An analysis of the deeming provision relating to temporary employment services in South Africa

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Declaration of originality

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SUMMARY

The Labour Relations Act 66 of 1995(LRA) is the primary legislation regulating employment relations in South Africa. Despite its effort to provide adequate protection to employees employed in various capacities, the LRA seems to have fallen short when it comes to atypical employees. Before the LRA was amended in 2015, Temporary Employment Services (TESs) were largely unregulated; this provided ample opportunities for clients to exploit the vulnerable TES employees. It is this abuse and exploitation which lead to the introduction of the section 198A(3)(b) of the LRA(deeming provision).

The deeming provision applies to TES employees who earn below the monetary threshold stipulated in section 6(3) of the Basic Conditions of Employment Act 75 of 1997. This is an effort by the legislature to reduce the exploitation of employees working in atypical forms of employment. Despite these efforts, the deeming provision has been subject to a lot of debate particularly with regard to its correct interpretation and application. It is against this background that this dissertation will focus on the ways in which the deeming provision has been interpreted by trade unions and labour brokers.

This dissertation will also discuss the judgement handed down in *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC), to determine whether the court provided sufficient clarity about the meaning behind section 198A(3)(b) of the LRA.

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CHAPTER 1

INTRODUCTION

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1. Introduction

1.1 Background

In the current era, "standard employment is steadily melting away in the advanced economics".[1] This is due to what Du Toit calls "the fourth industrial revolution", which is characterised by advanced technology, digitalisation and robotics.[2] This has caused a large acceleration of new forms of so-called atypical work.[3] One example of atypical work is the Temporary Employment Services (hereinafter TES), which in laymen's terms has been called labour broking.[4]

This working relationship involves an agency which employs a worker to provide labour to a client.[5] It is a working relationship which is regulated by a contractual undertaking.[6] Interestingly the worker works at the workplace of the client, under the supervision and control of the client.[7] This so-called triangular (or tripartite)

[1] Thompson 2003 *ILJ* 1798.
[2] Du Toit 2019 *ILJ* 1.
[3] It has also been referred to as non-standard work or irregular work. See also Mills 2004 *ILJ* 1204.
[4] The terms TES and labour broking have been used interchangeably throughout this dissertation.
[5] Bosch 2013 *ILJ* 1632.
[6] Bosch 2013 *ILJ* 1632.
[7] Bosch 2013 *ILJ* 1632.

relationship,[8] in principle means that "the recruitment, dismissal, and employment functions conventionally performed by the employer are outsourced to an intermediary (or TES)".[9] The three parties involved in such a relationship include; the agency (labour broker), the client, and the worker.[10] The worker is the most vulnerable party in this tripartite relationship.[11]

The courts have in the past emphasised the fact that although TESs are allowed it does not mean that "the labour broker and the client are at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client".[12]

With the world of work changing so rapidly, the labour sector has seen an increase in atypical forms of work mainly due to factors such as externalisation and casualization.[13] Externalisation is known as the process used by employers to transform and delegate the work that was previously done by permanent employees to temporary employees.[14] It can be found in industries such as mining, retail, engineering, clothing, banking, etc.[15] On the other hand casualization is the "process of shaping employment relations to deprive workers, particularly vulnerable workers, of their basic statutory rights as employees".[16]

The use of TESs has not been without controversy in South Africa. This is evident by the call from union federation-Cosatu,[17] and National Union of Metalworkers of SA (NUMSA) for the "death knell" of the entire TES industry.[18] This demand for a ban was highly motivated by the fact that employees in the TES are treated unfairly and to a certain extent exploited. It was also argued that the use of TESs was "an obstacle to the goal of the creation of decent jobs".[19] From a social perspective, commentators argued that "the social protection afforded to employees in non-

[8] Van Eck 2010 *PER* 111.
[9] Van Nierkerk *et al Law@work* 68.
[10] Gericke 2010 *Obiter* 95.
[11] *Nape v INTCS Corporate Solutions (Pty) Ltd (*2010) 8 *BLLR* 852 (LC) para 59.
[12] *Nape v INTCS Corporate Solutions (Pty) Ltd (*2010) *8 BLLR* 852 (LC) para 60.
[13] Gericke 2010 *Obiter* 98.
[14] Gericke 2010 *Obiter* 95.
[15] Gericke 2010 *Obiter* 98.
[16] Benjamin 2004 *ILJ* 789.
[17]Smith 2018 https://www.fin24.com/.../legal-experts-weigh-in-on-labour-broker-ruling-20180727 [Accessed 14 June 2019].See also Van Eck 2010 *PER* 107.
[18] Smith 2018 https://www.fin24.com/.../legal-experts-weigh-in-on-labour-broker-ruling-20180727 [Accessed 14 June 2019].
[19] Tshoose and Tsweledi 2014 *Law, Democracy and Development* 339.

standard employment is significantly inferior compared to protection for employees in standard employment".[20]

As evident from various commentators and widespread persistent protests against labour broking,[21] employees in TESs have been marginalised from the protection of the LRA to "a position [of] the underclass in the workforce".[22] This in my view is a direct disregard of section 23 of the Constitution, which provides that "[e]veryone has the right to fair labour practices."[23] The word "everyone" has a broad meaning and as such should include vulnerable TES employees. Furthermore, reports by the Department of Labour concluded that "agency workers were paid significantly less than those employed directly by the firms where they work and have no security of employment".[24]

Scholars have previously held that the South African labour legislations have been premised on the traditional concept of employment. The same legislations are then applied to workers in atypical forms of employment which results in it having little to no impact in terms of protecting atypical workers.[25] It was in this light that the legislature amended the LRA in 2015, to provide more protection to TES employees.

This is evident from the memorandum of objectives to the Labour Relations Amendment Bill 2012, which held that "policy makers [needed] to respond to the increased in-formalisation of labour by ensuring that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work".[26] This led to the coming into effect of the Labour Relations Amendment Act.[27] Amongst other amendments the LRAA inserted section 198A to specifically deal with the abuses that the TES employees faced.

[20] Tshoose and Tsweledi 2014 *Law, Democracy and Development* 338-339.
[21] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others (*2018) 39 *ILJ* 1911 (CC) para 65.
[22] Gericke 2010 *Obiter* 94.
[23] *Constitution of the Republic of South Africa*, 1996.
[24] Benjamin 2016 www.cth.coza/wp-content.../South-African-Labour-Law-A-Twenty-Year-Review.pd [Accessed 13 June 2019].
[25] Mills 2004 *ILJ* 1204.
[26] Van Nierkerk *et al Law@work* 67.
[27] *Labour Relations Amendment Act* 6 of 2014. Hereinafter the LRAA.

1.2 Motivation of study

Section 198(1)(a)-(b) of the Labour Relations Act (hereinafter the LRA)[28] formally defines 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".*

The increase in atypical forms of employment such as the TES has also brought about problems of "disguised employment". Disguised employment is described as "an employment relationship that is lent an appearance that is other than the underlying reality".[29] For instance, employers have previously held that TES workers are not employees but rather they are independent contractors. In terms of determining whether TES workers are employees or independent contractors;

> *"the Labour courts have adopted the approach that the contractual relationship is not definitive as to the nature of the legal relationship and a court must examine the true nature of the relationship between the parties, particularly where a party is induced into a relationship that deprives a party of the protection granted by the status of employment".*[30]

In *LAD Brokers (Pty) Ltd v Mandla*[31] the court had to determine "whether the respondent had been employed by the appellant or whether he was an independent contractor as envisaged in subsection (3) of section 198 of the Labour Relations Act 66 of 1995 (the Act)".[32] Both the Labour Court and the Labour Appeal Court were in agreement that there is an employment relationship between the TES worker and the TES.[33] Therefore, TES workers are employees and not independent contractors. Recognition as an employee forms an important part of a workers human dignity and personhood.[34]

Section 198 of the LRA governs the TES industry in South Africa, its purpose must be contextualised within the framework of section 23 of the Constitution and the LRA

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[28] Act 66 of 1995.
[29] Benjamin 2004 *ILJ* 794.
[30] Benjamin 2004 *ILJ* 795. See also *Rumbles v Kwa BAT Marketing (Pty) Ltd* (2003) 57 ZALC para 22, where the court held that the terms of the contract between the parties needs to be considered. In addition, the court looks at the manner, in which the agreement was implemented, and the nature and extent of any indications of employment manifested by that implementation.
[31] (2001) 9 *BLLR* 1137 (LAC).
[32] *LAD Brokers (Pty) Ltd v Mandla* (2001) 9 *BLLR* 1137 (LAC) para 2.
[33] *LAD Brokers (Pty) Ltd v Mandla* (2001) 9 *BLLR* 1137 (LAC) para 32. See also Van Nierkerk *et al Law@work* 69.
[34] Van Eck and Van Staden 2018 *Merc LJ* 420.

as a whole.[35] In order for a TES working relationship to come into being, "the TES concludes a commercial agreement with the client in terms of which the client is invoiced for the services being rendered".[36] The TES also concludes a contract of employment with the TES employee; this contract governs employment duties and rights of the employee.[37] Therefore there is no direct contractual undertaking between the client and the TES employee.

The question of the true identity of the employer of the TES employees has been an uncertainty for a long time. The courts have in the past come to grapple with this uncertainty both before the coming into effect of the LRAA and even after. In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck,*[38] the court had to determine who the employer of the employee (Rieck) was.[39] Rieck had an employment contract with a TES; the TES provided her services to the appellant (client) in return for a fee.[40] Rieck performed her duties under the control and direction of the client.[41] The court looked at the extended definition of "employer", and held that the TES was the true employer.[42]

In *Nape v INTCS Corporate Solutions (Pty) Ltd*,[43] the court accepted that the true employer was the client.[44] This was also confirmed in *Dyokwe v De Kock NO and Others*,[45] where the court accepted the true employer of the applicant as Mondi the client.[46] From the above, it is evident that there was inconsistency in determining who the true employer was.

When the LRAA came into force it provided more protection to TES employees in order to shield them from being further exploited by the client and the labour broker.

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[35] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 42.
[36] Van Eck 2010 *PER* 108.
[37] Van Eck 2010 *PER* 108.
[38] (2007) 1 *BLLR* 1 (SCA)
[39] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* (2007) 1 *BLLR* 1 (SCA) para 19.
[40] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* (2007) 1 *BLLR* 1 (SCA) para 25.
[41] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* (2007) 1 *BLLR* 1 (SCA) para 25.
[42] Van Nierkerk *et al Law@work* 72.
[43] (2010) 8 *BLLR* 852 (LC).
[44] *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 8 *BLLR* 852 (LC) para 43.
[45] (2012) 10 *BLLR* 102 (LC).
[46] *Dyokwe v De Kock NO and others* (2012) 10 *BLLR* 102 (LC) para 80.2.

The LRAA introduced section 198A which provides a formal definition of what temporary work means, and the duration of temporary work.[47]

There was also an introduction of section 198A(3)(b)(i) of the LRA which provides that, the employees of the TES, who render services that are no longer temporary services as defined by the LRA, are deemed to be the employees of that client and the client is deemed to be the employer. This provision only applies to employees earning below the monetary threshold[48] set in the Basic Conditions of Employment Act 75 of 1997(hereinafter BCEA). It should be noted that for section 198A of the LRA to apply there should be an existing relationship between a client and a temporary employment service provider.[49]

The deeming provision was meant to provide clarity about the true identity of the employer within the labour broking environment and to prevent employers from disguising the true employment relationship. However, the deeming provision caused fierce debates regarding its correct meaning. This is evident from the case of *Refilwe Esau Mphirime and Value Logistics Ltd BDM Staffing (Pty) Ltd,*[50] where the commissioner had to amongst other things determine the correct interpretation of section 198A(3)(b) of the LRA. The commissioner found the sole employer interpretation correct.[51] The commissioner held that in cases of unfair dismissal and unfair labour practices the client is the duty bearer and should therefore be awarded all duties and obligations for purposes of the LRA when TES employees are no longer performing temporary work.[52] This means during the first three months of temporary work the TES bears all the responsibilities in respect of the LRA, once the three months lapses and the TES employee is no longer performing temporary work the client bears all the responsibilities.[53]

In interpreting the deeming provision some scholars interpreted the provision to mean that "the employee becomes an employee of the client and ceases to be an

[47] Section 38 of the LRAA.
[48] Currently R205433.30 is the monetary threshold set in the BCEA. See Grogan *Employment Rights* 45.
[49] *Proctor and Gamble Manufacturing SA (Pty) Ltd and Another v Mokadi and Others* (2018) ZALC para 17.
[50] 2015 (8) *BALR* 788 (T).
[51] Aletter and Van Eck 2016 *Merc LJ* 294.
[52] *Refilwe Esau Mphirime and Value Logistics Ltd BDM Staffing (Pty) Ltd* (2015) (8) *BALR* 788 (T) para 40.
[53] Aletter and Van Eck 2016 *Merc LJ* 294. See also *Refilwe Esau Mphirime and Value Logistics Ltd BDM Staffing (Pty) Ltd* (2015) (8) *BALR* 788 (T) para 49.

employee of the TES".[54] This essentially means that the TES loses its place in the triangular relationship after three months and the placed worker "transfers (in the manner of s 197) to the client".[55] On the other hand some scholars have interpreted the provision to mean that "the employee remains an employee of the TES but is also deemed to be an employee of the client".[56] Therefore, TES employees were not provided certainty about the true identity of their employer once the deeming provision kicks in.[57]

In *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others*,[58] the court had to determine the correct interpretation of section 198A(3)(b) of the LRA. The applicant in this case, Assign services (Pty) Limited[59] argued that the correct interpretation of the provision was the "dual employer" interpretation.[60] This means that the TES employees remain the employees of the TES whilst at the same time being deemed employees of the client for purposes of the LRA.[61] The respondent, being the National Union of Metalworkers of South Africa,[62] argued contrastingly that the correct interpretation of section 198A (3)(b) of the LRA was the "sole employer" interpretation.[63] This means that only the client becomes the employer of the TES employees once the deeming provision kicks in.[64]

The majority of the judges of the Constitutional Court agreed with the sole employer interpretation on the basis that it was more in line with the purpose of the LRA and the 2014 LRAA. Furthermore the court relied on the plain language used in the

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[54] Tshoose and Tsweledi 2014 *Law, Democracy and Development* 342.
[55] Grogan *Employment Rights* 45.
[56] Tshoose and Tsweledi 2014 *Law, Democracy and Development* 342.Grogan describes this to mean that; "while the broker remains the *actual* employer, the client is simply *assumed* to be the employer in the sense that the client now assumes the obligations and acquires the rights of an employer vis-à-vis the TES employee, but that the TES remains the employer in a kind of suspended sense." See Grogan *Employment Rights* 45.
[57] Van Nierkerk *et al Law@work* 69.
[58] (2018) 39 *ILJ* 1911 (CC).
[59] Hereinafter Assign services.
[60] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 14.
[61] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 14.
[62] Hereinafter NUMSA.
[63] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 14.
[64] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 14.

provision.[65] The minority decision, on the other hand, favoured the dual employer interpretation on the basis that there is an existing employment relationship between the TES and the TES employees, in addition, the deeming provision creates a statutory employment relationship between the TES employee and the client.[66]

Despite the fact that the Constitutional Court has ruled on the interpretation of the deeming provision, the lack of unanimity amongst the judges illustrates the difficulties that lie in the interpretation thereof. This dissertation seeks to analyse the interpretation and application of section 198A(3)(b) of the LRA,[67] which involves a examination of the Constitutional Court judgment of *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others*.[68]

2. Research Questions

The following research questions will be critically looked at in this dissertation:

1. What are the difficulties associated with the legal interpretation and application of section 198A(3)(b) of the LRA in the TES industry?
2. Does the Constitutional Court judgment of *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and others* (2018) 39 *ILJ* 1911 (CC) provide clarity about the true nature and identity of the employer in a TES? If so, what is the impact of the court's decision in practice?
3. Does the Constitutional Court judgment of *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and others* (2018) 39 *ILJ* 1911 (CC). go far enough to protect vulnerable employees in TES employment?

3. Research Methodology

The methodology that will be utilised in this dissertation will be desktop research. Various sources of law will be used to discuss the topic at hand. Importantly, case law and journal articles that deal with TESs and the problems associated with the correct interpretation and application of section 198A(3)(b) of the LRA will be considered.

[65] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 84.
[66] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 109.

This dissertation will also conduct a comparative analysis with the regulation of TESs in the United Kingdom (hereinafter the UK),[69] and Namibia as there are similar work arrangements that exist in both these countries. What is referred to as the TES in South Africa, is generally called the temporary work agency in the UK, whilst in Namibia it is referred to as employment hire services.[70]

There will also be a discussion on the ILO conventions which have in place regulatory frameworks to specifically deal with TESs. The Private Employment Agencies Convention 181 of 1997 becomes important in this regard. Its purpose is to protect TES employees from exploitation and abuses in the working environment, whilst also allowing private employment agencies to function effectively.[71] This shows that the ILO recognises the need for private employment agencies, "it thus seeks to allow and to regulate the industry rather than banning it and driving it under cover".[72] Therefore it will be interesting to gain insight into the extent to which South African laws are in line with international law standards.

4. Chapter Outline

Chapter one briefly discusses the topic at hand. It explains the research questions and the research methodology that to be used in answering the research questions.

Chapter two discusses the role of the Constitution and the ILO conventions in the interpretation and application of the LRA provisions.

Chapter three focuses on the difficulties associated with the interpretation of section 198A(3)(b) of the LRA, In doing so, the court judgment of *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and others* is discussed. An analysis of the court's decision, the reasoning behind it and the practical implications thereof is conducted.

Chapter four focuses on a comparative analysis of the regulatory framework used in the UK and Namibia for their labour broking industry.

[69] Hereinafter the UK.
[70] Section 126 of the *Namibian Labour Act* of 2004 (NLA).
[71] Article 2(3) of ILO Convention 181 of 1997. See also Van Nierkerk *et al Law@work* 68.
[72] Aletter and Van Eck 2016 *Merc LJ* 302.

Chapter five briefly summarises the discussions of the various chapters. It answers the research questions posed and provides views and recommendations from the author about the TES industry.

CHAPTER 2

PERSPECTIVES ON STATUTORY INTERPRETATION

Contents

2. Introduction

Section 198A(3)(b) of the LRA provides that:

> *"for the purposes of [the LRA], an employee-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".*

What is clear from a literal reading of section 198A(3)(b) of the LRA, is that it yields ambiguous interpretations of the proviso. On the one hand it could mean that both the TES and the client become the employers of the placed workers, whilst on the other hand it could mean that only the client becomes the employer of the placed worker for purposes of the LRA.

In attempting to understand the difficulties associated with the legal interpretation and application of section 198A(3)(b) of the LRA in the TES industry, it is important to first explore the various interpretation tools that have been used by the courts, in trying to ascertain the true intention of the legislature. The courts have used various interpretive tools to provide meaning to legislative texts. It is against this background

that chapter two of the dissertation will discuss statutory interpretation in the context of the LRA. The power of the court to interpret legislation provides the judiciary with an important tool which will continue to shape the labour law landscape within South Africa.[73]

Before the enactment of the Constitution and even a little after, there were two schools of thought about how to interpret legislation in South Africa. The first approach was the so-called orthodox text-based approach and the second approach was the text in context approach.[74] The former approach held that when interpreting legislation regard must be given to the literal meaning of the wording used in the provision. This means that the ordinary plain meaning of the word should be preferred and applied as the legislature's true intention.[75] Evidently this approach is not appropriate for the interpretation of section 198A(3)(b) of the LRA because it has led to ambiguous interpretations in practice.

Alternatively, the courts have used other aids to determine the correct interpretation of the legislative text.[76] In *CHEP South Africa (Pty) Ltd v Shardlow N.O and others*,[77] the court solidified the fact that language and the context in which the language appears plays an important role in statutory interpretation. The latter approach always aims to interpret legislation in a way that reconciles the legislative context and the meaning of the words used with the legislature's true intention.[78] Botha states that this approach "provides a balance between grammatical and overall contextual meaning".[79] This approach is appropriate for interpreting section 198A(3)(b) of the LRA because it allows the courts to understand the meaning of the provision within the context of the LRA, and it takes into account socio-economic considerations.

In the post-1994 constitutional dispensation the courts have had an obligation to interpret legislation against the background of the values and socio-economic rights enshrined in the Constitution and against international law (hereinafter the ILO instruments). Therefore, this chapter of the dissertation will also discuss the

[73] Van Eck and Van Staden 2018 *Merc LJ* 419.
[74] Botha *Statutory Interpretation: An Introduction for Students* 141-142.
[75] Botha *Statutory Interpretation: An Introduction for Students* 142.
[76] Botha *Statutory Interpretation: An Introduction for Students* 142.
[77] *Chep South Africa (Pty) Ltd v Shardlow NO & Others* (2019) 5 *BLLR* 450 (LC) para 19.
[78] Botha *Statutory Interpretation: An Introduction for Students* 150.
[79] Botha *Statutory Interpretation: An Introduction for Students* 150.

influence of the Constitution and ILO instruments in the interpretation of the LRA. Having said this, the courts still acknowledge that "it is by now trite that legislation is to be interpreted by applying the founding principles of statutory interpretation".[80]

2.1 The LRA's regulation of the Temporary Employment Services

Triangular employment relationships are not a foreign concept within the South African labour law jurisprudence. This is because the world of work as it is traditionally understood is changing, with new forms of atypical working arrangements emerging. Employees who find themselves working in non-standard forms of employment are remunerated for the results they generate rather than their time.[81] The LRA recognises and regulates triangular forms of employment, albeit that the regulation of such employment relationships has been subject to a lot of criticism.

2.1.1 LRA provisions prior to the 2015 Amendments

Before the 2015 amendments to the LRA, section 198 recognised the Temporary Employment Service (hereinafter TES) as the true employer of the worker, and the worker as the employee of the TES.[82] Section 198 further provided for the joint and several liability of the TES and the client. This applied in situations where there was an infringement of the workers' right with regard to collective agreements, arbitration awards regarding terms and conditions employment, or contraventions of the Basic Conditions of Employment Act 75 of 1997 (hereinafter BCEA).[83]

This caused confusion on the part of the employees because the party he or she should hold liable for the infringement of his or her rights was not the party to whom he or she reported on a daily basis.[84] TES employees were first required to sue the TES and only after the TES did not comply with the court order could they then sue the client. [85]

Section 198 of the LRA recognised the TES as the employer; however this recognition came with a lot of unanswered questions. In this working arrangement, the placed worker performed his or her work at the premises of the client and under the control and supervision of the client. Therefore, recognizing the TES as the

[80] *Chep South Africa (Pty) Ltd v Shardlow NO & Others* (2019) 5 *BLLR* 450 (LC) para 19.
[81] Fourie 2008 *PER* 111.
[82] Botes 2015 *SALJ* 103.
[83] Section 198(4) of LRA. See also Botes 2015 *SALJ* 103-104.
[84] Botes 2015 *SALJ* 107.
[85] Botes 2015 *SALJ* 107.

employer meant that the TES was the one responsible for the "infringement of the employee's rights and any unfair labour practices as regards the employee".[86] However, this has been criticised by some scholars as being impracticable because the TES is more involved with the human resource component of the employment. The TES has little to no control over the employee's actual work and work premises.[87]

These uncertainties led to the Labour Relations Amendment Bill of 2012 being issued. For purposes of this dissertation the Labour Relations Amendment Bill of 2012 will be discussed because its proposed amendments were incorporated into the 2 Labour Relations Amendment Act 6 of 2016 (hereinafter LRAA).

2.1.2 LRA provisions subsequent to the 2015 Amendments

The Minister of Labour proposed changes to be made to various labour legislations, including the LRA. Amongst other amendments, the Minister proposed the insertion of section 198A into the LRA.[88] These proposed amendments were subsequently accepted and incorporated into the 2014 LRAA.

The 2014 LRAA recognised temporary service as being "a period not exceeding three months".[89] This period was included to ensure that temporary work is genuinely temporary.[90] The need for amending the LRA was very necessary especially when one considers the lack of protection afforded to workers involved in atypical forms of work. The LRA was thus amended to specifically close the loopholes at the time and provide more protection to vulnerable employees.

With the amendments included in the 2014 LRAA, employees in atypical forms of work were given more protection against exploitation. More certainty was provided by the legislature about the joint and several liability of the client and the TES. For purposes of the joint and several liability of the client and the TES, the LRA provides that the employee "may institute proceedings against either the temporary

[86] Botes 2015 *SALJ* 106.
[87] Botes 2015 *SALJ* 106.
[88] Section 38 of the *Labour Relations Amendment Bill*, 2012.
[89] Section 38 of the LRAA.
[90] Botes 2015 *SALJ* 111.

employment service or the client or both the temporary employment service and the client".[91] This protection is further solidified in the BCEA, which provides that

> *"[t]he temporary employment service and the client are jointly and severally liable if the temporary employment service in respect of any employee who provides services to that client does not comply with this Act or a sectoral determination".*[92]

Most importantly for purposes of this dissertation, the legislature included the section 198A(3)(b) of the LRA which is also referred to as the deeming provision. Through the inclusion of section 198A(3)(b) of the LRA, the legislature was purposefully closing the loophole for further exploitation of the TES employees, by ensuring that temporary work is genuinely temporary and preventing the client from bypassing their responsibilities in terms of the LRA.[93] The legislature further included section 198A(4) of the LRA to prevent the client from terminating the employee's services before the deeming provision kicks in. Should the client attempt to bypass his status as the new employer by removing the employee before the three months lapses, this will be regarded as a dismissal.[94] Section 198A(4) of the LRA specifically provides that:

> *"[t]he 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".*[95]

This added protection means that the employee no longer bears the onus to prove dismissal, rather the onus of proof shifts to the employer to prove that the dismissal was based on a fair reason and following a fair procedure.[96] This is in line with the Termination of Employment Convention 158 of 1982 (hereinafter Convention 158 of 1982), which provides that no employer can terminate the employment of an employee without furnishing fair reasons which are linked to the employees capacity, conduct or the employers own operational requirements.[97] Therefore the client who dismisses a placed worker for purposes of escaping his responsibility in terms of

[91] Section 198(4A) of the LRA.
[92] Section 82(3) of the BCEA.
[93] Botes 2015 *SALJ* 111.
[94] Botes 2015 *SALJ* 111.
[95] Tshoose and Tshweledi 2014 *Law, Democracy and Development* 342.
[96] Van Nierkerk *et al* Law@work 222.
[97] Article 4 of Convention 158 of 1982.

section 198A(3)(b) of the LRA, will have to show that such a dismissal is both substantively and procedurally fair.[98]

Of importance is the fact that once the deeming provision kicks in, the employee of the client must work under terms and conditions of employment which are not less favourable than those of the client's permanent employees performing similar work.[99] The client as the employer of the placed worker can bypass this requirement provided it can show "a justifiable reason for different treatment".[100] The LRAA included various factors that could justify differentiated treatment, these are namely:

> *"(a)seniority, experience or length of service;*
> *(b) merit;*
> *(c) the quality or quantity of work performed; or*
> *(d) any other criteria of a similar nature, to determine a justifiable reason for different treatment, and such reason is not prohibited by section 6(1) of the Employment Equity Act, 1998 (Act No. 55 of 1998)".*[101]

This approach by the legislature is favoured insofar as it not banning the TES industry in South Africa but rather further regulating it to ensure; more legal certainty, provide competitive flexibility for the client and ensure job security for workers.[102] This is particularly important considering the high unemployment rate in the country; as such job security should be treated as a core consideration in the interpretation and application of the LRA.[103]

It is worth mentioning that since South Africa recognises and regulates competition, the drafters of the LRA followed an approach of "regulated flexibility" when they drafted the LRA.[104] This means that they created a regulatory framework of the LRA which takes into account different standards which are applicable to certain categories of employers and employees "depending on the remuneration earned by workers and the size of employers' undertakings".[105] In essence this means that the LRA was drafted in a way that provides protection to vulnerable employees whilst also allowing the competitive nature of the employer to thrive, and as such ensuring

[98] Van Nierkerk *et al Law@work* 222.
[99] Botes 2015 *SALJ* 111.
[100] Section 198A(5) of the LRA.
[101] Section 198D(2) of the LRA.
[102] Botes 2015 *SALJ* 109.
[103] *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (2003) (3) SA 1 (CC) para 42.
[104] Van Eck 2013 *De Jure* 604.
[105] Van Eck 2013 *De Jure* 604.

that no employer is over burdened by unnecessary constraints and costs which hinder competition.[106]

2.2 The influence of the Constitution in the interpretation and application of the LRA

The LRA provides that the interpretation and application of its provisions must be consistent with the Constitution.[107] This is because the Constitution is the supreme law of the country, and all persons and the law are bound by it.[108] Moreover, South Africa's legal jurisprudence has its foundation in the value of the rule of law.[109] From a constitutional perspective the rule of law requires that all law within the Republic of South Africa be in line with the Constitution.[110] The rule of law further rests on the principle that the courts must as independent bodies apply the law without prejudice or preference.[111] Beyond that, the founding values of the Constitution play an important role in the interpretation of the LRA and other laws because they "serve as reasons for rules".[112]

This justification is solidified by section 39(2) of the Constitution which provides a mandatory obligation on the judiciary to interpret legislative texts in a manner that is consistent with "the spirit, purport and objects of the Bill of Rights".[113] This means that the starting point in interpreting any legislation, including the LRA is the Constitution and not the legislative text itself.[114] In *Bato Star Fishing v Minister of Environmental Affairs and Tourism* (hereinafter *Bato Star Fishing*), the Constitutional Court confirmed the supremacy of the Constitution and confirmed the principle that the Constitution is the starting point when interpreting any legislation.[115] Against this decision, some academics have argued that the interpretation of legislation must take place within the "value-laden framework of the supreme Constitution which is

[106] Van Eck 2013 *De Jure* 604.
[107] Section 3(b) of the LRA.
[108] Section 2 of the Constitution, 1996.
[109] Section 1(c) of the Constitution, 1996.
[110] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* (2002) 21 ZACC para 19.
[111] Krüger 2010 *PER* 476. See also *S v Mamabolo* (2001) (5) *BALR* 449 (CC) para 14, 19, 38.
[112] Krüger 2010 *PER* 480.
[113] Section 39(2) of the Constitution, 1996.
[114] Botha *Statutory Interpretation: An Introduction for Students* 155.
[115] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (2004) (4) SA 490 (CC) para 72.

the highest law of the land".[116] This was also confirmed by the Labour Court, when it held that "it is trite that the LRA must be purposively construed in order to give effect to the Constitution".[117]

The Constitutional Court confirmed the principle that under the South African labour law jurisprudence, section 23 of the Constitution provides the parameters of how to interpret the LRA to ensure that those who interpret it do so within the framework of the Constitution and the ILO conventions.[118] The court also held that in giving effect to section 23(1) of the Constitution, the courts must be conscious of the mutually important but competing interests of the workers and their employers whilst ensuring that equilibrium between these interests are reached.[119]

Also of importance are the ILO conventions and recommendations which play an important role when interpreting whether the provisions of the LRA are consistent with international law standards.[120] To this point the ILO and its instruments will be discussed next.

2.3 The importance of the International Labour Organisation

2.3.1 Background

The ILO is an important body within the context of international labour law. It uses its status to influence member states to recognise its importance.[121] Beyond this, the ILO aims to enhance social justice and the recognition of labour rights in society.[122] Its role is not only to issue international law instruments but also to facilitate social interaction between various labour bodies involved in the world of work. It is worth mentioning that social dialogue is an important method that is used by the ILO to ensure meaningful deliberations between employer's organisations, trade unions and

[116] Botha *Statutory Interpretation: An Introduction for Students* 153.
[117] *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 *ILJ* 1122 (LC) para 12.
[118] *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (2003) (3) SA 1 (CC) para 41.
[119] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (2003) 2 *BLLR* 103 (CC) *para* 40.
[120] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (2003) 2 *BLLR* 103 (CC) para 28.
[121] Kujinga and Van Eck 2018 *PER* 4-5.
[122] International Labour Organisation 2019 https://www.ilo.org/global/about-the-ilo/mission-and- objectives/lang--en/index.htm [accessed 26 September 2019].

the government.[123] It is these deliberations that create policies on labour standards that are recognised and recommended in the international arena.

The ILO has a Constitution in place which is binding to all countries who are members of the ILO. Despite this, member states are not automatically bound by the instruments issued by the ILO. This is because there is no "international labour parliament that has the power to bind sovereign states".[124] Instead, member states can choose out of their own will to be bound by the ILO instruments once they have ratified them.[125] If a member state ratifies an ILO convention but does not give effect to it, the ILO supervisory bodies may intervene.[126] South Africa is one of the member states of the ILO; it re-joined the ILO in 1994 during the dawn of democracy.[127] This is important because under the current Constitutional dispensation international law is recognised as a foundational principle of democracy. [128]

2.3.2 The influence of ILO instruments on South African labour law jurisprudence

The LRA recognises the importance of international law instruments by providing that the purpose of the LRA is amongst other things to give effect to obligations incurred by South Africa as a member state of the ILO.[129] Moreover, the LRA affords public international law superior status by providing that when one interprets the LRA they must favour an interpretation that is consistent with public international law.[130] This was confirmed by the Constitutional Court which held that "South Africa's international obligations are thus of great importance to the interpretation of the [LRA]".[131]

[123] International Labour Organisation 2019 https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang-en/index.htm [accessed 26 September 2019].
[124] Kujinga and Van Eck 2018 *PER* 4.
[125] Kujinga and Van Eck 2018 *PER* 4.
[126] Kujinga and Van Eck 2018 *PER* 4.
[127] Van Nierkerk *et al Law@work* 22.
[128] Kujinga and Van Eck 2018 *PER* 5.
[129] Section 1(b) of the LRA.
[130] Section 3(c) of the LRA.
[131] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (2003) 2 *BLLR* 103 (CC) para 26.

The Constitution affords a superior status to international law, and it makes it mandatory for international law to be taken into account when the courts interpret the LRA and the Bill of Rights.[132] The Constitution provides that;

> *"[w]hen 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".*[133]

Customary international law is also recognised as an important source of law by the Constitution provided that it is consistent with the Constitution and South African legislation.[134] The constitutional status of customary international law ensures that it is no longer subject to subordinate legislation.[135]

In order to interpret provisions of the LRA, it is important to understand the role of different ILO instruments and their relevance within the South African labour law jurisprudence. ILO standards are important to South Africa, because it is a member state of the ILO and it actively plays an important role in the affairs of the organisation.[136] The ILO provides a variety of instruments that can be used by member states to regulate labour law within their countries. ILO Conventions have been recognised as the most important standards of the ILO.[137] Therefore, in order for these Conventions to be binding law on member states, the member state has to ratify the Convention.[138]

Once a member state has ratified a Convention, it needs to ensure that the terms of such a convention are implemented and incorporated in their domestic law.[139] This entails that once an ILO Convention has been ratified by South Africa; the terms of such a Convention must shape and guide all labour legislation and policies within the country. Another important source of law from the ILO, are the ILO Recommendations. The ILO Recommendations are different from the ILO

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[132] Section 39(1)(b) of the Constitution,1996 provides that, "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law".
[133] Section 233 of the Constitution, 1996.
[134] Section 232 of the Constitution, 1996.
[135] Aletter and Van Eck 2016 *Merc LJ* 298.
[136] South Africa rejoined the ILO on the 26th of May 1994. See Van Nierkerk *et al Law@work* 22.
[137] Van Nierkerk *et al Law@work* 22.
[138] The ILO Constitution specifically provides that; "if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention". See also Van Nierkerk *et al Law@work* 23.
[139] Van Nierkerk *et al Law@work* 25.

Conventions in that member states cannot ratify them and they are simply recognised as non-binding guidelines which are mostly used to supplement ILO Conventions.[140]

Something worth mentioning is that the Constitutional Court recognised binding and non-binding international law instruments as international law.[141] This means that when the court interprets legislation, it can use both binding and non-binding international law standards. Furthermore, the courts have accepted a broad understanding of international law by providing that both the ILO Recommendations and the ILO Conventions constitute international law.[142] Following this, the Private Employment Agencies Convention[143] and the Private Employment Recommendations[144] will be discussed.

2.3.3 Private Employment Agencies Convention 181 of 1997

An important ILO Convention in the TES environment is Convention 181 of 1997. The ILO refers to private employment agencies, which it defines as "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 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".*[145]

The ILO recognises the importance of regulating private employment agencies to ensure that workers are afforded employment protection and job security, whilst at the same time allowing the clients to be able to use these private employment agencies in accordance with their business needs.[146] Therefore, ILO Convention 181

[140] Aletter and Van Eck 2016 *Merc LJ* 300.
[141] *S v Makwanyane* (1995) (3) SA 391 (CC) para 35.
[142] Aletter and Van Eck 2016 *Merc LJ* 299.
[143] Private Employment Agencies Convention 181 of 1997 (Hereinafter Convention 181 of 1997).
[144] Private Employment Agencies Recommendation 188 of 1997 (Hereinafter Recommendation 188 of 1997).
[145] Article 1(1) of Convention 181 of 1997.
[146] Article 2(3) of Convention 181 of 1997.

of 1997 aims to provide more protection to agency workers through regulating the agency work environment. In this regard, it is said that the ILO follows a balanced approach in how it regulates the agency work environment. On the one hand the ILO regulates agency work to ensure a well-functioning labour market, whilst on the other hand; it ensures that there is no unnecessary restraint for competition within the labour market.[147]

Moreover, the value of equality in the form of equal treatment is appreciated by the ILO. There is also recognition that vulnerable members of society should be afforded employment opportunities within their societies. To this point Convention 181 of 1997 provides that;

> *"[i]n order to promote equality of opportunity and treatment in access to employment and to particular occupations, a Member shall ensure that private employment agencies treat workers 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. Paragraph 1 of this Article shall not be implemented in such a way as to prevent private employment agencies from providing special services or targeted programmes designed to assist the most disadvantaged workers in their job seeking activities".*[148]

Aletter and Van Eck have criticised Article 5 of Convention 181 of 1997 for not satisfactorily addressing the need for equality in the workplace between workers of an employment agency and the client's direct employees.[149] Furthermore, Convention 181 of 1997 does not provide adequate certainty about which of the parties, the client or the private employment agency, bears the employment obligations and responsibilities with regards to the worker. The allocation of employer responsibilities is left up to the member state to decide on through the use of their labour legislation and labour practice.[150] This in my opinion is a missed opportunity by the ILO to provide certainty about the true nature of the employer within this triangular relationship.

2.3.4 Private Employment Agencies Recommendation 188 of 1997

As mentioned above, Recommendations are non-binding ILO instruments and cannot be ratified by member states. Despite this, Aletter and Van Eck argue that even though Recommendations are not legally binding, they should be morally

[147] Aletter and Van Eck 2016 *Merc LJ* 306.
[148] Article 5(1)-(2) of Convention 181 of 1997.
[149] Aletter and Van Eck 2016 *Merc LJ* 303.
[150] Article 12 of Convention 181 of 1997.

binding.[151] Recommendations play an important role in the interpretation and application of the ILO Conventions. For purposes of this dissertation, Recommendation 188 of 1997 will be discussed as it supplements Convention 181 of 1997, and as such they should be read in conjunction.[152]

In terms of the protection provided to workers, Recommendation 188 of 1997 seeks to ensure that member states regulate private employment agencies to ensure that they curb unethical practices within the labour broking environment.[153] Furthermore, it is recommended that private employment agencies and workers have in place written employment agreements which set out express terms and conditions of employment.[154] This is very important to ensure that there is no uncertainty between the parties especially due to the complex nature of this triangular relationship between the worker, the client and the private employment agency. Each role player within the triangular relationship should be aware of their rights and obligations.

Recommendation 188 of 1997 addresses the need to regulate private employment agencies whilst at the same time, providing flexibility to workers not to be deprived of various employment opportunities within the labour broking environment and externally. To this point, Recommendation 188 of 1997 provides protection against the unnecessary restriction of employment opportunities of the workers involved with private employment agencies.[155]

Conclusion

Although the LRA sought to better regulate the protection of employees employed through a TES, the deeming provision has created uncertainty in practice. In interpreting the LRA both the Constitution and the ILO instruments have an important role to play. Drawing from constitutional principles, it is clear that the deeming provision must be interpreted against the background of the rule of law and must be interpreted to be in line with the values of the Constitution. This provides a contextual background against which section 198A(3)(b) of the LRA can be interpreted.

[151] Aletter and Van Eck 2016 *Merc LJ* 300.
[152] Section 1 of Recommendation 188 of 1997.
[153] Section 4 of Recommendation 188 of 1997.
[154] Section 5 of Recommendation 188 of 1997.
[155] Section 15 of Recommendation 188 of 1997.

Moreover it assists with interpreting section 198A(3)(b) in a way that gives effect to the rights enshrined in the Bill of rights.

Drawing from the applicable international standards, notably Convention 181 of 1997 and Recommendation 188 of 1997, the ILO recognises and aims to protect workers who are engaged in agency work. A strong message from these ILO instruments is the need for equal treatment of workers engaged in agency work. It is unfortunate that the ILO instruments do not address the question about who is the true employer in these triangular relationships, it rather leaves this allocation of responsibility to the member states. Against this information, the ILO instruments do not assist with the interpretation of section 198A(3)(b) of the LRA.

CHAPTER 3

Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others (2018) 39 *ILJ* 1911 (CC)

Contents

3. Introduction

After many years of uncertainty regarding the correct interpretation and application of section 198A(3)(b) of the LRA (deeming provision), the Constitutional Court finally put the issue to bed. The court had to determine whether the so-called sole employer interpretation or the dual employer interpretation was correct insofar as section 198A(3)(b) of the LRA is concerned. The judgement of the Constitutional Court is welcomed insofar as it provides vulnerable workers with certainty concerning the true nature and identity of their employer after the deeming provision is triggered.

This chapter of the dissertation will discuss the litigation history leading up to the judgement of the Constitutional Court in Assign *Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC). A critical analysis of the court's judgement will be undertaken, including an assessment of the effect of the judgment on the clients business and the workers employment status.

Before proceeding with the discussion of the above mentioned case, the lessons in chapter 2 of this dissertation must be remembered. In chapter 2 it was concluded that, in considering the law of statutory interpretation together with constitutional imperatives, section 198A(3)(b) of the LRA must be interpreted against the values and rights enshrined in the Constitution. In addition, the context in which the provision appears in the LRA together with the language that is used, must be applied collectively to determine the true meaning behind section 198A(3)(b) of the LRA.

Therefore, the discussion of the Constitutional Court's judgement will also take into account how the court used the above mentioned interpretative aids to find the true meaning behind section 198A(3)(b) of the LRA.

3.1 Factual background

On the 23rd of April 2015 Assign Services (TES) referred a dispute to the CCMA after it, Krost (the client), and NUMSA failed to reach an agreement on the correct interpretation of the deeming provision.[156] This dispute arose as a result of Assign Services placing some of its workers at Krost to provide labour for a period in excess of three months, thereby causing the deeming provision to be triggered.[157] The conflicting views of the parties essentially gave rise to two schools of thought regarding the correct interpretation and application of section 198A(3)(b) of the LRA. The one school of thought supported the view that the provision must be interpreted to mean that “the employee becomes an employee of the client and ceases to be an employee of the TES”.[158] The other school of thought interpreted the provision to mean that “the employee remains an employee of the TES but is also deemed to be an employee of the client”.[159]

[156] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 15.
[157] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and* Others (2018) 39 *ILJ* 1911 (CC) para 13.
[158] Tshoose and Tsweledi 2014 *Law, Democracy and Development* 342.
[159] Tshoose and Tsweledi 2014 *Law, Democracy and Development* 342. See also Grogan *Employment Rights* 45. Grogan describes this to mean that; "while the broker remains the *actual* employer, the client is simply *assumed* to be the employer in the sense that the client now assumes the obligations and acquires the rights of an employer vis-à-vis the TES employee, but that the TES remains the employer in a kind of suspended sense."

3.1.1 The arbitration award by the CCMA

The Commissioner held that the sole employer interpretation of the deeming provision is correct and that it will provide more protection to the vulnerable TES employees.[160] The Commissioner further held that the dual employer interpretation would result in a lot of uncertainty in practice, especially in the event of disciplinary actions and reinstatement of TES employees.[161]

3.1.2 Labour Court judgement

The Labour Court reviewed the decision of the CCMA Commissioner. The court held that the correct position is that the TES is the rightful employer of TES employees under the common law. This is because there is a contract of employment which exists between these two parties.[162] Moreover, the court found that when the deeming provision kicks in it equally makes the TES the employer for purposes of the LRA.[163]

The learned judge held that there is no reason why the TES should not the regarded as the employer of TES employees for purposes of the LRA. With regards to the client, the court held that the deeming provision also recognises the client as the employer for purposes of the LRA.[164] Therefore, the court was in favour of the dual employer interpretation, and as such set aside the decision of the CCMA.[165]

3.1.3 Labour Appeal Court judgment

The decision of the Labour Court was taken on appeal to the Labour Appeal Court (LAC). NUMSA held that the Labour Court's decision of finding that the Commissioner of the CCMA committed an error of law was incorrect.[166] On the other hand, Assign Services argued that the decision of the Labour Court was correct and that there had been no material error of law committed by the learned judge.

The issue to be decided by the LAC had to do with the correct interpretation of the deeming provision. The LAC found that the Labour Court's decision in the interpretation of the deeming provision was misdirected and that the arbitration

[160] *NUMSA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) para 11.
[161] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) ZACC para 20.
[162] *Assign Services (Pty) Ltd v CCMA and Others (*2015) 36 *ILJ* 2853 (LC) para 9, 11.
[163] *Assign Services (Pty) Ltd v CCMA and Others* (2015) 36 *ILJ* 2853 (LC) para 12.
[164] *Assign Services (Pty) Ltd v CCMA and Others* (2015) 36 *ILJ* 2853 (LC) para 11.
[165] *Assign Services (Pty) Ltd v CCMA and Others* (2015) 36 *ILJ* 2853 (LC) para 28.
[166] *NUMSA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) para 20.

award of the CCMA was correct and reasonable.[167] The LAC found in favour of the sole employer interpretation, on the basis that it was more in line with the primary purpose of the LRA.[168] The court held that the intention of the legislature in introducing the deeming provision must have been to elevate TES employees from being vulnerable in atypical work to a position of stability in standard forms of employment.[169] The court clarified the intention of the legislature by stating that;

> *"[t]he purpose of the deeming provision is not to transfer the contract of employment between the TES and the placed worker to the client, but to create a statutory employment relationship between the client and the placed worker…the TES would be the employer only in theory and an unwarranted "middle-man" adding no value to the employment relationship".*[170]

3.1.4 The Constitutional Court

3.1.4.1 Assign Service's argument

Assign services was unhappy about the decision of the LAC, and applied for leave to appeal to the Constitutional Court. Assign Services argued that the effect of the judgement of the LAC amounts to a ban of the TES industry.[171] Furthermore Assign Services contended that the LAC did not properly interpret section 198A(3)(b) of the LRA within its overall context taking into account the language used by the legislature.[172] Assign services contended that the 2014 amendments of the LRA did not affect section 198(2) of the LRA, therefore as it stands the TES remains the employer of the placed worker for purposes of the LRA.[173] It was further argued by Assign Services that the sole employer interpretation would result in the placed workers losing the protection afforded to them by some provisions of the LRA.[174] A placed employee will be transferred to a new employer without the placed employee's consent and "forced" into new employment relationships on terms to

[167] *NUMSA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) para 47.
[168] *NUMSA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) para 46.
[169] *NUMSA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) para 43.
[170] *NUMSA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) para 43.
[171] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 29.
[172] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 29.
[173] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 30.
[174] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 30.

which they have not agreed".[175] It is on this basis that Assign Services argued in favour of the dual employer interpretation.

3.1.4.2 NUMSA's argument

NUMSA argued that their own interpretation of section 198A(3)(b) of the LRA allows the TES industry to be regulated in respect of employees earning below R205433.40.[176] Furthermore NUMSA argued that the commercial contract between the TES and the client is not affected when section 198A(3)(b) of the LRA is triggered.[177] Assign Services' characterisation of the employment relationship between the TES and the employee was criticised by NUMSA. NUMSA disagreed with Assign Services by contending that the relationship between the TES and an employee before placement with a client is not an employment relationship, in other words the TES does not employ the employee before placing them with a client.[178] In the initial stage, the relationship between the TES and the employee is a mere contractual relationship which only becomes an employment relationship when the employee is placed with a client and starts getting remunerated for services rendered.[179] With regards to the common law contract between the TES and the employee, NUMSA argued that it is a contract which contains the terms and conditions of employment once a client requires their services.[180] It is on this basis that NUMSA argued in favour of the sole employer interpretation.

3.1.4.3 The decision of the Constitutional Court

3.1.4.3.1The majority decision

The Constitutional Court granted Assign Services leave to appeal on the basis that it was in the interests of justice to do so. Furthermore, the court acknowledged that the issue at hand would have serious implications on a large number of persons who

[175] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 30.
[176] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 31.
[177] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 31.
[178] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 32.
[179] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 32.
[180] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 32.

rely on the services of TESs to enter the South African labour market.[181] The court relied on three interpretative aids to understand the meaning behind section 198A(3)(b) of the LRA. These aids are; the plain language used by the legislature, the context in which the provision exists and the overall purpose of the LRA.[182]

As mentioned in chapter 2 of this dissertation, the text in context approach has been one of the preferred techniques in interpreting any legislation. On this basis the Constitutional court first looked at the application of section 198A of the LRA within the context of section 23 of the Constitution and section 1 of the LRA. Section 1 of the LRA provides that the purpose of the LRA is to "advance economic development, social justice, labour peace and democratisation of the workplace…", whilst section 23 of the Constitution advances the right to fair labour practices for everyone. Therefore, section 198A(3)(b) of the LRA must be interpreted against the standard of fairness laid down in section 23 of the Constitution. This standard of fairness must be extended to the TES, the worker, and the client as an additional party in this triangular relationship.

The Constitutional Court also followed the purposive approach, to determine the purpose of section 198A(3)(b) of the LRA within the broader context of the LRA. In light of this approach, the court held that the purpose of section 198A of the LRA is to regulate the working arrangement of employees rendering temporary work and who fall below the threshold set in the BCEA.[183] In the broader scheme of things, the court summarised the purpose of section 198A(3)(b) of the LRA as making sure that the TES employee is genuinely rendering temporary work and that there is a level of accountability between the TES, the client and the workers with regards to the true employment relationship.[184]

Another approach which was adopted by the Constitutional Court, was the text based approach, where the court took into account the language that was used by the legislature in drafting section 198A(3)(b) of the LRA. The court compared and

[181] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 38-39.
[182] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 41.
[183] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 53.
[184] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 67, 70.

distinguished between the language and effect of section 198(2) and section 198A(3)(b)(i) of the LRA. Section 198(2) of the LRA states that;

> *"[f]or the purposes of the [LRA] a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer".*[185]

In this regard, it was held that the effect of section 198(2) of the LRA is to create a statutory contract of employment between the TES worker and the TES.[186] Section 198A(3)(b)(i) of the LRA on the other hand provides that "an employee not performing a temporary service for the client; is deemed to be the employee of that client and the client is deemed to be the employer".[187] As mentioned above this provision applies to employees who earn below R205433.30 per annum, and only becomes operative when an employee no longer performs temporary work as defined in the LRA. The court confirmed that these two provisions of the LRA cannot operate simultaneously, and as a result;

> *"[w]hen marginal employees are not performing a temporary service as defined, then section 198A (3) (b) (ii) replaces section 198(2) as the operative deeming clause for the purposes of determining the identity of the employer".*[188]

Just to recap, section 198A(3)(b)(ii) states "an employee not performing such temporary service for the client is, subject to the provisions of section 198B, employed on an indefinite basis by the client".

An analysis of the triangular relationship between the parties was examined by the court, to determine the role of the various parties. In particular, the court held that the role of the TES is to provide labour to the client for a fee; and it is also responsible for paying the TES workers their remuneration.[189] In essence the court recognised the TES as "merely the third party that delivers the employee to the client… [t]he employee does not contribute to the business of the TES except as a commodity".[190]

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[185] Section 198(2) of the LRA.
[186] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 83(a).

[188] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 83(f).
[189] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 73.
[190] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 73.

In light of the above, the court then proceed to analyse the sole employer interpretation against the background of section 198(4A) of the LRA. Section 198(4A) of the LRA reads as follows:

> *"[i]f the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b)-*
>
> *(a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;*
>
> *(b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and*
>
> *(c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either".*

Taking into account section 198(4A) of the LRA, the court held under the sole employer interpretation, a placed worker still retained their rights as contained in the provision. The court concluded on this interpretation on the basis that, when a client is deemed to be the employer of the placed employee, such an employee can still make his or her claims against the TES as long as the TES continues to play its administrative role by paying such an employee his or her salary.[191] The court supported this by further stating that when section 198A(3)(b) of the LRA is triggered "this is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship".[192]

Having considered all of the above, the court concluded that the sole employer interpretation is correct and confirmed that the legislature introduced the deeming provision as a mechanism to provide more protection to employees in temporary employment and to ensure that temporary services are genuinely temporary.[193]

3.1.4.3.2 The minority decision

The minority disagreed with the interpretation favoured by the majority of the court. Justice Cachalia, who handed down the judgment for the minority argued that by looking at the language used by the legislature in section 198A(3)(b) of the LRA, the

[191] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 80.
[192] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 75.
[193] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 65.

legislature intended that after the three months lapses both the TES and the client would be regarded as the employers of the worker.[194] This would provide the vulnerable worker with additional protection in the context of labour broking.

The court held that the dual employer interpretation was reinforced by the language that the legislature used in the provision.[195] To support this decision, the court then cross referenced section 198A(3)(b) of the LRA against section 198(4) and 198(4A) of the LRA. Section 198(4) of the LRA reads as follows:

> *"[t]he temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes -*
>
> *(a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;*
>
> *(b) a binding arbitration award that regulates terms and conditions of employment;*
>
> *(c) the Basic Conditions of Employment Act; or*
>
> *(d) a sectoral determination made in terms of the Basic Conditions of Employment Act",*

whilst section 198(4A) of the LRA which provides that:

> *"[i]f the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b)-*
>
> *(a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;*
>
> *(b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and*
>
> *(c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either".*

Justice Cachalia held that a reading of both these provisions against section 198A(3)(b) of the LRA, clearly supported the dual employer interpretation because when this deeming provision kicks in the employee still continues to enjoy the additional protection contained in the above provisions. Justice Cachalia further went on to state that section 198(4A) specifically made reference to section 198A(3)(b) of the LRA, therefore favouring the dual employer interpretation because the provisions must be aligned and not read in isolation.[196] Furthermore, the court established that

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[194] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ 1*911 (CC) para 92.
[195] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 93.
[196] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 96.

the dual employer interpretation is in line with the BCEA, as the latter recognises the joint and several liability of the client and the TES in respect of the worker.[197] Justice Cachalia then looked at the BCEA which provides that a worker provided for under a TES working arrangement is the employee of the TES and the TES is their employer.[198] Against this background the minority of the court criticised the sole employer interpretation for failing to harmonise the provisions of the LRA and the BCEA.[199]

In essence, the dissenting judgement favoured the dual employer interpretation on the basis that such an interpretation created a statutory employer-employee relationship between the client and the worker in addition to the already existing employment relationship between the TES and the worker.[200] This was viewed as providing more protection to the employees in the long run.

3.2 An analysis of the court's decision

I support the decision of the Constitutional Court insofar as it providing certainty about the correct meaning of section 198A(3)(b) of the LRA. The court expressly endorsed the sole employer interpretation; however this interpretation is not without its shortcomings. These shortcomings include the court not provide clarity and direction about the practical difficulties that can arise between the TES and the client, in the event that the client terminates the commercial agreement. It also fails to address what should be done in circumstances where the client does have employees directly employed by him, for purposes of section 198A(5) of the LRA.

The first part of this section will focus on an analysis of the majority decision in not sufficiently addressing the effects of the sole employer interpretation on the commercial contract. The Second part will discuss the failure of the majority decision in addressing the effect of its judgement on section 198A(5) of the LRA. The final part of this analysis will briefly discuss the extent to which I believe that the majority decision continues to protect vulnerable employees, despite the decision of the minority.

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[197] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 106.
[198] Section 82(1) of the BCEA. This section is identical to section 198(2) of the LRA.
[199] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 107.
[200] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 109.

3.2.1 The commercial contract

Despite the Constitutional Court not ruling in favour of Assign Services, it is opined by some that the court's judgment positively protects marginalized employees and regulates the TES industry. I support this statement and also believe that the decision taken by the Constitutional Court to validate the sole employer interpretation is correct. Having said this, the sole employer interpretation does have its shortfalls, especially in light of the court failing to provide clarity and direction about the commercial contract that exists between the TES and the client. On this subject, the court held that there is nothing in the law that prevents the client from terminating its commercial contract with the TES once the deeming provision is triggered.[201]

Seeing that this is the case, an interesting question is what happens when the client decides to terminate the commercial contract between itself and the TES. As previously discussed, the TES plays more of an administrative role within the triangular relationship. As such, the client can decide to no longer make use of the services of the TES and rather take the administrative responsibility on its own. In such an instance the TES no longer has a role to play as a go between, between the client and the placed worker. From a commercial point of view, I believe that the client would have to pay a termination fee; again this would be subject to the provisions contained in the commercial contract regarding early termination of the agreement.

The implications of such a termination on the statutory responsibilities that the TES has towards the placed worker are also not discussed by the court. I believe that in the event that the client decides to terminate its commercial contract with the TES, from an employment perspective the TES will no longer meet the definition of a TES as contemplated in section 198(1) of the LRA. Section 198(1) of the LRA provides that:

> *"In this section, "temporary employment services" means 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".*

[201] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 64.

In light of not meeting the above definition, the TES will cease being recognized as the employer of the worker as provided for in section 198(2) of the LRA. Therefore, all the statutory responsibilities that the TES has towards the employee will have to be transferred onto the client. These statutory responsibilities stem from the BCEA, the Unemployment Insurance Fund 63 of 2001, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, and other legislations which impose responsibilities on the employer. Again, these are simply my views, hopefully in future litigation the courts will straighten out these unclear issues.

The sole employer interpretation fails to discuss the value of a TES once a placed worker is deemed to be an employee of the client. Many clients might feel that there is no need to make use of the services of a TES due to the endorsement of the sole employer interpretation. In other instances, TESs have felt that they have been dealt a low blow and that "the ruling [made by the Constitutional Court] would have adverse effects on their profitability and potentially destabilise the labour market".[202]

In unpacking this, it is important to remember that the sole employer interpretation does not apply to all workers who render services to a client through the TES. Quite evidently, section 198A(3)(b) of the LRA, only affects those workers earning a remuneration that falls below the monetary threshold set in the BCEA.[203] This is expressly provided for in the heading of section 198A which reads as follows;"[a]pplication of section 198 to employees earning below earnings threshold". Therefore, the deeming provision only gets triggered when a TES worker earns below R205433.30 per annum and renders services which are no longer temporary as defined in section 198A(1)(a). Services are no longer temporary when they are performed for the benefit of a client by an employee for a period exceeding three months.[204]

As such the deeming will not affect TESs who pay employees a remuneration that is above R205433.30 per annum. This is expressly provided for in section 198A(2) of

[202] Mahlakoana 2018 https://www.timeslive.co.za/news/south-africa/2018-07-26-concourt-ruling-deals-a-blow-to- labour- brokers/ [Accessed 1 October 2019].
[203] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 53.
[204] Section 198A(1)(a) of the LRA.

the LRA and correctly explained by author Grogan who holds that "broking by registered entities remains permissible within limits. Labour brokers may lawfully supply clients with labour for periods of up to three months, or indefinitely if their employees earn above the threshold".[205]

Therefore, TESs will need to negotiate higher pay for their employees, and I believe that clients will pay because of the undeniable value TESs have in society. The importance of TESs in South Africa is briefly summarised below.

Atypical forms of employment such as the TES have an important role to play especially in a country such as South Africa, which is marked by high levels of unemployment.[206] Gericke recommends that “every society needs a system that is responsible for the creation of jobs and has the development of skills as its highest priority”.[207] This is true because currently there are not enough standard forms of employment, therefore organized labour, business and other stakeholders are forced to rely on atypical forms of employment to close loopholes in the labour market.

One needs to take a moment and reflect on the importance of TESs in South Africa, from the client’s perspective. From a business point of view, clients favoured and continue to favour TESs because of the “reduction of labour costs and the enhancement of flexibility linked to uncertainty and the completion in the business environment”.[208] Benjamin states that “labour broking [has] been utilised by firms to reduce standard employment in order to reduce labour costs and minimize risks associated with employment”.[209] In simple terms this means that employers favour TESs because they are able to bypass the stringent labour laws and avoid attracting any responsibilities of an employer whilst having work done for them for a duration which they dictate.[210] Therefore the client (business) who uses the workers in the TES exercises control over the labour to be performed and sets the standards to be met, whilst bypassing employer responsibilities.[211]

[205] Grogan *Employment Rights* 46.
[206] Carvalho 2019 https://tradingeconomics.com › South Africa [Accessed 13 June 2019].
[207] Gericke 2010 *Obiter* 97.
[208] Gericke 2010 *Obiter* 96.
[209] Benjamin 2016 www.cth.coza/wp-content.../South-African-Labour-Law-A-Twenty-Year-Review. 30 [Accessed 13 June 2019].
[210] Bosch 2013 *ILJ* 1632.
[211] Bosch 2013 *ILJ* 1632.

Furthermore, TESs are very important to clients because the world of work is changing so rapidly that "employers are being forced to turn to more flexible options than permanent employment".[212] Another value that TESs bring to the client is that, the client is able to find workers with specialised skills and make use of those skills according to the needs of the business and at a lesser cost then the cost of a permanent employee.[213] Therefore, the use of TESs provides flexibility that the standard form of employment does not. Research found that the business of clients who use TES employees have been able to make it through harsh economic times because they are able to find people with the right skills as needed to "enable them to take on projects that their competitors, who would potentially have downsized through mass retrenchments, cannot".[214]

The above-mentioned demonstrates that TESs play a fundamental role for workers and clients. Therefore, there is still value in making use of their services.

3.2.2 Section 198A(5) of the LRA

A loophole exists in the sole employer interpretation, specifically with regards to section 198A(5) of the LRA. This section expressly provides that;

> *"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'*.[215]

Although I am mostly inclined towards the majority decision, the judgement fails to address the uncertainty that exists in instances where the client does not have a an employee in their organisation performing the same or similar work to that of the TES worker. Is the answer that the client negotiates new terms and conditions of employment with the placed worker or does he continue to employ the placed worker on the current working terms and conditions?

A similar question arose in the case of *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd*,[216] where the CCMA had

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[212] Gericke 2010 *Obiter* 97.
[213] Gericke 2010 *Obiter* 96.
[214] Singer 2013 https://cdn.ymaws.com/www.apso.co.za/resource/collection/4C98A79B-6CA6-4B52-A46DE7880B210DA0/The_economic_importance_of_retaining_your_flexibility.pdf [Accessed 1 October 2019].
[215] Section 198A(5) of the LRA.
[216] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019.

to determine if section 198A(5) and 198D of the LRA are applicable to the employees who wanted to be transferred onto the books of the client as permanent employees.[217] The applicants (placed workers) were employed by Workforce Group (TES) to render services to the client (Swissport).[218] The applicants were employed as forklift drivers.[219]

The applicants argued that their work and role is similar to that of the cargo workers who were employed directly by the client.[220] The CCMA had to determine whether the applicants performed similar work to that of cargo controllers. In this regard the Commissioner compared the evidence led by both the applicants and respondents and held that although there were a few overlaps between the work performed by cargo controllers and the applicants, the evidence also showed that there was a huge difference between their respective jobs.[221] Some of the huge differences stem from the fact that the position and status of cargo drivers carries with it more responsibility and seniority than that of the applicants.[222]

Despite this, the commissioner accepted that the client was the employer of the applicants by virtue of the Constitutional Courts judgment for purposes of the LRA. In practice this does not mean that the applicants are entitled to be transferred "into the books" of the client.[223] The placed workers only become employees of the client for purposes of the LRA .This entails that the client will be recognised as the employer of these placed workers in cases of unfair dismissals, unfair labour practices, and other rights around collective bargaining. The applicants in this case did not succeed

[217] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 3.
[218] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 4.
[219] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 4.
[220] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 6.
[221] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 15.
[222] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 15.
[223] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 16, 17.

with their claim on the basis that their work was incomparable to that of cargo drivers.[224]

Interestingly, the Commissioner held that where the client does not have a permanent employee performing similar work to which the temporary employee can compare, section 198A(5) of the LRA does not apply. It is my opinion that in such a case new terms and conditions of employment between the placed worker and the client should be negotiated. It is no secret that in the triangular employment relationship the worker has little to no power to be able to negotiate their own terms of employment. Moreover, they might not receive the same benefits they would have received had they been employed permanently in the first place.

If the client has permanent employees chances are high that such workers receive more benefits then employees employed through the TES. This is clearly illustrated in *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd ,* where it was not disputed by the parties that the employees employed directly by the client (Swissport) received more benefits than employees employed through a TES.[225] Therefore, it would make sense from the placed workers point of view that he or she be allowed to negotiate new terms and benefits of employment in the event that the client does not have his own workers performing similar work. This would be in line with the legislature's intention to ensure employees in atypical employment are protected and given more stable employment opportunities.[226] This is a loophole that has been left open by the sole employer interpretation. It would be interesting to see the courts perspective on such an issue in future case law to come.

In instances where the client does have employees directly employed by him, section 198A(5) could have serious effects on the business of the client. From a business perspective, the court's judgment has the effect that, the client must provide benefits to the placed workers, which are similar to his permanent workers performing similar work. Benefits will include comparable salaries, among other things. This will have an effect on the balance sheet of the client as the sole

[224] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 20.
[225] *GIWUSA obo Mgedezi and others v Swissport SA (Pty) Ltd and The Workforce Group (Pty) Ltd* (unreported) case number WECT 18795-18 of 22 March 2019 para 6.
[226] *NUMSA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) para 43.

employer. Although the client pays a regular fee to the TES for services offered by the employees, having to take on such employees indefinitely could potentially cost more in the long run considering additional benefits that the client's permanent employees earn. An example could be that the client's permanent employees receive more annual leave, better pension fund benefits, higher salaries, amongst other things which the client would now also have to offer to the newly placed employees. It is therefore imperative that clients consider their business needs when making use of the services of a TES.

3.2.3 An analysis of the minority decision

The minority decision was is in favour of the dual employer interpretation. It supported this interpretation on the basis of the language that the legislature used in section 198A(3)(b), section 198(4) and section 198(4A) of the LRA. The latter sections recognise the joint and several liability of the client and the TES, as an added protection for the worker. The minority held that this wording is also used in the BCEA, as such the court held that both the BCEA and the LRA support the dual employer interpretation. Additionally, the dual employer interpretation is supported by the minority for providing additional protection to vulnerable workers.

In terms of the first reason advanced by the minority for supporting the dual employer interpretation, I am of the view that although section 198(4) and section 198(4A) of the LRA hint at supporting the dual employer interpretation, the sole employer interpretation also allows for the application of the joint and several liability of the TES and the client. The majority correctly pointed that as long as the TES is responsible for the remuneration of the employee and that there is still a relationship between the TES and client, liability against the TES still exists.[227] Therefore, in the event that the client continues to make use of the services of the TES after the deeming provision is triggered, which it is at liberty to do, the placed worker will continue to enjoy its protection under section 198(4) and section 198(4A), because the client is only the deemed employer of the placed worker for purposes of the LRA, whilst the TES will remain the employer of the placed worker for purposes of the BCEA and other applicable legislation. Again this is the case for as long as the

[227] *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC) para 61, 64.

commercial contract between the client and the TES exists, and the TES continuing to play its administrative role towards the placed worker.

In light of this, the sole employer interpretation is aligned with the purpose behind the BCEA, section 198A(4) and section 198A(4A) of the LRA. The purpose of these provisions and the BCEA is to protect marginalized workers.

Conclusion

It is great that the Constitutional Court finally put the endless debate surrounding the correct interpretation and application of section 198A(3)(b) of the LRA to bed. The court's judgment is welcomed insofar as it aims to provide marginalized employees, employed by the TES with more protection. It is also great that the Constitutional Court recognises the client as the sole employer of the placed worker.

Despite this hallmark, the court's judgment still leaves many unanswered questions surrounding the termination of the commercial agreement between the parties and the implications thereof. Concerns have been raised about the economic implications that the judgement will have on the business of the client and the TES industry. Although some clients might be reluctant to make use of the services of a TES due to the court's judgement, I maintain that there is still value in making use of the services of a TES.

What still needs to be remembered is that the TES employees who are regarded as employees of the client after section 198A(3)(b) of the LRA has kicked in, are only employees of the client for purposes of the LRA only. This means that the client does not interfere in any way in the employment relationship between the TES and the employee. The client will be recognised as the employer of the placed worker for purposes of unfair labour practices, unfair dismissals and collective bargaining provided for in the LRA. This makes sense because the placed employee works under the control of the client, as such the client is in a better position to deal with these issues.

On the other hand the TES will have to continue to ensure that it meets its statutory duties as contemplated in the BCEA, the Unemployment Insurance Fund 63 of 2001, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, and other applicable legislations excluding the LRA. This makes sense because the TES plays

more of an administrative role, and therefore such statutory responsibilities are more in line with the role of the TES. Based on the above, I conclude that the majority decision of the Constitutional Court does go far enough to protect vulnerable workers who are affected by the deeming provision.

CHAPTER 4
COMPARATIVE ANALYSIS ON THE REGULATION OF TEMPORARY EMPLOYMENT SERVICES

Contents

4 Introduction

As mentioned in previous chapters, South Africa's labour law jurisprudence has been shaped by amongst other things, international law and foreign law. This is solidified by the Constitution which provides that when one is interpreting the Bill of Rights they may consider foreign law.[228] This chapter will discuss the law regulating labour broking in the United Kingdom (hereinafter the UK) and Namibia.

This is for the most part important because South Africa forms part of the world which becomes interconnected through technological advancement. Consequently,

[228] Section 39(1)(c) of the Constitution, 1996.

in order to participate effectively within the global economy, South African laws must be continuously revised and adapted to suit the changing world of work. This chapter of the dissertation will therefore discuss the extent to which the law regulating TESs in South Africa is advanced in light of the lessons which can be learnt from the UK and Namibia regarding their regulation of labour broking.

4.1 United Kingdom

4.1.1 Background

Labour broking in the UK is not only legal but has been increasing over recent years in light of the ever-changing world of work. Against the changing nature of employment it has become increasingly necessary to establish a legal framework that will provide sufficient protection for atypical employees whilst allowing for labour flexibility. Within the context of labour relations, labour flexibility is defined as "the ability to reduce or increase employment or wage levels with ease; increase mobility; make more elastic use of skills; and introduce non-conventional work arrangements".[229]

Against this background author Gamwell's research paper identifies that there has been a shift from standard, traditional, full-time working arrangements to "a plethora of contingent working arrangements".[230] The increase in the use of atypical forms of employment can be linked to various economic elements such as; recession, increased demand for labour, the fourth industrial revolution, increased competition and various business restructuring.[231]

4.1.2 The European Council Directive on Temporary agency work

The regulation of labour broking in the UK is largely influenced by the European Council Directive on Temporary Agency Work (hereinafter TAW).[232] Initially, the regulation of agency work under the EU Directive was opposed by various labour stakeholders in the UK on the basis that over-regulating agency workers in the

[229] Arnold and Bongiovi 2013 https://doi.org/10.1177/0002764212466239 [Accessed 26 December 2019] [Accessed 26 December 2019] 294.
[230] Gamwell www.ilr.cornell.edu/international/event/upload/Gamwell_Paper.doc [Accessed 26 December 2019] 3.
[231] Burgess and Connell *International Perspective on Temporary Agency Work* 59.
[232] European Union Directive 2008/104/EC on temporary agency work (Hereinafter the EU Directive).

labour force would result in many jobs being lost and would negatively affect the UK economy.[233]

The EU Directive legally refers to labour broking as temporary agency workers. The purpose of the EU Directive is to protect temporary agency workers and to improve the quality of work that such employees do, whilst also establishing a legal framework that will facilitate flexible working arrangements and job creation.[234] Furthermore, the EU Directive promotes equal treatment of temporary agency workers, as it does not condone unfair discrimination against such employees based a certain grounds.[235] An interesting aspect of the EU Directive is that in Article 2 it holds that its purpose is amongst other things to promote the recognition of temporary work agencies as the employer.[236] The UK's regulations are an extension of the EU Directives and provide a legal context of what international labour law requires with regard to TESs.[237] With recent headlines showing that the UK wants to remove itself as a member of the EU, it might happen that the law regulating agency workers in the UK might drastically change.[238]

4.1.3 The Agency Workers Regulations

Against the legal principles and guidelines laid down in the EU Directive, the UK adopted the Agency Workers Regulations.[239] To supplement the Agency Workers Regulation certain guidelines were enacted to provide guidance on the application and interpretation of the Agency Workers Regulation. These key instruments play a significant role in the regulation of temporary agency work in the UK and provide necessary safeguards to such employees. Similarly, to labour broking in South Africa, in the UK the temporary agency relationship is a triangular relationship. This triangular relationship consists of three parties, namely; the temporary agency worker, the temporary work agency and the hirer.[240]

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[233] Burgess and Connell *International Perspective on Temporary Agency Work* 65.
[234] Article 2 of the EU Directive.
[235] Article 5 of the EU Directive. Article 5(1)(b*)* of the EU Directive specifically provides for "equal treatment for men and women and any action to combat any discrimination based on sex, race, or ethnic origin, religion, beliefs, disabilities, age, or sexual orientation…".
[236] Article 2 of the EU Directive.
[237] Ebrahim 2017 *PELJ* 11.
[238] Ford and Slater 2016 https://www.researchgate.net/publication/308186147 [Accessed 26 December 2019] 4.
[239] Agency Workers Regulations 93 of 2010. Hereinafter the Agency Workers Regulations.
[240] Agency Workers Regulations, Guidance (2011) 8.

The temporary work agency is formally defined as:

> *"[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".*241

Another important party in this triangular relationship is the hirer, which is formally defined as:

> *"a person engaged in economic activity, public or private, whether or not operating for profit, to which individuals are supplied, to work temporarily for and under the supervision and direction of that person".*242

The employee in this relationship is the agency worker, which is legally defined as 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 to perform work and services personally for the agency".*243

Agency workers in the UK are provided with various terms and conditions of employment. For this purpose, the Agency Workers Regulation distinguishes between the rights acquired by so-called “day one’’ agency workers verses rights given to those agency workers who have completed a continuous assignment with the same hirer, in the same role, for at least 12 consecutive weeks (qualifying period).[244] From the first day an agency worker begins their assignment under the supervision and control of the hirer, he or she must be provided with certain entitlements. These entitlements relate to agency workers being treated no less favourably than a comparable worker or employee directly hired by the hirer. This means the agency workers must be given access to facilities of the hirer and access to information regarding vacancies available with the hirer.[245] The former entitlement means that the agency worker must be given access to the hirer’s toilets and showers, common rooms, staff rooms, the staff canteen, childcare services, and access to job vacancies.[246] In the same light, there are further entitlements afforded to agency workers provided that the agency worker has completed at least 12

[241] Article 4 of the Agency Workers Regulations.
[242] Article 2 of the Agency Workers Regulations.
[243] Article 3(1) of the Agency Workers Regulations.
[244] Ford and Slater 2016 https://www.researchgate.net/publication/308186147 [Accessed 26 December 2019] 5.
[245] Agency Workers Regulations, Guidance (2011) 15.
[246] Ford and Slater 2016 https://www.researchgate.net/publication/308186147 [Accessed 26 December 2019] 12.

consecutive weeks in the same role under the same hirer (the equal treatment principle).

These terms and conditions of employment are afforded to them as if they had been directly employed by the hirer from day one of the assignment.[247] These terms and conditions of employment relate to pay; the duration of working time; night work; rest periods; rest breaks; and annual leave.[248] By extension the Agency Workers Regulation provides that an agency worker shall be entitled to the same basic working and employment conditions as he or she would be entitled to for doing the same work had he or she been recruited directly by the hirer.[249] These are the relevant terms and conditions of employment that are ordinarily included in the contracts of employees or workers of the hirer.[250] It is important to mention that these entitlements that the agency worker would get would be the same as those given to a comparable employee directly employed by the hirer.[251]

Interestingly though, there are anti-avoidance provisions included in the Agency Workers Regulations, which protects agency workers by not allowing hirers to structure assignments in a way which prevents an agency worker from completing the qualifying period in order to receive their entitlements.[252] What happens in practice is that the hirer successively renews the short assignments given to temporary agency workers with the aim to avoid the equal treatment principle. It is in such an instance that the anti-avoidance provision would apply when it can be proven that the hirer has structured the arrangement to intentionally deprive the agency worker from receiving their entitlements.[253]

An interesting aspect of the Agency Workers Regulation is the so-called Swedish Derogation contract. This contract in essence means that after the agency worker has completed a twelve week qualifying period in an assignment, the temporary work agency can instead of being liable under the equal treatment provisions on pay, rather "offer an agency worker a permanent contract of employment and pay them

[247] Ford and Slater 2016 https://www.researchgate.net/publication/308186147 [Accessed 26 December 2019] 12.
[248] Article 6 of the Agency Workers Regulation.
[249] Article 5(1) of the Agency Workers Regulation.
[250] Article 5(2)(a)-(b) of the Agency Workers Regulation.
[251] Article 6 of the Agency Workers Regulation.
[252] Agency Workers Regulations, Guidance (2011) 19.
[253] Agency Workers Regulations, Guidance (2011) 25.

between assignments".[254] This contract has been repealed and from 6 April 2020, the agency worker will be entitled to equal pay once they have completed a twelve week qualifying period in an assignment with the same hirer in the same role.[255]

In light of the Agency Workers Regulations not expressly discussing the employer-employee status between the agency worker, the hirer and the temporary agency, it may be helpful to look at case law in this regard.

4.1.4 Litigation in the UK surrounding temporary agency workers

The question surrounding the employment status of agency workers and the true identity of their employer had in the past been brought before the employment tribunal in the UK. In earlier decisions the Employment Appeal Tribunal (hereinafter the EAT) placed a high emphasis on there being an employment contract in order to recognise that there is an employment relationship between the agency worker and the end-user (hirer).[256]

A shift was seen when the UK courts looked beyond the need for a contract of employment, to focus on other factors which could potentially support an employment relationship between an agency worker and the hirer and/or the temporary work agency. This was illustrated in the case of *Dacas v Brook Street Bureau (UK) Limited*,[257] where an agency worker claimed that she was unfairly dismissed after she had been working as a cleaner.[258] The first legal issue to be decided on was whether the agency worker was the employee of the temporary agency or the hirer.[259] On appeal, the EAT confirmed the decision of the Employment Tribunal by holding that the agency worker was indeed the employee of the temporary agency. This decision was based on the tribunal applying various tests namely; the control test, mutuality of obligation test and the market investigation test.[260] These tests were later endorsed in the case of *Cable & Wires Pic v Muscat*.[261]

[254] Agency Workers Regulations, Guidance (2011) 40.
[255] Agency Workers Regulations, Guidance (2011) 40.
[256] *Hewlett Packard Limited v O'Murphy* (2002) IRLR 4 para 46, 51, 52.
[257] *Dacas v Brook Street Bureau (UK) Limited* (2004) 358 IRLR.
[258] *Dacas v Brook Street Bureau (UK) Limited* (2004) 358 IRLR para 1.
[259] *Dacas v Brook Street Bureau (UK) Limited* (2004) 358 IRLR para 1.
[260] *Dacas v Brook Street Bureau (UK) Limited* (2004) 358 IRLR para 37.
[261] *Cable & Wires Pic v Muscat* (2006) 354 IRLR para 15.

In later case law the courts had to determine whether an employment contract could be implied between the parties. This issue was raised in *James v Greenwich London Borough Council*,[262] where the court had to determine if an implied contact of employment existed, where the parties did not conclude an express contract of employment.[263] To this question, the court held that an employment contract cannot be inferred simply on the basis of the period which the agency worker has been in between assignments with the hirer.[264]

4.1.5 Conclusion

Similarly to regulation of TESs in South Africa, the regulation of TAWs in the UK is focused on protecting affected employees. In the Agency Workers Regulation attempting to improve the status of agency work in the UK, it is unfortunate that this legal instrument does not address the question of the true nature and identity of the employer of the agency worker. It does not expressly discuss the employer-employee status between the agency worker, the hirer and the temporary agency.

4.2 Namibia

The second foreign jurisdiction which will be briefly discussed in this dissertation is that of Namibia. Namibian labour law will be interesting to look at because it is similar to that of South Africa, especially in its history and regulation of labour brokering.[265]

4.2.1 History of labour hire in Namibia

For the most part of the Namibian history, labour hire as commonly known remained largely unregulated and informal.[266] This is particularly distressing considering how rapid the labour hiring industry in Namibia was growing, especially in the early 1990's.[267] Similar to the South African political history, the Namibian political history was also characterised by racial segregation and prejudice.[268] This meant that the indigenous Namibians were treated as subordinate and thus subject to discriminatory laws. This not only affected their human dignity but it also affected

[262] *James v Greenwich London Borough Council* (2008) EWCA 35 Civ .
[263] *James v Greenwich London Borough Council* (2008) EWCA 35 Civ para 6.
[264] *James v Greenwich London Borough Council* (2008) EWCA 35 Civ para 6.
[265] Botes 2013 *PELJ* 510. See also *Africa Personnel Services (Pty) ltd v Government of the Republic of Namibia* (2011) 32 *ILJ* 205 (NMS) para 8.
[266] Botes 2013 *PELJ* 509.
[267] Botes 2013 *PELJ* 506.
[268] Botes 2013 *PELJ* 510.

their ability to find and keep appropriate work.[269] This meant that many of these indigenous workers would subject themselves to contract work, which put them at the mercy of their employers.

This contract work was then regulated by the South West Africa Native Labour Association (SWANLA), which for the most past has been regarded as "the body that introduced the first forms of the exploitation of temporary employees in 1943…it used the desperation and vulnerability of the employees to the advantage of Namibian employers".[270] Employees who were part of the labour hiring industry were subject to inhumane treatment, and unfair labour practices.[271] The Appeal Court specifically described this working arrangement (labour hiring) as "the sale of human beings at a profit by the broker to user companies".[272]

Despite the first Namibian Labour Act being drafted, it failed to regulate labour hiring. This subsequently led to the drafting of the Namibian Labour Act of 2004 (hereinafter NLA of 2004), which attempted to regulate labour hiring in Namibia.[273] The NLA of 2004 defined employment hire services (labour hirer) as;

> *"any person who, for reward, procures for or provides to a client, individuals who,-(a) render services to, or perform work for, the client; and (b) are remunerated either by the employment hire services, or the client".274*

It is unfortunate that the NLA of 2004 did not come into force because it had made great strides into providing workers with some form of labour rights and job security, albeit limited.[275]

4.2.2 A call to ban labour hire in Namibia

A turning point in the regulation of labour hire in Namibia came after a call for a ban of the labour hiring industry.[276] There was a similar call for a ban by COSATU and the National Council of Trade Unions in South Africa.[277] In 2007, the Namibian Labour Act 11 of 2007 (hereinafter the NLA of 2007) was amended to ban the labour

[269] Botes 2013 *PELJ* 510.
[270] Botes 2013 *PELJ* 511.
[271] Workers were subject to receiving low wages, being punished by their employers, staying in unhygienic living conditions and getting imprisoned in cases where they were found to disregard the employer's rules. See Botes 2013 *PELJ* 511-512.
[272] *Africa Personnel Services (Pty) ltd v Government of the Republic of Namibia* (2011) 32 *ILJ* 205 (NMS) para 7.
[273] Botes 2010 *PELJ* 514.
[274] Section 126 of the NLA of 2004.
[275] Botes 2010 *PELJ* 515-516.
[276] Van Eck 2010 *PELJ* 107.
[277] Van Eck 2010 *PELJ* 107.

hiring industry in Namibia. Section 128(1) specifically stated that "no person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party".[278]

This ban was challenged on the basis of being unconstitutional in the case of *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia.*[279] The Appeal Court put this issue to bed by stating that section 128(1) of the NLA of 2007 was unconstitutional on the basis that it infringed on the right to "freedom to carry on any trade or business," which remains protected under Article 21(1)(j) of the Namibian Constitution.[280] Having the Appeal Court strike down section 128(1) of the NLA of 2007 for being unconstitutional, left a gap within the Namibian labour law.

Some years later flowing from the decision of the Appeal Court, the Namibian government introduced the Namibian Labour Amendment Act 2 of 2012, which amongst other provisions, included a provision which was aimed at substituting section 128 of the NLA of 2007.[281]

The Labour Amendment Act 2 of 2012 substituted section 128 of the NLA of 2007 to read as follows:

> *"(2) [f]or 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".*282

The Labour Amendment Act 2 of 2012 opted to regulate labour broking in Namibia as opposed to banning it completely. Consequently, section 128 of the NLA of 2007 as amended recognises the client as the true employer.[283] The Namibian Labour Amendment Act 2 of 2012 also substitutes section 128 of the NLA of 2007 by providing employees with various other rights, such as the right to join a trade union and the right to terms and conditions of employment which are not less favourable than those applicable to the clients directly employed employees.[284]

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[278] Section 128 of the NLA of 2007.
[279] *Africa Personnel Services (Pty) ltd v Government of the Republic of Namibia* (2011) 32 *ILJ* 205 (NMS).
[280] *Africa Personnel Services (Pty) ltd v Government of the Republic of Namibia* (2011) 32 *ILJ* 205 (NMS) para 118.
[281] Botes 2010 *PELJ* 521.
[282] Section 128(2) *Labour Amendment Act* 2 of 2012.
[283] Section 128(2) *Labour Amendment Act* 2 of 2012.
[284] Section 128 (3) and section 128(4) (a) of the NLA 11 of 2007.

Interestingly the NLA 11 of 2007 contains a provision which allows the client to provide written submissions to the Minister to be exempted in whole or part from being recognised as the employer, provided that such a client has the consent of the affected employee and the private employment agency.[285] Should the Minister be satisfied that the employees' rights will be protected, he can exempt the client as the sole employer and grant both the client and the private employment agency joint and several liability for contraventions of the NLA 11 of 2007.

Conclusion

Foreign law continues to form a very important part of the South African labour law jurisprudence. The theme of equality continues to reign supreme within the regulatory framework governing temporary agency workers both in the UK and in Namibia. The UK regulatory frame work does not expressly provide who the true employer of the agency worker is, whilst in Namibia the Labour Amendment Act 2 of 2012 provides more clarity on the identity of the employer.

It seems that in Namibia the legislature opted for sole employer approach by providing that the client is the employer of the affected employee. Notably it also hints at recognising dual employers in instances where, it allows the client to apply to the Minister to be jointly and severally liable for contraventions of the NLA 11 of 2007 with the labour broker.

[285] Section 128(8) of the NLA 11 of 2007.

CHAPTER 5
CONCLUSION

5.1 Introduction

The South African labour law jurisprudence has been largely influenced by various socio-economic challenges such as a history filled with racial segregation, chronic poverty and high unemployment rates.[286] This has resulted in the enactment and development of labour legislation that is uniquely designed to cater to the needs of the South African labour market. Beyond this there has been a great shift in recent years towards the use of atypical forms of employment as opposed to the, traditional orthodox forms of employment.[287]

This has brought more challenges on the South African labour market, particularly with technological advancement challenging the traditional world of work as we know it.[288] Historically there have been great challenges particularly with the regulation of atypical employment not only in South Africa but also globally. It has become apparent that the use of atypical employment such as TESs has exposed the loopholes that exist in the current South African labour law legislation. Despite the great strides brought about in 2015 by the LRAA, particularly with the insertion of the section 198A(3)(b) of the LRA(deeming provision), various interpretation challenges have posed a problem regarding the correct interpretation and application of this proviso.[289]

Against the above-mentioned, the aim of this dissertation was to analyse the decision of the Constitutional Court in *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 (CC), to determine firstly the difficulties associated with the legal interpretation and application of section 198A(3)(b) of the LRA, and secondly to look at whether the decision of the Constitutional Court provides clarity about who the employer is after the deeming

[286] See the discussion in chapter 3 of this dissertation. See also Carvalho 2019 https://tradingeconomics.com› South Africa [Accessed 13 June 2019].
[287] Mills 2004 *ILJ* 1204.
[288] Du Toit 2019 *ILJ* 1.
[289] See the discussion in chapter 3 of this dissertation.

provision kicks in. The final objective of this dissertation was to look at whether the decision of the Constitutional Court provides enough protection to employees.

5.2 Findings

5.2.1 What are the difficulties associated with the interpretation and application of section 198A(3)(b) of the LRA?

Historically, trade unions and TESs have stood on opposing sides of the spectrum regarding the correct interpretation and application of section 198A(3)(b) of the LRA. This confusion was not only in practice but it also affected the academic world, whereby some scholars believed that the deeming provision should be interpreted to recognise the client as the sole employer, whilst others believed that the provision should be interpreted to recognise both the TES and the client as the employers of the worker.[290]This confusion further extended to the courts, as recognised by the vastly different decisions of the Labour Court and the Labour Appeal Court.

5.2.2. Does the Constitutional Court judgment of *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and others* provide clarity about the true nature and identity of the employer in a TES? If so, what is the impact of the court's decision in practice?

After many years of endless debate regarding the correct interpretation of section 198(3)(b) of the LRA, the Constitutional Court in *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and others*,[291] finally put the issue to bed. The court concluded that the sole employer interpretation is correct, consequently once the deeming provision kicks in; the client becomes the employer of the placed employee for purposes of the LRA.[292] This employment responsibility accrues to the client automatically by operation of law.[293] Therefore, after the three month mark, an employee who renders services to a client through the TES and who earns below R205433.30 per annum will be recognised as an employee of that client for purposes of the LRA. The employee is given clarity regarding the true identity of their employer once the deeming provision kicks in, and is also afforded the necessary protection against exploitation. This gives effect to the legislature's

[290] Grogan *Employment Rights* 45-46.
[291] (2018) 39 *ILJ* 1911 (CC).
[292] See discussion in chapter 3 of the dissertation.
[293] See discussion in chapter 3 of the dissertation.

intention to ensuring that, temporary services are genuinely temporary and not disguised as temporary employment to avoid statutory responsibilities. The judgement does raise some practical difficulties; as such I foresee more litigation in the future, whereby the courts will have to provide more clarity regarding the consequences of the sole employer interpretation.

Some of these difficulties emanate as a result of the court not discussing the implication of the sole employer interpretation on the commercial contract between the TES and the client. There is also a lack of clarity about the application of section 198A(5) of the LRA, in instances where the client does not have any employees directly employed by him.

5.2.3. Does the Constitutional Court judgment of *Assign Services (Pty) limited v National Union of Metalworkers of South Africa and others* go far enough to protect vulnerable employees in TES employment?

In my view, the decision of the court does protect affected employees, because it provides clarity about who the employer of the placed worker is.

Given the long history of exploitation suffered by temporary employees at the hands of clients who have for many years disguised employment arrangements as temporary employment, whilst in reality they were simply trying to bypass labour responsibilities,[294] the court has done well in ensuring that such clients assume these responsibilities as required by law.

Furthermore the court's decision does not take away the added protection granted to the employee under section 198(4A) and section 198(4) of the LRA, for as long as the commercial contract between the parties exists and for as long as the TES continues to play its administrative role.

Recommendation

It is my recommendation that the legislature should use the Constitutional Courts judgement as a stepping stone to revise the current section 198A(3)(b) of the LRA. The legislature should provide direction on the termination of the commercial contract between the labour broker and the client once the deeming provision comes

[294] Botes 2015 *SALJ* 111.

into force. Furthermore, the legislature should provide clarity on what should happen in circumstances where the client does not have an employee in his organisation performing the same or similar work to that of the TES worker. This would eliminate inconsistencies in practice, and possibly reduce more litigation regarding the implementation of section 198A(3)(b) of the LRA.

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LEGISLATION

LONG TITLE	**MODE OF CITATION**
The Constitution of the Republic of South Africa, 1996	The Constitution
The Agency Workers Regulations 93 of 2010.	The Regulations
The European Union Directive 2008/104/EC on Temporary Agency Work	the EU Directive
The Labour Relations Act 66 of 1995	The LRA
The Labour Relations Amendment Act 6 of 2014	The LRAA
The Namibian Labour Act 11 of 2007	NLA 11 of 2007
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