STANDARD AND NON-STANDARD WORKERS: A CRITICAL ANALYSIS OF THE REGULATION OF TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA

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DECLARATION

I, **ZWIVHUYA MADALA (STUDENT NUMBER:14000695)**, hereby declare that this dissertation, for the LLM degree at the University of Venda, is my own work and has not been submitted previously at this institution or any other university. All reference material submitted herein has been duly acknowledged.

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DEDICATION

I dedicate this dissertation to my unborn twins. Surely, if your mother can do it, you can do much better. This is for you to see that there is nothing impossible with God.

TABLE OF CASES

- *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA)
- *Assign Services (Pty) Ltd v Commission, Mediation and Arbitration and others* (2015) JOL 33875 (LC)
- *Assign Services(PTY) Limited v National Union of Metalworkers of South Africa and Other* 2018 9 SA 837 (CC).
- *BArkhuzen v Napier* 2007 5 SA 323 (CC).
- *Discovery Health Limited v CCMA & Others* 2007 BLLR 633 (LC).
- *Dyokwe v De Kock NO nad Others 2012* (10) SA 102 (CC).
- *Equity Aviation Services (Pty) Ltd v Commission, Mediation and Arbitration and Others* 2009 1 SA 390 (CC).
- *General Industries Workers Union of South Africa and others v Swissport SA (Pty) and Another* (2019) 9 BALR 954 (CCMA).
- *Khosa v Minister of Social Development* 2008 7 BLLR 633 (LC).
- *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 4 SA 383 (LAC).
- *Liberty Life Association of Africa v Niselow* 1996 17 ILJ 673 (LAC).
- *Mackay v Comtec Holding (Pty) Ltd* 1996 BLLR 863 (IC).
- *Mahlamu v Commission for Conciliation, Mediation & Arbitration & Others* (2011) 32 ILJ 1122 (LC)
- *Mandla v LAD Brokers (Pty) Ltd* 2000 (9) SA 1047 (LAC).
- *Natal Pension Fund v Endumeni Municipality* (2012) 4 SA 593 (SCA).
- *National Entitled Worker's Union v Commissioner for Conciliation Mediation and Arbitration and Others* 2007 1 SA (LAC).
- *National Security and General Workers Union v Brilliant Image Personnel and Others* 2016 5 BALR 509 (CCMA).

- *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC).
- *NUM & others v Billard Contractors cc & another*, 2006 12 BLLR 91 (LC).
- *Old Mutual Life Assurance Co SA ltd v Gumbi* 2007 5 SA 552 (SCA)
- *Refilwe Esau Mphirime v Value Logistics Ltd BMD Staffing* (Pty) Ltd 2015 (8) SA 788 (T).
- *S v Makwanyane* 1995 3 SA 391 (CC).
- *S v Rosanthall* 1980 (1) SA 65 (A).
- *SA Correctional Services Workers Union v Police and Prisons Civil Rights Union and Others* 2017 38 SA 1 (LAC).
- *Simon Nape c INTCS Corporate Solutions (Pty) Ltd* 2010 8 BLLR 852 (LC).
- *Sindane v Prestige Cleaning Services* 2009 1 SA 1249 (LC).
- *Smith v Staffing Logistic* 2005 26 *Industrial Law Journal* 2097 (BCA).
- *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA).
- *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Anothe*r (2020) 9 BALR 988 (CCMA).
- *United Chemical Industries Mining Electrical State Health and Aligned Workers Union v South African Breweries* (Pty) *Ltd and another* (2020) 3 BALR 261 (CCMA).
- *Victor and others v Chep South Africa (Pty) Ltd and others* 2021 1 BLLR 53 (LAC).
- *Walljee v Capacity Outsourcing and Another* 2012 33 ILJ 1744 (LC).

TABLE OF STATUTES

- Basic Conditions of Employment Act 75 of 1997.
- Constitution of the Republic of South Africa,1996.
- Compensation for Occupational Injuries and Diseases Act 130 of 1993.
- Employment Equity Act 55 of 1998.
- Labour Relation Act 66 of 1995.
- Labour Relations Amendment Act 6 of 2014.
- Labour Relations Amendment Act 2 of 1983.
- The Labour Relations Act 28 of 1956.
- Skills Development Act 97 of 1998.
- International Labour Organization Equal Remuneration Convention of 1951.
- International Labour Organization Fee-Charging Employment Agencies Convection 1933.
- International Labour Organization Fee-Changing Employment Agencies Convention, 1949.
- International Labour Organization Private Employment Agencies Convention, 1997.
- International Labour Organization Private Employment Agencies Recommendations.

TABLE OF CONTENTS

ABSTRACT

This study focuses on South Africa's regulation of temporary employment services. Over the years, the regulation of temporary employment services has proven problematic, particularly with regards to the provision of employment security and the realisation of decent work. Having noted the afore-mentioned predicament, the legislature amended section 198 of the Labour Relations Act[1] to incorporate section 198A, for the purposes of providing additional protection to vulnerable employees in a temporary employment service. Thus, this study sought to determine whether the amendments to the 1995 LRA, particularly section 198A, provide adequate protection to the vulnerable employees employed by temporary employment services. Therefore, the researcher examined whether the "sole employment" interpretation of section 198A(3)(b) of the 2014 LRAA upheld by the Constitutional Court in the *Assign Services(Pty) Ltd v National Union of Metalworkers of South Africa & Others*[2] case assisted in enhancing the legal protection of vulnerable employees employed in a temporary employment services. This discussion highlights the practical difficulties of integrating the *Assign Services* case judgement with current provisions of the 1995 LRA. It further indicates that the judgement provided more questions than the certainty it was sought for, which in turn, undermines the legislature's intention of providing vulnerable workers with greater protection. This study adopted a doctrinal methodology.

Key Concepts: Labour Law, standard/typical workers, Non-standard/atypical workers, externalisation, globalization, casualization, temporary employment services, labour market flexibility and contract of employment.

[1] Act 66 of 1995.
[2] *Assign Services(PTY) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC).

CHAPTER 1

1. INTRODUCTION

This chapter provides an overview of the whole dissertation. It introduces the background of the study, research problem, the aim and objectives of the study, research questions, hypothesis, preliminary literature review, proposed methodology, definition of key terms, ethical considerations, proposed research structure, research schedule and limitations of the study.

1.1. BACKGROUND OF THE STUDY

The world is going through a global pandemic termed COVID-19[3] and South Africa has not been exempted.[4] The traditional workplace, as previously known by employers and employees, were redefined by the COVID-19 pandemic in that employers and employees started working remotely from home to curb the spread of the virus. This negatively affected the parties to the employment contract because businesses had to re-size their workforce and resort to non-standard forms of work, such as temporary employees. Consequently, the composition of the workforce changed to incorporate more non-standard forms of work, as opposed to the olden days, when the workforce had a magnitude of standard employment employees. Notably, these changes were already taking place because of the employer's need for greater market flexibility in a globalised world. However, the impact of COVID-19 has accelerated the trend.

The swift use of non-standard forms of work due to the pandemic, as indicated above, has exposed the little or no legislative protection afforded to workers in non-standard forms of work. This is so because labour laws are based on the assumption that an employment relationship is between an employer and an employee, employed on a full-

[3] COVID-19 is "an acute respiratory illness in humans caused by a coronavirus, capable of producing severe symptoms and in some cases death, especially in older people and those with underlying health conditions." https://www.who.int/health-topics/coronavirus#tab=tab_1 (accessed 04 April 2022)
[4] https://theconversation.com/covid-19-has-hurt-some-more-than-others-south-africa-needs-policies-that-reflect-this-151923 (accessed 04 April 2022).

time basis, for an indefinite period. Therefore, any other relationship that arises from other commercial relationships, established by ordinary contracts, receive little to no legislative protection. This includes non-standard forms of work, such as temporary employment services, fixed-term contracts and part-time contracts. This study focuses on the regulation of temporary employment service (hereafter referred to as TES) as a form of non-standard work, to determine whether the amendments to the Labour Relations Act[5](hereinafter referred to as 1995 LRA), particularly section 198A, provide adequate protection to vulnerable workers in TES

In South Africa, the 1995 LRA is known as the mother of labour regulation.[6] The 1995 LRA encapsulates the government's plan to provide a legislation aimed at reconciling the need for flexibility and social protection.[7] The 1995 LRA incorporated the two needs, by regulating, to a limited extent, non-standard forms of work. Consequently, most employers took advantage of the poorly drafted regulation in respect of non-standard forms of work and engaged in a systematic approach aimed at exploiting workers in non-standard forms of work.[8] For example, labour brokers together with their clients, attempted to hide the true identity of the employers in the triangular relationship, by structuring the triangular relationship as that of independent contracting.[9] In so doing, the labour brokers and their clients would escape the responsibilities of the employers, leaving the employees without employers, for the purposes of labour protection.

The 1995 LRA provided a definition of TES. The definition provides that "temporary employment services means any person who, for reward procures for or provides to a client other persons who render services to, or perform work for the client and who are remunerated by the temporary employment services".[10] The definition established a triangular employment relationship which is different from a binary employment

[5] 66 of 1995.
[6] http://lwo.co.za/2018/05/21/labour-legislation-south-africa/ (accessed 04 April 2022)
[7] T Masimbe 'Protection versus Flexibility: A critical Analysis of the New Labour Brokering Provisions Introduced by the 2014 Amendments to the Labour Relations Act,66 of 1995' unpublished MA dissertation, University of Cape Town, 2016.
[8] E Van AS 'Two is a party, Three is a Crowd: An Appraisal of Temporary Employment Services in South Africa' unpublished MA Dissertation, University of Pretoria, 2018.
[9] P Benjamin 'Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document' (2010) 31 (845) *Industrial Labour Journal* 845-871.
[10] Labour Relations Act 66 of 1995 sec 198(1).

relationship. The triangular employment relationship consists of three parties; namely, the labour broker, the labour broker's client and the employee.[11] In this triangular relationship, the labour broker undertakes to procure employees who will render services to the labour broker's client. However, the labour broker remains the employer of the employees it procures for its client. This triangular relationship that is created was affirmed by the Labour Appel Court (herein after referred as LAC) in the case of *Mandla v LAD Brokers (Pty) Ltd*[12] , where the LAC held that "the contract connecting employee and a labour broker generates a unique and *sui generis* triangular affiliation in which the employee provides personal service to their employer's client."[13]

The definition of TES ended the abusive tactics that were emerging in the labour broking industry, where the labour brokers' clients would procure for themselves employees and later transfer them to the labour broker's books, but continue to render services to the client. This position was confirmed in *Dyokwe v De Kock NO and Others*[14], where the LAC overruled the decision of the Commission for Conciliation, Mediation and Arbitration (hereinafter referred as CCMA) and held that "a genuine labour broker procures for or provides to a client other persons who render services to, or perform work for, the client."[15] The effect of the LAC's decision is that the client of the labour broker must receive employees that have been procured for it by the labour broker and not the other way round.

This triangular employment relationship gives rise to two separate contracts; namely, a commercial contract between the labour broker and its client. Secondly, an employment relationship exists between the labour broker and the employees it procures for its client.[16]The commercial contract that exists between the client and the labour broker exists to protect the client from assuming the responsibility of being an employer of the employees that the labour broker procures for it. To give clarity to the identity of the

[11] Labour Relations Act 66 of 1995 sec 198.
[12] *Mandla v LAD Brokers (Pty) Ltd* 2000 9 SA 1047 (LC).
[13] *Mandla v LAD Brokers (Pty) Ltd* 2000 9 SA 1047 (LC) para 34.
[14] *Dyokwe v De Kock NO and Others* 2012 (10) SA 102 (LC).
[15] *Dyokwe v De Kock NO and Others* 2012 (10) SA 102 (LC) para 60.
[16] A Botes 'A Comparative Study on the Regulation of Labour Brokers in South Africa and Namibia in Light of Recent Legislative Developments' (2015) 132 (1) *South African Law Journal* 3.

employer of the employees in the triangular relationship, the 1995 LRA appointed the labour broker as the employer of the employees.[17] However, the section was not effective in curbing the strategic plans devised by the labour broker and its clients, aimed at obscuring the identity of the employee in a tripartite relationship. For example, the client would dismiss the employee, and because the client was not regarded as the employer of the employee, the employee would not have a right to recourse against the client. The employee would have to cite the labour broker as the employer in an unfair dismissal claim brought by the employee and the labour broker would hide behind the fact that he was not the one who had fired the employee.

Furthermore, the 1995 LRA failed to provide a time-frame of operation for the temporary service. This meant the employee would be placed at the client's workplace for an indefinite period, without the benefits enjoyed by permanent employees employed directly by the client. Employees in a TES would remain in such employment without any prospect of being fully integrated into the business of the labour broker's client. As evidenced by the above case, the 1995 LRA had various shortcomings. These provided the labour broker, together with its client, with a *lacuna* to exploit vulnerable workers in TES. Owing to the flimsy 1995 LRA regulation with regards to TES, TES became the most problematic non-standard work in South Africa. Various stakeholders, including the Congress of South African Trade Unions (herein referred to as COSATU), pressured the legislature to ban TES.[18] However, after lengthy consultations, the legislature opted to regulate TES by promulgating the Labour Relations Amendment Act[19] (herein after referred to as the 2014 LRAA). The 2014 LRAA amended section 198 of the 1995 LRA and further inserted section 198A of the 2014 LRAA, which is aimed at providing additional protection to vulnerable employees in TES.

Significantly, section 198A of the 2014 LRAA contained a specific subsection which sparked interpretation debates in South Africa. Section198A(3)(b) (commonly known as the deeming provision), introduced by the 2014 LRAA, stipulates that after a period of three months of placement of workers by a labour broker with a client, the client is deemed

[17] Labour Relations Act 66 of 1995 sec 198(2).
[18] Van As (n 8 above) 2.
[19] Act 6 of 2014.

the employer of those workers. This section presents two views on how the provision should be interpreted. The first view is the "dual employment" interpretation, which suggests that after the three months' placement, both the labour broker and the client become employers of the placed workers.[20] The second view is the "sole employment" interpretation, which proposes that after the three months have lapsed, the client becomes the sole employer of the placed employees.[21] As much as this was a legal debate amongst scholars, cases were also pilling up and seeking interpretation of the ambiguous provision; for example, in the case of *Refilwe Esau Mphirime and Value Logistics Ltd BDM Staffing (Pty) Ltd*[22], the National Bargaining Council for the Road Freight and Logistics Industry(hereinafter referred as NBCRFLI) found in favour of a sole employment relationship. The NBCRFLI also held that if the worker earns less than the threshold, such a worker will be deemed to be the client's worker.

This legal debate was eventually settled by the Constitutional Court (hereinafter referred as CC) in 2018 in the *Assign Services(PTY) Limited v National Union of Metalworkers of South Africa and Others*[23]*(*hereinafter referred as *Assign Services* case*),* which favoured the sole employment interpretation. However, the judgement as a leading precedent in the TES industry, left more questions than answers. The questions are discussed in the problem statement. Thus, this study sought to determine whether the amendments to the 1995 LRA, particularly section 198Aof the 2014 LRAA, provide adequate protection to the vulnerable employees employed by temporary employment services. Thus, the researcher examined whether the "sole employment" interpretation of section 198A(3)(b) of the LRA, upheld by the Constitutional Court in the *Assign Services(Pty) Ltd v National Union of Metalworkers of South Africa & Others*[24] case, assisted in enhancing the legal protection of vulnerable employees employed in a TES.

[20] Van As (n 8 above) 28.
[21] Van As (n 8 above) 28.
[22] *Refilwe Esau Mphirime v Value Logistic Ltd BMD Staffing (Pty) Ltd* 2015 8 SA 788 (T).
[23] *Assign Services(Pty) Ltd v National Union for Metalworkers of South Africa & Others* 2018 9 SA 837 (CC).
[24] *Assign Services(PTY) Ltd V National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC).

1.2. Research Problem

To ascertain and fully comprehend this study's research problem, the study is discussed and supported by questions raised below, that the judgement handed down by the CC in the *Assign Services* case led to more questions than the answers it was originally sought for. For example, section 198A (5) of the 2014 LRAA provides that "deemed workers must be treated on the whole not less favourably than an employee of the client performing similar work, unless there is a justifiable reason for the different treatment".[25] This provision affords legal protection to placed workers who are deemed to be the employees of the client as a result of section 198A(3)(b) of the 1995 LRA, and further where the client has existing employees performing similar work to that performed by the placed employee. Thus, the questions that the CC failed to answer with regards to this positon are as follows: what happens in instances where the client does not have existing employees performing similar work? Does it mean that the placed worker will continue to be governed by the terms and conditions of employment prior to the activation of the deeming provision or a new contract of employment must be negotiated between the placed workers and the client? Furthermore, what is the nature of the contract that exists between the placed worker and the TES after triggering the deeming provision? And if the client is the employer of the placed worker after the deeming, for the purposes of the 1995 LRA, who becomes the employer of the placed worker for the purposes of other employment laws, such as the Employment Equity Act[26](hereinafter referred to as EEA)?

Failure of the CC to provide the much-needed clarity to the amendments in relation to the regulation of the TES creates a *lacuna* in law that labour brokers and their clients may utilise to exploit vulnerable workers in TES. This, in turn, undermines and defeats the legislature's intention to provide greater protection to vulnerable workers in TES.

1.3. Aims and Objectives

1.3.1. Broad Aim

[25] Labour Relations Act 66 of 1995 sec 198A (5).
[26] Act 55 of 1998.

This sought seeks to determine whether the amendments to the 1995 LRA, particularly section 198A of the 2014 LRAA, provide adequate protection to the vulnerable employees employed by TES.

1.3.2. Objectives.

To achieve the above aim the following objectives were pursued:

- This study discusses how the employer's need for greater market flexibility influences the labour market in relation to the proliferation of non-standard forms of work, particularly TES.
- This study examines the South African legislative framework changes regarding TES, for the purposes of ascertaining the extent to which the South African labour laws recognise and regulate TES, and further, adequately provide legal protection to vulnerable employees employed by TES.
- This study further examines whether the "sole employment" interpretation of section 198A(3)(b) of the 1995 LRA, upheld by the CC in the *Assign Services* case, helped in enhancing the legal protection of vulnerable employees in TES, and further, examines the implications of the CC's judgement.
- Finally, the study provides recommendations for lawmakers on how they can successfully circumvent the exploitation experienced by employees employed by TES, and further, how they can adequately provide for additional protection to vulnerable employees in TES.

1.4. Research questions

The main research questions emanating from the aim of this study are the following: -

- How have the amendments to the 1995 LRA, particularly section 198A, provided adequate protection to vulnerable employees employed by TES?

The sub-research questions emanating from the main research question are as follows: -

- How has the employer's need for greater market flexibility influenced the labour market in relation to non-standard forms of work, particularly TES?

- To what extent does the South African employment laws recognise and regulate vulnerable workers employed in TES?
- How has the "sole employment" interpretation of section 198A(3)(b) of the LRA, upheld by the CC in the *Assign Services* case, assisted in enhancing the legal protection of vulnerable employees employed in TES?

1.5. Hypothesis

This study was based on the hypothesis that the existing statutory regulation of TES does to a limited extent provide adequate protection to vulnerable employees employed by TES.

1.6. Preliminary Literature Survey

The literature available in this field of study mainly centres on the debate of whether the CC erred in interpreting section 198A(3)(b) of the 2014 LRAA to give rise to a sole employment interpretation in the *Assign Services* case. However, little literature is available on the court's failure to provide clarity to the ambiguity and uncertainty of other provisions, such as section 198A (5) of the 2014 LRAA after the triggering of section 198A(3)(b) of the 2014 LRAA. Furthermore, little literature is available on the practical difficulties of integrating the judgement in the *Assign services* case with current provisions of the 2014 LRAA.

The *Assign Services* case is a very important case and serves as a starting point in answering the question of whether the amendments to the 1995 LRA with regards to TES have indeed provided vulnerable employees employed by the TES adequate protection against exploitation. The protection that the legislature intended to afford vulnerable employees employed by the TES rests on the court's interpretation of the amendments to the 1995 LRA. The study also sought to find out if it was believed that Assign Services failed to provide clarity to other provisions other than section 198A(3)(b) of the 2014 LRAA. If this were so, it would defeat the entire purpose of the amendments and thus, leave employees employed by TES in a much weaker position than before.

Although the available literature post the *Assign Services* case does not focus on the problems identified in this study, it however, provides input which is valuable and aids in

answering the research questions. The literature review commences with a discussion of the views of scholars who are in favour of the sole employment interpretation and concludes with a discussion of submissions of scholars in support of the dual employment interpretation. It further identifies gaps in literature regarding the above interpretation and discusses how other scholars' views aid this study.

It is not difficult to understand why the sole employer interpretation upheld by the CC in the *Assign Services* case finds favour among scholars. The basis of the present scholar's arguments provides simpler and more perspicuous explanations than its rival (dual employment). Ferere[27], in support of the sole interpretation, pointed out that the legislature was aware of the inherent exploitation of having two authoritative figures (the client and the labour broker) in a triangular employment relationship. Thus, it would be baffling that the amendments meant to eradicate the exploitation would continue with the practice of having two figures in a position of authority.[28] The scholar further pointed out that if the labour broker does not cease to exist post the initial three-month period, the provided employees' link to the labour broker exists without end, and the purpose of the 2014 amendments is defeated.[29]

The present researcher concurs with the above interpretation, and is of the opinion that the legislature's true intention when legislating the 2014 amendments was to ensure that only one employer exists at a particular time. The lapse of the three-month period automatically terminates the employment relationship between the provided employee and the labour broker. Consequently, the client assumes the role of the employer to the provided employee. Ferere's submission is helpful because the researcher will submit with the support of case law and relevant legislative provisions that the sole employment interpretation held by the CC in the *Assign Services* case is in the best interest of the employee employed in TES and that it was the legislature's intention that section

[27] MA Ferere 'From exclusion to labour Security: To What Extent Does Section 198 of the Labour Relations Amendment Act of 2014 strike a Balance Between the Employers and Employees?' (2016) 3 (375) *South African Mercantile Law Journal* 390.
[28] Ferere (n 27 above) 390.
[29] Ferere (n 27 above) 391.

198A(3)(b) of the 2014 LRAA be interpreted to create a sole employment relationship after the lapse of the three-months period.

Botes[30], in support of the above submission that the legislature's intention was to provide the employee with one employer at a particular time, pointed out that section 198A(3)(b)(i) of the 2014 LRAA creates a statutory employment relationship that elevates the provided employees to standard ones.[31] He argues that it would be utterly futile to retain the labour broker post the initial three months, as the client will be performing all the responsibilities that come with being an employer.[32] However, Grogan[33] is of the opinion that the labour broker may continue in the relationship post the initial three-month period simply for the sake of remunerating the employee. The researcher is in favour of Botes' submission and further contends that retaining the labour broker post the lapse of the three-month period creates adverse financial implications for the client. The current study indicates that the continuous existence of the labour broker post the three months' period not only creates confusion with regards to the role the labour broker performs but also indicates that the continued existence creates unnecessary financial implications for the client. Therefore, the above submissions indicate that it was not the legislature's intention to financially burden the client.

Following the triggering of section 198A(3)(b) of the 2014 LRAA, a question arises as to which employment contract exists between the client and the provided employee. Benjamin[34] is in favour of the sole employment interpretation that the contract that existed prior to the triggering of section 198A(3)(b) of the 2014 LRAA continues to exist between the client and the provided employee, but is then amended, where necessary, to put the provided employee on the same footing with the existing employees of the client.[35] The present researcher concurs with the sole employment interpretation. However, she

[30] A Botes 'Answer to the questions? A Critical Analysis to the Amendments to the Labour Relations Act 66 of 1995 With Regard to Labour Brokers' (2014) 26 (110) *South African Mercantile Law Journal* 110.
[31] Botes (n 30 above) 111.
[32] Botes (n 30 above) 111.
[33] J Grogan 'Bashing the Brokers: Does Assign spell the end of labour broking?' (2018) 32.5 (1) *Employment Law Journal* 44.
[34] P Benjamin 'Restructuring Triangular Employment: The interpretation of Section 198A of the Labour Relations Act' (2016) 37 (28) *Industrial Law Journal* 30.
[35] Benjamin (n 34 above) 31.

disagrees with Benjamin's submission that sole employment interpretation does not give rise to a new employment contract. The present researcher is of the view that the sole employment interpretation gives rise to a new employment contract with different terms and conditions than those which existed prior to the triggering of section 198A(3)(b) of the 2014 LRAA. The present research shows that failure to create a new employment contract creates room for exploitation of the provided employee by the client. Thus, it defeats the purpose of the legislature of protecting the provided employees.

Although the present research supports the sole employment interpretation, the present researcher notes that scholars in support of the dual employment interpretation provide compelling arguments as to why dual employment relationship should be preferred over sole employment interpretation. The researcher now discusses the submission of scholars in support of the dual employment interpretation of section 198A(3)(b) of the 2014 LRAA.

Venter[36] pointed out that when interpreting legislation, one must commence with the ascertainment of the legislature's intention, by considering the ordinary meaning of the words the legislature used in drafting a particular section.[37] The legislature in section 198A(3)(b) of the 2014 LRAA uses the word "deemed". Venter pointed out that the word deemed can be understood to mean to consider or to regard. Therefore, section 198A(3)(b) of the 2014 LRAA should be understood in this manner. The legislature's intention of providing additional protection to provided employees is given effect because having the client as an employer alongside the labour broker adds the intended additional protection.[38] Venter further states that the sole employment interpretation does not afford the provided employee with addition protection because it removes the labour broker from the equation.[39]

The researcher disagrees with Venter's submission and argues that the dual employment interpretation does not create additional protection for the provided employee as the legislature has already made provision for additional protection, by inserting section

[36] 'Who is the Employer' *Without Prejudice* 26 November 2015 26.
[37] *Without Prejudice* (n 34 above) 26.
[38] *Without Prejudice* (n 34 above) 26.
[39] *Without Prejudice* (n 34 above) 26.

198(4A)(a) of the 2014 LRAA, which allows the employee to hold both the labour broker and the client accountable for dismissals and unfair labour practices, should the commercial contract between the labour broker and the client continue post the three-month period. Tshoose and Tsweledi,[40] in support of the dual employment interpretation, connote that section 198A of the 2014 LRAA does not limit the application of section 198(2) of the 1995 LRA, which identifies the labour broker as the employer of a provided employee.[41] They further state that section 198A(3)(b) of the 2014 LRAA and section 198(2) of the 2014 LRAA can exist simultaneously when the dual employer interpretation is preferred.[42] Simply put, their submission suggests that the sole employment interpretation hinders section 198(2) of the 1995 LRA because it removes the labour broker from the equation. The researcher disagrees with the above submission and argues that the legislature's intention was to provide the client and the labour broker with the option of whether to continue or not with the commercial contract that existed prior to the triggering of the three-month period. The researcher further shows that the option of whether to continue or not with the commercial contract further protects the labour broker from the application of section 198(4A) of the 2014 LRAA, which enables the employee to sue both the labour broker and the client for any unlawful conduct done by the client post the three-month period.

It rarely happens that directly opposing rival interpretations of the same statutory provision provide conclusions so reasonable that neutral observers ponder, yet fail to take a side. The legislature enacted vague and ambiguous provisions of section 198A of the 2014 LRAA and left it to the courts to break the existence of the intellectual stalemate created by section 198A(3)(b) of the 2014 LRAA. It has already been mentioned that the CC eventually upheld the sole employment interpretation.

However, the interpretation afforded to section 198A(3)(b) of the 2014 LRAA by the CC has provided a measure of much-needed certainty. However, many questions remain regarding the implications of the judgement. These include the following: regarding

[40] C Tshoose B Tsweledi 'A Critical anlysis of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South Africa' 2014 (18) 334 *Law, Democracy & Development- Sabinet African Journals* 335.
[41] Tshoose and Tsweledi (n 40 above) 335.
[42] Tshoose and Tsweledi (n 40 above) 335.

section198A (5) of the 2014 LRAA, what happens in instances where the client does not have existing employees performing similar work? Does it mean that the placed worker will continue to be governed by the terms and conditions of employment prior to the activation of the deeming provision, or should a new contract of employment be negotiated between the placed workers and the client. Furthermore, what is the nature of the contract that exists between the placed worker and the labour broker post the triggering of the deeming provision? And if the client is the employer of the placed worker post deeming for the purposes of the LRA, then who becomes the employer of the placed worker for the purposes of other employment laws, such as the EEA?

Thus, this study sought to determine whether the amendments to the 1995 LRA, particularly section 198A of the 2014 LRAA, provides adequate protection to the vulnerable employees employed by TES. In order to answer this question, the researcher examined whether the "sole employment" interpretation of section 198A(3)(b) of the 2014 LRAA, upheld by the CC in the *Assign Services* case, assisted in enhancing the legal protection of vulnerable employees employed in a TES, as well as the implications of the CC's failure to provide clarity on the ambiguity and uncertainty caused by other legislative provisions enacted to provide greater protection for vulnerable employees in TES, such as section 198A (5) of the 2014 LRAA.

1.7. Research Methodology

The study used primary and secondary sources of literature to answer the research question. The primary sources that the study consulted include the ILO's Conventions and Recommendations with regards to the regulation of temporary employment services, literature available from the World Bank and the World Economic Forum regarding labour market flexibility. Furthermore, secondary sources that were appraised, including the legislation, articles from peer-reviewed journals, newspaper articles, academic books and South African student papers on the subject matter.

1.8. Definitions of Key concepts

1.8.1. Labour law

It refers to rules that regulate the formation and protection of workers and employer's organisations, thereby facilitating collective bargaining between employers and employees.[43]

1.8.2. Standard workers

It refers to "any person, excluding an independent contractor, who works for another person or for the state and who receives or is entitled to receive remuneration and any other person who in any manner assists in carrying on or conducting the business of an employer."[44]

1.8.3. Non-standard workers

It is "an umbrella term for different employment arrangements that deviate from standard employment, which includes temporary employment, part-time and on-call work, temporary agency work and other multiparty employment relationships as well as disguised employment and dependent self-employment."[45]

1.8.4. Globalization

It is the "process basically characterized by liberalization of trade, expansion of foreign direct investment, integration of production processes, and emergence of massive cross-border financial flows."[46]

1.8.5. Externalisation

[43] Benjamin (n 34 above) 14.
[44] Labour Relations Act 66 of 1995 sec 213.
[45] A Ramparsad 'A critical analysis of the Impact of s198 A-D of the Amended Labour Relations Act 66 of 1995 on Non-standard employees in South African Labour Law' unpublished MA dissertation, University of Johannesburg, 2018.
[46] World Commission on the Social Dimensions of Globalization 'A Fair Globalization: Creating Opportunities for all' (2003) 24 http://www.presidentti.fi/netcomm/ImgLib/9/101/WCSDG%20report%20final.pdf (accessed on the 11th of April 2020).

It refers to "the engagement of workers in terms of a commercial contract, which excludes labour law from the relationship."[47]

1.8.6. Casualization

It refers to "the engagement of workers on a fixed-term, casual or part-time basis."[48]

1.8.7. Employment Relationship

It refers to "the legal link between the employee or worker on the one hand and the employer, to whom the worker provides services in return for remuneration under certain conditions."[49]

1.8.8. Labour Market Flexibility

It refers to "the extent to which an enterprise can alter various aspects of its work and workforce to meet the demands of the business."[50]

1.8.9. Temporary Employment Services

These refer to "any persons who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client and who are remunerated by the temporary employment services."[51]

1.9. Ethical Considerations

The researcher familiarised herself with the Plagiarism Policy set out at the University of Venda and was diligent in ensuring that information derived from primary and secondary sources were acknowledged and referenced. Furthermore, as contemplated in the University of Venda Plagiarism Policy, the researcher did not **"**fabricate information nor conceal the truth or impart misleading information about the true contemporary position of the law" regarding the protection afforded to vulnerable employees in TES. The study was based on the appraisal of primary and secondary sources of information concerning the subject matter and therefore did not conduct any human interviews. Emphatically, this

[47] P H Bamu 'Contracting work out of self-employed workers: Does South African law adequately recognise and regulate this practice', unpublished PHD thesis, University of Cape Town, 2011.
[48] Bamu (n 47 above) 5.
[49] Bamu (n 47 above) 59.
[50] MKJ Mathekga 'The political economy of labour market flexibility' unpublished MA dissertation, Stellenbosch University, 2012.
[51] Labour Relations Act 66 of 1995 sec 198(1).

study was carried out with the utmost attention to the integrity and the researcher maintained objectivity throughout the appraisal.

1.10. Proposed Structure

1.10.1. Chapter 1

The chapter introduces the study and deals with the subject matter of the dissertation, brief background, research problem, aims and objectives, research question, hypothesis, preliminary literature survey, proposed methodology, definition of key concepts, ethical considerations, proposed structure, research schedule, and limitations of study.

1.10.2. Chapter 2

The chapter discusses how the employer's quest for greater market flexibility in a globalised world has pressured the South African government to shift to the right and to adopt a neoliberal macroeconomic policy. These have led to the development and establishment of TES in South Africa. Finally, it covers the adoption of legislation aimed at curbing the exploitation of workers.

1.10.3. Chapter 3

The chapter examines the South African legislative framework changes for the purposes of understanding whether the South African labour law recognises TES and adequately provides legal protection to vulnerable employees employed by TES.

1.10.4. Chapter 4

The chapter examines whether the "sole employment" interpretation of section 198A(3)(b) of the 2014 LRAA upheld by the CC in the *Assign Services* case assisted in enhancing the legal protection of vulnerable employees employed in a TES. It also discusses the implications of the CC's failure to provide clarity to the ambiguity and uncertainty, caused by other legislative provisions enacted to provide greater protection for vulnerable employees in temporary employment services, such as section 198A (5) of the 2014 LRAA.

1.10.5. Chapter 5

The chapter makes conclusions as well as recommendations, and suggests possible reforms.

1.11. Limitations of Study

The major limitation of this study is the lack of prior research studies on the subject matter. As indicated in the literature review, most literature assessed section 198A(3)(b)(i) of the 2014 LRAA and whether it gives rise to sole employment interpretation or dual employment interpretation. Prior literature failed to assess the regulation provided by section 198A of the entire 2014 LRAA regarding whether it provides adequate protection to vulnerable employees in TES. Other legislative provisions were perused only to the extent that they assisted in providing clarity to the ambiguity contained in section 198A(3)(B)(i) of the 2014 LRAA and not stand-alone provisions that enhance the protection of vulnerable employees in TES.

1.12. Conclusion

This chapter identified the type of non-standard work that would be the study focus and provided the scope of this dissertation. Furthermore, it identified the type of non-standard work of TES. It further sought to determine whether the amendments to the 1995 LRA, particularly section 198A of the 2014 LRAA, provides adequate protection to the vulnerable employees employed in TES. This study was based on the hypothesis that the existing statutory regulation of TES does to a limited extent provide adequate protection to vulnerable employees employed by the TES.

CHAPTER 2

THE EMPLOYER'S QUEST FOR LABOUR MARKET FLEXIBILITY: THE PATHWAY TO NON-STANDARD FORMS OF WORK

2. INTRODUCTION

The previous chapter provided the scope of this study and further identified the form of non-standard work this study sought to analyse. In addition, it described non-standard work, such as TES, which is commonly known as labour broking. Most importantly, it explained that this study did not seek to discuss the practice as a whole, but rather to determine whether amendments to the 1995 LRA, particularly section 198A of the 2014 LRAA, provides adequate protection to the vulnerable employees employed in TES. Simply put, this study sought to critically analyse the legal protection that the 1995 LRA provides to vulnerable employees employed in TES.

The aim of this chapter is to provide the necessary background of subsequent chapters, by advancing reasons why non-standard forms of work continue to fall outside the scope and protective ambit of labour laws. The prominent point that is raised by this chapter is that non-standard forms of work, including TESs, enable employers to employ workers outside the scope and protective ambit of labour laws, in an attempt to provide labour market flexibility to employers in a globalised work. As a result of the aforementioned practice, workers in such non-standard work are vulnerable and prone to exploitation by their employers.

The first part of this chapter considers the advantages and disadvantages of using non-standard forms of work, particularly those that relate to TESs. The advantages help the reader to understand why employers prefer using non-standard forms of work, as opposed to standard employment. The disadvantages expose the challenges that workers employed in non-standard work encounter. The chapter also discusses labour market flexibility as an underlying factor responsible for the proliferation of non-standard forms of work in a globalised world. As this study is law-based, only related aspects of labour market flexibility are discussed. The discussion in this chapter provides a broader understanding of part two which focuses on how South Africa as the jurisdiction of interest

in this study, incorporated labour market flexibility into its social policy to balance the need for flexibility and security.

The second part of this chapter outlines the methods used to classify non-standard forms of work into different categories; namely, externalisation through commodification of the employment relationship, externalisation though the use of intermediaries and casualisation. However, the method that is used to classify TESs as a form of non-standard work is discussed in detail. The discussion of this method provides a better conceptual framework within which to understand TES and how it differs from other forms of non-standard work. The chapter also discusses in detail the challenges that workers employed in TES face. The rationale behind this discussion was to recapitulate the salient points raised in this chapter, that employers are now using non-standard forms of work because of their pursuit for greater market flexibility in a globalised world and further to benefit from cheap labour without having to assume the responsibility of being an employer.

2.1. Standard and Non-standard employment

Over the years, academics and legal practitioners have engaged in the discussion of the changing nature of employment and work relationships in a globalised world. This is so because academics and legal practitioners around the world are noticing the growth and increasing prominence of forms of employment that differ from standard employment. These forms of employment, commonly known as non-standard work, are not necessarily new, but have historically preceded and existed alongside standard-employment. However, much attention was given to standard employment, while non-standard forms of work laid dormant. It is therefore, important to firstly briefly discuss standard employment before discussing non-standard employment, as well as their advantages and disadvantages. The discussion of standard employment assists the reader to understand why standard employment was preferred over non-standard employment. Furthermore, this discussion helps the reader to understand why non-standard forms of work continue to fall outside the protective ambit of labour laws and the challenges that workers in non-standard work face because of the little or no labour law protection they receive.

2.1.1. The meaning of standard employment

It has been noted that standard employment has historically preceded and existed alongside non-standard forms of work. However, during the post-World War II period[52], standard employment gained more recognition than non-standard employment. This is because during the post-World War period, businesses such as Ford, engaged in a system of mass production and mass consumption of goods and services. This demanded that they employ many employees to survive. However, this also required highly skilled employees who would be employed in a chain of command structures, typically from senior management and executives to general employees. Such employees would be employed on a full-time basis and for an indefinite period. This set-up favoured standard employment, as opposed to non-standard employment.

Consequently, standard employment became accepted as the norm for employment relations and a focal point for labour laws. Industrialised countries around the world, such as South Africa, began to use standard employment as a channel for labour and social policy delivery. Furthermore, the post-World War II period was influenced by the international community's gradual pledge to labour standards and statutory protective measures, as well as the extension of labour rights and social security. This is commonly known as welfare state capitalism. The idea behind welfare state capitalism was to implement labour legislation that would confer some rights to employees and adopt institutions that would foster collective bargaining, such as trade unions, to balance the power and control between employers and employees.

The above-mentioned idea behind welfare state capitalism was supported by labour law proponents such as Sir Otto Kahn-Freund. He observed that the relationship between an employer and an employee is characterized by an imbalance of power.[53] The employer is regarded as the bearer of power while the employee is subject to the employer and is void of power. This situation posed a risk to employees and created a room for malpractice in the workplace. Thus, to successfully circumvent the difference in power

[52] The post-World War II period is the period between 1945 to 1960 which is regarded as the era of intense, anxiety and dynamic which affected society in all levels. Available at https://www.digitalhistory.uh.edu/era.cfm?eraid=16&smtid=1 Accessed on the 12th January 2022.
[53] O Kahn-Freund *Labour and the Law* (1983) 6.

between an employer and employee in standard employment, labour laws were promulgated. Labour laws confer rights and entitlements to employees while imposing obligations and placing restrictions on the employer in standard employment.

The Labour Appeal Court in the case of *National Entitled Worker's Union v Commissioner for Conciliation and Arbitration*[54], held that employers possess more bargaining power than the employees they employ, and that such employees are "generally extremely vulnerable to an exercise of such power. Employers enjoy greater social and economic power. Therefore, the labour legislation was necessary to provide greater protection to vulnerable employees and to regulate the power imbalance".[55] This is the reason why labour laws traditionally apply and for the most part, continue to apply to standard employment, as opposed to other commercial relationships established by ordinary contracts.

Standard employment can be understood to mean an employment relationship which consists of two persons, an employer and employee, who conclude a contract of employment for an indefinite duration. In this contract of employment, the employee undertakes to perform work for the employer at the employer's workplace on a full-time basis and for an indefinite duration. On the other hand, the employer undertakes to provide the employee with remuneration for the work that he or she performs for the employer. This sentiment is anchored in case law, most notably in the LAC decision of *Liberty Life Association of Africa v Niselow,*[56] where it was held that "once the employment contract is concluded, the employer has a duty to pay the employee remuneration which is subject to agreement by the parties".[57] Notably, the contract of employment concluded by the employer and employee does not necessarily have to be in writing for it to be valid but can be concluded orally or also be inferred from the conduct of the parties.[58]

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[54] *National Entitled Worker's Union v Commissioner for Conciliation Mediation and Arbitration and Others* 2007 1 SA (LAC).
[55] *National Entitled Worker's Union v Commissioner for Conciliation Mediation and Arbitration and Others* 2007 1 SA (LAC) at para 3.
[56] *Liberty Life Association of Africa v Niselow* 1996 17 ILJ 673 (LAC).
[57] *Liberty Life Association of Africa v Niselow* 1996 17 ILJ 673 (LAC) at para 29.
[58] *Mackay v Comtec Holding (Pty) Ltd* 1996 BLLR 863 (IC).

It is generally accepted that this contract of employment concluded is bilateral. This means that the employee only has one employer, as opposed to non-standard employment, where a worker can have more than one employer. The contract of employment concluded by the employer and the employee creates the following catalogue traits: "(a) job security; (b) expectations of rising living standards through high wages; (c) workplace participation of employees; (d) the presence of strong trade unions; (e) freedom to bargain collectively; and (f) welfare benefits".[59] The afore-mentioned catalogue traits are associated with standard employment and are governed and protected by labour legislations.

In South Africa, labour relations are governed by section 23 of the Constitution, labour legislations, such as the 1995 LRA, common law and customary law. The 1995 LRA was promulgated to give effect to section 23 of the Constitution. Section 23 of the Constitution confers the right to fair labour practices to everyone. In the case of *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (hereinafter referred as *Kylie case)*[60], the court held that "constitutional rights, including the right to fair labour practices, should be enjoyed by everyone, even if no formal contract of employment is concluded and even if the work is illegal".[61] The Labour Court's decision (hereinafter referred as LC) in the *Kylie* case is in line with the court's reasoning in *Khosa v Minister of Social Development*[62]. The LC held that "the meaning of the word everyone means what it conveys, it does not have a general import and a restricted meaning. This means that, once the government put in place a social welfare system, everyone has a right to have access to that system".[63] Similarly, in the case of *Discovery Health Limited v CCMA & others,*[64] the court held that section 23 of the Constitution provides protection against unfair labour practices, which is not based on any type of contract of employment. Other contracts of employment, relationships and an arrangement in which a person does work

[59] J Theron *et al* (2011) 'Keywords for a 21st Century Workplace' *Institute of development and labour law* 68.
[60] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 4 SA 383 (LAC).
[61] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 4 SA 383 (LAC) at para 8.
[62] *Khosa v Minister of Social Development* 2008 7 BLLR 633 (LC).
[63] *Khosa v Minister of Social Development* 2008 7 BLLR 633 (LC) at para 45.
[64] *Discovery Health Limited v CCMA & Others* 2007 BLLR 633 (LC).

or renders personal services to another are all covered by the protection conferred by section 23 of the Constitution.

In theory, every worker, whether in standard or non-standard employment, seems to enjoy the right to fair labour practices. However, to benefit from the rights and entitlements contained in labour legislations, a worker must qualify as an employee[65]. Secondly, only an employee can join a trade union for collective bargaining. Therefore, it is not only rights and entitlements that are limited to employees but also the mechanisms which enable employees to collectively bargain for improved working conditions. Notably, there is a certain category of workers under non-standard forms of work which qualifies as employees; namely, fixed-term employees and employees employed by TES. Nonetheless, these employees are often treated less favourably than employees employed in standard employment. This has become a problem in a globalised world, where the workplace is characterised by a large number of employees in non-standard forms of work.

2.1.2. Non-standard forms of work and their advantages and disadvantages, particularly those relevant to TES.

Over the years, the composition of the workplace has changed to incorporate more non-standard workers, as opposed to standard employees. This change in the composition of the workforce is attributed to the employer's quest for greater market flexibility in a globalised world.[66] This change has resulted in the fragmentation of contemporary labour markets and the proliferation of employment patterns termed 'non-standard forms of work'.[67] Du Toit *el al* understand and describe this change in the workplace as follows:

> The traditional notion of employment, has been increasingly questioned in recent decades as a conceptual basis for the legal regulation of work. workplaces and working relationships

[65] Section 213 of the Labour Relations Act 66 of 1995 defines an 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) another person who in any manner assists in carrying on or conducting the business of an employer". This definition distinguishes an employee from an independent contractor or any other worker to ascertain whether protection granted by labour statutes should extend to them or not.
[66] S W Mills 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility' 200 25 (1) *Industrial Law Journal* 1203.
[67] Mills (n 66 above) 1203.

> have been transformed as employers seek greater flexibility, *inter alia* by reducing core activities and employment commitments to a minimum. Indefinite, full-time and regular employment has increasingly given way to new varieties of work

Kohler, in a historical review of labour relations, remarks that the employment relationship is becoming characterised "by fluidity, and is much less a relationship than formerly".[68] Simply put, work is not what it used to be and is increasingly becoming unstable.

Nowadays, businesses have a small core group of employees employed on a full-time basis and a large number of workers in non-standard working arrangements, such as fixed-term workers, part-time workers and temporary employees.[69] The reasons why businesses elect to use non-standard forms of work are manifold. However, in this study, two advantages that apply to TES are discussed. Firstly, non-standard workers provide employers with a cost advantage. Studies suggest that non-standard working arrangements have a lower cost advantage, compared to standard employment.[70] For example, employees in TES are less costly in countries like Japan and the US because they are denied the benefits that are given to employees in permanent employment.[71] Furthermore, the labour broker in TES performs the human resources-related functions with regards to the placed employees. Therefore, the labour broker's client saves costs which he/she would have incurred by performing the functions. Using TES also lowers the costs of hiring because the labour broker's client gets the opportunity to benefit from the services rendered by the placed employees for the first three months, without assuming the obligations of an employer. Only after three months have elapsed can the placed employees become the employees of the labour broker's client.

Secondly, non-standard forms of work are regarded as 'flexible' because the employees employed in such forms of work can easily be transitioned from one job function to another at a lower cost and at any given time.[72] Businesses utilise non-standard working

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[68] T Kohler 'Labour Law and Labour Relations: Comparative and Historical Perspective' 1996 25 (1) *International Journal of Comparative Labour Law and Industrial Relations* 231.
[69] Mills (n 66 above) 1203.
[70] International Labour Office 'Non-standard work and workers: Organizational implications' http://ilo.org>wcms_414581 (accessed on the 13th of August 2021).
[71] International Labour Office (n 70 above) 6.
[72] International Labour Office (n 70 above) 6.

arrangements to achieve what is known as “numerical and/or functional flexibility”.[73] Businesses hire these workers at short notice to help the business to cope with seasonal demand. The business advantage of hiring temporary workers is that numerical flexibility enables businesses to increase or decrease their staff without having to deal with dismissals and unfair labour practice claims associated with standard employment.[74] Temporary employees and fixed-term contract employees are often utilised by businesses to attain the afore-mentioned.

However, the disadvantage of employees in non-standard forms of work is that they do not enjoy the same level of protection as workers engaged in standard employment.[75] Furthermore, they are often not entitled to the same conditions of employment, such as wages, benefits, annual leave, medical aid, paid maternity leave and pensions.[76] Furthermore, their employment is less secure; hours of work are not enough and longer or unpredictable and atypical working times are often the norm.[77] The above-mentioned disadvantages make workers in such work arrangements vulnerable to exploitation.

Labour protection covers employees in standard employment at the expense of employees in non-standard forms of work.[78] Employees in non-standard employment are vulnerable because of the nature of their employment relationship or the reason for not having the employment relationship at all.[79] For example, in TES, workers are often confused about the identity of their employer because both the labour broker and its client possess the qualities of an employer in terms of common law and labour statutes. In both common law and labour statutes, the employer remunerates, supervises and exercises control over the employee. This functions are shared between the labour broker and its client in TES. The labour broker remunerates the employee for the services rendered to the client, whilst the client manages and controls the employee who is placed at its

[73] International Labour Office (n 70 above) 6.
[74] International Labour Office (n 70 above) 6.
[75] Mills (n 66 above) 1205.
[76] Mills (n 66 above) 1205.
[77] Mills (n 66 above) 1205.
[78] Mills (n 66 above) 1205.
[79] Mills (n 66 above) 1205.

workplace. Thus, the employee in TES is often confused about the actual identity of his or her employer.

In South Africa, the current labour market policy recognises the need to bring workers in non-standard employment under the net of the protection of labour laws.[80] However, this policy is implemented with the consideration of providing employers with flexibility, in order to enhance competitiveness in the global market economy.[81] This is known as regulated flexibility, and it aims to balance the need for employers to have flexibility in the labour market and further providing for the protection of employees. Instead of the afore-mentioned labour market policy yielding positive results, it has resulted in an incomprehensible approach of dealing with the never-ending difficulty of regulating non-standard work arrangements. This has been evidenced by the legislative changes that have occurred throughout the years, in an attempt to regulate non-standard forms of work.[82] Amendments made to key statutes, such as the 1995 LRA and the BCEA, provide reasonable proof of a more reactive approach, instead of a proactive approach in dealing with the many problems associated with non-standard employment arrangements.[83] The manner in which South Africa has incorporated labour market flexibility into its labour legislation is further be discussed under the subheading 'South Africa and regulated flexibility'.

The following is a discussion of labour market flexibility. This discussion helps the reader to fully understand why South Africa has opted for a labour market policy that seeks to balance the need for employer flexibility in the labour market and provide for the protection of employees and how this affects non-standard workers. The discussion is evidence that it is through labour market flexibility that employers resort to using non-standard workers.

2.2. Labour market flexibility

It goes without a saying that globalisation is a major force impacting the world of work, mainly by increasing competition in the global market amongst businesses. Businesses

[80] Mills (n 66 above) 1206.
[81] Mills (n 66 above) 1206.
[82] Mills (n 66 above) 1206.
[83] Mills (n 66 above) 1206.

have unceasingly, without fail, resorted to means that allow them to attain labour market flexibility, to remain competitive in the global market. At the national level, there is also a move by states to deregulate their labour market, to attract as much foreign direct investment as possible and avoid relocation of business away from their territory.[84] Businesses have argued that increased regulation perpetuate and increase rigidity in the labour market which impedes them from effectively competing in the global market and further discourages foreign investment. Furthermore, businesses have argued for more flexibility, which allows for a self-regulating market with less intervention from the government and less constraints that come with labour legislations. This is where businesses start using more and more flexible employment forms, such as TES, at a lower cost. By using non-standard forms of work, businesses are able to escape the stringent obligations associated with being an employer in standard employment because workers in non-standard forms of work either receive little or operate outside the regulatory framework of labour legislations.

Therefore, it can be argued that the main reason why businesses have resorted to using non-standard forms of work is to attain labour market flexibility. Labour market flexibility refers "to the extent to which a business can alter various aspects of its workforce to meet the demands of the business, for example the size of the workforce, the content of jobs, and working time."[85] Labour market flexibility is also associated with reducing regulation and protection of workers.[86] There are three main forms of labour market flexibility:

2.2.1. Numerical flexibility

It provides an employer with the ability to terminate the employee's employment either permanently or temporarily for other reasons other than the employee's performance.[87] In this way, the employer hires and lays off workers according to the business's seasonal demands. During seasons where the business demands more workers, the employer will utilise seasonal or temporary workers and when the seasonal demand decreases, the

[84] P H Bamu 'Contracting work out of self-employed workers: Does South African law adequately recognise and regulate this practice', unpublished PHD thesis, University of Cape Town, 2011.
[85] Mathekga (n 50 above) 25
[86] Mathekga (n 50 above) 25.
[87] Mathekga (n 50 above) 25.

seasonal and temporary workers will be laid off. [88] This allows employers to escape the retrenchment procedures and unfair dismissal claims associated with permanent employment.

2.2.2. Wage flexibility

Wage flexibility allows the employers to deviate from paying its workers the national prescribed minimum wage.[89] Workers are paid for the work done and not according to the number of hours worked, as is the case in standard employment. This enables the employer to abuse workers in non-standard forms of work because their wages are often smaller, compared to the work they performed.[90]

2.2.3. Work process flexibility

It allows the employer to alter the worker's employment functions.[91] This alteration can happen at any given time of the worker's employment and at a low cost. The retail industry usually uses this form of flexibility to hire non-standard workers to perform multiple job functions. For example, teller counters in a shop can also perform other functions such as packing stock and cleaning the shop.[92] For example, tellers can be required to perform all the job functions at no additional cost.

The above discussion provided a definition and the three types of labour market flexibility. This discussion lays a foundation on how South Africa as the jurisdiction of interest has incorporated this phenomenon into its social policy, to balance the need for flexibility and security in a globalised world. The significance of the discussion of labour market flexibility is that this phenomenon has led to the advent and drastic increase of non-standard forms of work, including TES. The following is a detailed discussion of how South Africa has incorporated labour market flexibility in its labour laws and policies.

[88] Mathekga (n 50 above) 25.
[89] Mathekga (n 50 above) 25.
[90] Bamu (n 84 above) 95.
[91] Mathekga (n 50 above) 25.
[92] Mathekga (n 50 above) 25.

2.3. South Africa and Regulated flexibility

South Africa's re-entry into the global labour market meant that it would not be exempted from the resultant consequences of globalisation. The post-apartheid government was tasked with the responsibility of eradicating gender and race inequalities in the labour market that existed because of the effects of the apartheid government, and to promote economic growth *inter alia* through attracting foreign investment, in the order for South Africa to compete in the global labour market.[93] The International Labour Organisation invited to South Africa's Minister of Labour shortly after the first democratic elections in 1994, to review the South African labour market and further make recommendations as to which a labour market policy would be suitable.[94] The ILO's Country Review recommended that South Africa adopt an approach which will allow for trade liberalisation and further, devise strategies that will protect workers.[95]

The ILO Country Review pinpointed different forms of security, as well as flexibility, applicable to employers and employees.[96] Regulated flexibility originates from the ILO Country Review. Notably, the ILO Country Review was not binding on South Africa, although it influenced the Minister of Labour and the Labour Market Commission' approach of labour market reform.[97] In 1996, the Minister of Labour, together with the Labour Market Commission, opted for Regulated Flexibility as a labour market policy to influence labour laws.[98]

The ILO Country Review provides useful insight in understanding the meaning of regulated flexibility. The review defines regulated flexibility as a mechanism used "to balance the protection of minimum standards against the background of labour market flexibility."[99] The protection of minimum standards and labour market flexibility consists of interests that strive against one another. The ILO Country Review provides three types

[93] Mills (n 66 above) 1208.
[94] Mills (n 66 above) 1208.
[94] C J Aletter 'Protecting of agency workers in South Africa: An appraisal of compliance with ILO and UN norms' unpublished PHD thesis, University of Pretoria, 2016 121.
[95] Aletter (n 94 above) 121.
[96] Aletter (n 94 above) 122.
[97] Aletter (n 94 above) 122.
[98] Aletter (n 94 above) 122.
[99] Aletter (n 94 above) 122.

of flexibility; namely, employment flexibility, wage flexibility and work process flexibility. These three types of flexibility have already been defined and discussed under part one of this chapter. These types of flexibility are advantageous to employers because they enable employers to alter work functions, dismiss employees without going through the prescribed channels of fair dismissals and enable employers to change wages without having to comply with the prescribed minimum wages. Thus, it can be argued that flexibility enables the employer to employ workers outside the ambit and protection of labour laws by deviating from employment that is full-time and indefinite, and alternatively, employing workers in non-standard forms of work.

This is the reason why the majority of employers prefer using non-standard forms of work; it is because non-standard forms of work reduce the costs incurred by the employer with regards to employee's social benefits, such as medical aid and pension fund. However, workers in non-standard forms of work are often faced with the dilemma that some of them are not covered by labour laws. The few that are covered by labour legislation are in working arrangements that are so casual and temporary that it is difficult for them to be recruited for collective bargaining by trade unions. Mills states that labour market flexibility must not be achieved at the expense of the protection afforded to employees by labour laws.[100] Therefore, given the fact that employers utilise non-standard workers to avoid the stringent labour laws and to attain flexibility in the labour market, Mills argues convincingly, that labour laws must identify new types of non-standard employment and further take reasonable steps to provide workers in such forms of work with labour law protection.[101]

The ILO Country Review also identified seven forms of security underpinning labour legislation, namely;

> The first form provides for labour security and also a widespread opportunity for effective labour market participation which basically means that there must be a low, or falling level of unemployment.[102]The second form concerns employment security and protection against

[100] Aletter (n 94 above) 122.
[101] Aletter (n 94 above) 122.
[102] G Standing *et al*, *'Restructuring the labour market: The South African challenge; An ILO Country Review'* (1996) 6-7.

> arbitrary loss of employment.[103]The third form foresees protection against arbitrary transfers between sets of work tasks and the loss of job-based rights. Meaning, workers should have a sense of occupation.[104]The forth form provides for security of health and safety standards in employment.[105]The fifth applies to access to the acquisition of skills and re-training.[106]The sixth form covers protection against reduction of income which contributes to a sense of economic equity.[107]The seventh form of security relates to representation security which is a secure capacity to bargain and to influence the character of employment.[108]

It can be argued that the three types of flexibility and protection have failed to incorporate proficient information with regards to the regulation of non-standard forms of work, particularly vulnerable workers employed in TES. This is so because much of the protection identified by the ILO Country Review is aimed at providing protection to employees in standard employment.

2.3.1. Conceptual Framework underpinning South Africa's Regulated Flexibility

Van Eck argues that the South African form of regulated flexibility is underpinned by two assumptions; firstly, South Africa asserts that employees who earn less are more vulnerable that employees who earn higher wages. Therefore, higher earning employees have better chances of being employed because they possess more skills which they attained either by working experience or educationally.[109] Therefore, labour law protection centres primarily around lower-earning employees. This is evidenced by legislation's inclusion of section 198A of the 2014 LRAA to the 1995 LRA, which strictly lists the protection of lower-earning employees employed by TES.

Secondly, small businesses are not burdened with the same obligations that apply to bigger businesses. This is so because burdening small business with many obligations is costly, which hinders job creation.[110] For example, businesses with less than 50

[103] Standing (n 102 above) 6.
[104] Standing (n 102 above) 7.
[105] Standing (n 102 above) 7.
[106] Standing (n 102 above) 7.
[107] Standing (n 102 above) 7.
[108] Standing (n 102 above) 7.
[109] BPS Van Eck 'Regulated flexibility and the labour relations amendment bill of 2012' (2013) 46 (2) *De jure Law Journal* 604.
[110] Van Eck (n 109 above) 604.

employees are excluded from complying with affirmative action provisions envisaged by the EEA. Therefore, it can be argued that the aim of regulated flexibility is to protect lower-earning employees, by providing them with rights and leaving room for employers to operate without stringent laws. The following is a discussion of some of the basic minimum rights that apply to employees in standard employment that have been promulgated as a result of the assumptions that underpin regulated flexibility.

2.3.1.1. Basic Minimum Rights and Non-standard forms of work

A floor of basic minimum protections has been used in South Africa to achieve regulated flexibility, this includes; organisational rights of workers, the right against unfair dismissal, standardizing conditions of employment, establishing mechanisms for enforcement, institutions for standard setting and conflict resolution, and negotiations at national level. In this regard, the BCEA has provided these minimums. The conditions refer to aspects of employment, such as annual leave[111], sick leave[112], family responsibility leave[113], maternity leave[114], working hours[115], night shift[116] and notice periods[117]. The BCEA has been described as the most "notable example of the implementation of the regulated flexibility policy".[118]

Cheadle suggests that labour law should focus on extending protection to those who previously did not benefit from it, such as workers in non-standard forms of work, rather than intensifying regulation to employees in standard employment.[119] Therefore, more attention should be given to employees in non-standard employment because employees in standard employment are already covered by labour laws. Thus, Cheadle called for amendments to the 1995 LRA and the BCEA, to extend protection to all forms of dependent labour, including vulnerable workers in non-standard forms of work.[120] On a

[111] The Basic Conditions of Employment Act sec 20.
[112] Basic Conditions of Employment Act sec 22.
[113] Basic Conditions of Employment Act sec 27.
[114] Basic Conditions of Employment Act sec 25.
[115] Basic Conditions of Employment Act sec 9.
[116] Basic Conditions of Employment Act sec 17.
[117] Basic Conditions of Employment Act sec 37.
[118] Aletter (n 90 above) 125.
[119] H Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 15 (2) *Industrial Law Journal* 664.
[120] Cheadle (n 119 above) 664.

positive note, the inclusion of section 198A of the 2014 LRAA to the 1995 LRA, improves this floor of minimum rights to vulnerable workers in TES. This is discussed in later sections in chapter 3.

The above discussion summed up how the South African government incorporated the ILO Country Review report, which eventually led to South Africa opting for regulated flexibility. However, it is evident from this discussion that lack of the regulated flexibility conceptual framework has provided the legislature with difficulties in implementing regulated flexibility. This is because -instead of providing protection to vulnerable workers in non-standard forms of work- a stricter floor of minimum rights and conditions of employment were provided to those employees who already had protection; that is, employees in standard employment. That left non-standard forms of work highly unregulated, placing these workers in a vulnerable position.

The following is a discussion of the method that is used to classify TES as a form of non-standard work. Furthermore, the researcher discusses in detail the challenges faced by vulnerable workers employed in a temporary employment service.

2.4. TES as a form of non-standard work

There are different forms of non-standard work. Therefore, methods have been adopted to classify the different forms of non-standard work. These methods include what is known as externalisation through commodification of the employment relationship (independent contractors), or externalisation, through intermediaries (labour broking) and casualization of work.[121] For the purposes of this study, only externalisation through the use of intermediaries are discussed. This is because it is the method used to classify TES as a form of non-standard work.

2.4.1. Externalisation though the use of intermediaries

Externalisation through the use of intermediaries is used to classify non-standard forms of work which involve three or more parties to an employment relationship, thus deviating from the assumption that employment is a bilateral relationship involving two parties.[122]

[121] Bamu (n 84 above) 103.
[122] Bamu (n 84 above) 106.

The tripartite relationship consists of a commercial relationship "in terms of which an employer (styled as the client or user) benefits from the labour of workers who are employed by a third party".[123] It takes on a diverse range of forms, including outsourcing, subcontracting, labour-only contracting, labour broking and franchising arrangements.[124]

The evident characteristic of this arrangement is that the third party assumes the obligations of the employer of the workers producing the goods and providing the services.[125] On the other hand, the actual employer is styled as the client or user, and controls and supervises the work done by the workers(employees). Furthermore, the actual employer determines the terms and conditions of the workers' employment. Although the actual employer controls and manages the work done by the workers, he/she does not have a contractual relationship with the workers. Therefore, the absence of a contractual relationship between the actual employer and the workers discharges the actual employer of the responsibilities associated with a contractual relationship. The commercial contract between the actual employer and the workers places "a legal distance between the user of the enterprise and the risks associated with the employment relationship"[126].

For the purposes of this study, the form of externalisation by intermediaries that is discussed is TES. The purpose of TES is to acquire skilled employees for the client of the labour broker, who then become part of the client's workforce for a specific period and for a determined fee.[127] Despite that the labour broker becomes the statutory employer of the placed employees, the client exercises a certain level of supervision and control over the employees. The labour broker has a contractual relationship with the workers it assigns to its clients and this relationship allows the labour broker to take responsibility of fulfilling the employment obligations associated with worker's placements.[128]

[123] H Sato 'Atypical employment: A Source of Flexible Work Opportunities' (2001) 4(2) *Social Science Japan Journal* 161.
[124] Mills (n 66 above) 1212-1218.
[125] Bamu (n 84 above) 107.
[126] J Theron 'Intermediary or Employer? Labour brokers and the triangular employment relationship' (2006) 26 *Industrial Law Journal* 618.
[127] Bamu (n 84 above) 108.
[128] Bamu (n 84 above) 108.

This part has described the method that is used to classify TES as a form of non-standard work. The following part considers the challenges faced by workers in a temporary TES.

2.5. Challenges faced by vulnerable workers in TES

The TES industry has received criticism in South Africa to such an extent that COSATU called for a ban of TESs.[129] COSATU contended that the challenges that workers in TESs face can be equated to slavery because the regulation that they are afforded is inadequate.[130] Notwithstanding COSATU's demands of banning TES, the government opted to regulate and offer additional protection to vulnerable employees employed by TES.[131] The present researcher argues that the government's plan to regulate TES and offer additional protection is undermined by the assumptions(these assumptions are mentioned and discussed below) that underpin the South African labour laws. The researcher submits that unless the assumptions that underpin the South African labour laws are revoked, the challenges that employees in TESs face will persist, despite the legislature's attempts to provide them with labour law protection. Therefore, to understand the challenges faced by workers in TESs, the researcher outlines the assumptions that underpin the structure of the South African labour laws.

The first of these assumptions is that "the workplace is where the workers actually work and their employer controls the workplace."[132] This assumption does not cater for employees in TES because employees in TES are employed and remunerated by the labour broker but are placed at the workplace of the labour broker's client. The labour broker's client further determines the terms and conditions of the employee's employment. This makes it difficult for the employees to dispute the terms and conditions determined by the client through collective bargaining because the client is not regarded as their employer. Instead, their employer is the labour broker.[133]

[129] S Harvey 'Labour brokers and workers' rights: Can they co-exist in South Africa' (2011) 128 (1) *South African Law Journal* 100.
[130] Harvey (n 129 above) 100.
[131] Masimbe (n 7 above).
[132] J Theron 'The shift to services and triangular employment' (2008) 58 (1) *Industrial Law Journal* 61.
[133] Theron (n 132 above) 61.

Secondly, this assumption asserts that labour laws revolve around the notion that there are two parties to an employment relationship; namely, an employer and his/her employee.[134] This assumption is contrary to what transpires in TES.[135] TES consist of three parties; namely, the labour broker, the client and the employee. Therefore, assuming that an employment relationship consists of an employer and employee, the employee indirectly prejudices employees in TES because labour laws are enacted only offer protection to employees in standard employment.

Thirdly, this assumption asserts that there is an unequal distribution of power in binary relationships. The employer in binary relationships is considered to have more bargaining powers than employees. Therefore, labour laws are aimed at putting the employer and the employees on an equal footing. Although this assertion is correct, it fails to cater for employees in non-standard forms of work who are in a less favourable position than employees in binary employment. For example, TES are characterised by vulnerable workers earning below the prescribed threshold, and are susceptible to abusive practices because of lack and/or insufficient regulation.[136] Collective bargaining has, in some cases proven to be a futile exercise for alleviating the problems in TES. This is because these workers are employed on a temporary basis, which leaves little opportunity for them to be recruited by trade unions.[137]

Therefore, the labour broker, together with its client, use the tripartite triangular relationship to escape liability and deal with the placed employees haphazardly. Furthermore, the legislature attempts to regulate TESs in the 1995 LRA. However, the regulation proved inadequate to curb the abusive practices, as it failed to provide for joint and several liabilities in instances where the placed worker was dismissed by the labour broker at the insistence of the client. In addition, the regulation did not permit the client to be cited as a party to unfair dismissal proceedings at the CCMA because it was not regarded as the employer of the placed employee.[138] Therefore, both the labour broker

[134] Theron (n 132 above) 61.
[135] Theron (n 132 above) 61.
[136] Theron (n 132 above) 61.
[137] Theron (n 132 above) 62.
[138] A Botes 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 (1) *South African Mercantile Law Journal* 110.

and the client would get away with dismissing employees without the legal repercussions for doing so.[139]

The fourth assumption proposes that employment is for an indefinite period. This assumption does not consider other forms of employment, such as TESs. In TES, the employee is employed for a period not exceeding three months. In TES employees are used as substitutes for permanent employees who are temporarily absent.[140] This results in employment insecurity for workers in TES. It is believed that employment security is an integral part of employment rights, and without it none of the other rights can be realised.

Lastly, it is the incorrect assumption with regards to the "centrality of industry based bargaining in the South African labour system."[141] A fragment of this erroneous idea was that "different industries in the economy could be divided based on the nature of the job done at the workplace as a whole, without the need for government intervention."[142] However, despite this incorrect assumption, engaging in collective bargaining has constantly been a difficult, if not almost an impossible endeavour, for labour broker workers.[143] The workers, being detached from the workplace due to using labour brokers, and continuously on the move, often find it difficult to join trade unions and have access to the accompanying collective bargaining power. The contemporary workplace relating to non-standard employment has been structured in a way that ensures that the client "Is the dominant economic entity, who determines the parameters on which employment is provided and controls the actual workplace."[144]

This discussion has highlighted some of the challenges faced by employees in TES, which emanate from the assumptions that underpin the South Africa labour laws. The aim of the preceding discussion was to narrow down this chapter, to specifically focus on the practice of interest in this study, which is vulnerable workers employed in TES. It pointed out that despite the call to ban this practice in South Africa elected to regulate it. The

[139] Botes (note 138 above) 110.
[140] Theron (n 132 above) 62.
[141] Theron (n 132 above) 62.
[142] Theron (n 132 above) 62.
[143] Theron (n 132 above) 62.
[144] Theron (n 132 above) 62.

following chapter picks up where chapter two has left off. It discusses in detail the regulation of TES before and after the insertion of section 198A of the 2014 LRAA to the 1995 LRA, the shortfalls of the regulations and the ILO's regulations in respect of TES.

2.6. Conclusion

The salient point raised by this chapter is that non-standard forms of work, including temporary employment services, enable employers to employ workers outside the scope and protective ambit of labour laws in an attempt to provide labour market flexibility to employers in a globalised work. This quest for greater market flexibility has led to the development and proliferation of new forms of insecure jobs, termed non-standard forms of work.

The chapter began by discussing the meaning of standard employment. Secondly it discussed non-standard work, focusing on the advantages and disadvantages of utilising non-standard forms of work. It further provided a definition and types of labour market flexibility. It then discussed how South Africa incorporated labour market flexibility into its social policy. It argued that South Africa opted for 'Regulated Flexibility,' to balance the need for flexibility and security. This was followed by a discussion of the method used to classify temporary employment services as a form of non-standard work. It then identified the challenges that vulnerable workers in a temporary employment service face, by discussing the assumptions underpinning the South African labour relations. It showed that most workers in temporary employment services are at the lower end of the labour law protection and work under precarious conditions, characterised by deficits.

CHAPTER 3

THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK CHANGES IN RESPECT OF TES AND ITS OBLIGATIONS TO THE INTERNATIONAL LABOUR ORGANISATION

3. INTRODUCTION

The previous chapter provided the necessary background for subsequent chapters, by advancing reasons why work is increasingly falling outside the scope and protective ambit of labour laws, as well as the processes that are driving the rapid increase of non-standard workers. The prominent point raised by the previous chapter is that non-standard forms of work including TES, enable employers to employ workers outside the scope and protective ambit of labour laws, to provide labour market flexibility to employers in a globalised work. Because of the afore-mentioned, workers in such forms of non-standard work are vulnerable and prone to exploitation by their employers.

This chapter discusses the South African legislative framework changes in respect of TES. This is done by evaluating the International Labour Organisation (hereinafter referred ILO) Conventions and Recommendations in respect of TESs. This evaluation is important because it determines the extent to which the ILO Conventions and Recommendations have informed and influenced South Africa's legislative framework changes in respect of TESs.

Furthermore, South Africa's legislative framework in respect of TESs is evaluated through selected constitutional provisions and labour statutes. South Africa presents a pertinent case study because of the approach it adopted in regulating TESs. This is because the approach undertaken by South Africa is contrary to the approaches adopted by surrounding Southern African countries, such as Namibia. The aim of the approach adopted by South Africa is to strike a balance between recognising the need of the TES industry, to promote flexibility in the labour market and provide for the protection of workers employed by TESs, particularly vulnerable workers employed in TESs. Namibia, on the other hand, has adopted an approach that allows for the operation of TESs but strictly regulates their operation.

This chapter is divided into two parts. The first part provides a chronological synopsis of the South African legislative framework changes in respect to TES. The chronological synopsis starts by discussing the regulation of TES before 1995. This discussion focuses on how the legislature attempted to regulate TES by introducing section 198 to the 1995 LRA and later, inserted section 198A of the 2014 LRAA to the 1995 LRA to provide greater protection to vulnerable employees in a TES. From this part the reader then determines how TESs were regulated before and after 1995.The justification for this synopsis was that it would assist in answering this study's main research question, which seeks to determine whether the amendments to the 1995 LRA, particularly section 198A of the 2014 LRAA, provide adequate protection to the vulnerable employees employed by TES.

The second part of this chapter discusses international norms and how the ILO's Conventions and Recommendations in respect of TESs have influenced South Africa's legislative framework, as well as how the South African courts have relied on the ILO's Conventions and Recommendations in interpreting and applying the provisions of the LRA. The researcher starts by contextualising the discussion of ILO Conventions and Recommendations in respect TESs by considering the relevance of ILO standards in South Africa. Then, the researcher enumerates the essential international norms as derived from the ILO conventions and recommendations with regards to TESs and compares the 1995 LRA amendments to selected essential international norms. Shortfalls are identified and suggestions made regarding future changes that should be made to provide balanced reforms to the current regulatory framework.

3.1. South Africa's legislative framework changes in respect of TES

South Africa has been using TESs since the 1950s.[145] However, it was only in 1983 that the Labour Relations Amendment Act ("hereafter referred 1983 LRAA")[146] attempted to regulate TES by providing for a definition.[147] After South Africa's first democratic elections, the 1995 LRA was promulgated and incorporated provisions aimed at regulating TES. Notably, the 1995 LRA failed to regulate TES and this failure resulted in

[145] Botes (n 138 above) 20.
[146] Act 2 of 1983.
[147] Van As (n 8 above) 33.

various stakeholders in the labour market calling for a ban of TES. However, the government opted to remedy the issue by inserting section 198A of the 2014 LRAA to the 1995 LRA to provide greater protection to vulnerable employees in a TES.[148] The government in inserting section 198Aof the 2014 LRAA to the 1995 LRA bore in mind the need to balance the employer's need for flexibility and the employee's need for labour protection.[149] It is crucial to first explore the historical evolution of TES in South Africa before discussing the current legislative framework because the legislative framework applicable to TESs today is largely influenced by South Africa's unique socio-political history.[150]

Therefore, the development of the legislative framework of TES in South Africa is discussed in three stages. The first phase is the pre-constitutional era. During this era, triangular relationships were for the first time regulated in 1983 by the 1983 LRA.[151] The second phase is the constitutional dispensation. During this era, TES were regulated by section 198 of the 1995 LRA. However, it was later determined that section 198 of the 1995 LRA was inadequate in regulating TESs.[152] The third phase is the current legislative framework. It was in this era where the legislature promulgated the Labour Relations Amendment Act (2014 LRAA)[153] which amended section 198 of the 1995 LRA and further introduced section 198A of the 2014 LRAA aimed at providing additional protection to vulnerable employees.[154] The researcher next examines each of the three phases mentioned above in detail.

3.1.1. The pre-constitutional era: from 1982 to 1994

[148] Van As (n 8 above) 17.
[149] Van As (n 8 above) 17.
[150] Van As (n 8 above) 17.
[151] C Aletter and S Van Eck 'Employment agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisation's Standard' (2016) 28 (2) *South African Mercantile Law Journal* 287.
[152] Aletter and Van Eck (n 151 above) 287.
[153] Act 6 of 2014.
[154] Aletter and Van Eck (n 151 above) 287.

TES consists of a commercial contract between the labour broker and its client.[155] The labour broker undertakes to acquire employees who render services to the client in return of a determined fee.[156] Prior to the 1983 LRAA, the fees that the labour broker would receive from the client included the amount due to the labour broker for acquiring employees for the client together with the employee's remuneration.[157] It would then be the responsibility of the labour broker to debit the amount due to him and give the remainder to the employees as remuneration.[158] Labour brokers paid the employees meagre remuneration in order to remain competitive and attract more clients.[159] Labour broking at this time was used for financial gain at the expense of labour law protection. The legislature took notice of the abusive practice and amended the 1956 LRA through the 1983 LRAA.[160]

The rationale behind regulating labour broking in 1983 was to ensure that employees secure jobs and further, ensure that labour brokers did not shirk their responsibilities as the employer of the placed employees.[161] The 1983 LRAA provided a definition of labour brokers and the labour broker office.[162] Despite the fact that the regulation was insignificant, providing a definition of labour broking and the labour broker office provides certainty with regards to the role and responsibilities of the parties in the triangular employment relationship. This automatically excludes the "fly-by-night" labour brokers from the definition. This is so, especially in instances where they do not meet the requirements of the definition.[163] However, the definitions were not sufficient to curb the manifold abusive practices experienced by employees in a TES. It is argued that because the 1983 LRAA only provided for the definition of the labour broking and the labour broker office, without specifically conferring rights to provided employees through legislation, the

[155] MSM Brassey and H Cheadle 'Labour Relations Amendment Act 2 of 1983' (1983) 4 (1) *Industrial Law Journal* 36.
[156] TM Moeketsi 'The interpretation of the "deeming provisions" in terms of section 198A(3)(b) of the Labour Relations Act 66 of 1995: Who is the employer?' unpublished MA dissertation, North-West University, 2020.
[157] Brassey and Cheadle (n 155 above) 36.
[158] Brassey and Cheadle (n 155 above) 36.
[159] Brassey and Cheadle (n 155 above) 36.
[160] Moeketsi (n 156 above) 12.
[161] Brassey and Cheadle (n 155 above) 37.
[162] Labour Relations Act 28 of 1956 sec 1.
[163] Moeketsi (n 156 above) 12.

labour broker and its client had the freedom to manage the tripartite relationship the way they considered appropriate. This predicament resulted in job insecurity for the employees in the tripartite relationship. This was because the way the labour broker and its client managed the tripartite relationship was detrimental to the provided employees.[164]

The 1983 LRAA further created a statutory employer, by providing that the labour broker is the employer of the placed employees.[165] This provision was intended to eliminate the confusion surrounding the actual identity of the employer of the placed employee in the triangular employment relationship. Furthermore, this provision meant that the provided employees now had an employer whom they may hold accountable under labour law. The regulation also provided that the labour broker's responsibility is to remunerate the placed employee.[166] By stipulating that the labour broker is responsible for remunerating the placed employees, the legislature sought to ensure that the authoritative figures in a tripartite relationship do not structure the tripartite relationship in a way that the relationship does not appear as that of an independent contractor. Parties to the tripartite relationship were structuring the relationship to appear as an independent contractor relationship, to avoid paying the provided employees the national minimum wage.[167]

Despite the legislature's intention to protect provided employees from exploitation, the labour broker, together with its client, continued to find loopholes in the available regulation, to exploit provided employees.[168] Provided employees would often go for months without being paid by the labour broker. This was because the law did not hold the client jointly and severely liable with the labour broker in cases where the labour broker failed to discharge its responsibilities, such as remunerating the placed employees.[169] The placed employees would be left without a right of recourse against the client with whom they are placed.[170]

[164] Theron (n 132 above) 619.
[165] Labour Relations Amendment Act 2 of 1983 sec 1(3)(a).
[166]Labour Relations Amendment Act 2 of 1983 sec 1(3)(a).
[167] Brassey and Cheadle (note 155 above) 37.
[168] Van As (n 8 above) 19.
[169] Van As (n 8 above) 19.
[170] Benjamin (n 9 above) 33.

It is the researcher's opinion that the legislature's intention to eliminate confusion of the actual identity of the employer in a triangular relationship, by regarding the labour broker as the employer of the placed employee[171], exalted the employers' need for labour market flexibility at the expense of the employees' rights. The regulation was more concerned with saving costs for employers by hiring cheap labour. Furthermore, the pre-constitutional period made matters worse because of the inequalities that existed among black and white employees. This meant that Black employees in TES were in a more precarious position because of the segregation laws and insufficient TES regulation. Providing a definition for the labour broker, and further creating a statutory employer for the placed employee is commendable. However, at the time, the legislature failed to fully comprehend the challenges that Black employees faced in a racially divided and politically segregated labour market. The disadvantaged Black employees in TES, "simply did not have the means or ability to hold the fly-by-night labour brokers referred to as the bakkie-brigade"[172] accountable under labour laws.

In addition to the above-mentioned short-comings of the 1983 LRAA, it is worth mentioning that apart from the regulation provided for in the 1983 LRAA in respect to TESs, there was no other statute promulgated to provide for the basic conditions of employment for placed employees. Secondly, the client was not jointly and severely liable, together with the labour broker, for providing the basic conditions of employment for the placed employees. This meant that the labour broker, together with its client, would treat the placed employees in a manner they deemed fit. Thirdly, the labour broker failed to fulfil its common-law duty, to ensure that the placed employees were performing their services to the client in a healthy and safe working environment. The labour broker felt exempted from such a duty. This was because the placed employees were placed at the workplace of the client, and not at its own workplace. This also meant that the rights of the placed employees were not safeguarded when they were placed at the client's workplace. Therefore, in instances where the rights of the employees placed at the

[171] Labour Relations Amendment Act 2 of 1983 sec 1(3)(a).
[172] Benjamin (n 9 above) 849.

premises of the client were compromised, the labour broker would not beget the placed employees' "grievances" to the client.[173]

The above-mentioned discussion evidenced how the inadequate regulation made it possible for the labour broker and its client in the triangular employment relationship to easily exploit the employees. Following these submissions, it was necessary, if not important, to regulate TES in a manner that protected them from exploitation, particularly because South Africa was on the verge of attaining democracy and was eager to follow a human right-based approach.

3.1.2. The Constitutional Dispensation: 1994 to 2015

The dawn of a new government premised upon guarantees for human rights, after the demise of the apartheid government, provided hope for transformation to the South African people.[174] Following many years of systematic deprivation of opportunities of Black South Africans, coupled with an undeniable skew of racial inequality and poor working conditions for black employees, the South African multitudes anticipated radical social-economic and socio-political transformation. Thus, it was of paramount importance for the new government to radically transform and introduce new policies in line with the human rights based approach that was adopted. Furthermore, it was important for the country to re-enter the global market following years of economic sanctions imposed on South Africa to pressurise the "then" government to eradicate apartheid.

The new government placed labour relations at the fore-front, to improve the lives of the South African people, as well as to jump-start the much-needed transformation and policy adjustments. Amongst the manifold rights that were incorporated in the Constitution of the Republic of South Africa (thereafter "Constitution"[175]), section 23 of the Constitution officially recognized labour relations as a fundamental right, in line with the protection provided to all workers (both standard and non-standard workers). Furthermore, to protect the economic activities of South Africans, section 22 of the Constitution provided South

[173]PAK Le Roux 'Legal Representation at Disciplinary Hearings' (2011) 20 (10) *South African Cotemporary Labour Law* 24.
[174] http://www.facinghistory.org/confronting-apartheid/chapter-4/introduction (accessed on 05 April 2022).
[175] Act 108 of 1996.

Africans with the right to choose their trade, occupation or profession freely.[176] Additionally, the Constitution provided that such a profession or trade must be regulated by law.[177] Contextually, this meant that South Africans were permitted by the Constitution to take on labour broking as a profession. In cases where a South African opted to conduct his/her business as a labour broker, such business was compelled to be regulated by law. To give effect to section 23 and 24 of the Constitution, four significant Acts were promulgated to regulate and mandate labour relations in South Africa; namely, the 1995 LRA, the EEA, the BCEA and the Skills Development Act[178]. Of importance for this study, is the 1995 LRA and the BCEA.

The 1995 LRA encapsulated the government's plan to provide a piece of legislation aimed at reconciling the need for flexibility and social protection. One of the ways in which it did so, was to re-structure the South African labour relations and regulate TES as a form of non-standard employment. The latter evidenced the legislature's intention to balance the employer's need for flexibility together with providing protection for employees in non-standard working arrangements. The purpose of the 1995 LRA was "to advance social justice, labour peace and the democratisation of the workplace"[179] through ultimately affording everyone, including provided employees in TES, "the right to fair labour practices as contained in section 23(1) of the 1996 Constitution."[180] The legislature in drafting the 1995 LRA, took cognisance of its responsibilities as a member state of the ILO and used the ILO's conventions and recommendations as a guide.[181]

It is important to note that the 1995 LRA changed the term labour broking to TES. In summation, section 198 of the 1995 LRA provided for the following regulation of TES; Section 198(1) of the 1995 LRA provides for a definition of TES and section 198(2) of the 1995 LRA upheld the statutory employer envisaged by the 1983 LRA. It provided that the labour broker is the statutory employer of the placed employees.[182] Section 198(3) of the

[176] Constitution of the Republic of South Africa Act 108 of 1996 sec 22.
[177] Constitution of the Republic of South Africa Act 108 of 1996 sec 22.
[178]Act 97 of 1998.
[179] Labour Relations Act 66 of 1995 sec 1.
[180] Labour Relations Act 66 of 1995 sec 1(a).
[181] Van As (n 8 above) 19.
[182] Van As (n 8 above) 20.

1995 LRA provides for the exclusion of independent contractors as employees of the labour broker.[183] On the other hand, Section 198(4) of the 1995 LRA introduced "a limited form of joint and several liability for the labour broker and its clients in instances, where a labour broker failed to comply with collective agreements concluded at bargaining councils, the provisions of the BCEA and arbitration awards that regulated the terms and conditions of service."[184]

3.1.2.1. Shortfall of the 1995 LRA: dismissals effected at the instance of the client

The glaring omission of the 1995 LRA is its failure to extend joint and several liability to the labour broker's client in cases of dismissals of a placed employee at the instance of the client. This was confirmed in the case of *NUM & others v Billard Contractors CC & another*[185] were the LC held that "the provisions of section 198(4) of the 1995 LRA make the client jointly and severally liable in respect of contraventions of specifically identifies employment rights. Unfair dismissal rights are not among these. Whether 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."[186] Furthermore, the court in *Walljee v Capacity Outsourcing and Another* [187]the LC concurred with the decision in the *NUM* case and held that section 198(4) of the 1995 LRA does not extend joint and several liability to the client of the labour broker in cases of dismissals. Therefore, the client of the labour broker cannot be cited as a respondent in an unfair dismissal dispute referred to court by the placed employee. The researcher argues that the legislature's failure to extend joint and several liability to the labour broker's client in cases of unfair dismissal renders the inclusion of section 198(4) to the 1995 LRA ineffective.[188]

Employees in TES were therefore, still in a vulnerable and precarious position when compared to employees in standard employment who enjoyed protections against unfair

[183] Van As (n 8 above) 20.
[184] Van As (n 8 above) 20.
[185] *NUM & others v Billard Contractors cc & another*, 2006 12 BLLR 91 (LC).
[186] *NUM & others v Billard Contractors cc & another*, 2006 12 BLLR 91 (LC) at para 79.
[187] *Walljee v Capacity Outsourcing and* Another 2012 33 ILJ 1744 (LC).
[188] Benjamin (9 above) 849.

dismissals.[189] The insignificant and/or ineffective regulation enabled vulnerable employees in a TES to be exploited. Dismissing an employee at the instance of the client is when the client demands that the labour broker remove the placed employee from its premises before placed employee completes the temporary service. An example of this is in the case of *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*[190](*Simon Nape* case). In this case, Simon Nape, procured through the services of a labour broker, and was charged with an act of misconduct. It was alleged that he sent an offensive email to another employee using the client's laptop (the client is Nissan (Pty) Ltd). The client, contacted the labour broker, demanding that Simon Nape be removed from Nissan's workplace.

The labour broker suspended Simon Nape prior to his disciplinary hearing. After concluding the disciplinary hearing, Simon Nape was issued with a written warning by the labour broker. However, Nissan was not satisfied with the final written warning issued to Simon Nape, and demanded that he be removed from its workplace. The labour broker then retrenched Simon Nape in terms of section 189 of the 1995 LRA, on the basis that it did not have any employment position to offer him. Simon referred the matter to the LC, where the labour broker argued that it had a contractual obligation to heed to the client's demands, which in this case meant removing Simon Nape from the client's premises. The researcher argues that the failure to hold both the labour broker and its client jointly and severally liable for unfair dismissals leads to such abusive practices, which leaves the placed employee vulnerable and without adequate protection.

Another typical example is found in the case of *Smith v Staffing Logistic*[191](*Smith* case). In this case, a labour broker (Staffing Logistic) contracted to procure a person(Smith) who would carry out an assignment of work for a limited duration for the client(Armour Systems). One of the terms of the contract concluded between Armour Systems and Staffing Logistics was that, in an event that Armour Systems no longer wished to make use of Smith, the labour broker would have a duty to remove him from Armour Systems' premises. Subsequently, Armour Systems had a disagreement with Smith during the

[189] Benjamin (9 above) 849.
[190] *Simon Nape c INTCS Corporate Solutions (Pty) Ltd* 2010 8 BLLR 852 (LC).
[191] *Smith v Staffing Logistic* 2005 26 *Industrial Law Journal* 2097 (BCA).

course of employment. Armour Systems then requested the labour broker to remove Smith from its premises indefinitely. Staffing Logistics carried out its contractual duty and informed Smith that he had completed his duties and would be placed in a standby pool for further possible placements with other clients.

Smith instituted an unfair dismissal claim and submitted that he was dismissed without being furnished with reasons. The arbitrator held that:

> The Labour Relations Act does not exempt labour brokers from the obligation to ensure that fair labour practices are applied to its employees. A labour broker cannot contract out of this obligation by simply allowing its client to take over the role of the employer without requiring them to assume some responsibilities for fair labour practice. If the employment was terminated simply because the client advised the labour broker to remove the employee this would constitute unfair dismissal.

The researcher agrees with the LC's decision. However, it should be noted that the LC's reasoning does not take cognisance of the fact that there is an unequal division of power in the triangular relationship.[192] Firstly, most placed employees are vulnerable unskilled workers who would settle for harsh working conditions just to take home a pay check, particularly in South Africa, where the labour market is characterised by a high unemployment rate. Secondly, the labour broker is at the mercy of its client.[193] The client seems to be at the top of the triangular employment relationship, whilst the labour broker and the placed employees are at the bottom. The labour broker relies on the client to stay in business and the placed employee relies on both the labour broker and its client for continued employment. Thus, in instances where the placed employee is dismissed at the instance of the client, and the reason for the dismissal is weak, it would be difficult for the labour broker to question its client with regards to the reasons for the dismissal and further, force the client to continue to allow the placed employee to render services and/or perform the work.[194]

[192] Van Eck (n 109 above) 108.
[193] C Bosch, 'Contract as a barrier to dismissal: The Plight of the Labour Broker's Employee' (2008) 29 (1) *Industrial Law Journal* 813-840.
[194] *Sindane v Prestige Cleaning Services* 2009 1 SA 1249 (LC) para 4.

Critical analysis of the legislature's omission to extend joint and several liability clause to the labour broker's client in cases of dismissals effected at the instance of the client shows that there is no right of recourse for an unfairly dismissed placed employee at the instance of the labour broker and its client.[195] Because the 1995 LRA did not put the client as the statutory employer of the placed employees, the institutions established for labour dispute resolution would not possess in law the necessary jurisdiction to hear a labour dispute claim where the client is cited as the actual employer of the placed employee.[196] The placed employee would have to cite the labour broker as the actual employer in order for the CCMA, LC or LAC to have jurisdiction to hear the matter.[197]

It is argued that the legislature should have extended the joint and several liability clause to unfair labour practice and unfair dismissal claims, to protect placed employees from unfair dismissals at the instance of the client. Furthermore, the legislature should have specifically mentioned and provided that the placed employee is permitted to cite both the labour broker and its client or either of the parties in joint and several liability claims mentioned in section 198(4).[198] Instituting legal proceedings against the labour broker without citing the client as the second respondent in cases, where the placed employee was unfairly dismissed at the instance of the client, will leave the employee will an unenforceable reinstatement order. This is so because the order will be directed against the labour broker, and in such cases the placed employee does not work at the workplace of the labour broker but at that of the client.

3.1.2.2. Automatic termination clauses.

The clients in the *Simon Nape* case and the *Smith* cases could demand that the labour broker dismiss the placed employees because of automatic termination clauses included in service level agreements. Automatic termination clauses are inserted in an employment contract to enable the labour broker to terminate the employment contract in instances where the client is not willing to allow a placed employee to continue providing services

[195] SB Gericke 'Temporary employment services: Closing the loophole in section 189 of the Labour Relations Act 66 of 1995' 2010 31 (1) *Industrial Law Journal*.
[196] Gericke (n 195 above) 96.
[197] Gericke (n 195 above) 96.
[198] Gericke (n 195 above) 96.

for it. Should the client express to the labour broker its disinterest in the services provided by the placed employee or the work performed by the placed employee, the automatic termination clause allows the labour broker to dismiss the placed employee and the dismissal would be valid in law. This position was upheld in the *Sindane v Prestige Cleaning Services*[199]case. Automatic termination clauses have been accepted by the courts for reasons such as the unwillingness of the client of the labour broker to allow a placed employee to continue rendering services or performing work. The afore-mentioned reason is accepted by the court as a mutual agreed termination of an employment contract and not something that constitutes an unfair dismissal claim.

Notably, the readiness of the courts to allow automatic termination clauses in triangular employment relationships can be argued to go against the principles of social justice[200]. This is so because, most placed employees in triangular employment relationships are unskilled and illiterate. Thus, they might not necessarily fully understand the legal consequences of signing an employment contract which includes an automatic termination clause. At the time of signing the contract, the only thing that matters is that they got employment. That, alone, makes them vulnerable. This view was stressed by the court in the case of *Dyokwe v De Kok*[201]. The court held that "It can hardly be asserted that such contracts represent the will of the contracting parties when some provided employees sign contracts they do not even understand due to their literacy deficiency."[202] Therefore, automatic termination clauses constitute unfair contractual terms because in cases of illiteracy, vulnerable placed employees would be signing away their statutory right to refer an unfair dismissal claim at the instance of the client against the labour broker. This is against public policy, the objectives of the 1995 LRA and the spirit and purport of the Constitution.[203]

[199] *Sindane v Prestige Cleaning Services* 2009 1 SA 1249 (LC) at para 6.
[200] Social justice has been defined and understood by the courts to mean "considering the social challenges faced by the society in conciliating matters such as, illiteracy and the high unemployment rate". This view was held in *BArkhuzen v Napier* 2007 5 SA 323 (CC).
[201] *Dyokwe v De Kok NO and Others* 2012 1 SA 1012 (LC).
[202] *Dyokwe v De Kok NO and Others* 2010 1 SA 1012 (LC) para 8.
[203] *Dyokwe v De Kok NO and Others* 2010 1 SA 1012 (LC) para 8.

3.1.2.3. Shortcomings of the 1995 LRA: the limit of the temporary service performed by the placed employee.

The 1995 LRA does not limit the period that the placed employee would be employed by the labour broker. This means that placed employees would be employed on an indefinite basis, with less favourable terms and conditions of employment, compared to direct employees employed by the client. This loophole in law made the employment of placed employees less secure. This was because where the client wished to employ these workers indefinitely, their terms and conditions of employment would be less favourable and were the client is dissatisfied with the service rendered or the work done by the placed employee, the client would inform the labour broker to dismiss the client automatically, as provided for in the contract of employment without any right of recourse. Thus, legislation had to close this loophole, by putting a time-frame on temporary work and reduce it to genuine temporary employment.

3.1.2.4. Shortcomings of the 1995 LRA: Issues with the actual identity of the placed employee's employer

It is the researcher's view that the triangular employment relationship is difficult to manage because there are two parties who both possess the qualities of an employer. The identity of the employer in a triangular employment relationship has received significant judicial scrutiny, and the courts have come out with contradictory judgements. In *LAD Brokers (Pty) Ltd v Mandla*,[204] a client from the United Kingdom procured for itself an employee to work in its plant in Mossel Bay, South Africa. Upon appointment, the employee was told that he would be employed through a labour broker known as LAD Brokers.[205] During the course of employment. The labour broker also informed the employee that he would be offering his services to the client as an independent contractor. The broker also informed the employee to sign a contract consenting to the terms and conditions in

[204] *LAD Broker (Pty) Ltd v Mandla* 2002 6 SA 43 (LAC).
[205] *LAD Broker (Pty) Ltd v Mandla* 2002 6 SA 43 (LAC) at para 10.

December 1998.[206] Consequently, the labour broker and its client entered into a commercial contract.[207]

The client oversaw the following with regards to the employee's employment; firstly, the client supervised and controlled the employee during the course of employment. Secondly, the client was responsible for drafting the terms and conditions of the employment contact. Thirdly, the client made payments to the labour broker for the purposes of remunerating the employee. Lastly, the client was responsible for deciding whether the employee would receive any bonuses. The employee was informed by the labour broker that his employment would be terminated by the end of April 1999.[208] After the dismissal, the employee lodged an unfair dismissal claim in the LC. The LC had to answer a question of whether the relationship that existed between the employee and the client was that of an independent contractor relationship or an employment contract relationship.[209] The LC, as the court *a quo,* held that the 1995 LRA created a statutory employer by placing the labour broker as the employer of the placed employee, even though the client shared some of the roles and responsibilities of an employer at common law. *LAD Brokers* took the matter to the LAC, where the LAC upheld the decision of the court *a quo*. Furthermore, the LAC held that the labour broker was the employer because the labour broker remunerated the placed employee in the place of the client, which fulfils the requirement of being an employer in terms of section 198(1)(b) of the 1995 LRA.[210]

Section 198(1) and section 198(2) of the 1995 LRA provide for the requirements that must be present for the labour broker to be regarded as the employer of the placed employee; namely, the labour broker must acquire employees for the client. Secondly, the labour broker must remunerate the placed employee, and lastly, the labour broker must acquire employees for the client for a reward. Thus, for the labour broker to be regarded as the employer, he/she must have on his own accord without the aid of the client, acquired employees for the client to perform work or render services.[211] This requirement is

[206] *LAD Broker (Pty) Ltd v Mandla* 2002 6 SA 43 (LAC) at para 12.
[207] *LAD Broker (Pty) Ltd v Mandla* 2002 6 SA 43 (LAC) at para 7.
[208] *LAD Broker (Pty) Ltd v Mandla* 2002 6 SA 43 (LAC) at para 14.
[209] *LAD Broker (Pty) Ltd v Mandla* 2002 6 SA 43 (LAC) at para 2.
[210] *LAD Broker (Pty) Ltd v Mandla* 2002 6 SA 43 (LAC) at para 2.
[211] Moeketsi (n 156 above) 23.

essential in this case because the client had the opportunity to vet the employees before concluding a commercial agreement with the labour broker. Thus, for the LAC in the *LAD Brokers* case to overlook these requirements and only focus on the fact that the labour broker was remunerating the placed workers constitute a gross misinterpretation of the law. A possible outcome of this judgement would be exploitation, in the sense that clients will have a *de facto* opportunity to firstly interview and vet the employees for possible employment but later sign a commercial agreement with the labour broker making him the employer of the placed workers. This defeats the entire purpose of section 198(1) and section 198(2) of the 1995 LRA.[212]

The court rectified the above glaring misinterpretation of the law in the *Dyokwe* case. In this case, the client procured for itself employees to avoid the operation of section 198(1) and section 198(2) of the 1995 LRA, the client concluded a commercial agreement with a labour broker. The employees that it had procured for itself were transferred and became the employees of the labour broker. The client assured the employees that nothing would change in their contract of employment. Later, the employees' contracts of employment were terminated and/or dismissed because of the automatic termination clause stipulated in their employment contracts. The court in its decision looked at the requirements listed in section 198(1) of the 1995 LRA and held that the client had procured or provided for himself the employees and not the labour broker. Consequently, the employees were regarded as the employees of the client and not the labour broker. The dismissal was rendered to be substantively unfair. The employees were reinstated and integrated into the books of the client. The different conclusions reached by the courts in the *LAD Broker* case and the *Dyokwe* case show the uncertainty and ambiguity that is present in identifying the employer of the placed employee in a triangular employment relationship.

Following the above-mentioned submissions with regards to the regulation of TES during the constitutional dispensation, it can be argued that despite that the regulation had its own limitations and loopholes, employees in TES were in a better position compared to the pre-constitutional dispensation. The Minister of Labour in 2010, proposed

[212] Labour Relations Act 66 of 1995 sec 1.

amendments to the 1995 LRA which were later withdrawn, to ban labour broking and consequently, make the clients of labour brokers the employer of the employees that were placed in their workplace. The amendments were withdrawn because of the reason that banning labour brokers and further making the client the actual employer of the placed employees would have constitutional implications. For example, it would infringe upon section 22 of the Constitution, which allows for South Africans to choose their trade and occupation freely. Furthermore, the amendments were withdrawn for reasons that the ban did not support the employer's need for flexibility and thus, did not advance economic development as provided for in section 1 of the 1995 LRA.[213]

After the withdrawal of the 2010 amendments, the legislature introduced a set of new amendments to the Cabinet Committee in 2012 with regards to the regulation of TES. These amendments were open for debate as to how the legislature could best protect employees from exploitation. The amendments were approved by the Cabinet Committee and the legislature adopted the Labour Relations Amendment Bill in 2013. Consequently, in 2014 the Minister of Labour promulgated the Labour Relations Amendment Act, which amended section 198 of the 1995 LRA, by inserting section 198A. The aim of the legislature was to curb the exploitation evidenced by section 198 of the 1995 LRA and provide greater protection to vulnerable employees in temporary employment services. The researcher now turns to this aspect.[214]

3.1.3. Current legislative framework

Section 37 and 38 of the 2014 LRAA provides for the regulation of non-standard employment. Section 37 of the 2014 LRAA amended section 198 of the 1995 LRA and applies to both lower and higher earning employees in a TES. Section 38 inserted section 198A to 198D in the 1995 LRA and specifically deals with the regulation of "vulnerable" (lower-earning) employees, to the exclusion of higher-earning employees in TES. Section 37 retained the definition of a labour broker contained in section 198(1) of the 1995 LRA and the statutory employer created by section 198(2) of the 1995 LRA. This meant the labour broker remained the employer of the placed employee performing a temporary

[213] Van As (n 8 above) 21.
[214] Van As (n 8 above) 22.

service. Furthermore, section 37 upheld the joint liability and several liability clause contained in section 198(4) of the 1995 LRA, with an increased protection of permitting the placed employee to cite both the labour broker and the client or any of them in a joint and several liability dispute referred to in section 198(4) of the 1995 LRA.

New provisions were included in the 2014 LRAA. For example, the amendments provided that labour brokers must furnish the placed employees with "written particulars of employment that comply with section 29 of the BCEA when the employee commences employment."[215] Significantly, employees in a TES would be covered by collective agreements.[216] The amendments also provided that an employee in TES "may not be employed by the labour broker on terms and conditions not permitted by the 1995 LRA, or sectoral determination or collective agreement applicable to the employees of the client to whom the employee renders services.'[217] This entailed that if, for example, employees in the motor industry were covered by a bargaining council main agreement, which sets minimums pertaining to remuneration and pension or provident benefits, workers in TES would be entitled to the same conditions of employment as contained in the agreement.[218] This would be the case, irrespective of the fact that the labour broker, which was the employer, might not be covered by the scope of the bargaining council.[219] These measures pertaining to contracts of employment and collective bargaining rights applied to all employees employed by the TES, irrespective of the quantum of their remuneration or the duration of their placement.[220]

In short, the following four were the key points in relation to the improved protection offered to lower earning employees in TES:

- The protective measures as they may have been before the amendments, remained largely unchanged;[221]

[215] Labour Relations Amendment Act 6 of 2014 sec 37(4B)(a).
[216] Aletter and Van Eck (n 151 above) 291.
[217] Aletter and Van Eck (n 151 above) 291.
[218] Aletter and Van Eck (n 151 above) 291.
[219] Aletter and Van Eck (n 151 above) 291.
[220] Aletter and Van Eck (n 151 above) 291.
[221] Aletter and Van Eck (n 151 above) 291.

- Further, South African policymakers are supposedly guided by the strategy of "regulated flexibility" when drafting labour legislation[222];
- All workers, irrespective of whether they may be part-time, fixed-term or employees in a TES are protected by the EEA which prohibits unfair discrimination on grounds such as race, colour, religion and age[223]; and
- Lastly, 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 into more secure indefinite types of jobs. In other words, precarious jobs such as temporary employment services were not prohibited and could serve as a stepping stone towards more decent forms of work.[224]

Significantly, the legislature inserted section 198A of the 2014 LRAA, titled "Application of section 198 to employees earning below the earnings threshold''.[225] The section contained a limitation of temporary service to genuine temporary work. It provides that temporary service is service not exceeding three months and is performed by employees who are temporarily substituting an absent employee for a period of not exceeding three months or "a period determined by a collective agreement, sectorial determination or a notice published by the Minister of Labour".[226]

Furthermore, the amendments created another statutory employer for a placed employee who is not performing a temporary service. The section provided that the client is the statutory employer of the placed employee who is not performing a temporary service. This meant that after the lapse of the three-months period, the client would become the employer of the placed employee for the purposes of the LRA only.[227] Furthermore, the client would become the employer of the placed employee for an indefinite basis and the

[222] Aletter and Van Eck (n 151 above) 291.
[223] Aletter and Van Eck (n 151 above) 291.
[224] Aletter and Van Eck (n 151 above) 291.
[225] Labour Relations Amendment Act 6 of 2014 sec 38.
[226] Labour Relations Act 66 of 1995 sec 198A(1)(a)-(c).
[227] Labour Relations Act 66 of 1995 sec 198A(3)(a).

placed employees would not be treated less than the direct employees of the client performing similar work.[228]

The researcher notes that lower earning employees in TES received more protection after the amendments and this is commendable. This meant workers were not only protected in respect of their right to equality in terms of the EEA and equal treatment in terms of the 1995 LRA, but also in respect of not being kept in precarious positions for indefinite periods.

3.1.3.1. Shortcomings of the 2014 LRAA amendments: Section 198A of the 2014 LRAA applies to lower earning employees only

Even though this study centred primarily on the regulation of vulnerable workers in a TES, it is important to note that higher-earning employees in TES do not enjoy the additional protection afforded to lower-earning employees in TES. Higher-earning employees in TES receive protection offered by section 37 of the 2014 LRAA only. Section 37 of the 2014 LRAA provides for a right to be provided with contracts of employment. However, the protection given to higher-earning employees in a TES is inadequate, compared to the protection offered to lower-earning employees employed in a TES.

3.1.3.2. Shortcomings of the 2014 LRAA amendments: disguising the labour broking relationship as that of independent contracting

It has been reiterated in this chapter that the labour broker and its client engaged in abusive practices aimed at depriving employees in TES labour protection. It is for this reason that the legislature promulgated the 2014 amendments to provide employees in TES with greater protection. However, the LAC in the case of *Victor and others v Chep South Africa (Pty) Ltd and others*[229] was faced with yet another hurdle of ascertaining the actual nature of the relationship that existed between the parties to the dispute.

In this case, C-force (labour broker) concluded an agreement with Chep (the client) in 2009 to the effect that C-force would provide Chep with 201 employees for the purposes

[228] Labour Relations Act 66 of 1995 sec 198A(5).
[229] *Victor and others v Chep South Africa (Pty) Ltd and others* 2021 1 BLLR 53 (LAC).

of repairing and re-conditioning wooden pallets. However, this agreement was later changed into a service level agreement in 2014. The terms of the new agreement were that C-Force would be an independent contractor. Furthermore, C-force would be paid according to the number of wooden pallets it repaired and not for the employees it placed at the workplace of Chep for the purposes of repairing the pallets. The effect of this new agreement was that neither C-force or the employees it placed with Chep would be considered as agents or employees of Chep.

The dispute was first referred to the CCMA for arbitration. The applicants contended that C-force was a labour broker as contemplated by section 198(1) of the 1995 LRA under the 2009 agreement. Furthermore, the applicants contended that the aim of the 2014 service level agreement was to obscure the labour broking agreement that was in place for the purposes of denying the 201 employees of their labour law protection. The Commissioner concurred with the applicants' submissions and ruled that C-force was a labour broker in terms of section 198(1) of the 1995 LRA. The Commissioner's award was set aside by the LC on review. The 201 employees then appealed the LC's decision to the LAC.

The LAC expanded the definition of a labour broker envisaged by section 198(1) of the 1995 LRA. It held that in cases where the employees procured are rendering a service to a client, the courts must not take a restrictive approach in an attempt to ascertain whether a labour broking relationship exists. Furthermore, the court held that a labour broking relationship exists where there is a sign that a third party has brought workers to a client to perform work and further, where the client retains overarching control over when and how the workers will work. The LAC held that the fact that C-force was paid with regards to the number of wooden pallets repaired did not mean that it was not a labour broker. The legislature did not make any specific reference to how the labour broker should be paid. Consequently, the LAC upheld the appeal.

The researcher argues that ambiguity and uncertainty with regards to the regulation afforded to employees in TES persists, even in the face of the 2014 amendments. This ambiguity of the provisions has a potential of denying these employees in TES with labour law protection. The researcher also argues that the regulation must be amended to

ensure certainty. This will ensure that parties, particularly employees in TES do not have to go through the exhaustive and expensive litigation process to ascertain the nature of the legal relationship that exists between the parties to this tripartite relationship.

Having discussed the South African legislative framework changes in relation to TES and determining the extent to which South African employment laws, particularly how the LRA recognises and regulates TES, the researcher now turns to the ILO and its influence on the South African legislation, and further determines whether the regulations adopted in South Africa are in line with the protective measures envisaged by international norms.

3.2. Justification of weighing South African legislative framework with regards to TES against international norms

It is critically important to first discuss the relevance and significance of international standards in South Africa before the researcher proceeds to discuss the International Labour Organisation Conventions and Recommendations in relation to TES. It is notable that South Africa, being a member state of the ILO, has ratified the ILO Equal Remuneration Convention of 1951[230] which provides for "equal pay for all workers, regardless of gender, sex or age, who perform identical or same work". The ILO Equal Remuneration Convention also requires all its member states to establish mechanisms that aim at prohibiting discrimination in the workplace.[231] Accordingly, it is important that when interpreting labour legislation, the courts must adhere to international law norms or such interpretation must be in accordance with the Republic's obligation as a member of the ILO.[232] The ILO has played an important role in developing labour laws of its member states including South Africa.[233] As such, the Constitution empowers the courts "to adopt a reasonable interpretation that is consistent with international law when interpreting any legislation."[234] Section 232 of the Constitution states that "international law is law in South

[230] International Labour Organisation Equal Remuneration Convention of 1951.
[231] B J Gumede 'A critical examination of the interpretation and application of the law relating to temporary employment services in South Africa', unpublished MA dissertation, University of KwaZulu-Natal, 2016.
[232] Gumede (n 231 above) 12.
[233] Gumede (n 231 above) 12.
[234] Constitution of the Republic of South Africa Act 108 of 1996 section 39(1).

Africa unless it is inconsistent with the Constitution or an Act of Parliament." Section 232 regulates how the courts must interpret legislation by stating 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.

The CC interpreted the word international law as provided in section 232 to mean "international instruments that bind South Africa, as well as those to which South Africa is not a party."[235] Furthermore, section 30(1)(b) of the Constitution provides that "courts or tribunals must consider international law when interpreting the Bill of Rights." International obligations arising from international practices commonly known as customary international law is also considered as law in South Africa unless it is contradicting the Constitution as the supreme law of the land. These provisions show that the Constitution places significant value to international law.

The case of *Equity Aviation Services (Pty) Ltd v Commission, Mediation and Arbitration and Others*,[236] confirmed the importance of the ILO Conventions and Recommendations in interpreting legislation. The court held that:

> This court has acknowledged in *South African National Defence Union v Minister of Defence and Another* that in interpreting s 23 of the Constitution an important source of international law will be the conventions and recommendations of the International Labour Organisation. An important source of international law for the purpose of this case is ILO Convention B 138 of 1982. Article 4 of the Convention 158 lays the foundation for South African legislation regarding unfair dismissal based on misconduct, incapacity and operational requirements….[237]

South Africa is bound by the ILO Conventions and Recommendations, even if it has not yet ratified the convention and/or the recommendation. The continued use of international labour standards by courts in disputes brought before them, contributes to the development of the South African labour laws.[238] Furthermore, it has been reported that

[235] *S v Makwanyane* 1995 3 SA 391 (CC).
[236] *Equity Aviation Services (Pty) Ltd v Commission, Mediation and Arbitration and Others* 2009 1 SA 390 (CC).
[237] *S v Makwanyane* 1995 3 SA 391 (CC) para 22.
[238] *Old Mutual Life Assurance Co SA ltd v Gumbi* 2007 5 SA 552 (SCA) para 6-7.

minority trade unions are in the process of lodging complaints with the ILO directly, so that the ILO puts pressure on the state as the employer in the public sector during collective bargaining disputes.[239] One of the primary objectives of the 1995 LRA is to ensure that the South Africa's obligation as a member of the ILO is fulfilled.[240] Section 3(c) of the 1995 LRA requires any person interpreting it to comply with international laws.[241] Accordingly, ILO Conventions are legally binding to all member states who ratified them.[242] However, ILO Recommendations are not binding but provide guidelines in shaping and developing labour policies.[243] It is in the present researcher's opinion that member states have to consider international instruments because they are useful tools in drafting and enforcing employment legislation and social policy.

The following is a discussion of the ILO standards in respect of private employment agencies (the ILO standards use the term private employment agencies to refer to TES) and an analysis of the extent to which 2014 amendments with regards to TES comply with the ILO standards.

3.2.1. ILO standards and TES

In the past, the ILO made provision for fee-charging employment agencies and non-profit employment agencies. The fee-charging employment agencies were controlled by private entities, whilst non-profit employment agencies were controlled by the ILO member states. Fee-charging employment agencies were wavered between prohibition and regulation. In 1919, the ILO banned the operation of fee-charging employment agencies and allowed the operation of 'non-profit employment agencies'.[244] Following the promulgation of 1933 Fee-charging employment agencies Convention[245], the ILO formally banned the operation of fee-charging employment agencies to prevent the abuse of employees employed in fee-charging employment agencies.

[239] *SA Correctional Services Workers Union v Police and Prisons Civil Rights Union and Others* 2017 38 SA 1 (LAC).
[240] Gumede (n 231 above) 12.
[241] Gumede (n 231 above) 12.
[242] Gumede (n 231 above) 12.
[243] Gumede (n 231 above) 12.
[244] Aletter and Van Eck (note 151 above) 299.
[245] International Labour Organisation Fee-Charging Employment Agencies Connection 1933.

However, this position was amended in 1949 when the Fee-Charging Employment Agencies Convention of 1933[246] was replaced by the 1949 Fee-Charging Employment Agencies Convention. The ILO left the decision to either ban or regulate agency employment with its member states. [247] The adoption of the Decent Work Agenda in the 1990s paved a way for better regulation for employees in employment agencies. The Decent Work Agenda defines decent work as "work that is productive and delivers a fair income, with a safe workplace and social protection, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men."[248] The ILO also considered the decent work-agenda when promulgating the 1997 Private Employment Agencies Convention and the Private Employment Agencies Recommendation, 1997. The decent work agenda balanced the employer's need for flexibility and employee's need for labour protection. Therefore, the 1997 Private Employment Agencies Convention and the Private Employment Agencies Recommendation, were promulgated, based on regulated flexibility which was promoted by the decent work agenda.

3.2.1.1. Private Employment Agencies Convention, 1997

The 1997 Private Employment Agencies Convention provides a definition of employment agencies. It provides that:

> The term private employment agency means any natural or legal person, independent of public authorities, which provides one or more of the following labour market services: (a) Services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom; (b) Services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a user enterprise) which assigns their tasks and supervises the execution of these tasks; and (c) Other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organisations, such as the

[246] Gumede (n 231 above) 12.
[247] Gumede (n 231 above) 12.
[248] Gumede (n 231 above) 12.

provision of information, that do not set out to match specific offers of and applications for employment.[249]

The Convention is aimed at providing labour protection to employees in private employment agencies and consequently, curbing the abusive practices that these employees face. In achieving the afore-going aim, Article 4 of the Convention conferred collective bargaining rights to agency employees and rights, to form or join a trade union.[250] It is commendable that the Convention attempts to provide agency employees with bargaining rights and rights to form or join trade unions. However, the problem with affording organisational and bargaining rights to agency employees is that agency employees are procured by the agency, who in law is their employer and consequently, placed at the client's workplace. Meaning that they do not work in the workplace of their employer. Therefore, it would be difficult for these employees to be recruited by trade unions for them to exercise their bargaining rights.[251] If indeed they join a trade union and they can effectively bargain, it would be between them and their employer who would be the agency. The agency would not be able to implement their demands at the client's workplace because the agency does not have the authority to do so. The researcher argues that collective bargaining rights for agency employees are good in theory but difficult to enforce because they do not apply to joining trade unions and bargaining at the workplace of the client.

Article 5 of the Convention 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".[252] However, a glaring omission of Article 5 is the failure to provide for equal treatment between agency employees and direct employees of the client performing similar work.[253] This omission allows for an unjustified differential treatment between agency workers and direct employees of the client performing similar work. Practically, direct employees of the client enjoy benefits such as "medial aid, death

[249] Article 1 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[250] Article 4 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[251] Benjamin (n 9 above) 13.
[252] Article 4 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[253] Aletter and Van Eck (n 155 above) 303.

and disability covers, company pensions schemes", which are not enjoyed by agency workers performing similar work.[254] Affording agency employees the right to equal employment opportunities is a step in the right direction. However, Article 5 of the Convention merely provides for the bare minimum regarding equality in the workplace.

Article 12 of the Convention provides for the allocation and determination of the responsibilities of the parties to the triangular employment relationship. These responsibilities include, "collective bargaining, minimum wages, working time and other working conditions, statutory social benefits, access to training, protection in the field of occupational safety and health, compensation in case of occupational accidents or diseases, compensation in case of insolvency and protection of workers claims and lastly, maternity protection and benefits, and parental protection and benefits."[255] However, the Convention failed to provide for how the roles and responsibilities of the parties to the triangular employment relationship must be divided. This responsibility was left to the member states without the necessary conceptual framework of doing such. It is argued that the failure to provide for guidelines on how the roles and responsibilities are to be divided in the triangular employment relationship has left uncertainty and confusion with regards to the actual identity of the employer. If the Convention had specifically allocated the roles and responsibilities of the client and the labour broker in the triangular employment relationship, abusive practices in this regard would have been avoided. Article 12 has the potential of equating agency employees with standard employees by providing them with rights that are afforded to standard employees. The problem with the article is that in most cases, agency employees are not aware of who their employer is in the triangular employment relationship. Thus, these workers have rights that they cannot enforce. The omission in this regard is to the detriment of agency workers.[256]

3.2.1.2. Private Employment Agencies Recommendation, 1997

Following the adoption of the Private Employment Convention 1997, the ILO sought to amend some of the provisions in the Convention and adopted the Private Employment

[254] Aletter and Van Eck (n 155 above) 303.
[255] Article 12 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[256] Aletter and Van Eck (n 155 above) 303.

Agencies Recommendation.[257] The Recommendation provided that "member states should adopt all necessary measures to eliminate unethical practices by employment agencies."[258] Furthermore, the Recommendation provided that employment agencies must "provide workers with written contracts of employment, where appropriate."[259] This was to ensure that agency employees understand their rights and obligations and they can also provide conclusive proof of their employment.[260] This recommendation recognises the significant role which private employment agencies are playing in the functioning of the labour market.[261] It also regulates the functioning of private employment agencies and to protect its employees.[262]

Article 10 provides that "private employment agencies must be encouraged to promote equality in employment through affirmative action."[263] To ensure that agency employees are selected fairly, the Recommendation provides that "private employment agencies and the competent authority should take measures to promote the utilization of proper, fair and efficient selection methods".[264] Additionally, the Recommendation ensures that agency employees are afforded the opportunity to move from temporary agency work to direct employment with the client by providing that "private employment agencies should not prevent a client from hiring an employee that has been placed with it, by the employment agency, or restrict the mobility of an employee."[265]

The following is a discussion of the extent to which the amendments to the 1995 LRA with regards to TES comply with the Convention and Recommendation stipulated above. This

[257] Gumede (n 231 above) 15.
[258] Article 4 of the International Labour Organisation Private Employment Agencies Recommendations, 1997.
[259] Article 5 of the International Labour Organisation Private Employment Agencies Recommendations, 1997.
[260] Gumede (n 231 above) 15.
[261] Article 2 of the International Labour Organisation Private Employment Recommendations, 1997.
[262] Gumede (n 231 above) 15.
[263] Article 10 of the International Labour Organisation Private Employment Agencies Recommendations, 1997.
[264] Article 13 of the International Labour Organisation Private Employment Agencies Recommendations, 1997
[265] Article 15 of the International Labour Organisation Private Employment Agencies Recommendations, 1997

discussion will help to answer whether employees in TES are given adequate protection in South Africa.

3.2.2. The extent to which the provisions of the 1995 LRA, as amended, complies with ILO norms

In examining the extent to which the 1995 LRA with regards to the regulation of TES comply with ILO norms, the researcher extracts several key features from the ILO's Convention, 1997 and recommendation, 1997 and evaluate them against the regulation of TES in South Africa. Without being too prescriptive, the ILO endorses the notion that TES should not be prohibited and should be allowed to operate within a flexible labour market.[266] Employees in agency employment have the following rights, namely:[267]

- The right to freedom of association and the right to collectively bargain;[268]
- The right 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;[269]
- The right to be furnished with written contract of employment;[270] and
- The right not to be prohibited from being employed directly by a client, the right not to be restricted with regards to occupational mobility and the right not be penalised for accepting employment elsewhere,[271]

To incorporate Article 4 of the Private Employment Agencies Convention which confers the right to collectively bargain and the right to form or join a trade union to agency workers, In 2014 the LRAA provided for collective bargaining rights to employees in TES. Section 37(4C) of the 2014 LRAA provides "that an employee in a TES may not be employed by a TES on terms and conditions that are less favourable than the provisions of sectorial determinations or collective agreements, which are applicable to the

[266] Article 2 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[267] Article 4 of the International Labour Organisation Private Employment Agencies Recommendations, 1997.
[268] Article 4 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[269] Article 5 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[270] Article 5 of the International Labour Organisation Private Employment Agencies Convention, 1997.
[271] Article 15 of the International Labour Organisation Private Employment Agencies Recommendations, 1997.

employees of the client where the agency worker renders services."[272] Despite the difficulties in recruiting employees in a TES by trade union because of the nature of work they perform, the introduction of section 37(4C) of the 2014 LRAA permits the employees to benefit from section 32 of the 2014 LRAA.[273] Section 32 of the 2014 LRAA provides "for the extension of collective bargaining agreement concluded at sectorial level to persons not directly involved in the collective negotiations and not party to the agreement concluded in the relevant bargaining council."[274] Thus, although these workers might not belong to a specific trade union, due to the above mentioned difficulty, they are still covered by collective agreements which are applicable to employees of the client where they are placed. This provides a certain degree of protection to this vulnerable group of workers.

Secondly, to incorporate Article 5(1) of the Private Employment Agencies Convention which provides for the protection against unfair discrimination with regards to TES employees, South Africa included TES employees to benefit from the provisions of Chapter III and Chapter VI of the EEA. In addition to the fact that all workers in a TES are protected against unfair discrimination in terms of the EEA, lower earning employees in a TES are also expressly protected in so far as they have the right to 'equal treatment', compared to direct employees of the client performing similar work.[275] The researcher accepts this to mean that they are entitled to equal conditions of service. This goes further than the international norm and the researcher fully supports this development. However, it must be pointed out that international norms, as previously argued, only establish a low base and should probably have been improved to include equality of treatment and condition of service rather than merely proscribing unfair discrimination based on arbitrary ground.[276]

Despite that, this study is centred on the regulation of lower and/or vulnerable employees employed in a TES, it is worth mentioning that the amendments do not cater for higher-earning employees in a temporary employment relationship, particularly in relation to the

[272] Labour Relations Amendment Act 6 of 2014 sec 37(4C).
[273] Labour Relations Act 66 of 1995 section 32(1).
[274] Labour Relations Act 66 of 1995 sec 32.
[275] Aletter and Van Eck (n 155 above) 308-309.
[276] Aletter and Van Eck (n 155 above) 309.

right to equal treatment. This category of employees 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.[277] In this regard, it is the researcher's opinion that the 2014 LRAA amendments comply with international norms with regards to lower-earning TES employees. The protection afforded to TES employees in the ILO Convention and Recommendation applies to both lower and higher-earing employees in a TES. Therefore, South Africa should extend equality rights to higher earning employees in a TES, too.[278]

Unfortunately, South Africa does not meet the third norm, which relates to the clear allocation of responsibilities of the labour broker and of the client vis-à-vis employees in a TES.[279] Admittedly, the 2014 LRAA amendments do specify that "the labour broker and the client are jointly and severally liable in respect of the provisions of the BCEA, sectoral determinations and collective agreements."[280] However, it is the researcher's opinion that the legislature has dismally failed in its attempt to provide clarity on who between the client and the labour broker, should the employee cite in unfair dismissal and unfair discrimination disputes and further, who will be responsible for reinstating the unfairly dismissed employees. It is not clear whether only the client or both the client and the labour broker are deemed to be employers in respect of unfair labour practice and unfair dismissal disputes.[281] Regrettably, the ILO norms do not provide guidance in respect of the interpretation of South Africa's deeming provision.[282] The only guidance that can be assembled from international norms is that the definition of TES recognises the traditional triangular relationship, which recognises that the labour broker employs the employee.[283]

Aletter and Van Eck submitted that the LRA amendments woefully fail the fourth principle. This is in as far as employees in a TES should not be prohibited from being employed directly by clients subsequent to being placed with them.[284] In support of the

[277] Aletter and Van Eck (n 155 above) 309.
[278] Aletter (n 94 above) 85.
[279] Aletter and Van Eck (n 155 above) 309.
[280] Aletter and Van Eck (n 155 above) 309.
[281] Aletter and Van Eck (n 155 above) 309.
[282] Aletter and Van Eck (n 155 above) 309.
[283] Aletter and Van Eck (n 155 above) 309.
[284] Aletter and Van Eck (n 155 above) 310.

aforementioned, they argued that 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 clients to use this as an opportunity to evaluate TES workers for future, more secure employment.[285] It is the researcher's opinion that the reasoning behind temporary employment services is not only to employ persons for that specific period of time and consequently dispose of them at a later stage, but rather serves as a stepping stone in an upward transition to better work and, perhaps, permanent employment. Temporary work, on the other hand, serves as experiential and equips employees in such work with skills for better opportunities in the future. Thus, this loophole has to be rectified by means of additional regulation.

An exhaustive approach in analysing the amendments would deduce that the majority of the amendments are aligned with the international norms. 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.[286] It is the researcher's opinion that South Africa recognises and regulates TES. However, their operation is not banned. A significant shortcoming of the amendments is that they fail to include the two aspects identified above. These omissions, together with the fact that all workers in a TES earning above the threshold are excluded from most of the additional protective measures introduced by the 2014 amendments, result in lower protection for workers in a TES than is the case under international standards of the ILO.

3.3. Conclusion

This chapter detailed the South African statutory regulation of TES in chronological order. The discussion concluded that the statutory regulation of TES has proven comprehensively difficult to regulate with the effect that vulnerable employees in a TES fall victim to dishonest labour brokers and their clients, who exploit them. Furthermore, the detailed legislative framework changes helped in answering the question that this study seeks to determine, which is whether the amendments to the 1995 LRA, particularly

[285] Aletter and Van Eck (n 155 above) 310.
[286] Aletter and Van Eck (n 155 above) 308.

section 198A, provide adequate protection to the vulnerable employees employed by TES.

This chapter deduced that section 198A of the 2014 LRAA does provide adequate protection to vulnerable employees employed by TES. It does so by putting a time limit of the extent to which employees can be employed in TES. This specific provision curbs the abusive practice of placing an employee on a temporary service for a long time without justification and without a possibility of being employed permanently by the labour broker's client. It further provides for job security for the placed employees because after the lapse of the specified 3 months' period, the placed employees become the employees of the client, with an added advantage of being treated on no less favourable terms than those given to comparable employees.

The statutory regulation of TES was further weighed against international norms. This chapter indicated that although South Africa is a member state to the International Labour Organisation, it has not ratified the ILO Private Employment Agencies Convention and Recommendations. However, when critically analysing the amendments to the 1995 LRA, it can be argued that South Africa's legislative framework with regards to TES was influenced by the ILO Private Employment Agencies Convention and Recommendations. The amendments to the 1995 LRA are aligned with the ILO Private Employment Agencies Convention and Recommendations only with regards to the protection afforded to lower-earning employees by TESs in the exclusion of higher-earning employees. Furthermore, it was argued that this assertion leaves higher-earning employees employed by a TES at a disadvantage, compared to lower-earning employees. It was further argued that although South Africa is not bound to comply with the ILO Private Employment Agencies Convention and Recommendations, it would be beneficial to use the ILO norms as a guide in drafting additional regulation that would best protect higher-earning employees in TESs.

CHAPTER 4

CASE LAW FOLLOWING THE 2014 AMENDMENTS TO THE 1995 LABOUR RELATIONS ACT

4. INTRODUCTION

The aim of this study is to determine whether the amendments to the 1995 LRA, particularly section 198A, provide adequate protection to vulnerable employees employed by TES. In reaching the foregoing aim, chapter 3 discussed the South African legislative framework changes in respect of TES. The ILO was also discussed as the body or organization responsible for drafting labour legislation at an international law level. The researcher evaluated its Conventions and Recommendations with regards to agency work, to ascertain the extent to which the Conventions and Recommendations influenced South Africa's TES regulation.

Furthermore, South Africa's legislative framework with regards to TES was evaluated through selected constitutional provisions and labour statutes. It was argued that South Africa does to a certain extent regulate and recognize TES. However, the discussion concluded that regulating triangular employment relationships is quite difficult because employees employed in triangular employment relationships were being exploited by labour brokers and their clients, by presenting the triangular employment relationship as one of independent contracting and further, concealing the actual identity of the employer in such an employment relationship.

Bearing the above-mentioned in mind, traditionally, labour law statutes are aimed at regulating standard employment relationships.[287] Standard employment is a relationship between an employer and an employee employed on a full-time basis, for an indefinite period. This employment relationship apportions rights and obligations on the employer as well as the employee. Consequently, for an employee in a standard employment relationship to enjoy labour law protection, he/she must prove that there is an employment

[287] EBS Lalumbe 'The 'new' employment relationship created to protect vulnerable temporary employees: A legal analysis of case law' unpublished MA dissertation, University of Johannesburg, 2018 31.

relationship.[288] Furthermore, the employee must be able to identify his/her actual employer for the purposes of the application of labour laws.[289] Identifying an employer in triangular employment relationships is difficult, as opposed to identifying an employer in standard employment. This is so because a triangular employment relationship consists of three parties; namely, the labour broker, the client and the employee. Both the labour broker and the client possess the qualities of being an employer of the placed employee. Thus, it is difficult for the employee to identify the actual employer for the purposes of the application of labour laws.[290]

To remedy the above situation, the legislature enacted section 198A(3)(b) 2014 LRAA and section 198A(3)(b) of the 2014 LRAA as amended. Furthermore, the legislature created a new statutory employer by providing that "for the purposes of this Act, an employee performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2)".[291] This meant that in instances where a placed employee was performing a 'temporary service', the labour broker was regarded as the employer. In this way, for the duration of the 'temporary service'. The statute also identified an employer (the labour broker) for the placed employee who would be required to and would comply with the labour law obligations.

Section 198A(3)(b) of the 2014 LRAA as amended went on to create another statutory employer for the placed employee. It provided that an employee who has been placed at the workplace of the client by the labour broker for a period exceeding 3 months and continues to render services to the client, is deemed to be permanently employed by the client. This meant that the labour broker ceased to be the statutory employer of the placed employee, therefore, making the client the employer of the placed employee. The interpretation and application of this section sparked a debate on whether the section gave rise to a dual employment interpretation, where both the labor broker and the client became the employer of the placed employee after 3 months of performing a temporary

[288] Lalumbe (n 287 above) 31.
[289] Lalumbe (n 287 above) 31.
[290] Lalumbe (n 287 above) 31.
[291] Labour Relations Act 66 of 1995 sec 198(3)(a).

service or whether the section gave rise to a sole employment interpretation, where the client became the employer of the placed employee after 3 months of performing a temporary service. The uncertainty of this subsection placed the TES employees in a precarious position. This is because they were again left without the identity of their employer in instances, where they were no longer performing a temporary service, as contemplated by section 198A(1) of the 2014 LRAA. Meaning, they did not have an employer who will be required to and will comply with the statutory obligations of the employer.

Given the profound interests at stake for vulnerable employees in a TES, this debate went through all the prescribed labour dispute resolution structures in the *Assign Services* case for resolution. Therefore, this chapter discusses how the prescribed dispute resolution structures in the *Assign Services* case dealt with the application and interpretation of section 198A(3)(b) of the 2014 LRAA and whether the sole employment interpretation upheld by the CC in the *Assign Services* case assisted in enhancing the legal protection of vulnerable employees in a temporary employment service. This discussion provides that the sole employment interpretation held by the CC does to a limited extent enhance the protection of TES employees. However, questions regarding the interpretation and effect of section 198A(3)(b) 2014 LRAA on the rights and obligations of the labour broker, the client and the employee after the expiry of the three-months period were left unanswered.

Furthermore, this chapter provides a critical analysis of how the lower courts are interpreting and applying the *Assign Services* judgment. A discussion of selected cases post the *Assign Services* judgment would demonstrate the difficulties the lower courts have in harmonizing the judgment with the current provisions of the 1995 LRA with regards to the regulation of TES.

4.1. *Assign Services* case

The researcher discusses the *Assign Services* case in the following manner; Firstly, the researcher discusses the facts of the case. Then, the researcher outlines the legal question which the different dispute resolution structures were called upon to answer. Thirdly, the arguments of the parties to the dispute are discussed. Fourthly, the ruling of

the Courts are discussed. Lastly, the researcher's analysis of the arguments raised by the parties and the Court's ruling are discussed.

4.1.1. Proceedings before the CCMA

4.1.1.1. Facts of the case

Krost Shelving Pty (Ltd) is a company dealing with storage solutions. It has a workforce of 40 permanent employees and roughly about 90 part-time, temporary and fixed-term contract employees. Krost Shelving entered a service level agreement with Assign Service (Pty) Ltd, a registered labour broker, to supply approximately 22 to 40 temporary employees, as desired by Krost Shelving. At the time of the hearing, Assign Services had supplied 22 temporary employees to Krost Shelving. On the 1st of April 2015, it was discovered that the 22 employees that Assign Services had placed with Krost Shelving had been supplying labour for a period of more than three months, triggering the application of section 198A(3)(b) of the 2014 LRAA. Section 198A(3)(b) 2014 LRAA provides that if a labour broker places employees for more than 3 months with a client, those employees by operation of law automatically become the employees of the client for an indefinite basis for the purposes of the 1995 LRA only. Despite the application of section 198A(3)(b) of the 2014 LRAA, the 22 placed employees continued to work for the client, with Assign Services responsible for performing human resources related functions, such as disciplining the placed employees and remunerating the placed employees. Krost Shelving performed human resources related function to its direct employees.

It was common cause that some of the 22 temporary employees placed with Krost Shelving were members of the National Union of Metalworkers of South Africa(NUMSA). The placed employees approached NUMSA to refer the matter to the CCMA in terms of section 198D(1) of then 2014 LRAA which confers jurisdiction on the CCMA to preside over disputes relating to the application and/or interpretation of section 198A of the 2014 LRAA.

4.1.1.2. Legal question to be to be answered by the CCMA

The CCMA was called upon to determine the correct interpretation of section 198A(3)(b) of the 2014 LRAA.

4.1.1.3. Arguments of the parties to the dispute

Assign Services (the applicant) argued that the deeming provision has the effect that the placed employees remain the applicant's employees at common law and all labour legislations and are only deemed to be the first respondent's employees with regards to the 1995 LRA.[292] This, according to Assign Services, is referred to as the 'dual employment position'. In support of the dual employment argument, Assign Services first looked at the definition of the term deemed envisaged by section 198A(3)(b) of the 214 LRAA. It argued that in *S v Rosanthall*[293], the court held that the word deemed does not have a specific meaning. Thus, its meaning must be ascertained from the context within which it was used.[294] This meant that the term 'deemed' does not have a consistent and/or unchanging meaning, which can be applied in every case but must be understood within the context where it is used.[295] In this case, the meaning of the term 'deemed' can be construed from the purpose of the amendments. Thus, section 198A(3)(b) must be read as a whole and not in part; that is, in the context of section 198 and section 198A, as opposed to being read in isolation of other amendments aimed at providing greater protection for employees in TES.

Assign Services further referred to section 198(4A)(a) and section 198A(5) of the 2014 LRAA in support of its dual employer position. It argued that by making both the client and the labour broker the employer of the placed employees post the three-months period, it provides greater protection for vulnerable employees in a TES. This is so, because soon after the triggering of section 198A(3)(b) of the 2014 LRAA, the legislature provides that the placed employees must be afforded the same basic working and employment conditions afforded to the employees performing similar work that are

[292] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 3.2.
[293] *S v Rosanthall* 1980 (1) SA 65 (A).
[294] *S v Rosanthall* 1980 (1) SA 65 (A) para 15.
[295] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and* Another (2015) 9 BALR 940 (CCMA) para 4.1.

directly employed by the client.[296] This is something which was not afforded to the placed employees before the triggering of section 198A(3)(b) of the 2014 LRAA. Furthermore, it was argued that section 198(4A) of the 2014 LRAA, which provides for joint and several liability between the client and the labour broker for infringements of the 2014 LRAA and the BCEA, hints a dual employment interpretation.[297]

NUMSA argued that for the purposes of the 1995 LRA, the employees that were placed with Frost Shelving should be deemed to be permanent employees of Frost Shelving only, starting from the 1st of April 2015.[298] This is referred to as the 'sole employment position'. In support of its argument, it argued that the word deemed can easily be substituted with the word is. According to NUMSA, the word deemed is often used in statutes loosely. Meaning, it does not have any generic meaning. NUMSA argued further that section 198A(3)(b)(i) of the 2014 LRAA creates a legal fiction. This meant that section 198A(3)(b)(i) of the 2014 LRAA creates a legal rule which provides that the client becomes the employer of the placed employee after the lapse of a three-month period. This is on condition that the placed employee continues to render services to the client of the labour broker.[299]

NUMSA also argued that section 198(4A) of the 2014 LRAA applies to both higher earning employees in a TES and lower earning employees in a TES. Hence, the joint and several liability clause is found in section 198 of the 1995 LRA and not section 198A of the 2014 LRAA which provides for additional protection of lower earning employees in a TES. Thus, it cannot be taken to mean that it creates a dual employment interpretation because higher earning employees in a TES do not enjoy the protection afforded to lower earning employees under section 198A. The joint and several liability clause envisaged by section 198(4A) of the 2014 LRAA "does not create any new liabilities for the parties

[296] Labour Relations Act 66 of 1995 sec 198A (5).
[297] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 4.5
[298] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 3.3.
[299] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 4.2.

concerned."[300] In response to the Assign Services argument in respect of section 198A (5) of the 2014 LRAA, NUMSA contended that the aim of section 198A(5) of the 2014 LRAA is to ensure that placed employees receive better employment conditions after the triggering of the deeming provision, provided that the placed employees continue to render services to the client. Therefore, a mere transfer of employment contracts contemplated by section 197 of the 1995 LRA would not be sufficient to provide placed employees with better employment conditions after the triggering of the deeming provision.[301]

4.1.1.4. CCMA ruling

The Commissioner submitted that section 198A(3)(b) of the 2014 LRAA must be compared to the law of adoption.[302] In adoption, the law creates a legal parent for the child. In other words, for all purposes the adoptive parent becomes the parent of the adoptive child with all the rights and responsibilities towards the adoptive child. Therefore, in ascertaining what the best interests of the child are, the law affords the adoptive parents with all the rights and responsibilities that the biological parents would possess in terms of the upbringing of the adoptive child.[303] The biological parent of the child forfeits his/her rights and obligations towards the child. This is done to avoid uncertainty and confusion on the part of the adoptive child, adoptive parent and the biological parents of the child.

Referring to the case at hand, the Commissioner held that if the Court was to favor the dual employment interpretation, confusion and uncertainty might arise. Just to mention a few, who would oversee the discipline of the placed employees in cases of misconduct and which disciplinary code will be followed between the disciplinary code of the labour broker and that of the client? Furthermore, in cases where an Arbitrator or Commissioner issues a re-instatement award, who will be responsible for reinstating the placed

[300] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 4.7.
[301] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 4.8.
[302] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 5.12.
[303] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 5.12.

employee?.[304] In support of the afore-mentioned, the Commissioner referred to the Explanatory Memorandum of the 2014 LRAA which provide that the aim of amending section 198 of the 1995 LRA is to effectively address the problems that vulnerable employees employed in TESs face. Thus, allowing confusion and uncertainty to persist in such a manner would not be in line with the aim of the amendments envisaged by the Explanatory Memorandum.

The Commissioner held in favor of NUMSA's argument of sole employer interpretation of section 198A(3)(b) of the 2014 LRAA.

4.1.1.5. The researcher's analysis of the arguments and the CCMA judgement

Moeketsi, agreed with the Commissioner's interpretation on the main issue, that the client becomes the sole employer of the placed employees after the triggering of the deeming provision. Moeketsi submitted that the Commissioner's finding meant that the labour broker was, because of the sole employment interpretation, no longer considered an employer of the placed workers after the lapsing of the three-month period, and was released from any employer obligations it owed to the placed workers.[305] However, Moeketsi went on to criticize the Commissioner's ruling and argued that the Commissioner made no pronouncement on the terms and conditions that the placed employees would be employed by the client after the triggering of the deeming provision.[306] The researcher agrees with Moeketsi's argument and contends that this position remains even after the CC's decision in the *Assign Services* case. Both the CCMA, the LC, the LAC and the CC in this matter have in their interpretation failed to provide for the duties and obligations of the parties to the triangular employment relationship post the deeming provision.[307]

Aletter[308] also agreed with the Commissioner's interpretation on the main issue that the client becomes the employer of the placed employees after the triggering of the deeming

[304] *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd and Another* (2015) 9 BALR 940 (CCMA) para 5.13.
[305] Moeketsi (n 156 above) 41.
[306]Moeketsi (n 156 above) 41
[307] Moeketsi (n 156 above) 41.
[308] Aletter (n 94 above) 158.

provision. In support of the Commissioner's ruling, Aletter argued that the Commissioner's ruling was motivated by the pressing need to protect vulnerable employees in a TES. Furthermore, Aletter argued that the Commissioner's ruling was influenced by the social justice principle which calls for equality in the workplace.[309] The researcher supports Aletter's submissions and adds that it is the duty of the Commissioner when interpreting the provisions of the 1995 LRA to bear in mind its purpose of the specific Act. The purpose of the 1995 LRA is to "advance economic development, social justice, labour peace and democratization of the workplace".[310] Therefore, by ensuring that vulnerable employees in a TES are given adequate protection, the principle of social justice is upheld. The researcher observes that that the sole employer interpretation was preferred over the dual employer interpretation in the early stages of litigation amongst scholars.

The researcher submits that the Commissioner was correct in preferring the sole employment interpretation over the dual employer interpretation. The researcher argues that the amendments were brought to curb abusive practices and increase the protection of vulnerable employees in a TES, which forms part of non-standard forms of work. It seems logical that when the placed employee is no longer performing a temporary service as envisaged by section 198A(3) of the 2014 LRAA, indefinite employment by operation of law emanates with the client thereafter. Therefore, the placed employee is transitioned out of non-standard employment into standard employment, which has greater security for the placed employee.

Furthermore, prior to the 2014 amendments, parties to the triangular employment relationship were escaping liability in legal proceedings, by contending that they were not the employers of the placed employees. Therefore, the placed employees had rights which were not enforceable. Although they had a right to sue or to take their employer to court, the abusive practices of disguising the true identity of the employer made it difficult for the placed employee to cite and sue the correct party. It would be futile for the legislature to note this abusive practice and still enact a provision that provides for dual

[309] Aletter (n 94 above) 158.
[310] Labour Relations Act 66 of 1995 sec 1.

employment. The researcher contends that it was the legislature's intention to provide the placed employee with one employer at a time.

4.1.2. Proceedings before the LC

Assign Services was aggrieved by the CCMA's arbitration award and consequently applied for a review of the CCMA's arbitration award in the LC.[311] Assign Services based its review application on the grounds that the sole employment interpretation held by the CCMA was a gross material error in law.

4.1.2.1. The LC's ruling and analysis of the parties' arguments

The learned judge in this case contended that NUMSA's position of sole employment interpretation is misleading because in its heads of arguments it acknowledged that post the deeming, the amendments did not put an end to the contractual relationship that exists between the labour broker and the placed employees and further that the amendments do not dispossess the labour broker of its rights and responsibilities conferred by the contractual relationship.[312] Therefore, the continuation of the contractual relationship between the labour broker and the placed employees post the deeming envisage that both the client and the labour broker become dual employers of the placed employees.

The LC further criticized the arguments raised by the respondents in support of the dual employment interpretation. The LC held that the argument in support of the dual employment interpretation raised by the respondent may be construed to mean that the employment relationship that the client has with the placed employee post deeming and the contractual employment that the labour broker has with the placed employee post deeming operate within the same borders. However, this is not the case because the client only becomes the employer for the purposes of the LRA only. Thus, the two

[311] *Assign Services (Pty) Ltd v Commission, Mediation and Arbitration and others* (2015) JOL 33875 (LC).
[312] *Assign Services (Pty) Ltd v Commission, Mediation and Arbitration and others* (2015) JOL 33875 (LC) para 3.

employment relationships do not operate within the same boundaries and/or are "co-extensive in content".[313]

The LC held that the fact that a contractual relationship between a placed employee and the labour broker exists post deeming together with the employment relationship between the client and the placed employees that is triggered by the deeming provision is not in dispute.[314] However, what is in dispute is whether the operation of the employment relationship between the client and the placed employees post deeming relieves the labour broker of its rights and obligations that arise out of its employment relationship for the purposes of the LRA. Assign Services contends that both the client and the labour broker equally enjoy the rights and obligations that arise from their respective employment relationship with regards to the 1995 LRA whilst NUMSA contends that only the client has rights and obligations conferred upon it by the employment relationship with regards to the 1995 LRA.

The LC held in consequence of the above that, dual employment interpretation, is best explained by what is called a '*qua* employer'. A '*qua* employer' is someone who acts in the capacity of the actual employer. Therefore, in dual employment, the labour broker being the '*qua* employer,' exercises the rights and obligations conferred to it by the employment relationship to "relieve the client of its comparable burdens".[315] The labour broker can stand in the position or act in the capacity of the client and dismiss the employee, as provided by the 1995 LRA. Furthermore, dismissal would be regarded as a dismissal effected by the client. This explanation justifies the continued existence of the labour broker as the dual employer of the placed employee post the deeming provision.

The LC held that section 198, as amended, provides that the labour broker is the employer of the placed employee both at common and statutory law. This means that the labour broker has rights and obligations arising from the employment relationship both at common law and with regards to legislation, and in this case, with regards to the 1995

[313] *Assign Services (Pty) Ltd v Commission, Mediation and Arbitration and others* (2015) JOL 33875 (LC) para 4.
[314] *Assign Services (Pty) Ltd v Commission, Mediation and Arbitration and others* (2015) JOL 33875 (LC) para 5.
[315] *Assign Services (Pty) Ltd v Commission, Mediation and Arbitration and others* (2015) JOL 33875 (LC) para 6.

LRA. This position is further supported by the joint and several liability clause in section 198(4A) of the 2014 LRAA. Furthermore, section 198A(3)(b) of the 2014 LRAA confers the employer's rights and responsibilities to a client with regards to the provisions of the 1995 LRA only. Thus, these two positions operate in tandem and without obscuring the other.

4.1.2.2. The researcher's analysis of the LC's decision

The LC's decision has been criticized by some academics on the basis that it is unlikely to have practical effect in cases where employees seek to exercise their rights in terms of section 198A of the 2014 LRAA against the client.[316] Forere[317] argues "that as much as the LC acknowledged the ambiguity associated with the interpretation of section 198A(3)(b) of the 2014 LRAA, it did not go far enough in examining the contracts of employment between the employees and the labour broker."[318] As such, had the LC embraced a purposive approach it could have come to a different conclusion.[319]

The researcher agrees with Forere's submission and argues that should the LC have adopted the purposive approach, which is the intention of the legislature in drafting the amendments, the LC would have upheld CCMA's ruling of sole employment interpretation. The purpose and /or intention of the legislature can be ascertained from the memorandum of objectives accompanying the first version of the Labour Relations Amendment Bill.[320] It provides that the amendment to section 198 and the new section 198A of the 2014 LRAA were introduced to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant 'temporary work'. It did so by restricting temporary service to a period of three-months and further held that in cases where the placed worker is not performing such a temporary service, then that employee is deemed to be employed on an indefinite basis by the client. This means that the legislature intended for placed employees to transition from non-standard employment to standard employment which assumes that an employment relationship

[316] Gumede (n 231 above) 47.
[317] Forere (n 27 above0 391.
[318] Forere (n 27 above) 391.
[319] Forere (n 27 above) 391.
[320] *Assign Services (Pty) Ltd v Commission, Mediation and Arbitration and others* (2015) JOL 33875 (LC) para 14.

exists between an employer and its employee on a full-time basis and for an indefinite period. This kind of employment relationship identifies the employer of the employee to secure legislative protection. Therefore, only one employer, which is the client exists post the deeming since it is a transition from temporary service to an indefinite, bilateral employment relationship.

Benjamin[321], argued that the court was incorrect to conclude that section 198(2) of the of the 1995 LRA is consistent with the common-law position while section 198A(3)(b) of the 2014 LRAA is a deeming provision.[322] It is the researcher's view that at common law, the labour broker does not satisfy the requirements of an employer. This is so because the unique triangular employment relationship undermines the efficacy of the dominant impression, control or organizational tests adopted by common-law to identify an employment relationship.[323] The employee of the labour broker is effectively controlled by and subsumed within the organization of the client. It is the client that "determines the parameters of the relationship and is dominant in the relationship".[324]

However, the labour broker in terms of section 198(2) of the 1995 LRA, only remunerates and procures persons to perform a temporary service for a client. However, he does not control, supervise the placed employees and neither are the employees integrated to his organization. The placed employees operate as a commodity to the organization of the labour broker and are only regarded as the employees of the labour broker when placed in the premises or workplace of the client and not prior to that. Therefore, section 198(2) of the 2014 LRAA creates a statutory employment contract between the labour broker and the placed employee during the thee-months of being placed with the client. This contract is then altered upon the deeming and the client becomes the employer. The employment relationship is created by operation of law and not by satisfying the tests adopted by common law to identify an employment relationship.

[321] Benjamin (n 9 above) 38
[322] Benjamin (n 9 above) 38.
[323] T Cohen 'Placing substance over form-identifying the true parties to an employment relationship' (2008) 29 *Industrial Law Journal* 871.
[324] Cohen (n 323 above) 871.

Notably, Benjamin further argued that sections 198(2) of the 1995 LRA and 198A(3)(b) of the 2014 LRAA cannot operate in tandem to establish the identity of the true employer.[325] Aletter, in support of Benjamin's argument, contended that if the legislature had intended for two employment relationships, the legislature would have surely provided a clearer division of duties between the labour broker and the client in respect of the placed employee.[326] She contended that before the amendments, placed employees were uncertain whether the labour broker or the client was responsible for the obligations of the employer.[327] Thus, the identification of who is the employer prior and post deeming would remove the uncertainty that exists.[328] This submission supports and asserts the researcher's argument of sole employment interpretation and the salient point reiterated by this part that the sole employer interpretation is in line with the intention of the legislature and provides greater protection to vulnerable employees in temporary employment services by transitioning them from temporary services to an indefinite, bilateral contract of employment.

4.1.3. Proceedings before the LAC

The matter was appealed to the LAC.[329] The LAC noted that the dispute between the parties to the proceedings is the proper interpretation and effect of section 198A(3)(b)(i) of the 2014 LRAA.[330]

4.1.3.1. Arguments by the parties to the dispute

Counsel for the applicant(NUMSA) argued that the purpose of section 198(2)of the 1995 LRA is to create a statutory employer for the placed employee performing a temporary

[325] In *LAD Brokers v Mandla* (2002) (6) SA 43 (LAC), the LAC held that "for the purposes of common law, a labour broker is not necessarily regarded as the employer. A labour broker can in truth operate without concluding contracts of employment with the workers it places. A labour broker is therefore simply, required to place a worker with a client for a fee, and remunerate the worker, to be considered as the statutory employer for section 198. The LAC held that this was less onerous than the test for establishing conventional employment at common law. And it was therefore, incorrect to contend that a labour broker is usually in an employment relationship with the workers it places".
[326] Aletter (n 94 above) 156.
[327] Aletter (n 94 above) 156.
[328] Aletter (n 94 above) 156.
[329] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC).
[330] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC) para 1.

service and does not mean that the labour broker becomes the employer of the placed employee at common law. Therefore, the LC erred in holding that section 198(2) of the 1995 LRA proves beyond doubt that the labour broker is the employer of the placed employee at common law. Counsel for the applicant argued that the purpose behind creating a statutory employer for the placed employee is because both the conventional tests of identifying an employer at common law and statutory law are inefficient and/or inadequate in tripartite employment relationships.[331]

Furthermore, it was argued that for the legislature to recognize that the conventional tests adopted at common law and statutory law are inadequate to identify an employer in temporary employment relationships, thereby deeming the labour broker as the employer of the placed employee performing a temporary service. This indicates that a labour broker can procure employees for the client and subsequently place them at the client's workplace without being the employer of the placed employees. Therefore, the relationship that ensues out of the contract that exists between the labour broker and the placed employees does not constitute an employment relationship. Hence, the legislature created a statutory employer for the placed employee performing a temporary service.

Counsel for the first respondent (Assign Services), argued that the intention of the legislature in deeming the client as the employer of the placed employee no longer performing a temporary employment service was not to put a ban on temporary employment services post the temporary service but rather to retain it and further introduce the client as a dual employer of the placed employee.[332] Importantly, it was argued that the BCEA recognizes the labour broker as the employer of the placed employee performing a temporary service and also a placed employee no longer performing a temporary service.[333] Thus, the sole employment interpretation does not account for the differentiation between the BCEA and the 2014 amendments. In order to

[331] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC) para 20.
[332] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC) para 26.
[333] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae) 2017 10 BLLR 1008 (LAC)* para 27.

reconcile the two employment statutes, the dual employment interpretation must be favored.

4.1.3.2. The LAC's ruling

The LAC used the purposive interpretation to deduce the correct interpretation of section 198A(3)(b) of the 2014 LRAA.[334] The court, in interpreting section 198A(3)(a)-(b) of the 2014 LRAA, held that the identity of the employer in TES can be ascertained from the meaning of the term "temporary service," which is defined by section 198A(1)(a)-(c) of the 2014 LRAA. In instances where the placed employee was performing a temporary service, the legislation provided that the labour broker become the employer of the placed employee and in instances where the placed employee was no longer performing a temporary service, the client became the employer.

The LAC further asserted that section 198A(4) of the 2014 LRAA, which protects the placed employees against unfair dismissal, and section 198A(5) of the 2014 LRAA, which protects the placed employees against unfair discrimination, should not be interpreted to mean that the legislature intended for dual employment.[335] The aim of the above-mentioned sections are "to ensure that the deemed employees are fully integrated into the enterprise of the client as employees and the placed employee does not come about through a negotiated agreement or through the normal recruitment processes of the client."[336] The fact that the placed employee can cite both the labour broker and the client in disputes strengthens and/or supports the protection of vulnerable employees in a TES and limits temporary services to genuine temporary service, which is three months.[337]

The LAC upheld the Commissioner's sole employment interpretation.

4.1.3.3. The researcher's analysis of the Labour Appeal Court decision

[334] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC) para 31.
[335] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC) para 40.
[336] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC) para 40.
[337] *National Union of Metalworkers of South Africa v Assign Services (Casual Workers Advice Office and another as amici curiae)* 2017 10 BLLR 1008 (LAC) para 41.

The researcher argues that the LAC was correct in adopting the purposive approach in upholding the sole employment interpretation. This is supported by the Court in *Mahlamu v Commission for Concilliation, Mediation & Arbitration & Others*[338], which held that when interpreting the LRA, a purposive approach must be adopted to ensure that such interpretation is consistent with the Constitution.[339] It must be interpreted in a way that provides protection to workers against unfair dismissals.[340] The researcher submits that the purposive approach adopted by the LAC is further consistent with the approach the Court adopted in interpreting legislation in the *Natal Pension Fund v Endumeni Municpality*[341] case.

The judgement delivered in this case is leading regarding the principles of interpreting any legislation. Wallis JA accordingly held that the Courts must adopt a purposive approach when interpreting any document or legislation and if such material is capable of more than one meaning every possible meaning must be considered in relation to the ordinarily grammatical rules, context and syntax of that provision.[342] The LAC clearly stated that after the expiry of the three-month period, the labour broker ceases to be the employer of the placed worker and that by operation of law, the client becomes the employer of the placed employee. The Court further considered the rationale behind the phrase 'intention of the legislature', as a warning that the task they are engaged in, is to discern the meaning of the words used by others and not to impose their own views as to what would have been sensible for others to say.[343] Hence, it explains why they opted to consider the objects and purpose of the LRA and its Explanatory Memorandum accompanying the LRAA Bill, to ascertain the meaning and the intention of the legislature.

Furthermore, the LAC in its interpretation was sensible in that it considered which interpretation would be less onerous to implement for vulnerable employees in TES. It

[338] *Mahlamu v Commission for Conciliation, Mediation & Arbitration & Others* (2011) 32 ILJ 1122 (LC) para 12.
[339] *Mahlamu v Commission for Conciliation, Mediation & Arbitration & Others* (2011) 32 ILJ 1122 (LC) para 12.
[340] *Mahlamu v Commission for Conciliation, Mediation & Arbitration & Others* (2011) 32 ILJ 1122 (LC) para 12.
[341] *Natal Pension Fund v Endumeni Municipality* (2012) 4 SA 593 (SCA).
[342] *Natal Pension Fund v Endumeni Municipality* (2012) 4 SA 593 (SCA) para 19.
[343] *Natal Pension Fund v Endumeni Municipality* (2012) 4 SA 593 (SCA) para 19.

considered the abusive practices that these employees had been subjected to in the past because of the triangular employment relationship. These employees already fell within a marginalized group with insecure employment. Thus, subjecting them to a treatment wherein they would still be unsure of the identity of their employer would be insensitive and unjustifiable in an open democratic society.

4.1.4. Proceedings before the CC

Assign Services appealed the LAC's decision to the CC.[344]

4.1.4.1. Arguments of the parties to the proceedings

Counsel for the applicant (Assign Services) argued that the decisions of the LAC inevitably put a ban on the operation of TES and, further, that this would have far-reaching consequences for South Africa's labour market.[345] It was also argued that the LAC judgement only considered the purpose of the 2014 amendments and did not consider the language used by the legislature in drafting section 198A(3)(b)of the 2014 LRAA. In so doing, the Court "failed to properly consider section 198A(3)(b) of the 2014 LRAA in the context of the rest of section 198 of the 1995 LRA and section 198A of the 2014 LRAA."[346] In summation, the amendments to the 1995 LRA hint on a dual employment interpretation. This is because the legislature did not specifically put an end to the employment relationship between the labour broker and the placed employee after the lapse of three months. Secondly, section 198(2) of the 1995 LRA is still in operation, together with section 198A of the 2014 LRAA, meaning that the two sections operate in tandem.

Thirdly, the sole employment interpretation would amount to placed employees losing some of the protections provided to them by section 198(4) of the 1995 LRA and section 198(4A) of the 2014 LRAA. Therefore, it does not support the aim of the legislature which is to provide vulnerable employees in TES with greater protection. Finally, the

[344] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 1.
[345] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 29.
[346] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 30.

employment relationship that exists between the labour broker and the placed employee at common law would continue without being regulated by legislation which would be subject to abuses by the parties to the triangular employment relationship.

Meanwhile, the applicant for the first respondent(NUMSA) contended that there are two separate deeming provisions that are created by section 198 of the 1995 LRA and section 198A of the 2014 LRAA. Furthermore, the two separate deeming provisions created by section 198 of the 1995 LRA and section 198A 2014 LRAA do not operate in tandem.[347] The deeming provision envisaged by section 198A of the 2014 LRAA merely creates a statutory employer for lower-paid employees in a TES and who are no longer performing a temporary service. However, in the case of higher-earning employees, the labour broker continues to be the employer of the placed employees.[348] Furthermore, the deeming provision envisaged by section 198A(3)(b) of the 2014 LRAA alters 'by operation of law' the employment relationship between the placed employee by deeming the client to be the employer of the placed employee. Notably, this alteration happens automatically and by operation of the law. Furthermore, in cases were the service level agreement between the labour broker and the client continues, a contractual relationship between the labour broker and the placed employees remains in operation. This means that the labour broker will continue to remunerate the employee in a capacity of a payroll administrator and not as an employer.[349]

4.1.4.2. The Constitutional Court ruling and the researcher's critical analysis.

The CC held that section 198A must be read in line with section 23 of the Constitution, which provides for the right to fair labour practice and must also be read in line with the purposes of the 1995 LRA.[350] This means that section 198A of the 2014 LRAA must be interpreted in such a way that the parties to a triangular employment relationship can meaningfully participate in labour relations in South Africa. The researcher concurs with

[347] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 31.
[348] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 32.
[349] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 32.
[350] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 42.

the CC and submits that by interpreting section 198A of the 2014 LRAA, in line with the right to fair labour practice, protects vulnerable employees in a TES against unfair labour practices.

The CC further held that section 198(2) of the 1995 LRA does not require the labour broker to conclude a contract of employment with the placed employees in order to be regarded as their employer. Instead, it happens by operation of law when the labour broker fulfils the requirements listed under section 198(1) of the 1995 LRA.[351] The researcher commends this submission and submits that the positive outcome of not having to conclude new contracts of employment post the triggering of the deeming provision is that the placed employees would not be subjected to the tiresome recruitment and hiring processes. This provides the vulnerable employees in a TES with a guarantee of employment post the triggering of the deeming provision. Furthermore, the placed employees automatically become the employees of the clients. This provides vulnerable employees in a TES with adequate protection from job losses post the three-month period.

The CC held that section 198(2) of the 1995 LRA uses the word 'is' to regard the labour broker as the employer and section 198A(3)(b) of the 2014 LRAA uses the word 'deemed' to regard the client as the employer.[352] The difference in the wording used does not imply that the latter is inferior to the former. Rather, both sections are regarded as deeming provisions irrespective of the wording used.[353] The researcher agrees with the interpretation of the CC and submit that this interpretation clears the ambiguity and uncertainty with regards to the actual employer of the placed employees post the triggering of the deeming provision. The placed employees will now have certainty of who their employer is prior and post the triggering of the deeming provision. This provides placed employees with adequate protection because they are now in a position where they know which party to cite in legal proceedings because where there is uncertainty

[351] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 44.
[352] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 45.
[353] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 45.

regarding which party to cite in legal proceedings, the placed employees have no rights at all.

In response to the joint and several liability clause argument raised by the Counsel for the Applicant, the CC held that section 198(4) of the 1995 LRA and section (4A) of the 2014 LRAA apply to placed employees performing a temporary services.[354] This means that section 198(4) of the 1995 LRA and section 198(4A) of the 2014 LRAA apply to placed employees prior to the triggering of the deeming provision. During this time, the labour broker is the employer. The CC held that the legislature created a statutory employer in section 198(2) of the 1995 LRA and section 198A(3)(b) of the 2014 LRAA, and further created statutory joint and several liability clauses.[355] However, the statutory joint and several liability clause does not imply dual employment of the labour broker and the client. Where the labour broker contravenes "a collective agreement that regulates terms and conditions of employment, a binding arbitration award that regulates terms and conditions of employment, the BCEA and/or a determination made in terms of the Wage Act" as contemplated in section 198(4) of the 1995 LRA and section 198(4A) of the 2014 LRAA, the labour broker remains the principal wrongdoer to the dispute and the client is cited as an accessory to the proceedings. In other words, the client incurs liability insofar as being an accessory to the wrong committed by the principal wrongdoer and not as being the employer of the placed employee. The researcher concurs with the above CC submission and asserts that the wing used by the legislature in drafting section 198(4) of the 1995 LRA and section 198A(4A) of the 2014 LRAA must not be confused to mean that the legislature intended a dual employment. The intention of the legislature in providing for joint and several liability is to ensure that there is no room for the parties (the labour broker and its client) to escape liability in legal proceedings. This provides placed employees performing a temporary service with protection against abusive practices.

The Court dismissed the appeal with costs and further upheld the sole employment interpretation. The judgement handed down by the CC in the Assign Services case was

[354] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 58.
[355] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa & Others* 2018 9 SA 837 (CC) para 58.

highly anticipated. The Assign Services judgement provided the much-needed clarity with regards to the actual identity of the employer of the placed employees upon the triggering of the deeming provision. The CC put an end to the sole and dual employment interpretation debate among scholars and held that the sole employment interpretation provides better protection to vulnerable employees in a triangular employment relationship. The researcher is of the view that the sole employment interpretation held by the CC was correct.

It is important to note that the Assign Services judgement is a clear warning by the courts that they would not be lenient in interpreting and applying the provisions of the LRA to ensure that the intention of the legislature is given effect. This also serves as a warning to labour brokers together with their clients to refrain from engaging in abusive practices that places vulnerable employees in a TES in a precarious position.

The finding of the CC plays a significant role in that it strengthens the provision that a termination of employment of the employee, to avoid the operation of the deeming provision would amount to a dismissal.[356] Therefore, the current position of the law in respect of the deeming provision is that the labour broker is the employer of the placed employee until the deeming section becomes effective. In summation, the positive practical implications of the CC's decision are that:

- Section 198A(4) of the 2014 LRAA does not imply a dual employment relationship between the client and the labour broker;[357]
- Section 198(4A) of the 2014 LRAA does not mean or support the dual/parallel employer relationship but it aims at restricting labour brokers from employing employees to perform temporary services for a period exceeding three months without a valid reason;[358]
- The employment relationship is not transferred to the client post the deeming provision but happens by operation of law;[359]

[356] Labour Relations Act 66 of 1995 sec 198(A)(4).
[357] Gumede (n 231 above) 42.
[358] Gumede (n 231 above) 42.
[359] Gumede (n 231 above) 42.

- Therefore, the sole employer relationship does not suggest that the labour broking industry is prohibited from operation; instead, it is regulated.[360]

It should be noted that the judgement has far-reaching consequences for TES. However, of significance is the fact that the CC did not ban the use of temporary employment services but aimed to ensure that the objectives of the amendments are being upheld by both the labour broker and the client.

4.2. Possible consequences of the *Assign Services* Constitutional Court decision

The above discussion has shown four positive practical implications of the CC's decision in the *Assign Services* case. The researcher commends the CC's decision and submits that the CC's decision will provide protection to vulnerable employees in a TES. However, it should be noted that despite the four positive practical implications of the judgement, the judgement leads to more questions than the answers it was sought for, which the researcher discusses next. This is supported and evidenced by a discussion of how the lower courts have struggled to integrate the Assign Services judgement into disputes brought before them with regards to section 198A(3)(b) of the 2014 LRAA and other provisions pertaining to the regulation of TES.

Firstly, the words 'for the purposes of the LRA only' create problems in the interpretation of section 198A(3)(b) of the 2014 LRAA. The above implies that the placed worker is deemed to be the employee of the client for the purposes of the LRA only in exclusion of all other labour law legislation. That means that the placed employees will only be able to hold the employer (the client) liable for his/her rights with regards to the 1995 LRA only. This then gives rise to question such as, who then becomes the employer of the placed employee with regards to other labour laws such as, BCEA, the Compensation for Occupational Injuries and Diseases Act(COIDA)[361], the EEA[362] and the Skills Development Act[363]. Furthermore, in instances where the labour broker is not retained, or the triangular employment arrangement is not retained upon the triggering of the

[360] Gumede (n 231 above) 42.
[361] Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[362] Employment Equity Act 55 of 1998.
[363] Skills Development Act 9 of 1999.

deeming provision, who becomes the employer of the placed employees for the purposes of section 41 of the BCEA, which provides for severance pay? The researcher argues that the placed employee will only enjoy labour protection with regards to the 1995 LRA only in exclusion of all other employment laws which defeats and nullifies the purpose of the amendments.

Secondly, the *Assign Services* judgement provided that the triangular employment relationship may continue post the deeming provision provided that the labour broker is remunerating the employee. The CC, in its majority decision, further held that section 198A(3)(b) of the 2014 LRAA implies that post the deeming, a common-law contract between the labour broker and the placed employee still exists. However, the CC did not provide for the nature and the ramifications for such a contract in instances where the client dismisses the employee. The researcher argues that this statement is misleading because it hints dual employment whilst the CC upheld the sole-employment interpretation.

Thirdly, the CC indicated that the client and the labour broker may continue with their commercial agreement. The decision is left to both parties to either terminate or continue with the commercial agreement that existed before deeming. The CC failed to provide answers as to the way such a commercial agreement is to be terminated in instances where both parties decide to terminate. Furthermore, in instances where the client elects to terminate the commercial agreement, is the client obligated to furnish the placed employees with a written contract of employment with terms and conditions specified in the 1995 LRA or does the client and the placed employee continue with the written contract of employment that initially existed between the labour broker and the placed employee even though the placed employee is not the employee of the client? It is the researcher's opinion that the CC should have predicted such questions and provide definite answers other than waiting for the questions to be asked and then provide an answer. This is indicated by a case law discussion post the Assign Services judgement, where the lower courts were supposed to provide answers to the Assign Services judgement.

Fourthly, the CC held that post the triggering of the deeming provision, the placed employee is automatically employed by the client without having to go through the tiresome recruitment and hiring processes. Furthermore, the placed employee post the deeming provision must be employed on terms and conditions which are similar to those applying to employees directly employed by the client performing similar work. However, this provision is ineffective in instances where the client does not have direct employees in his workplace performing similar work to that of the placed employees. This means that if the client does not have direct employees performing similar work to that of the placed worker, then the placed employees will continue with terms and conditions of employment that existed prior to the deeming provision. The researcher argues that the greater protection intended by the legislature only applies to the lower earning placed employees who have comparable and/or similar direct employees of the client. This would be automatically unfair in that the provided employees would be deemed employees of the client permanently without rights and entitlements of employees employed permanently. Those are the questions that the CC should have anticipated and therefore attempted to provide answers, which would withhold the intention of the legislature to provide vulnerable employees in a temporary employment service with additional and greater protection.

Furthermore, the deeming provisions might result in logistical and economic implications for the client's business. In instances where the labour broker had placed 20 to 30 employees in the workplace of the client, the deeming provision would mean that the client would have to employ the placed employees on an indefinite basis. The client would have to assume the responsibility of all 20 to 30 placed employees. It is the researcher's opinion that this would inevitably have a negative impact on the "feasibility of the client's business model, which would result in dismissals based on operational requirements."[364] "The actual application of the 1995 LRA's obligatory consultation process in such circumstances, and the possible redundancy of the general selection criteria of 'first-in-last-out', will be interesting in cases where the client has no similar employees."[365]

[364] Van As (n 8 above) 41.
[365] Van As (n 8 above) 41.

Exceptionally, the terms and conditions of the employment contract between the labour broker and the placed employees prior to the deeming provision might be more favorable than those of direct employees performing similar work. The question that arises is whether section 198A (5) of the 2014 LRAA implies that post the deeming, the placed employees must be employed on lesser terms and conditions than those which existed prior to the deeming provision? Should the client elect to continue with such terms and conditions that existed prior the deeming, what will be the implications of this for the direct employees performing similar work? Would the above not amount to discrimination for the direct employees? The researcher believes that the deeming provision has far-reaching implications for both the labour broker, the client, the placed employees and the direct employees. Thus, the CC should have referred the 2014 LRAA for further amendments to close all possible loopholes.

Lastly, the CC's judgement provides that the operation of the deeming provision does not imply a transfer of contracts of employment that would normally take place in a transfer of business as a going concern[366]. Therefore, this means that the placed employees would forfeit the benefits that had accrued during the three-months period such as, leave days etc.[367] The CC should have held that the benefits that had accrued to the placed employee whilst the labour broker was still the employer should be incorporated in the terms and conditions that would govern the employment relationship between the client and the labour broker post the triggering of the deeming provision.

4.3. Critical analysis of the application and interpretation of the Assign Services judgment by lower courts.

The following is a discussion of how the lower courts have integrated the Assign Services judgment into the disputes that were brought before them with regards to the interpretation of section 198A(3)(b) of the 2014 LRAA. This supports the above discussion and shows that -despite the fact that the Assign Services judgement has four positive practical implications- it has raised more questions than the answers it was sought for.

[366] Labour Relations Act 66 of 1995 sec 197.
[367] Van As (n 4 above) 41.

4.3.1. *South African Chemical Workers' Union and Others v Yarona Cash & Carry and Another*[368]

4.3.1.1. Facts of the case

Yarona Cash & Carry (1st respondent) is a retail company that entered into a service level agreement with C Force (2nd respondent), a registered labour broker. According to the service level agreement, C Force procured 65 retail workers for Yarona Cash & Carry, who would provide labour services to Yarona Cash & Carry. The 65 retail workers procured by C Force to provide labour services to Yarona Cash & Carry had different job descriptions, some of them were Fork Lift Drivers, whilst some were Cashiers. After the lapse of the three-month period, the 65 retail workers were still providing labour services to Yarona Cash & Carry, which triggered the operation of section 198A(3)(b) of the 2014 LRAA. The 65 retail workers were deemed to be permanently employed by Yarona Cash & Carry. Despite being deemed to be the permanent employees of Yarona Cash & Carry, the retail workers were still being managed and remunerated by C Force. The 65 retail workers approached a trade union called South African Chemical Workers' Union (the applicant) to refer a dispute to the CCMA in terms of which the retail workers sought to be managed and remunerated by the 1st respondent, Yarona Cash and Carry. They claimed that the deeming provision meant that the 1st respondent became their sole employer, whilst the 2nd respondent fell away. Therefore, they should be remunerated and managed by the 1st respondent, who had become their sole employer.

4.3.1.2. Legal question to be answered by the CCMA

The CCMA was called upon to answer the question as to whether the labour broker completely falls outside the picture after the triggering of section 198A(3)(b)(i) of the 2014 LRAA, and in this case, whether it continues to be involved in the management of all human resources functions with regards to the deemed employees.[369]

4.3.1.3. CCMA ruling and the researcher's analysis of the ruling.

[368] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA).
[369] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA) para 6.

The Commissioner referred to the Assign Services case to answer the above question. The Commissioner held that the CC in the Assign Services case submitted that, the triangular relationship between the client, labour broker and the employees is not compulsory post the deeming provision.[370] It exists simply because the client and the labour broker had agreed to have what they had before the deeming provision kicked in.[371] Anyone between the client and the labour broker could terminate the commercial relationship at any time.[372] However, this would not end the employment relationship between Yarona Cash & Carry and the applicants.[373] The point the Commissioner was trying to make is that, the inclusion of C force once the deeming provision has kicked in, is a choice and not a must. It is not a statutory prescription.[374] Yarona Cash & Carry was the sole employer and was supposed to carry the responsibility of all human resource functions in respect of the applicants; that is, the management of the applicants' contracts of employment, remuneration, leave, and so on. It would not be illegal to outsource these services to a third party such as C Force or any other business rendering these services.[375] But Yarona Cash & Carry remained responsible for the monitoring and compliance of the provision of these services.[376] The Commissioner held that, as soon as a labour broker or a third party was factored in these functions, the 65 retail workers could hold the third party and Yarona Cash & Carry jointly and severally liable.[377]

The researcher commends and agrees with the Commissioner's interpretation of the Assign Services judgment to answer the question raised in this case. However, the above arbitration award only binds the parties to the above arbitration proceedings and cannot

[370] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA) para 40.
[371] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020] 3 BALR 324 (CCMA) para 40.
[372] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* [2020) 3 BALR 324 (CCMA) para 40.
[373] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA) para 40.
[374] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA) para 41.
[375] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA) para 41.
[376] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA) para 42.
[377] *South African Chemical Workers' Union and Others v Yarona Cash & Carry and another* (2020) 3 BALR 324 (CCMA) para 42.

be used as a precedent in another arbitration proceeding of a similar nature. The judgement delivered by the CCMA remains an *obiter dicta*. Another Commissioner might have elected to interpret the Assign Services judgment differently and arrive at a different conclusion than the one stated above. The interpretation of a lower court, such as the CCMA, does not amend the decision of a higher court nor can it give clarity to the decision of a higher court. It also cannot bind other Commissioners to arrive at a similar conclusion. This is the doctrine of *stare decisis*.

Thus, the above arbitration award would only be effective and helpful in these proceedings only. An arbitration award on its own does not form a legal precedent. It is argued that there was still a need for the legislature to amend section 198A(3)(b)(i) of the 2014 LRAA to specifically provide for the roles and the duties of the client and the labour broker post deeming in cases where the parties elect to continue with the triangular employment relationship. In so doing, further disputes such as the above would not continue to be referred to lower courts for interpretation. This would save costs for vulnerable employees in a TES and would further ensure that vulnerable employees in a TES were adequately protected.

4.3.2. *General Industries Workers Union of South Africa and others v Swissport SA (Pty) Ltd and another*[378]

4.3.2.1. Facts of the case

Swissport SA (Pty) Ltd, the 1st respondent, entered a service level agreement with Workforce Group Pty (Ltd), the 2nd respondent. According to the service level agreement, Workforce Group, a registered labour broker was supposed to procure two fork lift drivers and one acceptance clerk for Swissport SA (Pty) Ltd. Notably, Swissport is a company that deals with ground handling and cargo services at the airport. Workforce Group procured two fork lift drivers and one acceptance clerk between 2014 and 2017, as per the terms of the agreement. The two fork lift drivers and the acceptance clerk rendered their services to Swissport for more than three months, which triggered the operation of section 198A(3)(b) of the 2014 LRAA.

[378] *General Industries Workers Union of South Africa and others v Swissport SA (Pty) and Another* (2019) 9 BALR 954 (CCMA).

The two fork lift drivers and the acceptance clerk approached a trade union called the General Industrial Workers Union in South Africa (the applicant), to refer a dispute to the CCMA in terms of which they sought to be deemed permanent employees of Swissport SA (Pty) Ltd and, further, to be employed on terms and conditions similar to that of direct employees employed by Swissport performing similar work. However, Swissport did not employ direct employees performing similar work to the work being performed by the two Fork Lift Drivers and the acceptance clerk. Thus, the applicant compared the two fork lift drivers to cargo controllers who were directly employed by Swissport and claimed that - although the cargo controllers performed more job functions than forklift drivers- some of those job functions overlapped with their job functions. Therefore, they could not be treated on a less favorable basis than the cargo drivers directly employed by Swissport. Notably, there were no comparable employees cited to compare the acceptance clerk, either, although the acceptance clerk sought to be treated no less favorably than direct employees employed by Swissport.

4.3.2.2. Legal question to be answered by the CCMA

The CCMA had to answer the following legal question: What happens in instances where the client of the labour broker does not have direct employees performing similar work to that of the deemed employees.[379]

4.3.2.3. CCMA ruling and the researcher's analysis of the ruling

The Commissioner referred to the *Assign Services* judgement and held that the two fork lift drivers and the acceptance clerk were 'deemed' to be employed on an indefinite basis by Swissport. However, they were not entitled to further relief because Swissport employed no other direct employees performing similar work. Therefore, the terms and conditions of their employment contract that existed between them and the labour broker prior to the triggering of the deeming provision continued to apply between them and Swissport on an indefinite basis.[380]

[379] *General Industries Workers Union of South Africa and others v Swissport SA (Pty) and Another* (2019) 9 BALR 954 (CCMA) para 3.
[380] *General Industries Workers Union of South Africa and others v Swissport SA (Pty) and Another* (2019) 9 BALR 954 (CCMA) para 16.

A weakness in the Commissioner's ruling in this case is that it prejudiced the deemed employees who did not have comparable employees employed by Swissport. Deemed employees who do not have comparable employees performing similar work are left in a position where they must continue with terms and conditions that existed prior to the deeming. It should be noted that one of the reasons that businesses elect to use non-standard workers, in this case TES, is the cost advantage it provides. This is because the salary that the worker would be given in a situation where the business made use of a labour broker would not be the same as the salary the business would remunerate a permanent employee in its business. In instances where the worker is deemed and there are no other employees performing similar work, the employee will only enjoy the benefit of being employed on an indefinite basis without the benefits that come with being a permanent employee of the client.

Furthermore, there are terms and conditions provided by the BCEA that are incorporated and/or implied in the employment contract of a permanent employee, such as annual leave, maternity leave and family responsibility leave. These terms and conditions would not be incorporated or implied in a contract of employment between a labour broker and the placed employee. This is due to the nature and duration of the employment. When applying the interpretation of the CC in terms of section 198A (5)of the 2014 LRAA in the *Assign Services* case and the above case, it would mean that the deemed employees would be deprived of the terms and conditions that are applicable to permanent employees. The terms and conditions would still be those of a temporary employee while they were being employed on a permanent basis. The suggested approach would be to permit the client who is now deemed to be the employer to negotiate new terms and conditions that would be in line with the BCEA and therefore, favorable to the deemed employees despite them being employed without other employees performing similar work.

Notably, the *Assign Services* judgement failed to give clarity to the nature of the employee section 198A(5) of the 2014 LRAA is referring to. This is so because, section 198B(8) of the 2014 LRAA and section 198C(6)(a)-(b) of the 2014 LRAA which apply to vulnerable workers in part-time and fixed-term employment specifically point out that the comparable

employee the section is referring to is the full-time employee employed by the client and goes further to point out that in a case where there is no comparable full-time employee who works in the same workplace, then a comparable full-time employee employed by the employer in any other workplace would be sufficient. The above provides additional protection to vulnerable employees in part-time and fixed-term employment, while it excludes vulnerable employees in TES. The researcher argues that, not losing sight of the fact that the amendments were introduced to provide additional protection to vulnerable employees in non-standard forms of work, the above differentiation and the limited scope of application of section 198A(5) of the 2014 LRAA comparing it to section 198B(8) of the 2014 LRAA and section 198C(6)(a)-(b) of the 2014 LRAA is unjustifiable.

4.3.3. *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and another*[381]

4.3.3.1. Facts of the case

Adcorp Blu, a duly registered labour broker, procured an employee for Sovereign Foods on the 25th of September 2017. The employee procured by Adcorp Blu rendered services to Sovereign Foods for a period more than three months, triggering the operation of section 198A(3)(b) of the 2014 LRAA. The employee was then deemed to be an employee of Sovereign Foods in terms of section 198A(3)(b) of the 2014 LRAA. Soon after being deemed an employee of Sovereign Foods, the employee was dismissed for assaulting another employee in the workplace. However, the dismissal was effected by Adcorp Blu and not Sovereign Foods. The employee approached a trade union called the South African Catering and Allied Workers Union, to refer an unfair dismissal dispute to the CCMA in terms of section 191(5)(a) of the 1995 LRA. The employee claimed that the dismissal was substantively unfair because the employee was not dismissed by Sovereign Foods, who was his sole employer by virtue of the deeming provision.

4.3.3.2. The legal question to be answered by the CCMA

[381] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA).

The CCMA was called upon to answer the following question: Post the deeming provision, is the labour broker duly authorized to discipline and subsequently dismiss the deemed employee, in terms of section 198A of the 2014 LRAA.[382]

4.3.3.3. The CCMA's ruling and the researcher's analysis of the CCMA ruling

The Commissioner referred to the Assign Services case, particularly paragraph 83 and 84 of the said judgement.[383] The Commissioner held that the CC specifically found that when "vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client and that the deeming provisions in section 198(2) of the 1995 LRA and 198A(3)(b)(i) of the 2014 LRAA cannot operate at the same time".[384] The Commissioner held that the Assign Services judgement makes it clear that once deeming occurs, only the client is the employer.[385] Furthermore, the fact that the triangular relationship still exists cannot, in light of the Court's finding, results in the labour broker continuing to be the employer. The result is that whether the triangular relationship continues or not, the labour broker is not the employer once the deeming provisions become operative.[386]

In answering the question raised by this case, the Commissioner held that section 198(4) of the 1995 LRA and section 198(4A) of the 2014 LRAA which provide for joint and several liability of the labour broker and the client post deeming, has a limited purpose.[387] It mainly applies in instances where both the labour broker and the client are liable for contraventions of certain instruments and the BCEA.[388] The continued existence of the triangular relationship post deeming does not operate for, inter alia, unfair dismissal

[382] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 4.
[383] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 19.
[384] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 25.
[385] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 25.
[386] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 25.
[387] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 26.
[388] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 26.

disputes and disputes relating to unfair labour practices.[389] Therefore, the client's conduct to allow the labour broker to administer discipline and subsequently dismiss the placed employee, rendered the dismissal unfair. The labour broker, not being the employer of the placed employee, had no *locus standi* in disciplining and dismissing the placed employee.[390]

The above case illustrates the ambiguity and uncertainty of the *Assign Services* case. The case was meant to interpret and give clarity to what transpires after the triggering of the deeming provision; specifically, who becomes the employer of the placed worker after the triggering of section 198A(3)(b) of the 2014 LRAA. Further, should the triangular relationship continue, what are the duties and responsibilities of the parties in the triangular relationship. The CC's interpretation of the section should have been certain and unambiguous, to such an extent that the parties in the proceedings did not have to refer the matter again to any lower court regarding the identity of the employer post deeming and the responsibilities and roles of the parties thereof.

The second respondent argued in para 11 that, the deeming provision gives rise to a triangular relationship between the parties and that for all intent and purposes, an employment relationship is retained by the labour broker with the placed worker and that a commercial relationship between the respondents endures. Thus, the labour broker may perform various functions as an employer, including the administration of discipline in the workplace. This raises questions such as, does it now mean that each case concerning the role and responsibilities of the parties in a triangular relationship post deeming must be referred to the lower courts for interpretation and eventually be decided on a case by case basis because of the ambiguity and uncertainty of the *Assign Services* case? Furthermore, what purpose does the *Assign Services* case judgement serve if the above-mentioned must still take place? The researcher argues that the *Assign Services* case raised more questions than the answers it was sought for, with regards to the roles

[389] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 27.
[390] *South African Commercial, Catering and Allied Workers Union and another v Sovereign Foods and Another* (2020) 9 BALR 988 (CCMA) para 28.

and responsibilities of the parties post the deeming provisions in instances where the triangular relationship continues.

4.4 *United Chemical Industries Mining Electrical State Health and Aligned Workers Union and another v South African Breweries (Pty) Ltd and another*[391]

4.4.1 Facts of the case

Adcorp Blu, a duly registered labour broker entered a service level agreement with South African Breweries(SAB), to procure an employee to render services to it. Adcorp Blu procured and placed an employee with SAB for a period of 10 years. Soon after the coming into operation of the 2014 LRA amendments, the employee was deemed to be a permanent employee of SAB in terms of section 198A(3)(b) of the 2014 LRAA. The employee approached a trade union called the United Chemical Industries Mining Electrical State Health and Aligned Union, to refer a matter to the CCMA in terms of section 198A of the 2014 LRAA. The employee claimed that -in terms of section 198A(3)(b) of the 2014 LRAA- she was entitled to conclude a new contract of employment with SAB.

4.4.1.1 Legal question to be answered by the CCMA

The legal question to be answered by the CCMA was whether deemed employees are entitled to enter new contracts of employment with the client post the triggering of the deeming provision.[392]

4.4.1.2 The CCMA's ruling and the researcher's analysis of the ruling

The Commissioner referred to paragraphs 73 and 75 of the *Assign Services* judgement and section 198A of the 2014 LRAA. The Commissioner held that the client is the employer of the placed employee for the purposes of the Labour Relations Act only and

[391] *United Chemical Industries Mining Electrical State Health and Aligned Workers Union v South African Breweries* (Pty) *Ltd and another* (2020) 3 BALR 261 (CCMA).
[392] *United Chemical Industries Mining Electrical State Health and Aligned Workers Union v South African Breweries* (Pty) *Ltd and another (*2020) 3 BALR 261 (CCMA). para 4.

the placed employee is not, by virtue of the deeming provision, entitled to a contract of employment with the client.[393]

The researcher disagrees with the Commissioner's ruling and submits that the Commissioner's failure to provide that -post the deeming- the placed employees must be furnished with contracts of employment by the client will contribute to problems faced by vulnerable employees in a TES. This is evidenced in cases were the deemed employees do not have direct employees employed by the client performing similar work. In such cases, the deemed employees continue to be employed on terms and conditions that existed between the deemed employee and the labour broker. This puts deemed employees in a position where they are employed for an indefinite basis on terms and conditions applicable to temporary employees. Deemed employees who do not have comparable direct employees employed by the client should be permitted to conclude new contracts of employment with the client whilst deemed employees who have comparable direct employees employed by the client should be governed by section 198A (5) of the 2014 LRAA. This would adequately provide for protection to vulnerable deemed employees in all situations.

The researcher argues that the additional protection that section 198A of the 2014 LRAA with regards to the regulation of vulnerable employees in a temporary employment service is but to a limited extent enforceable and thus, not as adequate and desirable as it was expected to be.

4.5 Conclusion

The *Assign Services* judgement delivered by the CC provided the certainty that settled the debate as to who becomes the employer of the placed employee upon the triggering of section 198A(3)(b) of the 2014 LRAA for the purposes and application of the 1995 LRA only. This judgment is commended and welcomed because it has highlighted that the legislature in enacting section 198A of the 2014 LRAA has -to a limited extent- enhanced the protection of vulnerable employees in a TES. This was evidenced by the discussion of the four positive practical implications of the Assign Services judgement. However,

[393] *United Chemical Industries Mining Electrical State Health and Aligned Workers Union v South African Breweries* (Pty) *Ltd and another* (2020) 3 BALR 261 (CCMA). para 33.

despite the four positive practical implications discussed, the researcher also identified possible consequences of the *Assign Services* judgement. Among other findings, the researcher showed that the CC failed to provide for the rights and obligations of the parties to the triangular employment relationship post deeming. This consequence causes confusion and uncertainty on the nature of the triangular relationship post the triggering of the deeming provision.

Furthermore, the researcher argued that what can be expected from the judgment is continued litigation on the interpretation and application of section 198A(3)(b) of the 2014 LRAA, which is not cost effective for vulnerable employees in a TES. Consequently, this has a potential effect of discouraging the client of the labour broker in using temporary employment services in the future. The potential effect of discouraging clients from continuing using the labour broking industry. This would be disastrous for the South African labour market, which is characterized by high levels of unemployment. The researcher submitted that the judgment left many questions than the answers it was sought for, and if such questions remained unanswered, placed employees could be subject to further exploitation. The researcher suggests that -to successfully curb abusive practices that might be experienced by vulnerable employees in a TES in the future- the CC ought to have referred the 2014 amendments to the legislature for re-drafting. However, the CC failed to refer the 2014 amendment to the legislature for further amendments. Therefore, the ball is in the court of the legislature, to effect the necessary amendments that would curb abusive practices that might ensue in the future, as a result of the gaps identified in this chapter.

CHAPTER 5

CONCLUDING REMARKS AND RECOMMENDATIONS

5. INTRODUCTION

The previous chapters discussed the regulation of TES in South Africa, with an aim of determining whether the amendments to the 1995 LRA, particularly section 198A, provide adequate protection to the vulnerable employees employed by TES. This chapter is divided into two parts. The first part of this chapter provides for the concluding remarks and the second part provides recommendations, with specific reference to how the legislature can best protect vulnerable employees employed by TES. Furthermore, the second part provides the researcher's recommendations for future research.

5.1 Concluding remarks

To achieve this study's foregoing aim, the researcher pursued the following objectives.

5.1.1 Chapter 2 discussed how the employer's need for greater market flexibility influenced the labour market in relation to the proliferation of non-standard forms of work, particularly, TES

In writing this chapter, the researcher attempted to explain how the employer's need for greater market flexibility has influenced the labour market in relation to the proliferation of non-standard forms of work. It was ascertained that prior to the employer's quest for greater market flexibility in a globalised world, non-standard forms of work historically preceded and existed alongside standard employment.[394] However, standard employment gained prominence over non-standard forms of work post World War II.[395] Consequently, standard employment became accepted as the norm for employment relations and the focal point for labour laws.[396] During this period, employers employed a large core group of employees in standard employment, and a few employees in non-standard forms of work.[397] The large core group of employees employed in standard

[394] See para 2.1.1 in Chapter 2.
[395] See para 2.1.1 in Chapter 2.
[396] See para 2.1.2 in Chapter 2.
[397] See para 2.3 in Chapter 2.

employment received and benefited from labour law protection that existed during that period, whilst the small group of employees in non-standard forms of work received little or no labour law protection. Thus, the researcher concludes that non-standard forms of work did not originate because of the employer's need for greater market flexibility. Rather, the employer's need for greater market flexibility only exacerbated the use of non-standard forms of work by employers in a globalised world.

The researcher further, contextualised this discussion by discussing how the employer's need for labour market flexibility has influenced the South African labour market policy. The researcher argued that the employer's quest for greater market flexibility in a globalised world influenced the labour market policy that South Africa adopted. The labour market policy adopted in South Africa is aimed at balancing the employer's need for flexibility and the employee's need for security.[398] The labour legislations enacted, such as the 1995 LRA and the BCEA, focus on reinforcing the protection provided to employees in standard employment, whilst providing little or no protection to employees in non-standard forms of work.

The researcher, however, concludes that the main idea behind adopting a labour market policy that promotes flexibility and the realisation of workers' rights should be to necessitate a shift in regulatory policies that enhance the ability to adjust to changing labour conditions. The changing labour conditions include the resultant consequences of globalisation, which have led to employers employing large numbers of employees in non-standard forms of work. This is contrary to the era post World War-II, where employers hired a large number of employees in standard employment. This means regulatory policies that allow for flexibility should be flexible enough to easily detect changes that are occurring in the labour market and make the necessary changes, to provide labour law protection to employees in non-standard forms of work. In this manner, both employees in non-standard forms of work and those employees in standard employment would both be covered by labour law protection.

[398] See para 2.3.1 in Chapter 2.

However, in South Africa, the exacerbated use of non-standard forms of work by employers, particularly labour broking, has thrived by exploiting the little or no legislative protection that exists, while attempting to hide behind the need for a flexible labour market. Thus, employees in non-standard forms of work do not enjoy the same level of labour law protection as those engaged in standard employment. These employees are seldom entitled to the same level of conditions of employment, such as wages, benefits, annual leave, medical aid, paid maternity leave and pensions. Furthermore, their employment is less secure; there are insufficient working hours, longer or unpredictable and often atypical working times. The above-mentioned challenges make employees in such work arrangements vulnerable to exploitation.

5.1.2 Chapter 3 examined the South African legislative framework changes with regards to temporary employment services to ascertain the extent to which the South African labour laws recognises and regulates TESs

To determine the extent to which the South African legislative framework recognises and regulates TESs, the researcher discussed the provisions specifically dealing with the regulation of TESs in labour legislations promulgated through the years. This discussion was done for three chronological periods: the pre-constitutional period, the constitutional dispensation period; and the current legislative framework.[399] Furthermore, the shortfalls of each labour legislation identified in the three chronological periods were discussed.[400] It was argued and concluded that TES have been in existence for a long period. However, the regulation and recognition of TES in South Africa commenced in 1983, after the legislature amended the 1956 LRA.[401]

During the pre-constitutional era, the legislature regulated TES through the 1983 LRA and the 1983 LRAA.[402] The aim of the 1983 LRA was to ensure that labour brokers performed their employer duty, which was to provide employees employed by TES with social security and employment security.[403] The researcher concludes that -although the

[399] See para 3.1 in Chapter 3.
[400] See para 3.1 in Chapter 3.
[401] See para 3.1 in Chapter 3.
[402] See Para 3.1.1 in Chapter 3.
[403] See Para 3.1.1 in Chapter 3.

legislature recognised TESs, by providing a definition of labour broker and the labour broker office- the regulation was limited and not adequate to address the problems that TES employees faced during this period. Instead of the regulation leading to greater protection, it aggravated the problems that employees hired by TES faced in the South African labour market. For example, provided employees would often go for many months without being paid by the labour broker. This was so because the law did not hold the client jointly and severely liable with the labour broker in cases where the labour broker failed to discharge its responsibilities, such as remunerating the placed employees. The placed employees would be left without a right of recourse against the client with whom they are placed.

During the constitutional dispensation period, the researcher discussed the radical transformation of the South African labour relations in 1994 after the first democratic elections.[404] It was deduced that the new Labour Relations Act; namely, the 1995 LRA aimed at addressing the inequalities of the past, by adequately putting an end to the problems encountered by employees hired by TES.[405] The 1995 LRA introduced section 198, which provided for the regulation of temporary employment services. The researcher concluded that the 1995 regulation had improved compared to the regulation that existed prior to the constitutional dispensation was commendable. Not only did the 1995 LRA provide a definition of labour broking, but it provided employees in temporary employment services with additional protection. For example, section 198(3) introduced a limited form of joint and several liability for the labour broker and its client for contraventions of collective agreements and provisions of the BCEA.

However, the researcher concludes that the regulation was still inadequate to curb abusive practices that vulnerable employees in a TES face. For example, the actual identity of the employer in the triangular employment relationship was still uncertain and the disparity in treatment between placed employees and the client's direct staff persisted. Other problems which persisted include the automatic termination of the placed employees' contracts of employment at the instance of the client. Therefore, vulnerable,

[404] See para 3.1.2 in Chapter 3.
[405] See para 3.1.2 in Chapter 3.

placed employees were left without a right to recourse against the client or the labour broker. This is because their employment contracts contained automatic termination clauses.

The current legislative framework introduced the 2014 LRA amendments. The aim of the 2014 amendments was to address problematic issues encountered by employees employed by TES and thus, provide additional protection to vulnerable employees in a TES. The legislature enacted section 198A to this effect. The legislature incorporated the principle of labour market flexibility into the 2014 amendments. The researcher concludes that the 2014 amendments greatly enhanced the protection of vulnerable employees in a TES. For example, the amendments ensured that the placed employees received comparable wages after the lapse of the 3 months' period of performing genuine temporary work. However, this provision only applied to vulnerable placed employees who were deemed to be employees of the client by operation of section 198A(3)(b) of the 2014 amendments. By ensuring that placed employees only received comparative wages after the lapse of the 3 months' period of performing genuine temporary work, the continued operation of the TES industry was made possible. The TES industry would still be in operation because they would still offer their clients with a cost advantage.

Furthermore, provisions such as section 21 and section 22 of the 2014 LRAA provide greater protection to vulnerable employees employed by TESs. These sections ensure that collective bargaining is more accessible to vulnerable employees employed by TESs. Furthermore, access to collective bargaining would ensure that issues such as meagre wages received by vulnerable placed employees would not persist. In addition, trade unions which recruited these placed employees would ensure that they used their bargaining ability to negotiate adequate wages for their members. This argument was raised to criticize the view that the 2014 amendments failed to provide for a minimum wage.

Section 21 and section 22 of the 2014 LRAA are flexible enough to allow for reliance on mechanisms established such as collective bargaining, to resolve issues that may potentially arise in the labour market. This would ensure that vulnerable placed employees have access to collective bargaining and the legislation adequately protects

these employees because they would have the right to recourse through collective bargaining. The amendments further provide for decent work and secure basic rights for vulnerable placed employees; they restrict temporary work to 'genuine' temporary work by limiting it to 3 months. This ensures that placed employees are not employed in temporary work for an indefinite period, without the prospect of being employed directly by the labour broker's client.

The researcher lauds the amendments and argues that they are a welcome change. The 2014 amendments came at a time when employers in South Africa were benefiting to the detriment of placed employees because of inadequate regulation. Under the 1995 LRA, vulnerable placed employees used to endure inferior work conditions that lacked the security that is central to fair labour practices and decent work. Therefore, the amendments were of paramount importance and a much-needed change to redress such injustices. It can also be argued that the circumstances demanded a response to the legislature followed, which was to provide for additional protection to vulnerable employees hired by temporary employment services, whilst maintaining flexibility in the labour market. However, this is not to conclude that the approach the legislature took would always be the best and the most appropriate strategy. Often, current circumstances dictate the right and appropriate strategy to follow to effectively tackle problems that arise in the labour market. The solutions offered by the 2014 amendments might not necessarily be a perfect fit to resolve issues that might potentially arise in the future in the TES industry. Therefore, the law must keep track of the changing times, so that there is progress in society.

The researcher submits that the 2014 amendments and their protection-based point of view, did not only arrive at the right time, but also performed admirably, considering the difficulty of the circumstances and the necessity to accommodate the employee's need for protection, together with the employer's need for flexibility. Thus, after the abusive practices had subsided, it would be timely for further advancement in offering flexibility, and for this function to be at the forefront in leading the South African labour relations to a new and modern age.

5.1.3 Chapter 4 examined whether the *Assign Services* judgement helped in enhancing the legal protection of vulnerable employees employed by temporary employment services

The researcher submits that the aim of any law is to resolve legal problems that arise in societies. Consequently, the legal problems that arise in societies are then taken to court, to ascertain the effectiveness of the law applicable. The *Assign Services* case provided a platform where the effectiveness of the 2014 amendments to provide adequate protection to vulnerable employees in a TES was tested. Chapter 4 of this study identified four positive practical implications of the *Assign Services* judgement and argued that these implications play a significant role in ensuring that vulnerable employees in a TES are adequately protected from exploitation, and abusive practices carried out by the labour broker and its client.[406] However, the researcher further argued that the *Assign Services* judgement had assisted in identifying possible loopholes in the 2014 amendments which might lead to exploitation.[407]

The most glaring loophole of the 2014 amendments identified is the legislature's failure to provide for the actual nature of the rights and obligations of the parties to the triangular employment relationship post the triggering of the deeming provision. The researcher argued that the legislature's failure to provide for the actual nature of the rights and obligations of the parties to the triangular employment relationship post deeming, has a potential of frustrating the legislature's intention to provide protection to vulnerable employees in a TES. To reinforce the afore-mentioned argument, the researcher discussed case law post the *Assign Services* judgement. Case law indicated the lower court's difficulty in providing for the actual nature of the rights and obligations of the parties to the triangular employment relationship post the triggering of the deeming provision. Therefore, the researcher concludes that by identifying the four positive implications of the Assign Services judgement has enhanced the protection afforded to employees in TESs. However, one cannot simply look at the negative consequence of the judgement

[406] See para 4.2 in Chapter 4.
[407] See para 4.2 in Chapter 4.

and imply that the amendments together with the judgement do not provide adequate protection to vulnerable employees in a TES.

5.2 Recommendations

5.2.1 Recommendations of the study

The researcher recommends that the legislature amend the 2014 LRAA and introduce 'a build-up to additional protection model'. This proposed model would offer protection to vulnerable employees employed by TES in three separate stages. The model would also assist in providing clarity to the actual nature of the rights and obligations of the parties to the triangular employment relationship prior and post the triggering of the deeming provision. The next section presents a discussion of the protection offered in the three stages of the recommended model.

Stage one of the 'build-up to additional protection model' is comparable to the current legislative framework, afforded to vulnerable employees employed by a TES prior to the activation of the deeming provision. However, the researcher proposes slight modifications to the current legislative framework afforded to vulnerable employees working under a TES. The following is a discussion of the proposed modifications to the current legislative framework afforded to vulnerable employees hired by a TES. The researcher proposes that during this stage the labour broker remains the employer of the placed employees, as envisaged by section 198A(3)(a) of the 2014 LRAA. Furthermore, the labour broker, as the sole employer of the placed employees, would bear all the duties and responsibilities associated with an employer, both at common law and statutory law. In addition, the labour broker and the client would remain jointly and severally liable for contraventions of the BCEA and collective agreements, as envisaged by section 198(4A) of the 2014 LRAA. A proposed modification to this section is that, the legislature must insert a provision holding the labour broker and its client jointly and severally liable for unfair labour practice and unfair dismissal claims. This would provide vulnerable employees in a TES with additional protection because the placed employee would have a right of recourse against the client in instances where he/she was unfairly dismissed at the instance of the client.

The researcher further recommends that the legislature should insert a provision that permits the placed employees to take direct employment with the client prior to the activation of the deeming provision. Should an opportunity of permanent employment with the client avail itself, and such permanent employment is similar to the work being performed by the placed employee during the course of the temporary service, the placed employee should be given a preferential right over other job applicants. The researcher submits that this provision would serve as a stepping stone in an upward transition to better work and perhaps, permanent employment with the client. This would adequately provide for protection of vulnerable employees employed in a TES.

Stage two of the 'build up to additional protection model' is a workplace employee development stage. During this stage, the researcher proposes that the legislature should extend the initial three months' period of performing temporary work, with an additional three months. This would be beneficial to those placed employees who would not be deemed to be employees of the clients as envisaged by section 198A(3)(b) of the 2014 LRAA. Because instead of being employed for only three months, they would then be employed for six months. Six months' placement with the labour broker's client would be adequate to effect meaningful change in the life of the placed employees. The researcher further notes that temporary work mainly employs unskilled workers. Thus, extending the three months to six months would provide the placed employees with ample time to gain skills and work experience. Furthermore, the extended three months would enhance the placed employee's resume and assist the placed employee when seeking alternative employment after the lapse of the six months of placement with the labour broker's client.

The researcher further proposes that the legislature should include provisions that allow the placed employees to engage in collective skill formation and vocational training that comparable employees directly employed by the client engage in at the client's workplace. This would greatly assist in improving the status of placed employees.

Stage three of this model commences after the lapse of the six months' period of performing the temporary work. During this stage, the placed employees should still have the additional protection that applies to employees who have been deemed to be employees of the client in terms of section 198A(3)(b) of the 2014 LRAA. That means that

the client would become the deemed employee's employer and assume all the responsibilities of an employer towards the deemed employees. In addition, the legislature must introduce additional provisions which would clearly articulate the nature of the rights and obligations of the parties to the triangular employment relationship post deeming. These rights and obligations would only apply in instances where the parties (the labour broker, the client and the deemed employee) elect to continue with the triangular employment relationship post deeming. Enacting a provision that provides for the rights and obligations would assist in answering the following questions; Firstly, who has the right to discipline the deemed employee in cases of a reported misconduct? Secondly, whose disciplinary code would be followed in misconduct hearings? Thirdly, is the deemed employee entitled to conclude a new contract of employment with the client post deeming? Lastly, in cases where the client does not have comparable employees performing similar work, which terms and conditions would the deemed employee be employed under?

The advantage of providing for the nature of the rights and obligations of the parties to the triangular employment relationship would ensure that the vulnerable placed employees remain adequately protected even after the triggering of the deeming provision. This means that lower courts would not be given the task of having to provide for the nature of the rights and obligations of the parties to the triangular employment relationship post the triggering of the deeming provision. Because the duty of the court is to interpret and apply legislative provisions and not to enact laws. Referring a dispute to the CCMA for the purposes of providing for the duties and rights of the parties to the triangular employment relationship post deeming is a process which would be time-consuming and expensive for the majority of placed employees who are vulnerable and earning meagre wages. A crucial part of the rule of law is clarity.[408] The legislature must therefore, step in to provide the necessary clarity by providing for the nature of the rights and obligations of the parties to the triangular employment relationship post deeming.

[408] Majambere E, 'clarity, precision and unambiguity: aspects for effective legislative drafting' 27 September 2011 https://doi.org/10.1080/03050781.2011.595140 (accessed on the 15 December 2021)

5.2.2 Recommendations for future research

This study focused on the protection offered to vulnerable employees employed in TES in South Africa. However, during the course of this study, the researcher observed that the additional protection envisaged by the 2014 LRAA only applies to vulnerable employees employed in LRAA, to the detriment of higher-earning employees. This could, therefore, be an area for future research, particularly in South Africa, where the labour relations statutes are premised upon the attainment of values such as equality and dignity in the workplace. Affording vulnerable employees employed in TES with additional protection is commendable. However, providing such protection to vulnerable employees to the detriment of higher-earning employees hired in a TES amounts to differential treatment in the workplace and might also lead to exploitation because of the lack of regulation. This is because earning a salary above the stipulated minimum wage does not make higher earning employees hired in temporary employment services immune to exploitation.

[WORDS: 45312]

BIBLIOGRAPHY

Articles

- Aletter C and Van Eck S 'Employment agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisation's Standard' (2016) 28 (2) *South African Mercantile Law Journal* 287.
- Benjamin, AJ 'Labour Law Beyond Employment' 2012 1 *Acta Juridica* 21-400.
- Benjamin, P 'A Review of Labour Markets in South Africa: Labour Market Regulation: International and South African Perspectives' (2005) 3 *Johannesburg Human Sciences Research Council.*
- Benjamin, P 'Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document' (2010) 31 (845) *Industrial Labour Journal*.
- Benjamin, P 'Restructuring Triangular Employment: The interpretation of Section 198A of the Labour Relations Act' (2016) 37 (28) *Industrial Labour journal.*
- Bosch, C 'Contract as a barrier to dismissal: The Plight of the Labour Broker's Employee' (2008) 29 (1) *Industrial Law Journal* 813-840.
- Botes, A 'A Comparative Study on the Regulation of Labour Brokers in South Africa and Namibia in Light of Recent Legislative Developments' (2015) 132 (1) *South African Law Journal*.
- Botes, A 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 (1) *South African Mercantile Law Journal* 110.
- Brassey MSM and Cheadle H 'Labour Relations Amendment Act 2 of 1983' (1983) 4 (1) *Industrial Law Journal* 36.
- Cohen, T 'Placing substance over form-identifying the true parties to an employment relationship' (2008) 29 *Industrial Law Journal* 871.

- Cheadle, H 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 15 (2) *Industrial Law Journal* 664.
- Ferere, MA 'From exclusion to labour Security: To What Extent Does Section 198 of the Labour Relations Amendment Act of 2014 strike a Balance Between the Employers and Employees?' (2016) 3 (375) *South African Mercantile Law Journal*.
- Gericke, SB 'Temporary Employment Services: Closing a loophole in section 189 of the Labour Relations Act 66 of 1995' 2010 31 (1) *Industrial Law Journal* 12.
- Grogan, J 'Bashing the Brokers: Does Assign spell the end of labour broking?' (2018) 32.5 (1) *Employment Law Journal.*
- Harvey, S 'Labour brokers and workers' rights: Can they co-exist in South Africa' (2011) 128 (1) *South African Law Journal* 100.
- Kohler, T 'Labour Law and Labour Relations: Comparative and Historical Perspective' 1996 25 (1) *International Journal of Comparative Labour Law and Industrial Relations*.
- Le Roux, PAK 'Legal Representation at Disciplinary Hearings' (2011) 20 (10) *South African Cotemporary Labour Law* 24.
- Mills, S W 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility' 2004 25 (1) *Industrial Law Journal*.
- Sato, H 'Atypical employment: A Source of Flexible Work Opportunities' (2001) 4(2) *Social Science Japan Journal* 161.
- Standing, G *et al*, *'Restructuring the labour market: The South African challenge; An ILO Country Review'* (1996).
- Theron, J 'Employment is Not What It Used to Be' (2003) 24 *Industrial Law Journal.*
- Theron, J 'Intermediary or Employer? Labour brokers and the triangular employment relationship' (2006) 26 *Industrial Law Journal* 618.
- Theron, J 'The shift to services and triangular employment' (2008) 58 (1) *Industrial Law Journal* 61.

- Tshoose, C Tsweledi, B 'A Critical Analysis of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South Africa' 2014 18 (334) *Law, Democracy & Development- Sabinet African Journals.*
- Van Eck, BPS 'Regulated flexibility and the labour relations amendment bill of 2012' (2013) 46 (2) *De jure Law Journal* 604.
- Van Eck, BPS 'Temporary Employment services in South Africa and Namibia' (2010) 13 (2) *Potchefstroom Electronic Law Journal* 108.

Books

- Du Toit, D Bosch,D *et al Labour Law: A Comprehensive Guide* Lexis Nexis: Durban 2015 6th ed.
- Kahn-Freund, O *Labour and the Law* Steven & Sons: London 1983.
- Van Niekerk, A Smith, N *et al Law@Work* LexisNexis: Durban 2019 5th ed.

Dissertations and thesis

- Aletter, CJ 'Protecting of agency workers in South Africa: An appraisal of compliance with ILO and UN norms' unpublished PHD thesis, University of Pretoria, 2016 121.
- Bamu, PH 'Contracting work out of self-employed workers: Does South African law adequately recognise and regulate this practice', unpublished PHD thesis, University of Cape Town, 2011.
- Gumede, BJ 'A critical examination of the interpretation and application of the law relating to temporary employment services in South Africa', unpublished MA dissertation, University of KwaZulu-Natal, 2016.
- Masimbe, T 'Protection versus Flexibility: A critical Analysis of the New Labour Brokering Provisions Introduced by the 2014 Amendments to the Labour Relations Act,66 of 1995' Unpublished MA dissertation, University of Cape Town, 2016.
- Mathekga, MKJ 'The political economy of labour market flexibility' Unpublished MA dissertation, Stellenbosch University, 2009.

- Moeketsi, TM 'The Interpretation of the "deeming provision" in terms of section 198A(3)(b) of the Labour Relations Act 66 of 1995: Who is the employer?' Unpublished MA dissertation, University of North-West, 2020.
- Ramparsad, A 'A critical analysis of the Impact of s198 A-D of the Amended Labour Relations Act 66 of 1995 on Non-standard employees in South African Labour Law' unpublished MA dissertation, University of Johannesburg, 2018.
- Van AS, E 'Two is a party, Three is a Crowd: An Appraisal of Temporary Employment Services in South Africa' unpublished MA dissertation, University of Pretoria, 2018.
- EBS Lalumbe 'The 'new' employment relationship created to protect vulnerable temporary employees: A legal analysis of case law' unpublished MA dissertation, University of Johannesburg, 2018 31.

Internet sources

- https://www.digitalhistory.uh.edu/era.cfm?eraid=16&smtid=1 (accessed on the 12th January 2022.
- International Labour Office 'Non-standard work and workers: Organizational implications' http://ilo.org>wcms_414581 (accessed on the 13th of August 2021).
- Majambere E, 'clarity, precision and unambiguity: aspects for effective legislative drafting' 27 September 2011 https://doi.org/10.1080/03050781.2011.595140 (accessed on the 15 December 2021).
- World Commission on the Social Dimensions of Globalization 'A Fair Globalization: Creating Opportunities for all' (2003) 24 http://www.presidentti.fi/netcomm/ImgLib/9/101/WCSDG%20report%20final.pdf (accessed on the 11th of April 2020).

Monographs

- Theron, J *et al* (2011) *Keywords for a 21st Century Workplace Institute of Development and Labour Law* 1-80.

Newspaper Articles

- D Venter “Who is the Employer” *Without Prejudice* 26 November 2015.