employee is 'employed on an indefinite basis by the client'.
43 Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd with National Union of Metal Workers of South Africa (NUMSA) at para 5.8.
44 Idem para 6.1. In considering the interpretation of the section, the commissioner turned to the explanatory memorandum of the amendments when he noted (at para 5.4) that the 'main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant temporary work and to introduce various further measures to protect workers employed in this way'. Based on this, the Commissioner noted at para 5.8 that 'I am convinced that the correct interpretation is the one that will provide greater protection for the vulnerable class of employees'. The commissioner opined that a situation of dual employment would be confusing as to the question which employer would be responsible for which employer duties. Therefore, the client becomes the sole-employer of the agency worker after three months.
46 Para 12.
ment agency to the client or that the client steps into the shoes of the employment agency after the three-month period. However, the rest of the decision remains contentious and open for different interpretations.

The Labour Court holds the view that the original principle of a triangular employment relationship remains in place. According to the Court, the consequence of this is that when there is a dispute relating to rights under the LRA of 1995, the agency worker has an election to institute proceedings against either the employment agency or the client. As such, if the employee is dismissed by the employment agency, or subjected to an unfair labour practice, the employee can claim the remedies for unfair dismissal or unfair labour practice against the client directly. However, the agency worker may choose, for whatever reason, to rather institute proceedings against the employment agency.

The different views of the CCMA and the Labour Court will undoubtedly be considered on appeal by higher courts and no definitive pronunciation as to the proper construction of the amendments can be made at this stage. We argue that the legislature should have made a much clearer division of where the duties between the employment agency, the client and the agency worker lie. The absence of such an allocation of duties leaves all of the parties in a state of confusion, which certainly opens the door for the agency worker to remain in a vulnerable situation. If the legislature intended agency work to be temporary in nature, which it undoubtedly does, it may have been more feasible to have formulated the LRA of 1995 to the effect that the contract of employment is transferred and that the agency worker becomes indefinitely employed directly by the client. Such an interpretation would mean that the employee then ‘upgrades’ to standard employment, leaving behind atypical employment through an employment agency. It is deplorable that the LRA Amendment of 2014 does not provide for this possibility and the situation therefore remains uncertain.

Before proceeding to an evaluation of international norms, it should be mentioned that the Employment Services Act of 2014 (ESA of 2014) was introduced at about the same time as when the amendments to the LRA of 1995 were formulated. Amongst other things, the ESA of 2014 makes provision for the registration of a public employment agency, the registration and regulation of private employment agencies and the establishment of job-creation schemes.

The LRA of 1995 provides that no person may function as an employment agency ‘unless it is registered in terms of any applicable legislation’. The ESA of 2014 directs that a registrar of private employment agencies be appointed, that criteria for such agencies be published and that the registrar must issue successful applicants with a certificate of registration. The ESA of 2014 also provides that:

1. No person may charge a fee to any work seeker for providing employment services to that work seeker.

2. A private employment agency must not deduct any amount from the remuneration of an employee or require or permit an employee to pay any amount in respect of the placing of that employee with an employer.

3. A provision in any agreement concluded with an employee that is in breach of this section is invalid and of no force and effect.

We now proceed to consider the relevance and content of the applicable ILO standards. We also consider whether any guidance is to be found in international norms in relation to what can only be described as the ambiguous and confusing-deeming provisions that were reintroduced by the LRA Amendment Act of 2014.

III RELEVANCE OF INTERNATIONAL STANDARDS

Since the ILO’s establishment in 1919, international labour standards have played an important role in South Africa. Even during South Africa’s absence from the ILO between the 1950s and 1990s, the ILO continued to play an active role in shaping South Africa’s labour law.

The ESA establishes two types of employment agencies that render ‘employment services’, namely, public employment services, established and managed by the state to render free services to the public, and ‘private employment agencies’ that provide job-recruitment and placement services.

See s 198(4F) of the LRA of 1995.

Section 13(1) and (3) of the ESA of 2014.

Section 15.

South Africa was one of the founding members of the ILO when it was established in 1919.

See Van Niekerk and Smit (eds), (LexisNexis 2015) at 20 where it is stated that during South Africa’s absence from the ILO, an ILO Special Committee on Apartheid continued to produce annual reports to the ILO Conference on the labour-related aspects of apartheid. These reports highlighted the effects of the policy of the government on black workers. In addition, in 1988 COSATU lodged a complaint against the National Party Government with the ILO.

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48 Act 4 of 2014.

49 Section 1 of the ESA defines ‘employment services’ as including advising workers on career choices, referring work seekers to employers to apply for vacancies, assisting employers by providing recruitment and placement services, and performing the functions of temporary
During the pre-constitutional era, members of the former Industrial Court relied on ILO principles in developing the court’s unfair labour practice jurisprudence.50

Before the enactment of the Constitution, 1996 and the LRA, the ILO’s Fact-Finding and Conciliation Commissioner on Freedom of Association concerning the Republic of South Africa visited the country in 1992 and compiled a report in which they made specific recommendations on the reform of labour law. It is significant that this ILO report was used in the drafting of the current LRA of 1995.56 This Act was drafted by the Cheadle Task Team through negotiations at NEDLAC57 and during this process the ILO findings were taken into account.58

The South African Constitution, 1996 is the supreme law of the land59 and it gives ‘customary international law’ a particular and significant status within the constitutional democracy. The Constitution, 1996 provides that ‘customary international law is law in the Republic unless it is inconsistent with the Constitution, 1996 or an Act of Parliament’.60 It further provides 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’.61

Shortly after the adoption of the final Constitution, 1996, Dugard noted that this ‘constitutionalisation’ of the common-law rule on ‘customary international law’ gives the rule additional weight and ensures that customary international law is no longer subject to subordinate legislation.62 The Constitution, 1996 furthermore draws a distinction between

However, the government refused to accept the jurisdiction of the ILO until 1991 when it allowed a fact-finding mission from the ILO on freedom of association to come to South Africa. The ILO mission subsequently drew up a number of recommendations on how South Africa could improve its labour laws to be consistent with international standards.


NEDLAC is the acronym for the National Economic Development and Labour Council in South Africa.

Satgur, ‘The LRA and workplace-forums: Legislative provisions, origins, and transformative possibilities’ (1998) 2(1) Law, Democracy and Development 4 at 50. The author states that the Cheadle Task team was assisted by the ILO in the drafting of the new labour legislation for South Africa.

Section 2 of the Constitution, 1996.

Section 233 of the Constitution, 1996.

Section 233 of the Constitution, 1996.


‘international law’ and ‘foreign law’. It dictates that international law ‘must’ be considered when interpreting the Bill of Rights while foreign law ‘may’ be taken into account.63

The Constitution, 1996 does not define either ‘international law’ or ‘foreign law’. However, Mégret explains that international law is applicable between states as opposed to domestic rule or laws between individuals. Such law is the result of norms that have developed over time and have been given the status of law. Foreign law is the domestic law of other countries.64

Does international law only refer to international standards to which South Africa has assented or also to instruments that the country has not ratified? This is especially relevant as South Africa has not assented to the relevant ILO Convention and Recommendation which regulate employment agencies and are discussed below.65 In a seminal decision by the Constitutional Court, S v Makwanyane and another,66 it was held that both binding and non-binding international instruments must be used when interpreting South African law.67 The courts have confirmed that in terms of the meaning of international law, ILO conventions and recommendations constitute international law.68

The LRA of 1995 also confirms this commitment to the ILO in so far as it provides that: one of the primary objects of the LRA is to give effect to the obligations that the country incurs as a member state of the ILO.69

62 Section 2(1)(b) and (c) of the Constitution, 1996.

63 Mégret, ‘International law as law’ in Crawford and Koskenniemi (eds) The Cambridge Companion to International Law (Cambridge University Press 2012) 64 at 70 states that most significantly regarding international law, it lacks some of the key hallmarks of a functioning domestic legal order. Besides being a centralised legislative body, a compulsory court system, and a centralised enforcement. See also Charlesworth, ‘Law-making and sources’ in Crawford and Koskenniemi International Law (2012) 187–200 for the origins of international law.

64 See the discussion below in para IV.

65 1995 (3) SA 391.

66 At para 35 the Court stated that ‘public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three’ (our emphasis).

67 In Murray v Minister of Defence (2006) 1 BCLR 1137 (C) at 1388 the Court stated that [Section 181(1) of the Constitution obliged the Court to consider international law such as the ILO Conventions and Recommendations when interpreting any right to fair labour practice’.

68 Section 1(8) of the LRA.
It furthermore directs that the provisions of the Act must be interpreted in compliance with South Africa's public international law obligations. It

The guiding effect of ILO conventions on those countries that have not adopted particular ILO conventions has also become apparent when the

the Namibian Supreme Court placed reliance on ILO conventions when it declared a legislative ban on employment agencies (or 'labour hire') in that country to be unconstitutional. All of the above confirm the influence of international standards, and that of the ILO in particular, on South Africa's national labour law.

IV ILO STANDARDS ON AGENCY WORK

(a) Introduction

Conventions are legally binding instruments that may be ratified by member states while recommendations, on the other hand, are considered to be non-binding guidelines. We support the view that recommendations should not be lightly ignored since they ought to be seen to be morally binding in as far as they supplement conventions and provide policy direction to member states. Both instruments are tools, which organised business, labour and government should consult and be guided by when drafting and implementing labour law and social policy.

(b) Early Conventions and Recommendations

The history of agency work and ILO instruments show that already in 1919 agency work was mentioned in both the ILO Convention on

are SA's recent legislative amendments compliant

Unemployment 1919 (No. 2) and the ILO Recommendation on Unemployment 1919 (No. 1). It is significant to note that at the time non-profit employment agencies were allowed to exist as long as they were strictly controlled by a central state authority. However, the accompanying Recommendation stated that fee-charging agencies for profit were to be prohibited. This early recommendation regarding the banning of agency work was later extended and formalised to be included in the Fee-Charging Employment Agencies Convention 1934 (No. 34). This prohibition did not remain in place as the Convention on Fee-Charging Employment Agencies 1949 (No. 96) once again relaxed the banning of agencies in so far as it provided that member states could either abolish such agencies or regulate them. As Valkicos points out, most member states still chose the option of prohibiting fee-charging agencies.

During the late 1990s, at a time when the ILO developed the Decent Work Agenda, it was decided to liberate the approach towards agency work even further when it legitimised the industry, but also protected agency workers, with the adoption of the Private Employment Agencies Convention 1997 (No. 181). O'Donnell and Mitchell comment that by the time the ILO had enacted this new standard, it was merely reflecting what had already become the established policy position in many

70 Article 2(1) of the Convention states that "[e]ach Member which ratifies this Convention shall establish a system of free public employment agencies under the control of a central authority. Committees, which shall include representatives of employers and of workers, shall be appointed to advise on matters concerning the carrying on of these agencies. Where both public and private free employment agencies exist, steps shall be taken to co-ordinate the operations of such agencies on a national scale."

71 ILO Recommendation on Unemployment, 1919 (No. 1) stated that all practical measures should be taken to abolish such agencies.

72 Van Eck, "Reviving agency work in Namibia and South Africa: Any lessons from the recent work agenda and the Decency approach?" (2014) 30 International Journal of Comparative Labour Law and Industrial Relations 49 at 54 and 55. He points out that the limitation was later relaxed with the revision of the Convention in 1949.

73 Valkicos, "Temporary work agencies and international labour standards" (1973) 107 International Labour Review 43 at 50. Valkicos at 56 further suggests that general standards in existence do apply to temporary employment agencies and address some social problems. However, he states that particular standards with more precise provisions would fill some existing gaps. Waan, "A quid pro quo in temporary agency work: Abolishing restrictions and establishing equal treatment"—Lessons to be learnt from European and German labour law" (2012) 24(4) Comparative Labour Law and Policy Journal 47 at 49, writing about the German context in particular, states that historically agency work was forbidden and even a criminal offence, but that this changed with a court decision in 1967 when such work became permissible.
European countries. At more or less the same time, the ILO introduced conventions and recommendations relating to other groups of vulnerable workers as well, namely, part-time workers, home workers and domestic workers. The history of ILO standards on agency work shows an evolution in policy from restriction to prohibition and to allowing employment agencies to exist but at the same time providing for the protection of agency workers.

(c) The current Private Employment Agencies Convention, 1997 (No. 181)

The Introduction to Convention 1997, (No. 181) states that the General Conference of the ILO is "aware of the importance of flexibility in the functioning of labour markets" and that it recognises "the role which private employment agencies may play in a well-functioning labour market". The Introduction also emphasises the need to prevent abuses and to protect workers. This is confirmed in Article 2 which aims "to allow for the operation of private employment agencies and to protect workers". It thus seeks to allow and to regulate the industry rather than banning it and driving it under cover.

The definition of employment agency is broad and encompasses three types of agencies. It provides that

the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

(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 jobseeking, determined by the competent authority after consulting the most representative employers and workers organisations, such as the provision of information, that do not set out to match specific offers of and applications for employment.

Article 4 states that measures should be taken to ensure that workers recruited by employment agencies 'are not denied the right to freedom of association and the right to bargain collectively'. As pointed out by Benjamin, despite this noble intention it remains a question as to how such workers are meant to organise themselves if they are employed by the employment agency and then placed at different clients. Practicalities around organisational rights also become challenging in that the workers do not work at the workplace of their employer but rather at clients' workplaces. Also, rights of access to the employer's workplace, being that of the employment agency, would serve no function.

Article 5 provides for equal treatment by the employment agency without discrimination 'on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability'. A glaring shortcoming here is that there is no express mention of equal treatment of workers of an employment agency and employees employed directly by a client. Therefore, there could be different treatment of these groups of employees, even though they may be working side by side at the same workplace. Such inequality could relate to benefits such as medical aid, death and disability cover, company pension schemes and so forth, which the workers of the employment agency are less likely to enjoy. Whist equality is of key importance, it is submitted that Article 5 does not adequately address this need and merely provides for the bare minimum regarding equality in the workplace.

Article 7 directs that '(p)lacement of workers shall not charge
directly or indirectly, in whole or in part, any fees or costs to workers. The right not to be charged costs is important in preventing exploitation of the worker and this is therefore a helpful provision.

It remains problematic for any agency worker to determine which party — the employment agency or the client — bears the employer’s responsibilities. Article 12 states that the member state shall allocate the respective responsibilities of employment agencies and the client. However, it does not specify whether the responsibilities should lie with either the employment agency or the client. The listed responsibilities include rights in relation to collective bargaining, training, social security benefits and compensation for occupational health and safety claims. This is constructive in so far as Convention, 1997 (No. 181) places the obligation on the member state to determine and allocate these responsibilities. This allows for clarity and certainty for workers and the other parties in the triangular relationship as well. Ambiguity in this regard will be to the detriment of agency workers.

From the above, it is clear that in the past the ILO was opposed to the operation of employment agencies in that they would undermine the principle of labour not being a commodity and therefore their operation was prohibited or limited. In 1997, the ILO changed this policy and has since allowed the operation of employment agencies and provided for their regulation.

(d) Private Employment Agencies Recommendation, 1997 (No. 188)

The main thrust of Recommendation, 1997 (No. 188) is the protection of agency workers. Article 4 provides that member states should adopt measures to prevent unethical practices and Article 5 adds that each agency worker should have a written contract of employment. Such contracts can provide agency workers with certainty as to the particulars of their rights and duties and, at the very least, can provide clear evidence of their employment. Reference is also made to the health and safety of workers and the prohibition of discrimination, as well as promoting equality through affirmative action programmes. Measures should be taken to promote the use of proper, fair and efficient selection methods.

One of the key principles contained in Recommendation, 1997 (No. 188) relates to the transferring of agency workers to become employees of clients. Article 15 provides that employment agencies should not 'prevent the user enterprise from hiring an employee of the agency assigned to it', 'restrict the occupational mobility of an employee', or 'impose penalties on an employee accepting employment in another enterprise'. These rights are crucial in allowing an agency worker the transition from atypical work to standard employment. Any provision contained in an agency worker's contract with the employment agency which would prevent the worker from joining the client would contradict the notion that employment agencies could serve as a stepping stone to promote upward mobility into more decent jobs.

The latter part of Recommendation, 1997 (No. 188) deals with the relationship between public employment services and private employment agencies. Measures to promote co-operation are encouraged. Article 16 states that such co-operation should be encouraged in relation to the implementation of a national policy on organising the labour market.

(e) ILO’s Guide to Private Employment Agencies, 2007

The ILO’s Guide to Private Employment Agencies, 2007 was published for the purpose of providing guidance to national legislators in drafting may include laws or regulations which provide for penalties, including prohibition of private employment agencies engaging in unethical practices.

Article 5 states: 'Workers employed by private employment agencies as defined in Article 1(2) of the Convention and their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment.'

Article 13 states: 'Private employment agencies and the competent authority should take measures to promote the utilization of proper, fair and efficient selection methods.'
employment agency legal frameworks which accord with ILO norms. The Guide to Private Employment Agencies, 2007 confirms that Convention, 1997 (No. 181) was implemented to replace earlier standards aimed at abolishing employment agencies. The ILO presently recognises that employment agencies can contribute to the functioning of the labour market. Despite the on-going neo-liberal questioning of the regulation of employment agencies, it is clear that the ILO has adopted the view that regulation is necessary — the main justification being the protection of agency workers. At the same time, the Guide to Private Employment Agencies, 2007 adopts a balanced approach by providing that regulation should improve the functioning of the labour market and not serve as a tool to restrain competition or create unnecessary burdens for employment agencies.

The Guide to Private Employment Agencies, 2007 alludes to the fact that the ILO makes reference to a wide range of agencies as contained in the definition of employment agency as they all have placement of workers as their main function. However, this in itself is problematic. The different services are very different and agency workers would have received better protection had all of the different categories not been covered by one convention and the same set of rules. So, for example, a matching agent connects the worker and the client and at no stage becomes involved in the employment relationship. Contrary to this, the employment agency in the triangular relationship employs the workers and becomes the employer in the employment relationship. The problem with this is that the idea of serving as a stepping stone becomes moot should there be no emphasis on the temporary nature of the relationship between the employment agency and agency worker.

Neither the Convention, 1997 (No. 181) nor the Recommendation, 1997 (No. 188) (and for that matter the Guide to Private Employment Agencies, 2007) contains any guidance pertaining to the limits on the duration of placement with clients or provisions which have the effect of converting the employment relationship between the employment agency and agency worker to one of employment between the client and agency worker.

V EVALUATION AND CONCLUSION

To what extent do the provisions of the LRA of 1996, as amended, comply with norms established by the ILO? We discuss a number of key features from the ILO’s Convention, 1997 (No. 181) and Recommendation, 1997 (No. 188) below against which we evaluate the regulation of employment agencies in South Africa.

Without being too prescriptive, the ILO endorses the notion that employment agencies should not be prohibited and should be allowed to operate within a flexible labour market. Beyond this, agency workers should be protected in a number of key respects, namely:

(a) agency workers should not be denied the right to freedom of association and the right to bargain collectively;
(b) agency workers should be entitled to equal treatment by employment agencies, without discrimination on various grounds, which include but are not limited to race, colour, sex, religion and political opinion;
(c) the responsibilities of the employment agency and of the client vis-à-vis agency workers should be clearly allocated respectively and agency workers should have a written contract of employment;
(d) agency workers should not be prohibited from being employed directly by a client, their occupational mobility should not be restricted and they may not be penalised for accepting employment elsewhere;
(e) measures should be adopted to prevent unethical practices and fees or costs should not be charged to agency workers by employment agencies.

Adopting a holistic view, there can be no doubt that the majority of the amendments are aligned with the international norms listed above. This is so despite the fact that a number of the amendments may have been expressed in different words and in a number of instances the protective measures have been incorporated implicitly. It is clear that employment agencies are recognised and that they are not barred from existence.

See the discussion of the particular articles contained in the ILO’s Convention, 1997 (No. 181) and Recommendation, 1997 (No. 188) in para IV(c) The current Private Employment Agencies Convention, 1997 (No. 181) above.

See the Introduction and Article 2 of Convention, 1997 (No. 181).

See Article 2 of Convention, 1997 (No. 181) as well as Article 4 of Recommendation, 1997 (No 188) regarding the general principle that agency workers should be protected.

See Article 4 of Convention, 1997 (No. 181).


See Article 5 of Convention, 1997 (No. 181).

See Article 15 of Recommendation, 1997 (No. 188).

See Article 4 of Recommendation, 1997 (No. 188).

See Article 7 of Convention, 1997 (No. 181).
Added to this, effect has been given to the notion of the protection of agency workers within the broad parameters of a flexible labour market. In an attempt to put an end to the under- and over-regulation debate pursuant to the introduction of the amendments, the Deputy Director-General of the Department of Labour stated that

"[i]t is also some who are clearly of the view that our labour legislation is too restrictive and ... over-regulated. It will not be helpful, at this time, to fall back on old debates ... As government, we are committed to a policy and legislative approach that is captured by the concept of regulated flexibility ... [which] accepts the necessity of regulation, but also accepts the need for flexibility. The key issue is finding the right balance."  

It is evident that the legislature has gone a long way in introducing far-reaching fortification of workers' rights for lower income earners who are generally more vulnerable. This may be seen as a blow for neo-liberal literati who argue for the complete deregulation of the labour market. Despite this, flexibility for higher income earners remains in place. This category has received almost no additional protection and it begs the question whether the legislature has gone far enough in meeting international norms in protecting this category of workers. We return to this issue later in our evaluation. We turn now to each of the protective measures referred to above.

Firstly, in a positive move, agency workers' collective bargaining rights have been strengthened. As referred to above, the LRA Amendment Act of 2014 now provides that an agency worker may not be employed by an employment agency on terms and conditions that are less favourable than the provisions of sectoral determinations or collective agreements which are applicable to the employees of the client where the agency worker renders services. It is significant that this protective measure applies to all categories of agency workers irrespective of their level of income and this persuades us that this ILO norm is adhered to.

The second norm, which relates to the right to equality, has indisputably been improved in respect of lower earning agency workers. In addition to the fact that all agency workers are protected against unfair discrimination in terms of the ELA, lower earning agency workers are now also expressly protected in so far as they have the right to 'equal treatment' compared to other workers of the client. We accept this to mean that they are entitled to equal conditions of service. This goes further than the international norm and we fully support this development. However, it must to be pointed out that (as previously argued) international norms only establish a low base and should probably have been improved to include equality of treatment and conditions of service rather than merely proscribing unfair discrimination based on arbitrary grounds.

Unfortunately South Africa does not meet the third norm, which relates to the clear allocation of responsibilities of the employment agency and of the client. This norm is currently being introduced into the LRA. Admittedly so, the LRA Amendment Act of 2014 does specify that employment agencies and clients are jointly and severally liable in respect of the provisions of the BCEA, sectoral determinations and collective agreements. However, the legislature has dismally failed in its attempt to provide clarity as to the question where the employer responsibilities lie in respect of unfair dismissal and unfair labour practices. It is not clear whether the client alone or the client and the employment agency are deemed to be employers in respect of unfair dismissal and unfair labour practice disputes. The opposing opinions expressed in Refilwe Esatu Mphirrine and Assign Services (Pty) Ltd discussed earlier attest to this. Regrettably, the ILO norms do not provide guidance in respect of the interpretation of South Africa's deeming provision. The only guidance that can be gleaned from international norms is that the definition of employment agency recognises the traditional triangular relationship which recognises that the agency employs the worker. Also, no provision is made in respect of the transfer of responsibilities from the agency to the client after the expiration of some or other time period. Supporters of the dual relationship approach would probably argue that this implies that the employment agency should remain a party to the contract of employment despite the coming into existence of an additional employment relationship.

It is also regrettable that the LRA Amendment Act of 2014 woefully fails the fourth principle in as far as agency workers should not be prohibited from being employed directly by clients subsequent to being placed with them. Policymakers have missed a golden opportunity to establish agency work as a vehicle in terms of which agency workers can gain experience with a particular client and for the clients to use this as...

107 See s 198(4C) of the LRA of 1995.
an opportunity to evaluate agency workers for future, more secure employment. The whole idea of agency work serving as a stepping stone in an upward transition to better work has been overlooked. This lacuna should be rectified by means of regulations in terms of the ESA of 2014.

In the fifth instance, the amendments to the LRA of 1995 do not address fees or costs being charged to agency workers. However, despite this, South Africa does meet the international norm in as far as ESA of 2014 prohibits any such practice.\(^{1,2}\)

In conclusion, international labour standards have had an influence on the South African policymakers and legislature in relation to the regulation of agency work. South Africa’s policy of ‘regulated flexibility’ also draws upon aspects of employee protection and employer flexibility, much like the international instruments seek to do. The recent amendments in respect of agency work are for the most part compliant with international standards. However, a significant shortcoming of the amendments is that they have failed to include in particular the two aspects identified above. These omissions, in combination with the fact that all agency workers earning above the earnings threshold are excluded from most of the additional protective measures introduced by the LRA Amendment Act of 2014, result in lower protection for agency workers than is the case under the international standards of the ILO. One hope for agency workers is that the courts may be able to set precedents which can bring agency workers closer to the realisation of the international standards not accounted for in legislation.

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2. BAcc LLB (Stell),
3. **Comm LLB (Stell) PhD (Edinburgh),
4. Competition Act 89 of 1998 (as amended) (the ‘Act’) merely defines a prohibited practice as ‘a practice prohibited in terms of Chapter 2’, which means that the term covers ‘those types of conduct which the Act prohibits because they have or may have anti-competitive effects or are the product of unacceptable uses of market power.’
5. The complaint procedure has been the subject of several prolonged legal challenges. The Competition Appeal Court (‘CAC’) referred to these attempts to escape responsibility as the ‘Stalingrad’ method of litigation after the attritional methods of warfare used during the siege of that city (now Volgograd) in World War II. The CAC observed with

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\(^{12}\) See s 15 of the ESA.