The Legal Framework for Protecting Employees Engaged in Temporary Employment Services in South Africa

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ABSTRACT

This research papers starts by looking at the historic regulation of temporary employment services (TES) before 2015. What becomes clear is that, prior to 2015 the TES was being used to shield the client from employer obligations in terms of the Labour Relations Act (LRA).[1] This led to a lot of abuses being perpetuated by the client against the placed worker, but the client was not accountable to the placed worker. These abuses led to trade unions pushing for the banning of the TES. However, the legislature chose to rather regulate the use of TES's and extend certain protections to placed employees earning below the threshold set out in the Basic Conditions of Employment Act (BCEA).[2] This led to the 2014 LRA amendments[3] which came into effect in 2015.

Importance has been placed on the deeming provision which is created by s 198A(3)(b) of the LRA, which provides that a placed employee who is no longer performing a 'temporary service' is deemed to be an employee of the client for purposes of the LRA.[4] The Constitutional Court in *Assign Services (Pty) Limited v NUMSA*[5] has interpreted this provision to mean that once the provision is triggered, the client becomes the sole employer of the placed employee. The Constitutional Court however was not unanimous, which fuels the debate further.

This research paper has also looked at how the ILO's Private Employment Agencies Convention 181 has influenced the regulation of TES employment in South Africa and the concept of decent work. Furthermore, a comparative analysis of the regulation of TES's in Namibia and the European Union (EU) has been done.

The conclusion reached is that labour brokers cannot be banned as this will be inconsistent with international law. Furthermore, the ban of labour brokers is likely to be found to be unconstitutional in that it unreasonably and disproportionately limits the employer's right to choose its trade trade, occupation or profession freely.[6] As such, it is

[1] Labour Relations Act 66 of 1995.
[2] Basic Conditions of Employment Act 75 of 1997.
[3] Labour Relations Amendment Act 6 of 2014.
[4] S 198A(3)(b) of the LRA.
[5] (CCT194/17) [2018] *ZACC* 22.
[6] S 22 of the Constitution of South Africa of 1996.

concluded that any abuses by the use of labour brokers can be prevented through better regulations.

Due to the pandemic caused by COVID-19 and its anticipated lasting effect, labour market flexibility has not only become necessary but also urgent in order to grow the economy and reduce unemployment. The key is therefore to promote labour market flexibility whilst also protecting employees from being treated as commodities.

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CHAPTER ONE

INTRODUCTION

1.1 Background

Academics and labour lawyers, nationally and internationally, recognise a trend towards an increase of non-standard employment falling outside the traditional full-time employment paradigm.[7] Although non-standard employment is associated with job insecurity, it is nonetheless unavoidable due to globalisation, deregulation and technological advancement.[8] Temporary employment services (TES), commonly known as labour brokers, fall within this category of employment. Businesses argue that the use of labour brokers allows companies greater flexibility to meet production demands without the constraints of labour laws. This flexibility combined with cost saving benefits allows businesses to meet the standards of a globalised and competitive labour market,[9] thereby improving South Africa's economic growth and unemployment rate.[10] Considering that we are currently living in a global pandemic (Coronovirus Disease 2019), labour market flexibility has never been more relevant and necessary.

1.2 Constitutional Influence on the Regulation of Labour Broker/TES

South Africa was founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[11] S 22 of the Constitution guarantees every citizen the right to choose their trade, occupation or profession freely.[12] In this regard, all parties to the triangular relationship enjoy the right to choose and practice their chosen vocation. A person's employment is fundamental to definitions of self and provides status, esteem and meaning to people sufficiently fortunate to be engaged in it.[13] In *Affordable Medicines Trust and Others v Minister of Health*[14] the

[7] Mills (2004) *ILJ* 1203; Fourie (2008) *PELJ* 112.
[8] Fourie (2008) *PELJ* 112.
[9] Holzapfel & van Staden (2020) *TSAR* 49.
[10] Botes (2014) *SA Merc LJ* 113.
[11] S 1(1) of the Constitution of South Africa of 1996 (The Constitution).
[12] S 22 of the Constitution.
[13] Germishuys (2016) *SA Merc LJ* 360.
[14] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] *ZACC* 3.

Constitutional Court found that this right is closely linked to human dignity.[15] As such, any limitation to this right will not be lightly tolerated unless it can be justified in terms of the broad public interest and are not arbitrary or capricious.[16]

In addition, s 23 of the Constitution provides that everyone has the right to fair labour practices.[17] This right does not apply only to employment relationships but also relationships akin to employment.[18] In *Kylie v CCMA*[19] the Court held that 'this right was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated upon principles of social justice, fairness and respect for all.'[20] The Constitutional Court however has been very clear that the right to fair labour practices applies to both employers and employees.[21] For employees, the right affords security of employment.[22] As such, this right will be effectively undermined if the triangular relationship is used to 'effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client.'[23] Accordingly, it is imperative for South African labour laws to strike a balance between the rights of businesses to conduct business and the right of employees' to be treated fairly. In South Africa, the Constitution is the supreme law of the country and accordingly, any law or conduct that is inconsistent with it is invalid.[24]

1.3 The Labour Relations Act 66 of 1995

The Labour Relations Act (LRA)[25] seeks to give effect to s 23 of the Constitution. The LRA provides for the regulation of labour brokers in s 198 and 198A under Chapter IX.[26] The LRA serves the purpose of advancing economic development, social justice, labour

[15] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] *ZACC* 3 at para 59.
[16] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] *ZACC* 3 at para 60.
[17] S 23 of the Constitution.
[18] *SA National Defence Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC) at para 24 to 27.
[19] *Kylie v CCMA* [2010] 7 BLLR 705 (LAC).
[20] *Kylie v CCMA* [2010] 7 BLLR 705 (LAC) at para 40.
[21] *National Education Health & Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27 at para 40.
[22] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22 at para 55.
[23] *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] ZALC 33 at para 60.
[24] S 2 of the Constitution.
[25] 66 of 1995.
[26] S 198 of the LRA.

peace and democratisation of the workplace by fulfilling its primary objects.[27] In order to achieve this purpose, the rights of employees and employers should be considered as well as the interests of the public at large and the effect on the national economy.[28] In *Chirwa v Transnet Ltd,*[29] the Constitutional Court held that 'the primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects.'[30] In this regard, the primary purpose of the LRA will play a pivotal role in analysing its regulatory framework related to TES/labour brokers.

1.4 Problem Statement

The use of labour brokers has been and still is controversial both locally and internationally. This is because the use of labour brokers creates a triangular relationship with three components:

- the commercial agreement between the labour broker and the client for the labour broker to deliver the worker to the client;
- the contract of employment between the worker and the labour broker; and
- the day-to-day relationship between the placed worker and the client, where the client exercises complete control and supervision over the placed worker. Importantly, the client has the power to discontinue the services of the placed worker.

The practical reality of this arrangement is that the placed worker is the commodity of the commercial relationship between the client and labour broker and also the commodity in his or her employment contract with the labour broker. Yet, s 198(2) of the LRA expressly provides that the labour broker is the employer of the placed worker and not the client. This has effectively allowed the client not to be accountable to the placed worker who is under its direct control and supervision. As anyone could have predicted, the client exploited s 198(2) of the LRA as it could not be held liable for any claims related to unfair

[27] S 1 of the LRA.
[28] *Business SA v COSATU & another* [1997] 5 BLLR 511 (LAC) at page 518; *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others* [2020] ZACC 1 at para 53.
[29] *Chirwa v Transnet Ltd & others* [2008] 2 BLLR 97 (CC).
[30] *Chirwa v Transnet Ltd & others* [2008] 2 BLLR 97 (CC) at para 102.

dismissal, unfair labour practices and unfair discrimination.[31] In addition, labour broker employees are difficult to organise and as such could not meaningfully participate in collective bargaining.[32] Consequently, there were numerous calls for a total ban of the use of labour brokers.[33]

Following calls to ban labour brokers, in 2015 the legislature made headway in improving protection for TES employees through the incorporation of the Labour Relations Amendment Act (LRAA of 2014)[34] into the LRA. This research paper focuses on s 198A, which applies to employees earning below the earnings threshold determined in terms of s 6 of the Basic Conditions of Employment Act,[35] (BCEA earnings threshold). S 198A(1) of the LRA defines a temporary service as work for a client for a period not exceeding three-months; work to substitute an employee who is temporarily unavailable or work which is determined as a 'temporary service' by a bargaining council collective agreement, a sectoral determination or a notice published by the Minister of Labour.[36]

S 198A(3)(b) of the LRA further goes on to say that, should a placed employee no longer be performing a 'temporary service', that placed employee is deemed to be an employee of the client for purposes of the LRA.[37] Much of the debate has been made over the meaning of the word 'deemed' in s 198A(3)(b). Once the section is triggered, does the client become the employer of the placed worker (sole employer) or does the client become a dual employer of the placed employee along with the TES/labour broker. In *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa*[38] the Constitutional Court purported to settle this debate. Although the court was divided, the majority found in favour of the sole employment interpretation, arguing that this approach

[31] *Walljee v Capacity Outsourcing* (2012) 33 *ILJ* 1744 (LC) at para 11 and 12. *NEHAWU & another v Nursing Services of South Africa* [1997] 10 BLLR 1387 (CCMA) at para 1392; Ngebulana "Breaking the Brokers" (1997) *Employment Law* 73; Landman in (1993) 2 (7) *Contemporary Labour Law* 80 at 83; *Buthelezi & others v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC).
[32] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 at para 35.
[33] 'Ban labour brokers: Vavi' 08 September 2011 *The Times Live* accessed: www.timeslive.co.za
[34] Labour Relations Amendment Act 6 of 2014.
[35] Basic Conditions of Employment Act 75 of 1997. The current earnings threshold is R211 596.30.
[36] S 198A(1) of the LRA.
[37] S 198A(3)(b) of the LRA.
[38] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22.

afforded workers better protection.[39] The Constitutional Court, however, was clear that the sole employment interpretation did not automatically dissolve the triangular relationship. In this regard, the Constitutional Court held that 'there was no transfer of employment but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship.'[40]

As previously stated, it is imperative for the South African labour laws to be able to strike a balance between the rights of businesses to trade and the right of employees' to be treated fairly. This study will examine if the LRA has in fact struck this balance. Particular importance will be placed on the deeming provision which is created by s 198A(3)(b) of the LRA and the sole employer interpretation adopted by the majority judgment in *Assign Services* verses the dual employer interpretation mandated by the minority judgment. Since s 198A is only applicable to employees earning below the BCEA threshold, it will be examined whether s 198A should be extended to employees earning above the BCEA threshold.

1.5 Research questions

The following questions will be answered:

1. Does the LRA as it stands efficiently regulate TES employment so as to protect employees?
2. Does the Constitutional Court's interpretation of s 198A(3)(b) provide greater protection to employees?
3. Are the LRA provisions regulating TES arrangements compliant with the standards of the International Labour Organisation (ILO)?

1.6 Research methodology

The study will be conducted using a qualitative analysis which will consist of evaluating and analysing the appropriate legislative framework, jurisprudence and case law.

1.7 Structure of the Research

[39] Assign Services (CC) at Para 70.
[40] Assign Services (CC) at para 75.

In Chapter 2, this study examines South Africa's historical framework of the regulation of labour brokers from the 50's up until to 2014 and the reasons for the evolution of the regulations throughout the years. What becomes clear is that there is an accountability gap between the client and the placed worker under its supervision.

Chapter 3 picks up in 2015, when the LRAA of 2014 was adopted into law. This is the current regulatory framework of TES arrangements. Particular importance is placed on s 198A(3)(b) of the LRA which purports to fill the accountability gap between the client and the placed worker earning below the BCEA threshold. S 198A(3)(b) purports to fill this gap by 'deeming' the client to be the employer of the placed worker once the placed worker is no longer performing a temporary service. The *Assign Services* case will be analysed in its interpretation of the deeming provision.

In Chapter 4, this study evaluates South Africa's compliance with the ILO standards applicable to the regulation of TES arrangements. This is important as South Africa is a member of the ILO and part of the purpose of the LRA is to give effect to South Africa's obligations to the ILO as a member state.[41]

In Chapter 5, this study conducts a comparative analysis of foreign jurisdictions i.e., Namibia and the European Union (EU). Namibia was chosen because it has a similar history, economy and Constitution as South Africa. In 2007, Namibia even banned the use of labour brokers, and this ban was found to be unconstitutional. Consequently, Namibia unbanned the use of labour brokers but regulated its use very restrictively. The opposite is true with the EU. The EU has regulated the use of labour brokers in a more flexible way as it seeks to promote 'flexicurity'. Both the Namibian and the EU models are analysed to see which model best suits South Africa.

This study concludes in Chapter 6 with the good, the bad and the ugly side of South Africa's regulatory framework. Recommendations are made on how to improve the LRA to provide better protection to labour broker employees.

[41] S 1(b) of the LRA.

CHAPTER TWO

HISTORICAL FRAMEWORK OF TES's IN SOUTH AFRICA

2.1. Introduction

The purpose of this Chapter is to examine the historical framework of temporary employment services (TES) in South Africa from the Labour Relations Act of 1956 (LRA of 1956) to the Labour Relations Act of 1995 (LRA of 1995) prior to the 2014 amendments.[42] It is critical to examine the history and the practice of TES's in South Africa, and the reasons for the evolution of the regulations of TES's throughout the years. This will be accomplished by examining the legislative framework in each era, including the shortfalls of each era and reasons for amendment.

2.2. Labour Relation Act 28 of 1956

In the 1950's, labour brokers, as they were known at the time, were allowed in South Africa but not regulated by the LRA of 1956. This non-regulation created a number of uncertainties and in turn a variety of legal issues.[43] For example, there were no stipulations regarding whether the TES, client or both should be held liable in employment claims. Furthermore, provisions pertaining to terms and conditions of employment, namely wages and benefits were not regulated and resulted in exploitation of this vulnerable group of employees by a TES and client of a TES.[44] Quite often both the TES and its client would escape liability.

As a result of the exploitation of TES employees, along with other labour issues, the Wiehahn Commission was set up to review the LRA of 1956 and make recommendations for the amendment of the LRA of 1956.[45] These recommendations were incorporated into the Labour Relations Amendment Act 2 of 1983, which will be discussed below.

[42] Labour Relations Amendment Act 6 of 2014.
[43] Theron (2008) *ILJ* 813, 819.
[44] Van Niekerk (2017) 69.
[45] Visser (2014) *Journal for Contemporary History* 103.

2.3. Labour Relations Amendment Act 2 of 1983 (LRAA of 1983)

The amendments established the industrial court, granted trade union rights to black employees and introduced the concept of the unfair labour practice.[46] Part of these amendments was the recognition of labour brokers/TES's.[47] In this regard, the LRAA of 1983 defined a labour broker as any person who, for reward, provides a client with a person to render services or to perform work for the client. Furthermore, s 1(3)(a) of the LRAA of 1983 provided that the TES was deemed to be the employer of the placed worker and the TES was obligated to remunerate the placed worker.[48]

In this regard, all employer rights and obligations in terms of labour laws were placed on the TES in its capacity as the employer. This arrangement provided the client more flexibility in the way it planned the use of resources, and relief from the administrative burdens (PAYE, Workmen's Compensation, pension fund contributions and so on).[49] In the event that there were any disputes involving the TES arrangement, the Industrial Court was conferred with jurisdiction to resolve same.[50] Furthermore, the LRAA of 1983 required that a TES should register with the Department of Manpower to be recognised.[51] Operation in the industry without registration was considered a crime.[52] In addition, s 1(3)(c) of the LRAA of 1983 deemed the premises where the employees performed work for the client to be the TES's premises, regardless of whether it was the client's workplace.[53] This meant that the TES would have rights and obligations in relation to those premises which it normally would not have and which it could be argued it should not necessarily have (for instance, various forms of control over the workplace).[54]

According to Brassey and Cheadle,[55] the justification for the enactment of the LRAA of 1983 was that 'employers were structuring their relationships to prevent placed workers

[46] Cassim (1984) *De Rebus* 27.
[47] Labour Relations Act 28 of 1956 was amended by Labour Relations Amendment Act 2 of 1983.
[48] Brassey and Cheadle (1983) 4 *ILJ* 37; s 1(3)(b) of the Labour Relations Amendment Act 2 of 1983.
[49] Brassey and Cheadle (1983) 4 *ILJ* 37.
[50] S 1(3)(b) of the Labour Relations Amendment Act 2 of 1983.
[51] S 63 of the Labour Relations Amendment Act 2 of 1983.
[52] S 63 of the Labour Relations Amendment Act 2 of 1983; Brassey and Cheadle 1983 4 *ILJ* 37.
[53] Botes (2014) *SA MERC* LJ 111.
[54] Botes (2014) *SA MERC LJ* 111.
[55] Brassey and Cheadle (1983) 4 *ILJ* 37.

from receiving the protection of statutory wage regulating measures and other minimum conditions of employment.'[56] Whilst this was the noble purpose, it did not appear that the reality of the placed employees changed much. These employees simply became vulnerable to abuse by 'fly-by-night' labour brokers, colloquially known as the 'bakkie brigade.'[57] For example if the labour broker failed to pay the workers or could not be located, the worker had no recourse against the client, as it was not the employer.[58] As such, non-compliance by labour brokers inconvenienced employees and not the client of the labour broker, putting employees in a very precarious position.[59] This clearly needed to change.

2.4. Labour Relations Act 66 of 1995 (Prior to the 2015 Amendments)

In 1994, South Africa was ushering in a new constitutional democracy founded on the values of equality and universal human rights.[60] As part of this era, the LRA of 1995 was negotiated and came into effect in 1996. Significantly, this was before the final Constitution was enacted, at the time that the Interim Constitution[61] was still in place.

2.4.1 The provisions of the LRA of 1995

The LRA of 1995 retained the position of the LRAA of 1983 regarding the operation of labour brokers (TES). In this regard, the LRA of 1995 defines a TES as "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 [TES]".[62] Significantly, the definition does not provide that the use of a TES should be temporary or be of a limited duration.[63]

Moreover, s 198(2) of the LRA of 1995 provides that a person who has been placed by a TES with the client of a TES to perform work for the client, is the employee of a TES and a TES is that persons' employer.[64] The Constitutional Court has confirmed that on a

[56] Brassey and Cheadle (1983) 4 *ILJ* 37.
[57] Benjamin (2010) *ILJ* 849.
[58] Benjamin (2010) *ILJ* 849.
[59] Benjamin (2013) *Geneva: ILO* 2.
[60] Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26 at para 10.
[61] The Constitution of the Republic of South Africa 22 0f 1993.
[62] S 198(1) of the Labour Relations Act 66 of 1995.
[63] Harvey (2011) *SALJ* 106.
[64] S 198(2) of the Labour Relations Act 66 of 1995.

practical level, 'the TES is merely the third party that delivers the employee to the client. The employee does not contribute to the business of the TES except as a commodity.'[65] In this regard, by making the TES the employer, instead of the client, s 198(2) runs counter to the common law tests to establish an employment relationship.[66]

In this regard, the Labour Court found that s 198(2) creates a fiction or presumption that the TES is, in most instances, the employer.'[67] In terms of *Mandla v LAD Brokers (Pty) Ltd,*[68] this type of relationship was described as "a unique and *sui generis* tripartite relationship" in that there were two contracts.[69] First, there is the employment contract between the TES and the employee. Second, there is the commercial contract between the TES and the client for the TES to deliver the employee to the client. The courts have clarified that a placed employee is not the same as an independent contractor. This is so because a TES employee places his personal services at the behest of the client as opposed to an independent contractor who is tasked with performing certain specified work or producing a certain specified result.[70] As opposed to an independent contractor, the TES employee is subjected to the control and the supervision of the client and importantly the client has the overriding disciplinary authority.[71]

Despite the fact that the client can influence employment decisions on the part of a TES, the TES is still the employer and is responsible for ensuring compliance with various statutes that influence rights of employment.[72]

Be that as it may, the LRA of 1995 introduced instances where a TES and the client could both be held jointly and severally liable.[73] However, this liability was only limited to

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[65] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others [2018] ZACC 22 at para 73.*
[66] See *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC); *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC); *Smit v Workmen's Compensation Commissioner* 1979(1) SA 51 (AD); *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2234 (LAC).
[67] *Dyokhwe v De Kock NO and others* [2012] 10 BLLR 1012 (LC) at para 55.
[68] [2000] 9 BLLR 1047 (LC).
[69] *Mandla v LAD Brokers (Pty) Ltd* [2000] 9 BLLR 1047 (LC) at para 12.
[70] *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 *ILJ* 1807 (LC) at para 16.
[71] *Victor and others v Chep South Africa (Pty) Ltd and others* [2021] 1 BLLR 53 (LAC) at para 41.
[72] *NUM v Billard Contractors CC* [2006] 12 BLLR 1191 (LC) at par 79. Todd AJ added: "[w]hether or not this is desirable as a matter of policy is not for me to decide in these proceedings, and I express no view on that question here". See also *Contract Employment Contractors v Motor Industry Bargaining Council* [2012] 7 BLLR 726 (LC) at par 24.
[73] S 198(4) of the Labour Relations Act 66 of 1995.

instances where a TES failed to comply with collective agreements and arbitration awards regarding terms and conditions of service, and provisions of the Basic Conditions of Employment Act (BCEA).[74] It did not extend to disputes related to unfair dismissal, unfair labour practices and unfair discrimination.[75]

In this regard, should the client of a TES unfairly dismiss the placed employee, a TES is seen to have effected such dismissal.[76] The reason, seemingly, for holding the TES liable for the 'unfair practices' of their clients is that the TES has accepted the overall responsibility for the fair treatment of their employees which the legislator has cast upon it.[77] Whilst this is true, this was a major shortcoming of the LRA of 1995 as the TES employee is placed at the client's premises. As such 'the client has overarching control over the work process and can determine whether a worker continues to perform his or her work at all.'[78] Yet, the client is not accountable to the TES employee.

2.4.2 Shortcomings of the LRA of 1995 (Prior to 2015)

The use of TES arrangements as a form of employment creates two realities: Firstly, as already discussed, it creates a triangular relationship. Secondly, it places employees in a precarious position.[79] The actual employment relationship in this triangular relationship, is with the client, but the formal employment agreement is with a TES.[80] The LRA of 1995 in its original form did not offer enough protection to TES employees and as such, TES arrangements as a form of employment received a lot of criticism from trade unions. Much of the criticism revolved around the displeasure about the commodification of labour,[81] and further that TES employees are subjected to lower wages and inhumane working

[74] Basic Conditions of Employment Act 75 of 1997; Botes 2013 *SALJ* 103.
[75] *Walljee v Capacity Outsourcing* (2012) 33 *ILJ* 1744 (LC) at para 11 and 12. *NEHAWU & another v Nursing Services of South Africa* [1997] 10 BLLR 1387 (CCMA) at para 1392; Ngebulana "Breaking the Brokers" (1997) *Employment Law* 73; Landman in (1993) 2 (7) *Contemporary Labour Law* 80 at 83; *Buthelezi & others v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 588 (IC).
[76] *NEHAWU & another v Nursing Services of South Africa* [1997] 10 BLLR 1387 (CCMA) at para 1393.
[77] *NEHAWU & another v Nursing Services of South Africa* [1997] 10 BLLR 1387 (CCMA) at para 1393.
[78] *Victor and others v Chep South Africa (Pty) Ltd and others* [2021] 1 BLLR 53 (LAC) at para 37.
[79] Basson (2017) 73.
[80] Basson (2017) 74.
[81] Joubert & Loggenberg (2017) *Acta Commercii* 2.

conditions.[82] Below were the prevailing issues/shortfalls in the regulation of TES arrangements by the LRA of 1995.

2.4.2.1 The Nature of the Triangular Relationship

S 213 of the LRA of 1995 defines the term 'employee' as:

> '(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer.'[83]

Botes argues that TES employees fall within this definition and such should be granted their true employee status, with all the labour protections afforded by various labour statutes.[84] Basson J in *Mandla v LAD Brokers (Pty) Ltd*[85] also argued that the relationship between the placed employee and the client is an employer-employee relationship in terms of s 213.[86] In this regard, Basson J held that the main purpose of s 198(1) and 198(2) is to designate the TES as the employer of the placed employee, and not the client.[87] This is a fiction and as a result thereof, it is often difficult for placed employees to enforce different labour rights conferred upon them by different labour legislation.[88] These employees are often subjected to wages lower than those of their permanent counterparts and less favourable terms and conditions of employment.[89]

2.4.2.2 The Client's Lack of Liability

An employer is liable for the infringement of the rights of employees and unfair labour practices perpetrated against its employees. In consideration of a triangular relationship created by TES arrangements, it seems impractical to hold a TES liable.[90] The TES has little to no control over the workplace or the treatment of the placed worker. These issues are determined in terms of the commercial agreement, with the client having control over

[82] Joubert & Loggenberg (2017) *Acta Commercii* 2.
[83] S 213 of the LRA of 1995.
[84] Botes (2013) *SALJ* 104.
[85] *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 *ILJ* 1807 (LC).
[86] *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 *ILJ* 1807 (LC) at para 13.
[87] *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 *ILJ* 1807 (LC) at para 14.
[88] Botes (2013) *SALJ* 104.
[89] *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 *ILJ* 1807 (LC).
[90] Botes (2013) *SALJ* 106.

the employee on its premises. Therefore, it is unjustifiable to hold the TES responsible for unfair conduct relating to these aspects. Harvey highlights the issues associated with the TES being regarded as the employer in the following manner:

> "The broker-employer is duty-bound to treat the worker fairly, but its limited access to the client's workplace obstructs its ability to do so. It cannot modify the work for an injured worker. It cannot performance-manage the worker, to correct the worker as an alternative to dismissal. It does not make the rules or supervise the employee, and where misconduct or incapacity is alleged, it has no access to the workplace for purposes of investigation. It cannot easily call the client's employees as witnesses to a disciplinary enquiry. Crucially, it cannot physically reinstate an unfairly dismissed worker to the client's workplace."[91]

S 198(4) provides for the limited circumstances upon which the client and the TES may be held jointly and severally liable for employee claims. However, the TES as the employer should be sued or held liable first and the client should only be held liable when the TES fails to comply with the order of the court.[92] This causes confusion for employees because the party to be held liable for the infringement of their rights is in certain cases not the party they reported to or cited.[93]

2.4.2.3 The Use of Automatic Termination Clauses

An automatic termination clause is a provision which provides that an employment contract will terminate automatically on a specific date or on the occurrence of a specific event.[94] Once this condition is fulfilled, the employment terminates automatically and is not regarded as a dismissal in terms of the LRA.[95] In a triangular relationship, the employment contract will contain a clause that the employment contract of the placed worker will automatically terminate upon the termination of the commercial agreement between the client and the TES.[96] Consequently, the employment contract will terminate by operation of law and not by the TES.[97] As such, the TES is not required to follow the

[91] Harvey (2011) *SALJ* 107.
[92] Botes (2013) *SALJ* 107.
[93] Botes (2013) *SALJ* 107.
[94] *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC) at 16.
[95] *Nogcantsi v Mnquma Local Municipality & others* (2017) 38 ILJ 595 (LAC) at para 30 – 31.
[96] Bosch (2008) *ILJ* 814; Cohen (2008) *ILJ* 873; Hutchinson (2007) *ILJ* 90; Harvey (2011) *SALJ* 109; Lawrence and Moodley (2011) *Without Prejudice* 67.
[97] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9 at para 18.

dismissal procedures mandated by the LRA. Therefore, the employee is left without recourse to challenge the fairness of the termination of their employment.[98]

An automatic termination clause is valid and enforceable unless it contravenes the Constitution or the LRA.[99] Even though the employee might be deemed to have waived his or her rights, such waiver is not valid or enforceable.[100] For example, our courts have found that an automatic termination clause which allows the client to arbitrarily remove the TES employee from its premises is not valid as it often leads to an unfair dismissal of the placed employee.[101] In *Nape v INTCS Corporate Solutions,*[102] the Labour Court found that an employee's constitutional right to fair labour practices and the right not to be unfairly dismissed applies not only to the TES, as the employer, but also to the client.[103] As such, the client has a duty not to do anything which will undermine the placed employee's right to fair labour practices such as arbitrarily blocking the employee's access to the workplace.[104] Despite this progressive conclusion by the Labour Court, the placed employee still had no recourse against the client for unfair dismissal.[105]

It is important to note that in *Enforce Security Group v Fikile*[106] the LAC held that not all automatic clauses will be visited with invalidity.[107] In this regard, the LAC held that 'it would be necessary to determine whether in the circumstances of a particular case the clause was intended to circumvent the fair dismissal obligations imposed on the employer by the LRA and the Constitution.'[108]

In this case, Enforce Security, a TES, relied on an automatic termination clause to terminate the employment of 47 employees, who were placed at Boardwalk, the client.

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[98] Botes (2013) *SALJ* 105.
[99] Grogan (2014) 50.
[100] *SA Post Office v Mampeule* (2009) 30 ILJ 664 (LC) at para 46; *SA Post Office Ltd v Mampeule* [2010] 10 BLLR 1052 (LAC) at para 25; *Mahlamu v CCMA and Others* (2011) 32 ILJ 1122 (LC) at para 21 to 22; *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC) at para 61 - 70.
[101] For example: *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC) *and Mahlamu v CCMA and Others* (2011) 32 ILJ 1122 (LC).
[102] *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC).
[103] *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC) at para 63.
[104] *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC) at para 63.
[105] *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC) at para 44.
[106] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9.
[107] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9 at para 41.
[108] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9 at para 41.

Their employment was tied to a commercial agreement between Enforce Security and Boardwalk. In this regard, once Boardwalk no longer required the services of Enforce Security, the employees' employment automatically terminated along with the commercial agreement. In this regard, the LAC held that there was no dismissal as Boardwalk was the proximate cause for the termination of the employees' contracts of employment.[109] What is most concerning with this case is that the LAC further held that:

> '[t]he fact that the appellant [the TES] had an option to retrench the employees or could have considered other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties.'[110]

This clearly puts TES employees at a disadvantage as there are no obligations on the TES to look for alternative employment and for employees to be entitled to severance pay as they will not be considered permanent employees.[111]

2.4.2.4 The Effect of the Triangular Relationship on Collective bargaining

TES arrangements negatively impact the placed worker's ability to bargain collectively.[112] In South Africa, collective bargaining rights are tied to trade unions and their ability to organise workers within a defined workplace. This workplace is typically the employer's premises. In the case of TES employees, they do not work from their employer's premises but work from the client's premises.[113] In addition, TES employees are usually placed at different clients' premisses, which means trade unions found it difficult to organise them as a collective. Even in the slim cases where trade unions reach sufficient numbers of representativity, trade unions still might not be able to represent employees and/or exercise organisational rights at the premises of the client.[114] Furthermore, the TES has no power to grant trade unions organisational rights over the client's premises, despite the client's premises being the physical workplace of the employees.[115] In addition, a

[109] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9 at para 14.
[110] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9 at para 24.
[111] The 2015 LRA amendments introduced s 198B(10) of the LRA, which provides for the payment of severance pay on the termination of fixed-term contracts that are 2 years or longer.
[112] Botes (2013) *SALJ* 106.
[113] Benjamin, Bhorat and Van der Westhuizen (2010) A Report prepared for the Department of Labour and the Presidency 14, 16.
[114] Botes (2013) *SALJ* 106.
[115] Botes (2013) *SALJ* 106.

strike which is protected against the TES, may not be protected against the client who's premises the strike is likely to be taking place at.[116] Without the right to strike, collective bargaining rights are meaningless.

2.3 Conclusion

From the above, it is clear that the TES, instead of the client, is the employer in terms of s 198(2) of the LRA. As such, the TES is responsible for compliance with the obligations of the LRA, although in reality it cannot effectively secure the placed worker's employment. The client can, yet the client is not the employer. In this regard, it has become evident that the TES arrangement has been used to shield the client from liability in respect of unfair dismissal disputes, unfair discrimination disputes as well as unfair labour practice disputes. This is further worsened by the fact that the TES arrangement was being used for an indefinite period, thereby leaving placed employees in perpetual 'temporary' employment.

[116] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] *ZACC* 22 at para 34.

CHAPTER THREE

THE CURRENT LEGISLATIVE FRAMEWORK

3.1 Introduction

Following numerous calls for a total ban of labour brokers due to all the abuses discussed in Chapter 2 above, in early 2012, the Minister of Labour proposed the Labour Relations Amendment Bill[117] to the Cabinet Committee. The purpose of the Bill was to ensure vulnerable employees where afforded protection in accordance with the decent work agenda.[118] In 2013, the Bill was adopted and became the Labour Relations Amendment Act (LRAA of 2014),[119] which came into effect on 1 January 2015. The most prominent features are s 198A, particularly s 198A(1), s 198A(3)(b), s 198A(5) as well as s 198(4A). Each of these sections will be discussed below.

3.2 The Most Recent Provisions from the Labour Relations Amendment Act 6 of 2014

3.2.1 S 198A – Temporary Service

S 198A was introduced to protect temporary employment service (TES) employees who earn below the threshold set out in the Basic Conditions of Employment Act (BCEA)[120] and who are performing a 'temporary service'. S 198A starts by defining a temporary service. A temporary service is defined in s198A(1) of the LRA as work for a client for a period not exceeding three-months; work to substitute an employee who is temporarily unavailable; or work which is determined as a 'temporary service' by a bargaining council collective agreement, a sectoral determination or a notice published by the Minister of Labour.[121]

S 198A(3)(b) goes on to provide that once an employee is no longer performing a temporary service, the client is 'deemed' to be the employer of that employee indefinitely,

[117] Labour Relations Amendment Bill 16 of 2012.
[118] See Memorandum of Objects on Labour Relations Amendment Bill, 2012 which expressly states the reasons for the amendment of the LRA of 1997.
[119] 6 of 2014.
[120] 75 of 1997.
[121] S 198A(1) of the LRA.

subject to s 198B of the LRA.[122] In addition, once s 198A(3)(b) kicks in, 'the [placed] employee must be treated on the whole not less favourably than an employee of the client performing the same or similar work [comparative employee], unless there is a justifiable reason for different treatment.'[123]

Much debate has arisen about what happens once a low earning employee is no longer performing a temporary service and is deemed to be an employee of the client. The question is: does the client become the sole employer of this employee or does the deeming provision give rise to dual employment, where the client becomes an employer along with the TES?

3.2.1.1 The Award of the Commission for Conciliation, Mediation and Arbitration (CCMA) - *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and another* [2015] 9 BALR 940 (CCMA)

The question was first considered by the CCMA in *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd.*[124] In this case, the CCMA held that the deeming provision in s 198A(3)(b) should be interpreted akin to how the concept of child adoption is interpreted. Applying this interpretation, the CCMA held that the law creates a legal fiction to afford sole parental rights and obligations to the adoptive parent and not the biological parent.[125] Sole parenthood is considered to be in the best interest of the child as treating a biological parent and the adoptive parent as dual parents would lead to uncertainty and confusion.[126] In line with this reasoning, the CCMA held that the deeming provision in s 198A(3)(b) should be interpreted to mean that the client is the sole employer of the placed employee as dual employment will lead to confusion and uncertainty.[127]

[122] S 198A(3) of the LRA.
[123] S 198A(5) of the LRA.
[124] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and another [2015] 9 BALR 940 (CCMA)* (hereinafter referred to as "*Assign services* (CCMA)".
[125] *Assign Services* (CCMA) at para 5.12.
[126] *Assign Services* (CCMA) at para 5.12.
[127] *Assign Services* (CCMA) at para 5.13.

3.2.1.2 The Labour Court Judgment - *Assign Services (Pty) Ltd v CCMA* [2015] 11 BLLR 1160 (LC)

The Labour Court[128] set aside the CCMA award in favour of the dual employment interpretation. The Labour Court began its judgment on the premise that s 198 places it beyond doubt that the TES is the employer of the placed worker at common law and for the purposes of the LRA equally.[129] In this regard, the placed worker is entitled to certain statutory protections that naturally flow from its employment contract with the TES.[130] On this basis the Labour Court found that there is nothing in the deeming provision which seems to suggest that the TES should be relieved of these employer obligations simply because the client has also acquired same.[131] In this regard, the Labour Court concluded that those employer rights and obligations remained firmly in place once the deeming provision has kicked-in. In the circumstance, the Labour Court found the word 'deemed' in s 198A(3)(b) serves to create 'an augmentation and not a substitution' of rights and obligations in terms of an employment contract.[132]

3.2.1.3 The LAC Judgment - *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office ("CWAO") and another as amici curiae)* [2017] 10 BLLR 1008 (LAC)

Unhappy with the Labour Court's decision, the National Union of Metalworkers of South Africa (NUMSA) took the matter on appeal at the LAC. NUMSA's main argument was that:

> "the Labour Court misunderstood the purpose of [s] 189(2) of the LRA. The subsection, he contended, does not seek to affirm the common law, but to create a legal fiction in order to identify one of the parties as the employer of a placed worker under the LRA because the conventional test of employment, both at common law and statutorily, are

[128] *Assign Services (Pty) Ltd v CCMA* [2015] 11 BLLR 1160 (LC) (hereinafter referred to as *Assign Services* (LC)). On appeal, the CWAO applied and was admitted as Amicus curiae, similarly, CAPES applied and was admitted as Amicus curiae.
[129] *Assign Services* (LC) at para 9.
[130] *Assign Services* (LC) at para 12.
[131] *Assign Services* (LC) at para 12.
[132] *Assign Services* (LC) at para 14.

> inadequate in the circumstances of triangular employment and accordingly leave placed workers without protection."[133]

Casual Workers Advice Office (CWAO), in support of the submissions made by NUMSA, further added that the dual employer interpretation is not supported by the LRA of 1995 upon the plain reading of the provision. It was argued that the sole employer interpretation was one that gave effect to the intentions of the amendments and constitutional rights when read contextually.[134] Furthermore, CWAO pointed out that the Labour Court failed to appreciate that the employment relationship created between the client of the TES and the placed employees is created by operation of law. In this regard, that employment relationship operates independently from any contract between the TES and the placed employee.[135]

Assign Services, the TES, opposed the appeal on the basis that the effect of the deeming provision was to leave the employment relationship between the TES and the placed employees intact, whilst introducing and creating a new employment relationship between the client and the placed employees.[136] The Confederation of Associations in the Private Employment Sector (CAPES) supported the submissions made by Assign Services.[137]

After considering all parties' submissions, the LAC agreed with NUMSA's interpretation. The LAC found that the sole employer interpretation best protects the rights of placed employees and it embodies the purpose of the amendments to s 198 and s 198A of the LRA of 1995 as outlined by the Explanatory Memorandum which accompanied the Amendment Bill (Explanatory Memorandum).[138] The Explanatory Memorandum provides that the purpose of the LRAA of 2014 is to 'upgrade temporary service employment to standard employment in order to free vulnerable employees from atypical employment by the TES.'[139] Importantly, the intention was 'to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant 'temporary work', and

[133] *Assign Services* (LAC) at para 20.
[134] *Assign Services* (LAC) at para 25.
[135] *Assign Services* (LAC) at para 25.
[136] *Assign Services* (LAC) at para 26.
[137] *Assign Services* (LAC) at para 27.
[138] *Assign Services* (LAC) at para 38.
[139] *Assign Services* (LAC) at para 43.

to introduce various further measures to protect workers employed in this way.'[140] In this regard, the LAC found that, the dual employer interpretation is not consistent with the context of s 198A of the LRA and the purpose of the amendments.[141]

Furthermore, the LAC found that the sole employer interpretation did not ban TES arrangements but sought to regulate them in a way that discouraged them from being utilised in excess of three months.[142] The LAC was however clear that the effect of the deeming provision 'was not to transfer the contract of employment between the TES and the placed worker to the client but rather to create a statutory employment relationship between the client and the placed worker.'[143] In conclusion, the LAC held that the Labour Court misdirected itself in the interpretation of s 198A(3)(b) of the LRA[144] and found in favour of sole employment. In this regard, the Labour Court judgment was set aside.

3.2.1.4 The Constitutional Court Judgment - *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22

The matter then went to the Constitutional Court.[145] The Constitutional Court was not unanimous on which interpretation was correct. Dlodlo AJ, for the majority, ruled in favour of the sole employment interpretation, whilst Chachalia AJ, for the minority, found in favour of dual employment. Each judgment is discussed blow.

3.2.1.4.1 The Majority Judgment

Dlodlo AJ held that s 198A(3) identifies who is the employer of a placed employee performing a 'temporary service' and one that is not performing a 'temporary service'. In this regard, if an employee is performing a temporary service, s 198A(3)(a) provides that the TES is the employer in accordance with s 198(2). However, once the placed employee is no longer performing a temporary service, s 198A(3)(b) kicks in and the client becomes the employer of the employee, provided that the employee earns below the threshold.

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[140] *Assign Services* (LAC) at para 38.
[141] *Assign Services* (LAC) at para 40.
[142] *Assign Services* (LAC) at para 41.
[143] *Assign Services* (LAC) at para 43.
[144] *Assign Services* (LAC) at para 47.
[145] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] *ZACC* 22 (herein after referred to as *Assign Services* (CC)).

Dlodlo AJ therefore held that s 198A(3)(b) is an alternative to s 198(2).[146] Furthermore, Dlodlo AJ agreed with the LAC that there was no "transfer of employment to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship."[147] In addition, Dlodlo AJ held that the sole employer interpretation was further strengthened by the purpose of the amendments, which is first, to protect marginal workers in temporary employment, and second, to ensure that the TES is used for work that is truly temporary.[148] Therefore, retaining the TES as employer may have the effect of frustrating the purpose of the LRAA of 2014.[149] In addition, Dlodlo AJ held the the sole employer interpretation gives employees certainty and security of employment.[150] In this regard, Dlodlo AJ found that:

> "Part of this protection entails that placed employees are fully integrated into the workplace as employees of the client after the three-month period. The employee automatically becomes employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows."[151]

Helpfully, Dlodlo AJ juxtaposed the benefits of sole employment with the uncertainty and practical difficulties associated with dual employment.[152] These practical difficulties include:

> 'complying with two sets of terms and conditions and two disciplinary codes which may characterise misconduct and poor performance differently; ascertaining which employer dismissed the employee, which should reinstate them, whether reinstatement applies to both or only one employer; and which LRA procedure applies to a dismissal…a matter of mutual interest between the employee and TES may be different from a matter of mutual interest between the employee and the client company. As a result, a strike may be

[146] *Assign Services* (CC) at para 51.
[147] *Assign Services* (CC) at para 75.
[148] *Assign Services* (CC) at para 65.
[149] *Assign Services* (CC) at para 79.
[150] *Assign Services* (CC) at para 80.
[151] *Assign Services* (CC) at para 69.
[152] *Assign Services* (CCMA) at para 5.13.

> protected as against one employer but not the other, rendering the employee vulnerable to dismissal.'[153]

In this regard, Dlodlo AJ concluded that dual employment threatened employees' ability to exercise their rights under the LRA, thereby making placed employees even more vulnerable to further abuses.[154]

3.2.1.4. 2 The Minority Judgment

Chachalia AJ wrote the minority judgment and found in favour of dual employment. In arriving at this conclusion, Chachalia AJ relied on the choice of language used in s 198A(3)(b) and held that if it was the intention of the legislature for the TES to cease to be the employer after the three-month period, the legislature would have simply said so.[155] In addition, Chachalia AJ looked at the joint and several liability clauses. The LRAA of 2014 retained s 198(4)[156] and introduced s 198(4A).[157] S 198(4A) expressly states that once the client is deemed to be an employer in terms of s 198(A)(3)(b), both the client and TES are jointly and severally liable for certain employer duties. Chachalia AJ held that 'these provisions proceed from the premise that, if the deeming provision is triggered, that is, if the client is deemed to be the employer in terms of s 198A(3)(b), both the client and the TES are deemed to be the employers of the workers.'[158] Outside of that premise, Chachalia concluded, that the provisions make no sense.[159]

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[153] *Assign Services* (CC) at para 81 and 82.
[154] *Assign Services* (CC) at para 81.
[155] *Assign Services* (CC) at para 92 and 93.
[156] S 198(4) of the LRA provides that "[*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*".
[157] S 198(4A) of the LRA provides that*"[i]f the client of a temporary employment service is jointly and severally liable in terms of* [s] *198(4) or is deemed to be the employer of an employee in terms of* [s] *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."*
[158] *Assign Services* (CC) at para 96.
[159] *Assign Services* (CC) at para 96.

Furthermore, Chachalia AJ found that dual employment gives the employees added protection by allowing them to enforce their employment rights against two employers, which will be lost in a sole employment interpretation.[160] Other adverse consequences of sole employment picked-up by Chachalia AJ include:

> (a) the employment contract between the worker and the TES remains intact, but without the additional benefits the LRA confers upon workers;[161]
>
> (b) the worker is involuntarily transferred to a client who becomes her employer without her accrued employment rights – such as accrued leave, annual bonus and pension from the TES to the client;[162]
>
> (c) the worker is forced into involuntary employment with a new employer without a contract of employment, which may result in an involuntary downgrade of terms and conditions of employment if the TES is offering better terms;[163]
>
> (d) the equal treatment clause - s 198A(5) of the LRA – provides little comfort to employees transferred to a client where there is no comparative employee employed directly by the client as there is no baseline for the determination of an employee's terms of employment;[164] and
>
> (e) in the event of the client's liquidation, the employee will be unable to look to the TES to be protected from the consequences of a loss of employment.[165]

3.2.3 Analysis of the Assign Cases

The purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling its primary objects.[166] Due to power imbalances in employment relationships, our court must be vigilant to protect vulnerable employees from exploitation.[167] With this in mind, it is submitted that the sole

[160] *Assign Services* (CC) at para 96.
[161] *Assign Services* (CC) at para 100.
[162] *Assign Services* (CC) at para 100.
[163] *Assign Services* (CC) at para 102.
[164] *Assign Services* (CC) at para 102.
[165] *Assign Services (*CC) at para 103.
[166] S 1 of the LRA.
[167] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* [2010] ZALAC 8 at para 41.

employer interpretation is undoubtedly correct as it provides employees with certainty and employment security. Furthermore, it ensures that the TES is used for work that is truly temporary. It should not be lost that the client is the party that has the day-to-day interaction with the placed employee, yet the client was not accountable to the placed employee. Furthermore, the client has the most power in a triangular relationship. The TES is simply the middleman who delivers the employee to the client and as such has little to no power to protect the employee from dismissal. Accordingly, it is submitted that it makes little sense to uphold the dual employer interpretation.

Both the LAC and the Constitutional Court were at pains to clarify that s 198A(3)(b) of the LRA did not result in a transfer of employment from the TES to the client but merely a change in statutory responsibility from the TES to the client.[168] It simply means that the client cannot continue to pass on to the TES its obligations in terms of the LRA post the three-month mark.[169] In this regard, the TES employee is not entitled to a new contract of employment with the client nor is the triangular relationship automatically dissolved.[170] What is left of the commercial agreement between the TES and the client will be negotiated between the two parties, which leaves room for abuse. For example, the TES and the client may insert an indemnity clause to shield the client against liability. In such a situation, the client will not be "out of pocket" as a result of the deeming provisions. However, comfort can be found from case law which confirms that "if the terms of the new agreement infringes upon the rights of employees, it will not be binding and the Courts will reject such agreements"[171]

In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa*,[172] the Constitutional Court held that the job of judges 'is not to pick and

[168] *Mphirime / Value Logistics Ltd/BDM Staffing* (Pty) *Ltd* [2015] 8 BALR 788 (NBCRFLI) at para 33.
[169] See *South African Commercial, Catering and Allied Workers Union obo Noda / Sovereign Foods and* another [2020] 9 BALR 988 (CCMA).
[170] *Mredlana / Adcorp BLU, a division of Adcorp Fulfilment Services (Pty) Ltd* [2020] 3 BALR 261 (CCMA) at para 36.2; or *General Industries Workers Union of South Africa obo Mgedezi and others / Swissport SA (Pty) Ltd and another* [2019] 9 BALR 954 (CCMA) at para 17; *Mphirime / Value Logistics Ltd/BDM Staffing (Pty) Ltd* [2015] 8 BALR 788 (NBCRFLI) at para 33.
[171] *Mphirime / Value Logistics Ltd/BDM Staffing (Pty) Ltd* [2015] 8 BALR 788 (NBCRFLI) at para 47.
[172] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa* [2017] ZACC 3.

choose between the rights and wrongs, advantages and disadvantages of different models but it is to determine whether the model Parliament has in fact chosen passes scrutiny under the Bill of Rights.'[173]

Given the manner in which the deeming provision was crafted, the sole employer interpretation is correct as it best protects the placed worker in that it provides the worker with certainty and employment security. It is submitted that TES employees would have been better off if the triangular relationship ceased once the employee was no longer performing a temporary service and there was a transfer of employment from the TES to the client, akin to s 197 of the LRA. This is so in light of s 198A(5) which requires the client to fully integrate the placed worker into its workplace and not to treat the placed worker less favourably than its direct employees.

The legislature is not clear about what happens to the employee's accrued employment benefits from the TES, for example years of service. If the client undergoes a retrenchment process and uses Last-In-First-Out as the selection criteria, does this mean the TES employees would be the first ones on the chopping block? In this regard, even though s 198A(3)(b) of the LRA is progressive, it is inadequate to achieve true social justice for the employees so long as the triangular relationship is not dissolved post the three-mark month.

3.2.4 The Implications of The Deeming Provision created by S 198A(3)(b) of the LRA

S 198A(3)(b) of the LRA provides that once a placed employee is no longer performing a temporary service, the client is deemed to be the employer and the employee is deemed to be employed by the client indefinitely, subject to s 198B of the LRA.[174] S 198B regulates fixed-term contracts of employees earning below the threshold. There is no triangular relationship in a fixed-term contract. In this regard, the fixed-term contract is between the placed employee and the client. In terms of s 198B(3) an employee is permitted to be employed on a fixed-term contract for longer than three months if the nature of the work

[173] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa* [2017] ZACC at 3 para5.
[174] S 198A(3) of the LRA.

is of a limited or definite duration or if the employer can demonstrate a justifiable reason for fixing the term of the contract.[175]

S 198B(4) provides some of the justifiable reasons for a fixed-term contract.[176] These reasons include, using the employee to replace another employee who is temporarily absent from work; or the employee being placed on a graduate program; or the employee helping with increased volumes of work. This list is not exhaustive. This means that once the deeming provisions have kicked-in, the placed employee will be employed by the client indefinitely unless the nature of the work performed by the placed employee is of a limited or definite duration or if the client can demonstrate a justifiable reason for fixing the term of the contract.[177] What is clear from s 198B is that it prevents clients from keeping placed employees in perpetual temporary positions for no good reason.[178]

In addition to being deemed to be employed by the client indefinitely, s 198A(5) provides that that the placed employee "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."[179] The phrase "on the whole not less favourably" is not defined in the LRA and accordingly our courts and academics have sought to give meaning to this phrase.[180]

Whilst the phrase may have different meanings in different contexts, its usage in s 198A(5) has been interpreted by the Constitutional Court to mean that "the placed

[175] S 198B(3) of the LRA.
[176] S 198B(4) provides that: "*Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee— (a) is replacing another employee who is temporarily absent from work; (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; Page 212 of 299 Prepared by: (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; (d) is employed to work exclusively on a specific project that has a limited or defined duration; (e) is a non-citizen who has been granted a work permit for a defined period; (f) is employed to perform seasonal work; (g) is employed for the purpose of an official public works scheme or similar public job creation scheme; (h) is employed in a position which is funded by an external source for a limited period; or (i) has reached the normal or agreed retirement age applicable in the employer's business.*"
[177] S 198B(3) of the LRA.
[178] See for example *United Chemical Industries Mining Electrical State Health and Aligned Workers Unions obo Mbombo / Primeserv* [2017] 2 BALR 135 (NBCRFLI).
[179] S 198A(5) of the LRA.
[180] In *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR)* [2016] 9 BLLR 942 (LC). the labour court found that "[s] 198A(5) only requires that a labour broker's employee must be treated "on the whole" not less favourably than an employee of the client performing the same work (absent a justifiable reason for different treatment); it does not necessarily require the basic rate of pay to be the same."

employees must be fully integrated into the workplace of the client with the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows."[181] In this regard, s 198A(5) 'attempts to eradicate the underclass of TES employees who have been doing the same work as their colleagues employed by the client, but who have been paid significantly less or received benefits that are far less advantageous.'[182] This happens automatically and the client cannot escape its obligations under s 198A(5) on the basis of financial constraints.[183] In this regard, once s 198A(5) kicks in, as a result of s 198A(3)(b), it will become expensive for the client to maintain the triangular relationship, which could result in the client eliminating the TES from the relationship, whilst absorbing the TES employee.

Although, s 198A(5) has been praised for upgrading TES employees who were experiencing pay discrimination when compared to employees of the client performing the same or similar work (comparative employee(s)), it is not without criticism. One of the criticisms is that it could result in the automatic downgrading of terms and conditions of employment in circumstances where the TES was offering better terms and conditions. Whilst this is theoretically true, it is unlikely, as the main attraction for the engagement of a TES is the lower costs.[184]

Some of the more realistic criticisms include the fact that s 198A(5) does little to nothing for a TES employee who has been transferred to a client which does not have employees

[181] *Assign Services* (CC) at para 69. This interpretation is in line with the Memorandum of Objects on Labour Relations Amendment Bill, 2012.
[182] Bosch (2013) *ILJ* 1639.
[183] *Food and Allied Workers' Union obo Members / Giant Canning CC and Mighty Solutions CC* [2019] 1 BALR 21 (CCMA).
[184] To date there has been no reported cases of TES employees who have downgraded their terms and conditions of employment as a result of s 198(5). All the reported cases are related to a TES employees using s 198A(5) to improve their terms and conditions of employment (see *General Industries Workers Union of South Africa obo Mgedezi and others / Swissport SA (Pty) Ltd and another* [2019] 9 BALR 954 (CCMA); *Hlutha and others / Tsebo Outsourcing Group (Pty) Ltd t/a Fedics (Gauteng) and another* [2016] 6 BALR 634 (CCMA); *Mavuso and others / Tip Top Personnel CC / Skynet Worldwide Express* [2018] 6 BALR 581 (NBCRFLI); *Target Orientated Trade Union of South Africa obo Mdingi and others / Eastern Cape Nursing Services t/a Amatola Nursing Services and another* [2017] 11 BALR 1237 (CCMA); *Victor and others v Chep South Africa (Pty) Ltd and others* [2021] 1 BLLR 53 (LAC)).

performing the same or similar work (comparative employee).[185] In such circumstances, there is no baseline for the determination of an employee's terms of employment.[186]

Equally, s 198A(5) provides no assistance to TES employees where the client has outsourced a particular service to multiple labour brokers, who pay different rates. The claimant cannot rely on a comparative employee employed by a different TES as a baseline for determination of terms and conditions of employment, notwithstanding that these categories of employees work at the same workplace for the same client.[187] Consequently, those employees will still face pay discrimination. In addition, a comparative employee in terms of s 198A(5) can only be someone performing the same or similar work. This provision does not extend to 'work of equal value' as is the case with the Employment Equity Act (EEA)[188] which applies only to standard employment. In this regard, placed employees are still getting the short end of the stick compared to standard employees.

3.2.5 S 198A(4) of the LRA - Joint and Several Liability Clause

S 198(4) allows for the client to be held liable in instances where the TES reneges on the terms and conditions of employment set out in the BCEA, arbitration award, sectoral determination as well as a bargaining council collective agreement.[189] It is therefore clear that s 198(4) is not all-inclusive but only limited to issues stipulated in that section.[190] S 198(4) was retained but was not amended to include "dismissal" or "contraventions of the LRA", as such the section remains limited to issues stipulated in that section and nothing else.[191] S 198(4) was however supplemented by s 198(4A)[192] to provide recourse directly

[185] *Assign Services* (CC) at para 102.
[186] *Senamela and others / Home of Living Brands (Pty) Ltd* [2020] 12 BALR 1342 (CCMA); *General Industries Workers Union of South Africa obo Mgedezi and others / Swissport SA (Pty) Ltd* [2019] 9 BALR 954 (CCMA).
[187] *Sityodi / Capital South Africa (Pty) Ltd and another* [2017] 7 BALR 812 (CCMA).
[188] Employment Equity Act 55 of 1998.
[189] S 198(4) of the LRA.
[190] *Mphirime / Value Logistics Ltd/BDM Staffing (Pty) Ltd [2015] 8 BALR 788 (NBCRFLI)* at para 12.
[191] *Mphirime / Value Logistics Ltd/BDM Staffing (Pty) Ltd* [2015] 8 BALR 788 (NBCRFLI) at para 13.
[192] S 198(4A) provides that *"[i]f the client of a temporary employment service is jointly and severally liable in terms of* [s] *198(4) or is deemed to be the employer of an employee in terms of* [s] *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."*

against the client for contraventions in terms of s 198(4) without first having to institute proceedings against the TES.[193]

Before 2015, a placed worker was required to institute proceedings against the TES first, without the client.[194] It was only once the TES had failed to comply with the order or award in favour of the placed worker that the client could be held liable. The recourse in s 198(4A) applies even after the client has been deemed the employer of the TES employee and is still limited to the issues that are listed in s 198(4).[195] Once the deeming provision has kicked in, the joint and several liability of a TES and the client persists if the client chooses to retain its commercial contractual relationship with the TES.[196] This will only be allowed if it is in fact the TES, not the client, who continues to remunerate the employee. This is consistent with the long-term view of trying to make TES arrangements unattractive employment options for low earning employees.[197]

However, it must be noted, that the joint and several liability of the TES does not elevate it to being an employer along with the client. In this regard, it applies in the same way as a s 197 transfer where both the old employer and the new employer are jointly and severally liable in respect of certain claims brought by the transferred employees.[198] However, it is the new employer who has sole employer status. The joint and several liability will cease once the client terminates the contractual arrangement with the TES and directly remunerates the placed employee.[199]

[193] *Assign Services* (CC) at para 62.
[194] *Assign Services* (CC) at para 63.
[195] *South African Commercial, Catering and Allied Workers Union obo Noda / Sovereign Foods and another* [2020] 9 BALR 988 (CCMA) at para 26.
[196] Benjamin (2016) *ILJ* 41.
[197] Benjamin (2016) *ILJ* 42.
[198] S 197(8) and S 197(9) of the LRA.
[199] Benjamin (2016) *ILJ* 43.

3.3 The Blatant Exclusion of Employees Earning Above the Threshold From 198A of the LRA

The introduction of s 198A clearly disincentivises the use of labour brokers in respect of low-earning employees post the three-month mark by transferring the LRA obligations from the TES to the client and also requiring the client to absorb the placed employees on the same terms and conditions as its direct employees. This then begs the question, why were these important changes only limited to employees earning below the BCEA threshold. The Explanatory Memorandum does not provide an explanation for this exclusion. Forere,[200] argues it might be because these employees in the majority of cases are 'university graduates who are in a better position to negotiate and to claim their statutory rights.'[201] It is submitted that this is not a good enough reason as these employee are vulnerable by virtue of being in a TES employment.[202] Furthermore, there have been cases where the TES and client have increased the placed worker's earnings to above the threshold to avoid the effect of the deeming provision.[203]

The biggest argument against the banning of labour brokers is the labour broker's constitutional right to trade and to conduct business.[204] Hence the legislature has chosen to rather regulate same and extend protection to "low-earning" employees. It is not believed the labour broker's constitutional right to trade and to conduct business will be unreasonably restricted if s 198A of the LRA is extended to employees above the threshold. If the purpose of s 198A is "to fill a gap in accountability between client companies and employees who are placed with them,"[205] whilst still affording them "short-term flexibility", it does not follow that this should be limited to employees earning below the threshold. Importantly, the ILO Private Employment Agencies Convention, does not differentiate between high-earning and low-earning employees.[206] It is therefore

[200] Forere (2016) SA *Merc LJ* 375.
[201] Forere (2016) SA *Merc LJ* 382.
[202] *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] ZALC 33 at 59.
[203] *NUMSA / Eskom Holdings SOC Ltd* [2018] 12 BALR 1342 (CCMA) at para 13.4.
[204] S 22 of the Constitution.
[205] *Assign Services* (CC) at para 70.
[206] ILO Private Employment Agencies Convention, 1997 (No. 181).

submitted that since the legislature has not banned labour brokers, it could at least have extended the added protections to all labour broker employees, regardless of income.

3.4 Conclusion

This chapter examined the current legislative framework of TES's in South Africa, largely focusing on s 198(4A), s 198A(1), s 198A(3)(b) and s 198A(5) of the LRA which were introduced in 2015. It is clear that these provisions do not ban the use of labour brokers but rather seek to disincentivise its usage post the three-month mark for employees earning below the BCEA threshold. In this regard, the employer obligations in terms of the LRA are transferred from the TES to the client. In addition, the client is required to integrate the TES employees into its workplace and also treat them no less favourably than its direct employees.

The Constitutional Court in *Assign Services* correctly found that once the deeming provision kicked in, the client is regarded as the sole employer of the placed worker for the purposes of the LRA. However, the fact that the legislature made a policy choice not to dissolve the triangular relationship post the three-mark period leaves room for abuse and some confusion in certain respects. Another shortcoming of the LRA is its failure to extend the protections in s 198A to employees earning above the threshold. Furthermore, the LRAA failed to address the issue of automatic termination clauses discussed in Chapter 2.

CHAPTER FOUR

INTERNATIONAL LABOUR ORGANISATION STANDARDS

4.1 Introduction

The International Labour Organisation (ILO) is a specialised agency of the United Nations (UN) which was founded in 1919.[207] It seeks to promote universal and lasting peace through social and economic justice for employees and employers.[208] Historically, the ILO has been opposed to the use of private employment agencies on the basis they would undermine the principle that 'labour is not a commodity.'[209]

In the early 1970s, 'economic liberalism and international competition led to increasing acceptance of the role that private employment agencies could play in improving the functioning of the labour market.'[210] In this regard, private employment agencies can:

> 'Shorten the time involved in filling vacancies; [e]nsure vacancies appreciate changes in the labour market and react quickly; [b]ring together supply and demand without losing time; [f]ill the need that public employment services cannot fill; [b]ridge the gap between unemployment and permeant positions, mainly through temporary jobs and gradually (re)intergrating job seekers in the labour market; [t]hey enhance information about jobs; [s]horten the time between jobs by means of outplacement techniques, contributing to improved labour mobility; [t]hey provide short-term training, bridging the gap between the supply of and demand for skills.'[211]

Due to the history and controversy surrounding the use of private employment agencies, 'the challenge remains how to protect the millions of workers employed by agencies while also ensuring that the industry's s growth does not erode employment relationships.'[212] This is where the Private Employment Agencies Convention 181 of 1999 (Convention 181), supplemented by the Private Employment Agencies Recommendation 188 of 1997 (Recommendation 188) come in. These ILO instruments set out the minimum standards

[207] Guide to International Labour Standards *ILO* 2008 at page 249; Preamble of ILO Constitution, 1919.
[208] Guide to International Labour Standards *ILO* 2008 at page 249; Preamble of ILO Constitution, 1919.
[209] Raday (1999) *CLLPJ* 413; The Declaration of Philadelphia 1944.
[210] ILO Discussion Paper (2009) *Geneva, ILO* 5.
[211] Dr Fred, van Haasteren (2017) at para 2.1.16.
[212] ILO Discussion Paper (2011), *Geneva, ILO* 34.

for protection of agency workers.[213] Trade unions approved of these standards as they were offering protection to temporary and migrant workers.[214]

South Africa is a member state of the ILO but has not ratified Convention 181.[215] One would assume that the Convention finds no application in South African law, however this assumption is incorrect. The starting point is that the Constitution requires every court, tribunal or forum, in the interpretation of the Bill of Rights, to consider international law and foreign law.[216] In addition, s 233 of the Constitution places preference on the interpretation of legislation which corresponds with international law over an alternative interpretation which does not correspond with international law.[217] In this regard, the conventions, recommendations as well as decisions of the ILO committees are important resources to interpreting the LRA and the Constitution.[218] This is so regardless of whether the resource is binding or non-binding on South Africa.[219]

Furthermore, the Constitution requires that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[220] Importantly, the Labour Relations Act (LRA) regulates the use of private employment agencies in South Africa.[221] One of its purposes is to give effect to the right to fair labour practices conferred by s 23 of the Constitution and its obligations as a member state of the ILO.[222] In this regard, Convention 181 and Recommendation 188 play a pivotal role in how the LRA regulates private employment agencies.[223]

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[213] The old ILO instruments that regulated labour broking included Unemployment Convention 2 of 1919, Unemployment Recommendation 1 of 1919, Fee-Charging Employment Agencies Convention 34 of 1933 and Fee-Charging Employment Agencies Convention 96 of 1949.
[214] ILO Discussion Paper (2009) Geneva, ILO at page 5.
[215] Aletter and Van Eck (2016) *SA Merc LJ* 299.
[216] S 39(1)(b) of the Constitution.
[217] S 233 of the Constitution.
[218] *SA National Defence Union v Minister of Defence* (1999) 20 ILJ 2265 (CC) at para 25. *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 ILJ 305 (CC) at para 30.
[219] *S v Makwanyane and Others* [1995] ZACC 3 at para 35.
[220] S 39(2) of the Constitution.
[221] S 198 and s 198A of the LRA.
[222] S 3 of the LRA.
[223] For example *Dyokhwe v De Kock NO and others* [2012] 10 BLLR 1012 (LC) at para 33 and 34; *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] *ZALC* 33 at page 62.

The purpose of this Chapter is to examine the ILO standards pertaining to temporary work and the decent work agenda. In terms of temporary work, the Chapter specifically discusses Convention 181 and Recommendation 188 to establish how it strikes a balance in regulating TES arrangements, how it protects the rights of employees and how it influences the regulation of TES employment in South Africa, in an attempt to achieve decent work.

4.2. Private Employment Agency 181 of 1997

The purpose of ILO Convention 181 is 'to allow the operation of private employment agencies as well as the protection of workers using their services, within the framework of its provisions.'[224] It can be inferred from Article 2(3) of Convention 181 that the ILO does not endorse the theory of banning labour broking nor does it endorse or support the theory of illegality of labour broking. In contrast, the Convention recognises 'the importance of flexibility in the functioning of labour markets' and the role that private employment agencies can play in such a market whilst at the same time protecting employees from abuse.[225] It should be stressed that 'Convention 181 provides a framework that should be implemented as a whole, and should not be treated as an *à la carte* menu from which to choose a few items.'[226] What will follow is a detailed discussion to determine compliance of South African labour law with Convention 181. In doing so, different topics will be discussed to make such determination.

4.2.1. Definition

Under Convention 181, labour broking is referred to as a private employment agency. Private employment agency is defined by the Convention as any natural or legal person, independent of the public authorities, which provides one or more of the following labour markets services:

[224] Article 2(3) of Convention 181.
[225] See Preamble of Convention 181.
[226] ILO Discussion Paper (2011) *Geneva, ILO* at page 34.

> ‘(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.’[227]

From the definition, two types of labour brokers can be identified. First, is a recruitment agency which places job seekers with the client and is not part of the employment relationship. In terms of this type of labour broking, the jobseeker becomes the employee of the client and not the labour broker. The second type is the labour broker who employs jobseekers and places them with the client for employment. In terms of this type of labour broking, the labour broker is the employer of the jobseekers.[228] The second type of labour broking is the one regulated in South Africa. It is important to note that Convention 181 does not provide that agency work should be temporary.

4.2.2. Registration and licensing

In Article 3, Convention 181 places a duty on member states to require private employment agencies to be registered and licensed before they can be afforded legal status.[229] In addition, Article 10 places a duty on member states to ensure that adequate procedures and mechanisms exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies. These provisions are clearly aimed at curbing unethical practices by labour brokers so as to

[227] Article 1(1) of Convention 181.
[228] Mtshali *Labour Brokering, an ILO Perspective* accessed: http://www.times.co.sz/feed/thinking-aloud/37030-labour-brokering-an-ilo-perspective.txt.
[229] Article 3 of Convention 181.

protect vulnerable employees. Such mechanisms, if enforced, will go a long way to ensuring that placed workers are not treated as commodities.

4.2.3. Freedom of association and collective bargaining

In Article 4, Convention 181 requires of the member states to take certain measures to ensure that workers who are placed by the labour brokers are not denied their right to freedom of association and the right to bargain collectively.[230] These rights are particularly important in the workplace as collective bargaining is the primary means through which workers improve their terms and conditions of employment. Trade union organisation is based on the classic model of a workplace 'where large numbers of workers working for the same employer are massed in the same workplace.'[231] However, this is clearly difficult to achieve with agency workers as they are usually scattered at different workplaces of the labour broker's clients and they barely have any relationship with their employer, the labour broker.[232] This however does not mean that trade union organisation is impossible. Trade unions simply need to adapt to the changing nature of employment.[233]

4.2.4. Unfair discrimination

Article 5 of the Convention places a duty on member states to ensure that private employment agencies do not discriminate against agency workers on the basis of race, colour, sex, religion, political opinion, national extraction, social origin age or disability.[234] It must be noted that Article 5 speaks to equal treatment by the private employment agency, not the client/user enterprise. Furthermore, this provision is only limited to the "classical" grounds of discrimination and does not extend to terms and conditions of employment such as salary, leave days, pension benefits, hours of work, medical aid etc.

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[230] Article 4 of Convention 181.
[231] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51 of 2008) [2009] NASC 17 (14 December 2009 at para 103.
[232] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51 of 2008) [2009] NASC 17 (14 December 2009 at para 102; du Toit and Roger Ronnie (2012) *Acta Juridica* 198.
[233] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51 of 2008) [2009] NASC 17 (14 December 2009 at para 105.
[234] Article 5 of Convention 181.

Therefore, this could result in unequal terms and conditions of employment between agency workers and employees of the client.[235] This is a major shortcoming of article 5.

4.2.5. Allocation of Respective Rights and Obligations.

The use of private employment agencies denotes a triangular relationship between three parties, the placed worker, the private employment agent and the user enterprise/client. Although Convention 181 is clear that the private agency is the employer, the user enterprise nonetheless directs and supervises the placed worker's tasks. This creates confusion and uncertainty on which entity is responsible for various employer obligations, such as the enforcement of freedom of association and collective bargaining, working time and other conditions, access to training, occupational health and safety, etc.[236] In this regard, article 12 places a duty on member states to determine and allocate respective responsibilities between the private employment agencies and the user enterprises in relation to these employer obligations. This provides the agency workers with certainty when it comes to enforcing their rights. However, Convention 181 does not stipulate which employer obligations should be assigned to the private employer agency and which ones should be assigned to the user enterprise.[237] This is left to the member states.

Convention 181 also falls short in providing guidance in relation to the termination of employment. Perhaps this is because this issue is already dealt with in the Termination of Employment Convention 158 of 1982 (Convention 158). Convention 158 allows the employer to terminate employment for conduct, capacity and operational requirements.[238] As the private employment agency is the employer, it will be responsible for terminating the services of the agency worker. Practically the termination will be at the direction of the user enterprise. However, the user enterprise cannot be held accountable for the termination as it is not the employer. This is a huge shortcoming of the ILO standards as

[235] Aletter and Van Eck (2016) *SA Merc LJ* 303.
[236] Article 11 of Convention 181.
[237] Aletter and Van Eck (2016) *SA Merc LJ* 304.
[238] Article 4 of Convention 1982.

there is no employment security for the agency worker. Furthermore, this is aggravated by the fact that ILO standards do not require agency work to be temporary.

4.3. Private Employment Agency Recommendation 188 of 1997

The ILO Convention 181 was supplemented by Recommendation 188. The Recommendation encourages member states to adopt necessary and appropriate measures in order to prevent and eliminate practices which are unethical in the labour broking market.[239] Furthermore, the recommendation contains further employee protections such a mandating a written contract of employment,[240] prohibiting the use of agency workers as replacement labour during a strike,[241] placing a duty on private employment agencies to not knowingly place agency workers in jobs involving unacceptable hazards and risks,[242] as well the elimination of discriminatory practices.[243] It is submitted that these recommendations are for the prevention of abuse of employees by granting them rights and freedoms that standard employees typically enjoy.[244] In addition, the Recommendation provides that the agency worker should not be prevented from taking up a job with the user enterprise or another private employment agency.

4.4 South Africa's Compliance with the ILO Standards

Having considered South Africa's regulatory framework in Chapter 2 of this research paper, it is submitted that South Africa, for the most part, complies with the ILO standards. In South Africa, there has been numerous calls to ban the use of labour brokers.[245] Theron correctly asserts that 'a ban on labour broking would thus represent a ban on an internationally recognised form of employment.'[246] Hence, South Africa has opted to regulate the use of labour brokers with the aim of promoting the employer's business

[239] Article 4 of Recommendation 188.
[240] Article 5 of Recommendation 188.
[241] Article 6 of Recommendation 188.
[242] Article 8(a) of Recommendation 188.
[243] Article 9 of Recommendation 188.
[244] Mtshali *Labour Brokering, an ILO Perspective* http://www.times.co.sz/feed/thinking-aloud/37030-labour-brokering-an-ilo-perspective.txt.
[245] Ban labour brokers: Vavi' 08 September 2011 *The Times Live* accessed: www.timeslive.co.za
[246] Theron (2012) *Acta Juridica* 71.

interest whilst at the same time protecting the interest of workers not to be treated as commodities.

Labour brokers are provided legal status in the LRA read together with the Employment Services Act (ESA).[247] Together they provide that any person who wishes to operate an employment service must apply for registration of such an employment service.[248] This is an important requirement because by registration it becomes easier to monitor the activities of the TES.[249]

In terms of the Draft Regulations on the Registration of Private Employment Agencies (the draft regulations), in order for an applicant to successfully register, it must submit, inter alia proof of a viable physical address, proof of registration with the Companies and Intellectual Property Commission (CIPC), tax clearance, proof of registration with a bargaining council, where applicable.[250] If the registration is successful, the labour broker will be issued with a registration certificate which will have to be renewed every three years.[251] Importantly, the draft regulations provide that a registration certificate 'may' be revoked if the labour broker fails to comply with the LRA.[252] The use of the word 'may,' denotes an application of a discretion in deciding whether to revoke the certificate or not. At this point it is not clear how compliance will be monitored in practice. Furthermore, the regulations are still in the draft stages, and it is yet to be seen what parts will make it into law. Be that as it may, requiring registration is a good attempt at curbing unethical practices by labour brokers as mandated by the ILO.

In respect of collective bargaining, collective bargaining rights are attached to the 'workplace'. The LRA does not contain an enforceable duty to bargain collectively.[253] Rather, it creates a legal framework for collective bargaining to occur voluntarily.[254] Because of the composition of the workplace, it was difficult for trade unions to organize agency workers. In this regard, the LRA provides that should a dispute arise regarding

[247] 97 of 1998.
[248] S 13(1) of ESA 4 of 2014.
[249] Benjamin 2013 *Geneva: ILO* 14.
[250] Regulation 2(6) of the Draft Regulations.
[251] Regulation 2(7)(b) of the Draft Regulations.
[252] Regulation 3(1)(k) of the Draft Regulations
[253] Benjamin 2013 *Geneva: ILO* 12.
[254] Part A of Chapter 3 of the LRA.

organisational rights within a specific workplace, the Commissioner should take into account 'the composition of the work-force in the workplace taking into account the extent to which there are employees assigned to work by [TES].'[255] Furthermore, a trade union can seek to exercise organisational rights on the premises of either the TES or the client, it will depend on where the employees are at a given time.[256] In addition, s 22(5) provides that an arbitration award which deal with organisational rights binds, not only the labour broker, but also the client.[257] The provisions ascertain the involvement of TES employees in collective bargaining.[258]

In relation to the elimination of discriminatory practices, South Africa was founded on the principle of equality and does not tolerate any unfair discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, etc.[259] The LRA and the Employment Equity Act (EEA)[260] also align to this principle.[261] In relation to the regulation of labour brokers, s 198A(5) of the LRA places an additional burden on the client/user enterprise to treat agency workers on the whole not less favourably than their employees performing comparative work. S 198A(5) also covers terms and conditions of employment. However, as discussed in Chapter 3, this provision only applies after three months and only in respect of employees earning below the threshold. In this regard, South Africa provides better protection against discrimination compared to Convention 181.

In respect of the allocation of duties, s 198(2) of LRA provides that the labour broker is the employer and not the client. In this regard, the labour broker is responsible for all traditional employer obligations even though it cannot practically comply with some of these obligations due to its employees being placed with the client. S 198A(3)(b) seeks to solve this problem by transferring LRA obligations (including dismissals) to the client after 3 months, for employees earning below the threshold. As such, South Africa

[255] S 21(8)(b)(v) of the LRA.
[256] Botes (2013) *SALJ* 109.
[257] S 22(5)(a) of the LRA.
[258] Memorandum of Objects on Labour Relations Amendment Bill, 2012 2.
[259] Preamble of the Constitution and s 9 of the Constitution.
[260] Employment Equity Act 55 of 1998.
[261] S 187(1)(f) of the LRA and S 6 of the EEA.

provides better employment security compared to the ILO with regards to employees earning below the threshold. However, the Constitutional Court has ruled that this is not a transfer of employment and further that the triangular relationship is not automatically dissolved once s 198A(3)(b) is triggered.[262] In this regard, the labour broker continues to be the employer for labour legislation other than the LRA.

4.5 The Decent Work Agenda

The ILO is concerned with decent work. Decent work is defined as:

> 'productive work in which rights are protected, which generates an adequate income, with adequate social protection. It also means sufficient work, in the sense that all should have full access to income-earning opportunities.'[263]

Therefore, decent work does not only concern the creation of jobs, but the creation of jobs of acceptable quality.[264] There are four pillars to measure the Decent Work Agenda, namely: employment creation, social protection, rights at work, and social dialogue.[265] These four pillars are inseparable, interrelated and mutually supportive. Therefore, promotion of the others at the detriment of anyone of the pillars would harm progress towards the others.[266] Convention 181 for the most part adheres to the concept of decent work. The biggest issue is the security of employment.

Some experts argue that security of employment will not be achieved through severe dismissal laws but through creation of jobs. "Some analysts and institutions believe that primacy should be given to "job creation", on the grounds that this would be the most effective way of ameliorating poverty and inequality in the longer term."[267] In South Africa, the unemployment rate sits at a staggering 34.4%, largely due to lack of education and resources.[268] This unemployment rate has been exacerbated by COVID-19. Therefore, temporary work can be a steppingstone for new entrants into the job market and hence

[262] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa* at para 75.
[263] Ghai (2003) *International Labour Review* 13.
[264] ILO Report on Decent Work (1999) *Geneva: ILO*.
[265] ILO Declaration on Social Justice for a Fair Globalization, 2008 at page 11.
[266] ILO Declaration on Social Justice for a Fair Globalization 2008 at page 11.
[267] Standing, Sender, Weeks (1996) 1 - 2.
[268] Stats SA 2021 accessed: www.statssa.gov.za.

contribute to increased job creation.[269] Any abuses by labour brokers can be curtailed through regulation and not banning.

4.6 Conclusion

The traditional role of labour law is to act as a "countervailing force" against the inequality of bargaining power in an employment relationship.[270] In these modern times, it may be worthwhile to extend this role to facilitate job creation by recognising non-standard work and regulating it effectively.[271] It is submitted that this purpose is in line with the purpose of the LRA, which is to advance economic development and social justice. As such, s 198 and s 198A of the LRA, in line with Convention 181, places primacy on regulation and not banning labour brokers. In this regard, the flexibility that labour brokers provide will help South Africa become more competitive in the global market and thus create more jobs. Furthermore, on a holistic level, it is concluded that the LRA does comply with ILO standards, although it has some shortcomings. The major shortcomings are:

a) the failure on the legislature to finalise the process for the registration and licencing of labour brokers;
b) the lack of a clear provision allocating the respective employer duties between the labour broker and the client; and
c) the lack of a clear provision prohibiting labour brokers from prohibiting their employees from taking up vacant positions with the client.

On the upside, the LRA's application of the equal treatment principle extends to terms and conditions of employment, whilst the ILO Convention only limits same to the classical grounds of discrimination. Furthermore, s 198A(3)(b) of the LRA holds the client accountable for the dismissal of placed employees post the three-month mark whilst the ILO standards do not. In this regard, the LRA affords the agency workers better protection than the ILO.

[269] Wim Kok Report (2003) 32.
[270] Davies and Kahn-Freund (1983) 18.
[271] Van Eck (2014) *The International Journal of Comparative Labour Law and Industrial Relations* 52 - 53.

CHAPTER FIVE

COMPARATIVE ANALYSIS OF FOREIGN JURISDICTIONS

5.1 Introduction

This chapter deals with the comparative analysis of the regulation of labour brokers in the European Union (EU) and Namibia. The concept of 'flexicurity' will be explored with the view of analysing if such a model is suitable for South Africa or whether a blanket ban on labour brokers is more appropriate.

5.2 The Regulatory Framework in the EU

5.2.1 The Concept of Flexicurity

Similar to South Africa, the regulation of agency workers has been a controversial issue in the European Union.[272] Member states for the most part have not been able to agree on the level of protection to be extended to agency workers.[273] As such, a long negotiation process ensued which resulted in the adoption of the Directive on Temporary Agency Work 2008/104/EC (The Directive).[274] The purpose of the directive is to provide protection to temporary agency workers by ensuring the principle of equal treatment and also recognising temporary-work agencies as employers of the agency workers.[275]

The Directive gives effect to the Lisbon Strategy which seeks to increase the employment rate in Europe.[276] Lack of flexibility in Europe's labour market was highlighted as the primary reason for unsatisfactory job creation and economic growth.[277] In accordance with item 11 of the Directive's Preamble, "[t]emporary agency work meets not only undertakings' needs for flexibility but also the need of employees to reconcile their

[272] Frenzel (2010) *ELLJ* 120.
[273] Frenzel (2010) *ELLJ* 120.
[274] Frenzel (2010) *ELLJ* 120.
[275] Article 2 of the Directive.
[276] Item 8 of the Preamble of The Directive.
[277] Morel and Palier (2012) 340.

working and private lives. It thus contributes to job creation and to participation and integration in the labour market."[278]

The trick is therefore for the labour market to provide enough flexibility in the job market whilst ensuring that employment remain secure. This balance is known as flexicurity. Wilthagen, argues that security should not just mean that workers never lose their jobs. In this regard, he argues that employment security is about:

> "[B]uilding and preserving people's ability to enter, remain and progress in employment throughout the life cycle. It is also about the security for firms to preserve and improve their market position, the loyalty of their workforce and their productivity and job creation potential within an increasingly competitive environment."[279]

Nicu provides that:

> "[f]lexicurity is a means to strengthen the implementation of the Lisbon Strategy, to create more and better jobs, to modernise labour markets, and promote a higher activity through new forms of flexibility and security, to increase adaptability, employment and social cohesion."[280]

The most fundamental way in which the Directive gives effect to the principle of flexicurity is through the elimination of restrictions or prohibitions on the use of temporary agency work. In terms of article 4 of the Directive, limitations are only justified "on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented."[281] As such, Member States are instructed, after consulting with social partners, to conduct a review of their national laws and/or collective agreements to verify if their legislative limitations fall within the exception in article 4.

[278] Preamble of the Directive.
[279] Wilthagen (2007) *Tilburg Law Review* 82.
[280] Nicu (2015) *Conferinta Internationala de Drept, Studii Europene si Relatii Internationale* 728.
[281] Article 4 of the Directive.

5.2.2 Nature of the Relationship

Similar to South Africa, temporary agency work in the EU denotes a triangular relationship where the "temporary work agency" concludes an employment contract with the "temporary agency worker" in order to assign him or her to a "user undertaking" to work there temporarily under their supervision and direction.[282]

From this definition, it is clear that the temporary-work agency is recognised as the employer even though the temporary agency worker is under the direction and supervision of the user-undertaking. Whether the temporary-work agency or the user-undertaking or both are the employer differs from Member State to Member State.[283] However for most EU countries – for example Germany, Austria, Denmark, France, Italy - the temporary-work agency is the employer.[284] The situation in the United Kingdom (UK) is different. UK courts and tribunals have held at different times that a placed worker is an employee of the agency, an employee of the user-undertaking, an employee of both and an employee of neither.[285] This is because 'English law affords employment rights to individuals who have a contract of employment (or in some cases a worker's contract) with their employer.'[286] Often the agency worker will have neither, which places him or her in a very vulnerable position where they are unable to prove their employment status.[287]

5.2.3 Principle of Equal Treatment

Article 5(1) of the Directive provides that 'the basic working and employment conditions of temporary agency workers shall be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job' (the principle of equal treatment).[288] This principle shall only apply to the duration of the assignment at the user-undertaking. The test for establishing unequal treatment is whether the agency worker

[282] Article 3(1) of the Directive.
[283] Schiek (2004) *German LJ* 1234.
[284] Storrie (2015) European Foundation for the Improvement of Living and Working Conditions 7 – 8.
[285] Benjamin (2016) *ILJ* 37.
[286] Davies (2010) *ELLJ* 310.
[287] Davies (2010) *ELLJ* 311.
[288] Article 5(1) of the Directive.

would have been treated differently had he or she been recruited directly by the user-undertaking for the same position.[289] As such, the comparative employee can be real or hypothetical.

A “real comparator” is easy to identify in cases where the user-undertaking directly employs another employee in the same position as the temporary agency worker. The problem occurs where there is no real comparator and the claimant has to rely on a hypothetical comparator.[290] An express reference to a hypothetical comparator is incorporated into the national legislation of most EU states except for Spain and Hungary.[291] For example, Northern Ireland’s Sex Discrimination statute specifically provides that "a person discriminates against a woman ... if… on the ground of her sex he treats her less favourably than he treats or would treat a man". In *Shamoon v Chief Constable of the Royal Ulster Constabulary*[292] the House of Lords acknowledged that an actual comparator may not always be available and accordingly a hypothetical comparator can be determined by looking at the wider context of cases and the general knowledge of how some protected groups are usually treated in specific circumstances.[293] In this regard, a claimant relying on a hypothetical comparator will have to provide enough evidence, on a balance of probabilities, to allow a fact-finding tribunal to be able to draw inferences of discrimination.[294] This includes evidence of how the user-undertakings treats ‘its own similarly- situated workforce.’[295]

The principle of equal treatment applies not only to the classical grounds of discrimination (sex, race or ethnic origin, religion, beliefs, disabilities, age or sexual orientation) but also to basic working and employment conditions (the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays, and pay).[296] The principle of equal treatment has been a contentious issue amongst social partners.[297] Employers

[289] Davies (2010) *ELLJ* 319.
[290] Goldberg (2011) *Yale LJ* 805 – 806.
[291] Schiek, Waddington, Bell, Choudhury, De Schutter, Gerards, McColgan, Moon (2007).
[292] *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.
[293] *Shamoon v Chief Constable of the Royal Ulster Constabulary* at para 108.
[294] *Shamoon v Chief Constable of the Royal Ulster Constabulary* at para 109.
[295] Davies (2010) *ELLJ* 321 - 322.
[296] Article 1(f) of the Directive.
[297] Schiek (2004) *German LJ* 1242.

were simply not willing to agree to any rule which forced them to give up advantageous labour prices. Consequently, the Directive allows Member States to opt out of the equal treatment provisions in the following circumstances:

- With regards to pay, where 'permanent' temporary agency workers continue to be paid in the time between assignments;[298]
- Where a collective agreement provides for different working and employment conditions than those that would have applied had the temporary agency workers been employed directly by the user undertaking;[299]and
- There is a qualifying period for the equal treatment.[300]

In order to prevent abuse of the exemptions, member states are required to adopt appropriate measures.

5.2.4 Other Protections in the Directive

Other protections include providing temporary agency workers with an opportunity to apply for vacant posts at the user undertaking (article 6(1)); prohibition of temporary-work agencies from charging agency works recruitment fees (Article 6(2)); giving agency workers access to the amenities or collective facilities in the user undertaking (article 6(4) as well as vocational training (article 6(5)). Article 6(1) and article 6(5) are clearly aimed at improving the agency worker's employability, which gives effect to the principle of flexicurity as discussed above.

5.3 The Regulatory Framework of Namibia

Much like South Africa, Namibia has a deep and painful history wriggled with apartheid policies and discrimination against black people.[301] In both countries, black labour and

[298] Article 5(2) of the Directive.
[299] Article 5(3) of the Directive.
[300] Article 5(4) of the Directive.
[301] 'The Namibian struggle for independence – 1966 – 1990 – a historical background' *South African History Online* accessed: www.sahistory.org.za

resources were exploited by the white minority, with no protection.[302] In 1990, Namibia gained its independence.[303] In 1992, Namibia introduced its first labour legislation, the Namibian Labour Act of 1992 (NLA), which extended certain forms of protection to all employees, including black employees. Unfortunately, this act did not provide for the regulation of labour-hire,[304] which basically meant that employees under labour-hire were left unprotected. Thereafter numerous attempts were made to incorporate labour hire provisions into the NLA, but it proved futile.[305]

5.3.1 The Banning of the Use of Labour Brokers

In 2007, Namibia introduced an amendment to the NLA, which banned the use of labour-hire.[306] This ban was subject to a constitutional challenge in *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia,*[307] on the grounds that it violated the labour-hire's fundamental freedom to carry on any trade or business entrenched in Article 21(1)(j) of the Namibian Constitution.[308] This freedom is essential to the social, economic and political welfare and prosperity of society.[309] However, those in favour of the ban, argued that the principal features of agency work resulted in casualisation of employment and the commodification of labour, and as such "are inimical to the objects of the NLA

[302] 'The Namibian struggle for independence – 1966 – 1990 – a historical background' *South African History Online* accessed: www.sahistory.org.za
[303] 'The Namibian struggle for independence – 1966 – 1990 – a historical background' *South African History Online* accessed: www.sahistory.org.za
[304] van Eck (2014) *The International Journal of Comparative Labour Law and Industrial Relations* 58.
[305] Botes (2013) *PELJ* 514 – 516.
[306] S 128 of the NLA provided that:
'*128.(1) 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.*
(2) Subsection (1) does not apply in the case of a person who offers services consisting of matching offers of and applications for employment without that person becoming a party to the employment relationships that may arise therefrom.
(3) Any person who contravenes or fails to comply with this [s] *commits an offence and is liable on conviction to a fine not exceeding N$80,000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.*
(4) In so far as this [s] *interferes with the fundamental freedoms in Article 21(l)(j) of the Namibian Constitution, it is enacted upon the authority of Sub-article 2 of that Article in that it is required in the interest of decency and morality*'
[307] *Africa Personnel Services v Government of the Republic of Namibia* [2009] NASC 17.
[308] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 23.
[309] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 35.

and subversive to the scheme of social security benefits which the state is constitutionally enjoined to provide."[310]

The respondents argued that agency work violates a fundamental principle of the ILO that "labour is not a commodity."[311] In this regard, the argument went "by prohibiting agency work, Parliament sought to preclude these consequences and their deleterious effect on the attainment of the [NLA] objects."[312]

In order to pass constitutional muster, every restrictive measure must be rationally related and proportionate to the constitutionally permissible objective it seeks to attain.[313] In addition, the need for the restrictive measure must be so pressing, substantial and essential that it is "required" to "promote and maintain the welfare of the people of Namibia and to further a policy of labour relations conducive to economic growth, stability and productivity."[314]

The Court acknowledged that the use of agency work can become exploitative, however it found that it was up to the state to introduce a regulatory framework, which is enforced and supervised, that would not allow for the labour of agency workers rendered within its protective social structure to be treated like a commodity.[315] This was possible, not only because it is a mandate from ILO Convention 181, but also because a lot of other democratic societies were and still are doing it.[316]

In addition, the Court highlighted the undeniable realities of the global emergence of a "new economy" and the shift away from standard employment relationships.[317] As such, from an employer's perspective, by using agency work, it creates flexibility in operations and becomes more cost effective and competitive.[318] For employees, agency workers can be used to fill entry-level positions and also make it easier for agency workers to

[310] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 73.
[311] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 98.
[312] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 73.
[313] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 67.
[314] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 68 - 69.
[315] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 100.
[316] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 100, 113 and 117.
[317] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 105.
[318] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 110.

move from agency work to permanent employment.[319] It is also beneficial to those who, by choice and personal circumstances, require flexible working arrangements. In this regard, the Court found that all these benefits, for both employers and workers, will be lost under prohibition.[320] As such, the Court held that:

> "[t]he blanket prohibition of agency work by s. 128 of the Act substantially overshoots permissible restrictions which…may be placed on the exercise of the freedom to carry on any trade or business protected under Article 21(1)(j) of the Constitution. The prohibition is tailored much wider than those which reasonable restrictions would require for the achievement of the same objectives and is disproportionately severe compared to what is necessary in a democratic society for those purposes. Even if a generous margin of appreciation would be allowed in favour of Parliament, as the respondents urge us to do, the unreasonable extent of the prohibition's sweep would still fall well outside it."[321]

In the circumstance, the total ban on labour brokers was found to be unconstitutional and s 128 of the NLA was struck off.

5.3.2 The Unbanning of the Use of Labour Brokers

In 2012 Namibia introduced the Labour Amendment Act (NLLA),[322] with the aim of regulating agency work. S 128A of the NLLA provides that:

> "until the contrary is proved, an individual who works for or renders services to any other person, is presumed to be an employee of that other person, regardless of the form of the contract or the designation of the individual, if certain factors exist."[323]

One of these factors is if 'the manner in which the individual works is subject to the control or direction of that other person.'[324] In a triangular relationship, the user enterprise is responsible for the control and direction of the manner of work and accordingly is presumed to be the employer in terms of s128A(a). By making the client the employer, the relationship between the client and the placed work takes the form of a standard

[319] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 117.
[320] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 117.
[321] *African Personnel Services v Government of the Republic of Namibia* [2009] NASC 17 at para 118.
[322] 2 of 2012.
[323] S 128A of the NLLA.
[324] S 128A(a) of the NLLA

employment relationship. As such, the client is responsible for complying with all traditional employer obligations, including dismissal. 'This will create legal certainty and will moreover remove the earlier stated impractical obligations that rest on the labour broker as employer.'[325]

In addition, the client, as the employer, 'may not employ a placed work on terms and conditions that are less favourable than those that are applicable to its incumbent employees who perform the same or similar work or work of equal value.'[326] In addition, the client may not apply to the placed worker different employment policies and practices than those applied to a comparative employee employed by the client.[327]

5.4 Comparative Analysis

It is clear from the above that the EU and Namibia are regulating labour brokers in a fundamentally different way. Whilst the EU is looking into limiting restrictions, Namibia is seemingly extending them. Whilst Namibia's unsavoury history with labour brokers can be recognised, it is nonetheless still part of the global marketplace.[328]

It appears that Namibia is also regulating labour brokers purely because banning them was declared unconstitutional. Whilst this is a good model for checks and balances between different branches of government on a formative level, it is not suitable for South Africa on a substantive level. The EU model promotes flexicurity and is accordingly more in line with ILO Convention 181.

Banning labour brokers, as many South African trade unions demand, will not necessarily solve the problem associated with atypical employment, as the case of *Africa Personnel Services v Government of the Republic of Namibia* proves.[329] Furthermore, the banning of labour brokers is contrary to international law and possibly contrary to the right to carry on any trade or business protected in s 22 of the South African Constitution. The reason for this is that 'the abuses currently associated with labour broking could be effectively

[325] Botes (2015) *SALJ* 114.
[326] S 128(4)(a) of NLLA.
[327] S 128(4)(b) of NLLA.
[328] van Eck (2010) *PELJ* 117.
[329] Botes (2013) *PELJ* 529.

regulated without recourse to a prohibition, by amending legislation and providing adequate resources to promote and enforce compliance with legislative requirements.'[330] In this regard, it is submitted that South Africa should take a page out of the EU's book in promoting labour flexibility through labour brokering.

Due to rises in unemployment, particularly as a result of the Coronavirus Disease 2019 (COVID-19), South Africa should be looking into adopting labour policies which encourage job creation. The rigidity which comes with the banning of labour brokers will have the opposite effect.[331] Similarly, designating the client as the employer, as is the case in Namibia, impedes labour market flexibility in that the client is required to comply with all employer obligations (including dismissal and equal employment terms) from day one.[332]

For some academics, the Namibian approach makes perfect sense as the user enterprise is the one with day-to-day relations with the agency worker.[333] Others believe that by making the user enterprise the employer, the incentive for labour flexibility is taken away and as such is potentially unconstitutional.[334]

In contrast, the South African model provides that the labour broker is the employer of the placed employee (earning below the threshold) for the first three-months, whereafter the employer obligations are passed on to the client.[335] Furthermore, it is only after the three-month period that the client is no longer allowed to treat the placed worker differently to a comparative employee employed directly by the client.[336] In this regard, South Africa provides better labour flexibility as the client has some breathing room for at least three-months in relation to employees earning below the threshold. On the downside, the Namibian equal treatment clause is more expansive than s 198A(5) of the LRA in that it also caters for a comparator who performs work of equal value.

[330] Benjamin (2012) *Acta Juridica* 37.
[331] Forere (2016) *SA MERC LJ* 395.
[332] Botes (2015) *SALJ* 115.
[333] Botes (2013) *PELJ* 521 - 522.
[334] van Eck (2014) *The International Journal of Comparative Labour Law and Industrial Relations* 61.
[335] S 198A(3)(b) of the LRA.
[336] S 198A(5) of the LRA.

As it stands, South Africa has correctly chosen to regulate labour broking under s 198 and 198A of the LRA as discussed in Chapter 2 and 3 of this research paper. This legislation however is not without its shortcomings. Similar to the EU, s 198A(5) of the LRA gives effect to the principle of equal treatment. However, unlike the EU Directive a comparative employee can only be a real employee employed in a same or similar position of the agency employee. In this regard, South Africa can benefit from extending protection to include a hypothetical comparator, in line with the EU Directive, to cater for situations where there is no real comparator. Another way to achieve this is by extending the equal treatment principle to a comparator who performs works of equal value, as is the case under Namibian law.

In addition, the LRA could improve the employability of agency workers by mandating vocational training and also add provisions giving agency workers access to vacant posts with the client, as is the case with the EU.

5.5 Conclusion

Due to COVID-19 and the unprecedented shutdowns associated with it, labour market flexibility has become necessary for businesses to properly function. The use of labour brokers has never been more attractive than it is today. South Africa should take a page out of the EU's book in promoting labour flexibility through labour brokering. The rigidity which comes with the Namibian model of making the client the employer from day one is not suitable for South Africa. The South African labour market needs to remain competitive if it is to meet the demands of globalization and deal with the lasting effect of the pandemic.

CHAPTER SIX

CONCLUSIONS AND RECOMMANDATIONS

6.1 Introduction

S 198(2) of the Labour Relations Act (LRA)[337] provides that the labour broker is the employer of the placed worker, and the placed worker is its employee. This has effectively allowed the client not to be accountable to the placed worker who is under its direct control and supervision. This is a legal fiction which resulted in the placed worker not being able to exercise and enforce his or her employment rights.[338] Hence there were numerous calls to ban labour brokers.

Instead of banning labour brokers, in 2015 parliament introduced further regulations with the aim of providing better protection to placed workers earning below the earnings threshold. It is concluded that this approach is undoubtedly correct. Having gone through the ILO Convention 181 and Recommendation 188 in Chapter 4, it is clear that labour brokers play an important role in promoting flexibility in a well-functioning labour market.[339] With the changes in the global market, which have been accelerated by the COVID-19 pandemic, it is imperative that our laws make room for non-standard employment, such as agency work. The trick is to ensure that flexibility is not achieved at the expense of employee rights and job security. As seen from the EU, flexibility and job security are not mutually exclusive concepts.

In addition, a blanket ban on labour brokers is likely to be found to be unconstitutional on the basis that it unreasonably restricts the labour brokers' right to choose their trade, occupation or profession freely.[340] In the Nambian case, *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia,* a blanket ban on labour brokers was found to be grossly disproportionate, unreasonable and thus unconstitutional. Although, South African courts are not bound by court decisions of foreign jurisdictions, they nonetheless

[337] Labour Relations Act 66 of 1995.
[338] Harvey (2011) *SALJ* 107.
[339] Preamble of ILO Convention 181.
[340] S 22 of the Constitution.

have to consider foreign law when interpreting the Bill of Rights.[341] The Namibian Constitution is crafted in a similar manner as the South African one. As such, it is submitted that the rights are likely to be interpreted in the same way.

In addition, it is concluded that regulation, as opposed to banning, is the best way to give effect to right to fair labour practices for both labour brokers and their employees. This is the route South Africa has rightly chosen. Therefore, what is left is to analyse South Africa's regulatory framework of labour brokers and to provide recommendations for some of its shortcomings.

6.2 Research Questions Answered

6.2.1 Does the LRA as it stands efficiently regulate TES employment so as to protect employees? The good, the bad, the ugly.

6.2.1.1 The Good

From the research done, it is established that the protection of labour broker employees has significantly improved since the introduction of the 2015 LRA amendments. Employment security is a core value in the LRA,[342] yet it could not realistically be enjoyed by labour broker employees due to the employer being the labour broker and not the client. S 198A(3)(b) of the LRA seeks to fix this problem by deeming the client to be the employer of the placed worker if the placed worker is performing a 'temporary service' for more than three months. Consequently, as from 2015, the client is solely responsible for dismissing the placed worker, amongst other LRA obligations. This was a massive win for labour broker employees as they could now enforce their constitutional right not to be unfairly dismissed. This means that for the first time, the client has to think-twice before arbitrarily disposing of a labour broker employee, where previously it did not have to.

In addition, once s 198A(3)(b) is triggered, the client is required to fully integrate the placed employee into its workplace 'on the same terms and conditions of comparative employees, with the same employment benefits, the same prospects of internal growth

[341] S 39(1)(c) of the Constitution.
[342] *National Education Health & Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27 at para 42.

and the same job security.'[343] This happens automatically, and the client cannot rely on financial difficulties in order to avoid these consequences.

This is another win for labour broker employees which seeks to improve their terms and conditions of employment and eliminate pay discrimination. In this regard, it is concluded that South Africa's regulatory framework discourages the use of labour brokers for more than the three-month mark unless the work is truly temporary in nature. 'If properly regulated within the ambit of the Constitution and Convention No. 181, agency work would typically be temporary of nature; pose no real threat to standard employment relationships or unionisation and greatly contribute to flexibility in the labour market.'[344]

6.2.1.2 The Bad

No Transfer of Employment Akin to S 197 of the LRA

The Constitutional Court has been very clear that the effect of s 198A(3)(b) '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.'[345] In this regard, the client still has an option of keeping the labour broker even post the three-month mark. This leaves room for abuse. For example, the labour broker can simply indemnify the client from suffering any financial loss should the placed worker launch a claim against it.[346] If the indemnity clause is upheld, this could potentially derail any gains made in the 2015 amendments.

Furthermore, it appears that once s 198A(3)(b)(ii) kicks in, the placed worker starts its employment with the client on a clean slate, without his or her accrued employment rights – such as accrued leave, annual bonus and pension from the TES to the client.[347] In case of a retrenchment, the placed worker, as the newer employee, is likely to be retrenched first. Although it is accepted that this was not the intention of the legislature, the manner in which s 198A(5) is crafted could very well result in job losses for the placed workers.

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[343] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa* at para 69.
[344] *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia* at para 117.
[345] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa* at para 75.
[346] Cohen (2011) *Obiter* 666.
[347] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22.at para 100.

The Use of Automatic Termination Clauses

The LAC has found there is no dismissal when an employment contract is terminated as a result of the termination of the commercial agreement linked to it. When deciding whether to uphold an automatic termination clause, some of the relevant considerations, include 'whether it is left to the client to choose and pick who is to render the services under the service agreement or whether the event is based on proper economic and commercial considerations.'[348] These reasons for termination are clearly operational as envisaged in s 189 of the LRA, yet the employer is not required to follow a proper retrenchment process and to pay severance.[349] The employer can simply rely on an automatic termination clause, as we have seen in *Enforce Security Group v Fikile*. This leaves the placed employees at a disadvantage. It is unfortunate that the legislature did not seize the opportunity during the 2015 amendments to the LRA to address the lawfulness of such automatic termination clauses.[350]

Limited Application of the Principle of Equal Treatment

S 198A(5) of the LRA can only improve placed employee's terms and conditions of employment if there is a comparative employee employed in 'the same or similar position' as the placed employee. In standard employment, a comparative employee is not only an employee in 'the same or a similar position' as the claimant but also an employee performing 'work of equal value.'[351] S 198A(5) does not extend to a comparative employee performing 'work of equal value.' Therefore, labour broker employees are still getting the short end of the stick even after being 'transferred' to the client in terms of 198A(5).

In addition, s 198A(5) is ineffectual if there is no comparative employee employed directly by the client or if the comparative employee is employed indirectly by the client through another labour broker.

[348] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9 at para 41.
[349] *Enforce Security Group v Fikile and Others* [2017] ZALAC 9 at para 42.
[350] Huysamen (2019) *PELJ* 36.
[351] S 6 of the Employment Equity Act 55 of 1998.

6.2.1.2 The Ugly

Exclusion of Employees Earning Above the BCEA Earnings Threshold

Parliament has simply decided to completely exclude labour broker employees earning above the threshold from the additional protections introduced in 2015. This was a policy choice. There has been no mechanism put in place to fill the gap in accountability between these employees and the clients who control and supervise them. In this regard, they basically enjoy no employment security as it would be practically difficult for these employees to be reinstated, even if they are victorious in an unfair dismissal dispute. Furthermore, these employees will continue to endure less favourable terms and conditions of employment compared to comparative employees employed directly by the client. Such an approach is not in line with the spirit of *ubuntu* upon which our democracy was founded.

Lack of a Regulatory Body

S 198(4F) of the LRA provides that '[n]o person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation.' Despite this provision coming into effect in 2015, parliament is dragging its feet in finalising the regulations related to registration which makes it difficult to monitor abuses.

6.2.2 Does the Constitutional Court's interpretation of s 198A(3)(b) provide greater protection to employees?

As discussed in Chapter 3 of this research paper, the Constitutional Court[352] has interpreted s 198A(3)(b) of the LRA in favour of sole employment. It is concluded that this decision is undoubtably correct as it provides labour broker employees with the necessary certainty and employment security that has been lacking.

The labour broker employees can now enforce their LRA rights against the client without going through the labour broker. As previously discussed, there were serious practical difficulties with bestowing LRA obligations in the labour broker. The labour broker simply could not secure the employment of its employees. These employees merely existed as

[352] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] *ZACC* 22.

nothing more than a commodity and accordingly, allowing the labour broker to continue being the employer along with the client (the dual employment interpretation) serves no real purpose.

Any adverse effect of the sole employment interpretation, as discussed by the minority judgment, can be addressed through better regulation. In this regard, the placed worker is not forced into new employment without his or her consent, as the worker already had a day-to-day relationship with the client and not with a labour broker. Even if the worker was being forced into new employment, it is concluded that, this is a necessary trade off in order to increase protection of labour broker employees who are particularly vulnerable.

6.2.3 Are the LRA provisions regulating TES arrangements compliant with the standards of the International Labour Organisation (ILO)?

After considering ILO Convention 181 and Recommendation 188, it is concluded that the LRA does align with international law in so far as it promotes flexicurity, mandates for the elimination of discrimination on “classical grounds” and promotes the right to freedom of association and collective bargaining. In some respects, the LRA better protects labour broker employees in that it aims at limiting the use of labour brokers to work that is truly temporary. Furthermore, the LRA extends equal treatment to terms and conditions of employment. Both the ILO Convention 181 and Recommendation 188 are silent on these issues.

Where the LRA falls short is that there is currently no system in place for the registration and the licensing of labour brokers. Furthermore, there are no provisions prohibiting labour brokers from prohibiting their employees from taking up vacancies with the client. In addition, there is no clear provision allocating employer responsibilities to the labour broker and client respectively. One can argue that how the Constitutional Court has interpreted s 198A(3)(b) has somewhat resolved this issue, in that it held that once s 198A(3)(b) is triggered, the placed worker is automatically absorbed by the client and that the client becomes solely responsible for complying with the LRA. In this regard, the labour broker, as the employer will remain responsible for complying with other labour laws unless specifically excluded. However, these added protections provided by s 198A(3)(b) are only applicable to employees earning below the threshold. In this regard,

the LRA is not aligned to international law in so far as it differentiates between employees earning below the threshold and those earning above the threshold.

6.3 Recommendation

The conclusion addressed the good, the bad and the ugly aspects of the LRA's regulatory framework of the use of labour brokers. The fact that no party got everything they wanted from the negotiations which resulted in the LRAA of 2014 is indicative of the compromise that was reached at the National Economic Development and Labour Council (NEDLAC).

The traditional role of labour law is to act as a "countervailing force" against the inequality of bargaining power in an employment relationship.[353] In these modern times, it may be worthwhile to extend this role to facilitate job creation by recognising non-standard work and regulating it effectively.[354] As such, in order to increase protections to the placed employees, it is recommended that:

a) s 198A of the LRA be extended to include employees earning above the threshold;
b) S 198A(3)(b)(i) of the LRA is amended to provide that once an employee is no longer performing a temporary service, the employee ceases to be the employee of the TES and the client is deemed to be the employer of the employee;[355]
c) A provision could be added to the effect that the deeming provision created by s 198A(3)(b)(i) of the LRA does not interrupt the employee's continuity of employment and the employee transfers with his or her employment benefits (years of service, leave days, bonuses) that were accrued during the period of assignment with the client;
d) S 198(5) of the LRA – the equal treatment clause - should be amended to include a comparative employee performing work of equal value. This is not a new concept in our law as it is dealt with in the Employment Equity Act (EEA).[356] Alternatively, a hypothetical comparator can be introduced in line with the EU directive. In this regard, post the deeming provision the client can be required to treat the employee

[353] Davies and Kahn-Freund (1983) 18.
[354] Van Eck (2014) *The International Journal of Comparative Labour Law and Industrial Relations* 52 - 53.
[355] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 at para 92.
[356] Employment Equity Act 55 of 1998.

no less favourably than it would have if the placed worker had been directly recruited by the client from day-one;

e) The LRA could improve the employability of agency workers by mandating vocational training and also adding provisions giving TES employees access to vacant posts with the client, as is the case with the EU;

f) In compliance with article 12 of Convention 181, The LRA could insert a clause allocating the respective obligations of labour brokers and their client, before and after the deeming provision - in relation to:

> '(a) freedom of association; (b) collective bargaining; (c) minimum wages; (d) working time and other working conditions; (e) statutory social security benefits; (f) access to training; (g) occupational safety and health; (h) compensation in case of occupational accidents or diseases; (i) compensation in case of insolvency and protection of workers claims; (j) maternity protection and benefits, and parental protection and benefits.'[357]

Since the above recommendations are strident, it is not necessary to ban the use of labour brokers once the employee is no longer performing a temporary service. In addition, labour market flexibility can be promoted by increasing a temporary service from three-months to six-months. This is a compromise employee representatives can make as a trade off to the proposed additional protections for the employees.

[357] Article 12 of Convention 181.

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