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

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I INTRODUCTION

At the beginning of 2015 the Labour Relations Act (LRA)[1] was amended to provide significantly improved protection to workers engaged in 'non-standard work'. This term covers workers engaged in agency work, fixed-term contracts and part-time employment.[2] The focus of this contribution is on 'employment agencies' which constitute a significant proportion of the South African labour market.[3] There are differing views on the exact number of agency workers and the effects of the recent

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[1] Act 66 of 1995, as amended by the Labour Relations Amendment Act 6 of 2014 of 11 November 1996.

[2] Chapter IX 'Regulation of Non-Standard Employment and General Provisions' of the LRA, as amended.

[3] As confirmed by Benjamin, 'Law and practice of private employment agency work in South Africa', Sector Working Paper No. 292, International Labour Office, Geneva (2013) 1, the 'term "labour broker" is used in South Africa to refer to what are more commonly referred to as labour hire firms or temporary employment agencies in other countries. Although the statutory terminology was changed to "temporary employment services" in 1995, the term "labour broker" has stuck and is often used with a pejorative meaning in public discourse. The broader category of labour market intermediaries are, in keeping with international practice, referred to as private employment agencies.' The term 'employment agency' is used in this contribution and we do not cover public employment agencies, which fall beyond the scope of this article. The term 'client' is used for the user company and the term 'agency worker' refers to the employee of the employment agency.

legislative amendments in South Africa. So for example, one of the country's largest providers of agency workers, Adcorp, states that:

> 'Labour broking is the fastest-growing sector of the South African labour market. According to the Adcorp Employment Index for May labour brokers constitute a R44 billion industry employing around 19 500 internal staff and just over one million agency workers or temps in South Africa. Agency work now constitutes 7.5% of total employment in South Africa, and it is likely to grow further.'[4]

However, this statement is contradicted by researchers who contend that extensive job losses have occurred in the wake of the regulatory changes and that agency work is rapidly declining.[5] Bhorat, Magadla and Steenkamp suggest that 50% of agency workers lost their jobs subsequent to the amendments while only 20% secured indefinite positions.[6] Despite this, commentators such as Benjamin and Budlender have responded by stating that the abovementioned research is inaccurate in so far as it is founded on a narrow foundation and does not provide a basis for comparison with other periods.[7]

Despite these differing views, one aspect remains uncontested: employment agencies have formed and currently still form a large proportion of the labour market and the industry has grown substantially since its first inception.[8] Therefore, any changes to the regulation of these agencies are important and could have a significant effect on the working lives of agency workers and the way in which employment agencies conduct their business in South Africa.

[4] http://www.adcorp.co.za/Pages/Temporaryworkgrowingdespiteoveralldownwardtrend.aspx, accessed on 23 June 2015.

[5] So, for example, 'Free Market Foundation economist Loane Sharp said ... the amended Act will have a "disastrous impact on employment".' Mr Sharp said a survey of close to 500 employment agencies, representing 90% of job placements in South Africa, revealed that changes to the Act will cost the economy jobs. To put the expected job losses into perspective, Mr Sharp explained that 'before 30 April this year, 254,000 jobs are expected to be lost and of this figure, 192,000 have already been lost'. See http://www.staffingindustry.com/row/Research-Publications/Daily-News/South-Africa-Jobs-will-be-lost-and-unemployment-will-rise-following-labour-act-amendments–33618, accessed on 23 June 2015.

[6] Referred to by Paton, 'Labour broking changes "bled jobs"' *Business Day* 7 September 2015 at 1.

[7] Benjamin made this remark during a panel discussion at the 21st International Labour Law and Social Security World Congress hosted in Cape Town between 15 and 18 September 2015. See also the reference to Budlender's research in Paton, 'Experts poke holes in claim of labour-broking cataclysm' *Business Day* 18 September 2015. For a related discussion, see http://www.bdlive.co.za/national/labour/2015/09/18/news-analysis-experts-poke-holes-in-claim-of-labour-broking-cataclysm, accessed on 23 September 2015.

[8] See information contained in link provided at n4.

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

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

(a) Introduction

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

(b) The first phase: 1982–1994

The first statutory regulation of employment agencies in South Africa occurred in 1982.[9] At the time, South Africa was no longer a member of the ILO as a result of criticism it had attracted due to the apartheid policies of preceding years.[10] Amendments to the LRA in existence at the time introduced the concept of a 'labour broker' into the regulatory fold. As pointed out by Brassey and Cheadle in 1983, employment agencies

[9] The LRA 28 of 1956 was amended by the LRA 51 of 1982, which came into effect on 6 August 1982.

[10] Van Niekerk & Smit (eds), *Law@work* 3 ed (LexisNexis 2015) 22.

made their enterprises viable by staying away from statutory wage regulating measures in that they structured the relationships of workers so placed in such a way that they appeared to be independent contractors.[11] In an attempt to provide workers with more certainty the amendment 'deemed' employment agencies to be the employers of individuals whom they placed to work with their user companies, provided that they were responsible for paying their remuneration.[12] Benjamin refers to the fact that South Africa adopted a rule permitting employment agencies to be classified as the employers of those whom they placed to work with a client more than a decade prior to these arrangements currently being regulated in international standards by the adoption of the ILO's Private Employment Agencies Convention, 1997.[13]

The 1982 legislation also contained a legal requirement for employment agencies to register with the Department of Labour and provided that the client's premises were deemed to be the place of work of the workers.[14] It seems ironic that whereas the amendment at the time established a deeming provision, namely, that the employment agency was deemed to be the employer, the recent amendments during phase three of the evolution of the regulation of these arrangements contain a provision to the effect that the client is deemed to be the employer of some categories of agency workers.[15]

(c) The second phase: 1995–2014

The LRA of 1995 was implemented shortly after South Africa had conducted its first post-apartheid elections and after it had re-joined the ILO. Even though the Cheadle Task Team was ably assisted by experts sponsored by the ILO, there are no indications that the ILO instruments, which were in place at the time, played any role in the drafting of the 1996 provisions dealing with employment agencies.[16]

[11] Brassey & Cheadle 'Labour Relations Amendment Act 51 of 1982' (1983) *ILJ* 31 at 37.

[12] See Benjamin, (2013) at 2. It is to be noted that this early regulatory measure also made use of a 'deeming' provision that is currently creating interpretational problems. See the discussion in paragraph II, *(a) The third phase: 2015 and further* below.

[13] Private Employment Agencies Convention, 1997 (No. 181); Benjamin, (2013) at 2.

[14] Benjamin, (2013) at 2. However, the author also states that the 1983 legislation enabled employers to avoid aspects of labour law such as collective bargaining and protection against unfair dismissal.

[15] See s 198A.

[16] Van Eck, 'Employment agencies: International norms and developments in South Africa' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 29 at 36. Van Eck refers to the ILO's Convention on Fee-Charging Agencies, 1933 (No. 34) and the Convention on Fee-Charging Agencies, 1949 (No. 96) which were in place during the time of the adoption of the LRA of 1995.

In its original format, the LRA of 1995 applied to all workers irrespective of their level of remuneration and the size of the client where they rendered service. The LRA of 1995 provided that, in instances where a person (a 'temporary employment service') procures other persons, for reward, to render services for a client, and where the temporary employment service is responsible to remunerate the workers, the temporary employment service is the de facto employer of the workers.[17] This original section is clear in its operation in so far as it merely clarifies who the employer is in the triangular relationship and removes the deeming provision of the LRA of 1956. Furthermore, the worker only receives limited protection in so far as both the agency and the client are jointly and severally liable in respect of transgressions of collective agreements and the provisions of the Basic Conditions of Employment Act of 1997 (the BCEA of 1997).[18] Amongst others, the major stumbling blocks in respect of the protection of agency workers are that only the employer, the employment agency, is liable for unfair labour practices or unfair dismissal of the agency worker; agency workers are often paid less than their counterparts employed directly by the client; they do not receive medical cover and they do not belong to the employer's pension fund; even though agency work is meant to be temporary in nature it is widely used for employment that is indefinite in nature; and workers are unsure about who the employer is, namely, the employment agency or the client.[19]

Quarrelsome debates among stakeholders between 2007 and 2014 resulted in eventual reforms that witnessed the Labour Relations Amendment Act 6 of 2014 (the LRA Amendment Act of 2014) becoming effective as from 1 January 2015.[20] The governing African National Congress' 2009 election manifesto provided momentum to the process and served as a guideline in relation to the content of the Bills which sought to improve the protection of workers' rights. In an address to the

[17] See s 198(1) and s 198(2) of the LRA of 1995.

[18] Act 75 of 1997. See s 198(4) and s 198(2) of the LRA of 1995.

[19] Van Eck (2012) 28 International Journal of Comparative Labour Law and Industrial Relations at 37 and 38 refers to a number of studies and cases that confirm the mentioned shortcomings. Van Niekerk and Smit (eds), (LexisNexis 2015) at 68 point out that trade union federation COSATU called for an outright ban of employment agencies.

[20] Labour Relations Amendment Act 6 of 2014. Apart from the amendments to the LRA of 1995, amendments to a number of other labour laws were also implemented during the past year. The amendments include the Basic Conditions of Employment Amendment Act 47 of 2013 and the Employment Equity Amendment Act 47 of 2013. These changes came with the introduction of the Employment Services Act 4 of 2014.

National Assembly in May 2013,[21] the Speaker of the House highlighted the mandate of the Department of Labour and how this linked to the Bills that were before Parliament. The Speaker stated that:

> 'This is in keeping with the promises made in the African National Congress election manifesto in 2009 which promised that "In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, [we will] introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices. Provisions will be introduced to facilitate the unionisation of workers and conclusion of sectoral collective agreements to cover vulnerable workers in these different legal relationships and ensure the right to permanent employment for affected workers".'[22]

(d) *The third phase:* 2015 and further

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

> 'any person who, for reward, procures for or provides to a client other persons —
> (*a*) who perform work for the client; and
> (*b*) who are remunerated by the temporary employment service'.[23]

As in the past, the LRA still provides that the employment agency is the employer, and the above definition applies to all agency workers, irrespective of the rate at which they are remunerated or the size of the client's business.[24] The employment agency and the client also remain jointly and severally liable in respect of transgressions of the provisions of collective agreements, the BCEA of 1997 and sectoral wage determinations.[25] However, as is discussed below, employees earning below a

[21] Budget vote Address to National Assembly in May 2013, available at http://www.labour.gov.za/DOL/media-desk/speeches/2013/budget-vote-address-by-the-hon-minister-of-labour-ms-mildred-n-oliphant-mp-national-assembly, accessed on 2 September 2013.

[22] Ibid.

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

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

[25] Section 198(4) of the LRA of 1995. Section 198(4A) of the LRA of 1995 further provides that if 'the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(*b*) —
> (*a*) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;
> (*b*) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and
> (*c*) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either'.

particular threshold have received wide-ranging additional protection since January 2015.

As is the case with standard employees, the LRA Amendment Act of 2014 has introduced an obligation on employment agencies to provide agency workers with written particulars of employment.[26] In addition, and in a significant development, agency workers' protection, which is extended by means of collective bargaining, has been bolstered. The Amendment Act provides that an agency worker may not be employed by an employment agency on terms and conditions not permitted by the LRA of 1995, or sectoral determination or collective agreement applicable to the employees of the client to whom the agency worker renders services. This entails that if, for example, employees in the motor industry are covered by a bargaining council main agreement which sets minima pertaining to remuneration and pension or provident benefits, agency workers would be entitled to the same conditions of employment as contained in the agreement. This is the case irrespective of the fact that the employment agency, which is the employer, may not be covered by the scope of the bargaining council. These measures pertaining to contracts of employment and collective bargaining rights apply to all agency workers, irrespective of the quantum of their remuneration or the duration of their placement.[27]

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

(*a*) The protective measures in respect of higher earning agency workers, as insufficient as they may have been before the amendments, have remained largely unchanged.
(*b*) South African policymakers are supposedly guided by the strategy

[26] Section 198(4B) of the LRA of 1995 states that: 'A temporary employment service must provide an employee whose service is procured for or provided to a client with written particulars of employment that comply with section 29 of the Basic Conditions of Employment Act, when the employee commences employment.'

[27] Section 198(4C) of the LRA of 1995.

of 'regulated flexibility' when composing labour legislation.[28] Although this notion is not well defined and only sporadically used, it includes the idea of 'one shoe does not fit all' when it comes to the regulation of the labour market.

(c) All workers, irrespective of whether they may be part-time, fixed-term or agency workers are protected by the Employment Equity Act (the 'EEA') which prohibits unfair discrimination on grounds such as race, colour, religion and age.[29]

(d) It seems that the amendments could have been influenced by the European Union notion of 'flexicurity' in so far as labour policy promotes an upward transition of workers from non-standard forms of work (which are recognised) into more secure indefinite types of jobs. In other words, precarious jobs such as agency work are not prohibited and can serve as a stepping stone towards more decent forms of work.[30]

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

[28] The Cheadle Task Team's Explanatory Memorandum mentions that the LRA of 1995 sought to 'avoid the imposition of rigidities in the labour market' as it aimed to 'balance the demands of international competitiveness and the protection of fundamental rights of workers'. See in this regard the 'Explanatory Memorandum prepared by the Ministerial Task Team' (1995) 16 *ILJ* 278 at 285–286. At more or less the same time, an ILO *Country Review Report* swayed influential South African labour law scholars to develop the notion of 'regulated flexibility'. According to Cheadle, 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663 at 668 the 'concept of regulated flexibility was developed by Paul Benjamin' based on the ILO *Country Review Report's* conception of flexibility. Regulated flexibility amongst others represents an approach that makes room within which the selective application of legislative standards can take place. Two principles have been introduced into the South African brand of balancing flexibility and the protection of workers' rights. First, it is recognised that lower earning employees are generally in a more precarious position than higher earning employees, and secondly, smaller undertakings should not be burdened with obligations that could potentially introduce costs, which would ultimately limit job creation. The structure of the Basic Conditions of Employment Act 75 of 1997 has until now been the most notable example of the implementation of the regulated flexibility policy. See Godfrey & Witten 'The BCEA: Statutory, administrative and case law developments' (2008) 29 *ILJ* 2406 and Van Eck 'Regulated flexibility and the Labour Relations Amendment Bill of 2012' (2013) 46 *De Jure* 600–611 in this regard.

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

[30] For a discussion of the flexicurity approach and its different pathways, see Bovenberg & Wilthagen, 'On the road to flexicurity: Dutch proposals for a pathway towards better transition security and higher labour market mobility' (2008) 10(4) *European Journal of Social Security* 325–346. See also Van Eck, 'Revisiting agency work in Namibia and South Africa: Any lessons from the decent work agenda and the flexicurity approach?' (2014) 30(1) *International Journal of Comparative Labour Law and Industrial Relations* 49 at 54 and 55.

earnings threshold'.[31] In terms of the new provisions all agency workers not performing 'temporary services' (this is for a period not exceeding three months), and those earning below the threshold amount (which currently stands at R205 433.30): [32]

(i) will be 'deemed' to be indefinitely employed employees of the client to which they have been assigned;[33] and

(ii) may not be treated less favourably than employees of that client who perform similar work, unless such differentiation is justifiable.[34]

There can be no doubt that lower earning agency workers do receive more protection after the amendments and this is welcomed. They are not only protected in respect of their right to equality in terms of the EEA and equal treatment in terms of the LRA of 1995, but also in respect of not being kept in precarious positions for indefinite periods. Despite this, it is regrettable that policymakers have decided to fall back on the deeming position of the previous era, which may give rise to interpretational problems. In respect of improving the plight of agency workers in general, the same, however, can not be said of higher earning employees as their situation remains essentially the same as before the introduction of the amendments. The notable exceptions in this regard pertain to the right to be provided with contracts of employment and protection that may be extended by bargaining council agreements, sectoral agreements and ministerial determinations.[35] An evaluation of whether the regulation of their position is in line with the protective measures envisaged by international norms follows later in the contribution.

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

[31] Section 198A of the LRA of 1995.

[32] Section 198A(1) of the LRA of 1995.

[33] Section 198A(3)*(b)* of the LRA of 1995. It is to be noted that the period of three months can be changed by means of sectoral determination, ministerial determination and collective bargaining council agreement in terms of s 198A(1)*(c)*. Furthermore, the same grounds of justification which apply to fixed-term workers, such as work on a specific project that has a fixed duration, seasonal work, external funding, student work and retirement age, may also exempt the employee being deemed to become the employee of the client. See s 198B(4) of the LRA of 1995 in respect of the regulation of fixed-term contracts for the list of justifications in respect of fixed-term contracts if such an agreement is concluded for a period of more than three months.

[34] Section 198(5) contains the reference to treatment which is on the whole not less favourable: 'An employee deemed to be an employee of the client in terms of subsection (3)*(b)* must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.'

[35] See s 198(4B)*(a)* and (4C).

'deemed to be the employee of the client'.[36] Does it mean that, after the three-month period, the client is the sole employer and that the agency worker is no longer the employee of the employment agency? Or does it entail that the agency worker remains the employee of the employment agency in terms of the contract of employment and that, in addition, a second employment relationship with corresponding rights and obligations is established with the former client?

Early indications are that the Commission for Conciliation, Mediation and Arbitration (the CCMA) and bargaining council arbitrators favour the first option. The bargaining council commissioner in the matter of *Refilwe Esau Mphirime and Value Logistics Ltd / BDM Staffing (Pty) Ltd*[37] determined that joint and several liability only applies in respect of non-compliance in relation to non-compliance with collective agreements, the BCEA of 1997 and sectoral determinations.[38] In respect of other claims, such as alleged unfair dismissal and unfair labour practices, the commissioner held that the

> 'correct interpretation ... of s198A(3)(b)(i) is therefore that the client is awarded the duties and obligations for the purposes of the LRA when the employee is not performing a temporary service and therefore any claim brought in terms of the LRA must be brought against the duty-bearer, which is the client'.[39]

Although it is unfortunate that the commissioner said nothing about the continuance of the contract of employment with the employment agency, the commissioner is clear that while a temporary service is being rendered during the first three months of employment, the employment agency bears all responsibilities in relation to the LRA of 1995, but that after this period the client bears all responsibilities.[40] It goes without saying that there are a number of common-law duties that exist beyond the sphere of the LRA of 1995 and the question remains who bears the responsibilities in this regard.

Soon after *Refilwe Esau Mphirime*, the CCMA in *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd with National Union of Metal*

[36] In terms of s 198A(3)*(b)* of the LRA of 1995.

[37] *National Bargaining Council for the Road Freight Logistics Industry*, case reference number FSRFBC34922 of 24 June 2015.

[38] Para 12.

[39] *Refilwe Esau Mphirime and Value Logistics Ltd / BDM Staffing (Pty) Ltd* at para 40.

[40] At para 49 the commissioner held that the 'legislator awarded the duties and obligations in terms of the LRA to the TES only while the employee provides a temporary service ... Once the employee no longer performs a temporary service, the client is deemed to be the employer and the duty-bearer for purposes of the LRA'.

Workers of South Africa (NUMSA)[41] had to determine whether dual relationships with the agency worker come into operation. In other words, do both the employment agency and the client have an employment relationship with the agency worker?[42] Here the commissioner quite correctly held that 'the correct interpretation ... [should be] the one that will provide greater protection for the vulnerable class of employees'.[43] However, we are not convinced that the decision of the CCMA would have the mentioned effect. The commissioner concluded that 'deemed means that the client becomes the sole employer of the placed workers for purposes of the LRA, provided that they earn below the threshold and that the three months period has elapsed'.[44]

The Labour Court was requested to pronounce on the dual employer question during review proceedings shortly after the decision by the CCMA.[45] In his decision, acting Judge Brassey pointed out that that the expression 'dual employment' is a 'fertile source of confusion',[46] but he nonetheless set the decision of the CCMA aside and concluded that the agency worker acquires a parallel set of rights and obligations under the amendments.[47]

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

[41] CCMA case number ECEL 1652–15 of 26 June 2015.

[42] Para 4.1 states that counsel for the employment agency argued in favour of 'dual employment'. A summary of the arguments is in paras 4.1 to 4.6. At para 4.7 it is stated that counsel for the respondent supports the 'sole employment' argument based on the wording of the section which states that the employee is 'employed on an indefinite basis by the client'.

[43] *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd with National Union of Metal Workers of South Africa (NUMSA)* at para 5.8.

[44] Idem para 6.1. In considering the interpretation of the section, the commissioner turned to the explanatory memorandum of the amendments when he noted (at para 5.4) that the 'main thrust of the amendments is to restrict the employment of more vulnerable, lower paid workers by a TES to situations of genuine and relevant temporary work and to introduce various further measures to protect workers employed in this way'. Based on this, the Commissioner noted at para 5.8 that 'I am convinced that the correct interpretation is the one that will provide greater protection for the vulnerable class of employees'. The commissioner opined that a situation of dual employment would be confusing as to the question which employer would be responsible for which employer duties. Therefore, the client becomes the sole employer of the agency worker after three months.

[45] *Assign Services (Pty) Ltd and CCMA, Commissioner AC Osman NO, NUMSA, Krost Shelving & Racking (Pty) Ltd* JR1230/15 of 8 September 2015.

[46] Para 26.

[47] Para 12.

ment agency to the client or that the client steps into the shoes of the employment agency after the three-month period. However, the rest of the decision remains contentious and open for different interpretations.

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

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

Before proceeding to an evaluation of international norms, it should be mentioned that the Employment Services Act of 2014 (ESA of 2014)[48] was introduced at about the same time as when the amendments to the LRA of 1995 were formulated. Amongst other things, the ESA of 2014 makes provision for the registration of a public employment agency, the registration and regulation of private employment agencies and the establishment of job-creation schemes.[49]

[48] Act 4 of 2014.

[49] Section 1 of the ESA defines 'employment services' as including advising workers on career choices, referring work seekers to employers to apply for vacancies, assisting employers by providing recruitment and placement services, and performing the functions of temporary employment services. The ESA establishes two types of employment agencies that render 'employment services', namely, public employment services, established and managed by the state to render free services to the public, and 'private employment agencies', that provide job-recruitment and placement services.

The LRA of 1995 provides that no person may function as an employment agency 'unless it is registered in terms of any applicable legislation'.[50] The ESA of 2014 directs that a registrar of private employment agencies be appointed, that criteria for such agencies be published[51] and that the registrar must issue successful applicants with a certificate of registration. The ESA of 2014 also provides that:

> '(1) No person may charge a fee to any work seeker for providing employment services to that work seeker.
>
> ...
>
> (4) A private employment agency must not deduct any amount from the remuneration of an employee or require or permit an employee to pay any amount in respect of the placing of that employee with an employer.
>
> ...
>
> (6) A provision in any agreement concluded with an employee that is in breach of this section is invalid and of no force and effect.'[52]

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

III RELEVANCE OF INTERNATIONAL STANDARDS

Since the ILO's establishment in 1919, international labour standards have played an important role in South Africa.[53] Even during South Africa's absence from the ILO between the 1950s and 1990s, the ILO continued to play an active role in shaping South Africa's labour law.[54]

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

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

[52] Section 15.

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

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

During the pre-constitutional era, members of the former Industrial Court relied on ILO principles in developing the court's unfair labour practice jurisprudence.[55]

Before the enactment of the Constitution, 1996 and the LRA, the ILO's Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa visited the country in 1992 and compiled a report in which they made specific recommendations on the reform of labour law. It is significant that this ILO report was used in the drafting of the current LRA of 1995.[56] This Act was drafted by the Cheadle Task Team through negotiations at NEDLAC[57] and during this process the ILO findings were taken into account.[58]

The South African Constitution, 1996 is the supreme law of the land[59] and it gives 'customary international law' a particular and significant status within the constitutional democracy. The Constitution, 1996 provides that 'customary international law is law in the Republic unless it is inconsistent with the Constitution, 1996 or an Act of Parliament'.[60] It further provides that

> 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.[61]

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

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

[55] Van Niekerk, 'In search of justification: The origins of the statutory protection of security of employment in South Africa' (2004) 25 *ILJ* 853 at 863.

[56] Van Niekerk & Smit (eds), (LexisNexis 2015) at 20. The Commission's Report is available on the ILO website at http://www.ilo.org/public/libdoc/ilo/GB/253/GB.253_15_7_engl.pdf, accessed on 1 August 2014.

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

[58] Satgar, 'The LRA and workplace-forums: Legislative provisions, origins, and transformative possibilities' (1998) 2(1) *Law, Democracy and Development* 43 at 50. The author states that the Cheadle Task team was assisted by the ILO in the drafting of the new labour legislation for South Africa.

[59] Section 2 of the Constitution, 1996.

[60] Section 232 of the Constitution, 1996.

[61] Section 233 of the Constitution, 1996.

[62] Dugard, 'International Law and the South African Constitution' (1997) 1 *EJIL* 77 at 79.

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

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

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

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

[63] Section 39(1)*(b)* and *(c)* of the Constitution, 1996.

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

[65] See the discussion below in para IV.

[66] 1995 (3) SA 391.

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

[68] In *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) at 1358 the Court stated that '[s]ection 39(1) of the Constitution obliged the Court to consider international law such as the ILO Conventions and Recommendations when interpreting any right to fair labour practice'.

[69] Section 1*(b)* of the LRA.

It furthermore directs that the provisions of the Act must be interpreted in compliance with South Africa's public international law obligations.[70]

The guiding effect of ILO conventions on those countries that have not adopted particular ILO conventions has also become apparent when the Namibian Supreme Court placed reliance on ILO conventions when it declared a legislative ban on employment agencies (or 'labour hire') in that country to be unconstitutional.[71] All of the above confirm the influence of international standards, and that of the ILO in particular, on South Africa's national labour law.

IV ILO STANDARDS ON AGENCY WORK

(a) Introduction

Conventions are legally binding instruments that may be ratified by member states[72] while recommendations, on the other hand, are considered to be non-binding guidelines.[73] We support the view that recommendations should not be lightly ignored since they ought to be seen to be morally binding in as far as they supplement conventions and provide policy direction to member states.[74] Both instruments are tools, which organised business, labour and governments should consult and be guided by when drafting and implementing labour law and social policy.

(b) Early Conventions and Recommendations

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

[70] Section 3 of the LRA of 1995. See also *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) at para 23 where the court held that '[t]he International Labour Organisation has through a large number of Conventions and Recommendations, such as the International Labour Organisation Convention, 158 of 1982, played a formative role in the development of South African labour law'.

[71] *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & others* (2011) 32 *ILJ* 205 (Nms). See also Horn & Kangueehi, 'African Personnel Services v Government of Namibia and Others' (2009) *Namibia Law Journal* 101; Nghiishililwa, 'The banning of labour hire in Namibia. How realistic is it?' (2009) *Namibia Law Journal* 87. The Namibian Constitution and the Labour Act 11 of 2007 contain similar provisions to the South African legislation pertaining to the taking account of ILO conventions.

[72] *http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang–en/index.htm*, accessed on 22 August 2014.

[73] Waugh, 'The ILO and human rights' (1982) 5 *Comparative Labor Law and Policy Journal* 186 at 188 says that the ratification of an ILO convention by a member state of the ILO binds it to the provisions therein and that this is usually achieved by bringing national law and practice into conformity with the relevant convention.

[74] Waugh ibid at 188 states that recommendations are usually more detailed than conventions and represent model, ideal or optimum objectives.

Unemployment 1919 (No. 2) and the ILO Recommendation on Unemployment 1919 (No. 1).[75] It is significant to note that at the time non-profit employment agencies were allowed to exist as long as they were strictly controlled by a central state authority. However, the accompanying Recommendation stated that fee-charging agencies for profit were to be prohibited.[76] This early recommendation regarding the banning of agency work was later elevated and formalised to be included in the Fee-Charging Employment Agencies Convention 1933 (No. 34).[77] This prohibition did not remain in place as the Convention on Fee-Charging Agencies 1949 (No. 96) once again relaxed the banning of agencies in so far as it provided that member states could either abolish such agencies or regulate them. As Valticos points out, most member states still chose the option of prohibiting fee-charging agencies.[78]

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

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

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

[77] Van Eck, (2012) 28 International Journal of Comparative Labour Law and Industrial Relations at 32. Article 3(1) of the Convention stated that '[f]ee-charging employment agencies conducted with a view to profit as defined in paragraph 1 (a) of Article 1 shall be abolished within a limited period of time determined by the competent authority'. Also see Van Eck, 'Revisiting agency work in Namibia and South Africa: Any lessons from the decent work agenda and the flexicurity approach?' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 49 at 54 and 55. He points out that the limitation was later relaxed with the revision of the Convention in 1949.

[78] Valticos, 'Temporary work agencies and international labour standards' (1973) 107 *International Labour Review* 43 at 50. Valticos at 56 further suggests that general standards in existence do apply to temporary employment agencies and address some social problems. However, he states that particular standards with more precise provisions would fill some existing gaps. Waas, 'A quid pro quo in temporary agency work: Abolishing restrictions and establishing equal treatment — Lessons to be learnt from European and German labour law' (2012) 34(1) *Comparative Labor Law and Policy Journal* 47 at 49, writing about the German context in particular, states that historically agency work was forbidden and even a criminal offence, but that this changed with a court decision in 1967 when such work became permissible.

European countries.[79] At more or less the same time, the ILO introduced conventions and recommendations relating to other groups of vulnerable workers as well, namely, part-time workers,[80] home workers[81] and domestic workers.[82] The history of ILO standards on agency work shows an evolution in policy from restriction to prohibition and to allowing employment agencies to exist but at the same time providing for the protection of agency workers.[83]

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

The Introduction to Convention 1997, (No. 181) states that the General Conference of the ILO is 'aware of the importance of flexibility in the functioning of labour markets'[84] and that it recognises 'the role which private employment agencies may play in a well-functioning labour market'.[85] The Introduction also emphasises the need to prevent abuses and to protect workers. This is confirmed in Article 2 which aims 'to allow for the operation of private employment agencies and to protect workers'.[86] It thus seeks to allow and to regulate the industry rather than banning it and driving it under cover.

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

> 'the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:
> (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

[79] O' Donnell & Mitchell, 'The regulation of public and private employment agencies in Australia: An historical perspective' (2001) 23 *Comparative Labor Law and Policy Journal* 7 at 9. Also, in terms of the European Union in particular, Waas, (2012) 34 *Comparative Labour Law and Policy Journal* at 49 states that within the EU, member states may only prohibit or restrict the use of agency work on the grounds of general interest. The author states that restrictions or prohibitions by member states will not be tolerated anymore.

[80] ILO Convention on Part-Time Work.

[81] ILO Convention on Homework.

[82] ILO Convention on Domestic Work.

[83] Van Eck, (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* at 35 states with regard to the purpose of the Convention, that the ILO recognises the role that such agencies play in job creation and that the Convention aims to ensure that workers who gain employment through employment agencies are not exploited.

[84] Introduction to the ILO Convention on Private Employment Agencies.

[85] Introduction to the ILO Convention on Private Employment Agencies.

[86] Article 2 of the ILO Convention on Private Employment Agencies.

> (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;
> (c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organisations, such as the provision of information, that do not set out to match specific offers of and applications for employment'.[87]

Article 4 states that measures should be taken to ensure that workers recruited by employment agencies 'are not denied the right to freedom of association and the right to bargain collectively.' As pointed out by Benjamin, despite this noble intention it remains a question as to how such workers are meant to organise themselves if they are employed by the employment agency and then placed at different clients.[88] Practicalities around organisational rights also become challenging in that the workers do not work at the workplace of their employer but rather at clients' workplaces. Also, rights of access to the employer's workplace, being that of the employment agency, would serve no function.[89]

Article 5 provides for equal treatment by the employment agency without discrimination 'on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability'.[90] A glaring shortcoming here is that there is no express mention of equal treatment of workers of an employment agency and employees employed directly by a client. Therefore, there could be different treatment of these groups of employees, even though they may be working side by side at the same workplace. Such inequality could relate to benefits such as medical aid, death and disability cover, company pension schemes and so forth, which the workers of the employment agency are less likely to enjoy. Whilst equality is of key importance, it is submitted that Article 5 does not adequately address this need and merely provides for the bare minimum regarding equality in the workplace.

Article 7 directs that '(p)rivate employment agencies shall not charge

[87] Article 1.

[88] Benjamin, (2013) at 13.

[89] Ibid.

[90] The ILO Guide to Private Employment Agencies 2007 at 25 refers to a statement made by a large employment agency to the effect that employment agencies 'can either promote equal opportunities and improve transparency in the labour market or perpetuate discriminatory practice'. They indeed have the power to perpetuate inequality.

directly or indirectly, in whole or in part, any fees or costs to workers'. The right not to be charged costs is important in preventing exploitation of the worker and this is therefore a helpful provision.

It remains problematic for any agency worker to determine which party — the employment agency or the client — bears the employer's responsibilities. Article 12 states that the member state shall allocate the respective responsibilities of employment agencies and the client.[91] However, it does not specify whether the responsibilities should lie with either the employment agency or the client. The listed responsibilities include rights in relation to collective bargaining, training, social security benefits and compensation for occupational health and safety claims. This is constructive in so far as Convention, 1997 (No. 181) places the obligation on the member state to determine and allocate these responsibilities. This allows for clarity and certainty for workers and the other parties in the triangular relationship as well. Ambiguity in this regard will be to the detriment of agency workers.

From the above, it is clear that in the past the ILO was opposed to the operation of employment agencies in that they would undermine the principle of labour not being a commodity and therefore their operation was prohibited or limited.[92] In 1997, the ILO changed this policy and has since allowed the operation of employment agencies and provided for their regulation.

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

The main thrust of Recommendation, 1997 (No. 188) is the protection of agency workers. Article 4 provides that member states should adopt measures to prevent unethical practices[93] and Article 5 adds that each

[91] Article 12 reads as follows: 'A Member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to: (a) collective bargaining; (b) minimum wages; (c) working time and other working conditions; (d) statutory social security benefits; (e) access to training; (f) protection in the field of occupational safety and health; (g) compensation in case of occupational accidents or diseases; (h) compensation in case of insolvency and protection of workers claims; (i) maternity protection and benefits, and parental protection and benefits.'

[92] Raday, 'The insider-outsider politics of labor-only contracting' (1999) *Comparative Labor Law and Policy Journal* 413. In this regard, the ILO Unemployment Convention, 1919 (No. 2) and the ILO Fee-Charging Employment Agencies Convention, 1933 (No. 34) are relevant.

[93] Article 4 states: 'Members should adopt all necessary and appropriate measures to prevent and to eliminate unethical practices by private employment agencies. These measures may include laws or regulations which provide for penalties, including prohibition of private employment agencies engaging in unethical practices.'

agency worker should have a written contract of employment.[94] Such contracts can provide agency workers with certainty as to the particulars of their rights and duties and, at the very least, can provide clear evidence of their employment. Reference is also made to the health and safety of workers and the prohibition of discrimination, as well as promoting equality through affirmative action programmes. Measures should be taken to promote the use of proper, fair and efficient selection methods.[95]

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

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

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

The ILO's Guide to Private Employment Agencies, 2007[96] was published for the purpose of providing guidance to national legislators in drafting

[94] Article 5 states: 'Workers employed by private employment agencies as defined in Article 1.1(b) of the Convention should, where appropriate, have a written contract of employment specifying their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment.'

[95] Article 13 states: 'Private employment agencies and the competent authority should take measures to promote the utilization of proper, fair and efficient selection methods.'

[96] ILO Guide to Private Employment Agencies — Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007 1.

employment agency legal frameworks which accord with ILO norms. The Guide to Private Employment Agencies, 2007 confirms that Convention, 1997 (No. 181) was implemented to replace earlier standards aimed at abolishing employment agencies. The ILO presently recognises that employment agencies can contribute to the functioning of the labour market. Despite the on-going neo-liberal questioning of the regulation of employment agencies, it is clear that the ILO has adopted the view that regulation is necessary — the main justification being the protection of agency workers. At the same time, the Guide to Private Employment Agencies, 2007 adopts a balanced approach by providing that regulation should improve the functioning of the labour market and not serve as a tool to restrain competition or create unnecessary burdens for employment agencies.[97]

The Guide to Private Employment Agencies, 2007 alludes to the fact that the ILO makes reference to a wide range of agencies as contained in the definition of employment agency as they all have placement of workers as their main function.[98] However, this in itself is problematic. The different services are very different and agency workers would have received better protection had all of the different categories not been covered by one convention and the same set of rules. So, for example, a matching agent connects the worker and the client and at no stage becomes involved in the employment relationship. Contrary to this, the employment agency in the triangular relationship employs the workers and becomes the employer in the employment relationship. The problem with this is that the idea of serving as a stepping stone becomes moot should there be no emphasis on the temporary nature of the relationship between the employment agency and agency worker.

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

V EVALUATION AND CONCLUSION

To what extent do the provisions of the LRA of 1996, as amended, comply with norms established by the ILO? We distil a number of key

[97] Idem at 2.
[98] Idem at 10.

features from the ILO's Convention, 1997 (No. 181) and Recommendation, 1997 (No. 188) below against which we evaluate the regulation of employment agencies in South Africa.[99]

Without being too prescriptive, the ILO endorses the notion that employment agencies should not be prohibited and should be allowed to operate within a flexible labour market.[100] Beyond this, agency workers should be protected in a number of key respects, namely:[101]

(a) agency workers should not be denied the right to freedom of association and the right to bargain collectively;[102]

(b) agency workers should be entitled to equal treatment by employment agencies, without discrimination on various grounds, which include but are not limited to race, colour, sex, religion and political opinion;[103]

(c) the responsibilities of the employment agency and of the client *vis-à-vis* agency workers should be clearly allocated respectively and agency workers should have a written contract of employment;[104]

(d) agency workers should not be prohibited from being employed directly by a client, their occupational mobility should not be restricted and they may not be penalised for accepting employment elsewhere;[105] and

(e) measures should be adopted to prevent unethical practices[106] and fees or costs should not be charged to agency workers by employment agencies.[107]

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

[99] See the discussion of the particular articles contained in the ILO's Convention, 1997 (No. 181) and Recommendation, 1997 (No 188) in para IV*(c) The current Private Employment Agencies Convention, 1997 (No. 181)* above.
[100] See the Introduction and Article 2 of Convention, 1997 (No. 181).
[101] See Article 2 of Convention, 1997 (No. 181) as well as Article 4 of Recommendation, 1997 (No 188) regarding the general principle that agency workers should be protected.
[102] See Article 4 of Convention, 1997 (No. 181).
[103] See Article 5 of Convention as well the ILO 'Guide to Private Employment Agencies', 2007.
[104] See Article 5 of Convention, 1997 (No. 181).
[105] See Article 15 of Recommendation, 1997 (No. 188).
[106] See Article 4 of Recommendation, 1997 (No. 188).
[107] See Article 7 of Convention, 1997 (No. 181).

Added to this, effect has been given to the notion of the protection of agency workers within the broad parameters of a flexible labour market. In an attempt to put an end to the under- and over-regulation debate pursuant to the introduction of the amendments, the Deputy Director-General of the Department of Labour stated that

> '[t]here are also some who are clearly of the view that our labour legislation is too restrictive and ... over-regulated. It will not be helpful, at this time, to fall back on old debates ... As government, we are committed to a policy and legislative approach that is captured by the concept of regulated flexibility ... [which] accepts the necessity of regulation, but also accepts the need for flexibility. The key issue is finding the right balance'.[108]

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

Firstly, in a positive move, agency workers' collective bargaining rights have been strengthened. As referred to above, the LRA Amendment Act of 2014 now provides that an agency worker may not be employed by an employment agency on terms and conditions that are less favourable than the provisions of sectoral determinations or collective agreements which are applicable to the employees of the client where the agency worker renders services.[109] It is significant that this protective measure applies to all categories of agency workers irrespective of their level of income and this persuades us that this ILO norm is adhered to.

The second norm, which relates to the right to equality, has indisputably been improved in respect of lower earning agency workers. In addition to the fact that all agency workers are protected against unfair discrimination in terms of the EEA, lower earning agency workers are now also expressly protected in so far as they have the right to 'equal

[108] Esterhuizen, 'Changing SA's labour law not the answer, says DDG' (31 July 2013), available at www.polity.org.za, accessed on 2 September 2013.

[109] See s 198(4C) of the LRA of 1995.

treatment' compared to other workers of the client.[110] We accept this to mean that they are entitled to equal conditions of service. This goes further than the international norm and we fully support this development. However, it must to be pointed out that (as previously argued) international norms only establish a low base and should probably have been improved to include equality of treatment and conditions of service rather than merely proscribing unfair discrimination based on arbitrary grounds.

Unfortunately South Africa does not meet the third norm, which relates to the clear allocation of responsibilities of the employment agency and of the client vis-à-vis agency workers. Admittedly so, the LRA Amendment Act of 2014 does specify that employment agencies and clients are jointly and severally liable in respect of the provisions of the BCEA, sectoral determinations and collective agreements.[111] However, the legislature has dismally failed in its attempt to provide clarity as to the question where the employer responsibilities lie in respect of unfair dismissal and unfair labour practices. It is not clear whether only the client or both the client and the employment agency are deemed to be employers in respect of unfair dismissal and unfair labour practice disputes. The opposing opinions expressed in *Refilwe Esau Mphirime* and *Assign Services (Pty) Ltd* discussed earlier attest to this. Regrettably, the ILO norms do not provide guidance in respect of the interpretation of South Africa's deeming provision. The only guidance that can be gleaned from international norms is that the definition of employment agency recognises the traditional triangular relationship which recognises that the agency employs the worker. Also, no provision is made in respect of the transfer of responsibilities from the agency to the client after the expiration of some or other time period. Supporters of the dual relationship approach would probably argue that this implies that the employment agency should remain a party to the contract of employment despite the coming into existence of an additional employment relationship.

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

[110] See s 198A(5) of the LRA of 1995.

[111] See s 198(4) of the LRA of 1995.

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

In the fifth instance, the amendments to the LRA of 1995 do not address fees or costs being charged to agency workers. However, despite this, South Africa does meet the international norm in as far as ESA of 2014 prohibits any such practice.[112]

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

[112] See s 15 of the ESA.