

**An analysis of Temporary Employment Services and the new laws  
regulating them in South Africa**

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## DECLARATION

I, .....do hereby declare that unless specifically indicated to the contrary in this text, this thesis is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Pietermaritzburg on this the 29<sup>th</sup> day of November 2014

Signature: -----

**ABSTRACT**

This research focuses on temporary employment services in South Africa and considers the new legislation relating to them. The Labour Relations Amendment Act 6 of 2014 and the Basic Conditions of Employment Amendment Act 20 of 2013 were recently passed into law. The Congress of South African Trade Unions called for a total ban on temporary employment services in South Africa; however, rather than banning them, the government amended the labour laws regarding temporary employment services, in order to regulate them more closely.

This thesis considers the rationale behind the introduction of the new laws, the abuses suffered by temporary employees, and will explore the nature and implications of the amendments on temporary employment services in South Africa.

List of acronyms:

CCMA	Commissioner for Conciliation, Mediation and Arbitration
BCEA	Basic Conditions of Employment Act 75 of 1975
BCEAA	Basic Conditions of Employment Amendment Act 20 of 2013
COSATU	Congress of South African Trade Unions
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 6 of 2014
EEA	Employment Equity Act 55 of 1998
ILO	International Labour Organisation
NEDLAC	National Economic, Development & Labour Council
NHC	Namibian High Court
NLA	Namibian Labour Act 6 of 1992
PEAC	Private Employment Agencies Convention, 1997
SANDF	South African National Defence Force
SCA	Supreme Court of Appeal
TES	Temporary employment service
UIF	Unemployment Insurance Fund

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## CHAPTER I: INTRODUCTION

### 1.1 *Background to the research study*

In 1983 the concept of a ‘labour broker’ was introduced into South African law by amendments to the Labour Relations Amendment Act 2 of 1983 (hereinafter referred to as ‘the 1983 LRAA’).<sup>1</sup> Labour brokers were ‘deemed’ to be the employers of individuals who were placed with clients, and who had the responsibility of paying their employees’ remuneration.<sup>2</sup> The rationale behind the introduction of this provision, was the increasing number of businesses in the labour hire sector who were denying their employees the protection of statutory wage-regulating measures<sup>3</sup> when placing them with clients.

This ‘deeming approach’ however did not overcome all difficulties. There was the problem of employees who became vulnerable to abuse by the ‘fly-by-night’ labour brokers, colloquially known as the ‘bakkie brigade’. An additional problem lay with those labour brokers who could engage workers for clients, but then fail to pay them. The employees had no recourse against the client because the client was not their employer. If the employees could not find the labour broker, or the labour broker had no assets, there was no instrument available to the employees to recover wages and other payments owing to them. Non-compliance by labour brokers therefore rested on the employees and not the client.<sup>4</sup>

The Labour Relations Act 66 of 1995 (hereinafter referred to as ‘the 1995 LRA’) confirms that the labour broker (renamed as a temporary employment service and hereinafter referred to as TES) is the employer of persons they place with clients as employees if they assume responsibility for remunerating the employees.<sup>5</sup> However the client was made jointly and severally liable for breaches of the Basic Conditions of Employment Act 75 of 1997 (hereinafter referred to as ‘the 1997 BCEA’), sectoral determinations, collective agreements and arbitration

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<sup>1</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845 at 849.

<sup>2</sup> *Ibid.*

<sup>3</sup> M. Brassey & H. Cheadle, ‘Labour Relations Amendment Act 2 of 1983’ (1983) 4 *ILJ* 34 at 37.

<sup>4</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845 at 849.

<sup>5</sup> *Ibid.*

awards.<sup>6</sup> It is noteworthy that an initial proposal to extend joint and several liability was not included in the 1995 LRA.<sup>7</sup>

Temporary employment services (hereinafter referred to as TESs) were significantly affected by the proposed amendments to the 1995 LRA in 2010. Significant changes were planned for s 198 of the 1995 LRA, this section regulates the relationship between temporary employment services and temporary employees.

This ‘relationship’ is essentially one of the main issues that this thesis will be focusing on. More important are the new Labour Relations Amendment Act 6 of 2014 (hereinafter referred to as ‘the 2014 LRAA’) and the Basic Conditions of Employment Amendment Act 20 of 2013 (hereinafter referred to as ‘the 2013 BCEAA’), published in the Government Gazette<sup>8</sup> in August 2014. This research will discuss the impact of these two Acts on temporary employment services in South Africa.

For many years there was an apparent lack of concern about employees hired by temporary employment services (TESs), despite the fact these employees were being exploited by both the TESs and the clients. This issue was largely ignored until the Congress of South African Trade Unions (COSATU) reacted to the discrimination and poor treatment of these temporary employees. This began an intense reassessment of the existing labour laws.<sup>9</sup>

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<sup>6</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845 at 849.

<sup>7</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845 at 850.

<sup>8</sup> GN 590 of GG 37921, 18/08/2014.

<sup>9</sup> See newspaper articles by: A. Areff, ‘Companies use brokers to avoid labour laws, says judge’, *Mail and Guardian*, August 2012, <http://mg.co.za/article/2012-08-01-companies-use-brokers-to-avoid-labour-laws-says-judge>; E. Ferreira, ‘Cosatu admits ANC won labour brokers battle’, *Mail and Guardian*, July 2012, <http://mg.co.za/article/2012-07-31-cosatu-admits-anc-won-labour-brokers-battle>; Staff reporter, ‘New Bills do little to ease labour broking fears’, *Mail and Guardian*, March 2012, <http://mg.co.za/article/2012-03-22-new-bills-do-little-to-ease-labour-broking-fears>; Staff reported. ‘Labour laws should be reworked, says DA’, *Mail and Guardian*, June 2011, <http://mg.co.za/article/2011-06-10-labour-laws-should-be-reworked-says-da>. Accessed on 30 March 2013.

## 1.2 *Research area of study*

As stated earlier, this thesis will focus on the areas of law relevant to TESs, looking closely at the amended Acts. It will investigate the nature of the triangular relationship, and examine joint and several liability of employers and their clients.

When implemented, the amended Acts will cause a profound change in the current labour market, particularly TESs in the Republic of South Africa.

In summary it can be said that the research area of this thesis is to identify the need for the changes to TES laws, and the implementation thereof.

## 1.3 *Research aim, objectives and hypotheses*

Aim: To explore the influences of the 2014 LRAA and the 2013 BCEAA on TESs.

Objectives:

- To assess and identify the abuses suffered by temporary employees;
- Considering how the amendments seek to improve the laws regulating TESs;
- Assess the influence of both the International Labour Organisation and Namibia on South Africa; and
- To explore the effect of the amendments on TESs.

Hypothesis 1:

Is there a need for further legal reform as far as TESs are concerned.

Hypothesis 2:

Whether TESs are a necessary, lucrative and established manner of job creation in South Africa.

#### 1.4 *Brief description of methodology*

This research study focuses on South African labour law, as far as TESs are concerned. It is explorative research with the objective of reaching tentative conclusions. This research consists of both primary and secondary research. Primary sources will consist of case law and statutes; secondary sources will consist of internet sources, journal articles, books and newspaper articles.

#### 1.5 *Structure of the thesis*

This thesis consists of five chapters. Chapter one consists of an overview and background to the study. Chapter two is the literature review and consists of the contextual background to TESs in South Africa. Chapter three examines the new laws relating to TESs. Chapter four discusses the influence of both the International Labour Organisation and Namibia on South Africa with regard to TESs. Chapter five concludes the thesis.

## **CHAPTER 2: THE CONTEXTUAL BACKGROUND TO TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA**

### 2.1 *Introduction*

TESs have been around since the 1950s, but the Labour Relations Act 28 of 1956 did not even acknowledge their existence. It was only in the 1983 LRAA that TESs received legal recognition by means of a statutory definition. In terms of s 1(3)(a) of the 1983 LRAA, a TES was identified as the employer and the employees were considered to be its employees. This provision is similar to that of s 198 of the 1995 LRA.<sup>10</sup> It is submitted that s 198 of the 1995 LRA was somewhat vague, and on the whole deficient in regulating TESs, considering their atypical nature and the complexity of their construction.<sup>11</sup>

Section 198 did not address all the issues relating to the triangular employment relationship. In time it became clear that s 198 did not provide sufficient regulation as there was so much more to the triangular employment relationship that needed to be statutorily recognized and regulated to prevent exploitation and infringement of parties' rights.<sup>12</sup> It would therefore be reasonable to assume that this is what the South African Minister of Labour envisioned in 2010, when she proposed amendments to the 1995 LRA. These proposed amendments have changed over the past few years and the National Assembly passed the final draft of the Labour Relations Amendment Bill in March 2014.<sup>13</sup> The new developments will be discussed in Chapter III.

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<sup>10</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110.

<sup>11</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 111.

<sup>12</sup> Section 198 of the 1995 LRA. See also John Grogan, 'Corporate employees: Unmaking the bed' (2005) 21(6) *Employment Law* 9 at 16; Tamara Cohen 'Placing substance over form — Identifying the true parties to an employment relationship' (2008) 29 *ILJ* 863 at 872; Nicola Smit & Elmarie Fourie 'Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries' (2009) 3 *TSAR* 516 at 530; Ezette Gericke 'Temporary employment services: Closing a loophole in section 198 of the Labour Relations Act 66 of 1995' (2010) 31 *Obiter* 92 at 99; *NEHAWU obo Pienaar v Nursing Services of SA* (1998) 19 *ILJ* 188 (CCMA) 193.

<sup>13</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 111.

The obstacles facing TESs, and the various elements of triangular employment relationships will be discussed in this thesis. A further issue that will be explored is whether the 2014 LRAA solves earlier problems, or whether it adds more uncertainty and confusion.

The 1995 LRA extensively influenced South African labour law and afforded all employees in South Africa with employment protection *on par* with international labour standards. The 1995 LRA had the effect of making employment more diverse with a growing proportion of work being done by workers in non-standard employment. This also had the effect of increasing the number of workers not receiving protection, or being inadequately protected by labour law. In response, some employment providers restructured to reduce their dependence on standard employment, or they adopted strategies to escape or reduce the effect of labour laws.<sup>14</sup>

Although policy documents, such as the Department of Labour's 1996 Green Paper on Employment Standards noted the increase of non-standard employment relationships, later research commissioned by the department exposed the extent to which the growth of non-standard employment had eroded the quality of labour protection for employees. This research reveals that an exponential upsurge in the incidence of TESs has deprived many employees of basic labour law protection.<sup>15</sup>

This upsurge has brought about a concern to re-evaluate the laws with regard to TESs.

The author will start with a definition of the triangular relationship, and will then describe the difficulties associated with this relationship.

## 2.2 *Understanding the nature of triangular employment*

It is important when approaching the regulation of TESs to have a sound understanding of the legal relationship that underlies their operation.<sup>16</sup>

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<sup>14</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

### 2.2.1 *Definition of temporary employment services*

Triangular employment has been defined as an employment relationship where the recruitment, dismissal and employment functions usually executed by an employer, are outsourced to an intermediary, while the ‘task side’ of the relationship is not outsourced.<sup>17</sup> Therefore, it involves a partial outsourcing. Seen from the intermediary’s perspective, the TES provides their clients with employees who work under the client’s instruction and supervision.<sup>18</sup> Soldatos in his article defined a TES as “a person who for reward, procures for or provides to a client other persons who render services to the client, and who in turn are remunerated by the TES for that service.”<sup>19</sup> The International Labour Organisation (hereinafter referred to as ‘the ILO’) uses the term ‘temporary work agencies’ to refer to employers who employ workers and make them available to a third party (the user enterprise), to work under the instruction and supervision of the user enterprise.

Section 198 (1) of the 1995 LRA reads as follows:

“temporary employment service” means any person who, for reward, procures for or provides to a client other persons —

- (a) who render services to, or perform work for, the client; and
- (b) who are remunerated by the temporary employment service.

Section 198(2) of the 1995 LRA reads as follows:

For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person’s employer.

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<sup>17</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845.

<sup>18</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845. Also see Van Eck, BPS. ‘Temporary employment services (labour brokers) in South Africa and Namibia’ *Potchefstroom Electronic Law Journal* 2009 13(2) 107.

<sup>19</sup> Soldatos, C. ‘Labour brokers – Human trafficking or meaningful employment? Quo vadis.’ 2009. [http://butterworths.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu). Accessed on 30 March 2013.

As Benjamin puts it, triangular employment thus has three distinct relationships: firstly between employee and agency; secondly between employee and client; and lastly between agency and client. It is the relationship between the agency and the client, which is a commercial arrangement and (unless statute specifically provides so) is excluded from the purview of labour law and labour courts. Therefore the legal nature of the employee's relationship with both the agency and the client must be determined by reference to the tests developed by the courts for distinguishing employment from other forms of work relationships.<sup>20</sup>

### 2.3 *Discussion Document: Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa*

Professor P. Benjamin prepared a document for the Department of Labour for discussion in the National Economic, Development & Labour Council (NEDLAC) in July 2009. This is an insightful paper that highlights several discrepancies with our labour law regarding what he refers to as non-standard employees (employees employed on fixed-term contracts, temporary and part-time work and TESs).<sup>21</sup> These points will be discussed in this thesis.

#### 2.3.1 *Who is the true employer?*

This remains one of the main issues in dispute: whether the TES or its client is the employer. Even though legislation is clear on whom the employer is in the triangular relationship, it has become evident that it is in fact a grey area because our courts have taken into consideration the facts of each case to determine who the true employer is. This is a question that needs to be determined in each case by applying the ordinary principles of contractual interpretation. This is not an issue that is easily resolved by applying the conventional doctrines of contract law, and one reason for this is that principles have been developed to distinguish employment from other forms of work; not to recognise which of the two parties to a tripartite agreement (both of whom perform some of the functions of an employer) is in fact the employer. The resultant uncertainty

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<sup>20</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845 at 847.

<sup>21</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845.

that this creates works to the disadvantage of the weaker party(s) who are not sure as to whom they should enforce their rights against. It is for this reason that most countries have enacted legislation to stipulate who the employer is of placed employees.<sup>22</sup>

In South Africa, courts look at the employment relationship in its totality to establish whether an individual is working as an employee or an independent contractor. The courts attempt to grasp an overall impression of this relationship. It is however clear that the most important factor in determining whether a person is an employee, is whether the employing party has the right to control and direct the manner in which work is performed. Courts are of the view that this must be evaluated in the light of the reality of the employment relationship, and not merely by reference to the language of the contract. In South Africa it is likely that in most instances, the user of the TES would be held to be an employer because it exercises day-to-day control over the placed employee at work.<sup>23</sup> This approach is commendable as it makes more logical sense for the person who exercises day-to-day control over the employee to be classified as the employer. The TES is not involved in the day-to-day interaction with the employee. The TES has no direct impact on the actual work performed by the employee, and this leads to a disconnect between the TES and the employee.

The 1995 LRA and 1997 BCEA relate to persons who are placed to work with clients as employees, and whether or not they are covered by labour law depends on their relationship with the client. Therefore, if the work performed for the client is that of an employee, they become an employee of the TES.<sup>24</sup> It therefore follows that a TES who places persons to work with a client subject to the control and supervision of the client, is the employer of such persons.<sup>25</sup> This approach precludes TES from claiming that as it does not employ the persons whom it places, it

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<sup>22</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845 at 848.

<sup>23</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845 at 848 - 849.

<sup>24</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845 at 849.

<sup>25</sup> *LAD Brokers v Mandla* (2001) 22 *ILJ* 1813 (LAC).

is not governed by the 1995 LRA and 1997 BCEA.<sup>26</sup> Therefore if the employee is not working for a client there exists no employer/employee relationship between the TES and the employee.

An example of the difficulty in identifying who the true employer is in the triangular relationship is well illustrated in the leading case of *Dyokhwe v de Kock NO & Others* (2012) 33 *ILJ* 2401 (LC). The applicant was employed by Mondi, on a series of fixed-term contracts, and then permanently employed as from January 2003. In June 2003 Mondi engaged Adecco, a TES, to transfer some of its employees, including the applicant. Adecco then became responsible for paying their wages and performing other administrative duties. The applicant, although illiterate, signed his name to a *pro forma* document headed ‘Contract of employment defined by time’. He returned to Mondi and continued to work as usual, however he now received a pay slip from Adecco and his hourly rate was slightly reduced. The applicant queried the latter with the Commissioner for Conciliation, Mediation and Arbitration (hereinafter referred to as ‘the CCMA’) and was told by an official to ‘continue working’. The applicant remained working at Mondi until he was informed that his employment had been terminated without notice. The applicant referred an unfair dismissal dispute to the CCMA in 2009 and obtained an arbitration award against Mondi, which was subsequently set aside on review. He then again referred the dispute for arbitration citing both Mondi and Adecco as respondents.<sup>27</sup>

At the later arbitration the commissioner held that Adecco was the applicant’s employer at the time of his dismissal. The commissioner was not convinced that the employee was misled when he signed the contract with Adecco, and took into account the provisions of s 198(2) of the 1995 LRA, which states that a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person’s employer. The employee then applied to the labour court to review and set aside that ruling. The applicant challenged the commissioner’s findings on four issues, namely:

“His finding that the applicant was no longer employed by Mondi after signing the Adecco contract; His finding that the applicant had not been induced to sign the contract by

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<sup>26</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845 at 849.

<sup>27</sup> *Dyokhwe v de Kock NO & Others* (2012) 33 *ILJ* 2401 (LC).

misrepresentations; His reliance on incorrect legal advice provided to the applicant by a CCMA official to find the Adecco contract valid; and his failure to consider that it would be contrary to public policy to enforce the contract.”<sup>28</sup>

The court adopted the correct approach to the interpretation of s 198, in compliance with s 23 and s 39(2) of the Constitution of the Republic of South Africa, 1996 and public international law, and in the context of the purposes of the 1995 LRA as set out in s 1 as well as the constitutional right to fair labour practices. The court considered decided case law and authoritative writings, and the relevant ILO conventions and recommendations on the issue of ‘disguised employment relationships’. The court found that:

“...while it was common cause that the employee was being paid by Adecco, it had to approach the true nature of the relationship where the workplace and the employee’s work had remained the same for almost nine years, conscious of the obligation to combat disguised employment relationships and to examine the substance rather than the form of the relationship.”<sup>29</sup>

The court then went on to consider the commissioner’s finding that the applicant was no longer employed by Mondi after signing the Adecco contract, and could find no evidence that Mondi terminated the applicant’s employment prior to his dismissal in 2009. The court found that the commissioner had no regard to the true relationship between the parties and that the only reasonable conclusion was that the new agreement between Mondi, Adecco and the applicant was *in fraudem legis*. The court was of the view that there was no reason why the well-known principles involving sham independent contractors should not also apply to TES relationships.<sup>30</sup>

The court drew attention to s 198 and noted that it defines a TES as an entity that ‘procures for or provides to’ a client other persons who provide services to the client. In saying the latter the court concluded that in the present case Adecco did not procure the applicant for Mondi. It was in fact Mondi who sent the applicant to Adecco. Thus on the facts of the case the arrangement

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<sup>28</sup> *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 (LC) at 2402.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

could not be one that reflects a temporary employment relationship. Mondi continued to be the applicant's employer and the commissioner's finding to the contrary was held to be incorrect.<sup>31</sup>

In assessing the second ground for review, which was that 'the commissioner's finding that the applicant was not induced to sign the Adecco contract by misrepresentation', the court noted that where a misrepresentation results in a fundamental mistake there is no agreement and the 'contract' is *void ab initio*. The *caveat subscriptor* principle does not come into play if the terms of the contract have been inadequately or inaccurately explained to an ignorant signatory. The evidence that the applicant was illiterate was uncontested. The court stated that on the evidence no reasonable decision maker could conclude that the employee understood at the time that he was entering into a new employment relationship. The court found that the Adecco agreement was void for material misrepresentation and held that a different finding would not be in accordance with legal principles and would be unreasonable.<sup>32</sup>

Lastly, on the issue of public policy, the court found that the commissioner did not consider the argument that it would be contrary to public policy to enforce the Adecco contract, and held that his finding to the contrary was so unreasonable that no reasonable decision maker could have come to that conclusion.<sup>33</sup>

The court set aside the commissioner's ruling and declared Mondi to be the applicant's true employer at the time of his dismissal.

It is submitted that the court's decision was correct, since it took into consideration fairness and public policy.

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 (LC) at 2403.

### 2.3.2 *Disguised Employment Relationships*

Next to be considered is the issue of disguised employment relationships. Not only is it difficult to ascertain who the true employer is in a tripartite employment relationship, it is even more obscure when this relationship is deliberately disguised to further complicate the situation.

The ILO's Employment Relationship Recommendation 198 of 2006 recommends national policy to combat disguised employment relationships and states that a 'disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee'. It recommends the promulgation of national policy to combat disguised employment relationships, including the misuse of contractual arrangements to hide the true legal status of workers and to deprive workers of the protection due to them.<sup>34</sup> As Botes puts it 'a contract for work instead of an employment contract is drawn up between the TES and the worker, also leading to the worker being excluded from the protection afforded by all labour legislation.'<sup>35</sup>

Section 39(1)(b) of the Constitution states that, when interpreting the Bill of Rights, international and foreign law must be considered by the court.<sup>36</sup> In furtherance of this obligation, the Code of Good Practice - Who is an Employee<sup>37</sup> recognizes that the true relationship between the parties must be determined. Where the employment contract does not reflect the true relationship between the parties, the courts must look beyond the form of the contract and have regard to the realities of that relationship, irrespective of how the parties have chosen to describe their relationship.<sup>38</sup>

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<sup>34</sup> Furthermore the Private Employment Agencies Convention 181 of 1997 seeks to ensure that workers placed by employment agencies are adequately protected by labour law.

<sup>35</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 136.

<sup>36</sup> Section 1 of the 1995 LRA identifies the purpose of the Act as, amongst others, to give effect to obligations incurred as a member state of the ILO.

<sup>37</sup> GN R1774 Gazette 29445 dated 1 December 2006.

<sup>38</sup> In *Hydraulic Engineering Repair Services v Ntshona & Others* (2008) 29 *ILJ* 163 (LC) at para 18, the court held that "it is well established that the parties' categorization of their relationship is not in itself conclusive of the true nature of that relationship and that the courts and other dispute-resolution bodies are to move beyond the description given by the parties of the nature of their relationship to uncover the underlying and the true nature of the relationship. Much depends on the facts of each case in the light of the features of the relationship between such two parties, although the terms of the relevant contract should not be ignored."

In keeping with this approach the court in *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 24 ILJ 1587 (LC) stated that ‘what is required is a conspectus of all the relevant facts including any relevant contractual terms, and a determination whether these holistically viewed, establish a relationship of employment as contemplated by the statutory definition’.<sup>39</sup> The court noted that the contract is the primary source used to identify the nature of the legal relationship, but held that it is not definitive and that the reality of the relationship is paramount. The court held that the parties’ own perception of their relationship and the manner in which the contract is carried out in practice are also relevant factors in determining the nature of the relationship.<sup>40</sup>

In *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC) the court held that the existence of an employment relationship is not dependent solely upon the conclusion of a contract and that a person who works for, or assists another in his business and receives remuneration for such services would satisfy the definition of employee, even if the parties had not yet agreed on all relevant terms of the agreement.<sup>41</sup> However the court in *Lewis & Another v Contract Interiors CC* (2001) 22 ILJ 466 (LC) noted that while a mutual intention is not necessary when establishing an employment relationship, and the intention of one of the parties will suffice if backed up by conclusive evidence of such a relationship, a contractual employment relationship can never be established where neither party intended such a relationship to be formed.<sup>42</sup> Cohen states that ‘a willingness on the part of the judiciary to adopt a purposive interpretation of statutory and contractual provisions in order to uncover the substance and not the form of the working relationship has diffused many of the difficulties posed by disguised employment relationships’.<sup>43</sup>

In *Bachoo and Sasol Oil* (2013) 34 ILJ 1344 (BCA) the applicant was placed with the respondent by a TES, K, in May 2010 and his contract was terminated by K on 30 May 2012 after being overlooked for a permanent position. The employee claimed that he was an employee of the

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<sup>39</sup> *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 24 ILJ 1587 (LC) at para 17.

<sup>40</sup> T. Cohen, ‘Debunking the legal fiction - *Dyokhwe v De Kock No & Others*’ (2012) 33 ILJ 2318 at 2321 – 2322.

<sup>41</sup> *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC) at 391 B – C.

<sup>42</sup> *Lewis & Another v Contract Interiors CC* (2001) 22 ILJ 466 (LC) at para 18.

<sup>43</sup> T. Cohen, ‘Placing substance over form - Identifying the true parties to an employment relationship’ (2008) 29 ILJ 863 at 880.

respondent, not K, and referred a dispute to the National Bargaining Council for the Chemical Industry, requesting a declaratory order to that effect. It was common cause that the employee was provided for the position with the respondent by K, was paid by K and submitted time sheets to K. The employee did not receive the same benefits as those of the permanent employees and was given his Unemployment Insurance Fund (hereinafter referred to as 'the UIF) documentation by K after termination.<sup>44</sup>

The employee's contract with K expired after a month and he stopped working for K. The respondent called the employee a few months later and invited him to return to work. He was still paid by K, but never signed another contract. The employee applied for a permanent position but was unsuccessful. The employee was unhappy with the outcome of the interview. Shortly thereafter his contract was terminated by K.<sup>45</sup>

N testified that the employee was a temporary employee on contract from K. The arbitrator considered s 198 of the LRA 1995, read with paragraph (a) of the definition of 'employee' in s 213, and the recent labour court decision of *Dyokhwe v De Kock NO & Others* (2012) 33 ILJ 2401 (LC). He distinguished *Dyokhwe's* case from the employee's, on the basis that *Dyokhwe's* first contract had been with the client and not the TES; *Dyokhwe* was dismissed by the client and *Dyokhwe* was not *au fait* with English. On the other hand the employee in this case was employed first by K, was dismissed by K and fully understood the terms of his contract. Adopting a purposive interpretation of s 198 in terms of the constitutional right to fair labour practices as required by s 1 of the 1995 LRA, the arbitrator held that the employee was an employee of the TES. The arbitrator explained that even if the dominant impression test was applied to distinguish between employees and independent contractors, the scale weighed heavily in favour of the respondent. The employee was not completely without remedy and could have referred a dispute against K, with the requisite application for condonation, to challenge his termination by K and, if necessary, argue that he was entitled to severance pay.<sup>46</sup> Accordingly the arbitrator found that an employee who was placed with a client by a TES remained the employee of the TES, and did not become the employee of the client.

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<sup>44</sup> *Bachoo and Sasol Oil* (2013) 34 ILJ 1344 (BCA).

<sup>45</sup> *Bachoo and Sasol Oil* (2013) 34 ILJ 1344 (BCA) at 1345.

<sup>46</sup> *Ibid.*

The labour court on review observed that it is not for the court or arbitrators to determine the desirability of the form which contracts concluded between TESs and clients should take. This was the case in *Colven Associates Border CC v Metal & Engineering Industries Bargaining Council & Others* (2009) 30 ILJ 2406 (LC) which involved a staffing service agreement between the applicant TES and one of its clients in terms of which the applicant was obliged to remove an assigned employee when instructed to do so by the client. The agreement between the applicant and the employee provided further that although an assignment would terminate automatically when the applicant was instructed to remove the employee, the contract of employment between the applicant and the employee would continue. The respondent employee was involved in a fight at the client's premises and the client instructed the applicant to remove him, which the applicant did. He did not return for work, despite being told that he had not been dismissed by the applicant. The employee approached the relevant bargaining council contending that he had been unfairly dismissed. The arbitrator held that the applicant ought to have convened a disciplinary enquiry and should have found the employee not guilty and, if the client refused to take him back, should have followed a retrenchment procedure. The arbitrator accordingly ruled that the employee had been unfairly dismissed.<sup>47</sup>

The court in *Chirowamhangu and Ramfab Fabrication (Pty) Ltd* (2012) 33 ILJ 3002 (BCA) indicated that there are three primary criteria to consider when determining who the employer was - an employer's right to supervision and control; whether the employee formed an integral part of the employer's organization; and the extent to which the employee was economically dependent on the employer. In this case the applicant was dismissed by the respondent R and claimed that his dismissal was unfair. He lodged a dispute with the Metal & Engineering Industries Bargaining Council and, at arbitration, R claimed that it was not his true employer and that he had been placed with it by a TES, L. The arbitrator dealt with two issues at arbitration: firstly, whether or not the employee was indeed an employee of R and secondly whether or not he was fairly dismissed.<sup>48</sup>

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<sup>47</sup> *Colven Associates Border CC v Metal & Engineering Industries Bargaining Council & Others* (2009) 30 ILJ 2406 (LC) at 2406 – 2407.

<sup>48</sup> *Chirowamhangu and Ramfab Fabrication (Pty) Ltd* (2012) 33 ILJ 3002 (BCA).

The employee contended that he was referred to R by a friend and was interviewed by a manager of R. A week after he commenced employment he was told that his salary would be paid through another entity (L) but that was the extent of his involvement with L. He took all his instructions from R. The employee claimed that he was dismissed after querying, *inter alia*, the fact that provident fund contributions were deducted from his salary but not paid over to the council. He was called to a meeting with H and a representative from L and was informed that there was no more work for him, despite the fact that employees had been hired after his dismissal to perform the work he had performed. It was alleged by R that L was the employee's real employer as his contract was signed with L, L's name appeared on his payslip and he was always paid by L.<sup>49</sup>

The arbitrator referred to the 1995 LRA, as well as the 'Code of Good Practice: Who is an Employee' and confirmed that in order for the employee to be considered an employee of L, he must have been procured by L for R. The employee's undisputed evidence was that he was referred to R by a friend who was already employed there. The arbitrator considered the three primary criteria used to determine the employment relationship and in light of those criteria the arbitrator concluded that R was the only entity with control over the employee and that the substance of the employment relationship was between the employee and R. L was nothing more than a channel through which the employee's salary was paid. The arbitrator concluded that L did not qualify as the employer in terms of the definition of a TES in s 198 and held that R was the employee's true employer.<sup>50</sup>

In *National Union of Metalworkers of SA & Others v SA Five Engineering (Pty) Ltd* (2007) 28 ILJ 1290 (LC) the first respondent, SA Five, had been contracted to reconstruct and refit a ship, the Glas Dowl, as an off-shore petro-chemical refinery. The second to fifth respondents were a TES subcontractor. They were all contracted by SA Five to provide employees to work on the project.<sup>51</sup> The court agreed with SA Five that, even if it was responsible for the day-to-day control of the applicants' work, and even if it did determine when the individual portions of the

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<sup>49</sup> *Chirowamhangu and Ramfab Fabrication (Pty) Ltd* (2012) 33 ILJ 3002 (BCA) at 3003.

<sup>50</sup> *Ibid.*

<sup>51</sup> *National Union of Metalworkers of SA & Others v SA Five Engineering (Pty) Ltd & Others* (2007) 28 ILJ 1290 (LC).

work had come to an end, and further even if SA Five informed the other respondents that the services of the employees were no longer required, this still did not make SA Five the applicants' employer for purposes of the LRA.<sup>52</sup>

It is clear from the above case law that determination of an employee's true employer is a complex exercise in which the courts are guided by s 198. However the courts will take all the relevant circumstances of each case into consideration to establish the true employer.

It is well known that certain South African employers assume strategies to disguise employment in order to deprive employees of labour law protection. These strategies include clothing the employment relationship in a legal form that differs from the underlying employment relationship, or seeking to obscure the identity of the true employer.<sup>53</sup> Soon after the enactment of the 1995 LRA, many employers wanted to 'convert' employees into 'independent' contractors. The presumptions of employment in both the 1995 LRA and the 1997 BCEA were introduced in 2002 as a response to this strategy.<sup>54</sup> The courts were prepared to go beyond the wording of employment contracts to study the underlying reality of the employment relationships.<sup>55</sup> In several significant judgments they described the contractual stipulations that some consultants and employers used to exclude employees from labour law as a 'bizarre subterfuge' and a 'cruel hoax and sham'.<sup>56</sup> Benjamin noted that:

"Research shows that labour broking arrangements have become the mechanism most commonly used to deprive vulnerable employees of labour law protections."<sup>57</sup>

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<sup>52</sup> *National Union of Metalworkers of SA & Others v SA Five Engineering (Pty) Ltd & Others* (2007) 28 ILJ 1290 (LC) at 1291.

<sup>53</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 ILJ 845 at 846.

<sup>54</sup> The 2002 amendments to the 1995 LRA and 1997 BCEA introduce a provision into each Act creating a rebuttable presumption as to whether a person is an employee and therefore covered by the Act. These provisions are found in s 200A of the 1995 LRA and s 83A of the 1997 BCEA. These sections only apply to employees who earn less than a threshold amount determined from time to time by the Minister of Labour in terms of s 6(3) of the 1997 BCEA.

<sup>55</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 ILJ 845 at 846.

<sup>56</sup> *Motor Industry Bargaining Council v Mac-Rites Panel Beaters & Spray Painters (Pty) Ltd* (2001) 22 ILJ 1077 (N); *Building Bargaining Council (Southern & Eastern Cape) v Melmon's Cabinets CC & Another* (2001) 22 ILJ 120 (LC).

<sup>57</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 ILJ 845 at 846.

Further strategies comprise outsourcing and subcontracting arrangements that obscure the identity of the true employer, fixed-term contracts and the fraudulent use of cooperatives.<sup>58</sup>

It is important to prevent these practices, and therefore legislation must ensure that arbitrators and judges can look beyond the formal content of contractual arrangements to ascertain the true nature of working relationships. Also, legislation must ensure that employees in the different categories of non-standard employment obtain equivalent protection to ensure that employers are not encouraged to reformulate arrangements to deprive employees of protection.<sup>59</sup>

### 2.3.3 *Joint and several liability*

Where two or more parties are jointly and severally liable for a wrongful act, each party is independently liable to compensate the injured party to the full extent of the wrongful act. This means that where a plaintiff wins a monetary judgment against the parties collectively, the plaintiff may collect all the money from either or both of them. The party who paid the money may then seek contributions from the other wrong-doers.<sup>60</sup>

The issue of joint and several liability is important as it assures the employee that if anything were to go wrong that he/she would be compensated. The consequence of joint and several liability is that either the TES or the employer is liable to make payments. What is to be noted is that this liability arises regardless of whether the client has paid the TES or not. The introduction of this form of joint and several liability in theory transfers the risk of the TES defaulting on its obligations from the employee to the client. However, the client's liability is a default liability and the client is prohibited from being sued directly in the CCMA or Labour Court because it is

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<sup>58</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845 at 846.

<sup>59</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 *ILJ* 845 at 847.

<sup>60</sup> [http://www.law.cornell.edu/wex/joint\\_and\\_several\\_liability](http://www.law.cornell.edu/wex/joint_and_several_liability) Accessed on 25 October 2014.

not an employer. The employee is only able to proceed against the client if it has obtained a judgment or order against the TES which it refused to pay.<sup>61</sup>

In *Solidarity on behalf of Smit and Denel (Pty) Ltd & Another* (2004) 25 ILJ 2405 (BCA) the applicant argued that both respondents were jointly and severally liable for not renewing his fixed-term contract where he had a legitimate expectation of renewal. The applicant argued unfair dismissal by virtue of s 82(3) of the 1997 BCEA. The arbitrator found that this section dealt with contraventions of the 1997 BCEA and of collective agreements and awards, and was not intended to cover alleged unfair dismissal in terms of s 186(1)(b) of the 1995 LRA. The court held that the respondents could not be held jointly and severally liable for the alleged unfair dismissal.<sup>62</sup>

In *Walljee & Others v Capacity Outsourcing & Another* (2012) 33 ILJ 1744 (LC) the applicants were employees of the first respondent, a TES. The client changed its policy to prohibit immediate family members of permanent employees from being deployed by the first respondent, and the applicants' services were terminated as a result. The applicants alleged that their dismissal was automatically unfair on the basis that they had been discriminated against on arbitrary grounds of family relations, in terms of s 187(1)(f) of the 1995 LRA and they applied to join the client in the proceedings.<sup>63</sup>

The court stated that the first respondent was a TES and, as the applicants were employees of the first respondent, the provisions of s 198 of the 1995 LRA applied. The court also noted that the client could only be held jointly and severally liable with the first applicant if it had contravened a provision of s 198(4). It could however not be held jointly and severally liable in the case of dismissal. The applicants claimed that they were automatically unfairly dismissed by the first respondent and thus they were confined to seeking such redress as the 1995 LRA allowed from the first respondent only.<sup>64</sup>

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<sup>61</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 ILJ 845 at 850.

<sup>62</sup> *Solidarity on behalf of Smit and Denel (Pty) Ltd & Another* (2004) 25 ILJ 2405 (BCA) at 2406.

<sup>63</sup> *Walljee & Others v Capacity Outsourcing & Another* (2012) 33 ILJ 1744 (LC).

<sup>64</sup> *Ibid.*

Therefore as the client was not the applicants' employer and s 198 applied, and the applicants had no right of redress against the client, it could not be said that the client had a direct and substantial interest in any order the court might make regarding their claim that they had been unfairly dismissed by the first respondent. The application for joinder therefore failed and was dismissed with costs.<sup>65</sup>

In *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another* (2003) 24 ILJ 2019 (BCA) the court dealt with the issue of joinder. It was argued that the first respondent was not a TES within the meaning of s 198 of the 1995 LRA, because it was not a TES but a cleaning contractor. In the circumstances it was argued that the second respondent, as its client, was not jointly and severally liable for a contravention of the collective agreement in terms of s 198(4). The arbitrator rejected this argument, and found that to be properly regarded as a TES a company must supply workers to a client, be responsible for paying them, and receive some consideration for supplying the service. It was common cause that this was the contract between the first and second respondents and the court held that it was irrelevant whether or not the core business of the first respondent was that of a classical TES. It was enough that the factual position as between the first and second respondents and the cleaning staff fell within the ambit of s 198.<sup>66</sup>

Therefore in terms of s 198(4), the second respondent was jointly and severally liable with the first respondent for any contravention of the collective agreement by them. It was therefore held that both respondents fell within the definition of a TES, and they were held to be jointly and severally liable for the contravention of the council's collective agreement. The points *in limine* raised by the respondents were also dismissed, and the first and second respondents were held jointly and severally liable to pay to the applicant the amounts claimed.<sup>67</sup>

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<sup>65</sup> Ibid.

<sup>66</sup> *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another* (2003) 24 ILJ 2019 (BCA) at 2020.

<sup>67</sup> *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another* (2003) 24 ILJ 2019 (BCA) at 2021.

### 2.3.4 *Decent work*

Prof P. Benjamin emphasizes the need for decent work which is an issue relevant to temporary employees. The author however, will not focus on this particular issue in this thesis, but will merely allude to its importance as it falls beyond the main scope of this thesis. The need for an extended scope of protection is echoed in the conception of decent work of the ILO which has the objective of promoting ‘opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.’<sup>68</sup> There is a definite need for our labour law to be re-evaluated to ascertain the extent to which TESs provide employees with decent work.<sup>69</sup>

It is important to provide decent work for non-standard employees by recommending legislative responses to exploitative labour practices that have become general practice in the South African labour market. Benjamin scrutinizes different options for regulating the operation of TESs<sup>70</sup> and proposes reforms, in the short term, to protect employees from abuse concomitant with TESs as well as fixed-term contracts, subcontracting and outsourcing, all of which are undermining our labour market.<sup>71</sup>

## 2.4 *Termination of employment contracts*

An example of how the courts have dealt with unfair labour practice is the case of *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 *BLLR* 852 (LC), where Boda AJ ‘set the cat among the pigeons’ in his judgment.<sup>72</sup> This judgment was not concerned about the issue of the

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<sup>68</sup> “According to the ILO, decent work is captured in four strategic objectives: fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism. These objectives hold for all workers, women and men, in both formal and informal economies; in wage employment or working on their own account; in the fields, factories and offices; in their home or in the community.” International Labour Organization, Decent work agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm>. Accessed on 7 August 2014.

<sup>69</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845 at 846.

<sup>70</sup> I will use the terms temporary employment services/agencies, labour hire and labour brokers interchangeably to describe the practice of triangular employment.

<sup>71</sup> P. Benjamin, ‘Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document’ (2010) 31 *ILJ* 845 at 846.

<sup>72</sup> F. Coetzee and A. Patel, 2012, ‘The battle of the labour brokers’, *Without Prejudice* Vol 12 Issue 3 April 2012 45.

constitutionality of the TES arrangement, or the fact that s 198 of the 1995 LRA takes away the right of the employee to claim directly from the client in unfair dismissal claims.<sup>73</sup> Instead this judgment was concerned with the right of the TES to rely on s 189 of the Act (which relates to operational requirements dismissals) to justify the termination of the employment relationship after the clients, for unfair reasons, maintained that the employee be removed from its premises.<sup>74</sup>

In this case, the client demanded that the TES remove the employee from its premises.<sup>75</sup> The employee was suspended by the TES and after a disciplinary hearing, the TES determined that a final written warning was an appropriate sanction instead of dismissal.<sup>76</sup> The client however declined to allow the employee back on to its premises.<sup>77</sup> The TES was obliged, in terms of its contractual relationship with its clients, to comply with the client's demands and thereafter retrenched the employee.<sup>78</sup> The contract between the TES and the client allowed the latter the right to request the removal of the employee from its premises for any reason whatsoever.<sup>79</sup>

The court held that the agreement between the TES and the client was against public policy and constituted an unlawful breach of the employee's right to fair labour practices in terms of the 1995 LRA.<sup>80</sup>

The court also held that the TES is not powerless in response to the demands of the client. The TES can resist its client's attempt to wield its bargaining power in a way which undermines the fundamental rights of employees. The TES is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed. The court also held that the TES is entitled to resist any attempt by the client to enforce a contractual provision which is against public policy.<sup>81</sup>

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<sup>73</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at para 62.

<sup>74</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 865 para 73.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 854 para 3.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 854 para 4.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 854 para 85.

<sup>81</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 854 para 77.

The court held that the dismissal was substantively unfair but that the dismissal was procedurally fair. The court further held that the TES had acted unlawfully and unfairly, but that it had acted in good faith. The court granted the employee compensation equivalent to one month's salary.<sup>82</sup>

In the case of *South African Post Office v TAS Appointment and Management Services CC* [2012] 6 *BLLR* 621 (LC), the court interdicted TES employees from taking part in industrial action.<sup>83</sup> The court held that TESs could withhold their labour but did not have the power to preclude the South African Post Office (which was not the employer) from employing replacement labour.<sup>84</sup>

It is clear that insofar as policy choice regarding TESs is concerned, legislative intervention is necessary. If not, countless cases will prevail where attempts to create facades of fairness and justice will be made, thereby creating uncertainty. It seems that the trade union movement is winning the war on TESs, in so far as bargaining councils are employing clauses which limit the use of TESs in the future,<sup>85</sup> and courts are passing judgments which ensure that fairness in the tripartite relationships triumph.<sup>86</sup>

TESs are not as helpless as they would like their employees to believe. If fairness prevails in accordance with the courts' application, then TESs must stand-up for their employees' rights.

In *Sindane v Prestige Cleaning Services*,<sup>87</sup> one of the respondent's clients minimized its cleaning requirements, and the services of the applicant and a colleague were terminated. The applicant claimed that he was unfairly dismissed for the respondent's operational requirements. The respondent however claimed that the employee's services had been terminated according to the

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<sup>82</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 *BLLR* 852 (LC) at 853 - 854.

<sup>83</sup> *South African Post Office v TAS Appointment and Management Services CC* [2012] 6 *BLLR* 621 (LC) at para 1.

<sup>84</sup> *South African Post Office v TAS Appointment and Management Services CC* [2012] 6 *BLLR* 621 (LC) at para 15 - 16.

<sup>85</sup> F. Coetzee and A. Patel, 2012, 'The battle of the labour brokers' *Without Prejudice* Vol. 12 Issue 3 April 2012 at 45.

<sup>86</sup> F. Coetzee and A. Patel, 2012, 'The battle of the labour brokers' *Without Prejudice* Vol. 12 Issue 3 April 2012 at 45.

<sup>87</sup> *Sindane v Prestige Cleaning Services* [2009] 12 *BLLR* 1249 (LC).

terms of his fixed-term contract, which provided that the contract would only last while the client required his services, and he stated that the applicant had not been dismissed.<sup>88</sup>

On the first issue, that is whether the applicant was dismissed or not, the court noted that if the respondent's argument were believed, it would mean that the employer was entitled to make the termination of the contract dependent on a future event.<sup>89</sup> The court further noted that in *SA Post Office v Mampeule* (2009) 30 ILJ 664 (LC)<sup>90</sup>:

“the court had held that contracts that made continued employment conditional on the happening of a particular event (in that case the employee's removal from the board of directors) were against public policy and unenforceable as they were in conflict with the provisions of the LRA.”<sup>91</sup>

The court emphasised that employment contracts may be terminated in numerous ways that do not constitute dismissals as defined in the 1995 LRA. These include the expiry of a fixed-term contract after the passage of a stated time, or on the happening of a stated event. An example of this is when the cause of the termination is not an act by the employer, unless the employer frustrates a reasonable expectation that the contract will continue. The *South African Post Office* case was different because in that case the termination of the contract related to alleged misconduct by the employee and not to the natural expiry of the contract.<sup>92</sup> The court held that the applicant had not been dismissed. The court also stated that, even if there was a dismissal, the dismissal was substantively and procedurally fair as he had been consulted and the respondent had endeavoured to find alternative work for him. Accordingly the application was dismissed.<sup>93</sup>

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> *SA Post Office Ltd v Mampeule* (2009) 30 ILJ 664 (LC).

<sup>91</sup> *Sindane v Prestige Cleaning Services* [2009] 12 BLLR 1249 (LC).

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

It is evident that the courts consider public policy as an important factor in determining what is regarded as fair labour practice in our society. The courts have shown that public policy will be the dominant factor in determining fair labour practice where TESs are concerned.

## 2.5 *An overview of how South Africa regulates temporary employment services*

Extensive evidence indicates that the manner in which many TESs work involves the exploitation of vulnerable workers with the result that they are effectively divested of their constitutional protection and rights under labour legislation.<sup>94</sup>

It is clear that s 198 of the 1995 LRA acknowledged TESs but did not regulate them. The provisions of s 198 of the 1995 LRA made temporary employment for all intents and purposes indefinite. As a result, provisions intended to regulate the placement of temporary employees have been used to achieve extensive labour law avoidance for both temporary and permanent employees.<sup>95</sup>

A case that has made specific reference to the need for reform is that of *Mabena and Blue Pointer Trading 341 (Pty) Ltd t/a Immediate Response* (2009) 30 ILJ 222 (CCMA). In this case the commissioner first referred to an employee's right not to be unfairly dismissed in terms of s 185 of the 1995 LRA, and then to the wording of s 198, which made it clear that the respondent was a TES who was the applicant's employer. It was noted by the commissioner that TESs often tried to circumvent the provisions of the 1995 LRA by concluding questionable contracts of employment that could be terminated at the behest of clients, and that the provisions of s 189 were mostly ignored. The commissioner also suggested that a strong case for legal reform had been made out in this regard.<sup>96</sup> In *Molusi and Ngisiza Bonke Manpower Services CC* (2009) 30 ILJ 1657 (CCMA) the Commission referred to *Mabena* and specifically to s 198 and also emphasised the need for legal reform.<sup>97</sup>

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<sup>94</sup> P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 ILJ 845 at 851.

<sup>95</sup> Ibid.

<sup>96</sup> *Mabena and Blue Pointer Trading 341 (Pty) Ltd t/a Immediate Response* (2009) 30 ILJ 222 (CCMA) at 223.

<sup>97</sup> *Molusi and Ngisiza Bonke Manpower Services CC* (2009) 30 ILJ 1657 (CCMA) at 1665.

As can be seen from case law, scrutiny of s 198 indicated that there was a need for legal reform and this has been responded to by the enactment of new legislation regulating TESs.

## 2.6 Summary

The courts embark on an investigation into the relevant facts of each case to establish who *in fact* the true employer is. This is commendable, however it causes uncertainty and there should be certainty in our law regarding this issue. If one cannot say with certainty who the true employer is, then the employee will not know how to enforce his /her rights, and this is undesirable.

## 2.7 Temporary employment services in South Africa and Namibia

Van Eck<sup>98</sup> wrote a paper on TESs in South Africa and Namibia, comparing the situations in each country and considering whether South Africa could learn from its neighbor, where several attempts had been made to ban ‘labour hire’. TESs came to the fore in Namibia in the Supreme Court of Appeal case of *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* (hereinafter referred to as *Africa Personnel Services*). This case will be discussed in detail in Chapter IV.

Van Eck and other writers agree with Benjamin that there was a need for reform in our law.<sup>99</sup> Van Eck notes that business owners in South Africa increasingly sought to ‘externalise’ the traditional full-time, permanent, employer-employee relationship into a triangular TES configuration.<sup>100</sup> Van Eck also examined s 198(1) of the 1995 LRA<sup>101</sup> which affords certainty about the identity of the employer within this triangular relationship and describes some of the

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<sup>98</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ 2010 13(2) *Potchefstroom Electronic Law Journal* 107

<sup>99</sup> See for example, A. Patel, and F. Coetzee, ‘The battle of the labour brokers’ *Without Prejudice* Vol 12 Issue 3 (April 2012) 45 and S. Harvey, ‘Labour brokers and workers’ rights can they co-exist in South Africa?’ (2011) 128 *SALJ* 100 at 101.

<sup>100</sup> Also see J. Theron, ‘The shift to services and triangular employment: Implications for labour market reform’ 2008 29 *ILJ* 1-22 at 1; J. Theron, ‘Employment is not what it used to be’ 2003 24 *ILJ* 1247-1282 at 1271; J. Theron, ‘Intermediary or employer? Labour brokers and the triangular employment relationship’ 2005 26 *ILJ* 618-649 at 618.

<sup>101</sup> Also see s 82 of the Basic Conditions of Employment Act 75 of 1997.

responsibilities of the TES and the client.<sup>102</sup> He confirms that s 198(2) continues to support a legal fiction by establishing the TES as the employer of the person whose services have so been acquired, and the worker is identified as the employee of the TES. This construction triumphs despite the fact that the employee generally renders services under the supervision and control of the client, is given the tools of the trade by the client and forms part of the client's organisation.<sup>103</sup>

Van Eck also tackles the issue of joint and several liability of the TESs (the deemed employer) and the client in respect of infringements of conditions of service arising from collective agreements concluded at bargaining councils, the minimum and maximum standards as set in the 1997 BCEA, and arbitration awards that regulate terms and conditions of service.<sup>104</sup> A clear omission he identified is that this section does not extend to shared responsibility between the TESs and the client for some of the most significant protections offered by the 1995 LRA, such as protection against unfair dismissal and unfair labour practices committed by the client against its employees.<sup>105</sup> Further, Chapter II of the Employment Equity Act 55 of 1998 (hereinafter referred to as 'the EEA') was intended to protect workers against unfair discrimination in any employment policy or practice founded on arbitrary grounds such as race, sex, gender and so forth, but not in respect of unequal conditions of service.<sup>106</sup>

Van Eck highlights the fact that the TES and employer will both be held jointly and severally liable where, for instance, a TES commits an act of discrimination against an employee on the

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<sup>102</sup> B.P.S. Van Eck, 'Temporary employment services (labour brokers) in South Africa and Namibia' 2010 13(2) *Potchefstroom Electronic Law Journal* 107 at 109.

<sup>103</sup> Section 200A of the 1995 LRA establishes a presumption to the effect that a person who works under the supervision and control of another person is provided with tools of the trade and forms part of the other person's organisation is an employee of that person. This is also in accordance with common-law tests developed by the courts. See in this regard *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) and *South African Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC).

<sup>104</sup> B.P.S. Van Eck, 'Temporary employment services (labour brokers) in South Africa and Namibia' 2010 13(2) *Potchefstroom Electronic Law Journal* 107 at 109. Also see s 198(4) LRA.

<sup>105</sup> This has been confirmed on a number of occasions. See, for example, *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* (2005) 26 ILJ 2224 (CCMA) and *National Union of Metalworkers of SA v SA Five Engineering (Pty) Ltd* (2007) 28 ILJ 1290 (LC).

<sup>106</sup> In terms of S 10(1) of the EEA "disputes in respect of unfair dismissal and unfair labour practices, which have discriminatory elements, must still be adjudicated in terms of the LRA. In terms of the last-mentioned Act, employees placed by labour brokers are not deemed to be employees of the client."

implied or expressed instructions of a client.<sup>107</sup> Such instructions could for example occur when a client instructs a TES only to provide persons who belong to a particular race group, follow a particular religion or who are not married or pregnant.<sup>108</sup> Van Eck submits that the issue of joint and several liability does not extend to:

“the unequal treatment between permanent employees of a client and those persons placed by a labour broker when it comes to equal pay for similar work and other conditions of service.”<sup>109</sup>

In other words an unequal condition of service does not fall within the meaning of ‘discrimination’ as contained in s 6(1) of the EEA.

## 2.8 *The triangular relationship*

Van Eck looked at a number of cases when dealing with the triangular relationship, which will now be discussed. In the case of *LAD Brokers (Pty) Ltd v Mandla* 2002 (6) SA 43 (LAC), the Labour Appeal Court had to establish whether the TES arrangement was a sham. The court found that it was and accordingly set aside the arrangement and determined that the employee was indeed the employee of the client.<sup>110</sup>

The court adopted a similar approach in *State Information Technology (Pty) Ltd v CCMA and Others* [2008] 7 BLLR 611 LAC. In this case the third respondent employee was retrenched and was given a severance package by the South African National Defence Force (hereinafter referred to as ‘the SANDF’). This package and the relevant regulations had the effect that he could not thereafter be employed by the SANDF. However, the appellant agency wanted to make use of his services. He could however not be employed directly by the SANDF and an agreement was arranged whereby Inventus CC would employ the third respondent and would

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<sup>107</sup> Section 57(2) EEA.

<sup>108</sup> s 6(1) of the EEA stipulates that ‘no employer may unfairly discriminate, directly or indirectly, on a number of grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth’.

<sup>109</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ 2010 13(2) *Potchefstroom Electronic Law Journal* 107 at 110.

<sup>110</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ 2010 13(2) *Potchefstroom Electronic Law Journal* 107 at 118.

supply his services to the appellant. In the ensuing proceedings for alleged unfair dismissal, an award was made by the CCMA making the appellant and Inventus CC jointly and severally liable to pay compensation to the employee. The labour court set aside that award on review and held that only the appellant was liable to pay the compensation awarded. The appellant appealed against that order. The labour appeal court noted that the sole issue before it was the nature of the contract, and who was the third respondent's employer.<sup>111</sup>

The labour appeal court in its earlier judgment in *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) adopted a 'reality test' to apply to a situation where:

“a company or close corporation was interposed between an employer and an employee, and had approached the vexed question of the employment relationship on the basis of the substance of the arrangements between the parties as opposed to the legal form adopted.”<sup>112</sup>

The court held that when determining whether there exists an employment relationship, a court must apply three criteria consistent with the principles in the *Denel* judgment. These criteria are the following:-

- (1) “An employer's right to supervision and control;
- (2) Whether the employee formed an integral part of the organization with the employer; and
- (3) The extent to which the employee was economically dependent on the employer.”<sup>113</sup>

After applying these tests to the facts, the court came to the conclusion that the employee had offered his services only to the appellant *via* the conduit of Inventus CC. The court also stated that:-

“[it] accepted the appellant's argument that the employee had not come to court with clean hands in that he was a party to an avoidance scheme, but this had also been the case in the *Denel* decision, where the absence of clean hands did not prevent the court from finding that the

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<sup>111</sup> *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 2234 (LAC).

<sup>112</sup> *Ibid.*

<sup>113</sup> *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 2234 (LAC) at 2235.

employment relationship was between Denel and the respondent employee. Section 198 of the LRA, which applies to temporary employment services, was therefore not applicable. The court below had therefore been correct in finding that the employment relationship was between the appellant and the employee, and that the commissioner had misdirected himself by finding that the employee was employed by Inventus CC.”<sup>114</sup>

Therefore the labour appeal court dismissed the application with costs.

Lastly, Van Eck points out that over the past few years, trade unions have requested employers to conclude agreements to prohibit the use of TESs. In a few instances, they have achieved this goal. This has been achieved in Bargaining Council Agreements of the Motor Industry Bargaining Council and Metal and Engineering Industries which contain provisions for phasing out employees of TESs in certain bargaining units with effect from 1 March 2012.<sup>115</sup>

## 2.9 *Banning temporary employment services*

Harvey’s opinion of TESs concurs with those of Van Eck and Benjamin; she agrees that the problem is the issue of identifying the true employer, which prevents the employee from enforcing his rights against the true employer. She specifically deals with the question of whether TESs should be banned. In her award winning paper, Harvey wrote the following:

“In debating ‘regulation’ versus ‘banning’ and in implying that a threat to brokers entails a threat to temporary work or to job creation, the unions, the employers and the political parties are missing the point. The point is not the existence of labour brokers or their regulation. The point is the undermining of employment rights.”<sup>116</sup>

Harvey expresses the view that the TES industry became unpopular when it became evident that workers’ rights were being undermined. TESs undermine those rights by exploiting a loophole in the 1995 LRA, that of s 198(2) which deems the TES, rather than the client to be the

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<sup>114</sup> Ibid.

<sup>115</sup> Van Eck, BPS. ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 118.

<sup>116</sup> S. Harvey, ‘Labour brokers and workers’ rights can they co-exist in South Africa?’ (2011) 128 *SALJ* 100 at 118.

employer. She termed this provision ‘the disconnect - between the worker and the workplace’. It is important to emphasise, as she does, that ‘the worker is unable to exercise his rights (to fair procedure, to reinstatement, and to collective bargaining) against the party who is in control of the workplace’. Again the issue is that the employer (the TES), by not being in control of the workplace, is unwilling or unable to give effect to the employee’s rights.<sup>117</sup>

According to Harvey, ‘the existing constitutional and legislative protection for workers are comprehensive; it is the deeming provision, rather than inadequate policing (or ‘regulation’), that is the font of the rights limitations.’<sup>118</sup> It is the loophole provision alone that disconnects TES employees from the workplace, and thus from their capacity to exercise their rights. Harvey states that the employers’ lobby is incorrect when it proposes that the failure actually lies with the Department of Labour, or with the trade unions, in their failure to properly apply the existing, allegedly sufficient, legal regulatory framework.<sup>119</sup> Harvey had the following to say about the banning of TESs:

“The repeal of s 198 would not ‘ban’ labour brokers. What it would do is to reflect a change in policy as to who, in the triangular relationship, bears the employer’s duties towards the employee. The broker is in general not able to fulfil those duties; the broker should therefore not be the employer. The current policy has led to differential rights access for labour broker employees as compared to other employees, and in this respect it runs counter to the Bill of Rights. In fact, it is likely that the existing s 198 would itself not withstand constitutional challenge. The repeal of s 198 takes care of the concerns represented by COSATU’s call for a ban.”<sup>120</sup>

## 2.10 *Conclusion*

It is the view of Benjamin, Van Eck and Harvey that TESs should not be banned. It is however clear that all three authors indicate that it is the identification of who the true employer is, that creates one of the biggest problems facing TESs and employees. Case law is however an

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<sup>117</sup> S. Harvey, ‘Labour brokers and workers’ rights can they co-exist in South Africa?’ (2011) 128 *SALJ* 100 at 118 – 119.

<sup>118</sup> S. Harvey, ‘Labour brokers and workers’ rights can they co-exist in South Africa?’ (2011) 128 *SALJ* 100 at 119.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

indication of how the true employer can be identified, and when determining who the true employer is, every case should be interpreted on the relevant facts and follow existing precedent.

## CHAPTER III: SOUTH AFRICAN LAW IN RELATION TO TEMPORARY EMPLOYMENT SERVICES

### 3.1 *The 2014 amendments to the LRA and the BCEA*

The amendments have the effect of significantly varying our laws, and this chapter will be focusing on what these particular amendments mean for our labour regime in relation to TESs.

#### 3.1.1 *Introduction*

As stated earlier the relationship between the TES and the temporary employee is regulated by s 198 of the 1995 LRA. In 2010, a proposal was made that this section be removed, leaving TESs unregulated.<sup>121</sup> The new s 198<sup>122</sup> however differs in that it elaborates extensively on the relationship between a TES and its client, as well as the rights of temporary employees employed by a TES.<sup>123</sup> The 2013 BCEAA specifically focuses on the issue where those earning less than the prescribed earnings threshold are concerned.<sup>124</sup>

### 3.2 *Temporary employment services*

Each relevant amended section will be examined and a short explanation of the likely impact of the new and amended sections to the labour laws will be provided. The amendments in the 2014 LRA include additions to the existing s 198, and the introduction of new sections such as s 198A to s 198D and s 200B.

#### 3.2.1 *Amendments to the s 198*

The first thing to note is the change in the definition of a TES in s 198.

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<sup>121</sup> Du Toit, J. 'Labour broking – The way forward', *Professional Accountant* Quarter 2, (2012) at 20-21.

<sup>122</sup> Labour Relations Amendment Act 6 of 2014.

<sup>123</sup> Du Toit, J. 'Labour broking – The way forward', *Professional Accountant* Quarter 2, (2012) at 20-21.

<sup>124</sup> *Ibid.*

“Section 198 of the principal Act is hereby amended -

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

‘(a) who [render services to, or] perform work for [,] the client; and’...

This amendment entails the removal of the phrase ‘renders a service’, as it may cause some confusion. The amendment clarifies who should be regarded as the true employer. It provides that the employee employed by a TES is not employed by the client, but is merely placed with it to perform temporary work. The new definition clarifies that the TES is the employer.<sup>125</sup>

There is now a definition of “temporary services” in respect of an employee in terms of s 198(2), which is found in s 198A(1), which reads as follows:<sup>126</sup>

“198A(1) In this section, a ‘temporary service’ means work for a client by an employee—

- (a) for a period not exceeding three months;
- (b) as a substitute for an employee of the client who is temporarily absent; or
- (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).”<sup>127</sup>

An important section is that of s 198(4), which determines that the TES and the client will be jointly and severally liable for the contravention of a relevant collective agreement, a binding arbitration award, the Basic Conditions of Employment Act, and a sectoral determination made in terms of the Wage Act 5 of 1957.<sup>128</sup>

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<sup>125</sup> A. Botes, ‘Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers’ (2014) 26 *Samerc LJ* 110 at 118.

<sup>126</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 15. Accessed on 28 May 2014.

<sup>127</sup> s 198A(1) of the 2014 LRAA.

<sup>128</sup> A. Botes, ‘Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers’ (2014) 26 *Samerc LJ* 110 at 118.

### 3.2.2 *Clarifying liabilities and duties: The addition of sections 198(4A) to 198(4F)*

Section 198(4) is now expanded to include ss 198(4A) to 198(4F). These sections provide for the duties of the TES and the regulations regarding joint and several liability of the TES and the client. Subsection (4A) for example determines that should a client of a TES be jointly or severally liable in terms of s 198(4) the employee may institute proceedings against the TES, the client, or both. This entails the appointment of an inspector acting in terms of the BCEA who may enforce compliance with the BCEA against either the TES or the client, or both collectively, while an award in this regard may be enforced against either party.<sup>129</sup> Sections 198(4A) to (198(4F) will be discussed later in this chapter.

### 3.2.3 *Section 198A of the 2014 LRAA*

Section 198A(3) records that only those employees defined as temporary services will be regarded to be actual employees of the TES itself. Employees who do not fall into this definition are considered to be the employees of the client of the TES and not the TES itself.<sup>130</sup> It then follows that a client can only use a TES for three months, before itself becoming the actual employer of the employees of the TES.<sup>131</sup>

Section 198A(4) states that if the assignment of the TES employee is terminated by the client because the client does not want to become an employer in terms of s 198A(3)(b), then that termination is deemed to be a dismissal. Thus if the client terminates the contract with the TES upon the expiry of the three month period, but still requires the services rendered by such employee/s (which it would then find elsewhere), then it is deemed to be a dismissal of the employee/s of the TES. It therefore has the effect that if a client has any work performed by the TES employee that would last longer than three months, it will by law become the employer of

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<sup>129</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 119 -120.

<sup>130</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 16. Accessed on 28 May 2014.

<sup>131</sup> Section 198A(1)(a), 2014 LRA.

the employee.<sup>132</sup> This seems completely arbitrary, and would force a client to employ employees for whom a client never financially or otherwise prepared for. It also seems completely irrational for the law to force a client to employ people that could potentially have serious negative implications for a client's business.

Section 198A(5) goes further and provides that any employee who is deemed to be an employee of the client by way of the application of s 198A(3)(b) is then entitled to enjoy all the same employment conditions and benefits as the client's permanent staff complement, unless a justifiable reason for differentiation can be shown.<sup>133</sup> The justified reasons can be determined by taking into consideration the guidelines set out in s 198A(D). (The guidelines are discussed hereunder). Simply put this means that TESs can only be used for three months, and then if the client still requires the services to be rendered, it must employ the employees on the same basis as their full-time employees.<sup>134</sup>

Lastly, it is prescribed in s 198A(2) that the provisions of s 198A will only apply to those employees earning less than the BCEA threshold prescribed in terms of s 6(3) of the BCEA from time to time.<sup>135</sup> As at 1 July 2014 the threshold is R193 805.00.

Snyman is of the opinion that the above mentioned provisions negate an important part of the instances where TESs are used. Clients do not want to be burdened with the duties that accompany the obligation of employing temporary workers as permanent employees after three months. He further states that:

“...the very reason why a client would use a temporary employment service is because the client does not want to be burdened with the employment of personnel and all the duties and obligations

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<sup>132</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 16. Accessed on 28 May 2014. Also see C. Bosch, ‘The proposed 2012 amendments relating to non-standard employment: What will the new regime be?’ (2013) 34 *ILJ* 1631 at 1638.

<sup>133</sup> Also see C. Bosch, ‘The proposed 2012 amendments relating to non-standard employment: What will the new regime be?’ (2013) 34 *ILJ* 1631 at 1639.

<sup>134</sup> S 198A(1)(a). Also see Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 16 -17. Also see C. Bosch, ‘The proposed 2012 amendments relating to non-standard employment: What will the new regime be?’ (2013) 34 *ILJ* 1631 at 1640.

<sup>135</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 17. Accessed on 28 May 2014.

associated with it where such a service could be provided to it by a legitimate service provider. The fact is that businesses legitimately, and often, outsource various business functions, such as cleaning, security, marketing, IT and the like, and then legitimate service providers would provide such services by way of their own employees... the simple point is that temporary employment services are used for a purpose, not a period.”<sup>136</sup>

Snyman focuses unduly on the time limit stipulated in s 198A(1)(a). This section stipulates that a temporary employee employed for longer than three months must not be treated differently than a permanent worker. If there is no compliance with the three month time limit in s 198A(1)(a) it would seem to be too strict. It therefore depends on the consequences. It is suggested, depending on the type of work, that the three month period is too short. An extended period would properly equip the client to evaluate an employee and determine whether the employee is suitable for a permanent position.

Snyman acknowledges that TESs can be abused by clients wishing to avoid being held liable as employers, but he is of the view that it is not acceptable to legislate to deal with such unscrupulous conduct, to the detriment of employers and legitimate TESs’ interests. The labour court has always had the power in terms of existing provisions of the 1995 LRA to call employers to account if they attempt to avoid their obligations by using any kind of device or a sham. Examples of such judgments are *Mahlamu v Commission for Conciliation, Mediation & Arbitration & Others* (2011) 32 ILJ 1122 (LC) and *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another* (2001) 22 ILJ 120 (LC).

In *Mahlamu v CCMA & Others* [2011] 4 BLLR 381 (LC) the applicant was a security guard engaged on a contract which stated that it would expire automatically on termination of the contract between the employer and its client, or if the client no longer required the applicant’s service for whatsoever reason. The client subsequently cancelled the security contract, and the respondent employer then informed the applicant that his services were no longer required because it had no alternative position for him. It was held by the respondent commissioner that because the client no longer required the applicant’s services, the employment contract between

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<sup>136</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 17. Accessed on 28 May 2014.

the applicant and his employer had terminated automatically. The applicant was accordingly unsuccessful in proving that he had been dismissed. The applicant took the matter on review, arguing that the commissioner had made a material error of law by finding that he had not been dismissed.<sup>137</sup>

On review, the court noted that the labour courts did not agree on the legal consequences of contracts of service, when the duration of which are linked to the happening of some external event.<sup>138</sup> When the court dealt with that issue in *SA Post Office Ltd v Mampeule* [2010] 10 *BLLR* 1052 (LAC), the Labour Appeal Court had endorsed the view that:

“parties may not contract out of the fair dismissal requirements of the Labour Relations Act 66 of 1995 (“LRA”), and that in such cases the employer must still prove that the termination clause was fairly triggered.”<sup>139</sup>

The effect of the commissioner’s decision in the case of *Mahlamu v CCMA & Others* [2011] 4 *BLLR* 381 (LC) was that the applicant’s security of employment was entirely dependent on the will or whim of the client. The client could at any time, and for any reason, terminate the applicant’s services when it was no longer required and that done, the contract would terminate automatically and by operation of law, leaving the applicant with no remedy.<sup>140</sup> The court noted that the 1995 LRA states that every employee has the right not to be unfairly dismissed. The question was, accordingly, whether contracts of the above nature were permitted by the 1995 LRA.<sup>141</sup> The court held that:

“employers and employees cannot contract out of the protection against unfair dismissal afforded to the employees whether through the device of “automatic termination” provisions or otherwise: a contractual device that purports to render the termination of a contract of employment as something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of s 188 of the LRA, is the very mischief that s 5 of the Act prohibits.

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<sup>137</sup> *Mahlamu v CCMA & Others* [2011] 4 *BLLR* 381 (LC).

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Mahlamu v CCMA & Others* [2011] 4 *BLLR* 381 (LC) at 381 - 382.

<sup>141</sup> *Mahlamu v CCMA & Others* [2011] 4 *BLLR* 381 (LC) at 382.

Secondly, a contractual term to this effect does not fall within the exclusion in s 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.”<sup>142</sup>

The court further stated that the above reasoning was not applicable to contracts where termination is set by the occurrence of a particular event, in other words a condition of some sort. In cases like these, there is no conversion of a right not to be unfairly dismissed, into a conditional right. The effect of a provision which links the termination of an employment contract to a defined act of misconduct or incapacity, or a decision by a third party, is that the fair dismissal provisions of the 1995 LRA are flouted.<sup>143</sup>

The court found that the commissioner did in fact commit a reviewable error of law, and set the award aside. The court found that since the applicant’s dismissal was as a result of the employer’s operational requirements, the applicant should refer the matter to the labour court or, if s 189A(12) applied, for arbitration.<sup>144</sup>

The provisions in s 6(3) of the 1997 BCEA afford employees earning below a specified amount certain additional rights. Surely it cannot be suggested that only persons earning below the threshold can be subject to abuse. Any employee can be subjected to abusive practices, irrespective of the value of their earnings.<sup>145</sup> An interesting argument by Snyman is that a particular transaction is either a sham or it is not, and must be treated as such if it is irrespective of the employee earnings.

Snyman argues that the issue of the earnings threshold is now being used for a purpose it was never intended for, and as such, is an arbitrary, artificial and an unjustified distinction. The original purpose of the threshold was to apply to issues of working hours and overtime; the whole intention of s 6(3) was that employees earning more than a certain amount of money would be adequately compensated for any working hours and extra time worked, without having to be paid extra or having their working hours limited. Highly paid employees, to whom the s

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> *Mahlamu v CCMA & Others* [2011] 4 BLLR 381 (LC) at 382.

<sup>145</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labourmet%20-%20Commentary%20on%20Pr...> Pg 17 – 18. Accessed on 28 May 2014.

6(3) exception applies, still enjoy the same protection in respect of notice provisions, leave, sick leave and other benefits in terms of the 1997 BCEA irrespective of being subject to the threshold.<sup>146</sup> The same threshold is used for the purposes of the presumption of employment in terms of s 200A of the 1995 LRA, but unlike s 200A, which just creates a rebuttable presumption, the s 198A amendments make actual substantive changes to legal provisions and the employment contract and relationship.<sup>147</sup>

### 3.2.4 Sections 198(4A) to (F) of the 2014 LRAA.

The substance of these sections will be discussed. Section 198(4A) deals with the issue of joint and several liability. This means that the employee can institute legal proceedings against the TES, the client or both. Any award or order can also be similarly imposed. This creates a problem because the award or order can be enforced against a party that was not an actual party to legal proceedings, which flies in the face of the fundamental principle of *audi alteram partem*.<sup>148</sup> It is however practice to cite both parties.

Section 198(4B) requires a TES provider to provide an employee it allocates to a client with written particulars of employment that conform to s 29 of the 2013 BCEAA. Section 198(4C) provides that an employee may not be employed by a TES on terms and conditions of employment which are not permitted by the 2014 LRAA, any employment law, sectoral determination or collective agreement concluded in a bargaining council, applicable to a client to whom the employee renders services.

Section 198(4D) provides that the issue of whether an employee of a TES is covered by a bargaining council agreement or sectoral determination, must be determined by reference to the sector and area in which the client is engaged.

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<sup>146</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 18. Accessed on 28 May 2014.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

Section 198(4E) states that in any proceedings brought by an employee, the labour court or an arbitrator may (a) determine whether a provision in an employment contract or a contract between a TES and a client complies with subsection (4C); and (b) make an appropriate order or award.

Section 198(4F) states that TESs must be registered in terms of legal provisions to be prescribed and a business may not claim non-registration as a defence to any of the provisions of s 198 and s 198A.

### 3.2.5 *Section 198D of the 2014 LRAA*

The CCMA, in terms of s 198D, will have jurisdiction to deal with disputes as to whether the provisions of the new s 198A (relating to temporary employment services), 198B (fixed term contract employees) and s 198C (part time employees) apply in a particular case, and also to interpret such provisions. Section 198B and s 198C do not relate to TESs and will therefore not be discussed here. When it comes to the CCMA establishing what constitutes ‘differentiating treatment’ it must take into consideration the elements stipulated in s 198D(2)(a) – (d) which are the seniority of an employee, experience and length of service of an employee, merit, the quantity and quality of the work performed and any other criteria of a similar nature not prohibited by s 6(1) of the 1998 EEA.<sup>149</sup>

### 3.2.6 *Section 200B of the 2014 LRAA*

Section 200B(1) states that ‘for the purposes of this Act and any other employment law, ‘employer’ includes one or more persons who carry on associated or related activity or business by or through an employer, if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law’. Subsection (2) states that ‘if more than one person is held to be the employer of an employee in terms of subsection

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<sup>149</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...> Pg 11 – 12. Accessed on 28 May 2014.

(1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law’.

Section 200B is introduced to give the employee the opportunity to establish in any proceedings who is the true employer of the employee, despite of any arrangement or structure of the contract that may exist, in terms of which employees are actually employed through an intermediary or by another third party. Thus an employee can claim employment with a primary employer where multiple or alternative employers are associated in the same business or conduct activities in the same business, provided it can be shown that the intent of multiple or alternative employers is to circumvent the provisions of the 2014 LRAA or any other employment law. The employee can even claim that he/she has multiple employers in such circumstances, and can hold all such employers jointly and severally liable for employment law contraventions or enforcement. This provision seeks to address deliberate avoidance by employers of employment law provisions.<sup>150</sup>

### 3.3 *Issues not covered by the amendments*

Issues such as the illegitimate automatic terminations by way of resolutive clauses, remuneration and disguised employment did not enjoy specific attention in the 2014 LRAA.<sup>151</sup> These issues will be discussed next.

#### 3.3.1 *Remuneration*

It is generally accepted that employees of TESs are often paid much less than permanent employees. The reason for this could be that the employee’s wages are paid from the fee the client pays the TES. Of concern is the fact that there are no legislative provisions or sectoral determinations made for the minimum wages of these types of employees. This leaves the parties free to determine the amount the employee is to be paid within the first three months, for the duration of the temporary contract. It is suggested that a sectoral determination be drawn up,

<sup>150</sup> Snyman, S. 10 April 2012. <https://www.psiberworks.com/.../Labournet%20-%20Commentary%20on%20Pr...>; pg 12. Accessed on 28 May 2014. Also see C. Bosch, ‘The proposed 2012 amendments relating to non-standard employment: What will the new regime be?’ (2013) 34 *ILJ* 1631 at 1643 - 1644.

<sup>151</sup> A. Botes, ‘Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers’ (2014) 26 *Samerc LJ* 110 at 135.

providing a minimum wage for TES employees. The creation of such a sectoral determination is made possible by s 51 of the 2013 BCEAA. When determining the minimum wage it is important that the interests of all the parties concerned should be promoted.<sup>152</sup>

### 3.3.2 *Disguised employment*

The TES and/or the client sometimes avoid restrictive labour legislation by deeming the employee to be an independent contractor. This practice is not prohibited in any labour legislation and it can be argued that s 198(3) of the 2014 LRAA even recognises and supports the possibility that an employee be considered as an independent contractor by stating that an independent contractor will not be considered as the employee of the TES, and the TES will not be that contractor's employer, despite the provisions of sections 198(1) and 198(2).<sup>153</sup>

The situation does arise where all the parties concerned prefer this triangular relationship. It is only where the client and the TES disguise the employment relationship to avoid labour legislation that the issue of disguised employment becomes a problem.<sup>154</sup>

### 3.4 *Conclusion*

It remains to be seen whether the 2014 LRAA will improve the lot of TES employees. TESs will have to be strictly regulated to ensure compliance.

A major effect of the new law is that the period for which an employee may be employed as a temporary worker is capped at three months. This will eliminate the problem of employees being kept in temporary positions for years on end, with no guarantee of ever being appointed permanently. The new legislation states that an employee employed for longer than three

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<sup>152</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 135; Also see P. Benjamin, 'Informal Work and Labour Rights in South Africa', (2008) 29 *ILJ* 1579 at 1585.

<sup>153</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 136; Also see P. Benjamin, 'Informal Work and Labour Rights in South Africa' (2008) 29 *ILJ* 1579 at 1582.

<sup>154</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 136.

months 'must not be treated differently than their permanent counterparts', subject to certain exceptions (which were discussed earlier).

Jacques van Wyk, an employment law specialist, commented that TESs have become a highly regulated sector and states that some commentators believe that for all intents and purposes, TESs have met their end.<sup>155</sup>

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<sup>155</sup> <http://www.moneyweb.co.za/moneyweb-safm-market-update/r-1738>. Accessed on 28 May 2014.

**CHAPTER IV: THE INFLUENCE OF BOTH THE INTERNATIONAL LABOUR  
ORGANISATION AND NAMIBIA ON SOUTH AFRICA**

4.1 *The International Labour Organisation and the Private Employment Agencies Convention 181 of 1997*

The International Labour Organisation (hereinafter referred to as ‘the ILO’) adopted the Private Employment Agencies Convention, 1997 (hereinafter referred to as the ‘1997 PEAC’) on 19 June 1997.<sup>156</sup> South Africa is a member of the ILO but has not ratified this convention as yet. The 1997 PEAC is a short convention consisting of only 22 Articles. This convention specifically deals with TESs or as the convention refers to them, ‘private employment agencies’. The author will discuss relevant articles of the convention. The 1997 PEAC is limited and covers aspects of TES’s very broadly, acting as a framework for member states. On reading the convention it is simply laid out and straight forward.

The ILO in Article 1 of the 1997 PEAC defines a TES as any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

- “(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
- (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (a "user enterprise") which assigns their tasks and supervises the execution of these tasks;
- (c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the

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<sup>156</sup> Private Employment Agencies Convention, 1997 (No. 181) Convention concerning Private Employment Agencies (Entry into force: 10 May 2000) Adoption: Geneva, 85th ILC session (19 Jun 1997). [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312326](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326). Accessed on 1 September 2014.

provision of information, that do not set out to match specific offers of and applications for employment.”<sup>157</sup>

One purpose of this Convention is to allow the operation of TESs as well as the protection of the workers using their services, within the framework of its provisions.<sup>158</sup> The 1997 PEAC sets out very generally the protection that TES employees should receive. An example is that a TES shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.<sup>159</sup> A member of the ILO shall, after consulting the most representative organizations of employers and workers, ‘adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other members, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by TESs. These shall include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses’.<sup>160</sup>

The 1997 PEAC goes on to state that a member of the ILO shall, ‘in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by TESs in relation to issues such as: freedom of association; collective bargaining; minimum wages; working time and other working conditions; statutory social security benefits; access to training; occupational safety and health; compensation in case of occupational accidents or diseases; compensation in case of insolvency and protection of workers claims; maternity protection and benefits, and parental protection and benefits.’<sup>161</sup> The 1997 PEAC sets out the above issues without defining or elaborating on any of them. It therefore follows that the ILO offers guidelines to member states, and that it should always be considered when developing labour laws, but should not be interpreted too strictly. South African employment laws are consistent with the 1996 Constitution and the 1997 PEAC.

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<sup>157</sup> Private Employment Agencies Convention, 1997 (No. 181) Convention concerning Private Employment Agencies (Entry into force: 10 May 2000) Adoption: Geneva, 85th ILC session (19 Jun 1997) Article 1(1). [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312326](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326).

Accessed on 1 September 2014.

<sup>158</sup> Private Employment Agencies Convention, 1997 Article 2(3).

<sup>159</sup> Private Employment Agencies Convention, 1997 Article 7(1).

<sup>160</sup> Private Employment Agencies Convention, 1997 Article 8(1).

<sup>161</sup> Private Employment Agencies Convention, 1997 Article 11.

#### 4.2 *Namibia and the International Labour Organisation*

Namibia and the ILO will be discussed in light of the *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* case (hereinafter referred to as ‘*Africa Personnel Service case*’). Van Eck discussed a situation in Namibia, similar to that in South Africa, where the banning of TESs was called for. Van Eck stated that the banning of TESs would be unconstitutional and result in substantial job losses.<sup>162</sup> Namibia had the opportunity of dealing with the matter in the Supreme Court of Appeal (SCA). The SCA in this case held that the banning of TESs (in Namibia) was unconstitutional. This case will be discussed below.

In his article,<sup>163</sup> van Eck elaborated on the situation in Namibia, where in 2007 intense debates preceded the regulation of labour hire.<sup>164</sup> Namibians still remember the apartheid policies and an inhumane TES system which remained a politically charged issue.<sup>165</sup> There were arguments in favour of the regulation of TESs, rather than abolishing them completely, and then there were arguments in favour of banning TESs altogether. TESs were compared to slavery, and it was argued that slavery could not be regulated in an attempt to give it a humane character.<sup>166</sup>

The debate resulted in the withdrawal of the initial proposal seeking to regulate TESs, with an outright ban on the triangular relationship being imposed in its place. This was backed up by

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<sup>162</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 112.

<sup>163</sup> *Ibid.*

<sup>164</sup> GN R 898 in GG 32555 of 11 September 2009 Hansard of 27 June 2007 22–23, 25 and 30, as referred to in *Africa Personnel Services* para. 7. “The debate was preceded by LARRI [www.larri.com.na](http://www.larri.com.na). The main findings of this report suggested that although the provisions of Namibian labour law apply to labour hire companies as well, the practice of employment at will is applied by labour brokers; labour hire is hardly a springboard for permanent jobs; and the most significant problems experienced by labour hire workers are the lack of benefits and job security and low wages. The LARRI report concluded with the recommendation that the labour hire system be abolished in Namibia.”

<sup>165</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* at para 7–8.

<sup>166</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 112.

criminal sanction.<sup>167</sup> Section 128 of the Namibian Labour Act 6 of 1992 (hereinafter referred to as ‘the NLA’) read as follows:<sup>168</sup>

128. “Prohibition of labour hire
- (1) No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party.
  - (2) [...]
  - (3) Any person who contravenes or fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding N\$80,000.00 or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.”

Namibia is a member of the ILO and the Namibian Constitution provides that the state must adopt policies aimed at ‘adherence to and action in accordance with the International Conventions and Recommendations of the ILO.’<sup>169</sup> Namibia is however not a signatory to the ILO’s Private Employment Agencies Convention,<sup>170</sup> which strives to provide guidelines in respect of TESSs.<sup>171</sup> The Namibian Constitution guarantees a number of fundamental rights and freedoms, including human rights such as the right to freedom from slavery and forced labour,<sup>172</sup> equality and freedom from discrimination,<sup>173</sup> freedom of association<sup>174</sup> and, significantly for the purposes of this discussion, all persons’ right to practise any profession, or carry on any occupation, trade or business.<sup>175</sup> The South African Constitution contains a similar provision.<sup>176</sup> The 1992 NLA’s prohibition of labour hire would have taken effect on 1 March 2009, but on 29

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<sup>167</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 112.

<sup>168</sup> *Ibid.*

<sup>169</sup> Art 95(d) Namibian Constitution.

<sup>170</sup> 181 of 1997 (hereafter ILO’s Agencies Convention).

<sup>171</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 113.

<sup>172</sup> Art 9 Namibian Constitution.

<sup>173</sup> Art 10 Namibian Constitution.

<sup>174</sup> Art 21(e) Namibian Constitution.

<sup>175</sup> Art 21(j) Namibian Constitution.

<sup>176</sup> Section 22 of the South African Constitution provides that “every citizen has the right to choose their trade, occupation or profession freely”.

February 2009 the Namibian High Court (NHC)<sup>177</sup> postponed its implementation, subject to constitutional review by the SCA in the *Africa Personnel Services* case.<sup>178</sup>

The author will now consider the *Africa Personnel Services*<sup>179</sup> case. *Africa Personnel Services* (a TES) is one of the biggest employers in Namibia. The TES sought to challenge the constitutionality of s 128 of the 1992 NLA on the basis that this section infringed on its fundamental freedom to engage in any profession, or carry on any occupation, trade or business.<sup>180</sup>

The NHC looked at the Roman law origin of the common-law contract of employment and held that the equivalent of that time, the *locatio conduction operarum*, entailed the letting and hiring of personal services in return for monetary return.<sup>181</sup> The court continued to note that:

“One of the other forms of hiring (that is no longer valid today) was slavery, where the owner of the slave could in terms of the *location conduction rei* rent out the object (namely, the slave). It was held that the common-law contract of employment had only two parties to it and that there was no room for interposing a third party, the labour broker, into this relationship.”<sup>182</sup>

Taking into account the latter, it is clear that the NHC compared TESs to slavery and held that such practice should be eliminated.<sup>183</sup> The NHC held that since s 128 of the 1992 NLA rendered labour hire illegal, the TES could therefore not claim a right to conduct such business under the

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<sup>177</sup> Case number A13/2009.

<sup>178</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 114.

<sup>179</sup> Case number A4/2008. Also see Horn, N. and Kanguuehi, K. ‘*African Personnel Services v Government of Namibia and Others*, decided on 1 December 2008. Case No. A4/2008’ *Namibia Law Journal* Vol. 1 Issue 1 (January 2009) 100 – 103.

<sup>180</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 114.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* at para 20–21.

<sup>183</sup> The High Court relied on the ILO’s Declaration of Philadelphia (1944), which confirms that labour is not a commodity. Also see Horn, N. and Kanguuehi, K. ‘*African Personnel Services v Government of Namibia and Others*, decided on 1 December 2008. Case No. A4/2008’ *Namibia Law Journal* Vol. 1 Issue 1 (January 2009) 100 at 103 in this regard.

fundamental freedom of occupation, profession, trade or business.<sup>184</sup> Despite finding in favour of the binding effect of s 128, the NHC did, however, suspend the implementation of the section until the SCA could consider the matter and reach a decision.<sup>185</sup>

The SCA upheld the appeal and consequently s 128 of the 1992 NLA was repealed.<sup>186</sup> A discussion of the case follows. An undivided bench highlighted the fact that the respondents in the matter had never raised the argument in the court *a quo* about allowing a third party into the employment relationship.<sup>187</sup> Had the respondents done so, the appellants could have canvassed and addressed the constitutionality of the common law restrictions relied on – a matter which the court *a quo* did not even consider in its judgment. The SCA significantly mentioned that changes have occurred in the way in which work is done in the contemporary globalised economy.<sup>188</sup> The court held that if:

“contracts of service [had] remained marooned in roman or common law of pre-modern times, the narrow scope of their application would have been entirely inappropriate to address the demands of the modern era.”<sup>189</sup>

When the SCA deliberated on the issue of the legality of TESs, it held that the mere fact that the 1992 NLA declared TESs illegal did not place limits on the ambit of the rights and freedoms contained in the 1990 Constitution, nor on the authority of the SCA to consider the constitutionality of legislative provisions that recognised possible infringements on constitutional rights.<sup>190</sup> The SCA held that:

“statutory, customary or common law restrictions that fall outside the ambit of permissible limitations under Sub-Article (2) are unconstitutional. Impermissible restrictions contained in

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<sup>184</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 114.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17*

<sup>187</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 115.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* at para 23.

<sup>190</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 115.

legislation cannot be considered as ‘legislation lawfully enacted’ ... If the limitation of a fundamental freedom by ‘the law of Namibia is unconstitutional; the scope of the fundamental freedom is not circumscribed by it. To hold otherwise would be to put the proverbial cart before the horse.’<sup>191</sup>

Another argument on behalf of the Government of Namibia in the *Africa Personnel Services* case was that the fundamental freedom protected by Article 21(1)(j) of the 1990 Constitution is linked to human dignity, and this can only apply to a natural person and not to a juristic person.<sup>192</sup> This was rejected by the SCA: it was noted by the SCA that the latter phrase applied to ‘all persons’ and that this could refer to both natural and juristic persons.<sup>193</sup> The court went further and stated that it was vital that a generous and purposive interpretation of the rights be followed.<sup>194</sup> The SCA held that:

“even though labour broking might be associated with the abhorrent history of labour hire of the past the Constitution served as a compass for current and future developments of the law. The SCA recognised that the freedom of trade and occupation is essential to the social, economic and political welfare of society as a whole. This is applicable not only to individuals, but also to those who organise themselves into collectives such as partnerships and companies.”<sup>195</sup>

As stated earlier, Namibia has not ratified the ILO’s Agencies Convention; the SCA however took cognisance of the content of these international guidelines.<sup>196</sup> It is clear that the ILO’s Agencies Convention does not require the banning of TESs, but the aim is to recognise the existence of TESs and to regulate this economic activity to ensure that workers so placed are not exploited.<sup>197</sup>

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<sup>191</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* at para 51.

<sup>192</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 115.

<sup>193</sup> *Ibid.*

<sup>194</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* at para 36–37.

<sup>195</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 116.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

The SCA accordingly had to consider whether the restriction imposed by s 128 of the NLA was reasonable and justifiable in an open and democratic society. The SCA considered the limitation clause and the restrictions regarding the free exercise of fundamental freedoms.<sup>198</sup> The SCA held that:

“anyone who seeks to justify the limitation of a fundamental freedom by law bears the burden to show that the justification falls clearly and unambiguously within the terms of permissible constitutional limitations, interpreted objectively and as narrowly as the Constitution’s exact words will allow.”<sup>199</sup>

This limitation was held to go beyond the permissible limitations of the rights and freedoms guaranteed by the 1990 Constitution, and s 128 of the 1992 NLA was held to be unconstitutional. Thus s 128 of the 1992 NLA was nullified, and the prohibition against TESs in Namibia has been lifted in its entirety.<sup>200</sup>

Van Eck supports the SCA decision. The court adhered to the international standard that does not place an outright ban on TESs, as after all, Namibia is a member of the global market place. The 1990 Constitution was correctly interpreted to protect the right to free economic activity. The court stated that protecting workers placed by TESs is not only achieved by the complete banning of TESs, but also by regulation of the TES industry. By its decision, the SCA endeavoured to strike a balance between the right to freedom of economic activity and the protection of workers’ rights.<sup>201</sup>

#### 4.3 Conclusion

After considering the *Africa Personnel Services* case, it would have been hard to ban TESs in South Africa. The 2014 LRAA is now law, and it is evident that the South African Government

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<sup>198</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 116 – 117.

<sup>199</sup> *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia SA 51/2008 2009 NASC 17* at para 65.

<sup>200</sup> B.P.S. Van Eck, ‘Temporary employment services (labour brokers) in South Africa and Namibia’ (2010) 13(2) *Potchefstroom Electronic Law Journal* 107 at 117.

<sup>201</sup> *Ibid.*

did not entertain the idea of banning TEs. It is also clear that the legislature amended the labour laws to conform to international standards, and to protect temporary employees from further abuse.

## **CHAPTER V: CONCLUSION AND RECOMMENDATIONS**

Four objectives were defined in order to fulfill the aims of this research. Each objective will be discussed, followed by the author's recommendations.

### *5.1 To assess and identify the abuses suffered by temporary employees*

The first objective of this thesis was to assess and identify the abuses suffered by employees employed by TESs. Chapter two considered the issues surrounding the first objective, as follows: the nature of the triangular relationship; identifying the true employer; disguised employment relationships; joint and several liability; termination of employment contracts; and an overview of how South Africa regulates TESs. The abuses suffered by employees employed by TESs were identified. The triangular relationship was regulated by s 198 of the 1995 LRA. In time it became clear that s 198 did not provide sufficient regulation as there was so much more to the triangular employment relationship that needed to be statutorily recognized and regulated to prevent exploitation of employees and the infringement of their rights. This research identified all of the problems that temporary employees of TESs face, and assessed each problem. TESs' employees do not have the same benefits as permanent employees, and are paid less than their permanent counterparts. They are also dismissed without justifiable reasons when a client decides to end their relationship with the TES, or when it no longer requires the services of the employee, or even if it just dislikes the employee.

The case of *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC), however held that such clauses in employment contracts are against public policy. And whereas trade unions have also highlighted a number of negative issues, in a country with a high level of unemployment TESs can provide access to jobs for many people. It became evident therefore, that s 198 of the 2014 LRAA addressed many, but not all of these problems.

## 5.2 *Considering how the amendments seek to improve the laws regulating temporary employment services*

The second objective of this thesis was to consider how the amendments seek to improve the laws regulating TESs. All the relevant stakeholders have given their input, some for and some against TESs. Public policy is a great and influential part of our law and it is of vital importance in a democratic society. Public policy will no doubt continue to influence the interpretation and application of the new law by the CCMA and the judiciary. Chapter three considered the new laws regulating TESs.

One of the biggest problems that temporary employees had to face, was identifying their true employer. The new definition in s 198 is now clear, stating that the TES is the employer, and providing for the joint and several liability of the TES and client in certain circumstances. A temporary employee had no right of recourse against the client, but now in terms of s 198(4) the temporary employee can hold both the TES and the client jointly and severally liable for any of the listed contraventions against the employee. Section 198(4) is now expanded to include ss 198(4A) – 198(4F). These sections provide for the duties of the TESs and the regulations regarding the joint and several liability of the TES and the client.

## 5.3 *Assess the influence of both the International Labour Organisation and Namibia on South Africa*

Chapter four considered this objective. South Africa also had to face the issue of potentially banning TESs when COSATU called for them to be banned. The South African Government instead elected to amend the 1995 LRA to bring it in line with the ILO, and to accommodate temporary employees more effectively.

Namibia also faced the issue of legislation banning TESs but the Namibian SCA held that banning would be unconstitutional in the *Africa Personnel Services* case. It is not unlikely that the Namibian SCA's decision influenced the new laws in South Africa.

#### 5.4 *Considering the effect of the amendments on temporary employment services*

The final objective of this thesis was to assess the effect of the amendments on TESs. In an ever developing economic environment, it will be necessary to constantly review these laws to keep up with changes.

TESs will continue to operate as normal and will be unaffected by the amendments where services are only to be rendered for a short duration of time of less than three months. However, the TESs who render services for longer periods of time will be most affected by these new provisions.<sup>202</sup>

In a democratic and developing country, the labour force is of utmost importance, and labour legislation should afford the same rights to both permanent and temporary employees. The author believes that this is what these new Acts aspire to achieve, despite the fact that issues such as unequal remuneration and disguised employment were not addressed by the amendments.

Joint and several liability has addressed accountability in the tripartite relationship, which is a positive development. In Botes' opinion, neither the TES nor the client should be allowed to evade their responsibilities by hiding the true nature of the relationship.<sup>203</sup> This view cannot be argued with.

#### 5.5 *Hypotheses 1 and 2: Is there a need for further legal reform as far as temporary employment services are concerned; and are temporary employment services a necessary, lucrative and established manner of job creation in South Africa*

Although TESs need to be regulated, they may find it virtually impossible to flourish financially. For their income, TESs depend on employees being placed with a client for long periods at a time, resulting in a far greater number of temporary employees being placed, but resulting in far

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<sup>202</sup> H. Pienaar and A. Taylor, Cliffe Dekker Hofmeyr (2013) <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13>. Accessed on 30 May 2014.

<sup>203</sup> A. Botes, 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers', (2014) 26 *Samerc LJ* 110 at 136.

less income potential. For example, an employee will be provided to a client and the TES will earn money for the period that the employee is considered a temporary employee, which is three months. But after three months the employee will be employed permanently and the TES will not receive any further income from the client for that specific employee.

The new legal developments will place limitations on TESs.

### 5.6 *Recommendations*

The amendments are now law, but it is difficult to foresee how the amendments will be beneficial to both TESs and their employees. However, it is the author's opinion that even though the amendments are not a complete cure to all the existing problems, they are commendable. Section 198(4)(F) states that TESs must be registered in terms of legal provisions to be prescribed, and a business may not claim non-registration as a defence to any of the provisions of s 198 and s 198A. Therefore it must be the responsibility of government to register TESs, and to establish a regulatory body within the Department of Labour to ensure that TESs comply with the new laws.

Pienaar and Taylor suggest that the only reasonable alternative to traditional TESs would be to revise the whole concept, and to move into the sphere of genuine subcontracting. The answer apparently lies in the wording of s 198 (3)(b) of the 2014 LRAA, which states that:

“an employee not performing such temporary service for the client is-

- i) deemed to be the employee of that client and the client is deemed to be the employer; and
- (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.”

Thus a person who is an independent contractor will not be considered an employee of the TES and will be employed on an indefinite basis.<sup>204</sup> This in effect means that TESs will have to

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<sup>204</sup> H. Pienaar and A. Taylor, Cliffe Dekker Hofmeyr (2013) <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13>. Accessed on 30 May 2014.

establish a new legal entity, which will render a sub contractual service to the client.<sup>205</sup> In order to stay financially viable, TESs will have to ‘evolve’ and create new alternatives, such as this, for the future.

Pienaar and Taylor state that the TES will then have to tender, or propose to take over, the whole of the contract or service previously provided. An example would be if the TES provided 80% of the general workers for a particular client, it would then need to take over all the general workers, and subcontract the work to the client. This would ensure that the pricing reflects the true value of the subcontract,<sup>206</sup> rather than being linked to the number of employees performing the work. The employees will be permanent employees of the new legal entity and may be appointed on a fixed term basis, depending on the entity’s relationship with the client. It is interesting to note that such fixed term arrangements would be acceptable in terms of the 2014 LRAA.<sup>207</sup> It is important to note that the sub contractual relationship must be a genuine one, and not a scheme to circumvent the provisions of the 2014 LRAA.

The above suggestion provides a good opportunity for TESs to render a broader service, where they can also offer to take over payrolls and other relevant services to a client. Pienaar and Taylor’s suggestion therefore has the effect of a TES dealing with subcontracts under another *alias*, or as they state it as ‘another legal entity’. The latter will then extend into the area of fixed term contracts. Thus s 198B will apply to this kind of venture. However fixed term contracts are also subject to strict requirements.<sup>208</sup>

An alternative is that companies may rely on employees who work less than 24 hours a month, being excluded from becoming permanent employees after three months have lapsed. Thus employees could work on a rotational basis; such an arrangement may be useful when skilled labour is not required. Another useful alternative is by not having a ‘comparator’ in permanent

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<sup>205</sup> H. Pienaar and A. Taylor, Cliffe Dekker Hofmeyr (2013) <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13>. Accessed on 30 May 2014.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

employment<sup>209</sup> and this would enable companies to avoid the limitations in terms of the amendments.

TESs are very restricted under the new laws and it is unclear how they will remain financially viable in an era of temporary employment. There is no doubt that they will become highly regulated, and with the new laws it is clear that temporary employees will benefit more than TESs.

In addition, these restrictions place limitations on the right to freedom of trade<sup>210</sup> for the TES industry and it will have to be established whether these limitations are justifiable in terms of s 36 of the Constitution of the Republic of South Africa. It thus follows, and I agree with Pienaar and Taylor, that it is likely that the new laws may be subject to constitutional challenge by the TES industry.

Botes addressed the issue of disguised employment by suggesting that a clause regarding disguised employment could have been added to the 2014 LRAA, in order to protect TES employees. This clause could have stated that ‘parties may not attempt to avoid their duties that arise from an employment contract, by classifying a TES employee as an independent contractor and thereby effectively excluding him or her from the protection offered by labour legislation, provided that such contracts of work may arise legitimately.’<sup>211</sup> If the employee is in fact an independent contractor, all parties should agree that that is indeed the relationship, and the contract must be concluded as a contract for work for a valid reason. The TES must be obliged to make sure that the worker understands what relationship he is agreeing to. It would be inconsistent to ban contracts for work within the triangular relationship, and it would negate s 198(3), which recognises such practices.<sup>212</sup>

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<sup>209</sup> H. Pienaar and A. Taylor, Cliffe Dekker Hofmeyr (2013) <http://www.polity.org.za/article/alternatives-to-labour-brokering-2013-08-13>. Accessed on 30 May 2014.

<sup>210</sup> The Constitution of the Republic of South Africa Act 108 of 1996, Chapter 2 Bill of Rights section 22.

<sup>211</sup> A. Botes, ‘Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers’, (2014) 26 *Samerc LJ* 110 at 136.

<sup>212</sup> A. Botes, ‘Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers’, (2014) 26 *Samerc LJ* 110 at 136 – 137.

Finally the author agrees with Botes that s 198A(3)(b) is not clear about the triangular employment relationship when it supposedly ‘ends’ after three months,<sup>213</sup> leaving both TESs and clients in the dark as to what exactly they are to do after the three month period. Further amendments to this section may be necessary, in order to avoid uncertainty and litigation.

### 5.7 *Summary*

It is clear from the 2014 LRAA, that the relevant stakeholders considered the above issues. The only way to ascertain whether the amendments will be effective is when they are applied in practice. It has been said by various commentators that the amendments will have such an enormous impact on the TES industry that it will not survive.<sup>214</sup> This is perhaps true and if TESs want to continue, they will have to be open to change and willing to evolve in order to stay relevant.

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<sup>213</sup> A. Botes, ‘Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers’, (2014) 26 *Samere LJ* 110 at 137.

<sup>214</sup> J. Van Wyk, <http://www.moneyweb.co.za/moneyweb-safim-market-update/r-1738>. Accessed on 28 May 2014.

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