

University of KwaZulu-Natal

**Effects of labour legislative changes regarding temporary employment services in
KwaZulu-Natal mining and construction coastal sectors.**

By

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A Thesis submitted in full fulfillment of the requirements for the degree

Masters of Commerce in Industrial Relations

College of Law & Management Studies, School of Management, IT and Governance

at the University of KwaZulu-Natal

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DECLARATION

With the signature below, I **Sindisiwe Charity Ntshangase**, hereby declare that the work presented in this thesis is based on my own research and all the material contained has been duly acknowledged, that I have not submitted this thesis to any other institution of higher education in full or partial fulfillment of the academic requirements of any other degree or other qualification.

Signature: Student Number: 209515835

Date:

ACKNOWLEDGEMENTS

To God Almighty, The Great I Am, thank you for reminding me once again that all things are possible through you and that you know all the plans you have for us, plans to prosper us and not to harms, plans to give us hope and a future.

To my husband, my greatest blessing from God, Gugulethu Sibiyi, thank you for cheering all my successes and encouraging me in all my failures. Thank you for all the support and encouragement that you have given me throughout this study, I am eternally grateful, no words can ever be enough to express my sincere gratitude.

To my son, my ultimate blessing, Zanemali Sukoluhle Sibiyi, thank you for being my anchor and for brightening up my days. Thank you for giving me a reason to not give up every time I felt defeated during this study.

To my academic supervisor Mr D.V. Dlamini, thank you for all your guidance, input and support during this study.

To all the participants, thank you for making this study possible with your contributions.

ABSTRACT

This study has been conducted to shed light on the effects of labour legislative changes regarding temporary employment services in KwaZulu-Natal mining and construction coastal sectors. This study employed an exploratory research design. Since this study is exploratory in nature, both purposive sampling and stratified sampling was used. The participants were chosen from the temporary employment services (TES) in Durban and Richardsbay.

A qualitative approach was employed to collect data. Thirteen structured interviews (13) were conducted out of the maximum of twenty (20) interviews that are required for a qualitative study to understand the perceptions of management of TES's, client companies as well as trade unions. Eight five percent (85%) of the participants agreed that TES's contribute positively towards the labour market as well as our economy and concluded that it is fair for the government to impose legislation to regulate this industry rather than an outright ban of the industry as this would have adverse effects on the economy and the already low employment growth rate in South Africa. Fifteen percent (15%) of the participants argued that TES's should be banned completely as they are exploitative in nature and do not create employment but merely act as intermediaries.

Findings also revealed that most TES's state that the common notion that companies approach them as they provide cheap labour is false as companies only approach them to ease the administration burden of recruitment and hiring. This study found that due to the nature of the mining and construction industry, this sector is unable to carry all of its employees on a full time basis hence the need for the existence of TES's. The non-registered TES's will now be totally eliminated and the abuse of employees by non-compliant TES's will be minimised. Most TES's have responded positively towards the changes as they suggest that it is better that to be banned, however they raise that the word "deemed" in the provisions is still being defended in court as there are several applications submitted contesting it as it causes confusion on who the real employer is between the TES and the client company.

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UNIVERSITY OF KWAZULU-NATAL

School of Management. IT and Governance

Dear Respondent,

Masters Research Project

Researcher: Ms Sindisiwe Charity Ntshangase (0728821540)

Supervisor: Mr David Vusi Dlamini (0312607864)

Research Office: Ms M Snyman (0312608350)

I, Sindisiwe Ntshangase, am a Masters of Commerce (IR) student in the School of Management, at the University of KwaZulu-Natal. You are invited to participate in a research project entitled Effects of labour legislative changes regarding temporary employment services in KwaZulu-Natal mining and construction coastal sectors. The aim of this study is to establish the extent to which the recent labour legislative changes on TES's have effect or impact on the operation of the TES as well as the client companies and how trade union movement views the foregoing scenario.

Through your participation I hope to understand how the labour legislative changes will affect the role and existence of the role players in the triangular relationship between TES, client companies as well as trade unions. The results of this survey are intended to enlighten the role players in the relationship of the parties about the implications of the recent labour legislation changes.

Your participation in this project is voluntary. You may refuse to participate or withdraw from the project at any time with no negative consequence. There will be no monetary gain from participating in this research project. Confidentiality and anonymity of records identifying you as a participant will be maintained by the School of Management, UKZN.

If you have any questions or concerns about participating in this study, please contact me or my supervisor at the numbers listed above.

It should take you about 15 minutes to complete the interview/questionnaire. I hope you will take the time to complete the interview/questionnaire.

Sincerely

Sindisiwe Ntshangase

Investigator's signature _____ Date _____

UNIVERSITY OF KWAZULU-NATAL
School of Management, IT and Governance

Masters Research Project

Researcher: Ms Sindisiwe Charity Ntshangase (0728821540)

Supervisor: Mr David Vusi Dlamini (0312607864)

Research Office: Ms M Snyman (0312608350)

CONSENT

I _____(full names of participant)
hereby confirm that I understand the contents of this document and the nature of the research project,
and I consent to participating in the research project. I understand that I am at liberty to withdraw
from the project at any time, should I so desire.

Signature of Participant

Date

This page is to be retained by researcher

INTERVIEW SCHEDULE

Effects of labour legislative changes regarding temporary employment services in KwaZulu-Natal mining and construction coastal sectors.

The aim of this study is to establish the extent to which the recent labour legislative changes on temporary employment services (TES's) have effect or impact on the operation of the TES as well as the client companies and how trade union movement views the foregoing scenario. It is vital to understand that your identity as a respondent will remain anonymous (i.e. unknown) and respondents may withdraw their participation at any given time should they wish so. Your time and patience is highly appreciated.

SECTION A: Biographical Information

For each of the following, mark a cross (X) in the box that best describes you:

1. Age:

Less than 25 years	<input type="checkbox"/>	1
25 to 40 years	<input type="checkbox"/>	2
Above 40 years	<input type="checkbox"/>	3

2. Gender

Female	<input type="checkbox"/>	1
--------	--------------------------	---

Male		2
------	--	---

3. Current Position

TES Management		1
Client Company Management		2
Trade Union Representative		3

4. Length of Service in the current position

2 years and less		1
3 to 5 years		2
6 to 10 years		3
Above 10 years		4

5. Educational Qualifications

Matriculation		1
Diploma		2
Degree		3
Postgraduate qualifications		4

SECTION B: Information Related to the Study

<p>1. In your opinion, what is a TES?</p> <hr/> <hr/> <hr/> <hr/> <hr/>

2. In your opinion, what is a TES?

3. Do you think it is fair to describe TES as a form of human trafficking where employees are sold to clients without being accorded the basic statutory rights that they deserve or that they are entitled to receive?

4. In your opinion, why do companies use TES?

5. In your organisation, would you emphasise the continuous use of TES

6. Please explain what could be the implications of using TES?

7. Please explain what could be the implications of not using TESs?

8. In your opinion, what are the possible implications for the regulation of TESs?

9. How will the sanctions for non-compliance with labour standards as set out in the amendments will affect the use of TES?

10. Please provide how the organisational rights for the TES employees are going to be upheld by both TES and client companies as per the new legislation?

11. In your opinion, how will the time limits of three months of which TESs may secure the services of an employee before that employee is deemed the employee of the client affect the use of TESs?

12. In your opinion to what extent do you think the employees are the ones who are mostly disadvantaged in the tripartite relationship between the TES, client company and employees?

To a <i>very low</i> extent		1
To a <i>low</i> extent		2
To a <i>moderate</i> extent		3
To a <i>high</i> extent		4
To a <i>very high</i> extent		5

13. In detail please discuss your role in the tripartite relationship and state the benefits that you provide for the parties in this relationship.

14. Please provide how the issues of dismissals are to be handled?

15. Given a choice, do TES employees prefer to be released from the relationship with TES's to either being directly contracted by firms or be permanently by employed by firms? If yes, why?

16. Please explain if there are benefits enjoyed by employees of TES such as health benefits, pension benefits and leave benefits.

17. Are the salaries received by permanent employees of client companies the same as

those received by TES employees?

18. Are there career prospects such as promotions and trainings for TES employees as well as offering them permanent positions?

19. Would you agree that TES employees are treated equally by the client company as the client company employees? If no, why?

20. When recruiting for a permanent position are TES employees given preference? If no, why?

21. Are TES employees made aware of whom their employer is in the triangular relationship?

22. In cases of dismissals are TESs and TES employees made aware of the procedures that are to be followed?

23. Would you agree with the statement that TESs contributes to a flexible job market and creates employment? If no, please state your reasons.

24. In your opinion do you think that TESs should be banned or regulated? Please support your statement.

******Thank you for your participation******

CHAPTER ONE

1.1 INTRODUCTION

This chapter aims to provide background information on the nature of the present study and its objectives and purpose. It encompasses the background of and motivation for the study and elucidates the focus of the study. The problem statement, objectives, research questions, conceptual and legislative framework, research design, data analysis, limitations and structure of the study are also outlined.

1.2 BACKGROUND OF THE STUDY

Temporary Employment Services (TES) which are popularly known as labour brokers have been under a lot of public scrutiny in the past years and have recently been dominating headlines as a result of the recent amendments to and enactment of new legislation into South African labour law. Recently, the National Assembly has passed the Labour Relations Amendment Act of 2014 (the LRA) and the Employment Services Act, No. 4 of 2014 (the ESA), respectively. These legislative changes regarding the TES have come into being *inter alia* because prior to such enactment the continued right of existence of the TES necessitated that its employees were often subjected to abusive labour practices thus requiring additional statutory protection. According to MacGregor (cited in Maduna, 2012, p.5) the human resourcing strategies adopted by companies around their personnel requirements and utilisation has led to the significant growth of TES industry.

Recently, the South African government has proposed and passed the above mentioned legislation with the view to provide changes to the current labour legislation. These changes include amongst other things, the deletion of clauses permitting the unlawful treatment of employees, the sanctions for non-compliance with labour standards that will be implemented and placement of a limitation on the time for which their client companies may obtain the services of their (labour brokers) employees before such employees are deemed employees of the TES or client company (Beerman & Moosa, 2013, p.2). The foregoing has vast implications regarding the *modus operandi* of the TES environment because it ought to be business as unusual if there were to be in compliance with legislation. It has been suggested that these amendments have potential to have dire effect on the other parties of the triangular relationship, namely; the TES and clients.

The Labour Relations Act 66 of 1995 (the LRA) – prior to the amendments - made provision for the existence of the above mentioned industry however, the role of TES has become an increasingly controversial and divisive issue in both the labour market and political arena as it has been stated that they have enabled employers to avoid some aspects – in terms of compliance - of the country’s labour law. In March 2009, the then Minister of Labour Membathisi Mdladlana stated in his Parliamentary address that labour brokers are contributing to the exploitation of workers. He further described them as risk absorbers who act as intermediaries between the client company and the workers to lower labour costs, to reduce exposure to labour legislation, transfer employee risks to the labour broker and evade labour legislation without any employer liability. An emphasis was also made that these labour brokers are not employment creators but are nothing more than human traffickers (Craven, 2009).

Organised labour in South Africa has, on one hand vociferously called for the ban of the TES because it is seen as exploiting workers. On the other hand, the Free Market Foundation (FMF), and its political allies, the Democratic Alliance (DA), continue to argue that job seekers and the government should defend labour brokers because they create jobs. The call to defend jobs in South Africa sounds plausible and sustainable in the light of the rate of unemployment and poverty in this country. Faced with this predicament, the government has elected not to ban the labour brokers but to make legislative enforcement with stricter regulations which are onerous to parties in the triangular relationship (labour brokers, client companies, and TES employees). This study being triggered by the foregoing therefore seeks to investigate the perceptions held by triangular partners regarding the effects of labour legislation changes on TES companies in the KwaZulu-Natal mining and construction coastal sectors.

1.3 MOTIVATION FOR THE STUDY

The issue of the use of TES companies in South Africa has been debated numerous times. Reviewing previous research, a few studies have been conducted on the use of TES in this country; however, this is the first study conducted to examine the effects of labour legislation changes regarding TES in the KwaZulu-Natal mining and construction coastal sectors. This research will add new perspectives to the gaps in the existing body of knowledge with regard to the use of TES in South Africa. The study will enlighten the principal role players on ways

in which these labour legislation changes will affect their role and existence in the triangular relationship.

1.4 FOCUS OF THE STUDY

The study primarily focuses on the effects of labour legislation changes regarding TES in the KwaZulu-Natal mining and construction coastal sectors. This study attempts to deepen our understanding of effects of these changes on TES companies, client companies, as well as trade unions.

1.5 PROBLEM STATEMENT

Since there have been a number of problems and criticisms surrounding the existence of TES to the extent that some have suggested a complete ban or strict regulation of the companies, as it has been recognised that vulnerable communities in employment (employees sourced by TES) have been disadvantaged. The legislative changes are certainly having particular effects on all the parties in the triangular relationship but mainly on TES and client companies, as they are at the forefront of implementing legislation and also ensuring compliance. The parties will now have to alter their work practices accordingly: some managers and executives may struggle to implement these changes at their place of work. This study therefore seeks to establish the extent to which the legislative changes have an effect on the operation of TES companies as well as their client companies; and how the trade union movement views the coming scenario.

1.6 RESEARCH OBJECTIVES

- 1.6.1. To determine the extent of the impact of the repeal of Section 198 of the Labour Relations Act: this refers to the unlawful treatment of employees by both the TES companies and their client company.
- 1.6.2. To determine the way in which the sanctions for non-compliance with labour standards as set out in the Labour Relations Amendments Act of 2014 will affect the TES companies.
- 1.6.3. To discover the implications of a prescribed maximum time of three months during which TES clients may secure the services of temporary employees.

- 1.6.4. To elicit the manner in which the organisational rights for the TES employees are to be upheld by both the TES companies and client companies as per the new legislation.
- 1.6.5. To establish the awareness levels of TES companies, who will have jurisdiction to deal with disputes arising from the new legislation.

1.7 RESEARCH QUESTIONS

- 1.7.1. What is the extent of the impact regarding the repeal of section 198 of the Labour Relations Amendment Act which refers to the unlawful treatment of employees by both the TES companies and the client company?
- 1.7.2. How will the sanctions for non-compliance with labour standards as set out in the Labour Relations Amendment Act of 2014 affect the temporary employment services?
- 1.7.3. What are the implications of a prescribed maximum time of three months during which TES company clients may secure the services of the employees?
- 1.7.4. In which ways will organisational rights for the TES company employees be upheld by both TES companies and client companies as per the new legislation?
- 1.7.5. What are the awareness levels of TES companies on those responsible for dealing with disputes arising from the new legislation?

1.8 CONCEPTUAL FRAMEWORK AND LEGISLATIVE FRAMEWORK

The field of industrial/employment relations is multidisciplinary in nature, which requires the scouring labour legislation. This study will utilise both the conceptual framework as well as the legislative framework to establish which part of the Acts of Parliament, in terms of labour relations, is applicable and in which way. The ILO Convention governing the utilisation of private employment agencies and the way this convention has been ratified by South Africa will be addressed. Also, Section 198A and 198B of the LRAA and ESA will be referred to indicating the effect such provisions have on the TES environment, their client companies, and trade unions, in the mining and construction industry.

1.9 METHODOLOGY AND DESIGN

This study employed an exploratory research design. This design is utilised on a research problem about which there are few or no earlier studies to which to refer. The focus of this design is on gaining insights and familiarity for later investigation; or the research is undertaken when problems are at a preliminary stage of investigation. The researcher used exploration, because not many studies have been conducted on the research topic. There was no evidence found of an empirical study conducted along these lines of enquiry.

1.9.1. RESEARCH APPROACHES AND PARADIGMS

A qualitative approach was employed when collecting and analysing data. The researcher chose this approach because it is aimed at exploring, analysing, and understanding the effects of the labour legislative changes. Furthermore, the qualitative approach was utilised in this study as it offers methods that are able to provide explanations of participants' personal experiences of the phenomena. Qualitative data is reported in the words of the respondents; thus it enabled the researcher to gather the primary meaning and understanding of how and why the phenomena occurred.

1.9.2. STUDY SITE

The study was conducted in the KwaZulu-Natal Durban and Richards Bay area. The justification for such use was that a large number of TES companies are found in these two areas, in accordance with Federation of African Professional Staffing Organisations (APSO) database.

1.9.3. TARGET POPULATION

The target population for this study consisted of TES companies which include, amongst others, Capital Outsourcing, V&A Labour Solutions, Quyn International Outsourcing, and the Confederation of Associations in the private employment sector, owing to convenience and easy access to the researcher. Management in the selected TES companies was interviewed as they are at the forefront of implementing and complying with legislation, and therefore any changes in legislation will impact on the way in which they operate.

1.9.4. SAMPLING AND SAMPLE SIZE

The researcher requested each TES Human Resources department to provide the organisational structure (organogram) for each occupational level. A selection was made based on the managerial positions of each participant until an acceptable number of participants was achieved. The number was justified, the study taking a qualitative approach.

1.9.5. SAMPLING METHOD

Sekeran & Bougie (2010) state that sampling is the process of selecting a sufficient number of the right elements from the population so that a study of the sample and understanding of its properties or characteristics make it possible for us to generalise such properties or characteristics to the population. The study was exploratory in nature, hence both probability and non-probability sampling methods were used. Probability sampling allowed the researcher to use stratified random sampling.

The researcher used stratified random sampling as it ensured the presence of key subgroups within the sample, and also allowing for the division of the population into strata groups thus ensuring that the sample chosen was representative of the population being studied. Non-probability sampling allowed for the use of purposive sampling in order to elicit the views of the participants (management), as they are those who could provide the desired information on the effects of labour legislative changes TES companies. The non-probability sampling technique known as snowball sampling was also utilised to recruit more subjects for the study. The identified participants were used to refer the researcher to other participants.

1.9.6. DATA COLLECTION METHODS

Qualitative data was collected. Semi-structured and open ended face-to-face interviews were utilised by the researcher to elicit responses from participants on the effects of labour legislative changes. This allowed the researcher to interpret questions clearly and clear any misunderstandings, they are also quick and easy to administer. The researcher was also able to aggregate responses in a reliable manner and to confidently compare responses between different interview periods of time. Furthermore, this interview approach also allowed the interviewer to diverge in order to pursue an idea or response in more detail.

1.9.7. DATA ANALYSIS

Qualitative data was collected therefore data was analysed and interpreted using thematic analysis. This analysis was suitable for this study as data was transcribed to an appropriate level of detail and the transcripts have been checked against the tapes for accuracy. It allowed the researcher to treat the data collected from interviews in a way that made it possible to interpret the research topic.

1.10. ETHICAL CONSIDERATIONS

The ethical clearance for this study was acquired from the University Of KwaZulu-Natal School Of Management, IT & Governance. The researcher approached each and every TES in order to obtain a gatekeeper's letter insofar as labour brokers and client companies are concerned and each and every participating trade union was approached. As part of the process, the researcher assured the prospective participants of the confidentiality, privacy and anonymity. A written informed consent form was issued to each of the participants that were selected for the study to seek for his/her voluntary participation in the study. Each of the participants were made to sign the written informed consent form to indicate his/her willingness to take part in the study.

The participants were also encouraged to ask questions concerning the study. They were also given the opportunity to voluntarily withdraw from the study at any point in time. Participants were offered an opportunity to confirm whether they wish to see the study results or not. For participants who wish to access the results in more detail a hard copy of the full research thesis will be made available at the University of Kwa-Zulu Natal Westville Campus library. A CD with a PDF copy will also be sent to the participants who cannot access the University library. Data will be stored in the Discipline for a period of five years and thereafter, be disposed in accordance of the prescribed requirements of the University's guidelines.

1.11. LIMITATIONS OF THE STUDY

This research had limitations with regards to resources and time. The outcome of this study cannot be generalised to all the TESs in South Africa as this study was only conducted in KwaZulu-Natal and only in two geographical areas which are Durban and Richards Bay hence this was a small-scale qualitative study. The study was also limited to the mining and construction sector. The study also only managed to cover thirteen (13) subjects and not

between 15 and 20 as it had intended to from the onset. This is due to the fact that some of the subjects that were approached were not comfortable with participating in the study. There's also a lot of red tape in this industry which can be attributed to the fact that this industry has been constantly under a lot of scrutiny. Most TES companies also requested that only their managers may participate in the study and not their employees as they are placed at the client company site.

1.12. THE STRUCTURE OF THE STUDY

Chapter 1 provides an outline of the study and explains the background to, motivation for and the focus of the study. The problem statement, research objectives, questions, conceptual and legislative framework, limitation and summary outline per chapter are also presented.

Chapter 2 and 3 provide a review of various literatures on labour legislative changes regarding temporary employment services. Chapter 2 critically analyses the law and practice of temporary employment services in South Africa. Chapter 3 critically reviews the arguments for and against the prohibition and regulation of the TES industry in South Africa.

Chapter 4 explains the research design and methodology that will be employed. An extensive study of the sampling technique as well as the data collection method that will be employed will be done. The theory on the analysis of data will also be supplied.

Chapter 5 depicts the research outcomes for interpretation in Chapter 6 using themes and sub-themes. Quotes from the responses are included to support the themes as well as to strengthen the discussion around the themes.

Chapter 7 vividly provides recommendations on the effects of labour legislation changes and concludes the study.

1.13. CONCLUSION

This chapter supplied a compressed foreground of the temporary employment services (TES) industry and highlighted the research problem. The overall aim, main objectives and key questions were presented. The importance of the research and the limitations were also presented. Lastly, an overview of the chapters in the thesis was outlined. The following chapter will provide a literature review on the law and practice of temporary employment services in South Africa as well as the conceptual framework.

CHAPTER TWO

LAW AND PRACTICE OF TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA

2.1 INTRODUCTION

The preceding chapter gave an overview of background information on the nature of the present study and its objectives and purpose. It also encompassed the background of and motivation for the study and elucidated the focus of the study. The problem statement, objectives, research questions, conceptual and legislative framework, research design, data analysis, limitations and structure of the study were also discussed. This chapter aims to provide background of the problem, the historical background of the practice of TES in South Africa, the legislative framework. The comparative jurisdictions will also be discussed.

2.2. BACKGROUND OF THE PROBLEM

According to Mostert (2011, p.15) TES is defined as an exercise that involves the placing of employees by the TES at their client's place of work. Temporary employment services are a common phenomenon worldwide. Some countries have chosen to regulate them while in other countries they have become a contentious issue with the desire to ban them completely as it has been suggested that they do not protect the employee but actually abuse an already disadvantaged employee (Mavunga, 2010, p.5). According to the World Bank Development Report (2013) 7% of South Africa's labour force is made up of temporary employees and TES dispenses employment to an average of 410 000 workers a day. Adcorp, South Africa's biggest TES has indicated that the TES industry has a yearly turnover of around R44bn and the industry has grown from 2000 to 2012 and the number of temporary jobs has increased by 2.6 million (Jones, 2013).

The TES industry in South Africa has for various reasons come under the spotlight recently and has become a target for attack. Maduna (2012, p.15) states that a number of statements and labels have been used to describe TES companies which are commonly known as labour brokers. The following phrases have been used frequently to describe TES companies as those that:

- i. Act as intermediaries between the client company and the workers to lower labour costs

- ii. Are risk absorbers and not employment creators
- iii. Reduce exposure to labour legislation and evade labour legislation without any employee liability
- iv. Are nothing more than “human traffickers
- v. Contribute to the exploitation of workers.

The TES company is distinguished from the activities of placement agencies in that the TES company remains involved with the worker after the worker has been placed with the client. The TES company pays the worker for the services rendered at the workplace of the client. The employees that are supplied to the client by the TES company are not regarded as employees of the client but are considered employees of the TES company and are therefore the exclusive responsibility of the TES company. Section 198 of the LRA currently regulates the TES company relationships. According to Lawrence (2011, p.3) a large number of businesses in South Africa tend to use TES to avoid unfair dismissals, unfair retrenchments, overtime pay and many other rights that are accorded to workers in the country and the provisions made in the LRA.

2.3. HISTORICAL BACKGROUND OF TEMPORARY EMPLOYMENT SERVICES

According to MacGregor (cited in Maduna, 2012, p.5) the human resourcing strategies adopted by companies around their personnel requirements and utilisation has led to the significant growth of TES industry. The Labour Relations Act 66 of 1995 (the LRA) allowed for the existence of the above mentioned industry however, the role of TES companies has become an increasingly disputed issue in the political arena and the labour market as it has been stated that they have enabled employers to avoid some aspects – in terms of compliance - of the country’s labour law. In March 2009, the then Minister of Labour Membathisi Mdladlana stated in his Parliamentary address that labour brokers are contributing to the exploitation of workers.

He further described them as risk absorbers who act as intermediaries between the client company and the workers to lower labour costs, to reduce exposure to labour legislation, transfer employee risks to the labour broker and evade labour legislation without any employer liability. An emphasis was also made that these labour brokers are not employment creators but are nothing more than human traffickers (Craven, 2009). Recently, the South African government has proposed and passed the above mentioned legislation with the view

to provide changes to the current labour legislation. These changes include amongst other things, the deletion of clauses permitting the unlawful treatment of employees, the sanctions for non-compliance with labour standards that will be implemented and placement of a limitation on the time for which their client companies may obtain the services of their (labour brokers) employees before such employees are deemed employees of the TES or client company (Beerman & Moosa, 2013, p.2).

The foregoing has vast implications regarding the *modus operandi* of the TES environment because it ought to be business as unusual if there were to be in compliance with legislation. It has been suggested that these amendments have potential to have dire effect on the other parties of the triangular relationship, namely; the TES companies and clients. The use of TES companies is a phenomenon that came with the discovery of minerals, the issue of migrant workers became a key element of the labour movement in this country. Workers were recruited by an agency from the homelands or elsewhere in Southern Africa. These workers were compelled to enter into contractual relationships in the place where they resided.

This was necessary to control any legal claims migrant workers might have to the rights accorded permanent workers in the workplace and to control any political claims to reside in the urban areas. These brokers had to operate in close conjunction with the employers that utilized the labour. The establishment of brokers was based on either organized businesses or individual companies. In many cases, brokers were employed by the employers for whom they were recruiting for. Two organisations ensured the supply of labour in the mines and these were the Witwatersrand Native Labour Association (WNLA) which got labour from Southern Africa while the Native Recruitment Corporation (NRC) provided labour from the domestic market (Mavunga, 2010, p.19). These agencies were introduced in response to an international trend and combined the supply of temporary workers with the placement of persons in permanent jobs and also provided workers for posts other than clerical and administrative posts.

Manpower opened its first office in South Africa in the late 1960s. Kelly-Girl was also established during that period. In 1973 there were widespread strikes by black workers over wages which were declining rapidly and the rising of inflation. The labour industry was brought to a near standstill and these events dramatically underlined the change in legislation (Mavunga, 2010, p.20). In 1977, the Wiehahn Commission which initiated the first introduction of South Africa's current labour relations system was set up to investigate how

to regulate labour legislation. Certain recommendations were noted which include black employees being accorded trade union rights, a national Manpower Commission being established and minimum standards of employment being introduced. The Comhe activities of a new type of placement service where undertakings would lease the services of persons in their employment to other persons, being their clients. It recommended amendments to the 1956 LRA (Mostert, 2011, p.15).

It recommended amendments to the Labour Relations Act 28 of 1956. The South African labour law first recognised agency work in 1983 when the concept of labour brokers was first introduced in amendments to the LRA. South Africa adopted a rule permitting temporary employment agencies to be classified as the employers of those whom they placed to work with a client more than a decade prior to this type of arrangement being reflected in international standards with the adoption of ILO Convention No. 181 of 1997 (Benjamin, 2013 p.2). During this period emergent trade unions established themselves and supplied skilled workers to the manufacturing industry and the migrant labour system and influx control were dismantled.

Employees became vulnerable to abuse by “fly-by-night” labour brokers, the so called “bakkie brigade”. Workers who were employed by these labour brokers would sometimes not receive their wages and when they approached the client for payment as they assumed that they were employed by them, the client would inform them that it had no obligation to pay them as they were not its employees but the labour broker’s and that their wages had been paid over to their employer (the labour broker). By then the broker had changed the contact numbers and are unreachable and in most cases conducting business elsewhere. This was usually the end of the matter for the employees as there was no mechanism available to employees to recover wages and other payments owed to them (Benjamin, 2009, p.3).

The regulation of TES companies has been a high-profile issue in South Africa for at least a decade. Legislation to regulate them was first enacted in 1983 and amendments were made to same in 1995 with the introduction of a new labour relations framework by the first SA’s democratic Parliament, just before the International Labour Conference adopted the Private Employment Agencies Convention, 1997 (No. 181). The rationale given for enacting the amendments was that firms were structuring their employment relationships to prevent workers from receiving the protection of statutory wage regulating measures and other minimum conditions of employment (Benjamin, 2013, p.2).

The Labour Relations Amendment Act 2 of 1983 introduced the definition of a labour broker, which is similar to the definition that is currently in the Labour Relations Act of 1995. The labour broker was defined as a person who for reward procured persons for a client. Labour brokers were deemed to be the employers of individuals they placed with their clients provided they were responsible for paying them their remuneration (Benjamin, 2009, p. 2). This legislation meant that the client had no obligation to comply with labour legislation. The only recourse that employees had was against their employer (the labour broker) and this certainly brought a number of complexities for example, a client could disregard essential principles like occupational health and safety and the employee would have no recourse against such abuse (Mavunga, 2010,p.23). The amendment also introduced a requirement that labour brokers must register with the Department however the system of registration was not enforced. During this period emergent trade unions established themselves and supplied skilled workers to the manufacturing industry and the migrant labour system and influx control were dismantled.

In 1994 when South Africa underwent its transition to democracy, the apartheid laws were abolished. A drafting committee comprising of government, labour and business assisted by the ILO prepared legislation that was the subject of intense negotiations in the tripartite forum the National Development and Labour Council (NEDLAC) to address the inequalities brought about by the apartheid regime. This legislation was enacted by the new democratic Parliament in late 1995 and the LRA came into effect in October 1996 (Benjamin, 2013, p.2).

2.4. LEGISLATIVE FRAMEWORK

Before engaging in an in depth discussion of the recent amendments it imperative that one discusses the legislative framework which influences any decisions made regarding labour law in the country. The diagram below illustrates the legislative framework regulating the triangular relationship between the TES company, the client and the employee which consists of the ILO Conventions as well as the South African legislation.

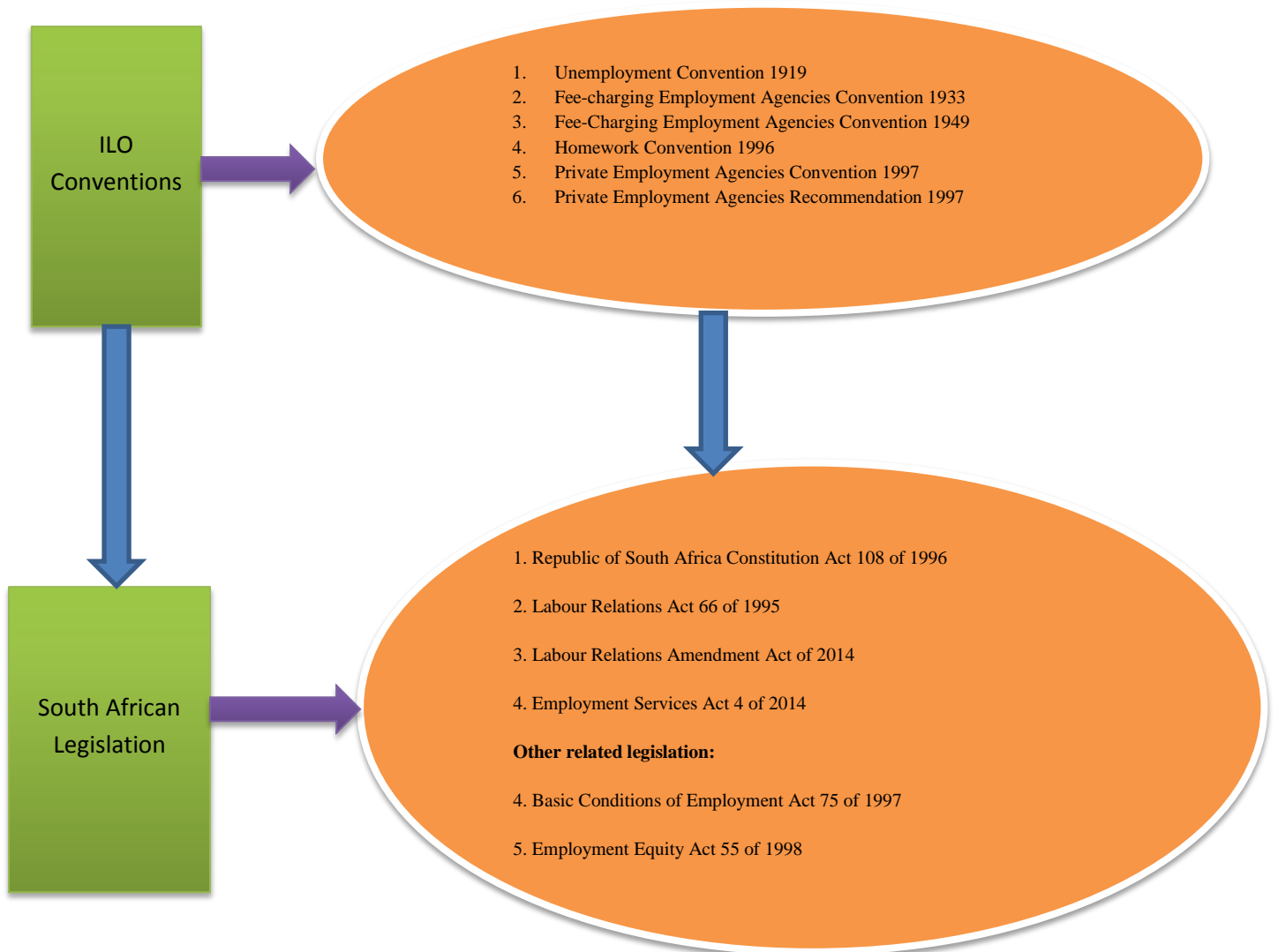


Fig 2.1: Legislative framework regulating the triangular relationship

Source: The Researcher

2.4.1 THE INTERNATIONAL LABOUR ORGANISATION (ILO)

The ILO can be defined as a body committed to address the issues of social justice in its member states. It aims to make an impact on the world of work by regulating matters such as working and living conditions, hours of work, the prevention of unemployment, the organisation of vocational and technical education and also the position of labour brokers (Mavunga, 2010, p.6). The ILO is one of the key international players in the field of employment relations and labour law. This is against the background that the organisation focuses on the quality of employment relations worldwide, has adopted more than 180 Conventions and more than 190 Recommendations for member states (Venter and Levy, 2014 p.63). In a nutshell, the ILO is the global body based in Geneva, Switzerland, entrusted with the responsibility for the formulation and supervision of international labour standards in the form of conventions. It functions through three main organs namely, the International Labour Conference, the Governing Body and the International Labour Office. These organs have different functions but ultimately have the goal of establishing international standards in the world of work. The International Labour Conference is the highest policy making body of the ILO and meets annually in Geneva (Mavunga, 2010, p.6).

TES environment has been recognised and commended by the ILO. Soon after the advent of democracy in 1994, South Africa resumed its membership of the ILO and has ratified most of its conventions which include those that regulate the TES environment. According to Mavunga (2010, p.7) the ILO has drafted important conventions that are exclusively meant for the regulation of the TES and they are the Unemployment Convention 1919, Fee-charging Employment Agencies Convention 1933, Fee-Charging Employment Agencies Convention 1949, Homework Convention 1996, Private Employment Agencies Convention 1997, Private Employment Agencies Recommendation 1997.

The ILO has put obligations on member states to make sure that labour brokers are effectively operating. The onus is on government of the member states to regulate the system in terms of their national laws in order for all role players to benefit and adopt all necessary and appropriate measures to prevent and to eliminate unethical practices by labour brokers (Mavunga, 2010, p.15). To ensure that this materialises, South Africa has enshrined in its Constitution the rights of the workers – through the fair labour practice regime – and that has been translated to commensurate labour legislation of this country.

2.4.2 UNEMPLOYMENT CONVENTION 1919

This Convention was adopted at the end of World War 1 with a purpose of alleviating unemployment that had been a result of the wretched war. The drafters of this Convention recognised that public free of charge labour brokers would play an important role in job creation therefore the principle of free placement agencies was established as a standard for employment to curb unemployment (Mavunga, 2010, p.8).

Article 2 of this Convention stipulates the following: 1. Each Member which ratifies this Convention shall establish a system of free public employment agencies under the control of a central authority. Committees, which shall include representatives of employers and of workers, shall be appointed to advise on matters concerning the carrying on of these agencies. 2. Where both public and private free employment agencies exist, steps shall be taken to co-ordinate the operations of such agencies on a national scale. 3. The operations of the various national systems shall be coordinated by the International Labour Office in agreement with the countries concerned (ILO, 1919).

2.4.3 FEE-CHARGING EMPLOYMENT AGENCIES CONVENTION 1933

This Convention defines fee-charging employment agencies as any person, company, institution, agency or other organisation which acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker. Article 2 (1) of this convention stipulates fee-charging employment agencies conducted with a view to profit shall be abolished within three years from the coming into force of this Convention for the Member concerned. During the period preceding abolition there shall be no new fee-charging employment agency established with a view to profit. Fee-charging employment agencies conducted with a view to profit shall be subject to the supervision of the competent authority and shall only charge fees and expenses on a scale approved by the said authority.

Article 3 stipulates that exceptions to the provisions of paragraph 1 of Article 2 of this Convention may be allowed by the competent authority in exceptional cases only after consultation of the organisations of employers and workers concerned. Exceptions may only be allowed for agencies catering for categories of workers defined by national laws or regulations and belonging to occupations placing for which is carried on under special

conditions justifying such an exception. The establishment of new fee-charging employment agencies will also not be allowed after the expiration of the period of three years. The fee-charging employment agencies which had been granted exceptions were subject to the supervision of the competent authority, required to be in possession of a yearly license renewable at the discretion of the competent authority during a period which should not exceed ten years, only charge fees and expenses on a scale approved by the competent authority; and only place or recruit workers abroad if authorised so to do by its license and if its operations are conducted under an agreement between the countries concerned (ILO,1933). This convention was revised in 1949 as it was concluded that it undermined flexibility in the labour market.

2.4.4 FEE CHARGING EMPLOYMENT AGENCIES CONVENTION 1949

This Convention was drafted to revise the 1933 Fee-Charging Employment Agencies Convention. Part 2 of this Convention Article (2) to Article (9) provides an option to abolish fee-charging agencies. If a member state decided to abolish these labour brokers they needed to do so within a limited period of time determined by the competent authority. These brokers were not abolished until a public employment service was established. The competent authority prescribed different periods for the abolition of agencies catering for different classes of persons. During the period preceding the abolition these agencies were be subject to the supervision of the competent authority and only charged fees and expenses on a scale submitted to and approved by the competent authority or fixed by the said authority. This supervision was directed more particularly towards the elimination of all abuses connected with the operations of fee-charging employment agencies conducted with a view to profit. The competent authority will consult the employers' and workers' organisations concerned (ILO, 1949).

Part 3 of this Convention Article (10) to Article (14) provides and option to regulate these labour brokers. These brokers had to be supervised by a competent authority, were required to be in possession of a yearly license renewable at the discretion of the competent authority, were expected to only charge fees and expenses on a scale submitted to and approved by the competent authority, could only place or recruit workers abroad if permitted so to do by the competent authority and under conditions determined by the laws or regulations in force. Appropriate penalties, including the withdrawal of the licenses when necessary and authorisations provided for by this Convention was prescribed for any violation of the provisions of this part of the Convention or of any laws or regulations giving effect to them.

The competent authority had to take the necessary steps to satisfy itself that non-fee-charging employment agencies carry on their operations gratuitously (ILO, 1949).

2.4.5 HOMEWORK CONVENTION 1996

This Convention marked the successful end of a long struggle for recognition for homeworkers and set minimum standards of their employment. It spells out a legal framework for the different ways in which homeworkers should be protected. This Convention describes a home worker as someone who provides a product or service in his or her home or other premises of his choice other than the workplace of the employer, for a fee irrespective of who provides the equipment (Mavunga, 2010, p.12). The main clause cover equality of treatment and protection against discrimination, health and safety, pay, social security, maternity protection, access to training and minimum wages for employment. The Convention also requires governments to adopt and implement a national policy on home work. The use of intermediaries in Homework is permitted, the respective responsibilities of employers and intermediaries is determined by laws and regulations or by the court decisions in accordance with national practice. Flexibility is also granted to the member states to accommodate personal circumstances (Mavunga, 2010, p.12).

2.4.6 RATIFIED ILO CONVENTIONS

Convention 87 and Convention 98 are two of the ratified conventions that impose public international law obligations on South Africa in respect of freedom of association, the right to organise and collective bargaining. Convention 87 concerns freedom of association and protection of the right to organise (Gericke, 2010, p.92). It ensures that workers and employers may exercise freely the right to organise and join organisations of their choice. Workers and employers and their respective organisations should ensure that while exercising their rights, they respect the law of the land. Member states also have a duty to ensure that the laws of the land do not impair or shall not be applied as to impair the guarantees provided for in this convention (Brand, 2010, p.10).

Convention 98 stipulates that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment and promotes the right to organise. This Convention also imposes a duty on member states to take measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organisations and trade unions with a view to regulating terms and conditions of employment by means of collective agreements. Convention 100 is another

ratified convention which places an obligation on member states to ensure that the principle of equal remuneration for men and women workers who perform work of equal value is applied to all workers (Brand, 2010, p.11).

2.4.7 UNRATIFIED ILO CONVENTIONS

a) THE PRIVATE EMPLOYMENT AGENCIES CONVENTION OF 1997

This Convention successfully allows for the operation of labour brokers as well as the protection of workers using their services within the framework of its provisions. It attempts to strike a balance between the opposing needs of employers and workers (Brand, 2010, p.13). Article (1) of the Convention defines private employment agency as any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

- i. 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.
- ii. Services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person which assigns their tasks and supervises the execution of these tasks.
- iii. Other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment. (ILO, 1997, Article 1)

According to Article 3 of Convention 181 the determination of the legal status of private employment agencies and the conditions governing their operation in accordance with a system of licensing or certification (Brand, 2010, p. 13).

It states that the legal status of private employment agencies shall be determined in accordance with national law and practice and after consulting the most representative organizations of employers and workers and a member shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice (ILO, 1997). Article 4 stipulates that measures shall be taken to ensure that the workers recruited by private employment agencies providing the

services are not denied the right to freedom of association and the right to bargain collectively. Article 5 stipulates that in order to promote equality of opportunity and treatment in access to employment and to particular occupations a member shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability. Article 11 imposes a duty on member states to ensure that labour broker employees are adequately protected in relation freedom of association, collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits and access to training. Article 12 requires member countries to determine and allocate the respective responsibilities of private employment agencies and user enterprises in relation to the matter mentioned in Article 11 (Brand, 2010, 13).

While this Convention seeks to ensure that workers placed in user enterprises by employment agencies receive adequate protection under labour law as well as protection against discrimination and violation of their labour rights, it has been criticised for not establishing how responsibilities should be allocated amongst the entities party to the triangular relationship. It is also stated that it fails to provide guidelines for the division of responsibility in this type of relationship. The Convention also does not deal with the circumstances that countries should take into account in deciding whether to permit agencies to be classified as employers or address the security of employment of workers hired by private employment agencies (Benjamin, 2013. p. 7).

The ILO has placed obligations on member states to ensure that labour brokers are effectively conducted. The onus is on the government to regulate the system in terms of its national laws in order for all role players to benefit. South Africa has not ratified this Convention and the ILO has encouraged countries to ratify it as its implementation can be the engine for job creation, structural growth and improved efficiency of national labour markets better matching supply and demand for workers, higher labour participation rates and increased diversity (Mavunga, 2010, p.15).

b) PRIVATE EMPLOYMENT AGENCIES RECOMMENDATION 1997

Convention 181 is supplemented by the Private Employment Agencies Recommendation 188 of 1997. This convention acknowledges the existence of agencies and promotes control of agencies in the form of a system of registration or licensing by national governments. It

proposes measures that member states may take to address certain consequences relating to the responsibilities of private employment agencies protecting the rights of workers which include freedom of association, minimum wages and access to training and collective bargaining (Gericke, 2010, p.102). Recommendation 188 recommends that private employment agencies should have written contracts with agency workers and refrain from making agency workers available to agency clients to replace workers who are on strike. This recommendation encourages members to adopt all necessary and appropriate measures to prevent and to eliminate unethical practices by labour brokers. Private employment agencies should not knowingly recruit, place or employ agency workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discrimination. Recommendation 188 furthermore recommends that private employment agencies should not prevent agency clients from employing agency workers, restrict the occupational mobility as well as impose penalties on an agency worker for accepting employment in another enterprise (Brand, 2010, p.15).

2.5. THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT 108 OF 1996

The constitution plays a significant role when interpreting labour legislation. It permits the granting of labour rights. Section 2 of the Constitution states that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. The LRA also states that it has to give effect to and regulate fundamental rights bestowed in the Constitution and compels everyone interpreting it to do so in accordance with the Constitution (Mostert, 2011, p. 10). Section 82 of the Basic Conditions of Employment Act (BCEA) 75 of 1997, s57 of the Employment Equity Act (EEA) 55 of 1998, s23 of the Republic of South Africa Constitutional Act 108 1996 (the Constitution) as well as the different ILO Conventions also make provision for the legal existence of TES in the field of employment relations and labour law. Now that one has done a discussion on the ILO Conventions it is imperative to delve into a discussion regarding the Labour Relations Act.

2.6.THE LABOUR RELATIONS ACT (LRA) 66 OF 1995

2.6.1. SECTION 198 (1)

According to this provision of the Act, a TES company is defined as ‘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 service. A person

whose services have been procured for or provided to a client by the broker is the employee of that and the broker is that person's employer (Department of Labour, 1995, s198 (1)). The Act makes a legal provision for the existence of TES companies and gives certainty to who is actually the employer in the existing triangular relationship.

2.6.2. SECTION 198 (2)

This provision explains that all the obligations and duties of an employer in this relationship must be fulfilled by the TES companies. It states that "For the purpose of this Act, a person whose services have been procured for or provided to a client by a TES company is the employee of that TES company and the TES company is that person's employer (Department of Labour, 1995, s198 (2)).

2.6.3. SECTION 198 (3)

This section states that "Despite subsections (1) and (2), a person who is an independent contractor is not employee of a TES company, nor is the TES company the employer of that person (Department of Labour, 1995, s198 (3)). Independent contractors are excluded from this tripartite relationship.

2.6.4. SECTION 198 (4)

This section regulates the issue of liability. It states that, "The TES company and the client are jointly and severally liable in respect of any contraventions pertaining to a collective agreement concluded in a bargaining council that regulates terms and conditions of employment, a binding arbitration award that regulates terms and conditions of employment, the Basic Conditions of Employment Act and a determination made in terms of the Wage Act (Department of Labour 1995, s198(4)) The client and the TES company are responsible for ensuring that the relevant provisions of such instruments are complied with. This encourages responsible contracting as well as providing a safety net for workers who are usually disadvantaged. (Mavunga, 2010, p.25).

The LRA promotes the effective resolution of labour disputes. The LRA establishes the Commission for Conciliation, Mediation and Arbitration (CCMA) and Labour Court for this purpose. The Act prohibits unfair labour practices and unfair dismissals and allows employees to refer such disputes to the CCMA and Labour Court (Brand, 2010, p.22). The LRA has been criticized for its inability to extend shared responsibility in cases of unfair

dismissals and unfair labour practices this has been witnessed in cases where a client terminates a contract with the TES company, the TES company is obliged to dismiss the employee and this results in employees struggling to refer a dispute to the CCMA as the termination of this contract does not constitute a dismissal (Mavunga, 2010, p.25).

2.7. BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

The BCEA contains the same definition of temporary employment service as the LRA. The TES companies that provide employees to clients are deemed to be the employer of those employees in terms of the Act. However, the client is jointly and severally liable for compliance with the minimum standards set by the Act as well as those contained in sectoral determinations issued by the Minister in terms of the BCEA, on the recommendation of the Employment Conditions Commission (ECC). Non-standard employees such as labour broker employees increasingly rely on sectoral determinations to provide them with basic conditions of employment in particular minimum wages however many falls outside the scope of sectoral determination (Benjamin, 2013, p.3).

If a TES company fails to pay amounts owed to its employees, the client for whom the employees worked for is liable to make those payments even if the client has paid the TES company. The client cannot be sued directly in the Commission for Conciliation, Mediation and Arbitration (CCMA) or Labour Court because it is not an employer. The employee can only proceed against the client if it has obtained a judgment or order against the TES company that the TES company has declined to pay (Benjamin, 2013, p.3). The BCEA has a dual purpose which is to establish and enforce basic conditions of employment as well as to regulate the variation of basic conditions of employment.

2.8. THE EMPLOYMENT EQUITY ACT 55 OF 1998

The Employment Equity Act (EEA) prohibits unfair discrimination and requires employers to take affirmative action measures. The EEA prohibits all persons from unfairly discriminating against employees. Both the TES company and the client with whom the employees are placed are covered by the Act's prohibition of unfair discrimination. A client is also jointly and severally liable for unfair discrimination by the TES company on implied instructions of the client in cases where a TES company selected a candidate on a prescribed ground such as race following the client's instruction (Benjamin, 2013, p.4). The EEA deems the client to be the employer if the labour broker is placed with the client for period of three months or

longer. A research study done by the Department of Labour (DOL) revealed that TES company employees are paid less for doing the same job as employees directly employed by the client as the Act does not place an obligation on the client to pay similar wages to employees engaged through a TES company even if they perform the same work as directly employed employees (Brand, 2010, p. 24).

2.9. THE SKILLS DEVELOPMENT ACT 97 OF 1998

The Skills Development Act aims to provide for the development of skills of the South African workforce in order to improve the quality of life. The Act does not make any reference to TES companies however it introduces a broader category called private employment services agency which refers to any person that provides employment services for gain (Benjamin, 2013, p.4). It stipulates that any person who wishes to provide services for gain must apply for registration to the Director-General in the prescribed manner and the Director-General must register the applicant if it is satisfied that the prescribed criteria have been met, however the Department of Labour has done little to ensure that the system of registration is implemented. The employment services mentioned in the provision include a wide range of services such as education and training and career advice (Mavunga, 2010, p. 27).

2.10. SKILLS LEVIES, UNEMPLOYMENT CONTRIBUTIONS AND INCOME TAX

Schedule 4 of the Income Tax is used to determine whether or not the TES company is an employer. A TES company that has applied for and been issued by the South African Revenue Service (SARS) with an exemption certificate (IRP30) is an employer for the purposes of the SDA and Unemployment Insurance Fund (UIF) and may deduct tax from employees' income and pay it to SARS. These certificates are valid for a year and must be renewed. If a TES company does not hold a valid exemption certificate, it is the client's obligation to pay the skills development levy as well as the employer's and employee's contribution to the UIF and the employer may not use the TES company to deduct and make tax payments on behalf of the employees it places (Benjamin, 2013, p.5).

2.11. THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT (COIDA) 130 OF 1993.

The Compensation for Occupational Injuries and Diseases Act (COIDA) is a legislation that was enacted with purpose of providing compensation for disablement caused by occupational injuries or diseases sustained or contracted by an employee in the course of employment (Mavunga, 2010, p.27). A TES company is defined as an employer in terms of this Act. The TES company has to register as an employer with the Compensation fund, comply with the Act's reporting obligations, pay contributions to the fund and report occupational accidents and diseases in terms of the Act. The client is not liable unless the employee is paid by the client in terms of COIDA.

2.12. CURRENT SOUTH AFRICAN LABOUR LEGISLATIVE REFORM

The current legislation changes have their origins in the growing casualisation of work that has become a feature of the South African labour market over the past decade. In late 2010, the Department of Labour published a Bill containing amendments to the Labour Relations Act. The intention of these proposed amendments was to effectively prevent triangular employment relationships without an explicit prohibition of TES companies as any explicit prohibition on TES companies would be regarded as violating s22 of the Constitution which stipulates that every citizen has the right to choose their trade, occupation or profession freely (Benjamin, 2013, p.16).

The amendments came into operation on 4 January 2015. The amendment of the LRA and introduction of the Employment Services Act No.4 of 2014 in 2010 became relevant to TES companies as it made provision for the regulation of TES companies by the government in order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and outsourcing, address the problem of labour broking and prohibit certain abusive practices. Provisions have been made to introduce and facilitate unionisation of workers and the conclusion of sectoral collective agreements to cover vulnerable workers in these different legal relationships and ensure the right to permanent employment for affected workers (Mkalipi, 2011, p.2).

2.12.1. AMENDMENTS TO THE LABOUR RELATIONS ACT 66 OF 1995

In terms of the amended LRA, the definition of an employer will be added to section 213 to assist employees with identifying their employer. An employer will be defined as “any person, institution, organisation or organ of state that employs or provides work to an employee or any other person and directly supervises, remunerates or tacitly or expressly undertakes to remunerate or reward such employee for services rendered (Mostert, 2011, p. 50). The definition of TES company employees will be amended and will stipulate that TES company employees are employees that are employed for a period of 3 months or less, a substitute for a temporarily absent employee or a category of work as determined by the Minister, a Sectoral Determination or a bargaining council agreement. This clarification of ‘employee’ status was to prevent situations whereby employees are deprived of their rights such as freedom of association and collective bargaining. The contract with a TES company employee can continue beyond the 3 months period. The TES company and its client are jointly and severally liable for the obligations of the employment contract with TES company employees (SABPP, 2015, p.3).

After 3 months service, TES company employees who earn below the current threshold of R205 433.30 per annum will be deemed employees of the client and will have full labour law protections including protections against unfair dismissals as well as unfair discrimination. The client must treat TES company employees equally as their employees who do similar work and apply the company policies and procedures as well as company benefits fairly unless they can provide justifiable reasons for not doing so such as seniority, length of service, merit, quality or quantity of the work performed or any other reason that is justifiable (Van Eck, 2013, p. 606).

In cases where the client terminates a contract of employment to avoid being deemed the employer of the TES company employee, the LRA stipulates that the client must prove that the reason for the dismissal was fair or this will be classified as a unfair dismissal as stated in Section 186(1) of the LRA (SABPP, 2015, p.3). An arbitration award granting employees of the agency organisational rights may also be made binding on a user enterprise. The CCMA may make rules limiting or prohibiting representation in conciliation and arbitration proceeding, the powers of the CCMA to intervene to resolve disputes in the public interest have also been extended. All disputes are to be dealt with via “con-arb” proceeding unless Commission and all parties agree to the contrary (Department of Labour, 2011). The

amendments also seek to promote trade unionism among agency workers by permitting these workers and their trade unions to exercise organisational rights at the client's workplace (Benjamin, 2013, p. 17). Statutory councils have been empowered to apply for the extension of collective agreements subject to conditions required by the LRA. Bargaining councils have also been enabled to charge for dispute resolution services where CCMA charges a fee (Department of Labour, 2011, p.8).

2.12.2. AMENDMENTS TO THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997

The BCEA aims to address Government's commitment to avoid exploitation of workers, ensure decent work and protect the employment relationship. The amendments will introduce laws to regulate contract work, sub-contracting, outsourcing, address the problem of labour broking and prohibit abusive practices (Mkalipi, 2011, p. 1). In addressing the issue of labour broking the amendments stipulate that employers must contribute equal or similar benefits for fixed term contracts and permanent workers. Sectoral Determinations will regulate the placement of employees by TES companies; sub-contracting and contract work (Department of Labour, 2011, p. 10).

2.12.3. AMENDMENTS TO THE EMPLOYMENT EQUITY ACT 55 OF 1998

This amendment bill aims to promote the prevention of unfair discrimination in the workplace, ensure the Act gives effect to fundamental constitutional rights which include equality, the right to fair labour practices and protection from unfair discrimination. Fines for non-compliance with the Act will also be increased (Mkalipi, 2011). A new clause to deal with unfair discrimination by employers in respect of terms and conditions of employment of employees doing the same work, similar work or work of equal value has been inserted. Differences in pay and conditions of work between employees performing the same or substantially the same work or work of equal value will amount to unfair discrimination unless the employer can show that differences are fair in relation to experience, skill, responsibility and qualifications. Disputes concerning discrimination by lower paid employees can be referred to the CCMA for arbitration (Department of Labour, 2011, p. 16).

2.12.4. EMPLOYMENT SERVICES ACT NO. 4 OF 2014

The purpose of the Act is to promote employment of citizens, improve access to the labour market for work seekers, provide opportunities for new entrants to the labour market to gain

work experience, improve employment prospects of persons with disabilities, improve employment prospects of work-seekers and employees facing retrenchments, facilitate access by work seekers to training and, promote employment growth and workplace productivity (Department of Labour, 2012). It establishes a framework for regulating private employment agencies including TES companies. A requirement for TES company registration has been reintroduced and it will be a criminal offence to operate without registration. In terms of the Act, private employment agencies may not charge work-seekers any fees for services rendered and also prohibits practices by which employers or agencies may seek to circumvent this prohibition or make deductions from employees' remuneration however, charging of fees for specific categories of employees or for the provision of specialist services may be permitted. The retention of information by Private Employment Agencies and the confidentiality of information concerning employees will be regulated by this Act in line with the ESA, LRA and Protection of Personal Information Act No.4 of 2013. This Act also plays a role of Registrar of Private Employment Agencies (Benjamin, 2013, p.19).

It establishes the Employment Services Board with functions to oversee the public employment services established by the Act and to implement and oversee various related strategies and regulatory matters. The Act also establishes public employment services which aim to match work seekers with available work opportunities free of charge. These public employment services require work seekers to register and employers to register job vacancies and other placement opportunities. These public employment services would also provide advice to workers on access to social security benefits and provide other specialised services to assist the youth, new entrants into the labour market, disabled persons, and members of rural communities to find access to work. The Act aims to elevate opportunities for citizens over those of foreign workers. An employer will be required to make use of the public employment service before employing foreign nationals and to also submit reasons to the Director General as to why citizens with suitable profiles referred to them by the department could not be employed instead of foreign nationals (Ryan, 2013).

2.13. COMPARATIVE JURISDICTIONS: A CASE OF NAMIBIA AND THE NETHERLANDS

International labour standards have a direct influence on South Africa's formulation of its labour policies hence the consideration of international labour standards is imperative due to a constitutional obligation to consider international law when interpreting the Bill of Rights.

This is dealt with in s39 of the Constitution of the Republic of South Africa directs that it is imperative that international law must be considered hence the examining of other jurisdictions is imperative as they also have a direct influence on the legislation (Aletter, 2015, p. 9).

2.13.1. NAMIBIA

Labour hire emerged in Namibia in the late 1900s. This era was characterised by contract labour which was characterised by unfair labour treatment, racism and discrimination. Indigenous Namibians were subjected to extreme racial discrimination and prejudice during this era. Various laws existed to limit indigenous Namibians freedom of movement which include the Native Administration Proclamation of 1922, the Prohibited Areas Proclamation of 1928, the Native Passes Proclamation of 1930 and the Natives (Urban Areas) Proclamation of 1951. These legislations made it difficult for indigenous Namibians to find employment. Curfews were introduced, removal from urban areas and restricting their entrance to urban areas and influx control was exercised (Botes, 2013, p. 510).

In search of work, these people had to use the contract labour system which was regulated by South West Africa Native Labour Association (SWANLA) which introduced the first forms of exploitation for temporary employees. This organization allowed white employers to employ indigenous Namibians and use their in whichever way that they deemed suitable. Potential employees were classified according to their working abilities and health and were issued tags. They also had to be registered with the authorities and were issued with necessary passes to allow them access to work in specified areas. Employees would be placed at the employ of the employer who had applied for their services and signed a contract and were paid a minimum wage (Botes, 2013, p. 511).

These employees worked in unfavourable conditions. The government only provided them with one blanket, one shirt and one pair of shorts for the full duration of their employment. Employees were only limited to their employer's premises and had to eat what the employer provided and they were not allowed to have contact with their families. Ten to fifteen men shared a single room, the sanitation facilities provided no degree of privacy as they were open. They worked long hours and were paid extremely low wages, and no medical care was provided despite the high health risks that were involved in their job. If an employee fell sick, he would be dismissed and was replaced by a healthy employee. The employer decided how he would punish an employee for disregarding the rules (Botes, 2013, p. 512). In the 1950s,

an organization called the South West Africa People's Organisation (SWAPO) arose to provide some degree of protection to employees and objected to unfair labour treatment.

From December 1971 until January 1972 Ovamboland and the greater part of Namibia suffered labour unrest and during this time most offensive elements of the labour system were addressed by regulatory changes. In 1977 it was abolished by the General Law Amendment Proclamation of 1977 (Botes, 2013, p. 513). The Namibian Labour Act of 1992 was Namibia's first official Labour Act. This Act made no reference to labour hire. In the late 1990s labour hire emerged and supplied employees for short periods as well as those who work on a full time and ongoing basis for the client company. Labour hire in Namibia has increased rapidly without being regulated. Labour broker companies supply labour to third parties with whom they have a commercial agreement with. Employers used labour hire companies to obtain cheap labour without any long term obligations, to cope with peaks in demand for employees, to reduce costs, to avoid industrial relations, to ensure larger flexibility in the workplace and also to avoid trade unions. Labour hire employees are paid less than permanent workers and usually do not receive benefits such as paid leave or severance pay in cases of retrenchment (Mostert, 2011, p.44).

In 2004, in response to the growth of labour hire the Namibian Parliament passed the Namibian Labour Act of 2004 however it was not brought into effect. Section 126 of this Act provided for certain aspects of labour hire. A revised Labour Bill was introduced in 2007. The Namibian Labour Act of 2007 was gazetted on 31 December 2007 and entered into force in May 2008. This Act did not regulate labour hire instead it prohibited labour hire. Section 128 of this Act stated that no person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party. Any person who contravenes or fails to comply with this section commits an offence and will be liable on conviction to a fine not exceeding N\$80 000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment (Burger, 2010, p.18).

The Namibian labour hire firm Africa Personnel Services challenged the prohibition on labour hire practices and argued that it infringed their right to carry on a trade as enshrined in Article 21 of the Namibian Constitution and claimed that about 90% of their business would be deemed illegal by the Act. The High Court dismissed their application by stating that the practice had no basis in Namibian law as the constitutional protection did not apply and was therefore unlawful (Benjamin, 2009, p.9). The High Court also held that labour broking

violates a fundamental principle on which the ILO is based that labour is not a commodity (Brand, 2010, p. 58). Africa Personnel Services (Pty) Ltd appealed to the Supreme Court of Namibia and still argued its fundamental right to carry on any trade or business of its choice. The respondents still argued that labour hire should remain banned as its historical context evokes powerful and painful memories of the abusive contract labour system which was part of the obnoxious practices inspired by policies of racial discrimination (Botes, 2013, p. 16).

The Supreme Court held that s128 (1) was unconstitutional and dismissed that labour hire was unlawful because labour hire arrangements do not fit the typical mold of a bilateral contract of service described in Roman Law and Common Law. The Supreme Court also held that labour hire does not violate the principle that labour is not a commodity if member states implement and enforce the regulative framework proposed by Convention 181 which intends to ensure that the labour of labour hire employees are not treated as a commodity and that their human and social rights as workers are respected and protected in the same respects as the protection accorded in labour legislation to employees in standard employment relationships (Brand, 2010, p. 58).

In 2009, the Namibian Government reinstated labour hire and in April 2012 a new Labour Act was promulgated to regulate labour hire. The Labour Amendment Act 2 of 2012 came into force on 1 August 2012. The main aim of this Act was to provide for the protection of temporary employees of labour hire and to grant them the entire scope of employment rights contained in the 2007 Labour Act (Botes, 2013, p. 521). South Africa can learn a lot from the history of labour hire in. As highlighted above, the Namibian labour hire system was unregulated and mostly characterised by exploitative aspects which proved to only benefit the labour hire companies and their clients and not the employees. In 2004, with the rapid growth of unregulated labour hire in the country, the Namibian government passed a law to provide for certain aspects of labour hire however this law did not come into effect and was replaced by the Namibian Labour Act of 2007 which prohibited labour hire.

This decision was challenged by labour hire companies as it infringed their right to carry on trade and resulted in the Act being lifted and the Labour Amendment Act of 2012 being introduced. The above case of Namibia is an ideal example for South Africa to draw lessons from. Namibia has moved from unregulating labour brokers to opting to prohibit the practice and then proceeding to lifting the ban on labour brokers. South Africa can learn that it is necessary to regulate labour hire than to introduce a total ban of it as it can cause turmoil and

pose a number of negative implications for the country as section 22 of the 1996 Constitution of the Republic of South Africa grants South African citizens a right to carry on any trade or business of their choice. The country can consider the guidelines used by Namibia when adopting new legislation to regulate the use of TESs.

2.13.2. NETHERLANDS

Labour brokers have been active in the Netherlands for over 50 years. The Netherlands is one of the biggest users of labour brokers and is an example of a country that has successfully created a framework for combining flexibility and security in the labour market. The Dutch labour market is marked by high statutory protection against unemployment. The penetration rate of labour brokers in Netherlands has been consistently above 2%. The country has been long known for having the lowest unemployment rates in Europe which was below 4% on the first decade of the 2000s however it witnessed a sudden drastic downturn which began in the second half of 2012 which has led to rising unemployment rates and a decline in people's living standards (Van Liemt, 2013, p.9). The Dutch agency UWV has noted that there has been a long-term increase in the number of people on flexible contracts. The 1930 Job Placement Act prohibited profit driven employment services and left several aspects of the operation of labour brokers unregulated, this resulted in labour brokers not paying tax, disregarding safety and health regulations and not paying their employees proper wages (Van Liemt, 2013, p. 11). Public employment service was also introduced for each municipality in 1930. In 1940, these public employment services became state run and were placed under the supervision of the Ministry of Social Affairs in 1954. During the 1950's, the number of brokers increased rapidly in different sectors and the need for extra labour offered attractive possibilities for temporary workers and resulted in the Temporary Agency Work Act being enacted in 1965 to regulate temporary employment services (Mavunga, 2010, p. 3).

The Temporary Agency Work Act ensured that employees employed by labour brokers were treated equal as normal employees under the social security and laws. In 1970, a mandatory licensing system was introduced which set a minimum duration per assignment and prohibited agency work in construction (Van Liemt, 2013, p. 11). The need for greater flexibility in labour became a concern in the 1990's and the Employee Placement Act of 1991 which succeeded the Temporary Agency Work Act of 1965 was enacted. This Act consolidated the regulation covering labour brokers and ensured that the license system was continued as the Netherlands had ratified ILO Convention No. 96 however, licenses were

issued in regulation of the allocation of workers. The Act allowed for profit driven brokers to operate. The maximum duration of the assignments, the prohibition which prevented a temporary worker from entering employment with another company and the prohibition on using temporary workers in the construction industry were determined by the Act (Mavunga, 2010, p. 55).

The Act on the Allocation of Employees by Intermediaries (WADDI) Act of 1998 was adopted in 1998 to regulate the labour broker product market. This Act liberalised the labour broking system by abolishing the licensing system, banned agency work in the construction industry as well as other restrictions relating to placement, maximum duration, worker redeployment, and the ability for labour brokers to prevent agency workers from entering into direct employment contracts with user firms. It also reinforced the ban on the use of agency workers to replace workers on strike and the dual responsibility of user firms and labour brokers for payments of social premiums and taxes (Van Liemt, 2013, p. 11).

The Act also stipulated that labour broker workers should receive in principle the same pay and remuneration as workers in the user firm in the same or in similar positions. The labour broker has the responsibility to provide their temporary employees with information relating to safety regulations and the needed qualifications in the user firm (Tijdens *et.al.*, 2006 p. 26). After years of intense debates among the social partners, the Flexibility and Security Act came into force which complemented WADDI. The purpose of the Act was to regulate employment relationships in and by labour brokers. The law allowed for more freedom for establishing and operating labour brokers. It aimed to provide both flexibility that some workers seek and that most employers want and the employment and income security desired by workers.

Labour broking was placed under regular labour laws and flexible workers were awarded rights as employees with regular contracts. The broker and the worker could agree in writing that the temporary agreement is dissolved. In a case of dismissal, an employer needs to seek permission from the Public Employment Service to dismiss such employee. Labour brokers are also obliged to train a temporary worker under contract as a permanent worker if conditions are met (Mavunga, 2010, p.56). A new collective agreement for temporary workers the ABU Collective Agreement for Temporary Workers was introduced with the Flexibility and Security Act. This agreement regulated temporary employment contracts,

remuneration, working time, days of holiday, holiday allowances and sick leave (Mavunga, 2010, p.58).

The four phase model was employed. During the First Phase (26 weeks) the employment relationship ends if the assignment terminates or as a result of the sickness of the employee. The employee is insured against unemployment and sickness. The duration of this phase can be extended up to 52 weeks by collective agreement. In the Second Phase (12-18 months), the employee is interviewed to ascertain training needs and employees above the age of 20 begin to accumulate pension rights. During the Third Phase (18 months at a single firm or 36 months with various enterprises) an employee has some employment security. The minimum duration of a fixed-term contract is three months which may be renewed throughout the phase. The employee is guaranteed pay even if no work is available. The employee is also guaranteed full pay in case of sickness until the limited duration contract expires or if the contract is open ended for a maximum 52 weeks. The Fourth Phase consists of an open ended contract and therefore usual dismissal procedures must be observed. If an employer offers a worker three consecutive fixed-term contracts of three months, or a number of fixed-term contracts of an accumulated duration of 36 months, then the worker becomes employed on an open-ended contract (Benjamin, Borat & Westhuizen, 2010, p.21).

From the above discussion, one can see that South Africa can draw a number of positive lessons from Netherlands as it has vast experience when it comes to the issue of labour broking. As noted above, Netherlands had previously left some aspects of labour broking unregulated and many labour brokers saw an opportunity to engage in unlawful behaviors for their personal gain however, Netherlands did not ban the practice of labour broking instead it opted to regulate it. It has thus been successfully regulating it for over 50 years and its success can be attributed to their ability to implement a framework that combines both flexibility and security for the temporary employee and the employer.

Netherlands acknowledged that labour markets were changing rapidly and that flexibility was increasingly becoming a subject of importance amongst the role players in the labour market, therefore the need to introduce labour laws to accommodate the changing nature of labour relations was imperative as labour brokers played a crucial role in minimising unemployment. South Africa can focus more on implementing laws that regulate labour broking as Netherlands has done as labour brokers can play a crucial role in minimising unemployment if they are properly regulated. South Africa can even go as far as adopting the

Netherlands four phased model to ensure that flexibility and security in this industry is well regulated. Policies that protect vulnerable workers from being exploited by labour brokers can be thoroughly looked into and policy makers can ensure that the most important concerns about this system are addressed accordingly.

2.14. GLOBAL TRENDS

In the late 1970s, an emboldened group of social and economic thinkers called ‘neo-liberals’ and libertarians disliked the state which they equated with centralised government, with its planning and regulatory apparatus. They saw the world as an increasingly open place where investment, employment and income would flow to where conditions were most welcome. One neo-liberal claim that crystallised in the late 1980s was that countries needed to pursue ‘labour market flexibility’. They stated that unless labour markets were made more flexible, labour costs would rise and corporations would transfer production and investment to places where costs were lower, financial capital would be invested in those countries rather than ‘at home. Flexibility had many dimensions for this purpose employment flexibility is relevant (Standing, 2016, p. 6).

Employment flexibility meant easy and costless ability of firms to change employment levels particularly downwards, implying a reduction in employment security and protection. The employment flexibility advocated by the brash neo-classical economists meant systematically making employees more insecure however, they claimed that it was a necessary price for retaining investment and jobs. Each economic setback was attributed in part, fairly or not to a lack of flexibility and to the lack of ‘structural’ reform of labour markets. As globalisation proceeded and governments and corporations chased each other in making their labour more flexible, the number of people in insecure forms of labour multiplied. Millions of people in affluent and emerging market economies entered a new phenomenon, the precariat (Standing, 2016, p. 7).

Many entering the precariat would not know their employer or how many fellow employees they or likely to have in the future. They did not have a stable or predictable salary or the status and benefits that the middle class people were supposed to possess. The precariat consists of people who lack the seven forms of labour-related security which include labour market security, employment security, job security, work security, skill reproduction security, income security as well as representation security. They also lack work-based/occupational identity and do not feel part of a solidaristic labour community. A growing number of people

(temps, casuals, dependant contractors and so on) in the world lack at least one of these rights. Most people who find themselves in temporary jobs are close to being precariat because they have tenuous relations of production, low incomes compared with others doing similar work and low opportunity in occupation terms (Standing, 2016, p. 16). The number with a temporary tag to their jobs has grown enormously in the world because of the flexible labour market era. In most countries, the statistics show that the number and share of national labour forces in temporary statuses have been rising sharply over the past three decades. They have grown rapidly in Japan where by over a third of the labour force was in temporary jobs by 2010 (Standing, 2016, p.17).

2.15. CONCLUSION

This chapter provided the background of the problem, the historical background of the practice of TES in South Africa as well as the legislative framework. The comparative jurisdictions were also discussed. From the above discussion one can deduce that the regulation of TES's has been a high profile issue in South Africa. The practice of TES's has been recognised and commended by the International Labour Organisation (ILO) which places obligations on member states to ensure that TES companies are effectively operated.

The ILO has drafted a number of important conventions which have been highlighted in depth in this chapter to ensure proper regulation of TES's. Section 23 of the Constitution, s198 of the LRA 66 of 1995, s82 of the BCEA 75 of 1997 and s57 of the EEA 55 of 1998 also make legal provision for the existence of TES companies. The current legislative reform have their origins in the growing use of TES companies which has had both a positive and a negative impact on the South African labour market. The proposed amendments as highlighted in the chapter are to effectively regulate the triangular employment relationship as prohibiting TES companies would be regarded as violating their right to existence. These labour legislation amendments will possibly minimise the exploitation of workers employed by TES companies, reduce the evasion of labour legislation by TES companies and also ensure that this industry is properly regulated.

CHAPTER THREE

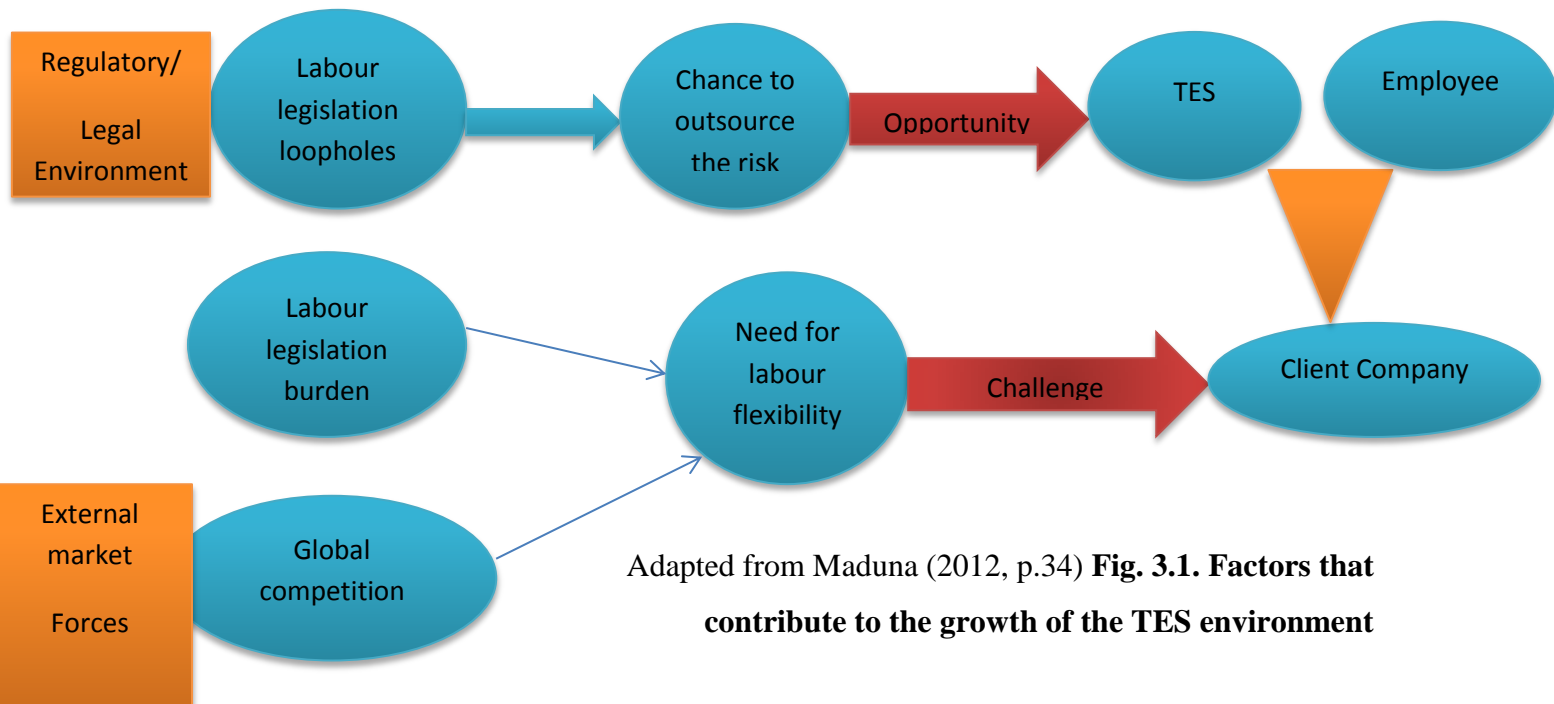
PROHIBITION AND REGULATION OF THE TEMPORARY EMPLOYMENT INDUSTRY IN SOUTH AFRICA

3.1.INTRODUCTION

The preceding chapter provided an overview of the law and practice of temporary employment service in South Africa. A number of reasons have been brought forward for the banning of labour brokers as well as the reasons for regulating labour broking. This chapter will engage in an in depth exploration of the arguments for and against prohibition and regulation as a measure to curb the exploitation received by TES company employees one will discuss the conceptual framework which will highlight the factors that have contributed to the significant growth of the TES environment. These factors include labour legislation loopholes, chance to outsource the risk for client companies, eliminating the burden of directly employing employees, global competition as well as the need for flexibility by client companies.

3.2 CONCEPTUAL FRAMEWORK

Before examining the arguments for and against the prohibition and regulation of the TES industry in South Africa it is imperative that one discusses the conceptual framework that is illustrated in Fig. 3.1., as it highlights the factors that have contributed to the increase use of TESs.



Adapted from Maduna (2012, p.34) **Fig. 3.1. Factors that contribute to the growth of the TES environment**

The liberalisation of the economy and the informalisation of work are having a profound but uneven impact on employment and the labour movement. They are leading to a growing differentiation of work, creating new lines of social inclusion and exclusion in post-apartheid South Africa. The jobs that liberalisation and informalisation have created are often precarious, lack benefits and have low wages. A central reason for the worldwide growth of the informal sector is the changing nature of work in the modern enterprise. At the centre of the new work paradigm are two strategies namely 'effective downsizing' and subcontracting all but the indispensable core activities (Buhlungu, 2006, p.21). By retrenching much of the core workforce and subcontracting activities to various forms of precarious labour, management not only reduces labour costs but also shifts the responsibility for benefits onto the individual worker.

The nature of employment has changed. There are two factors that contributed to the rise in the usage of non-standard labour practices. These factors are the legal and regulatory environment as well as globalisation. The ILO report (paras 32-33) cited in Godfrey, Maree, Du Toit & Theron (2010, p. 9) state that the intensification of international competition has induced the search for more flexibility in production methods and work organisation. While in some countries this internal flexibility has been achieved within the context of relatively stable labour markets and employment relationships in others the search for flexibility has led to the increasing informalisation of the employment relationship. There are two ways in which these changes are occurring. The first is the growing number temporary and part-time workers as a percentage of the workforce and the second is the growing numbers of workers in indirect employment.

Globalisation, deregulation of markets as well as technological changes have introduced new forms of work. Globalisation has increased social inequality within developed and developing countries and creating a heightened sense of insecurity. The large bureaucratic firm which employs a large full-time workforce to perform in-house production functions is disappearing and employers now prefer to only focus on the high value dimensions of their business and to outsource the components that are non-core. Employers also prefer a workforce that fluctuates with peaks and troughs of customer demand for their goods and services (Brand, 2010, p.40). Hyman (1992:62) cited in Webster, Lambert & Beziudenhout (2008, p.4) state that global competitive pressures have forced corporations to implement 'flexible production systems' transforming a once stable working class replacing it by 'networks of temporary and cursory relationships with subcontractors and temporary help agencies. The result is

structurally disaggregated and disorganised working class. Globalisation has resulted in an intense competitive business environment and has prompted employers to stop running their businesses 'as usual' by seeking greater flexibility when dealing with labour needs in order to stay on par or ahead of global players and competitors. One of the factors driving globalisation and the liberalisation and mobility of capital has fundamentally changed the bargaining power of firms vis-a-vis governments and workers. The implicit and sometimes explicit, threat of relocation and transnational nature of firms in some sectors have changed the political economy of industrial relations weakening the bargaining position of workers. Some governments keen to attract or retain investment offer 'discounts' on labour protection, further undermining the ability of workers to bargain over decent work (Godfrey et. al. 2010, p. 9).

The above framework depicts that client companies resort to using TES companies as there is an increasing need for labour market flexibility, which is prompted by external market forces due to globalisation and the regulatory environment (Maduna, 2012, p.34). According to Barker (2014, p.127) labour market flexibility is the extent to which an enterprise can alter various aspects of its work and workforce to meet the demands of the business, for example, the size of the workforce, the contents of the jobs and working time. He further states that it implies being subjected to lower wages and less regulation and fewer benefits such as sick leave. There are three kinds of flexibilities that characterise labour market flexibility. These are numerical flexibility, wage flexibility and work flexibility. However, for the purposes of this study only two types of these flexibilities will be considered because of their relevance, as they are required by organisations to deal with the current social and economic challenges faced by the country, especially the TES environment (Barker 2014, p.127). That said, both numerical and work flexibilities shall be considered.

Numerical flexibility refers to the adaptability of the size of the enterprise's workforce to change in demand for the products or services supplied, for example using casual employment, sub-contracting and outsourcing labour. Work flexibility refers to the process whereby firms use the patterns of working time through ongoing shift systems, part-time work, temporary work and job sharing (Barker, 2014, p.127). Companies use labour market flexibility for various reasons which include decreasing labour costs, to cover overtime hours and extraordinary shift hours and to allow for relatively easy deployment of labour. Flexibility allows companies reduce costs and maximise profits at the expense of employees. According to Kalleburg (cited in Maduna, 2012, p.35) there is another kind of flexibility that

is required by organisations and that is based on labour legislation hence to achieve it, client companies and TES companies have observed loopholes in the current labour legislation. They have then taken advantage of the existing regulatory inadequacies in labour legislation as an opportunity to create employment relationships that ensure that they are able to save on labour costs by using temporary and part-time workers and thus have enjoyed greater profits. From the above framework one can see that the TES company benefits from this as they get to pursue their business interests and the client company receives the benefit of flexibility that they desire however, there is clear evidence that employee receive no benefits from this employment arrangement.

There are several loopholes in labour legislation of which two have been already noted as applying to South Africa. The first limitation is the designation of the TES company as the employer of the employee who is placed at the client company's site. The second limitation is the failure of the legislation to extend the joint and several liabilities to both the TES company and the client company in unfair dismissal cases (Maduna, 2012, p.34). The burden placed on employers by imposed regulations has led employers to seek flexible means of fulfilling their labour or staffing requirements.

According to Klerck (cited in Maduna, 2012, p. 30) the casualisation of labour tends to mirror and reinforce existing hierarchies of subordination in a society, reflecting the broader tendency for insecure low-wage jobs to be held by workers with diminished bargaining capacity in the labour market. Employees in this tripartite relationship can be laid off at any point if the client company feels that their services are no longer required as long as the contractual obligations between the labour broker and the client company are fulfilled. These employees are also likely to receive reduced wages because a certain portion of what the client company pays for the employees' services goes towards covering the TES company service fees or commission. Opportunities for growth and career advancement are very minimal for these employees and they are often viewed as outsiders that can leave at any point and no long-term relationships are established with them (Maduna, 2012, p. 31).

3.3.THE TRIANGULAR RELATIONSHIP

It is imperative that the researcher introduces the parties in the triangular relationship as the labour legislative changes have a direct impact on them and explain the role that each party plays in the triangular relationship between the client company, TES company and the trade

unions before engaging in a discussion on the arguments for and against the use of TES companies in South Africa.

TES Structure

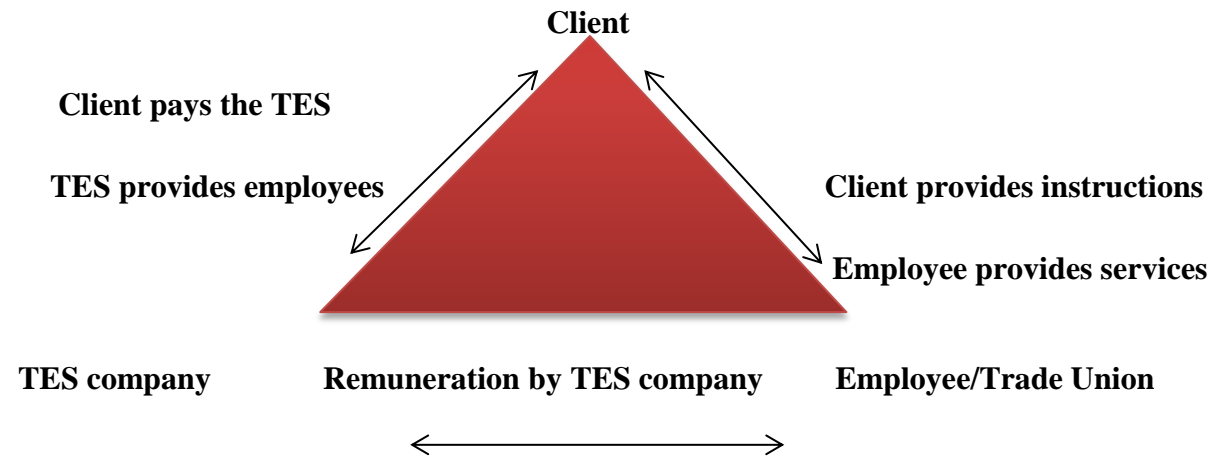


Fig. 3.2. Triangular relationship between TES companies, client companies and employees

Source: The Researcher

3.3.1. CLIENT COMPANIES

As depicted in Fig.3.2. there is a services contract between the labour broker and the client company in relation to the services or skills required and procured, the period of engagement, payment rates as well as the terms and conditions for this service provision. This contract allows the client company delegation of employment where it can reap the rewards and use the employee at will but without the risks associated with being an employer Maduna (2012, p. 25). Client companies outsource employees from TES companies and the employees are placed at the client’s site by the TES company to work for the client and the client provides day to day instructions to these employees.

The client company pays the TES company for the services rendered by employees of the TES company. Client companies resort to using temporary workers as they do not have employment rights which mean that their contracts can be ended at any time at the client company’s convenience, thereby giving the flexibility required. It has been noted that although the employee is considered by the law as an employee of the agency, the agency has

no legal obligation to provide continuous employment or a certain number of assignments (Bidwell & Fernando-Mateo, 2008).

According to Maduna (2012, p. 25) outsourcing employees provides a number of benefits for the client companies which include:

- i. Allowing the client company to manage labour demand uncertainty.
- ii. Allowing the client company to minimise labour costs.
- iii. Easing the legislative burden on client company.
- iv. Providing flexibility to the client company.

Client companies normally are the dominant partner in the tripartite relationship and yield the greatest bargaining power and as a result the labour broker will always bow to the requirements of the client company even if it has to be at the expense of their employees in order to maintain a good relationship with the client company and to secure continued business with them (Bidwell & Fernando-Mateo, 2008).

3.3.2. TEMPORARY EMPLOYMENT SERVICES

As depicted in Fig. 3.2; the TES company serves as both as a placement agency as well as the intermediary in the tripartite relationship. The TES provides client companies with employees when they require them and assists client companies by handling employment contracts of employees placed at a client company. It is responsible for paying employees their salaries and makes any necessary deductions such as garnishee orders granted to an employee, provident or pension fund matters. The TES company is also responsible for distributing employee payslips, IRP5 documents from SARS and also deals with other administrative issues such as completing injury on duty documentation (Mostert, 2011, p. 17).

3.3.3. EMPLOYEES

As depicted in Fig. 3.2. employees are employed by the TES company to render services to the client company. It is often stated that workers are the most vulnerable party in the triangular relationship between the worker, the TES company and the client company. Employee can be laid off at any point if the client company no longer requires their services (Maduna, 2012). The client company terminates the relationship with the labour broker and the labour broker is required to give the same notice period given by the client company to its employees doing work at the site of the client company (Theron, 2005).

There is evidence that the TES company and their clients benefit enormously from this relationship. It has been also observed that the LRA does not give employees protection to not be unfairly dismissed and the right of workers to organise has also been removed therefore this has eroded the workers' right to fair labour practices as reflected in the South African Constitution (Maduna, 2012). In *Dyokwe v De Kock NO & Others* (2012) 33 ILJ 2401 (LC), Steenkamp J examined the TES company environment into more detail and noted that workers are the weakest and most vulnerable party in the triangular relationship. In fact in the earlier yet similar judgement Boda J had already noted how TES companies and their clients connive to exploit vulnerable workers [see *SA Post Office v Mampeule* (2009) 30 ILJ 664 (LC)].

3.4. PROSPECTS FOR THE USE OF TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA

3.4.1. JOB CREATION

A TES company creates opportunities for the disadvantaged and diverse groups who find it difficult to access the labour market and equips them with skills and the experience they require to secure better employment. They also provide short term employment for nomadic workers who enjoy working in different environments from time to time. The TES company and reconciles the interest of two clients responding to the market pressures and engineers solutions for both of them (Mavunga, 2010, p.30). Since the year 2000, more than 5.4 million people have been introduced to the world of work by TES company.

Access to the world of work is challenging in South Africa and statistics have shown that the use of an intermediary such as a TES company greatly improves the employment chances for individuals. According to Apso (2015, p.3) it takes an average of 90 days for an individual to secure employment using an agency and 806 days (2 years, 3 months) when a job seeker is looking on their own. Individuals who register with an agency are exposed to a multitude of job opportunities that can be coordinated by the agency on their behalf. This is more effective, time efficient and less costly for job seekers. On average nearly 30% of temporary employees secure permanent employment within 12 months and 40% secure permanent work within 3 years.

The TES industry has proven to be an important entry point to the labour market by providing access thousands of people many of whom were previously unemployed. More than 50% of

the temporary employees were previously unemployed and 83% are youth, under the age of 35 years. This industry brings in additional revenue for the Government in the form of taxes and VAT as they generate more than R40 billion per year. TES company ensure that they seek ongoing work opportunities for their employees and often assist them in moving between sectors from depressed sectors to thriving sectors in some cases (APSO, 2015, p.3).

Employees receive ongoing training and development to ensure long-term employability and productivity. This industry has been recognized as a skills development driver and has since 2000, facilitated in excess of 35000 learnerships, apprenticeships and formal skills programmes enabling unemployable people to access the world of work. A number of TES companies also provide Employee Assistance Programmes (EAP) to ensure employee wellness. COSATU has however highlighted that labour brokers do not create jobs as highlighted by the Confederation of Associations in the Private Employment Sector (CAPES) but instead act as intermediaries to access jobs that already exist and which in many cases would have existed previously as permanent full time job (Mavunga, 2010, p.31).

3.4.2. REDUCTION OF LABOUR COSTS

TES companies can play a vital role in any company's effort to cut costs. There has been a significant growth in the use of TES companies in South Africa over the past years and this growth can be attributed to the perception that the costs of complying with statutory employment requirements are high as well as the costs of the direct administration of employees (Mostert, 2011, p.16). The TES sector has been useful to the South African economy in that it has allowed firms to adjust to the structural changes of the economy by adjusting their cost base and staffing needs in response to the business cycle (APSO, 2015, p.4). During economic recessions or downswings, it easier for companies to downsize by releasing the temporary employees that are placed by the TES company and this will not have any adverse effects on the client companies. Maduna (2012, p.26) highlights that it is easy to let non-standard employees go and employers do not need to worry more about creating more work for them as they can be easily sent back to the TES company once their assignment has been completed. The organisations also carry the costs of temporary agency workers indefinitely for a limited time only as stipulated by their contract agreement whereas in the case of a permanent employee the costs are carried up until the employment is terminated by instances such as resignation, incapacitation or death. The use of TES

companies allows client companies to avoid the administration associated with recruiting and hiring, payroll and the cost of laying off employees.

According to Mostert (2011, p. 17) making use of TES companies has become very attractive for many employers for a number of reasons such as the labour broker takes care of the payroll of the employees that are placed on the client's workplace, the labour broker also distributes the employees pay slips and also has to deal with all their administrative issues as well as other financial issues that may rise at the end of each financial year. The use of TES companies also takes care of the issue surrounding unfair dismissals and retrenchments by removing the costs relating to this such as the payment of severance pay as well as other procedures that are involved. Organisations are also able to reduce training costs through the use of TES companies (Mavunga 2010, p. 32).

3.4.3. ENHANCEMENT OF FLEXIBILITY

Flexible workforces have become essential for companies that want to remain globally competitive. Flexibility is crucial for the client company to ensure effective and efficient use of labour resources and improved operations (Maduna, 2012, p.25). In order for companies to manage flexibility effectively, many client companies choose to focus on their core business and to outsource the flexibility management to the TES company because TES companies are able to quickly source and assess skills required by a client who needs to upscale to take advantage of a business opportunity. The client companies are able to source access suitable workers within a short period of time. The client company utilises the expertise and the experience of a TES company to effectively manage supply and demand of skill, manage shift scheduling and all associated human resources administration and management allowing them to focus on their core business (APSO, 2015, p.4). Flexibility also gives the client company an opportunity to avoid contributions to medical aid, the unemployment insurance fund and the retirement funds (Maduna 2012, p.26). Client companies also often make use of TES companies to manage skills development initiatives such as learnerships and apprenticeships, leveraging their expertise and administrative capacity. Client companies also make use of TES companies in cyclical business environments to bring in additional workers when demand increases knowing that the workers that will be provided have been assessed, skilled and will be managed with the applicable legislation.

In cases where the demand is low, the client company has the ability to release and not renew contracts of employees that are placed on a temporary basis, this allows client companies an opportunity to optimally deal with fluctuations and uncertainty of demand. TES company workers have employment security as they can easily be transferred between sectors in the event that a specific industry is experiencing a downturn (APSO, 2015, p.4). Organisations are also able to adjust their labour input by moving temporary employees to different parts of the organisation to meet their current demands as this strategy might not be feasible with permanent employees because any changes in their job description may be considered a breach of contract. TES company employees are more adaptable to change as they are exposed to multiple work environments (Mavunga, 2010, p.33).

3.4.4. FRINGE BENEFITS

Fringe benefits are regarded as a payment to a worker in addition to salary or wages. It may take the form of cash, goods, or services, and may include such items as medical aid, provident fund and paid vacations. Temporary employees seldom receive fringe benefits as fringe benefits are regarded as expensive by some employers. Many client companies as a result have resorted to terminating contracts of permanent employees and replacing them with temporary employees. In order to retain and entice their staff, many employers offer fringe benefits and in the case of a temporary worker it becomes a challenge to offer these benefits to them as they are only at a particular workplace for a short duration, for example if an employee's contract is only for 3 months the question arises as to whether there really is a need for the employee to be given paid leave and benefits such as medical aid. It is important to note that in some sectors such as the agricultural sector, it has been observed that the TES companies have compromised on the health and safety of their employees by not offering them the necessary training on how to operate certain machinery and how to use chemicals such as pesticides and some employees have suffered injuries as a result (Mavunga, 2010, p. 35).

According to (APSO, 2015, p. 2) an industry-specific provident fund was established in 2010 by CAPES and caters specifically for temporary workers in that it encourages preservation of retirement funding and allows transferability between different TES company employers. Several of the large TES companies also have their own organisational provident funds that are offered to the assignees. Temporary employees working under the Basic Conditions of Employment Act (BCEA) have statutory benefits which include 1 hour of sick leave for

every 26 hours worked, 1 hour of annual leave for every 17 hours worked, paid public holidays if the employee is on duty as well as being entitled to 3 days family responsibility leave in each cycle.

3.4.5. TRADE UNION MEMBERSHIP

Freedom of association is a right recognized and respected by compliant temporary employment services and is included within the industry's Code of Conduct. The global restricting of work has led to a multiplicity of precarious work arrangements that threaten traditional union organisation. This has led to the global debate on how to reverse the problems of union decline and revitalise the union movement. In developing countries where an increasing majority of the workforce is not formally employed, organised labour needs to think beyond existing methods of organisation to survive (Buhlungu, 2006, p. 22). The increase in the number of workers in casual and lower paid jobs threatens those in standard relationships. This is creating a crisis of representation for organised labour. Unemployment is no longer the main explanation of declining unionisation. More significant is the shift from full time indefinite employment to more precarious flexible forms of employment associated with globalisation. Globalisation has led to a change in the nature of the employment relationship. Much greater attention is given to the issues of productivity and performance when determining wages. In order to achieve greater internal flexibility, stronger emphasis is placed on negotiating issues such as the reorganisation of work, flexible working hours and pay for performance and skills within the context of employment relations at this enterprise level (Godfrey et. al. 2010, p. 13).

Decentralisation of collective bargaining has a significant impact on collective bargaining average (the percentage of employees subject to collective agreements). The declining trade union membership ensures a further decline in the numbers of employees protected by collective agreements (Godfrey et. al. 2010, p. 14). Trade unions encountered all the problems bound up with the shift towards 'flexibility' that have been experienced internationally. Increasing numbers of temporary and part-time employees in the workforce and all those disguised, as 'independent contractors' have remained largely unorganised. Trade union rights do not exist for the new working class so the new labour relations does not represent them. Previous research has shown that unions are a long way from any innovative responses to the challenge of flexibility. Buhlungu (2006, p.26) affirmed that unions have not paid sufficient attention to dealing with the problem of casualisation, often being more

concerned with their core, permanent membership and improving their associated benefits and wages. Globalisation has greatly increased the inequality in bargaining power of transnational employers and employees. On the other hand, changing production methods have undermined the unions ability to organise employees. The quest for ‘more flexible methods’ of production had a significant impact in patterns of employment (Godfrey et. al., 2010, p.8).

Temporary employees do not often make any demands and also very seldom join trade unions as they are constantly moving around hence this often leads to exploitation as well as being assigned to dangerous and unpleasant tasks. It is also a challenge for unions to organise as these employees are constantly detaching from one employer to another this results in the employee’s constitutional right of participating in trade union activities being undermined. The TES companies also find it difficult to grant a trade union rights’ to access to the clients workplace. TES company employment contracts and conditions are determined by the employer and the client and the employee has no say in it and trade unions are often also not able to peruse or challenge the employment contracts (Mavunga, 2010, p.36).

The 2009 Election Manifesto of the African National Congress (ANC) committed to the introduction of “laws to regulate contract work, sub-contracting and outsourcing, address the problem of TES companies and prohibiting certain abusive practices in order to avoid exploitation of employees and ensure decent work for all employees as well as to protect the employment relationship. The manifesto commits to introducing provisions to facilitate unionization of workers and conclusion of sectoral collective agreements to cover vulnerable employees in these different legal relationships and ensure the right to permanent employment for affected employees (Budlender, 2013, p. 16).

The Confederation of Associations in the Private Employment Sector (CAPES) has together with the Federations of Unions South Africa (FEDUSA) set up a dedicated temporary call centre that focuses on educating workers about their rights and to manage any complaints. CAPES and FEDUSA have also run a pilot study involving close to 1000 temporary workers to provide these workers with access to union membership and associated benefits, in cases where the temporary employees are members of unions, the TES company ensure that the union membership is deducted in their payroll administration. Nearly 60% of all TES employees are covered by collective agreements or sectoral determinations and are therefore entitled to the union negotiated minimum wages and benefits that can include provident or

pension, medical aid etcetera. Research conducted by the National Bargaining Councils (NABC) concluded that the majority of TES's are compliant (APSO, 2015, p. 2).

3.5. ARGUMENTS AGAINST THE USE OF TEMPORARY EMPLOYMENT SERVICES

3.5.1. DISCIPLINE AND CONTROL

A number of concerns have been raised against the existence of temporary employment services. Benjamin *et al.* (2010) as cited in (Budlender, 2013, p. 17) has highlighted a number of reasons that have motivated the need to amend the legislation that concerns TES's which are as follows:

- i. Concerns about the extent to which decent work can be achieved in atypical employment arrangements.
- ii. Differences in wages and benefits available to atypical workers compared to those of permanent workers doing similar work.
- iii. Lack of access to benefits such as medical aid, pensions, and maternity leave for atypical workers.
- iv. Limited access to training opportunities for atypical employees.
- v. Insecurity of temporary work.
- vi. Use of TES company for workers who work in the same company for a lengthy or indefinite period.
- vii. Reported abuses of labour legislation by some TES companies and client companies.
- viii. Dismissals of TES company workers without following proper procedures and in particular the ability of a client to instruct the TES company to replace a particular worker.
- ix. Low rates of unionization among TES company workers. Limited application of bargaining council agreements to TES company workers.
- x. Limited application of bargaining council agreements to the TES company workers.
- xi. TES company contracts that exclude the right to strike or join a union.

Mavunga (2010, p. 36) asserts that the TES company is the employer however, the employees of the TES company are based at the client company premises and this often results in confusion as to which disciplinary rules and procedures must be used by the employees. Clarity of who disciplines and gives instructions should be the mandate of the TES company and employees should not have the burden of having to comply with two sets

of procedures and standards of conduct. The fact that TES companies do not have full control over their employees poses a challenge where an employee's act is considered misconduct by the client company but not by the TES company. There has been an increase in job insecurity in the workforce as employees in the tripartite face job insecurities and instabilities due to their weak ties to their client organisation. Employees also receive a reduced wage as a certain portion of what the client company pays is reserved for the TES company service fees or commission as part of this relationship contract (Maduna, 2012, p. 31).

3.5.2. PROBLEMS WITH IDENTITY OF THE EMPLOYER

The Labour Relations Act 66 of 1995 s198 (1) previously stipulated that 'For the purposes of the Act, a person whose services have been procured for or provided to a client by a TES company is the employee of that TES company and that the TES company is that person's employer. The TES company and the client are jointly and severally liable in respect of contraventions of conditions of service arising from collective agreements concluded at the bargaining councils, the minimum and maximum standards as set in the Basic Conditions of Employment Act and arbitration awards that regulate terms and conditions of service.

Despite the provision that was previously made regarding who the employer is in the tripartite relationship, case law has proven that employees are not aware of who their employer is as most of these employees are always under the impression that their employer is the client company as they are supervised by the client company and also render their services directly to them. These employees are also placed at the client company and form part of the client's organisation. In the case of *Vitapront Labour Brokers CC v SACCAWU & Others* (2000) 2 BLLR 238 (LC), the TES company employees were assigned to a client. These employees and their union assumed that they were employed by the client company and not the TES company. Vitapront CC was a separate legal entity from the client company and the employees were employed by them on fixed term contracts. The employee's fixed-term contracts came to an end and their services were terminated and these employees were of the view that this constituted an unfair dismissal and embarked on an illegal strike. The Labour Court held that it was clear that the employees were confused on who the actual employer is (Mostert, 2011, p. 32). This confusion is also witnessed in a number of cases including the case of *Dyokwe v De Kock NO & Others* (2012) (C418/11) ZALCCT 25 which will be briefly highlighted below.

Case 1: Dyokwe v De Kock NO & Others (2012) (C418/11) ZALCCT 25

Principles

The applicant (Dyokwe) was employed by Mondi from 2000-2002 on a series of fixed term contracts for a series of two years. In December 2002 he was told that his contract would be terminated however, he stayed with the company and there was proof that he received Mondi paylips in 2003. He continued working for the company for six months after the fixed term contract expired. In July 2003 the applicant was told that he would have to sign a new contract with labour broker Adecco after being assured that nothing would change. The applicant, who was illiterate and could not read English signed the contract of employment which was headed 'Contract of employment defined by time' despite the fact that it had no termination date and which specified that he would be employed at Mondipack. Dyokwe continued doing the same job and reported to the same supervisor and manager at Mondi however, things did change. His wages dropped by 20% and he did complain about but was advised by someone at the CCMA to simply accept it. He also started to receive his payslip from the labour broker and not from the client company. After 5 1/2 years Dyokwe's employment was summarily terminated by Adecco who told him that they had no work for him because he was too old. Dyokwe referred an unfair dismissal dispute to the CCMA citing Mondi as a party.

Extract from the judgement

The Commissioner ruled that Adecco was Dyokwe's employer which meant that Mondi should be excused from the proceedings, and that arbitration proceedings involving Adecco should be rescheduled. The Labour Court had to decide on whom the employer was Mondi or Adecco. Judge Steenkamp first looked at section 198 of the LRA which makes provisions for labour brokers. The judge examined labour broking in more detail and he noted that South African courts have recognised that workers are 'the weakest and most vulnerable party in the triangular relationship and held that an employee of a TES company cannot be dismissed in terms of a clause that says the contract terminates when the client no longer needs that employee.

He further highlighted that Professor Paul Benjamin has stated that while s198 was enacted to regulate the temporary employment sector, it has become a vehicle for permanent triangular employment it is an entirely superficial construction, one that gives rise to immense scope for

abuse to make an agency the employer of an employee working on an on-going or indefinite basis for a client merely because the employee's pay is routed through the agency. Moreover, he noted that the International Labour Organisation has recommended that member states should "combat disguised employment relationships (Johnson, 2012, p.1). The Judge evaluated the case he stated that first, there was no evidence that Mondi had ever terminated Dyokwe's employment contract.

The judge stated that it was against public policy to enforce the Adecco contract and hold that Adecco was the employer because of the manner in which the employee signed the contract with the labour broker. The labour broker and the company exploited the employee's illiteracy and vulnerability and induced him to sign the contract. Judge Steenkamp referred to a Constitutional Court decision of *Barkhuizen v Napier* (2007), where Judge Cameron said that courts should not enforce a contractual clause if 'implementation would result in unfairness or would be unreasonable for being contrary to public policy. He noted that in the case of Dyokwe there was extreme inequality in bargaining power, something that was exacerbated by Dyokwe's illiteracy. The decision that Mondi was excused from the proceedings was set aside and replaced with the ruling that Mondi was Dyokwe's true employer.

According to Mavunga (2010, p. 37), if a party fails to identify the correct employer then there can be dire consequences such as financial, time and psychological effects for that employee. Ratti (2009) also recognised that courts also experience difficulty in finding remedies for employees in cases where there is absence of provisions to deal with such cases and end up having to resort to common law to come up with remedies that are favourable for employees. Sixty-one percent (61%) of cases that have been analysed in a study by SETA have illustrated that the arbitrator dismissed the applications because they had failed to establish an employment relationship with the party that they had cited. The recent amendments of the LRA have provided clarification on who is the employer of an employee that is employed by a TES company who has been performing services for a client company of the TES company. Two conferring decisions have recently been handed down regarding this issue. The CCMA in the matter of *Assign Services Proprietary Limited v Krost Shelving and Racking Proprietary Limited and National Union of Mine Workers South Africa* (2015) (JR1230/15) ZALCJHB 298 the commissioner held that the client becomes the sole employer of the agency worker rather than establishing a dual employer-employee relationship (Aletter, 2015, p.7). In the case of *National Bargaining Council for the Road Freight and*

Logistics Industry (NBCRFLI) and Refilwe Esau Mphirime v Value Logistics Limited/BDM Staffing Proprietary Limited FSRFBC (2015) 34922 the Commissioner found that section 198(4) is in respect of non-compliance in relation to the BCEA and the joint and several liability created for the employment agency and the client and s198(3)(b) has been created to cater for the situation of liability for LRA contraventions (Aletter, 2015, p.8).

In both decisions the CCMA and the NBCRFLI found in favour of a sole employment relationship and held that if an employee provides services to the client of a labour broker in a manner which falls outside the scope of the definition of temporary employment and earns below the threshold (currently R205 433.43 per annum) that employee will be deemed to be the employee of the client therefore the relationship between the TES company and the employee will cease to exist (Badal, 2015, p.2).

3.5.3. DIFFICULTY IN DETERMINING DISMISSALS

APSO (2015, p. 5) asserts that all temporary employees who work for more than 24 hours in a month are required to have an employment contract and are protected by the same dismissal rights as permanent employees as per the Labour Relations Act. Research conducted by the Commission for Conciliation, Mediation and Arbitration (CCMA) has found that unfair dismissal cases cited against labour brokers accounted for less than 1% of the total cases brought against employer. The Labour Relations Act specifies six forms of dismissals which includes misconduct, medical incapacity, desertion and resignation, poor work performance as well as retrenchment and redundancy. It also highlights that termination is done by the labour broker as they are the employer.

In cases of dismissals, an employer must prove that the reason for the dismissal was fair and compliance with procedural fairness. Case law has reflected that there is confusion that arises when handling termination by the client and not the labour broker who is deemed the employer of the employee as this creates an impression that the labour broker should provide alternative employment in such cases. This also undermines the employee's right to not be unfairly dismissed. The cases discussed below of *Simon Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) (JR 617/07) ZALC 33 and *NUMSA v Abancedisi Labour Services* (2013) ZASCA143 highlight how difficult it has been to determine dismissals.

Case 1: *Simon Nape v INTCS Corporate Solutions (Pty) Ltd (2010) (JR 617/07) ZALC 33*

Principles

The respondent was a labour broker in the IT industry and supplied mainly computer programmers and engineers to its clients. The contract between the two parties stipulated that the client has the right to call for any of the respondent's employees to be substituted for whichever reason whatsoever or to request that the employees be removed from its premises. The applicant (employee) committed an act of misconduct. He sent an email containing offensive material to one individual whilst on the client's company premises. The client company, Nissan (Pty) Ltd, invoking its contractual rights, demanded that the respondent (the labour broker) remove the applicant from its premises with immediate effect.

The respondent's as the applicant's employer suspended the applicant and after a disciplinary hearing determined that a final written warning instead of a dismissal was the appropriate sanction. The applicant agreed to the written warning but Nissan was not satisfied and refused to permit the applicant to return back to its premises to continue with provision of services. The respondent then terminated the employment contract with the employee as a result, since the applicant could no longer be placed at the client company's site and the respondent could no longer place the applicant with any of their other clients. The applicant proceeded to challenge his dismissal in the Labour Court.

Extract from the judgement

The court referred to s198 which stipulates that the labour broker is the employer of the employee and therefore the employee has no right of recourse against the client for an unfair dismissal claim. The Labour Court held that even though labour broking arrangements are legally permissible it does not mean that the labour broker and the client are at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client. Nor does it mean that labour brokers and clients may structure their contractual relationship in ways that would undermine the employees' constitutionality guaranteed right to fair labour practices.

The Constitution provides that everyone and not just employees have a right to fair labour practices consequently even though a person may not be regarded by the law as an employee

of the client but of the labour broker, the client still has a legal duty to do nothing to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation. In applying the right not to be unfairly dismissed, a court is not bound by contractual limitations created by parties through an agreement when the agreement conflicts with the fundamental rights of workers. Accordingly any clause in a contract between a labour broker and a client which allows a client to undermine the right not to be unfairly dismissed would be against public policy.

Case 2: NUMSA v Abancedisi Labour Services (2013) ZASCA143

Principles

The TES company left its employees employment in abeyance which is similar to a lay-off or time-off until production increases for over ten years. In 2001 Kitsanker (Pty) Ltd concluded an agreement with Abancedisi Labour Services to provide it with employees. The employees who were employed directly by Kitsanker entered into voluntary retrenchments and were immediately re-employed by Abancedisi on a limited duration contract for which their services would be at Kitsanker's disposals but the location and terms and conditions of employment remained precisely as before. After a work stoppage during July 2001, Kitsanker required employees to sign a code of conduct to regulate industrial action. Kitsanker refused to allow any employee onto its premises who did not sign the code of conduct.

Upon enquiry from the Union of Metalworkers of SA (NUMSA), Abancedisi confirmed Kitsanker's position and stated that the employees would not be paid any wages since they were only paid for work performed. An unfair dismissal dispute was referred to the Bargaining Council in which Abancedisi claimed that the employees had not been dismissed but remained on their payroll. The dispute was thereafter referred to the Labour Court where the same point was raised and upheld. On appeal to the Labour Appeal Court (LAC), although the cost order was found to be unfair and reversed, the LAC maintained the view that the employment relationship had continued and that the employees' situation had merely amounted to an indefinite suspension. The employees appealed to the Supreme Court of Appeal (SCA).

Extract from the Judgement

The Supreme Court of Appeal (SCA) held that it was specifically linked to the Kitsanker project as Abancedisi had made no effort to secure alternative work for the employees after the expulsion of employees by Kitsanker. Kitsanker filled the employee's posts and the contract of employment had been terminated. The SCA further held that Abancedisi had not paid the employees any wages and there was nothing that resembled the characteristics of an employment relationship remaining between the parties beyond the illusory retention of employees on Abancedisi's payroll. The effect of Abancedisi's conduct was that there was material breach of the employment contract that entitled the employees to cancel it. The Labour Court's view that the employees were on an indefinite suspension was found to be unsupported by the evidence. The SCA concluded that the dismissal was unfair and Abancedisi was ordered to pay the employees twelve months compensation each and costs.

The above cases make it clear that previous legislation did make certain provisions for TES company arrangements however, many TES companies and their client companies structured their contractual relationships in a way that undermined the employee's constitutional right to fair labour practices hence indeed there was a need to amend section 198 which deals with the operation of TES company in South Africa as employees of these TES companies often experienced a number of problems when trying to resolve labour disputes as labour legislation had limited provisions for TES companies and employees ended up experiencing a lot of financial constraints as they had to resort to labour courts and other statutory bodies to find remedies to challenge their unfair dismissals and other unfair labour practices (Maduna, 2012, p.8). In cases of unfair dismissals, the TES companies often found it easy to convince the CCMA that no dismissal took place as defined by section 186 of the LRA. If an unfair dismissal case was established against the TES company, the proceedings usually did not produce an effective remedy for the employee (Mostert, 2011).

3.6. GOVERNMENT PROPOSED AMENDMENTS AND THEIR IMPACT ON TES

The growth of TES companies has grown rapidly in recent years resulting in problems for the South African labour law. In October 2009, the social partners engaged in negotiations about the existence of temporary employment services (TES) and the possible need for labour reform at the National Economic Development Labour Council (NEDLAC). The Congress of

South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU) confirmed that they are in favour of a legislative ban on labour broking as it is deemed “immoral and politically reprehensible”. Organised business and the Federations of Unions of South Africa (FEDUSA) argued in favour of the retention of the existing system in South Africa but accepted that there is a need for improved regulation (Van Eck, 2010, p.107). In implementing the 10th Congress resolution on Decent Work and labour brokering in 2009/2010 the COSATU programme focused on the imposition of a total ban on TES companies in all sectors.

They stated reason for their opposition to labour brokers is that they act as go-betweens in the employment relationship taking a fee from the party who should be the employer for doing nothing. In this way the real employer dodges employment responsibilities and the law and the TES company gets rich through being a trader in labour and the worker is exploited worse than ever (COSATU TODAY, 2013, p.1). COSATU has brought forward a number of reasons which are listed below on why TES’s should be banned:

- i. TES companies are equivalent to the trading of human beings as commodities.
- ii. TES companies do not create jobs but merely act as intermediaries to access jobs that already exist and which in many cases would have existed previously as permanent full-time jobs.
- iii. TES companies destroy permanent jobs as they lead to insecure contractual relations and downgrading of wages and employment terms.
- iv. TES companies do not practise the principle of equal pay for work of equal value. TES company workers are paid differently to permanent workers and do not have the same benefits.
- v. Apart from undermining collective bargaining rights, TES companies also provide scab labour and therefore serve as strike breakers.
- vi. TES companies combined with other forms of atypical work, reflects the current trends of the intensification of the rate of exploitation of employees.
- vii. TES companies allows employers to evade their obligations as stipulated in the Labour Relations Act. This is a way of outsourcing labour relations to a third party and making it much more difficult for employees to exercise their rights.
- viii. Increased regulation of the industry will not work. The Department of Labour cannot enforce current regulation of employment conditions and safety let alone adding

another area of enforcement. A total ban will be easy to enforce. Most of the employees employed by the TES companies do not enjoy pension fund or provident funds, medical aid benefits etc. The employers dump these employees into the government social security system thereby increasing the state burden to provide for them in their pension life. This means the taxpayers are subsidising the employers to make super profits.

- ix. TES companies are also anti-trade unions because their employees are constantly being moved around from one workplace to another within short periods often with no access to union officials or the possibility of stop-order deductions for union subscriptions and find it very difficult to join a union or to remain members.
- x. TES companies contribute to the progressive de-skilling of workers especially as a result of the short-term and irregular nature of the contracts associated with labour brokering and other forms of atypical labour.

COSATU further stated that the effect of the proposed set of amendments will in fact be totally the opposite to what was promised as it will seriously undermine the protection which vulnerable workers have under the previous legislation, destabilise the current system of collective bargaining and will deny workers their constitutionally enshrined right to strike. The African National Congress (ANC) took a resolution at the Polokwane 52nd conference to create decent work and eliminate poverty. The ANC resolution on Labour Broking as per the 2009 Manifesto stated that, “In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices, provisions will be introduced to facilitate unionisation of workers and conclusion of sectoral collective agreements to cover vulnerable workers in these different relationships and ensure the right to permanent employment for affected workers. Procurement policies and public incentives will include requirements to promote decent work (COSATU TODAY, 2013, p.1). COSATU has totally rejected the argument advanced by the Free Market Foundation (FMF) and the Democratic Alliance (DA) that job seekers should defend TES’s because they create jobs. The DA submitted that the banning of TES companies would result in the loss of employment of more than 850 000 people employed by TES companies and will also deprive the households attached to these workers of a valuable source of wage income.

The Inkatha Freedom Party (IFP) has also supported the regulation of this industry as it is a critical component of the country's economy and asserted that TES companies can recruit employees across sectors ensuring greater continuity of employment. The two political parties have further stated that in a joint statement the concerns that have been raised regarding the exploitation of individuals employed by TES companies are in some cases real and need urgent attention however it is likely that an outright ban or excessive legislation will deepen exploitation by driving the industry underground (Ensor, 2013, p.2).

Kutumela (2013, p.9) asserts that Mkalipi also shares the view that proper regulation of the TES is desirable rather than the outright ban of this industry and accordingly stated that in order to avoid exploitation of employees and ensure decent work, laws should be introduced to regulate contract work, subcontracting and outsourcing and address the problem of TES companies and prohibit certain abusive practices. The Solidarity Trade Union argued that the banning or partial banning of TES companies in South Africa will have a negative impact on the right of TES companies to engage in free trade and will be a serious infringement on their rights. The regulation of this industry will ensure that the rights of these individuals are balanced with the right of employees in the industry to fair labour practice (Kutumela, 2013, p.10).

COSATU stated that it is stunned about the amendments to labour laws proposed by the Minister of Labour as they are the biggest attack on workers' rights. COSATU president Sdumo Dlamini held that the job losses were large and a concern however, partial restrictions on TES companies rather than a total ban means that the employers will continue to manipulate the system and dismiss employees or move them around contracts and hence the COSATU would still push for a total ban (Polity, 2013, p.1). Business Unity South Africa (BUSA) warned of significant job losses should the African National Congress (ANC) Members of Parliament change provisions in the Labour Relations Amendment Act to ban TES companies. This will also damage business confidence and negatively affect South Africa's economic growth and the labour market. BUSA also added that business had gone to great lengths to obtain a regulatory impact assessment study of the proposed legislative amendments which showed that hundreds of thousands of job losses would occur when the amendments are introduced (Ensor, 2013, p.2).

Benjamin (2010, p.53) also highlights four possible negative consequences of amendments. Firstly, depending on the extent of the demand for their labour some of the employees

currently employed by the TES companies might lose their jobs if clients (employers) are unwilling to incur the administrative and other costs associated with directly employing these workers. Secondly, if clients would like to continue utilising the labour supplied by workers previously employed by the TES companies, they would have to employ these workers directly and incur the associated time and financial costs, which may ultimately result in a significant increase in the cost of doing business. Thirdly, the proposed repeal of Section 198, coupled with the proposed change in the definitions of employee and the new definition of an employer may induce uncertainty in the labour market and would in all probability increase the number of cases referred to the CCMA, the Labour Courts and civil courts. A third negative consequence is therefore the potential increases in the case-load of these institutions as additional disputes will be referred to the CCMA. While it is difficult to predict the actual increase in the number of cases referred to the CCMA, the increased case-load will have significant time and cost implications for the Commission.

It has previously been estimated that a ten percent increase in the number of cases referred to the CCMA will be associated with a 26 percent increase in the Commission's budget allocation. Workers who are no longer considered to be employees in terms of the new definitions will have to refer their workplace related disputes to the Magistrate and High Courts. While it is difficult to quantify the impact, these institutes will face increases in their case-load as a result of the additional cases referred to them. The CCMA does not charge a fee for hearing a labour dispute and depending on the nature of the disputes it can be resolved in as little as half-a-day and in most cases no longer than two days. Employees and employers will now have to incur the costs associated with acquiring legal representation when bringing matters to the civil courts.

Estimates obtained from a legal expert indicate that the fee for drafting an application to the Court is approximately R7 000, while the fee for actual representation in the Court will be R26 000 for the first day and R12 000 per day for any subsequent days. In addition, litigation in the civil courts is also a much lengthier process than the average dispute resolution process at the CCMA (Benjamin 2010, p.67). Finally, the proposed amendment means that substitute employees will now be considered employees of the client and each individual client will now have to register the employee under the Compensation for Occupational Injuries and Diseases Act (COIDA) and the Unemployment Insurance (UIF) Act which would impose additional administrative costs on the Unemployment Insurance Fund (UIF) and the

Compensation Fund, given that the unit cost of temporary and part-time workers who move across a multitude of employers, is no longer fixed (Benjamin, 2010, p.53).

The ANC head of economic transformation Enoch Godongwana described the COSATU's call to ban TES companies as unconstitutional as they cannot ban economic activity when people are making business rather it is constitutional to regulate this activity and deal with the negative impact of it (Letsoalo, 2015, p.2). Costella (2012, p. 1) also highlights that TES companies have an important role to play in South Africa provided that they are properly regulated. There is a huge market for these services in developing countries such as South Africa especially in the construction and engineering fields where there is a constant stream of blue collar workers. In January 2015, the Labour Relations Amendment Act came into effect. One of the rationales behind this amendment was to prevent employers from hiring employees on endless contracts in order to avoid the payment of benefits associated with full-time employment. The amendment provides that an employer may engage an employee on a fixed-term contract of employment for a period in excess period of six months only if the nature of the work for which the employee is engaged is of a limited or definite duration or if the employer is able to demonstrate any other justifiable reason for fixing the term of the contract (Hofmeyr 2013, p.3).

The employer bears the onus of proving at any proceedings that there exists a justifiable reason for fixing the term of the contract and that such term was agreed. A list of reasons which will be considered sufficient to establish the justifiability of fixing the term of a contract of employment have been stipulated and include that the employee is replacing another employee who is temporarily absent from work, the employee is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months or the employee is engaged to perform seasonal work. The proposed amendment also provides that the termination of an employee's assignment with a client by a TES company or the client for the purposes of avoiding deeming the client an employer of the employee will constitute a dismissal. The amendment has however not defined justifiable reasons hence this will be subject to extensive litigation in the Labour Court (Hofmeyr 2013, p.3).

To represent their members and operate effectively, trade unions require certain privileges which include access to the employer's premises, access to certain information as well as the ability to collect union dues as well as appoint shop stewards. The amendments have given trade unions given greater access to organisational rights. The inclusion of non-standard

employees in the collective bargaining framework is promoted and this may assist smaller or less representative trade unions to gain greater access into the workplace than what is currently permitted under the CCMA process stipulated in section 21 (Hofmeyr, 2013, p.5).

Since the amendment came into effect, half of the employees employed by TES's have lost their jobs while a far smaller portion secured permanent employment in the 12 months following the amendments to the LRA. Statistics submitted by the TES industry associations which was analysed by Professor Haroon Borhat from the University of Cape Town Economics shows that a classic trade-off has occurred where a small number of workers secured better employment but mostly lost employment entirely. Professor Borhat stated that job destruction was the key response in the wake of regulatory changes (Paton, 2015, p. 2).

A survey undertaken by the Confederation of Associations in the Private Employment Sector (CAPES) shows that 20% of employees were taken on by the end client and got permanent jobs, 50% had their employment terminated. The remainder were unaffected or were given new contracts of some sort. Just over half of all TES company employees had their employment relationship either terminated (45%) or underwent retrenchment (6%). The negative effects of the regulations were highest in the metal and engineering sector, the public sector among white collar workers as well as in education. The survey sample suggested that in the government sector all employees previously employed through third party contractors have lost their job. There are sectors that have responded positively to the regulations by absorbing the temporary contract workers into the permanent workforce and these were companies in waste management (74%), hospitality and leisure (48%) and retail (67%) sectors (Paton, 2015, p. 2). The regulations have also resulted in businesses losing their flexibility when it comes to sizing-up or sizing-down their workforce on a temporary basis. Employers are now forced to think long and hard before utilizing TES company employees, fixed-term employees or even part-time employees in order to address the sudden rise in production unless the employer can put forward one of the justifications permitted by the law (Van Wyk, 2013, p.2).

3.7. CONCLUSION

In conclusion, this chapter provided conceptual framework, the explanation of the triangular relationship and the role played by each party. The prospects for and against the prohibition and regulation of the TES industry in South Africa were examined in depth. From the above

discussion one can deduce that some of the factors that have contributed to the significant growth in TES's include globalization, deregulation of markets as well as technological changes. Several loopholes in labour legislation have also contributed to the increase in the use of TES's. One has seen that the existence of TES's has been scrutinised by many who argue that TES employees are vulnerable as they are denied their right to decent work by their employer however, it seems more favourable to regulate the industry than to totally ban it as the for the regulation outweigh the arguments against regulation. The next chapter will provide an in-depth discussion of the research design used in this study.

CHAPTER FOUR

RESEARCH DESIGN AND METHODOLOGY

4.1. INTRODUCTION

This chapter aims discuss the research design that will be employed in this study. This chapter will outline the different research approaches and provide the justification of the qualitative methodology that will be used in this study. Thereafter, the study site, target population as well as the sampling method and sample size will be presented. This chapter will also discuss how reliability and validity will be achieved and highlight the data analysis that will be utilised to understand the findings.

Research is undertaken in order to enhance our knowledge of what we already know, to extend our knowledge about aspects of the world of which we know either very little or nothing at all and to enable us to better understand the world we live in (Adams *et al.*, 2014, p.2). According to Sekeran & Bougie (2010, p. 2) research is simply a process of finding solutions to a problem after a thorough study and analysis of the situational factors. Research involves a series of well thought out and carefully executed activities that will enable one to know how an organisation's problems can be solved or reduced.

Research involves a series of well thought out and carefully executed activities. It encompasses the processes of inquiry, investigation, examination and experimentation. These processes have to be carried out systematically, diligently, critically, objectively and logically (Sekeran & Bougie, 2010, p. 2). In order to answer the research questions of the current study, it is imperative that one develops a research design that will be applied in the quest to find answers to the research questions. Research design refers to the overall strategy that you choose to integrate the different components of the study in a coherent and logical way, thereby, ensuring you will effectively address the research problem, it constitutes the blueprint for the collection, measurement, and analysis of data (Business Dictionary, 2016).

4.2. OBJECTIVES OF THE STUDY

This study aims:

- i. To determine the extent of the impact of the repeal of Section 198 of the Labour Relations Act: this refers to the unlawful treatment of employees by both the TES companies and their client company.

- ii. To determine the way in which the sanctions for non-compliance with labour standards as set out in the Labour Relations Amendments Act of 2014 will affect the TES companies.
- iii. To discover the implications of a prescribed maximum time of three months during which TES clients may secure the services of temporary employees.
- iv. To elicit the manner in which the organisational rights for the TES employees are to be upheld by both the TES companies and client companies as per the new legislation.
- v. To establish the awareness levels of TES companies, who will have jurisdiction to deal with disputes arising from the new legislation.

4.3. RESEARCH QUESTIONS

The following questions will be answered in this research:

- i. What is the extent of the impact regarding the repeal of section 198 of the Labour Relations Amendment Act which refers to the unlawful treatment of employees by both the TES companies and the client company?
- ii. How will the sanctions for non-compliance with labour standards as set out in the Labour Relations Amendment Act of 2014 affect the temporary employment services?
- iii. What are the implications of a prescribed maximum time of three months during which TES company clients may secure the services of the employees?
- iv. In which ways will organisational rights for the TES company employees be upheld by both TES companies and client companies as per the new legislation?
- v. What are the awareness levels of TES companies on those responsible for dealing with disputes arising from the new legislation?

4.4. RESEARCH DESIGN

Research deals with the structure involved in researching and bringing to realisation the aim and objectives of a study. According to Creswell and Clark (2011, p.53) research designs are procedures for collecting, analysing, interpreting and reporting data in research studies. They represent different models for doing research and they are useful because they help guide the methods decisions that researchers must make during their studies and set the logic by which they make interpretations at the end of their studies. Cooper and Schindler (2005) further state that it is the blue print for the collection, measurement and analysis of data. The process

of research design as explained by Sekeran & Bougie (2010, p.103) includes the purpose of the study which relates to the exploratory, descriptive and hypothesis testing. It also includes location, type of investigation, the extent of the researcher's involvement in the control and manipulation of the study, constraints such as the time horizon and the level at which the data is analysed. The sample design and the data collection methods which will be discussed later on in this chapter are also segments of research design that must be considered.

Studies will involve a choice of one or two research designs amongst a number of research designs which are namely, cross-sectional, action research, case study, causal, cohort, descriptive, experimental, historical, longitudinal and sequential. The following research designs will be explained briefly below, descriptive study, hypothesis testing, case study analysis and exploratory study. The choice of the analysis is dependent on the nature of the study conducted as well as the amount of knowledge that has been collected on the topic (Sekeran & Bougie, 2010, p. 103). This study is exploratory in nature, it is important to understand the basis of this method of analysis.

Neuman, (2011) describes exploratory research as research which seeks to explore an area where little is known or little research has been done either in the context (research site) or on the research topic in that particular context. The main aim is to examine an issue that is not understood well and to develop ideas about it. Exploratory studies are undertaken to better comprehend the nature of the problem since very few studies are conducted in that area. Exploratory studies are also necessary when some facts are known but more information is needed for developing a viable theoretical framework. These studies are important for obtaining a good grasp of the phenomenon of interest and advancing knowledge through subsequent theory building and subsequent testing (Sekeran & Bougie, 2010, p. 104).

According to Cooper to Schindler (2005) formal studies may be invoked which may begin where exploration stops. With that said, this study was conducted under the premise of exploratory research design as preliminary literature revealed that other studies that have been conducted have been focusing on whether temporary employment services (TES's) should be banned or regulated in South Africa, there is no evidence that exists that suggests that an empirical study has been conducted on this line of enquiry hence a rigorous study on this is imperative therefore an exploratory research design was most suitable.

Labaree (2009, p. 2) explains that this design provides a number of advantages to the researcher which include the generation of new ideas and assumptions, the development of

tentative theories or hypotheses, determination about whether a study is feasible in the future. It also allows issues to get refined for more systematic investigation and formulation of new research questions and may provide direction for future research and techniques get developed. Exploratory research is flexible and can address research questions of all types (what, why, how) as well as provide an opportunity to define new terms and clarify existing concepts.

4.5. RESEARCH APPROACH

There are three broad methods of inquiry that are used when conducting a research study which are qualitative, quantitative and mixed methods. The research approach that was utilised in this study is qualitative.

4.5.1. QUANTITATIVE APPROACH

A quantitative research approach can be represented as a research strategy that emphasises quantification in the collection and analysis of data and that entails a deductive approach to the relationship between theory and research in which the accent is placed on the testing of theories. It incorporates the practices and norms of natural scientific model and embodies a view of social reality as an external objective reality (Bryman, 2012, p. 32). A quantitative approach tests objective theories by examining the relationship among variables. These variables can be measured typically on instruments so that numbered data can be analysed using statistical procedures (Creswell 2013, p.4). Rasinger (2013, p. 9) further states that quantitative research is deductive: based on the already known theory, hypotheses are developed which then one tries to prove (or disprove) in the course of our empirical investigation. Once the data is collected it is analysed using the analytic methods. The results are a set of numbers and numerical indices which describe the data in great detail. This method can be used to measure approaches, feelings, actions, and other defined variables and it simplifies outcomes from a larger sample population. Quantitative data collection methods are much more systematic than qualitative data collection methods. Forms of quantitative data collection methods include online surveys, paper surveys, mobile surveys and kiosk surveys, personal interviews which usually comprise of close-ended questions, telephonic interviews, longitudinal studies, website interceptors, online polls and systematic observation (Neuman, 2011, p. 196).

4.5.2. QUALITATIVE APPROACH

A qualitative approach is one that is used for exploring and understanding the meaning individuals or groups ascribe to a social or human problem. The process of research involves emerging questions and procedures, data typically collected in the participant's setting, data analysis inductively building from particulars to general themes and the researcher making interpretations of the meaning of the data (Creswell 2013, p.4). Qualitative research inquires into documents and interprets the meaning-making process. Qualitative Research is also used to discover trends in thoughts and sentiments and to delve into a phenomenon.

Qualitative data collection methods vary between unstructured and semi-structured methods. Some common methods include focus groups, individual interviews and participation or observation in order to obtain deeper information (Neuman, 2011, p.174). It includes collecting quotes from people, verifying them and contemplating what they mean. It allows the researcher to illuminate meaning, study how things work, capture stories to understand people's perspectives and experiences, understand contexts, identify unanticipated consequences as well as make comparisons to discover important patterns and themes across cases (Patton, 2014, p. 15).

The researcher used this research approach as it provided a number of advantages which include the subjects covered being evaluated in depth and in detail. The interviews are not limited to particular questions and can be redirected or guided by the researcher in real time. The data in qualitative research depends on human experience and this is more compelling and powerful than data gathered through quantitative research. Complexities and subtleties about the subjects of the research or the topic covered is usually missed by many positivistic inquiries hence it was necessary to use this approach as it seemed to be more suitable. The researcher has a clear vision on what to expect and they collect data in a genuine effort of plugging data to bigger picture.

4.5.3. MIXED METHODS APPROACH

A mixed methods approach involves collecting both quantitative and qualitative data, integrating the two forms of data, and using distinct designs that may involve philosophical assumptions and theoretical framework. The core assumption of this form of inquiry is that the combination of qualitative and quantitative approaches provides a more complete understanding of a research problem than either approach alone (Creswell 2013, p.4). Clark

(2011, p. 3) also states that a mixed methods approach refers to a research methodology that combines features of both quantitative and qualitative approaches, with the aim of achieving a depth and breadth of understanding and validation. This approach provides equal value for collecting and analysing both quantitative and qualitative data in analysing the problem. Both data are collected during one phase of the research at roughly the same time (Creswell 2013, p.16).

The mixed methods approach also provides superior evidence for the result. It also enables the researcher to complement one set of results with another, to expand a set of results and to discover something that would have been missed if a quantitative or a qualitative approach was only used to gather results. This method offers the best of both worlds that is the detailed, contextualised and natural qualitative research together with the more efficient but light or compelling predictive power of quantitative research. It is seen by many as providing the most complete research approach. The advantage of this method is its holistic nature. It encompasses the strengths of both qualitative and quantitative methods providing both statistical and in depth data (Clark, 2011, p. 3).

4.5.4. RESEARCH APPROACH USED

The qualitative approach was suitable for this study as it offers methods that are able to provide explanation of participants' personal experiences of the phenomena. Qualitative data is reported in the words of respondents thus offering the primary meaning and understanding of how and why the phenomena occurred so this method will assist the researcher to understand the effects of labour legislative changes. Neuman (2011, p. 174) highlights the following advantages of qualitative research:

- i. Data is based on the participant's own categories of meaning.
- ii. Provides individual case information.
- iii. Can describe in rich detail phenomena as they are situated and embedded in local contexts.
- iv. The researcher almost always identifies contextual and setting factors as they relate to the phenomenon of interest.
- v. The researcher can study dynamic processes.
- vi. Data is usually collected in naturalistic settings.

From the above advantages, it is evident that the qualitative research approach is the most appropriate to achieve the objectives of this study.

An interpretive research philosophy was used as it values subjective understanding of people's lives. Interpretivism is a position that emphasises gaining a detailed insight into an issue as opposed to being concerned with being able to make generalisations about the world. Interpretivist's research acknowledges that there may be multiple explanations for actions (Mukherji & Albon, 2014, p. 22). Interpretivism values subjective understanding of people's lives. Interpretivists hang out with people and observe them in their natural settings where they attempt to gain an emphatic understanding of how people feel inside, seeking to interpret individual's everyday experiences, deeper meanings and feelings and idiosyncratic reasons for their behaviours. Interpretivists believe that the best way to learn about people is to be flexible and subjective in one's approach so that the subject's world can be seen through the subject's own eyes as there is no objective knowledge that can be independent of thinking reasoning human beings (Rubin & Babbie, 2009, p. 37).

This was deemed particularly relevant in understanding the effects of labour legislative changes regarding temporary employment services. This philosophy allowed the participants to interpret their own thoughts thereby making sense of their lived experiences. Inductive reasoning emerges directly from the data and is influenced by the unique characteristics of the participants. The researcher also brings her own meaning and is not separate from the process. Inductive reasoning was used to draw attention to knowledge in order to develop theories and create concepts. As multiple realities are understood and explored through inductive reasoning, managements experiences were different as they socially constructed different interpretations of their lives and experiences. This new knowledge about the management's experiences will certainly contribute useful extension of knowledge and research in the field of temporary work.

As the researcher wanted to gain an in-depth view of the participants' experiences a phenomenological approach was used in this study. Phenomenology focuses more on the meaning of phenomena than on the facts associated with them. Researchers adopting this phenomena try to understand what is happening. Their approach is holistic covering the whole picture rather than reductionist. Researchers collect and analyse evidence but their purpose is to use this data to develop ideas that can explain the meaning of things. They believe that reality is socially constructed rather than objectively determined. It tends to be

inductive. Phenomenology aims to describe what the phenomenon is according to the meanings that individuals apply to it (Armstrong, 2010, p. 387). Phenomenological approach allowed the researcher to learn more about peoples' viewpoints, opinions and understanding on the effects of labour legislation changes on temporary employment services industry. To gain further insight, the researcher employed bracketing where all the judgements and preconceived ideas were set aside in order to see the management's view point and describe the findings in a non-judgemental manner.

4.6. SAMPLING TECHNIQUE AND DESCRIPTION

Sekeran and Bougie (2010, p.266) state that sampling is the process of selecting a sufficient number of the right elements from the population so that a study of the sample and understanding of its properties or characteristics make it possible for us to generalise such properties or characteristics to the population elements. There are two types of sampling designs namely, probability and non-probability sampling. In probability sampling, the elements of the population have an equal chance of being selected as sample subjects (Ary *et al.*, 2009, p. 150). There are four types of probability sampling which are frequently used. They are namely simple random sampling, systematic sampling, stratified sampling and cluster sampling. Non-probability sampling is a method in which observations are not selected randomly instead the observations are selected based on the judgement of the researcher. There are three types of non-probability sampling. They are namely accidental or availability sampling, purposive or judgemental sampling and quota sampling.

With regards to the recruitment of the participants, the researcher first contacted the human resource manager to get the database of all the TES in Durban and Richards Bay after the research protocol was granted. Purposive sampling was used to select the participants for this study as the selected group had to provide the researcher with the best information on the subject at hand. The criteria that was used for selection was that the participants have to be in management positions which include top management, middle management as well as lower management as management are at the forefront of implementing the amended legislation and hence hold very useful information on the subject matter. Having identified the target group for the study, the researcher and the research assistants approached the participants on one on one basis and asked for their voluntary participation in the study.

The researcher then scheduled meetings with the participants to explain the purpose of the study and assure them that the study is solely for academic purpose. As part of the process, the researcher assured the prospective participants of the confidentiality, privacy and anonymity. A written informed consent form was distributed to each of the participants that were selected for the study to seek for his/her voluntary participation in the study. Each of the participants was required to sign the written informed consent form to indicate his/her willingness to take part in the study. The participants were also encouraged to ask questions concerning the study. They were also be given the opportunity to voluntarily withdraw from the study at any point in time. The researcher was only aware of the identity of potential participants once the informed consent letters were returned.

Both probability and non-probability sampling methods were used. Probability sampling allowed the researcher to use stratified random sampling. The researcher used stratified random sampling as it ensures the presence of key subgroups within the sample, also allowing for the division of the population into strata groups thus ensuring that the sample chosen was representative of the population that was being studied. A disproportionate stratified random sample was drawn from the following subgroups of the population top management, middle management and lower level management. Managers in the selected TES companies were classified according to the different management levels which are mainly top management, middle management and lower levels management in order to gather their different perceptions on the effects of labour legislation changes regarding temporary employment services in KwaZulu-Natal mining and construction coastal sectors.

Non-probability sampling allowed for the use of purposive sampling in order to elicit the views of the participants (management) as they are those who can provide the desired information on the subject. The non-probability sampling technique known as snowball sampling was also utilised to recruit more subjects for the study. The identified participants were used to refer the researcher to other participants.

4.6.SAMPLE SIZE

The total population of this study consisted of a total of forty-four (44) participants which included TES management, client company management as well as Trade Union representatives. However, based on the fact that the study is of a qualitative nature, the researcher had targeted a total of 20 participants as a sample size, this approach is supported

by Sekeran & Bougie (2010) but the researcher only had access and solicited participation from thirteen (13) participants which comprises of three (3) client company managers, two (2) trade union representatives and eight (8) TES managers. To determine the sample size, each TES company Human Resources department was called to provide the organisational structure (organogram) from each occupational level as well as names and contact details of each manager and ask them to participate in the study. Purposive sampling was used to select the sample and stratified random sampling was used to stratify the participants according to their different job levels. To enhance the response rate of the participant's, confidentiality and anonymity was assured and a summary of the research findings will be offered to participants.

4.7.SAMPLE FRAME

To determine the sample frame for the study, from the total of 52 registered TES company in KwaZulu-Natal (KZN) as indicated by the Federation of Professional Staffing Organisations (APSO), the researcher approached all the TES companies in Durban and Richards Bay as these are the KZN economic hubs and most TES companies in KZN are situated in these two areas.

4.8.STUDY SITE

The study was conducted using the KwaZulu-Natal Durban and Richards Bay area. The justification for such use was that a large number of TES companies are found in these two areas, in accordance with APSO database. However, the target population for this study will consist of temporary employment services which include amongst others Capital Outsourcing, V&A Labour Solutions and Quyn International Outsourcing and the Confederation of Associations in the private employment sector due to convenience and easy access to the researcher.

4.9.TARGET POPULATION

According to Whitley & Kite (2013, p.486) the target population is the group of people to whom we want the results of our research to apply. The target population for this study was management in both TES companies and client companies in selected sectors in KZN as management is at the forefront of implementing and complying with legislation, and therefore any changes in legislation will impact on the way in which they operate.

4.10. DATA COLLECTION

Data collection refers to the collection of data from surveys, independent or networked locations via data capture, data entry or data logging. It involves the collection of disembodied information. This is the process whereby the researcher collects the information needed to answer the research problem (Punch, 2009, p.144). The selection of the data collection method begins during the literature review. To a large extent the success of a study depends on the quality of the data collection methods chosen and employed. There are various methods that are used to collect data for research. The data collection method must be appropriate to the problem, hypothesis, the setting and the population. These methods are dependent on the type of study that is being conducted therefore, it is imperative that the research method falls in line with the study in respect of it being qualitative or quantitative in nature (LoBiondo-Wood et.al, 2013, p. 288). The selected data collection method will be discussed briefly. This study is qualitative in nature, the data collection approaches for qualitative research usually involve direct interaction with individuals on a one to one basis or direct interaction with individuals in a group setting. The benefit of the qualitative approach is that the information is richer and has a deeper insight in the phenomenon under study (LoBiondo-Wood *et.al*, 2013, p. 288). According to Punch (2009, p.144) the interview is the most prominent data collection tool in qualitative research. It is a good way of accessing people's perceptions, meanings, and definitions of situations and constructions of reality. It is also one of the most powerful ways we have of understanding others. The best suited method of data collection for this study was interviews. There are three fundamental types of research interviews namely unstructured, semi-structured and structured.

4.11.1. UNSTRUCTURED INTERVIEWS

Unstructured interviews can be referred to as depth or in depth interviews. They have very little structure at all and the interviewer may just go with the aim of discussing a limited number of topics, sometimes as few as just one or two. The interviewer may frame the interview questions based on the interviewee and his/her previous response. These types of interviews allow the discussion to cover areas in great detail. They involve the researcher wanting to know or find out more about a specific topic without there being a structure or a preconceived plan or expectation as to how they will deal with the topic. Unstructured interviews are far less rigid. A schedule is seldom kept and there are usually no predetermined answers. Often the questions are created as the interaction proceeds. The most

common form of unstructured interviews makes use of open-ended questions and in most cases this type of interview style is done in conjunction with participant-observation (Dantzer & Hunter, 2011, p.59). This type of interview is used as a way of understanding the complex behaviour of people without imposing a prior categorization which might limit the field of inquiry (Punch, 2009, p.148).

4.11.2. SEMI STRUCTURED INTERVIEWS

Semi structured interviews are sometimes also called focused interviews. These interviews consist of a series of open ended questions based on the topic areas the researcher wants to cover and a series of broad questions to ask and may have some prompts to help the interviewee. The open ended nature of the question defines the topic under investigation but provides opportunities for both interviewer and interviewee to discuss some topics in more detail. Semi structured interviews allow the researcher to prompt or encourage the interviewee if they are looking for more information or find what they are saying interesting. This method gives the researcher the freedom to probe the interviewee to elaborate or to follow a new line of inquiry introduced by what the interviewee is saying. It also allows the researcher to go beyond the responses for a broader understanding of the answers. The researcher may ask for more explanation of an answer than has been given or follow-up with an additional question or questions depending on the answers given (Dantzer & Hunter, 2011, p.59). Semi structured interviews work best when the interviewed has a number of areas he/she wants to be sure to be addressing.

4.11.3. STRUCTURED INTERVIEWS

A structured interview entails asking pre-established open-ended questions of every respondent. Most structured interviews are quantitative as they usually entirely/predominantly consist of close-ended questions. A tightly structured schedule is utilised and the questions may be phrased in order that a limited range of responses may be given. Responses are recorded as given. The structured interviews are geared towards limiting errors and ensuring consistency of order in the responses. The structured interview can elicit rational, legitimate responses (Dantzer & Hunter, 2011, p.59). There is little room for variation in response. All respondents receive the same questions in the same order, delivered in a standardized manner. Flexibility and variation are minimised, while standardization is maximised (Punch, 2009, p.146).

This study made use of structured interviews face to face personal interviews as it allows the researcher to interpret questions clearly and clear any misunderstandings, they are also quick and easy to administer. Thirteen structured interviews (13) were conducted out of the maximum of twenty (20) interviews that are required for a qualitative study as suggested Sekeran & Bougie (2010) to understand the perceptions of management of TES companies, client companies as well as trade unions. A personal structured interview gives the researcher greater control over the interview process as questions are organised in a sequence that will cover the interest of the researcher. It is for this reason that the researcher followed this process. The interview schedule consisted of open-ended questions in order to give respondents the opportunity to respond freely and to express their views without the narrow constraints of the types of questions that would be asked in a quantitative study. The researcher was also able to aggregate responses in a reliable manner and to confidently compare responses between different interview periods of time (Saunders et al. 2003). The participants were asked a number of questions to elicit answers pertinent to understanding the effects of the labour legislative changes in the mining and construction industry in KwaZulu-Natal. The interview schedule is attached (Appendix 1). The interview schedule sequence and wording were deemed satisfactory to all the pilot study participants that were interviewed and the same schedule was therefore used for the larger sample. Extensive notes were written and also recorded using a voice recorder to capture the experiences as detailed by the participants during the interview. The participants were given a choice whether to be recorded or not to minimise the risk of them withholding some information because of the voice recorder. None of the participants declined to be recorded.

4.12. THE CONSTRUCTION OF THE INTERVIEW SCHEDULE

A personal interview gives the researcher greater control over the interview process as questions are organised in a sequence that will cover the interest of the researcher. It is for this reason that this process was followed. The interview schedule for this study was constructed by drawing on existing literature on the problem of interest and by considering the gaps that were identified. The interview schedule provides a brief explanation of the purpose of the research and is divided into two sections, namely Section A and Section B. It is accompanied by an informed consent letter and consent form for respondents (Refer to Appendix 1).

While constructing the questionnaire, in order to ensure that the questions were understood and interpreted correctly by the respondents and that the correct and unbiased responses were received, the language used in the interview schedule was appropriate for the level of understanding of the respondents. The interview schedule consisted of open-ended questions order which were focused on eliciting information related to the topic to give respondents the opportunity to respond without the narrow constraints of a quantitative study. The choice of words used depended on the educational level of the respondents sampled and the frame of reference of the respondents. The questions were unbiased. Confidentiality was assured. The focus of the interview schedule focuses on the research objectives and encourages respondents to provide accurate responses.

4.13. ADMINISTRATION PROCESS

The administration of the interview schedule was conducted with the help of each TES company Human Resources Department. Face to face interviews were conducted as well as telephonic interviews to those participants that preferred telephonic interviews.

4.14. IN-HOUSE PRETESTING AND PILOT TESTING

A pilot study was undertaken to determine the suitability and relevance of the interview schedule. Pilot testing is conducted to detect weakness in research methodology and the data collection instrument as well as to provide proxy data for a section of a probability sample. The pilot study is an essential stage during which doubts are identified and resolved about the content, structure and design of the questions to be posed to participants and involves the execution of a trial with a group as similar as possible to your intended participants. Pretesting provides a fairly stable measure of accuracy because it involves the administration of the instrument on a small group of respondents from the identified population (Saunders *et al.*, 2003).

Four managers in one of the study areas (Richards Bay) were interviewed for the pilot study in order to test the research instrument and to see whether the participants would provide reliable and valid information needed. The pilot study also offered the opportunity to seek clarification on questions that the participants may have not understood. The feedback indicated that the interview schedule was appropriate for the research and that the instrument adequately covered the research objectives. It also helped to ascertain the time that respondents would take to respond to the schedule.

4.15. TRUSTWORTHINESS AND CREDIBILITY

To increase trustworthiness, there are four constructs that must be addressed within qualitative research which are credibility, transferability, dependability and confirmability. The credibility of the study was achieved by adopting well-established methods of data collection which. The interview is the most common used method for data collection in qualitative research and was used in this study. To ensure reliability in the interviews, the questions were appraised and reviewed by an independent academic who was identified as an expert within the field of industrial relations as well as research methodology. To help ensure honesty from participants, voluntary participation was allowed where participants were free to leave the project at any time. This ensured that participants were willing to participate and share information freely. To confirm the honesty and obtain the correct information from participants, the researcher used probing and clarifying questions within the interviews.

The researcher engaged in frequent debriefing sessions with her supervisor to ensure that the methods and procedures that were used for this study are valid and reliable. The researcher also kept notes on a continual basis and reflected on the research questions to ensure that they were answered correctly and without bias. Participants were also given the opportunity to comment on the emerging themes however, no one commented specifically on the themes indicating that they most likely in agreement with them. Thick descriptions of the phenomena were provided which allowed the reader to experience the actual commentary from participants thus allowing the reader the opportunity to place the data in context and further decide on the transferability of the information to other contexts. Quotes from participants were used to support statements made by the researcher. Objectivity was ensured in presenting the data accurately by keeping an audit trail of decisions made throughout the research process, keeping a reflective journal and meeting frequently with the supervisor to unpack findings from the participants to reduce bias.

4.16. DATA ANALYSIS

Data analysis refers to the process of evaluating data using analytical and logical reasoning to examine each component of the data provided. Data from various sources is gathered, reviewed and then analysed to form findings and draw a conclusion (Bryman, 2008). This study collected qualitative data therefore data will be analysed using both thematic analysis as well as content analysis. A qualitative data collection tool (NVivo) was used to analyse all the data collected and present them in a reliable and correct way. It also allowed the

researcher to examine the data thoroughly. Thematic analysis refers to a qualitative analytic method for identifying, analysing and reporting patterns/themes within data. It minimally organises and describes your data set in detail and interprets various aspects of the research topic Braun & Clarke (as cited in King & Horrocks 2010, p.152). This analysis is suitable for this study as data is transcribed to an appropriate level of detail and the transcripts have been checked against the tapes for accuracy. Thematic analysis also allowed the researcher to treat the data collected from interviews in a way that made it possible to interpret the research topic.

Content analysis refers to an observational research method that is used to systematically evaluate the symbolic contents of all forms of recorded communications. Content analysis enables the researcher to analyse textual information and systematically identify its properties such as the presence of words, concepts, characters, themes or sentences. The text is coded into categories and then analysed using conceptual analysis or relational analysis (Sekeran & Bougie, 2010, p.386). Thematic analysis made it possible for the researcher to properly analyse the data and interpret effects of labour legislation changes regarding temporary employment services in KwaZulu-Natal mining and construction coastal sectors in a reliable and correct way. The researcher was also able to examine the data thoroughly. Thematic analysis involves sorting or coding of data into themes and categories by identifying and analyzing the same patterns that exist in the data. The themes of a research study are very important, as they show patterns and trends of the responses. The patterns and trends answers the research objectives in a qualitative study. This analysis was done using the Nvivo qualitative data analysis software.

The following steps were used during the thematic analysis as recommended by Oppong Asante, Osafo and Nyamekye (2015).

1. The data was transcribed after the interviews. The researcher became familiar with data by reading and re-reading the data. The reading was done in conjunction with listening to the audio tapes to ensure consistency in transcriptions.
2. Transcription of the data into Nvivo ready- format was done.
3. Reading of the data over again to have a deeper understanding of the themes and patterns.
4. The Coding proper: this involved rephrasing of the questions. E.g.: Question one – “explain your role and the benefits in the tripartite relationships across all parties?” –

This was coded as “*role and benefits for the concerned parties*” this is also the main theme.

5. Generation of Themes. The responses to the questions formed the sub-themes of the study: E.g.: - *job creation for employment, revenue generation of government, labour brokers and removal of recruitment & selection issues from the hands of organizations, and flexible staffing needs for companies and skilling of un-skilled unemployed workers*. This process was repeated for all the responses to the questions.
6. The fifth step involved going through the main themes and sub-themes to make sure they align with the research questions and the research objectives.
7. The last step was explaining some of the statements / responses that seemed ambiguous for easy conceptualization accordingly.

4.17. ETHICAL CONSIDERATIONS

The ethical clearance for this study was obtained from the University of KwaZulu-Natal School of Management, IT & Governance. The researcher approached each and every selected TES company in order to obtain a gatekeeper’s letter. The participant’s inclusion in the research was voluntary and they were allowed to leave the research at any time. Informed consent letter was done by giving the participants sufficient information about the purpose and nature of the study, so they could make an informed decision as to whether they would like to participate in the study. An invitation and informed consent was sent out to all potential participants explaining the research project in detail. The participants were encouraged to ask the researcher questions and to clarify any doubts they may have had about risks or benefits that may arise from the study.

The participants gave written consent by completing the informed consent form at the interview. All participants were literate and able to read and understand the informed consent document. To further ensure clarity the informed consent was explained verbally to all participants before they agreed to participate and all queries were addressed at the time. The participants were reassured in the interview that all information shared was confidential. This confidentiality was ensured in the form of anonymity. The interviews were conducted behind closed doors and the participant’s privacy was respected at all times. No participant was forced to share on a certain question that they felt uncomfortable with as positive responses and effects were anticipated to emanate from the research.

The participants were placed at ease to ensure maximum participation and sharing and were asked open-ended questions to stimulate discussion on the research topic. The researcher listened attentively to the participants during the interview sessions. To maintain anonymity and confidentiality data was stored on password encrypted files to ensure that the data will not be tampered with. An information sheet was given out by the researcher to all the participants who wished to see the study results detailing a summary of the results gathered.

Participants were also offered an opportunity to confirm whether they wish to see the study results or not. For participants who wished to access the results in more detail a hard copy of the full research thesis will be made available at the University of Kwa Zulu Natal Westville Campus library. A CD with a PDF copy will also be sent to the participants who cannot access the University library. Data will be stored in the Discipline for a period of five years and thereafter, be disposed of in accordance of the prescribed requirements of the University's guidelines.

4.15. CONCLUSION

This chapter discussed the relevant research methodology adopted in this study. This includes the research design which is exploratory in nature. The study adopted a qualitative research approach as it allowed the researcher to gain an in-depth understanding of the participant's perceptions and feelings regarding the research topic. The sampling technique was also discussed as well as the study site, the target population and the sample size. The data collection method (interviews) that was utilised in this study and the data analysis was also discussed. This methodology enabled the researcher to arrive at the results presented in the following chapter.

CHAPTER 5

PRESENTATION OF RESULTS

5.1. INTRODUCTION

This chapter attempts to describe the findings collected through interviews conducted by the researcher. The findings relate to the research questions that guides this study. The data was analysed using the thematic analysis through the NVivo 11 software. The data focused on explaining and describing the tripartite relationships between client companies, temporary employment services and trade unions, as well the impact and effect of the new amendment on the Section (198) of the labour legislations that governs the use of TES companies.

The purpose of this study was to investigate the following:

- i. The extent of impact regarding the repeal of section 198 of the labour relations amendment and how employees are treated by the client companies and TES companies.
- ii. How the sanctions implemented for non-compliance will affect the TES companies?
- iii. What are the implications of a prescribed maximum time of three months for the participants in the tripartite relationships?
- iv. How the rights of employees are to be upheld by both TES companies and client companies?
- v. What is the awareness level of employees, TES companies and client companies concerning dispute resolutions as well as jurisdictions?

5.2. RESPONDENTS DEMOGRAPHICS

The participants are thirteen comprising of three client company respondents, two trade union respondents and eight TES company respondents.

Table: 5.1. The table below shows the different characteristics of respondents interviewed in this research.

Participants	Gender	Length of service	Educational achievement	Position in Company
Client Company Respondent 1	Male	6-10 years	Degree	Client Management

Client Company Respondent 2	male	3-5 years	Degree	Client Management
Client Company Respondent 3	Male	6-10 years	Diploma	Client Management
Trade Union rep 1	Male	Above 10 years	Matric	Trade Union Rep
Trade Union Rep 2	Male	6-10 years	Diploma	Trade Union Rep
TES Rep 1	Female	6-10 years	Diploma	TEs Management
TES Rep 2	Male	6-10 years	Matric	TES management
TES Rep 3	Male	Above 10 years	Matric	TES management
TES Rep 4	Male	3-5 years	Degree	TES management
TES Rep 5	Female	Above 10 years	Matric	TES management
TES Rep 6	Female	6-10 years	Degree	TES management
TES Rep 7	Female	3-5 years	Diploma	TES management
TES Rep 8	Female	6-10 years	Matric	TES management

These characteristics are needed to show the different context and the different perceptions the questions were answered. For instance, the trade union representatives could have a

master/ servant perception of the working relationships between TES company employees, the client company and the TES company itself.

5.3. THEMATIC ANALYSIS

5.3.1. IMPACT OF SECTION 198 OF LABOUR RELATIONS ACT, AS AMENDED

The figure below shows the main research question and the interview questions which was developed into themes on NVivo.

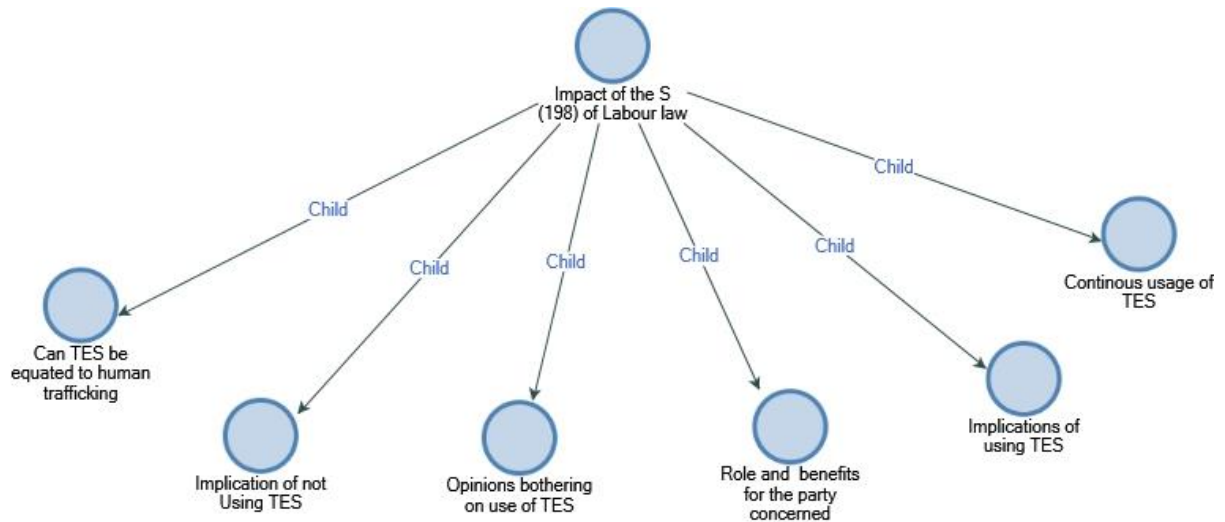


Fig: 5.1 The main research question and the interview questions developed in to sub-themes generated by NVivo.

The interview question is as follows:

- i. Explain your role and the benefits in the tripartite relationships to across all parties?
- ii. Why do companies use TES companies?
- iii. Would you emphasize the continuous use of TES companies?
- iv. Please explain the implications of using TES companies?
- v. The Implications of not using TES companies?
- vi. Do you think TES companies can be likened to human trafficking?

I. Explain your role and the benefits in the tripartite relationships to across all parties?

The responses is showing in themes generated on NVivo in the figure below:

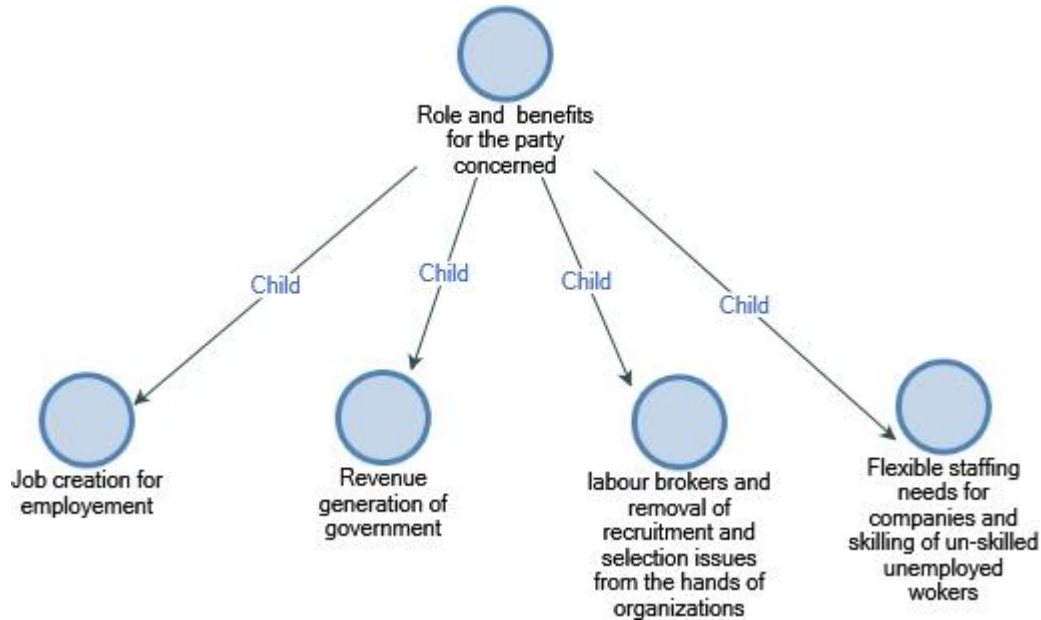


Fig: 5.2. The different roles mentioned by respondents developed into themes by nvivo

In answering the first interview question, the following responses are cited below:

Client company Respondent One: *“Our company provides business to TES’s our service providers.”*

Client Company Respondent Three: *“We contribute our quota to the economy.”*

Client Company Respondent Two: *“We assist in creating employment opportunities.”*

TES Respondent Eight: *“We are a labour broker, we facilitate the process of getting employees for our clients, we do all the necessary legislative tax, UIF and other necessary deductions for our clients and deal with any disciplinary and any termination issues that may arise.”*

TES Respondent Five: *“We are labour brokers, our role in the tripartite relationship is to provide flexible staff for our clients, handle their administrative needs which include managing employee contracts and payroll.”*

TES Respondent Four: *“We are labour brokers, our role is to handle processes such as advertising positions, screening of applicants, interviewing and managing employees for our clients.”*

TES Respondent One: *“We are a labour broker, our role is to provide employees to our clients. Basically we ease our client’s administrative burden of hiring and managing employees.”*

Trade Union Respondents One: *“We protect the rights of employees in such arrangements.”*

Trade Union Respondents Two

: *“We ensure the rights of employees in these forms of employment are upheld.”*

The responses outlined the different roles and benefits that each member of the tripartite relationship provides. The researcher gathered that the roles and benefits for the different parties in the tripartite relationship are symbiotic. The kind of relationship benefits everyone as well as the economy. Some of the roles and benefits includes: *Job creation, training and skilling of employees, companies and organizations have access to needed labour that allows for flexibility, high productivity for the organizations, payment of tax dues to the government, protection of employee rights and regular supply of scarce labour from the labour force.* TES companies source both skilled and unskilled employees and place them at client companies when needed. They engage in administrative tasks of recruitment and selection on behalf of their clients. Their operations make it possible for flexible job creations. The trade unions are representatives of employees that protect and ensure the organizational rights of employees are protected and not infringed upon.

II. Why do companies use TES companies?

Below are extracts of some of the responses from respondents:

Client respondent One *“TES’s allow us to find replacements in a short period of time in cases where there is a worker who is unable to make it to work or if production increases.”*

Client respondent Three *“They give us the flexibility we need to remain globally competitive and able to focus on our core responsibilities. We are able to get employees whenever we need them with no hassle.”*

Client Respondent Two *“We use TES’s during peak periods as they always have staff that is ready to be deployed when needed.”*

TES Respondent Eight *“To ensure that employee administration is comprehensive and accurate and the clients are able to concentrate on their core functions.”*

TES Respondent five *“It usually takes time for companies to find suitable candidates for a particular position hence companies approach us to assist..”*

Trade Union Respondent two: *“To save on costs, dodge the responsibility of employing someone on a full time basis. They also do not want to deal with procedures for disciplinary action that are set out in our labour law as they believe that these are such a burden. TES workers are seldom represented by unions so it is easier to exploit them.”*

Trade Union Respondent one: *“Cheap labour that is provided by TES’s. TES employees are remunerated at a lower rate than that of permanent employees. They do not have to pay benefits such as housing, medical aid etc. It is also easy for them to lay off workers at any time and replace unproductive workers with no hassle.”*

From the few responses cited above, we gathered that client company’s use TES companies for a number of reasons, which include the flexibility to find replacements in a short period, they are also able to focus on their core responsibilities. Some companies also do not have the ability to carry employees on a full time basis hence they need to use TES companies. Client companies are also able to save time spent on employee administration. However, trade union respondents raised that companies merely use TES companies as they provide cheap labour and a channel for them to dodge their responsibilities towards the employee.

III. Would you emphasize the continuous use of TES companies?

Below is the position the respondents to in their responses represented in the figure generated on Nvivo.

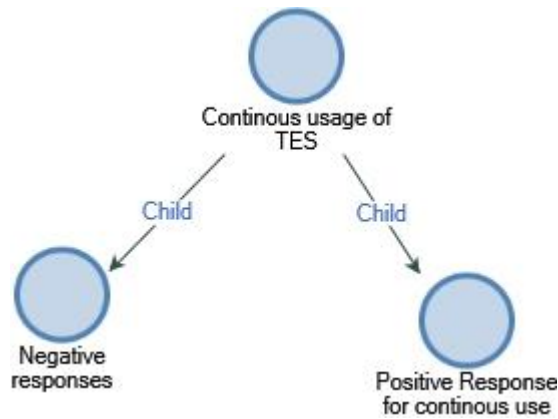


Fig: 5.3. The two views expressed by respondents on the continuous use of TES company

The responses show many positive responses to the continuous use on TES companies. The client companies as well as the TES companies all answered an emphatic “YES”, that they would continue the use of TES companies unless otherwise stated by the law. The trade unions as expected contradicts that view and say they are exploitative. Below are the extracts of the trade Union responses from respondents:

Trade Union Respondent One: *“No. TES exploit employees.”*

Trade Union Respondent Two: *“No. They do not offer job security and fringe benefits and this makes their employees vulnerable.”*

IV. Please explain the implications of using TES companies?

Cited below are some of the responses:

Client Respondent One *“Labour brokers reduce administrative costs for us as the process of hiring can take up to a month or even more in some cases when in fact we need to employ someone urgently to fill that position. They offer specialised staff in a very short period of time.”*

Client Respondent Three: *“Allow local companies an opportunity to compete with companies abroad by providing flexibility. In our industry we often require to employ staff for a limited period of time and TES’s allow us to employ staff according to our needs or as required.”*

TES respondent Five: *“We facilitate employment by making it easier for our clients to employ staff who might not have been employed.”*

TES Respondent Four: *“Administrative costs are reduced and this results in more people being employed as a result of increased profits received by client companies.”*

TES Respondent one: *“Employment creation, also the clients and the employees become exposed to a variety of skills.”*

Trade Union Respondent one: *“TES’s are exploitative, they supply labour to clients for indefinite periods and offer them no job security, no benefits such as leave as they believe in “no work, no pay”. They pay their employees less salaries than they should in fact these employees are paid peanuts compared to what they should be paid. Employees are laid off at a short notice with no recourse.”*

From the above responses cited, the researcher deduced that using TES companies is very useful and helpful for both clients and TES companies as it provides an opportunity to save on labour costs. But, according to the trade union respondents, it is *exploitative, degrading and employees are treated badly.*

V. What are the implications of not using TES company services?

Below are some of the responses given by respondents:

Client Company Respondent one: *“This would certainly affect our business negatively as we would be required to employ staff that we cannot afford to employ on a full time basis. Our industry is characterised by temporary projects which do not allow us to have the capacity to employ some employees on a full time basis.”*

TES Respondent Six: *“Small companies that rely on TES’s to provide their administrative needs may be required to close down as it is quite expensive to run a human resources department and many of these companies need time to focus on their core responsibilities in order to be more productive.”*

TES Respondent two: *“This would certainly have an adverse effect on the labour market.”*

Trade Union respondent one: *“Job security for employees. More permanent positions will be offered. Clients will no longer retrench workers with ease.”*

From the few responses above, one can infer that not using TES company will increase unemployment, there will be reduced productivity among small and medium scale companies especially those ones that do not have strong financial strength to hire permanent employees. This will definitely reduce the tax returns as some businesses may be forced to shut down.

VI. Can TES companies be described as a form of human trafficking?

The denial of employees their basic rights and welfare? Find below the general responses to the question:

Client Company respondent one: *“No. TES’s create employment as they are easily accessible to the unemployed population as it is not easy to find employment if you apply directly to companies in some cases.”*

Client Company Respondent three: *“No. They play a large and positive role in helping unskilled and inexperienced young people to secure employment.”*

TES Respondent Six: *“No. Our company complies with the basic conditions of employment act (BCEA), the labour relations act (LRA) and the other relevant legislation as well as the standards set by ASPO and CAPES and we treat our employees accordingly.”*

TES Respondent Three: *“No. There are many compliant TES’s like us that treat our employees fairly.”*

TES Respondent Five: *“No. Different agencies apply different rules so it is unfair to describe all TES’s as such, as we are not all just in the business of making money, the well-being of our employees also matters.”*

Trade Union Respondent One and Yes: **“YES”**

The above responses show that temporary employees are not treated well like their permanent colleagues, but they are not treated badly either. All of the client companies and the TES companies interviewed all claimed they treat their temporary employees fairly.

Below is a figure showing the responses and the themes according to the responses from the respondents generated by Nvivo.

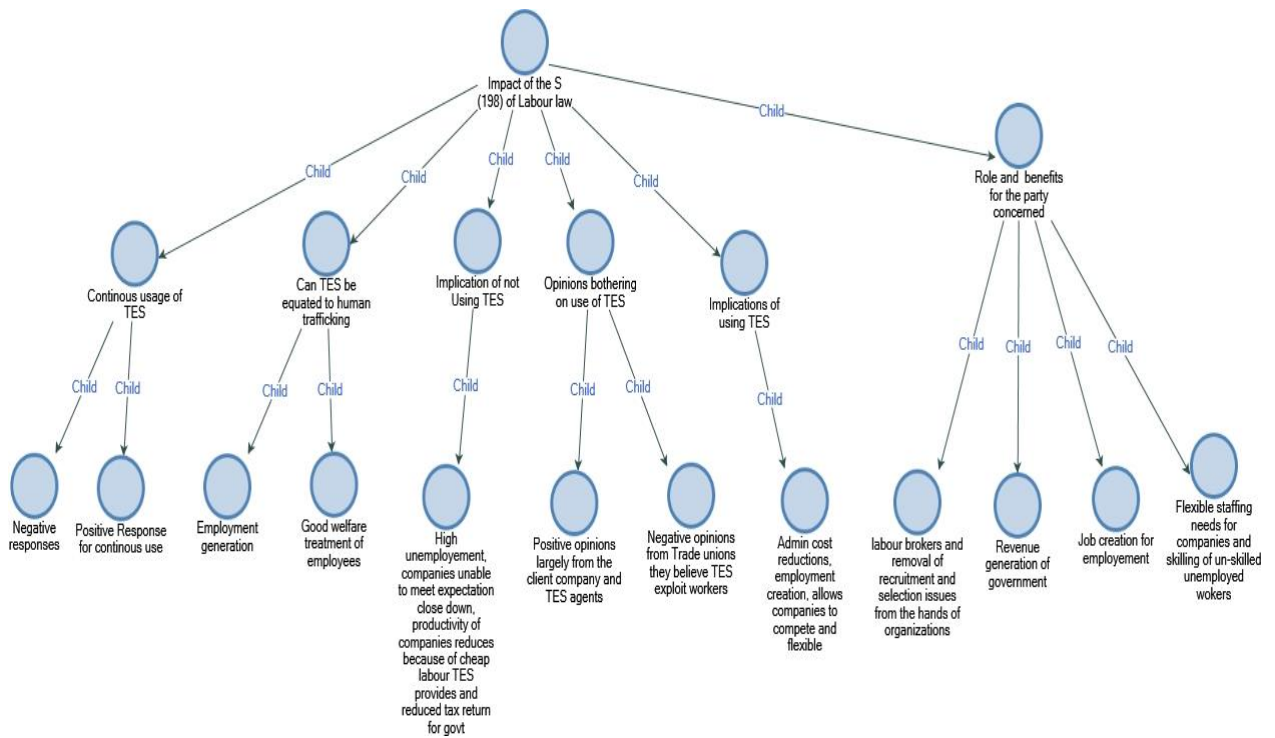


Fig: 5.4. The Responses on research question one developed into themes and sub-themes

5.3.2. EFFECT OF SANCTIONS FOR NON-COMPLIANCE

I. How the sanctions implemented for non-compliance will affect the TES companies?

The two interview questions below are depicted in the figure below:

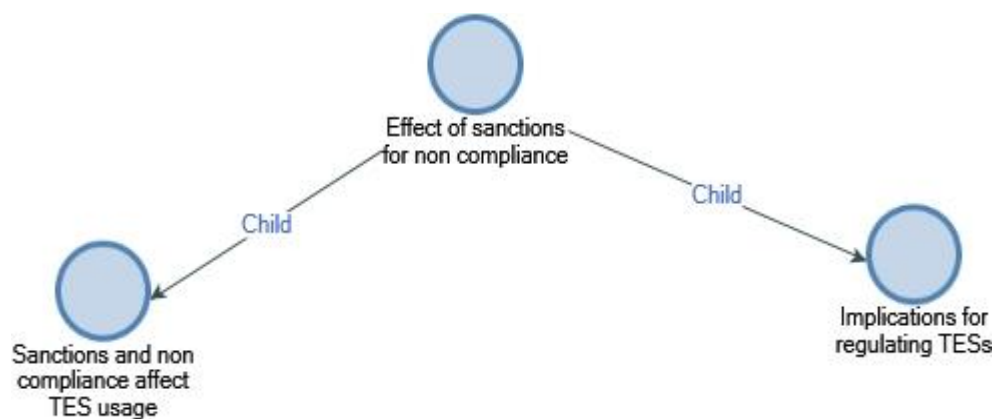


Fig: 5.5. The two interview questions developed into sub-themes on NVivo

For the first question, the response includes:

Client Company respondent one: *“Some of the businesses will be discouraged to use TES employees as it will be hard to lay them off. We will be forced to spread work amongst our permanent staff and look into increasing their salaries.”*

Client Company Respondent Three: *“It will not make any more business sense to take TES employees on board and many of us are looking into reducing our reliance on TES’s as the cost of employing these employees seems to be much greater than before.”*

Client Company Respondent Two: *“Dismissing and retrenching employees will not be as easy as it was before.”*

TES Respondent Eight: *“Some companies may consider retrenching employees to allow for the increased cost to company per employee.”*

TES Respondent Five: *“Businesses may be forced to find other ways of cutting costs rather than using TES.”*

TES Respondent Four: *“Companies will be forced to assess their needs for the use of TES’s”*

TES Respondent One: *“More and more clients may look for alternative forms of employment.”*

Trade Union Respondent One: *“Less client companies will use the services of TES’s and this could possibly be victory for us trade unions as well as the employees that are constantly being exploited.”*

Trade Union Respondent Two: *“Clients of TES’s will utilise this form of employment when it is really necessary and the abuse of this form of work will certainly decrease.”*

From the responses above, we can infer that the recent amendment of the labour law will have an adverse effect on many businesses in their bid to comply and avoid sanctions from the government. The trade unions see it as a victory for them as they think it will sanitise and reduce exploitation of workers.

I. What are the possible implications for the regulation of TES companies?

Client Company Respondent One: “Some of the businesses will be discouraged to use TES employees as it will be hard to lay them off. We will be forced to spread work amongst our permanent staff and look into increasing their salaries.

TES Respondent One: “The regulation of this industry may create a hostile environment and disastrous to employment creation.”

TES Respondent Five: “Employees will be afforded better protection than before.”

TES Respondent Four: “Client companies may be discouraged to take employees on board because dismissing and retrenching them will be difficult.”

TES Respondent One: “This is good as only the compliant TES’s will remain.”

The regulation of the industry may pose some grave effects on TES companies. TES companies will have to deal with a severe blow to their businesses and client companies will be forced to restructure their operations. All the respondents prefer TES companies to be regulated and not banned. Client companies will be now forced to find a way to re-strategize their operations and other ways to reduce costs.

5.3.3. IMPLICATIONS OF THE NEW TIME FRAME ON STAKEHOLDERS

The interview questions that emanated from the above research questions are depicted in the figure below:

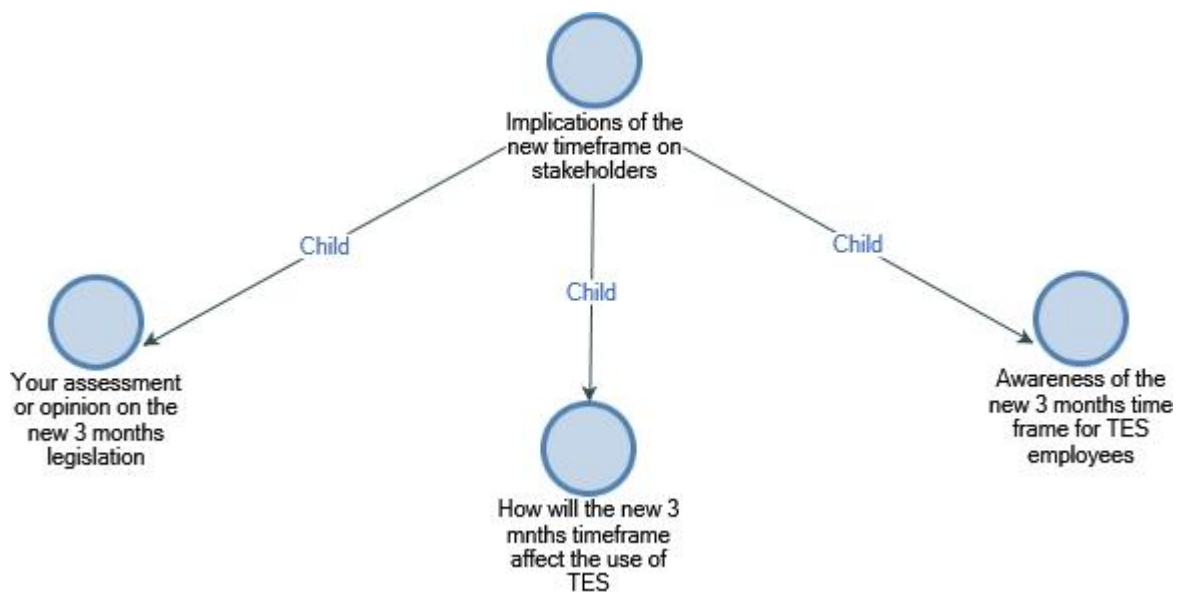


Fig: 5.6. The three sub-themes generated from the interview question

- I. Are you aware of the new amendment that stipulates a maximum of 3months to keep employees as temp employees before they can become permanent employees of companies?**

The responses to the question on awareness was an overwhelming affirmation (**YES**) and that they are all aware of the new amendment to the labour legislation.

II. How will the new time limit of three months affect the use of TES companies?

The research question on the 'impact or effect the new amendment will have on the use of TES services elicited these responses:

Client Company Respondent one: *"We foresee that the word deemed will be problematic as it leads to uncertainty."*

Client company Respondent Three: *"financial implications that will come with employing casual workers on a full time basis will certainly force us to do away with TES's."*

Client Company Respondent Two: *"this will impact negatively on our sector."*

TES Respondent Eight: *"Job losses may increase as many clients would want to flee"*

TES Respondent Five: *"this will result in profit or losses for our clients, when there's no longer work available for these employees"*

TES Respondent Six: *"This will impact negatively on our businesses as the TES's which are currently operating on a small scale may be required to close down."*

Trade Union Respondent One: *"Clients of TES's will certainly need to look into exploring other alternatives to help them remain productive and competitive."*

Trade Union Respondent Two: *"these time limits will definitely force clients to only use TES's when necessary as they do not want to have the burden of employing someone on full time basis once the 3-month period is over."*

The responses from this interview question reveal that the new amended time limits will cause great harm and lead to *losses of profits* as well as *jobs and a general uncertainty across the industry*. This will add to the already over bloated unemployment figures. Many of the client companies that outsource their recruitment to TES companies will have to focus both on the core operations and overheads which will add more expenses to their operational expenses.

III. In your opinion, do you think it is fair for government to impose this legislation, and why?

Third question on focused on finding out the ‘opinions or views of respondent regarding the insertion of the particular amendment (3months notice) if it is fair or not’. The responses from respondents includes:

Client Company Respondent one: *“No, simply because we constantly require their services due to the nature of our business.”*

Client Respondent Three: *“The financial implications that will come with employing casual workers on a full time basis will certainly force us to do away with TES’s.”*

Client Respondent Two: *“No, because many of the problems can be dealt with by better enforcement by labour inspectors of existing laws.”*

TES Respondent One - Eight: *“Yes.”*

Trade Union one: *“No, it is better for TES’s to be banned as they do more harm than good.”*

Trade Union Respondent Two: *“Yes, it is better to try and regulate the industry rather than leaving it as it was. However, the best option to deal with this is to ban them completely.”*

From the above responses cited, we can deduce that not all the client companies that employ temporary employees are happy with the new amendment, but they have no choice but to abide with it. TES companies have responded positively to the amendments and are ready to comply, while the trade unions also see it as a good measure to curb the excesses of both TES companies and client companies.

5.3.4. UPHOLDING OF THE RIGHTS OF EMPLOYEES BY THE STAKEHOLDERS

This research objective and question elicited seven (7) interview questions: But the main question was to know:

- i. How client companies as well as TES companies that employ and facilitate temporary employees uphold the organizational rights of employees?
- ii. Explain the benefits enjoyed by employees of TES companies, such as health benefits, pension benefits and leave benefits, and if no, they should provide reasons?
- iii. Are their remunerations at par with those of their permanent colleagues, if no why?
- iv. Are there opportunities for career prospects, training and promotions for TES company employees?
- v. The respondent’s opinion on whether TES company employees are treated equally by the client companies, if no why?

- vi. Are TES company employees given preference when there is a permanent vacancy, if no why?
- vii. In the respondent's opinion, if TES company employees are given a choice do they prefer to be released from the contract to become permanent employees or prefer to remain a TES company employee?

I. How client companies as well as TES companies that employ and facilitate temporary employees uphold the organizational rights of employees?

The responses from the respondents are cited below starting from the first question:

Client Company Respondent one: *“Employees will no longer be prohibited from participating in union activities and will not be treated less favourably than permanent employees.”*

Client company Respondent Two: *“There will be improvements in the way TES employees are treated by TES's. They will certainly have access to organisational rights that are enjoyed by permanent employees.”*

Client company Respondent Three: *“TES employees will be able to exercise their trade union rights at our premises and these employees will no longer experience any discrimination which they might have experienced simply because they were not directly our employees.”*

TES Respondent Eight: *“We both have the responsibility to ensure that our employees are aware of their right to join the trade unions without fear. We also have to ensure that the necessary union fees are deducted from our employees.”*

TES Respondent Five: *“Employees will no longer be discouraged from exercising their right to organise.”*

TES Respondent Four: *“Our employees will be treated equally as the permanent employees of our clients.”*

TES Respondent One: *“There will be no less favourable terms of employment for our employees that are placed in the client's organisation.”*

TES Respondent Six: *“As much as there is no one stopping employees to be members of unions, they will be more encouraged to be members than ever before.”*

TES Respondent Seven: *“Trade unions will now have organisational rights in the workplace where our employees are placed.”*

Trade Union Respondent One: *“We believe that we will be able to organise and ensure that the rights of employees are going to be upheld.”*

Trade Union Respondent Two: *“Trade unions will now obtain organisational rights which they were not granted before as TES’s and clients were discouraging their employees in engaging in such activities.”*

The various responses elicited different reactions from different respondents. Many of the client company respondents and TES companies claimed that they will allow more freedom to temporary employees to join trade unions, grant them more organizational rights and as well as stop any form of discriminations from the employers. The trade unions affirmed that they would ensure proper monitoring and ensure that rights of employees are upheld.

The figure below are the themes generated on NVivo based on the interview questions:

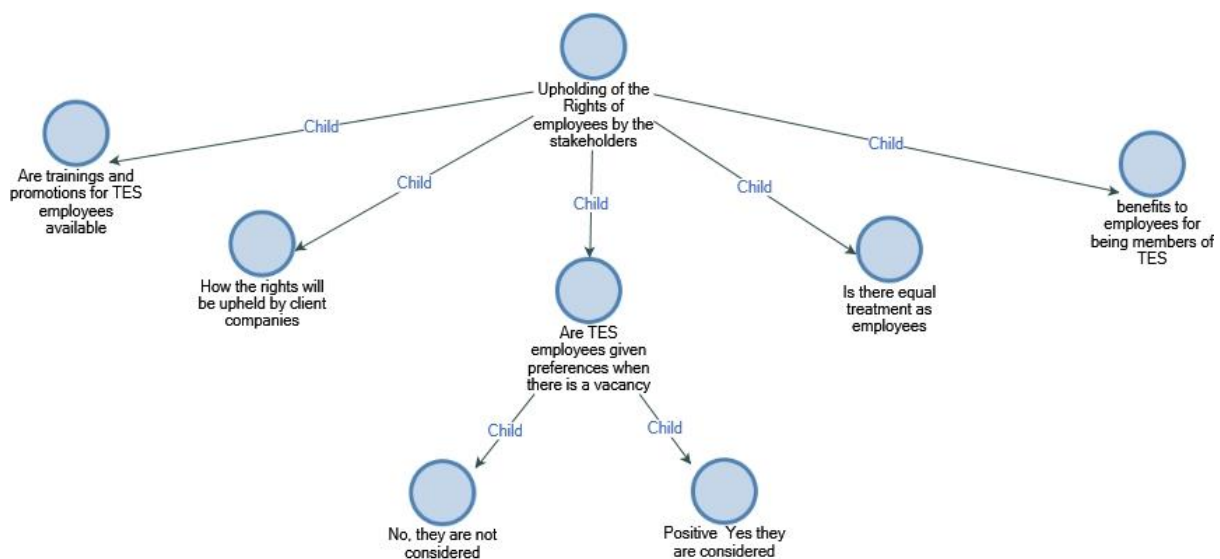


Fig: 5.7. The main theme and the sub-themes on the question of upholding the rights of employees

II. Explain the benefits enjoyed by employees of TES companies, such as health benefits, pension benefits and leave benefits, and if no, they should provide reasons?

Cited below are some of the extracts of the responses to the question:

Client Company Respondent one: *“Yes, we believe that these employees receive basic statutory benefits as prescribed by the legislation such as being paid for public holidays, leave etc.”*

TES Respondent eight: *“Yes, unemployment insurance fund is provided as stipulated in the legislation, provident fund in which we contribute towards and the employee also contributes towards it.”*

Trade Union Respondent One: *“No, the TES’s are trying their best to remain competitive in their industry and they do so by sacrificing the opportunity for employees to earn more and receive more benefits.”*

All of the respondents affirmed that temporary employees receive some benefits such as leave benefits, provident fund, medical aid, Unemployed insurance fund, maternity leaves, sick leave and other statutory benefits, except for the trade union respondents who both confirmed that the client company and the TES company deny employees their benefits all in a bid to remain competitive in their industry.

II. Are their remunerations at par with those of their permanent colleagues, if no why?

The responses for this question were a bit divided, but most concurred that the salaries were market or industry determined. TES company respondent five: stated that *some temporary employees earn more than permanent staff because some of them possess certain specialised skills*. Trade unions as usual hold the view that the temporary employees earn much lower than their colleagues do. Cited below are some of the responses:

Client Respondent Two: *“Yes, the premiums charged by TES’s are not taken from the employees’ wages so they definitely earn the same or almost similar market related salaries.”*

TES Respondent Three: *“Yes, the department of labour has wage determinations and we negotiate market-related salaries, we use these wage determinations as our benchmark.”*

Trade Union Respondent Two: *“No, clients approach TES’s as they provide cheap labour so it is impossible that their employees receive the same salaries as those that are employed by the client company directly.”*

III. Are there opportunities for career prospects, training and promotions for TES company employees?

Below are some extracts of the responses of the respondents interviewed:

Client Respondent Three: *“Yes, there is a skill development programme in place and employees are given the necessary training as required.”*

Client Respondent Two: *“Yes, we do offer these employees on the job training that will enable them to perform their jobs more effectively.”*

TES Respondents Five: *“Yes, there are prospects for promotions.”*

TES Respondent One: *“Yes, employees do receive trainings to uplift their skills.”*

TES Respondent Three: *“Yes, first preference is given to them when permanent positions are offered.”*

All the respondents stated that there are opportunities for trainings, promotion and career progression for all employees and not only temporary employees. There are *skills development programs for employees, on-the-job trainings, promotions opportunities*. When opportunities for promotions become available, these employees are most of the times considered. Some of the client companies stated that they have many times offered temporary employees trainings opportunities, as it will help them improve their skills and do their jobs effectively. The trade unions did not object or state otherwise on this question.

IV. The respondent’s opinion on whether TES company employees are treated equally by the client companies, if no why?

TES Respondent One: *“Yes, employees are treated equally as those of client companies.”*

TES Respondent Two: *“Yes, none of our employees have reported cases of discrimination.”*

Trade Union Respondent one: *“No, many of the employees of TES have suggested that they are treated less favourably when compared to permanent staff of the client.”*

Trade Union Two: *“No, some employees of TES have said that they are given more work and expected to be more productive than the permanent staff of the clients.”*

All of the client companies and the TES company respondents asserted an emphatic “YES” that they do treat temporary employees well, and one of the respondents even stated that there is no reported case of discrimination against them. However, the contradictory views were from the trade union respondents.

V. Are TES company employees given preference when there is a permanent vacancy, if no why?

Some of the extracts of the responses are cited below:

Client company Respondent One: *“Yes, sometimes. It depends on the position advertised and if they have the necessary skills to take on that position.”*

TES Respondent Two: *“No, because employees need to apply for the vacant position just like everybody else and if suitable for the position they will definitely be considered.”*

TES Respondent Five: *“Yes, many of our clients have approached us stating that they require the services of particular employee on a full time basis and would like the employee to be released from our contract we often accept this request and release the employee.”*

TES Respondent Four: *“Yes, very often this is the case.”*

The responses from the respondents all stated that TES company employees are definitely considered for any vacancies that become available. Some stated that as long as they qualify and have the required skills for the position they could apply freely. The positions are made open for anyone to apply.

VI. In the respondent’s opinion, if TES company employees are given a choice do they prefer to be released from the contract to become permanent employees or prefer to remain a TES company employee?

Below is some of the extract of the responses from respondents:

Client Company Respondent One: *“Yes, some employees want stability and do not want to be moved from assignment to assignment and believe that we can give them such.”*

Client Company Respondent Two: *“No, many employees still want the job flexibility that is offered by TES’s and often say that they have potential to earn more money than if they were in a permanent position in some company.”*

TES Respondent Four: *“No, because some of our employees enjoy the flexibility that comes with working for us.”*

TES Respondent One: *“Yes, mostly because employees often think that our clients will offer them greener pastures.”*

TES Respondent Seven: *“Yes, as employees grow they seek stability and job security it is therefore for this reason that employees would prefer to be released from us.”*

Trade Union Two: *“Yes, these employees would want to be directly employed by the firm/client than being contracted in the already highly uncertain job market more and more employees are looking for certainty and stability.”*

The responses from the client company and the TES company showed that when temporary employees were given an option to choose, most of them chose to be permanent employees because, of the job security and stability it offers them. A sizable number of the employees chose to remain as contract staff as it gives them some flexibility and potential to earn more rather than staying on a permanent job.

5.3.5. DISPUTES JURISDICTION DUE TO THE NEW LEGISLATION

This research question elicited the following interview questions which are depicted in the following themes in the figure below:

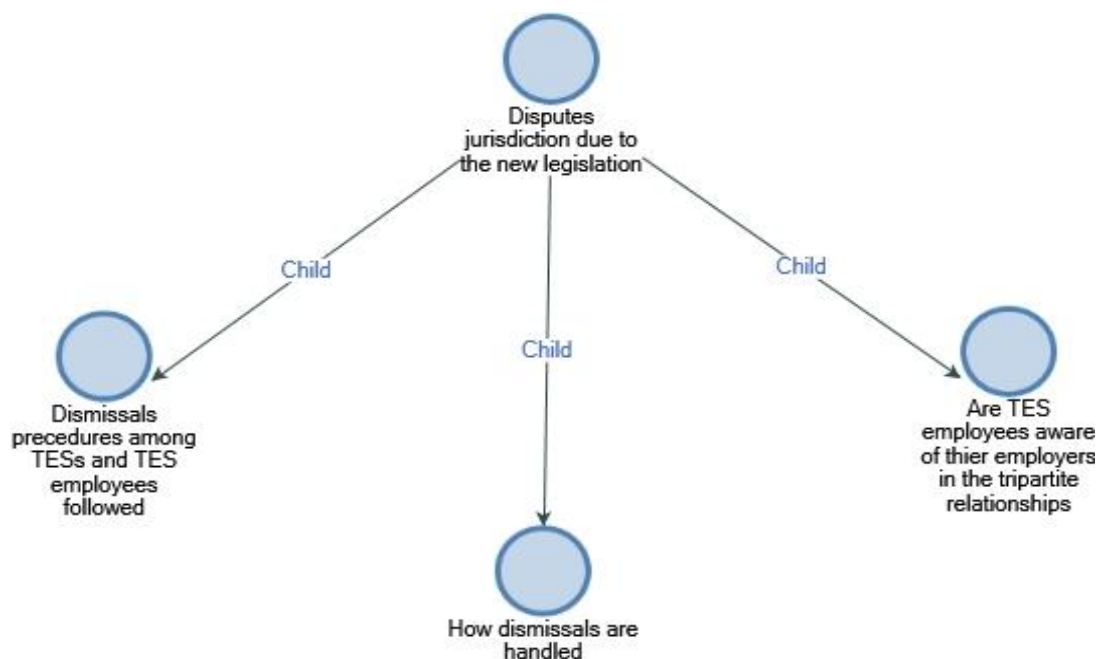


Fig: 5.8. The three views as expressed in themes and sub-themes on nvivo

I. Are TES company employees made aware of whom their employers is in the triangular relationship?

Below are some of the extracts of the responses:

Client Company Respondent One: *“Yes, it is the TES’s responsibility to do so.”*

TES Respondent Eight: *“Yes, the conditions of employment clearly state this.”*

TES Respondent Five: *“Yes, this is stipulated in the employee’s contract of employment.”*

TES Respondent Two: *“Yes, when the employees’ employment terms are explained.”*

Trade Union Respondent One: *“No, not always, they often realise when problems start to arise.”*

Trade Union Respondent Two: *“Yes.”*

From the responses collected, the level of awareness is high. This is because it is stipulated in their contract of employment that they need to be notified of who their employer is.

II. How are issues of dismissals handled?

Below are few of the extracts of the responses:

Client company Respondent one: *“It will not be as easy to dismiss employees as it was before, employees will only be dismissed when necessary upon consultation with the TES. We will definitely be required to work together for an alternative solution before resorting to dismissal.”*

Client Company Respondent Three: *“Since we will now be deemed employers of TES employees we will have joint responsibility in dismissals cases.”*

Client company Two: *“There is still some confusion on how this law will be applied but definitely we are aware that we are jointly and severally liable together with the TES should there be a need to dismiss any employee.”*

TES Respondent Eight: *“A client who wishes to dismiss an employee will need to consult the TES and afford the employee a fair hearing before dismissing them.”*

TES Respondent Five: *“Dismissals of our employees by clients will be investigated thoroughly and we will be involved throughout the process.”*

TES Respondent Four: *“Our clients will no longer be able to dismiss employees as they please just to run away from the obligation of employing them permanently, a justifiable reason has to be provided should such dismissals occur.”*

The respondents all affirmed that it will not be business as usual (i.e client companies will not be able to fire anytime they deem fit. Both client companies and the TES now have joint responsibility in cases of dismissals because of the new amendment. The responses also showed that issues of dismissals will now be thorough investigated and the employee will be given a fair hearing before resorting to dismissals. One of the trade unions respondents also confirmed that the TES company and the client company would be jointly and severally liable for any issues surrounding dismissals. One of the trade union respondents also stated that it is still a bit of a challenge to respond to this question as the word “deemed” is still being defended in court.

III. In cases of dismissals, are TES company employees made aware of the procedures that are to be followed?

Below are some of the excerpts from the responses:

TES Respondent Six: *“Yes, during induction employees are made aware of how to handle such cases.”*

TES Respondent Three: *“Yes, there are disciplinary procedures that are in place which are in line with the client company procedures.”*

Trade Union Respondent One and Two: *“NO”*.

Client Company Respondent One: *“No, Not always”*

Client company Respondent Two and Three: *“YES”*.

All the respondents interviewed except for the ‘trade union’ respondents and ‘client company respondent one’ all answered “YES”, that *employees are informed during induction on how to go about their grievances procedures*. They also confirmed that *the disciplinary processes are aligned with the client company procedures*. The trade unions respondents simply stated that most of the time the employees are not aware of the procedures to be followed, thereby concluding that their employees did not inform them.

Other interview questions asked includes:

I. Would you agree with the statement that TES companies contribute to a flexible job market and create employment? If no, please state your reasons.

Below are the responses depicted as themes in the figure below:

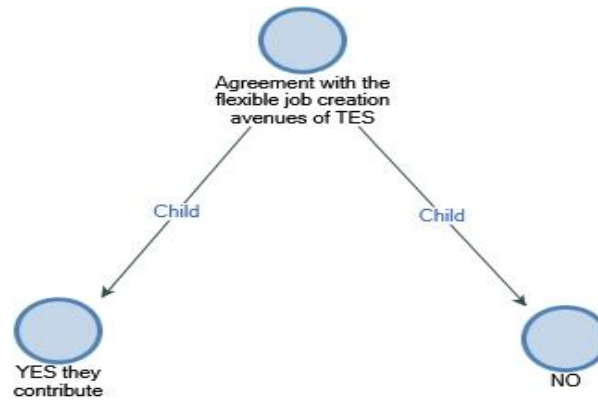


Fig: 5.9. The views expressed by respondents on if TES creates flexible jobs or not

The TES company and client company responses were an overwhelming “YES”, while one of the trade unions respondents stated that they do not contribute to flexible job markets or create employment but only offer already existing jobs. One of the trade union respondents supported the statement that they contribute to flexible job markets but do not create employment.

Cited below are some of the extracts of the responses:

Client company Respondent **One to Three**: “YES”

TES Respondent **One to Eight**: “YES”

Trade Union Respondent One: “*No, they do contribute to a flexible job market however they do not create employment.*”

Trade Union Respondent Two: “*No, TES’s do not create employment but offer already existing jobs in the labour market.*”

IV. In your opinion do you think that TES companies should be banned or regulated? Please support your statement.

Below is the figure showing the responses as represented in themes:

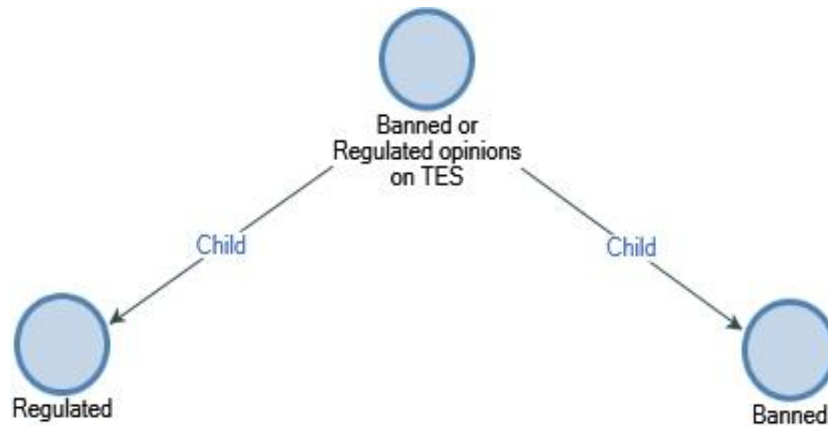


Fig: 5.10. Respondent views on the banning or regulation of TES companies

The responses from both the client companies and the TES companies respondents all asserted overwhelmingly that regulating rather than banning the operations of TES companies is the best solution. They then enumerated the benefits to be gained if the TES companies are sustained and regulated. There are lot of benefits to be derived from regulating the activities of TES companies, which include flexible job creation, transparency and accountability, sanitising the labour markets from unfair labour practices that employers normally engage in. They also stated that banning TES companies will lead to large scale unemployment, retrenchment and reduction in the profitability of client companies that rely on temporary employees. The trade union respondents were of the opinion that TES companies should be banned rather than regulated. Below are some of the extracts of the responses from respondents:

Client company Respondent One: *“Regulated, besides the fact that they have a constitutional right to exist, they contribute positively to the economy. There are also many TES’s that are compliant with all the statutory requirements and this is one of the main criteria that help us choose the suitable TES to handle our staffing needs.”*

Client Respondent Three: *“Regulated because the ban on the practice will mean that we would incur additional costs and the administrative burden of carrying out the hiring process.”*

Client Company Respondent Two: *“Regulated as the ban of TES’s could lead to many job losses and increase unemployment.”*

TES Respondent Eight: *“Regulated as we assist with job creation and contribute to the economy”.*

TES Respondent Five: *“Regulated as this will create fairness and transparency in the industry.”*

TES Respondent Four: *“Regulated, because if this industry is regulated there will be less of non-compliance to deal with.”*

TES Respondent Seven: *“Regulated, because it is a proven fact that throughout the world that TES’s are a major contributor to economies.”*

TES Respondent Six: *“Regulated, because a total ban will result in many job losses and retrenchments.”*

TES Respondent Three: *“Regulated, TES’s contribute to the economy.”*

Trade Union Respondent One: *“Banned and there should be processes in place to facilitate the process of the unemployed people to get jobs.”*

Trade Union Respondent Two: *“Banned. TES employees are no different to slaves and TES’s reap them off as they only receive a fraction of what they are truly entitled to.”*

5.4. CONCLUSION

This chapter presented and analysed data obtained in this study. The findings was analysed using interview questions, this was guided by the research questions. The interview response was transcribed and exported into NVivo software. The researcher then coded the findings into themes and sub-themes guided by the research objectives. NVivo models and extracts of responses was used in describing and analysing the findings. The following chapter will discuss the findings of this study extensively in relation to the research objectives and other studies.

CHAPTER 6

DISCUSSION OF RESULTS

6.1. INTRODUCTION

This chapter aims to engage in a full in-depth discussion of the research findings of this study. The discussions and findings emanate from the empirical research based on the in-depth interviews that were conducted with the participants which were presented in the previous chapter. The interpretation and explanation of the findings will also be compared with previous research conducted on the topic. This will enhance the findings of this study and may also provide a framework for future research on this topic.

6.2. DISCUSSION AND INTERPRETATION

The results relating to the effects of labour legislative changes on TES companies in the Kwa-Zulu Natal mining and construction coastal industries will be discussed. These results will also be compared and contrasted with that of other researchers in the literature review.

6.2.1. BIOGRAPHICAL INFORMATION OF RESPONDENTS

For the study, a total of 13 people were interviewed. The study comprised of eight (8) male respondents and five (5) female respondents. Seven (7) of the respondents indicated that they have served in this industry for 6 to 10 years and three (3) respondents have served in the industry for 3 to 5 years and another three (3) respondents indicated that they have served above 10 years in the TES industry. The majority of the respondents possess a Matriculation and an equal number of respondents possesses a Diploma (4) and a Degree (4). Eight respondents were TES company management, followed by three (3) client company management and two (2) trade union representatives. This biographical information was important as it had material impact on the study and will allow the reader to place them in context.

6.2.2. THEMATIC ANALYSIS

This section will analyse the responses obtained to the questions posed to the parties in the tripartite relationship. As it was highlighted in the previous chapters, thematic analysis was used to analyse that the data collected. The responses are grouped by research objectives/questions and into themes and sub-themes that emerged from the research and explained in-depth.

6.2.2.1 IMPACT OF THE REPEAL OF SECTION 198 OF THE LRA

i. ROLE AND BENEFITS FOR THE PARTY CONCERNED

In response to the role and benefits that each party provides for the parties in the tripartite relationship, the client company's management highlighted that they contribute to the economy and also assist in employment creation. This is supported by research conducted by APSO (2015, p.3) which states that more than 5.4 million people have been introduced to the world of work by TES companies since the year 2000. TES management stated that their role in the tripartite relationship is to facilitate the process of getting employees for their clients, handle all the necessary legislative taxes, UIF as well as other necessary deductions for their clients and deal with any disciplinary and any termination issues that may arise.

TES companies also provide flexible staff for their clients, handle their administrative needs which include advertising positions, screening of applicants, interviewing, managing employee contracts and payroll. These managers hold a similar opinion as Mostert (2011, p.17) who states that TES companies assists client companies by handling employment contracts of employees placed at the client company, responsible for paying employees their salaries and make any necessary deductions such as garnishee orders, provident or pension fund matters and also deals with other administrative issues that concern the employee.

The trade union representatives responded that their role is to protect the rights of employees in such arrangements and ensure that their rights are upheld however, these representatives held the view that it is difficult to ensure that the rights of these employees are protected as there are regulatory inadequacies in labour legislation. These findings are consistent with Maduna (2012) who highlighted that there are several loopholes in labour legislation which include the designation of the TES companies as the employer of the employee who is placed at the client company's site and the other is the failure of the legislation to extend the joint and several liabilities to both the TES companies and the client companies in unfair dismissal cases.

ii. OPINIONS ON THE USE OF TEMPORARY EMPLOYMENT SERVICES

The participants were asked to provide reasons for using TES companies. Client companies responded that they use TES companies as they allow them to find replacements in a short period of time in cases where there is a worker who is unable to make it to work or if production increases, they also give them the flexibility they need to remain globally competitive and hence are able to focus on their core responsibilities. TES companies management also agreed with this view by stating that client companies utilise their services to ensure that employee administration is comprehensive and accurate and that they are able to concentrate on their core functions.

Research conducted by Maduna (2012, p.34) revealed that client companies resort to using TES companies as there is an increasing need for them to seek greater flexibility when dealing with labour needs in order to stay globally competitive. There is an increasing need for labour market flexibility which is prompted by external market forces. Client companies are also able to get employees whenever they are required (during peak periods) with no hassle as they always have staff that is ready to be deployed when needed. Brand (2010, p.40) supports this statement by stating that employers prefer a workforce that fluctuates with peaks and a trough of customer demand for their goods and services hence the need for TES companies. TES companies management also highlighted that it usually takes time for companies to find suitable candidates for a particular position hence client companies approach them to assist them with their short-term staffing needs.

However, trade union respondents held a converse view and raised that client companies engage in such arrangements to save on costs and dodge the responsibility of employing someone on a full time basis. They also do not want to deal with procedures for disciplinary action that are set out in our labour law as they believe that these are such a burden. TES company employees are seldom represented by unions so it is easier to exploit them. TES company employees are remunerated at a lower rate than that of permanent employees. They do not have to pay benefits such as housing, medical aid etc. It is also easy for them to lay off workers at any time and replace unproductive workers with no hassle. This is in line with Bidwell & Fernando-Mateo (2008) research findings that client companies resort to using temporary employees as they do not have employment rights which mean that their contracts can be ended at any time at the client company's convenience.

iii. CONTINUOUS USAGE OF TEMPORARY EMPLOYMENT SERVICES

With regards to whether or not the managers of client company, TES companies as well as trade union representatives would emphasise the continuous use of TES companies, the findings of this study revealed that eleven (11) of the participants would still emphasise the continuous use of TES companies as they provide many advantages to the parties in this triangular relationship whilst two (2) of the respondents felt that TES companies exploit employees and do not offer job security as well as fringe benefits and this makes their employees vulnerable hence such arrangements should not be emphasised.

These findings are consistent with the findings of research conducted by Lawrence (2011, p.3) which found that a large number of businesses in South Africa tend to use TES companies to exploit employees, avoid unfair dismissals, unfair retrenchments, overtime pay and many other rights that should be accorded to these employees. Mavunga (2010, p.5) further stated that many countries have regulated them while in other countries they have become a contentious issue with the desire to ban them completely as it has been suggested that they do not protect the employee but actually abuse an already disadvantaged employee.

iv. IMPLICATIONS OF USING TEMPORARY EMPLOYMENT SERVICES

Managers opinions on what could be the implications of using TES companies were assessed. The majority of the managers responded that TES companies reduce administrative costs for them as the process of hiring can take up to a month or even more in some cases when in fact they need to employ someone urgently to fill that position. They also offer client companies specialised staff in a very short period of time. TES companies also reduce unemployment as they facilitate the process of someone getting work. Another client company manager stated that using TES companies allows local companies an opportunity to compete with companies abroad as they provide flexibility.

The mining and construction industry often require to employ staff for a limited period of time and TES's allow them to employ staff according to their needs. TES company managers hold the similar view as client companies that they reduce administrative costs for the client company and this result in more people being employed as a result of increased profits received by client companies. Client companies as well as TES company employees become exposed to a variety of skills which can be beneficial to both parties by bringing a range of positive results. Maduna (2012, p. 25) supports this by stating that using TES companies

provides a number of benefits which include allowing the client company to minimise labour costs, manage labour demand uncertainty and ease the legislative burden on the client company. The trade union representatives were of the opinion that TES companies have more of a negative impact than a positive impact on the parties in the triangular relationship as they have noted that they are exploitative and treat their employees unfavourably by paying them less salaries than they deserve and laying them off at short notice with no recourse as many employees in this arrangement find themselves with no rights. TES companies are merely the middle man between the client and the employee and hence they do not create jobs. They further highlighted that the construction industry has appalling levels of health and safety due to the common use of TES companies. The views of the trade union representatives are consistent with the findings of COSATU TODAY (2013, p.1) where they stated that TES companies do not create jobs but merely act as intermediaries to access jobs that already exist and in which many cases would have existed previously as permanent full time jobs.

v. IMPLICATIONS OF NOT USING TEMPORARY EMPLOYMENT SERVICES

Managers opinions on what could be the implications of using TES companies were also assessed. Majority of the respondents were of the opinion that this will pose negative effects on the parties in the tripartite relationship. Client company managers stated this would certainly affect their businesses negatively as they would be required to employ staff that they cannot afford on a full time basis as the mining and construction industry is characterised by temporary projects which do not allow them to have the capacity to employ some employees on a full time basis. Many small companies that rely on TES companies for their administrative needs may be required to close down. These views are consistent with that of (Van Wyk, 2013, p.2) who states that business would also lose their flexibility when it comes to sizing up or sizing down their workforce on a temporary basis. This would also have an adverse effect on the labour market and the employment rate as TES companies provide employment to a large pool of people and could result in a possible downturn in economic growth. On the other hand, trade union representatives were of the opinion that this will have a positive impact on the South African labour market as there will be more job security for employees, more permanent positions will be offered and there will be increased protection for vulnerable employees.

vi. EMPLOYEES MOSTLY DISADVANTAGED IN THE TRIPARTITE RELATIONSHIP

Eleven (11) of the respondents indicated that to a low extent the employees are the ones who are mostly disadvantaged in the tripartite relationship between the TES companies, client companies and employees. Two (2) of the respondents indicated that to a very high extent employees are the ones who are mostly disadvantaged in the tripartite relationship these findings are consistent with Maduna (2012) which states that it is often workers that are the most vulnerable party in the triangular relationship as they can be laid off at any point if the client company terminates the relationship with the TES companies, there is also vast evidence that suggests that TES companies and their clients benefit enormously from this relationship.

vii. CAN TEMPORARY EMPLOYMENT SERVICES BE EQUATED TO HUMAN TRAFFICKING

Eleven (11) of the respondents (client companies managers and TES companies managers) disagreed with the statement that TES companies are a form of human trafficking where employees are bought and sold to clients without being accorded the basic statutory rights that they deserve or that they are expected to receive. Client company managers as well as TES companies managers supported their stand by highlighting that TES companies create employment as they are easily accessible to the unemployed population as it is no longer easy to find employment by directly applying to companies and they play a large and positive role in helping unskilled and inexperienced young people to secure employment. Mavunga (2010, p.30) supports this by asserting that TES companies creates opportunities for the disadvantaged and diverse groups who find it difficult to access the labour market and equips them with skills and the experience they require to secure better employment.

TES companies managers also stated that their companies comply with the Basic Conditions of Employment Act (BCEA) and the Labour Relations Act (LRA) and the other relevant legislations as well as the standards set by APSO and CAPES and treat their employees accordingly. One of the TES companies managers also indicated that different agencies apply different rules so it is unfair to describe all TES's as such as they are not all just in the business of making money, the well-being of their employees also matters. However, as expected the trade union representatives hold a different view that supports the statement that TES companies can be equated to a form of human trafficking. COSATU TODAY

(2013, p. 1) supports the union representatives stand by stating that TES companies are equivalent to the trading of human beings as commodities. They act as go-betweens in the employment relationship taking a fee from the party who should be the employer for doing nothing and hence gets rich through being a trader of labour and the worker is exploited worse than ever.

6.2.2.2 EFFECTS OF SANCTIONS FOR NON-COMPLIANCE

i. SANCTIONS AND NON-COMPLIANCE AFFECT TEMPORARY EMPLOYMENT SERVICES USAGE

This study also examined how the sanctions for non-compliance with labour standards as set out in the amendments will affect the use of TES companies. Client companies indicated that some of the companies will be discouraged to use TES companies as it will be hard to dismiss and retrench employees. Companies will also be forced to spread work amongst their permanent staff and therefore less people will be employed and they will have to look into increasing their salaries as these employees will be doing more work. Another client company manager stated that it will not make any more business sense for them to take TES company employees on board hence many businesses are looking into reducing their reliance on TES companies as the cost of employing these employees seems to be much greater than before. TES company managers cited that some companies may consider retrenching employees to allow for the increased cost to company per employee. Businesses will also be forced to assess their needs for their use of TES companies and look into finding other ways of cutting costs which may include looking for alternative forms of employment rather than using TES companies. Trade union representatives felt that this could possibly be a victory for them as well as employees that are constantly exploited as fewer companies will utilise the services of TES companies and the abuse of this form of work will certainly decrease.

ii. IMPLICATIONS FOR REGULATING TEMPORARY EMPLOYMENT SERVICES

The respondents were asked what are the possible implications for the regulation of TES companies. All the respondents were in support of the regulation of TES companies however, client company managers and TES company managers indicated that the regulation of this industry may create a hostile environment where businesses will be discouraged to use TES companies and will have a disastrous impact on job creation and a number of jobs may be lost in the process. Ensor (2013, p.2) supported this statement by asserting that an outright

ban or excessive legislation will deepen exploitation by driving the industry underground. The DA also submitted that it is better to regulate the industry as banning it would result in the loss of employment of more than 850 000 people employed by TES companies and will also deprive the households attached to these workers of a valuable source of wage income. On the other hand, other TES company managers highlighted that regulating TES companies may also have a positive impact as employees will be afforded better protection than before and only the compliant TES companies will remain. The abuse of employees by some TES companies will be minimised if not totally eliminated. Trade union representatives also raised that there may be some improvement there and there however they feel that it is still not clear as to whether how the government will ensure that this industry is properly regulated and that there are no loopholes. The TES companies will still have no control over what happens to their employees in the client's workplace.

Another union representative stated that there are still going to be employees that are exploited hence it would be best to ban this practice. This is in consistent with Johnson (2012) research where it was established that while section 198 was enacted to regulate the temporary employment sector, it is an entirely superficial construction that gives rise to immense scope of abuse to make an agency the employer of the employee working on an ongoing basis for a client merely because the employee's pay is routed through the agency. The labour brokers may offer a minimum wage however, for TES companies to make a profit they need to deduct a certain percentage from the amount that is paid by the client for the services of their employee.

6.2.2.3 IMPLICATIONS FOR STAKEHOLDERS OF THE NEW TIME FRAME

i. AWARENESS OF THE NEW 3 MONTHS TIME FRAME FOR TES EMPLOYEE

The respondents were asked whether they were aware of the prescribed maximum time of three months for keeping temporary service employees before they are deemed employees of the client. All the respondents agreed that they are all aware of these time limits.

ii. HOW WILL THE NEW 3 MONTHS TIMEFRAME AFFECT THE USE OF TEMPORARY EMPLOYMENT SERVICES

Management's and trade union representatives views on how the time limits of three months of which TES companies may secure the services of an employee before that employee is deemed the employee of the client will affect the use of TES companies were examined. Client company managers as well as TES company managers highlighted that these time limits will have a negative impact on the TES industry and the mining and construction sector. There will be a lot of financial implications that will come with employing casual employees on a full time basis. Job losses may increase as many clients would want to flee from these arrangements and many businesses which are operating on a small scale may be required to close down and other client companies will certainly need to look into other alternatives to help them remain productive and competitive. The word "deemed" may be also problematic as it leads to uncertainty. Trade union representatives responded positively to this amendment as they state that these time limits will definitely force clients to only use TES companies when necessary as they do not want to have the burden of employing someone on a full time basis once the three month period is over.

iii. ASSESSMENT OR OPINION ON THE NEW 3 MONTHS LEGISLATION

In response to the question of whether or not it is fair for government to impose this legislation, nine (9) of the respondents agreed that it was fair for government to do so and four (4) of the respondents disagreed. The client companies stated that it is not fair for the government to impose such legislation because they constantly require the services of TES companies due to the nature of their business and also that many of the problems can be dealt with by better enforcement by labour inspectors of existing laws. The trade union representatives were of the view that it is best for them to be banned as they do more harm than good and another trade union representative actually applauded the government for their efforts to regulate this industry rather than leaving it as it was however they also still feel that it is better for this industry to be banned.

6.2.2.3 UPHOLDING OF THE RIGHTS OF EMPLOYEES BY THE STAKEHOLDERS

i. HOW THE RIGHTS WILL BE UPHELD BY CLIENT COMPANIES AND TEMPORARY EMPLOYMENT SERVICES

The respondents were asked to provide how the organisational rights for the TES company employees are going to be upheld by both TES companies and client companies as per the new legislation. All the respondents responded positively to this question. Client companies stated that employees will no longer be prohibited from participating in trade union activities and will not be treated less favorably than permanent employees. There will also be improvements in the way TES company employees are treated by TES companies as they will certainly have access to organisational rights that are enjoyed by permanent employees and will no longer experience any discrimination which they might have experienced simply because they were not directly the employees of the client. TES company managers explained that they both (with client companies) have the responsibility to ensure that their employees are aware of their right to join the trade unions without fear and ensure that the necessary fees are deducted from their employees.

Another TES company manager stated that as much as there is no one stopping employees to be members of unions, they will be more encouraged to be members than ever before. Each and every TES company will now have a responsibility to ensure that the rights of their employees are upheld. Trade unions will also now have organisational rights in the workplaces where TES company employees are placed and they will ensure that they are upheld. Trade union respondents also stated that trade unions will now obtain the organisational rights which they were not granted before as TES companies and client companies were discouraging their employees from engaging in such activities.

Hofmeyr (2013, p.5) also ascertains that the amendments have trade unions greater access to organisational rights. Trade unions also had the challenge of organising as these employees are constantly on the move detaching from one client to the other (Mavunga, 2010, p.36). A research study conducted by APSO (2015, p.2) found that currently the Confederation of Associations in the Private Employment Sector (CAPES) as well as the Federations of Unions South Africa (FEDUSA) have run a pilot study involving close to 1000 temporary employees to provide these employees with access to union membership and associated benefits, in cases where the temporary employees are members of unions, the TES companies are to ensure that the union membership is deducted in their payroll administration.

ii. BENEFITS TO EMPLOYEES FOR BEING MEMBERS OF TEMPORARY EMPLOYMENT SERVICES

The managers were asked to explain if there are any benefits that are enjoyed by employees of TES companies such as health benefits, pension benefits as well as leave benefits. Majority of the respondents who amounted to eleven (11) responded that they do provide benefits to the TES company employees. One of the client company managers cited that they believe that these employees do receive basic statutory benefits as prescribed by legislation such as being paid for public holiday, leave etc. One of the TES companies managers confirmed this by stating that their employees are provided the unemployment insurance fund as stipulated in the legislation, provident fund which they contribute towards as well as the employee. Research conducted by APSO (2015, p.2) supports this by stating that an industry-specific provident fund was established in 2010 by CAPES and caters for temporary employees in that it encourages preservation of retirement funding and allows transferability between the different TES companies. These employees are also entitled to sick leave, annual leave, paid public holidays as well as family responsibility leave. As expected two (2) of the respondents which were the trade union representatives argued that these employees do not receive any benefits from the their employer (TES company) or the client companies as the TES companies are trying their best to remain competitive in their industry and do so by sacrificing the opportunity for employees to earn more and receive more benefits.

iii. ARE REMUNERATION AT PAR WITH THOSE OF PERMANENT COLLEAGUES

The majority of the respondents which amounted to ten (10) agreed that the salaries received by TES company employees are the same as those received by permanent employees of the client company. Client company managers indicated that the premiums charged by the TES companies are not taken from the employees' wages so they definitely earn the same or almost similar market related salaries. Most TES companies managers also confirmed this by stating that their clients give them a set premium and from that premium they pay their employees and the law prohibits them from taking a cent extra from their employees. The department of labour has wage determinations and they negotiate market-related salaries and use these wage determinations as their benchmarks. Some even earn more than permanent staff due to the specialised skills that they may possess one TES company manager indicated.

Three (3) of the respondents indicated that the remuneration received by these employees is not the same because of the different natures of work or job specifications. Trade union

respondents were of a different opinion and stated that client companies approach TES companies because they provide cheap labour hence it is impossible that their employees receive the same salaries as those that are employed by the client company directly. TES companies are also constantly seeking to offer employees to their client's at the most competitive price hence this is impossible. This opinion was consistent with the literature findings of Maduna (2012, p.31) which revealed that employees receive a reduced wage as a certain portion of what the client company pays is reserved for the TES companies fees or commission as part of this relationship contract.

iv. ARE TRAININGS AND PROMOTIONS FOR TEMPORARY EMPLOYMENT SERVICES EMPLOYEES AVAILABLE

Eleven of the respondents agreed that there are career prospects such as promotions and trainings for TES company employees as well as offering them permanent positions. Client company managers said that there are skill development programmes in place and employees are given the necessary on the job-trainings that will enable them to perform their jobs more effectively. TES company managers also confirmed that there are prospects for promotions, trainings offered to uplift the employee's skills and TES company employees are given first preference when permanent positions are offered by the client company. This is consistent with the research findings of Mavunga (2010, p.31) which reveals that employees receive ongoing training and development and productivity.

This industry has also been recognised as a skills development driver and has facilitated in excess of 35 000 learnerships, apprenticeships and formal skills programmes. Two (2) of the respondents disagreed with the statement that there are no opportunities for trainings and promotions for TES company employees. A review of various literatures has also indicated that opportunities for growth and career advancement are very minimal for these employees and they are often viewed as outsiders that can leave at any point and no long-term relationship is established (Maduna, 2012, p.31).

v. IS THERE EQUAL TREATMENT AS EMPLOYEES

The respondents were asked if whether or not the TES company employees are treated equally by the client company as the client company employees. Majority of the respondents which comprised of client company managers as well as TES company managers agreed that these employees are treated the same and that none of the employees have reported cases of discrimination. While two (2) of the respondents disagreed that these employees were treated

equally as they stated that many of these employees have suggested that they are treated less favourably when compared to the permanent staff of the client. Some of the TES employees have even indicated that they are given more work and expected to be more productive than the permanent staff of the clients. Benjamin *et al.* (2010) cited in (Budlender, 2013, p.17) also raised concerns about the extent to which decent work can be achieved in such arrangements and the differences in the treatment and wages and benefits available to TES company employees compared to those of permanent employees doing similar work.

vi. ARE TEMPORARY EMPLOYMENT SERVICES EMPLOYEES GIVEN PREFERENCES WHEN THERE IS A VACANCY

Ten (10) of the respondents agreed that TES company employees are given preference when recruiting for permanent positions. The client company managers indicated that they mostly do, it depends on the position advertised and if there are TES company employees who have the necessary skills to take on that position. The TES company managers also stated that many of their clients have approached them stating that they require the services of a particular employee on a full time basis and want the employee to be released from their contract with the TES company. This is also supported by research conducted by APSO (2015, p. 3) which states that nearly thirty percent (30%) of temporary employees secure permanent employment within 12 months and forty percent (40%) secure permanent work within 3 years. The other minority of the respondents disagreed that this takes place and also raised that employees are not automatically given preference, they need to apply for the vacant position just like everybody and if they are suitable for the position they will definitely be considered.

vii. TES EMPLOYEES PREFER TO BE RELEASED FROM TES CONTRACTS

The respondents opinions on whether given a choice do TES company employees prefer to be released from the relationship with the TES companies to being directly contracted by firms or permanently employed by firms were examined. Seven (7) of the participants agreed that TES company employees prefer being directly or permanently employed by client companies because of the highly uncertain job market, some employees seek stability and job security and do not want to be moved from assignment to assignment. They often think that client companies will offer them greener pastures. Many also view this form of work arrangement as undermining their right to enjoy the same rights and benefits that are enjoyed by the permanent employees of the client.

Six (6) of the respondents disagreed that TES company employees prefer to be released from these contracts and supported this by stating that some employees enjoy the flexibility that comes with being employed by TES companies and see such arrangements as an opportunity to earn more money. Many of the employees are just concerned with earning and making a living and are not looking for any job security or stability. Some of the TES company employees are paid more than employees that are directly employed by the client.

6.2.2.4 DISPUTES JURISDICTION OWING TO THE NEW LEGISLATION

i. ARE TES EMPLOYEES MADE AWARE OF THEIR EMPLOYERS IN THE TRIAPARTITE RELATIONSHIPS

Eleven (11) of the respondents confirmed that TES company employees are made aware of whom their employer is in the tripartite relationship. Client companies indicated that it is the TES companies' responsibility to ensure that their employees are aware of this. TES company managers responded by stating that this is clearly stipulated in their employee's contracts and explained to them when the terms of employment are explained. However two (2) of the respondents indicated these employees are often not aware of whom their employer is until problems start to arise between the client company and the employee. Mavunga (2010, p.36) also highlighted that the employees of the TES companies are based at the client company premises and this often results in confusion as to who is their employer. Mostert (2011, p.32) also states that case law has proven that employees are not aware of who their employer is as most of these employees are under the impression that their employer is the client company as they are supervised by the client company and also render their services directly to them.

ii. HOW DISMISSALS ARE HANDLED

In response to how issues of dismissals are to be handled. The client company managers highlighted that it will not be easy to dismiss employees as it was before, employees will only be dismissed when necessary upon consultation with the TES company. They will definitely be required to work together for an alternative solution before resorting to dismissal. Since the clients will now be deemed employers of the TES company employees they will have joint responsibility in cases of dismissals. Another client company manager raised that there is still some confusion on how this law will be applied but they are definitely aware of the fact that they will now be jointly and severally liable together with the TES company should there be a need to dismiss any employee. The TES company managers added that a client

who wishes to dismiss an employee will need to consult the TES companies and afford the employee a fair hearing before dismissing them.

Dismissals of employees by clients will be thoroughly investigated and the TES company managers will be involved throughout the process and will be required to prove whether their reasons for the dismissal were fair and compliance with procedural fairness. Client companies will also no longer be able to dismiss employees as they please just to run away from the obligation of employing them permanently, a justifiable reason has to be provided should such dismissals occur. Trade union representatives also confirmed that the TES company and the client will be jointly and severally liable for any issues surrounding dismissals however they raised a concern about the fact that the word “deemed” is still being challenged in court. Research conducted by APSO (2015, p. 5) also confirms that the TES company and the client are jointly and severally liable in cases of dismissals and the employer must prove that the reason for the dismissal was fair and compliant with procedural fairness.

iii. DISMISSALS PROCEDURES AMONG TESs AND TES EMPLOYEES FOLLOWED

In response to whether TES company employees are made aware of the procedures to be followed in cases of dismissals, the results of the study reflect that ten (10) of the respondents agreed that TES company employees are made aware of the procedures that are to be followed in cases of dismissals. The TES company managers asserted that this is done during the induction of employees and these disciplinary procedures that are in place are in line with the client company procedures. The other three (3) respondents disagreed that the employees are made aware of the dismissal procedures that are to be followed in cases of dismissals. Case law has also reflected that there is still confusion when it comes to the procedures that are to be followed by all the parties in the triangular relationship during dismissals this can be witnessed in the case of *Simon Nape v INTCS Corporate Solutions (Pty) Ltd* (JR 617/07) (2010) ZALC 33.

6.2.2.5 AGREEMENT WITH THE FLEXIBLE JOB CREATION AVENUES OF TES

Eleven respondents agreed to the statement that TES companies contributed to a flexible job market and create employment. These findings are consistent with that of APSO (2015, p.3) which found that it takes an average of 90 days for an individual to secure employment using an agency and 806 days when a job seeker is looking on their own. More than 5.4 million people have been introduced to the world of work by TES companies. TES companies also ensure that they seek ongoing work opportunities for their employees. While the other two (2) respondents disagreed with this statement. One of the trade union representatives highlighted that TES companies do create a flexible labour market however, they do not create employment but offer already existing jobs in the labour market.

6.2.2.6 BANNED OR REGULATED OPINIONS ON TES

i. REGULATED

In response to whether TES companies should be banned or regulated, eleven (11) respondents stated that this industry should be regulated and listed a number of reasons to support their stand. The client company managers highlighted that TES companies have a constitutional right to exist and they also contribute positively to the economy. This industry brings in additional revenue for the Government in the form of taxes and VAT as they generate more than R40 billion per year (APSO, 2015, p.3). The ANC head of economic transformation Enoch Godongwana also stated that it would be unconstitutional for them to ban TES's as they cannot ban economic activity when people are making business rather it is constitutional to regulate this activity and deal with the negative impact of it (Letsoalo, 2015, p.2). There are also many TES companies that are compliant with all the statutory requirements and this is one of the main criteria that help them choose the suitable TES companies to handle their staffing needs.

Banning the practice would also mean that client companies will incur additional costs and have the administrative burden of carrying out the hiring process. This could also lead to many job losses and retrenchments. The TES company managers also added that they assist with job creation and it is a proven fact that throughout the world TES companies are a major contributor to economies. They also felt that this industry should be regulated as this will create fairness and transparency in the industry, there will also be less non-compliance to deal with. As highlighted in the literature review Kutumela (2013, p. 9) asserts that Mkalipi also

shares the view that proper regulation of the TES companies is desirable rather than an outright ban of this industry and accordingly stated that in order to avoid exploitation of employees and ensure decent work, laws should be introduced to regulate contract work, subcontracting and outsourcing and address the problem of TES companies and prohibit certain abusive practices.

ii. BANNED

Two (2) respondents argued that TES companies should be banned and there should be a process in place to facilitate the process of the unemployed people to get jobs. One of the trade union respondents also stated that TES company employees are no different to slaves and TES companies reap them off as they only receive a fraction of what they are truly entitled to. COSATU TODAY (2013, p.1) held that the increased regulation of this industry will not work hence the need for the total ban. They further stated that the effect of the proposed set of amendments will in fact be totally the opposite of what was promised. In the literature review Benjamin (2010, p. 53) highlighted four possible negative consequences of the amendments which in summary are that some of the employees that are currently employed by TES companies might lose their jobs if clients (employers) are unwilling to incur the administrative and other costs associated with directly employing these workers.

If clients would like to continue utilising the labour supplied by workers previously employed by TES companies, they would have to employ these workers directly and incur the associated time and financial costs, which may ultimately result in a significant increase in the cost of doing business. The proposed repeal of s198, coupled with the proposed change in the definitions of employee and the new definition of an employer may induce uncertainty in the labour market and would in all probability increase the number of cases referred to the CCMA, the Labour Courts and civil courts.

The potential increases in the case-load of these institutions as additional disputes will be referred to the CCMA. Finally, the proposed amendment means that substitute employees will now be considered employees of the client and each individual client will now have to register the employee under the Compensation for Occupational Injuries and Diseases Act (COIDA) and the Unemployment Insurance (UIF) Act which would impose additional administrative costs on the Unemployment Insurance Fund (UIF) and the Compensation Fund, given that the unit cost of temporary and part-time workers who move across a multitude of employers, is no longer fixed (Benjamin, 2010, p.53). BUSA also added that

hundreds of thousands of job losses would occur when the amendments are introduced (Ensor, 2013, p.2).

6.3. CONCLUSION

This chapter provided a discussion of the results of this study. It was found that the majority of the respondents indicated that TES companies provide a number of benefits for the parties in the tripartite relationship which surpass the disadvantages of being in this employment relationship. Most of the respondents ascertained that they would emphasise the continuous usage of TES companies as they contribute to employment creation as well as the economy. It was also found that there are certain sectors such as the mining and construction industry which often utilise the services of TES companies as in some cases they usually require to employ staff for a limited period of time hence this form of work arrangement allows them to employ staff according to their staffing needs.

Majority of the managers suggested that the banning of TES companies will pose negative effects to all the parties in the tripartite relationship which may include job losses, a possible downturn in economic growth as well as many small businesses that are heavily reliant on this industry for their staffing needs closing down hence it is far more favourable to regulate the industry. Regulating this industry promises to have more positive effects than negative effects as it will ensure that employees in such work arrangements will no longer be exploited as TES companies as well as client companies will ensure that they are more compliant than ever before as a result of the sanctions of non-compliance that are introduced by the recent amendments. The recommendations that have emanated from the findings of this study as well as the conclusion will be discussed in the next chapter.

CHAPTER 7

RECOMMENDATIONS AND CONCLUSION

7.1. INTRODUCTION

The previous chapter entailed a discussion of the results of this study. In this final chapter, the researcher aims to conclude and provide recommendations based on the findings of this study and for future research initiatives in this area of study.

7.2. LIMITATIONS AND RECOMMENDATIONS FOR FUTURE RESEARCH

This section will highlight the problems encountered in the research methodology and research process and provides possible solutions:

- i. Due to time and financial constraints, the study was only conducted in KwaZulu-Natal and only in two geographical areas which are Durban and Richards Bay as they are one of the economic hubs in KwaZulu-Natal. The study was also limited to the mining and construction sector. Therefore the sample drawn may not reflect or be a representative of the perceptions of managers and trade union representatives on the effects of labour legislative changes regarding temporary employment services therefore the results for this study cannot be generalised the TES companies in all sectors and South Africa as a whole as they might hold different perceptions or views. A larger sample which consists of all the sectors may be recommended for future research so that the findings can be generalised across all sectors and South Africa as a whole.
- ii. The study only used management as well as trade union representatives to gather data as a result for future research it can be recommended that the employees of TES companies should also be included as they may hold a different perception on the subject than that of TES companies and their client companies.
- iii. Future research may also investigate how procurement departments of client companies select or choose their preferred TES company.
- iv. The contract entered into between the TES companies and the client companies in South Africa should be thoroughly investigated.

- v. Lastly, employee turnover in this tripartite relationship may also be worth investigating.

7.3. RECOMENDATIONS BASED ON THE RESULTS OF THIS STUDY

The recommendations will be based on the results of this study. Before engaging in a discussion of the recommendations of this study, it is vital that one acknowledges and applauds the government's efforts to fast track the regulation of this industry. The new amendment Bills addresses most of the loopholes that previously existed in this industry. The following recommendations can be made:

- i. The Department of Labour should play a hand on role in regulating and monitoring the activities of TES companies and their relationship with their employees.
- ii. To ensure that the regulatory framework is not undermined, sufficient funding and personnel should be allocated to conduct regular on-site inspections of TES companies and their clients. The inspectors should also interact directly with the employees in this arrangement to ensure that the TES companies and the client companies are complying with the regulatory provisions and that their employees are paid the minimum wage, workmen's compensation as well as other employment benefits that they should receive.
- iii. Non-compliant TES companies and their client's should be severely penalised and even have their licences withdrawn.
- iv. TES companies should use labour law experts to draw up their contracts with clients and employees in order to ensure that they avoid any possible legal traps and ensure that legally sound procedures are used when employees are hired, disciplined or dismissed.
- v. An establishment of a Board to regulate and enforce set standards and a code of conduct should be considered in order to minimise the exploitative practices in this industry.
- vi. TES company employees experience greater violations of their rights as a result of a lack of representation and protection from collective agreements. Trade unions should become more proactive and develop strategies to organise TES company employees more effectively. Unions should also regularly facilitate training and education programmes for these employees to inform them about their labour rights and the standards for decent work that are promoted by the ILO conventions. TES companies

should also be involved in these programmes so that they can fully understand their employee's needs and concerns.

- vii. A bargaining council for TES company employees needs to be explored once the TES companies are legally registered.
- viii. Client companies need to investigate how the TES companies treat their employees as a prerequisite for entering into a relationship with them.
- ix. TES companies should opt to enter into fixed-term contracts with the client companies so that they do not lay off employees at any point in time when they feel like they no longer require their services without giving them an ample notice period.
- x. The Department of Labour should ensure that the administration or service charges levied by the TES companies are properly regulated.
- xi. Finally, employees must insist on working for labour brokers that are affiliated to organisations such as Confederation of Associations in the Private Employment Sector (CAPES) as well as the Federation of African Professional Staffing Organisations (APSO).

7.4. CONCLUSION

The objective of this research paper was to gain insight on the effects of labour legislative changes regarding temporary employment services. This study was driven by the following objectives:

OBJECTIVE 1

To determine the extent of the impact of the repeal of Section 198 of the Labour Relations Act: this refers to the unlawful treatment of employees by both the TES companies and their client company.

The extent of the impact of the repeal of section 198 of the Labour Relations Act is that the rights of employees in TES company arrangements will be protected as previously the regulatory inadequacies in labour legislation prevented this. The failure of the previous legislation to extend the joint and several liabilities to both the TES companies and the client companies in cases of unfair dismissals will now also be addressed. Majority of the participants indicated that they would still emphasise the continuous use of TES companies as they provide many advantages to parties in the triangular relationship between client companies, TES companies as well as Trade Union representatives such as being able to access specialized staff in a very short period of time, allowing local companies an

opportunity to compete with companies abroad and allowing companies to employ staff according to their needs. It will also ensure that employees are not the ones who are mostly disadvantaged in the tripartite relationship. With regards to whether temporary employment services can be equated to human trafficking, client companies as well as TES companies create employment as they are easily accessible to the unemployed population as it is no longer easy to find employment by directly applying to companies and they play a large and positive role in helping unskilled and inexperienced young people to secure employment. TES companies also comply with the Basic Conditions of Employment Act (BCEA) and the Labour Relations Act (LRA) and the other relevant legislations as well as the standards set by APSO and CAPES and treat their employees accordingly.

OBJECTIVE 2

To determine the way in which the sanctions for non-compliance with labour standards as set out in the Labour Relations Amendments Act of 2014 will affect the TES companies.

Client companies indicated that some of the companies will be discouraged to use TES companies as it will be hard to dismiss and retrench employees. Less people will be employed as companies will be forced to spread work amongst their permanent staff. There will also be less reliance on TES companies and retrenchments may also take place. Trade union representatives indicated that fewer companies will utilise the services of TES companies and the abuse of this form of work will certainly decrease. A hostile environment where businesses will be discouraged to use TES companies will emerge and this may have disastrous impact on job creation and a number of jobs may be lost in the process.

OBJECTIVE 3

To discover the implications of a prescribed maximum time of three months during which TES clients may secure the services of temporary employees.

Client company managers as well as TES company managers indicated that these time limits will have a negative impact on the TES company industry and the mining and construction sector. There will also be a lot of financial implications that will come with employing casual workers on a full time basis. Job losses may also increase. Trade Union representatives however responded positively to this amendment as they stated that these limits will definitely force clients to only use TES companies when necessary. With regards to whether or not it is fair for government to impose the new three (3) months legislation in which client

companies may utilise the services of TES companies, client companies stated that this legislation is not fair as they constantly require the services of TES companies due to the nature of their business. Trade Union representatives were of the view that it is best for TES companies to be banned as they do more harm than good.

OBJECTIVE 4

To elicit the manner in which the organisational rights for the TES employees are to be upheld by both the TES companies and client companies as per the new legislation.

Client companies indicated that employees will no longer be prohibited from participating in trade union activities and will not be treated less favourably than permanent employees. There will also be improvements in the way TES company employees are treated by client company employees as they will certainly have access to organisational rights that are enjoyed by permanent employees of the client. TES company managers stated that both with client company managers have the responsibility to ensure that their employees are aware of their right to join the trade unions without fear and that the necessary fees are deducted from their employees. Employees will also be more encouraged to be members than ever before. Trade unions will also now obtain organisational rights that they were not granted before as TES companies and client companies were discouraging their employees from engaging in such activities.

TES company employees are entitled to sick leave, annual leave, paid public holidays as well as family responsibility leave. The salaries received by TES company employees are the same as those received by permanent employees of the client company. Majority of the respondents confirmed that there are career prospects such as promotions and trainings for TES company employees as well as offering them permanent positions. With regards to whether or not the TES company employees are treated equally by the client company as the client company employees, majority of the respondents agreed. TES company employees are also given preference when recruiting for permanent positions. The respondents opinions on whether given a choice do TES company employees prefer to be released from the relationship with TES companies to being directly contracted by firms or permanently employed by firms were examined and majority of the respondents indicated that these employees prefer to be released from such contracts as they seek stability and job security. The minority of the respondents indicated that these employees do not prefer to be released

from such contracts as they enjoy the flexibility that comes with being employed by TES companies and see such arrangements as an opportunity to earn more money.

OBJECTIVE 5

To establish the awareness levels of TES companies, who will have jurisdiction to deal with disputes arising from the new legislation.

The majority of the respondents confirmed that TES company employees are made aware of whom their employer is in the tripartite relationship. However the minority disagreed and stated that these employees are often not made aware of whom their employer is until problems start to arise between the client company and the employee. In response to how issues of dismissals are to be handled, the client company managers highlighted that it will not be easy to dismiss employees as it was before, employees will only be dismissed when necessary upon consultation with the TES company. They will be required to work together to find an alternative solution before resorting to dismissal. Dismissals will also be thoroughly investigated. Client companies will also no longer be able to dismiss employees as they please in order to run away from the obligation to employ them permanently after three months, a justifiable reason will be required should such dismissals occur. The TES company and the client company will be joint and severally liable for any issues surrounding dismissals. TES company employees are also made aware of the procedures to be followed in cases of dismissals.

As previously highlighted, TES companies have received much attention over the years with arguments on whether to ban or regulate the industry and lately as a result of the recent labour legislative changes. The findings of this research in conjunction with previous academic literature found that TES companies play a prominent role in the South African economy by facilitating employment creation, training employees and assist businesses to optimise their resources therefore the use of TES companies should be vigorously pursued. From the results of this study one can deduce that a total ban of the TES industry was going to be detrimental to those who seek employment without necessary skills and qualifications. As discussed in the previous chapter, an absolute ban would be unconstitutional and would not be an effective solution to the exploitative practices which may be provided by the TES companies as it would not prevent business owners from using desperate casual employees without entering into a formal employment contract and paying the a very low wage. Banning this industry would also not be in line with international standards. As highlighted earlier in

the literature review, the Supreme Court of Namibia found that a total ban was unconstitutional as it infringed labour brokers' right to freedom of trade or occupation. The ILO recognises TES companies and considers them to play a necessary part in the economy. Other foreign jurisdictions such as the Netherlands also legally recognise the use of TES companies therefore if South Africa banned the practice it would have gone against the international labour standards hence the regulation of this industry was in fact most favourable given this and the fact that there were already existing legislations which regulated the industry as well as South Africa's massive unemployment crisis. Regulation will extend the protection provided by labour laws to TES company employees without limiting the capacity of client companies to compete globally. TES companies create opportunities for the disadvantaged and diverse groups' entrance into the labour market and many employees actually choose not to take up permanent positions of employment and prefer temporary employment.

New entrants into the labour markets usually do not have prior experience and the utilisation of TES companies makes it easier for the employee to obtain employment while getting some sort of experience therefore this makes TES companies an attractive option when seeking employment. As highlighted in the literature review, the amendments cover a wide range of issues such as the organisational rights of employees in these employment arrangements, the time frame that the employee may work for the client as a temporary employee before they are deemed the employee of the client and the joint and several liability of the client and the TES company. The amendment Acts provide better protection for TES company employees and achieves this by enabling the employees to effectively exercise rights that they were previously restricted from enjoying.

It also enables trade unions to obtain organisational rights in respect to the employees from either the client or the TES company, depending on where the employees are located therefore employees will be able to exercise their right to collective bargaining as they will now be able to be represented by a trade union. The amendment Acts also provide stricter regulations which include amongst others preventing the client company from making the employee work for them for indefinite periods of time as it stipulates that the work will only be considered temporary if it is for a period of three months. The overall effects of the amendment Act have on the industry is that it limits flexibility as the client and TES company are now bound by stricter regulations which prevents them from dealing with the TES company employees as they please. Findings from the literature review indicated that

regulating the industry may result in job losses however, majority of the respondents in this study indicated that this has not yet taken place. It is also important to note that leaving employees at the mercy of market forces and arguing that regulations to protect them will lead to further unemployment does not only ignore the plight of vulnerable employees but also locks them into a poverty trap without a chance of working their way out of poverty. Employee's rights have to be defended as universal human rights and thus exploitative practices have to be fought wherever they occur hence the need for the regulation of this industry (Mbwaalala, 2013, p. 73).

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