

**Title: TEMPORARY EMPLOYMENT SERVICES IN
CONTEMPORARY SOUTH AFRICA: A CRITICAL
ANALYSIS**

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DECLARATION

I,do hereby declare that unless specifically indicated to the contrary in this text, this dissertation 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.

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ABSTRACT

This paper focuses on the Temporary Employment Services (TESs) industry in South Africa. The TES system involves three parties to an employment contract, namely: the client, TES and the employee. In this type of employment relationship the TES recruits the employees in order to make them available to work for the client. In terms of the Labour Relations Act 66 of 1995, the TES is the employer of the employee even though the employee works for and is controlled by the client.

The Labour Relations Act 66 of 1995 provided little protection for employees in this type of employment relationship. The Labour Relations Act was amended in 2012. Some of the amendments in the Act affected TESs. The amendments with regards to TESs were aimed at providing better protection for these employees in order to prevent the abuse of TES employees. In August 2014 the Employment Services Act 4 of 2014, came into force. The act regulates the employment services in the republic, this includes TES.

There are many problems associated with the TESs practice such as low wages and lack of protection from unfair dismissals. These problems amongst others have been the reason why some people are opposed to the use of TESs. Trade union (including COSATU) have called for the ban of the practice as they viewed it to be similar to slavery.

In 2007 the Namibian government banned the TESs practice as the practice was seen as being similar to slavery. This ban was however later uplifted by the Namibian Supreme Court which held that that banning the practice infringed on the TESs' right to freedom of trade or occupation. Namibia will be discussed in this dissertation as a guideline to whether a ban would be an effective solution to the problems associated with the TESs industry and whether a ban would be constitutional.

This thesis examines the effect that the Employment Services Act and Labour Relations Act will have on the TES industry. It identifies the problems associated with the labour broking practice and examines whether the above mentioned legislation acts as solutions for these problems. The thesis will also discuss the possible loopholes in the legislation and aims to provide solutions to these loopholes.

Abbreviations

BCEA	-	Basic Conditions of Employment Act.
COIDA	-	Compensation for Occupational Injuries and Diseases Act.
ESA	-	Employment Services Act.
ILO	-	International Labour Organisation.
LRA	-	Labour Relations Act.
LRAA	-	Labour Relations Amendment Act
OHSA	-	Occupational Health and Safety Act.
SWANLA	-	South West Africa Native Labour Association
TES	-	Temporary Employment Services.

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CHAPTER 1 - INTRODUCTION

1.1 Introduction

Sipho¹ is a cleaner at Save Right, one of the leading supermarkets in Durban. He has been working at the supermarket for over two years now. Sipho was assigned to the job by Quickclean, a company that provides cleaners to businesses. Even though Sipho works at Save Right, his salary is paid by Quickclean.

One day Sipho arrives at work to be told that he will no longer be working at the supermarket. The reason for this is that the supermarket has now decided that the cashiers will take on the duty of cleaning the shop. He immediately contacts Quickclean to complain that he has been unfairly dismissed. However, the manager at Quickclean informs him that he has not been dismissed as he is an employee of Quickclean and is still on the books of the company. To date Sipho has not been assigned to a new job and has not received a salary for over 5 months. This is but one example of the type of problems that arise in the TES industry.

The use of Temporary Employment Services (TESs), also known as labour brokers, is a practice that involves three parties to an employment relationship.² These three parties are the TES, the client and the employee. In such a relationship, the TES procures employees to carry out a service for the client.³ This is a controversial employment relationship because employment relationships usually involve two parties, namely, the employer and the employee. In this arrangement the TES is regarded as the employer of the employees, even though they work for the client and on the client's premises.⁴

Previously the practice was provided for in the Labour Relations Act (LRA)⁵. However, there was very little protection afforded to employees in this kind of employment relationship.⁶ The

¹ This represents a hypothetical situation to introduce the topic

² Van Eck B.P.S. "Temporary Employment Services (labour brokers) in South Africa and Namibia." (2010) 13(1) *PER* 107 pg.108

³ Van Eck (see note 2) pg108.

⁴ Section 198A (2) of the LRA 66 of 1995.

⁵ Labour Relations Act 66 of 1995

⁶ Tshoose C, Tsweledi B "A Critique of protection afforded to nonstandard workers in temporary employment services context in South Africa" (2014) 18 *Law, Democracy and Development* 334 pg.338

lack of regulation of the TES industry led to employees being exploited by the client or the TES.⁷ Employees did not enjoy many of the employment rights which standard type employees were entitled to, such as the right to security of employment.⁸ The other challenge associated with the use of TES was the fact that employees of the TES could not effectively exercise their right to join a trade union.⁹ This led to the client and the labour broker being able to avoid their obligation towards the employees.¹⁰

The Labour Relations Act¹¹ and Employment Services Act¹² both provide protection for employees in TES employment relationships. The Labour Relations Amendment Act (LRAA)¹³ now provides protection for employees of the TES. The LRAA now provides a new definition of a TES. In terms of the LRAA, there are situations where the client will be deemed to be the employer of the TESs' employees.¹⁴ The client will be deemed to be the employer of the employees where the work being performed by the employees for the client is not temporary.¹⁵ The Act further provides that employees may take legal action against both the TES and the client as they are jointly and severally liable for the failure to comply with provisions in the BCEA¹⁶, collective agreements, and arbitration awards.¹⁷

The Employment Services Act (ESA)¹⁸ aims to increase job opportunities for work seekers by providing a public employment service.¹⁹ The ESA²⁰ also affords protection to employees of labour brokers by providing that all private employment services must be registered.²¹ This will help reduce the abuse associated with the TES practice because TESs will not be able to carry on

⁷ Ibid pg. 335.

⁸ Cohen T. "The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships" (2014) 35 *ILJ* 2601 pg.2607.

⁹ Bote A "The history of labour hire in Namibia: A lesson to South Africa." (2013) 16(1) *PER* 506 pg. 525.

¹⁰ Tshoose C, (see note 6) pg.339.

¹¹ 66 of 1995.

¹² 4 of 2014.

¹³ 6 of 2014.

¹⁴ Section 198A (3)(b) of the Labour Relations Act 66 of 1995.

¹⁵ Section 198A (3)(b) of the Labour Relations Act 66 of 1995.

¹⁶ 75 OF 1997

¹⁷ Section 198(4A)(a) of the Labour Relations Act.

¹⁸ 4 of 2014

¹⁹ Preamble of the Employment Services Act 4 of 2012.

²⁰ 4 of 2012.

²¹ Section 13(4) of Employment Services Act 4 of 2012.

business if they are not registered. The minister is given the power to revoke the licence of TESs who contravene the provisions of the ESA²² and other labour legislation.²³ This provision will act as a deterrent to TESs from contravening provisions of the LRA²⁴ and infringing employees' rights. The ESA also seeks to stop the commoditization of labour, by prohibiting private employment servicers from charging work seekers a fee.²⁵

The question is, however, whether this legislation goes far enough in protecting employees' rights. There are however many perceived problems that are expected despite these enactments. One of them is that the Labour Relations Amendment Act (LRAA)²⁶, does not extend joint and several liability to matters in respect of unfair dismissal and unfair labour practices.²⁷ Another perceived problem that arises from the legislation is the meaning of the word "deemed" in s198A (3) (b), which provides that under certain circumstances the employees will be "deemed" to be the employees of the client. This and other problems and loopholes will be discussed in later chapters.

The use of TES's has not been supported by all, this is evidenced by a call for the ban of the practice by many, including the Congress of South African Trade Unions (COSATU).²⁸ This is because there have been many problems associated with the TES practice, such as the exploitation of employees, low wages received by these employees, and lack of protection against unfair dismissals. This dissertation looks at the option of an overall ban to determine whether it would be an effective solution to the problems associated with the use of TESs. In considering this question, the position in Namibia regarding the re-legalisation of the practice will be explored.

²² 4 of 2012.

²³ Section 18(1) of Employment Services Act 4 of 2014.

²⁴ 66 of 1995.

²⁵ Section 15(1) of Employment Services Act 4 of 2014.

²⁶ 6 of 2014.

²⁷ Van Eck B.P.S "Regulated flexibility and the Labour Relations Amendment Bill of 2012" (2013) *De Jure* 600 pg. 606.

²⁸ <http://www.retrenchmentassist.co.za/index.php/ra-newsletters/107-labour-brokering-temporary-employment-services-section-198-of-the-labour-relations-acts> accessed on 16/04/2015.

In Namibia the use of TESs was banned through s128 of the Namibian Labour Act.²⁹ In the case of *African Personnel Services v Government of Namibia*³⁰, The Namibian Supreme Court dealt with the issue of the constitutionality of such a ban of the practice in the country. The Supreme Court of Namibia held that s128 was unconstitutional as it infringed TESs' right to freedom of trade and occupation, as provided for in the Namibian Constitution.³¹ The above mentioned judgement, Namibian labour law and other foreign law and international law will be considered in order to determine whether the courts in South African would find that an absolute ban is constitutional.

This dissertation will critically examine the TESs industry in South Africa. It will look at how the LRAA and ESA will affect the TESs practice in South Africa. The aim of the dissertation is also to determine whether the new legislation goes far enough to protect vulnerable workers in the TESs employment relationship.

This research is motivated by the great debate that the TESs industry has caused. There is an ongoing debate between the unions and the employer organisations about whether the TESs practice should be banned or not. It is therefore important to find an effective solution to the problems surrounding the TESs industry.

1.2 Research question

The research questions of this dissertation are: How does the LRAA and ESA affect temporary employment services in South Africa and do these statutes go far enough in protecting the employees in a TES employment relationships?

In answering the above mentioned questions, the dissertation will also discuss the problems associated with the industry and it will consider whether an absolute ban would be an effective solution to the problems surrounding the industry.

²⁹ Van Eck BPS "Temporary Employment Services (labour Brokers) in South Africa and Namibia" (2010) 13(2) *PER* 107 pg.112.

³⁰ *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (2011) 32 *ILJ* 205(Nms).

³¹ *Supra* (note 22) para.118.

The objectives of the dissertation are to provide recommendations to the problems associated with the TESs industry.

1.3. Research methodology

The research method that will be used in this dissertation is desktop research. The dissertation will analyse the LRA³², LRAA³³ and the ESA³⁴. The dissertation will also discuss a variety of cases dealing with the statutory provisions pertaining to TESs, including the interpretation of the new LRAA provisions and Namibian cases dealing with the question of the constitutionality of an absolute ban of TESs. Material from various journal articles which discuss TESs will also be discussed in this dissertation.

This dissertation will also look at foreign law and international law in order to establish possible solutions to the problems surrounding the TESs industry. The paper will focus particularly on Namibian law and the reasons for the re-legalisation of the TESs industry in that country. The reason why Namibia is a significant focus, is because it has a similar judicial system to South Africa. The country also has case law that specifically deals with the issue of a ban of the use of TESs. In conducting this dissertation it is also necessary to look at the ILO and the conventions that pertain to the TESs industry. This will be done to determine whether South African law regulating TESs is consistent with that of international standards.

1.4 Chapter outline

Chapter one has provided a brief overview of the topic including the methodology used in the completion of this dissertation.

Chapter two will discuss the history of TESs in South Africa as well as the previous position in South Africa regarding the TESs practice. The chapter will also look at the developments leading to the amendments of the LRA and the promulgation of the ESA. The effect of the amendments and ESA will not be discussed in this chapter but will be discussed in Chapter three. Chapter two

³² 66 of 1995.

³³ 6 of 2014.

³⁴ 4 of 2014.

will also outline the problems associated with the TESs industry. It will look at the disadvantages that employees in these employment relationships are faced with.

Chapter three discusses the LRAA and ESA. It examines what effect the two pieces of legislation have on the TESs industry. The chapter specifically focuses on s198A of the LRAA and how different it is to the previous version of the Act.

Chapter four will discuss the possible issues that may arise from the new legislation. This chapter examines the loopholes in the legislation and the problems that may arise in interpreting the legislation. The chapter also discusses whether the new legislation goes far enough in protecting employees in the TESs employment relationship. The chapter critically examines the amendments and ESA to see if they provide an effective way of protecting the employee's rights.

Chapter five discusses the recognition of TESs in other jurisdictions. The chapter focuses on Namibia and the country's transition from an absolute ban on the TESs industry to re-legalisation of the industry. The chapter also discusses the law in the United Kingdom and the ILO conventions pertaining TESs; this is done in order to establish whether South Africa meets the international standards in regards to TESs³⁵. Furthermore the chapter examines whether a ban would be an effective solution with regards to the problems associated with the TESs practice. The arguments put forward for the absolute ban of the TESs industry will be analysed. In answering this question, the chapter will discuss the reasons behind Namibia's re-legalisation of the TESs practice. This is done to establish whether a ban would be an effective solution to the problems associated with the practice.

Chapter six is the conclusion. It provides a brief summary of the points in the previous chapters. This chapter will also provide the author's view on the topic. The chapter also discusses a possible way forward with regards to TESs in South Africa.

³⁵ The term equivalent to labour brokering in the United Kingdom and the ILO is labour hire.

CHAPTER 2- HISTORY, PREVIOUS POSITION AND PROBLEMS ASSOCIATED WITH THE PRACTICE

2.1. Introduction

The TESs industry has been in existence for many years in South Africa. The industry was only regulated for the first time in the LRA of 1956.³⁶ The definition of a “TES” has remained substantially the same since the LRA of 1956 up till the Amendment Act of 2014.³⁷

There have been many problems associated with the TESs industry. Some of the problems associated with the industry are low wages³⁸ and the lack of protection for TES employees against unfair dismissal.³⁹ These problems and others will be discussed in greater detail in this chapter.

The problems associated with the labour broking industry has led to many calling for the ban of the TESs industry. The Confederation of South African Trade Unions is one of the organisations that has called for the ban of the practice.⁴⁰

In order to attempt to solve the problems associated with the practice, the legislature proposed a number of amendments to the LRA⁴¹ which were aimed at addressing the issues associated with the TESs practice.⁴²

This chapter provides a brief history of the TESs practice in South Africa and the previous position regarding TESs (before the Amendment Act). The problems associated with the practice will also be discussed.

³⁶ Bote A. “Answers to Questions: A Critical Analysis of the Amendments to the Labour Relations Act 66 of 1995 with Regard to Labour Broking.” (2014) 26 SA MERC LJ 110 pg.110.

³⁷ Ibid.

³⁸ Harvey S. “Labour Brokers and Workers Rights; can they co-exist” (2011) *SALJ* 100 pg.107.

³⁹ Van Eck B.P.S. 109.

⁴⁰ Bote A. “The History of Labour Hire in Namibia; a Lesson for South Africa” (2013) 16(1) *PER* 505 pg.507.

⁴¹ 66 of 1995.

⁴² Bote A “A comparative study on the regulation of Labour brokers in SA and Namibia in light of recent legislative developments” (2015) *SALJ* 100 pg.108.

2.2. *History of Temporary Employment Services in South Africa*

Temporary Employment Services have been in practice since the early 1900s.⁴³ Section 1(3) of the LRA OF 1956, provided that “an agency is any person, who for reward procures services of workers to perform work for clients and for which service such persons are remunerated by the agent”.⁴⁴

After the country’s first democratic election, a ministerial task team compiled an explanatory memorandum in preparation for the LRA of 1995.⁴⁵ The definition of a “labour broker”⁴⁶ in the LRA of 1956, and was adopted in the LRAA of 1995.⁴⁷ The LRA of 1995 however changed the wording of the definition by adopting the term “Temporary Employment Service” in place of the term “agency”. According to s198(1) of the LRA “a Temporary Employment Service is any person, who for reward procures for or provides for the client other persons who render services or perform work for the client, and are remunerated by the TES”.⁴⁸ The LRA of 1995 further provided that the TES would be regarded as the employer where the TES had procured that person’s services for the client.⁴⁹

The TES practice has not however been accepted by all. There has been a call for the ban of the practice by mostly trade unions. In March 2012 there was a march by COSATU protesting against the use of TESs.⁵⁰ COSATU argued that the use of TESs was immoral because it reduced the human dignity of the TES employees.⁵¹ These objections lead to the National Economic Development Labour Council (NEDLAC) considering the need to amend the labour legislation at the time.⁵²

⁴³ Bote A. “Answers to questions: A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour broking.” (2014) 26 *SA MERC LJ* 110 pg.110.

⁴⁴ *Ibid.* pg.61.

⁴⁵ *Ibid.* pg.61.

⁴⁶ Also known as a temporary employment service.

⁴⁷ Bote (see note 43) pg. 110.

⁴⁸ Section 198(1) of the LRA 66 of 1995.

⁴⁹ Van Eck S. “Revisiting Agency Work in Namibia and South Africa: Any Lessons from Decent Work Agenda and Flexicurity Approach” (2014) 30(1) *International Journal of Comparative Labour Law* 49 pg.61.

⁵⁰ Bote A. “The History of Labour Hire in Namibia; a Lesson for South Africa” (2013) 16(1) *PER* 505 pg.507.

⁵¹ Van Eck BPS “Temporary Employment Services (Labour Brokers) in South Africa and Namibia” (2010) 13(2) *PER* 107 pg.118.

⁵² *Ibid.* pg.118.

Initially the Minister of Labour was in favour of the ban on TES.⁵³ However after considering the Regulatory Impact Assessment report which indicated that an absolute ban of the industry would have negative impact on the country's labour market, the Minister's point of view later changed to one of strict regulation of the industry rather than an absolute ban.⁵⁴ It is evident that the government has supported the latter approach as there has been amendments to the LRA of 1995 and the enactment of ESA which aim to provide better protection for TES employees.

In 2010 the Minister of Labour at the time proposed amendments that would affect the TES industry.⁵⁵ The Minister's proposal was that all temporary employment should be deemed permanent, unless the employer could provide reasons why the employment should be temporary.⁵⁶ One of the other proposed amendments made by the minister was the amendment of the definition of employee in the LRA.⁵⁷ It was proposed that only workers who worked on the employer's premises, who were under the direct supervision of the employer should be regarded as employees for the purposes of the LRA.⁵⁸ This would mean that TES employees would no longer be afforded protection under the Act⁵⁹, as they would no longer be regarded as employees.

A Regulatory Impact Assessment of the Amendment Bill was requested by cabinet.⁶⁰ The purpose of the assessment was to identify the possible impact that the amendments would have on the labour market.⁶¹ The assessment indicated that the above mentioned amendments would have negative consequences on the economy and the labour market.⁶² The reasoning was that the amendments reduced the flexibility enjoyed by the clients and as a result clients would no

⁵³ Ibid pg.119.

⁵⁴ Ibid pg.119.

⁵⁵ Bote (see note 43) pg.113

⁵⁶ Ibid.

⁵⁷ Ibid pg.114.

⁵⁸ Ibid pg.114.

⁵⁹ Labour Relations Act 66 of 1995.

⁶⁰ Bote (see note 43) pg.114.

⁶¹ Ibid pg. 114.

⁶² Benjamin P, et al "Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010. A Report prepared for the Department of Labour and the Presidency" (2010) pg. 34-40.

longer want to make use of TESs.⁶³ After considering assessment the proposed amendments were withdrawn and redrafted.⁶⁴

In March 2012 new proposals were put forward.⁶⁵ These proposals were accepted by cabinet and resulted in the amendment of the LRA.⁶⁶

2.3. *Previous legal position*

Section 198 of the LRA⁶⁷ of 1995 governed the TES industry before s198A of the LRAA⁶⁸ came into effect. In terms of the LRA⁶⁹, a TES was defined as “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 TES”.⁷⁰

The definition of a TES above, creates two contracts; one being a commercial contract between the client and the TES, and the other being an employment contract between the employee and the TES.⁷¹ There is no contractual relationship between the client and employee.⁷²

In terms of s 198 of LRA of 1995, the TES was considered to be the employer of the employees procured by the TES to work for the client.⁷³ The TES paid the salaries of the employees but the employees worked under the control of the client. Considering the TES to be the employer is the cause of many of the problems associated with the TES system.

⁶³ Ibid pg. 34-40.

⁶⁴ Ibid pg. 114.

⁶⁵ Bote A “A comparative study on the regulation of labour brokers in SA and Namibia in light of recent legislative developments” (2015) *SALJ* 100 pg.108.

⁶⁶ Ibid pg. 114.

⁶⁷ 66 of 1995.

⁶⁸ 6 of 2014.

⁶⁹ 66 of 1995.

⁷⁰ Section 198(1) of the Labour Relations Act.66 of 1995.

⁷¹ Bote A (see note 43) pg.104.

⁷² Van Eck BPS “Temporary employment services (Labour Brokers) in South Africa and Namibia” (2010) 13(2) *PER* 107 pg.108.

⁷³ Section 198 (2) of the Labour Relations Act 66 of 1995.

Little protection was afforded to employees of the TES under the previous version of the LRA. Although s198 provided that the client and TES were jointly and severally liable for the failure to comply with collective agreements, arbitration awards and provisions in the BCEA⁷⁴ or Wage Act⁷⁵, the liability was limited to where the failure was by the TES.⁷⁶ This means that liability only arose where there was non-compliance on the part of the TES only, and no liability arose where there was non-compliance (with collective agreements, arbitration awards and provisions in the BCEA⁷⁷ or Wage Act⁷⁸) and the committal of unfair labour practices by the client.⁷⁹As a result the client was able to demand that the employee be removed from the premises at any time without having to worry about legal consequences, such as an action for unfair dismissal or an action for unfair discrimination. There is case law to support this contention which shall now be discussed.

In the case of *April v Workforce Group Holdings (Pty) Ltd t/a*⁸⁰the TES employee was unfairly dismissed, without the client being held liable. In this case the client indicated to the labour broker that it no longer required the services of the employee.⁸¹ The labour broker made the employee sign a document notifying her that it was her last day at the client's workplace and that her service with the client had been terminated.⁸² The employee was not given any reason for the termination.⁸³ The court held that the action of the client did not amount to dismissal, as the client was not the employer.⁸⁴

The courts did however come to the rescue of these vulnerable employees in the decision of *Nape v ITNCS*⁸⁵. In this case the client requested that the employee be removed from the client's premises after the TES employee had forwarded an offensive email to another employee using

⁷⁴ Act 75 of 1997.

⁷⁵ Act 5 of 1957.

⁷⁶ Bote A. "A comparative study on the regulation of labour brokers in SA and Namibia in light of recent legislative developments" (2015) *SALJ* 100 pg.103.

⁷⁷ Act 75 of 1997.

⁷⁸ Act 5 of 1957.

⁷⁹ BPS Van Eck "Temporary Employment Services (Labour Brokers) in South Africa and Namibia" (2010) 13(2) *PER* 107 pg. 109.

⁸⁰ 2005 ILJ 2224 (CCMA).

⁸¹ *Supra* para. 4.

⁸² *Supra* para. 6.

⁸³ *Supra* para. 6.

⁸⁴ *Supra* para. 40.

⁸⁵ 2010 31 *ILJ* 2120 (LC).

one of Nissans' (the client's) computer. The labour broker removed the employee from the client's premises and did not find alternative employment for the employee. The employee thereafter filed an application for unfair dismissal against the labour broker. The labour broker argued that it did not dismiss the employee and that it was only following its client's instructions. The court held that it was not up to the labour broker to argue that it was powerless and had to comply with the demands of the client.⁸⁶ The court held that the labour broker had several options where the client demanded that the employee be removed without good reason.⁸⁷ The options given by the court were the following;

- a. The labour broker could have approached the court ;
- b. The labour broker may resist the demand by the client; or
- c. The labour broker may enforce an order against the client ⁸⁸

This judgement has however been criticised as it did not take into account the commercial realities of the relationship between the TES and the client.⁸⁹ The contract between the TES and client is of a commercial nature.⁹⁰ The TES industry is competitive, and each TES aims to provide workers to the client at the lower rate than the next TES. The labour broker is not likely to want to involve its client in an unfair dismissal dispute or go against the client's orders to remove the TES employee from the client's premises. ⁹¹ Doing so would possibly lead to client terminating the commercial contract with the TES, and seeking out another TES to provide workers to the client.

2.4. *Problems associated with the practice*

It is important to look at the problems that are associated with the TESs industry.

⁸⁶ Supra para 48.

⁸⁷ Supra para 24.

⁸⁸ Supra para.77.

⁸⁹ <http://www.legalcity.net/Index.cfm?fuseaction=magazine.article&ArticleID=2151461> accessed 15/11/2015.

⁹⁰ Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments "(2015) *SALJ* 100 pg. 104.

⁹¹ *Ibid.*

The purpose behind the use of TES's is to provide for flexibility in the labour market.⁹² This is advantageous to many businesses. Even though the use of TESs is meant to be advantageous, it often leads to many problems and may in turn be disadvantageous to the employees in this type of employment relationship. Below are some of the problems associated with the triangular employment relationship.

2.4.1 Decent work agenda

The International Labour Organisation's (ILO) decent work agenda is a goal set by the ILO for member states to provide jobs that are decent and productive, by ensuring that the working conditions promote freedom, equality and human dignity.⁹³ The concept of decent work is based on the idea that jobs are a source of "dignity, family stability, peace in the community and economic growth".⁹⁴ The use of TES's is often regarded as a mechanism for exploitation and an obstacle to the goal for the creation of decent work.⁹⁵ This is because the TESs employment relationship replaces the standard type of employment (which is considered to be secure), with an employment relationship with lower wages, less security and little or no employment benefits.⁹⁶

2.4.2 Temporary Employment Service as the employer

The LRA holds the TES as the employer of the employees.⁹⁷ The client is able to make use of services of the employees whenever it deems it necessary,⁹⁸ and incurs little responsibility towards the employees.⁹⁹ The TES is responsible for the employer's duties and obligations owed to the employees. This is problematic as the TES cannot effectively fulfil its duties as the employer as they have no control over the work environment which the employees work. This means that the TES cannot ensure a safe working environment or ensure that the employees are

⁹² Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments" (2015) *SALJ* 100 pg. 115.

⁹³ Cohen T., Moodley L "Achieving decent work in South Africa" (2012) 15(2) *PER* 320 pg.320.

⁹⁴ *Ibid.*

⁹⁵ Tshoose C, Tsweledi B. "A critique of protection afforded to non-standard workers in a temporary employment services context in South Africa" (2014) 18 *Law and Democracy* 335 pg.339.

⁹⁶ *Ibid.*

⁹⁷ Section 198 (2) of the Labour Relations Act 66 of 1995.

⁹⁸ Bote A "The history of labour hire in Namibia: A lesson to South Africa" (2013) 16(2) *PER* 506 pg. 508.

⁹⁹ *Ibid.*

treated fairly and that other requirements of the BCEA are met. The TES is essentially responsible for wages and the administrative burden of hiring someone, as the client has control over the employees and the workplace, and therefore controls aspects of the employment relationship such as working hours, breaks, safe working environment and equality in the workplace.

2.4.3 Lower wages.

The TES system is largely focused on providing temporary employees to the client at a lower price, than other TESs. The TES seeks to offer its employees to the client at a competitive price.¹⁰⁰ This is often at the expense of the employees. The wages the employees receive are dependent on the price that the labour broker offers its service to the client.¹⁰¹

Benjamin¹⁰² suggest the solution is not a provision that the TES employees should receive the same wages as the permanent staff of the client as this fails to take into account the difference in skills between the two types of employees.¹⁰³ He suggests that the labour legislation should rather have a requirement that the employer have a rational system that is applied consistently to determine remuneration.¹⁰⁴ Under this requirement the employer would have to be able to show that differentiation is based on a rational and objective criteria. Another suggestion put forward in the assessment is that that the relevant bargaining councils should set minimum wages for atypical employees.¹⁰⁵

2.4.4 Job security

There is little job security in the triangular employment relationship.¹⁰⁶ In terms of the court in the case of *National Education Health & Allied Workers Union v University of Cape Town &*

¹⁰⁰ Harvey S. "Labour Brokers and Workers Rights; can they co-exist" (2011) *SALJ* 100 pg.107.

¹⁰¹ *Ibid* pg. 108.

¹⁰² Benjamin P, et al "Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010. A Report prepared for the Department of Labour and the Presidency" (2010) pg. 18.

¹⁰³ *Ibid* pg.18.

¹⁰⁴ *Ibid* pg.19.

¹⁰⁵ *Ibid* pg.19.

¹⁰⁶ Bote A. "The History of labour hire in Namibia: a Lesson to South Africa" (2013) 16(1) *PER* 505 pg. 508.

*others*¹⁰⁷ the Constitutional Court held that the right to fair labour practices includes the right to security of employment.¹⁰⁸ The court further held that this encompasses the right not to be unfairly dismissed.¹⁰⁹ Even though the LRA provides for this right in s185, it is one of the rights that are infringed in the TES employment relationship, as employees are summarily dismissed at the will of the client and TES. The excuse often used by labour brokers in such situations is that the removal of the employee from the client's premises does not amount to dismissal, as the employee is still on the pay roll of the TES and is merely waiting to be assigned to a new client.¹¹⁰ The TES system operates on a no work no pay basis.¹¹¹ This means that the employee only receives an income during the periods when they have been assigned to work for a particular client.¹¹² During the period of time that an employee waits to be assigned to a client, he or she does not perform any work and therefore does not get paid. This means that during this period the employee has no income.¹¹³ The argument that the employee is not dismissed and remains on the books of the labour broker is therefore problematic as the employees' conditions are identical to that of an unemployed person, as they do not perform any work or receive an income.¹¹⁴

The employment relationship is of an indefinite nature, in the sense that although the contract is categorised as being temporary, the TES employees often continue to work on the clients' premises long after the assignment period has come to an end, without being made to sign a new contract with new terms.¹¹⁵ This means that the employee is not informed as to when the assignments end. The client often keeps the employee on for a long period of time without making the employee a permanent employee.¹¹⁶ This means that experienced workers are

¹⁰⁷ 2003 (3) SA 1 (CC).

¹⁰⁸ *NEHAWU v University of Cape Town & Others* supra para. 24.

¹⁰⁹ Supra para. 24.

¹¹⁰ Harvey S. "Labour brokers and workers' rights : Can they co-exist" (2011) *SALJ* 100 p.110; *April v Workforce Group Holdings (Pty) Ltd t/a 2005 ILJ 2224 (CCMA)* para 11.

¹¹¹ Harvey (see note 110) pg.110.

¹¹² *Ibid* pg.110.

¹¹³ *Ibid* pg.110.

¹¹⁴ *Ibid*.

¹¹⁵ Tshoose C, Tsweledi B. "A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa" (2014) 18 *Law, Democracy and Development* 334 pg.340.

¹¹⁶ *Ibid*.

retained on a long term basis which exceeds their assignment period, without being afforded the protection and benefits that the permanent staff enjoy.¹¹⁷

The employment contact between the employee and the TES is usually based on the continuation of the commercial contact between the labour broker and the client.¹¹⁸ An automatic termination clause is usually included in the employment contract of the employee. This clause stipulates that upon expiry of the contract with the client then the employment automatically terminates.¹¹⁹ In terms of the clause this termination of the employment does not constitute a dismissal.¹²⁰ This means that in such a case the employee is left without a remedy even where the circumstances surrounding the termination of the service are unfair.¹²¹ This clause contributes to the lack of job security associated with the industry.

The courts have however ruled that these clauses are not permitted. The case of *SA Post Office v Mampeule*¹²² is authority for the principle that parties may not contract out of the requirements for fair dismissal as provided for by the LRA.¹²³ In this case the respondent was appointed as the Chief Executive Officer of the South African Post Office, he was also appointed as a director.¹²⁴ One of the terms of the contract was that should the executive director cease to hold the position of the director then his contract of employment terminated automatically.¹²⁵ The respondent was removed from office of the director by a vote by the shareholders and his term as the Chief Executive Officer automatically came to an end.¹²⁶ The court was faced with the question of whether the automatic termination of the employment contract amounted to dismissal. The court found that the termination of the employment contract by operation of the law amounted to dismissal.¹²⁷ The court found that there was no clear reason given by the client for the suspension

¹¹⁷ Ibid.

¹¹⁸ Van Eck B.P.S “Temporary employment services (labour brokers) in South Africa and Namibia” (2010) 13(2) *PER* 107 pg. 110.

¹¹⁹ Bote A. “Answers to 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 pg. 125.

¹²⁰ Van Eck B.P.S (see note118) pg. 110.

¹²¹ Ibid pg.111.

¹²² (2009) 30 *ILJ* 664 (LC).

¹²³ Supra para. 33.

¹²⁴ Supra para 6.

¹²⁵ Supra para 14.

¹²⁶ Supra para 12.

¹²⁷ Supra para. 16.

of the employee and that this was indicative that the client aimed to avoid the obligations in the LRA.¹²⁸ The court further held that parties may not contract out of the requirements for fair dismissal as provided for by the LRA.¹²⁹

In terms of s5 (2) (b) and s5 (4) of the LRA, automatic termination clauses are invalid. Section 5(2) of the LRA provides that no person may prevent an employee from exercising a right conferred by the LRA.¹³⁰ Section 5(4) provides that any provision that limits the provisions in ss4 and 5 are invalid.¹³¹ The court in the case of *Chilibush v Johnstone & others*¹³² confirmed that an automatic termination clause contravened s5 (2) (b) and s5 (4) and was therefore invalid.¹³³ The facts of this case are similar to that of *Mampeule*.¹³⁴ The respondent in this case was the managing director and a shareholder of the applicant. The shareholders agreement provided that should a shareholder cease to be a director or an employee of the company then they were obliged to offer to sell his or her shares in the company.¹³⁵ The court held that an agreement that provided for the automatic termination of an employment relationship upon occurrence of a certain event was in contravention of s5(2)(b) and s5(4) of the LRA¹³⁶ and could not be accepted.¹³⁷ The court further held that the fact that the respondent was lawfully removed as a director did not in turn mean that the company could deprive him of his right to fair labour practices.¹³⁸

In the case of *Mahlamu v CCMA and others*¹³⁹ the court confirmed that the client and labour broker may not contract for automatic termination of employment on the expiry of the contract.¹⁴⁰ The facts in this case are similar to those of the two above mentioned cases. The

¹²⁸ Act 66 of 1995; supra para 24.

¹²⁹ *SA Post Office v Mampuele* supra para 33.

¹³⁰ Section 5(2) of the Labour Relations Act 66 of 1995.

¹³¹ Section 5(4) of the Labour Relations Act 66 of 1995.

¹³² (2010) 31 ILJ 1358 (LC).

¹³³ Supra para. 38.

¹³⁴ (2009) 30 ILJ 664 (LC).

¹³⁵ Supra para 13.

¹³⁶ 66 of 1995

¹³⁷ *Chilibush v Johnstone & others* (2010) 31 ILJ 1358 (LC) para. 38.

¹³⁸ Supra para.41.

¹³⁹ (2011) 4 BLLR 381 (LC).

¹⁴⁰ Supra para.21.

applicant in this case was employed as a security officer by a labour broker.¹⁴¹ One of the terms of the contract employment was the contract would automatically terminate on expiry of the contract or in the event that the client no longer required the services of the employee for whatever reason.¹⁴² The court held that this clause meant that the security of employment of the applicant was entirely dependent on the will of the client.¹⁴³ In this regard the court found that the commissioner had committed a material error of law by regarding the clause to be applicable in law.¹⁴⁴ The court adopted the approach followed in *Mampuele*¹⁴⁵ by holding that the question was whether the automatic termination clause was in line with s5 (2)(b) and s5(4) of the LRA.¹⁴⁶ The court concluded that the automatic termination clause was invalid in terms of s5 (4) of the LRA¹⁴⁷, and that parties cannot contract out of the protection against unfair dismissal that is afforded to the employee.¹⁴⁸

The cases discussed above prove that the automatic termination clauses are regarded as being invalid by the courts as they deprive the employee of their right to fair labour practices and their right not to be unfairly dismissed.

2.4.5 *Collective bargaining and organisational rights*

The Constitution¹⁴⁹ and the LRA¹⁵⁰ both provide for the right to freedom of association.¹⁵¹ This right means that the employee has a right to join a trade union of their choice and participate in the lawful activities of the union. The employees in TES employment relationships are often restricted from effectively exercising their right to collective bargaining. Collective bargaining is when one or more employers engage with one or more trade unions or employee organisations in order to attempt to reach an agreement on issues of mutual concern.¹⁵² The employees are also

¹⁴¹ Supra para.2.

¹⁴² Supra para. 2.

¹⁴³ Supra para. 10.

¹⁴⁴ Supra para. 10.

¹⁴⁵ (2009) 30 *ILJ* 664 (LC)

¹⁴⁶ Supra. 14.

¹⁴⁷ 66 of 1995.

¹⁴⁸ *SA Post Office v Mampuele* supra note 145 Para. 21.

¹⁴⁹ The Constitution of the Republic of South Africa 1996.

¹⁵⁰ Act 66 of 1995.

¹⁵¹ The right is provided for in s18 of the Constitution and s4 of the Labour Relations Act.

¹⁵² Grogan J. *Workplace Law* 11th ed.2014 pg. 370.

restricted from effectively exercising their right to organise.¹⁵³ This is their right to join a trade union of their choice and participate in lawful union activities. This problem is the result of the nature of the triangular relationship. The employees work on the client's premises and are controlled and supervised by the client and not the TES, who is the employer. Harvey¹⁵⁴ argues that the nature of the relationship creates a disconnection between the employees and employer (TES) on the one hand, and the employee and workplace on the other hand.¹⁵⁵ The disconnection between the TES and employees arises from the fact that the employees do not work on the TESs' premises and has no control over the employees. The disconnection between the employees and the workplace arises from the fact that, the employees are often treated differently from the other employees on the client's premises and the employees are unable to exercise certain labour rights in the workplace. The right to collective bargaining attaches to the workplace, the above mentioned disconnection means that the labour broker employees cannot exercise their right to collective bargaining¹⁵⁶, as they cannot bargain with their employer (the TES) about issues arising in the workplace because the labour broker has no control over the workplace.

Section 23 of the Constitution affords trade unions the right to organise and engage in collective bargaining.¹⁵⁷ Organisational rights are granted to the trade unions by the employer. Organisational rights are granted to trade unions depending on the trade unions level of representivity.¹⁵⁸ This means that the organisational rights that a trade union will obtain will depend on the number of employees in that workplace that it holds as members.

Trade unions are opposed to the practice because they are unable to recruit such employees. The general rule is that only the employer can give organisational rights to the trade union, which the trade union can exercise within the employer's workplace.¹⁵⁹ In the case of the TES arrangement the trade unions do not have organisational rights in the workplace that the labour broker

¹⁵³ Bote A. "The history of labour hire in Namibia: a Lesson to South Africa." (2013) 16(2) *PER* 506 pg.525.

¹⁵⁴ Harvey S. "labour brokers and workers' rights; Can they co-exist?"(2011) *SALJ* 100 pg. 100.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ <http://www.nortonrosefulbright.com/knowledge/publications/43164/organisational-rights-sufficient-representivity>.

¹⁵⁸ *Ibid.*

¹⁵⁹ Bote A. "The History of Labour Hire: a lesson to South Africa" (2013) 16(2) *PER* 506 pg. 525.

employees are employed.¹⁶⁰ This is because the TES does not have the authority to grant organisational rights to be exercised in the client's workplace. The result of this issue is that the TES employees are often left unrepresented. Another factor that contributes to the problem of non-representation of the TES employees is the fact that the employees are spread over a number of different workplaces.¹⁶¹ There are rarely enough employees at one workplace to provide the trade union with sufficient representatives at the workplace to render the trade union eligible for any organisational rights that apply to the TES employees.¹⁶² The employees also change workplaces frequently making it hard for the trade union to locate them.¹⁶³

2.4.6 *Unfair dismissal and fair labour practices.*

The legal fiction deeming the TES to be the employer of the employees is problematic as it leads to the employees not being able to enforce their rights guaranteed in the Constitution and labour laws.¹⁶⁴ The disconnection between the employer and employee (as discussed above), means that the TES, as the employer cannot effectively fulfil its duty to the employee to provide fair labour practices as they have no control over the workplace.¹⁶⁵ In order to solve this problem, the legislation should place a duty on the client to ensure that fair labour practices are complied with by introducing a regulatory body that will comply with the legislation.

Even though s198 provides that the labour broker and client are jointly and severally liable for contraventions of collective agreements, contraventions of collective bargaining agreements, provisions of the BCEA, and arbitration awards, it is difficult for the employee to get any justice in cases where they have been unfairly dismissed because sometimes it is the client who insists that the employee be removed from its premises. In such a case the employee cannot lay a complaint against the client for the dismissal as the client is not the employer.¹⁶⁶ The employee

¹⁶⁰ Ibid.

¹⁶¹ Bote A. "A comparative study on the regulation of labour broking on South Africa" (2015) pg. 106.

¹⁶² Bote A. "Answers to the questions: A critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to Labour Brokers" (2014) 26 *SAMERC LJ* 110 Pg. 116.

¹⁶³ Ibid.

¹⁶⁴ Tshoose C, Tsweledi B. "A Critique Afforded to Non-standard Employees" (2014) 18 *Law Democracy and Development* 334 pg. 343.

¹⁶⁵ Harvey S. "Labour Broker and Workers Rights: Can they Co-Exist" (2011) *SALJ* 100 pg. 101.

¹⁶⁶ Tshoose C, Tsweledi B. (see note 164) pg. 343.

also cannot lay a complaint against the TES as it is not the one who dismissed the employer. This leaves the employee with no relief.

Section 198 of the 1995 LRA provides for joint and several liability for contraventions of collective bargaining agreements, provisions of the BCEA, and arbitration awards.¹⁶⁷ However the section does not provide for joint and several liability in respect of unfair dismissals and unfair labour practices committed by the client against the employees of the labour broker.¹⁶⁸ Even though the section provides for joint and several liability for contraventions of collective bargaining agreements, provisions of the BCEA, and arbitration awards this does not provide a speedy remedy for the employee. In cases of such contraventions the employee would have to first have to proceed against the labour broker.¹⁶⁹ Where the TES fails to act, the employee can only proceed against the client if they have obtained a judgement order against the labour broker.¹⁷⁰ This is because the client is not the employer of the TES employee and therefore the employee would not be able to bring an action directly against the client.¹⁷¹ This is burdensome on the employee as many of these employees do not have the resources to pursue all these avenues of redress.

Due to the fact that the TES is considered to be the employer, the CCMA and the Labour Court do not have jurisdiction to consider disputes involving unfair dismissals and unfair labour practices between the client and the worker.¹⁷² This is because the CCMA and Labour Court deal with disputes between employers and employees, in case of the TESs arrangement the client is not the employer of the TES employees and therefore an action cannot be brought against the client before the dispute resolution bodies.

¹⁶⁷ Van Eck B.P.S. "Temporary employment services (labour brokers) in South Africa and Namibia" (2010) 13(2) *PER* 107 pg. 204.

¹⁶⁸ *Ibid* pg. 109.

¹⁶⁹ Bote A "A comparative study on the regulation of labour brokers in SA and Namibia in light of recent legislative developments" (2015) *SALJ* 100 pg.106.

¹⁷⁰ *Ibid* pg. 107.

¹⁷¹ P Benjamin 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 32 *ILJ* 845 pg. 850.

¹⁷² Van Eck BPS "Temporary employment services (labour brokers) in South Africa and Namibia." (2010) 13(2) *PER* 107 pg.110.

2.4.7 *Disguised employment relationship*

One of the other problems associated with the TES practice is the fact that the client and TES often use this employment relationship to disguise the true nature of the employment in order to avoid labour legislation.¹⁷³ One of the ways that the client and the labour broker do this is by identifying the employee as an independent contractor.¹⁷⁴ By doing so the client and the TES are able to avoid consequences of unfairly terminating the employment relationship.¹⁷⁵ This is because independent contractors are not considered to be employees are therefore not protected against unfair dismissal.¹⁷⁶ The other reason why clients and TES do this is because it allows them to avoid having to fulfil employer responsibilities owed to the employees.

The Regulatory Impact Assessment Report reported that there were cases where large companies had employed their entire workforce through TES.¹⁷⁷ This means that the client is able to keep on an entire workforce at a lower wages and without being responsible for unfair labour practices and unfair dismissals.

2.5. *Conclusion*

This chapter has discussed the various problems that are associated with the TESs practice. Amendments to the LRA¹⁷⁸ were introduced by the legislature in 2014 in order to overcome some of the problems discussed above.¹⁷⁹ The ESA¹⁸⁰ was also enacted to regulate employment services such as TES. The following chapter will discuss the amendments to the LRA¹⁸¹ that are relevant to TESs, and the relevant sections of the ESA¹⁸²

¹⁷³ Bote A. "The History of labour hire in Namibia: a lesson to South Africa." (2013) 16(2) *PER* 506 pg.525.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Section 198 (3) of the Labour Relations Act 66 of 1995.

¹⁷⁷ Van Eck B.P.S "Regulated flexibility and the Labour Relations Amendment Bill of 2012" (2013) *De Jure* 600 pg. 605.

¹⁷⁸ 66 of 1995.

¹⁷⁹ Bote A. "Answers to 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 pg. 113.

¹⁸⁰ 4 of 2014.

¹⁸¹ 66 of 1995.

¹⁸² 4 of 2014.

CHAPTER 3- LABOUR RELATIONS AMENDMENTS AND EMPLOYMENT SERVICES ACT PROVISIONS.

3.1. Background

In December 2010 the Minister of Labour at the time, published proposals for an amendment of the LRA, with the intention of submitting them to the National Economic Development Labour Council (NEDLAC).¹⁸³

The amendment bill was submitted to the Cabinet Committee in March 2012 and was later approved by the cabinet for submission to parliament.¹⁸⁴ The bill was however strongly opposed by business organisations throughout South Africa as it was believed that the amendments would lead to the end of the flexibility that TESs provided.¹⁸⁵

3.2 Amendments

The following amendments were included in the LRAA¹⁸⁶ that affects the TES practice.

Sections 198A, 198B, 198C and 198D were added to s198 of the 1995 LRA.¹⁸⁷ The provisions are aimed at providing protection to atypical employees.¹⁸⁸ Section 198A provides for labour broker employees. These provisions only apply to employees that earn salaries below the threshold determined by the Minister of Labour in section 6(3) of the BCEA.¹⁸⁹ The threshold amount is R 205 433.30¹⁹⁰

¹⁸³ Bote A. "The history of labour hire in Namibia: a lesson to South Africa." (2013) 16(1) *PER* 505 pg. 528.

¹⁸⁴ *Ibid* pg. 528.

¹⁸⁵ *Ibid* pg. 529; Bote A. "Answers to 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 pg. 114.

¹⁸⁶ 6 OF 2014.

¹⁸⁷ Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments." (2015) *SALJ* 100 pg.110.

¹⁸⁸ *Ibid* pg.110.

¹⁸⁹ Section 198A (2) of Labour Relations Amendment Act 6 of 2014.

¹⁹⁰ Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments" (2015) *SALJ* 100 pg.110.

3.2.1. Organisational rights

Organisational rights are granted to the trade unions by the employer. Organisational rights are granted to trade unions depending on the trade unions level of representivity.¹⁹¹ This means that the organisational rights that a trade union will obtain depends on the number of employees in that workplace that it holds as members.

The following provisions promote the attainment of organisational rights by trade unions seeking to represent TES, as TES employees are now considered to be a part of the workforce rather than separate from it as was the previous position.¹⁹² This means that TES employees will now benefit from collective agreements between the trade union and client.¹⁹³

Section 21 of the LRA deals with disputes arising from organisational rights. Section 21 was amended by adding sub paragraph (v) to s 21 (8) (b). Subsection 21 (8) (b) (v) provides that where a dispute arises with regards to the organisational rights, then the commissioner should take the composition of the workplace into account, including the degree in which the workforce is represented by atypical employees.¹⁹⁴ TES employees are included under atypical employees. This amendment will affect the trade union's total representativeness.¹⁹⁵ This is because the TES employees will also be added to the number of members that the union representing them has as a result the number of members that the union has will increase.

The TES employees will be able to become members of a trade union and as a result will be obliged to pay union fees. The problem that may arise in this regard is that the TESs employees work at a particular clients' workplace for a short period of time and move from one workplace to another, depending on where they have been assigned to work. This would mean that the TESs employees would have to join a new union if they are assigned to a client whose business falls under a different sector than that of the client where the employee previously worked.

¹⁹¹ Ibid.

¹⁹² Bote A. "Answers to 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 pg. 116.

¹⁹³ Ibid pg. 116.

¹⁹⁴ Section 21(8) (b) (v) of the Labour Relations Amendment Act 6 of 2014.

¹⁹⁵ Bote (see note 192; 109).

The addition of ss (12) to s21 provides for the allocation of organisational rights to trade unions who wish to represent TES employees. The following sentence has been inserted into s21 (12) in order to avoid confusion: “if the trade union seeks to exercise organisational rights in respect of TES employees, it may seek to do so either on the TES’s premises or the clients’ premises”.¹⁹⁶ The section further provides that if the trade union exercises the organisational rights in the workplace of the client then any reference in chapter III to the employers’ premises must be read as including the clients’ premises.¹⁹⁷ Chapter III discusses collective bargaining and organisational rights. This means that the trade union may seek to exercise organisational rights in respect of the TES employees from either the client or TES employer depending on where the employees are situated.

The amendments further provide that where a trade union seeks to exercise organisational rights in a workplace where there are labour broker employees, then these employees will be considered a part of the workforce for purposes of ascertaining the trade unions representativeness.¹⁹⁸

Subsection 5 was added to s 22¹⁹⁹ in order to provide for the binding effect of arbitration on awards made in relation to organisational rights. The sub-section provides that any arbitration award made with reference to organisational rights shall be binding on the employer but also any third party (such as the client), whose rights may be affected by such an award.²⁰⁰ Section 22 (5) (b) further provides that the third party is required to be granted an opportunity to participate in the arbitration proceedings.²⁰¹ Section 22 (5) (b) expands the application of arbitration awards to also apply to the client even though they are not the employer. This is necessary as the client also has control over the TES employees and they work under the client’s supervision.

The amendments discussed above seek to provide better protection for the TES employees’ rights to collective bargaining and organisational rights by allowing easier access to those rights. This is done by allowing the union to seek organisational rights in respect of these employees

¹⁹⁶ Section 21(12) of the Labour Relations Amendment Act 6 of 2014.

¹⁹⁷ Section 21 (12) of the Labour Relations Amendment Act 6 of 2014.

¹⁹⁸ Section 21(8) (b) (v) of the Labour Relations Amendment Act 6 of 2014.

¹⁹⁹ Section 22 provides for disputes arising from organisational rights.

²⁰⁰ Section 22 (5) (a) of the Labour Relations Amendment Act 6 of 2014.

²⁰¹ Section 22(5) (b) of the Labour Relations Amendment Act 6 of 2014.

from either the client or the TES.²⁰² The result of this is that the more TES will be able to be represented by trade unions and collective agreements between the client and the union will apply to them.

3.2.2 Section 198 Amendments

The purpose of the amendments to s198 was to reduce the vulnerability of TES employees and remove any uncertainty as to the role and duties of the client and TES employer in the employment relationship that may exist.²⁰³ The following amendments were made to s198.

The criterion of what constitutes temporary work in the context of TESs is set out in s198 (1).²⁰⁴ This is important because the client will be deemed to be the employer of the TES employees where the work is found not to be temporary. The section provides two criteria which determine whether the employment relationship is a TES arrangement and whether the relationship will be governed by s198A of the LRA²⁰⁵.

The first criterion provides the work must be temporary and the employees must not perform work for the client for longer than three months.²⁰⁶ Previously the LRA provided that the maximum assignment period for these employees to the client's workplace was six months, this period was however reduced to a three month period.²⁰⁷ The reduction was a result of pressure from trade unions to limit the use of labour brokers.²⁰⁸ Bote²⁰⁹ argues that this time period is not favourable to the larger labour market.²¹⁰ He argues that it might destroy the flexibility offered by the TESs industry, resulting in clients opting to rather employ fewer employees than use

²⁰² Bote A. "Answers to Questions: A Critical Analysis of the Amendments to the Labour Relations Act 66 of 1995 with Regard to Labour Broking." (2014) 26 *SA MERC LJ* 110 pg.115.

²⁰³ Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments "(2015) *SALJ* 100 pg. 109.

²⁰⁴ Bote A. "Answers to 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 pg.128.

²⁰⁵ 6 of 2014.

²⁰⁶ Section 198(1) (a) of the Labour Relations Act 66 of 1995.

²⁰⁷ Section 198A (1) of the Labour Relations Act 66 of 1995.

²⁰⁸ Bote A (see note 203) pg.111.

²⁰⁹ Bote A. (see note 204) pg.110.

²¹⁰ *Ibid* pg. 129.

labour brokers in order to save costs and avoid having to be responsible for the labour broker employees after the prescribed three month period has come to an end.²¹¹

The second criteria is that the employees may only be provided to the client to temporarily fill the position of permanent employees who are not available to perform their work or perform a task that falls within a category of temporary work declared by a collective agreement, sectorial determination or notice by the Minister of Labour.²¹² This means that the work will be considered temporary where the employee is temporarily filling in for an employee who is absent from work or if the type of work done by the TES employee is a type that has been declared temporary in terms of legislation.

The LRAA²¹³ retains the position in the 1995 Act in regards to the identity of the employer. The labour broker retains the status of employer in the employment relationship.²¹⁴ It is flawed to hold the labour broker responsible for the employee's rights as the labour broker retains very little control over the employees after the assignment to the client.²¹⁵

Section 198A (3) (b) (i) provides that if the employee does not meet the criteria set out in s198 (1)²¹⁶, then the client will be deemed to be the employer of the TES employees, for an indefinite period of time.²¹⁷ This means that the client will be responsible for the employer duties and obligations as provided for in the LRA²¹⁸. The TES employment relationship does not come to an end,²¹⁹ the client merely takes over the employer duties as prescribed in the LRA.²²⁰ This is controversial as there is no formal transfer of the employees from the TES to the client as per s197 of the LRA client.

²¹¹ Ibid pg.129.

²¹² Section 198 (1) (b) of the Labour Relations Act 66 of 1995.

²¹³ 6 of 2014.

²¹⁴ Section 198A (3) (a) of the Labour Relations Amendment Act 6 of 2014.

²¹⁵ Bote A. "The history of labour hire in Namibia: A lesson to South Africa." (2013) 16(1) *PER* 505 pg. 227.

²¹⁶ Section 198A(1) provides that the work is considered to be temporary where the labour broker employees perform work for the client for no longer than three months. The second criteria is that the employees may only be provided to the client to temporarily fill the position of permanent employee who is not available to perform his work or perform a task that falls within a category of temporary work declared by a collective agreement, sectorial determination or notice by the Minister of Labour.

²¹⁷ Section 198A (3) (b) (i) of the Labour Relations Amendment Act 6 of 2014.

²¹⁸ 66 of 1995

²¹⁹ *Assign Services (Pty) Ltd v CCMA and others* [2015] ZALCJHB 283 para 11.

²²⁰ *Supra* para 11.

The aim of this provision is to limit the potential exploitation of TES employees by the client.²²¹ The 1995 LRA deemed the TES to be the employer for the duration of the employment relationship; this allowed the client to avoid restrictive labour legislation and employer responsibilities.²²² The provision prevents the client and the TES employer from making the worker work at the client's workplace for unreasonably long period of time, without making the employee a permanent employee of the client.

s198A (5) provides that where the client is deemed to be the employer, the employee should not work under conditions which are less favourable than those of the client's permanent staff.²²³ The client may differentiate between the labour broker employer and its own employee only if valid grounds for differentiation can be proven.²²⁴ Section 198D (2) provides for these grounds for differentiation. Some of the grounds that are listed are the following:

- Seniority ;
- Experience ;
- Period of employment;
- Merit and quality of work performed.²²⁵

Since the TES employees work for the client on a temporary basis the amount of years that they have been employed with the client is likely to be shorter than that of the permanent employees of the client. This means that labour broker employees are likely to be treated differently.

Sub-sections 4A - 4F were added to s198. These subsections clarify the duties of the client and TES.²²⁶ Section 198A (4A) (a) pertains to the joint and several liability of the client and the labour broker. It provides that the client and TES are jointly and severally liable for failure to comply with collective agreements, arbitration awards and provisions in the BCEA. It provides

²²¹ Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments "(2015) *SALJ* 100 pg. 111.

²²² *Ibid* pg. 111.

²²³ Section 198A (5) of the Labour Relations Amendment Act 6 of 2014.

²²⁴ Section 198A (5) of the Labour Relations Amendment Act 6 of 2014.

²²⁵ Section 198D of the Labour Relations Amendment Act 6 of 2014.

²²⁶ Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments "(2015) *SALJ* 100 pg.110.

that where the client of a labour broker is jointly and severally liable, the employee may institute proceedings against the TES, client or both.²²⁷ This changes the previous position where the employee could only institute action against the TES and only hold the client liable upon obtaining judgement against the TES. Section 198(4A) (b) provides that a labour inspector may enforce the provisions of the BCEA against either the client or TES.²²⁸ Any order with regards to the compliance of the provisions of the BCEA against one of the parties, may be enforced against the other.²²⁹

Section 198 (4B) requires the TES to provide the employee with a written contract containing all the relevant provisions for the assignment to the client.²³⁰ This provides TES employees with some security, as they have a document that they can rely on should they be unfairly dismissed.

In terms of s198 (4C), the TES employees may not perform work for the client under terms and conditions that are inconsistent with legislation, sectorial determinations and collective agreements.²³¹ This provision will act as a deterrent against including terms that are contrary to legislation or infringes the rights of employees in the employee's employment contract. This provision also places a duty on the client to provide safe and conducive working conditions for the employees of the TES.

Section 198A (4F) of the LRAA requires that all TES's be registered in order to conduct business as a TES.²³² Section 198A (4F) the LRAA further provides that non-compliance with the registration requirement cannot be used as a defence for non-compliance with s198A.²³³

In the past clients avoided having to retain labour broker employees by requesting the removal of the employee before the end of the assignment period. Section 198A(4) addresses this issue by providing that removal of an employee before the three month period comes to an end in order to avoid responsibility, will be deemed to be dismissal.²³⁴ This section does not however provide

²²⁷ Section 198(4A) (a) of the Labour Relations Amendment Act 6 of 2014.

²²⁸ Section 198(4A) (b) of the Labour Relations Amendment Act 6 of 2014.

²²⁹ Section 4A(c) of the Labour Relations Amendment Act 6 of 2014.

²³⁰ Section 198(4B) of the Labour Relations Amendment Act 6 of 2014.

²³¹ Section 198(4C) of the Labour Relations Amendment Act 6 of 2014.

²³² Section 198A (4F) of the Labour Relations Amendment Act 6 of 2014.

²³³ Section 198A (4F) of the Labour Relations Amendment Act 6 of 2014.

²³⁴ Section 198A (4) of the Labour Relations Amendment Act 6 of 2014.

whether the dismissal will be considered to be unfair or which of the two authority figures should be held liable.²³⁵ Fairness would depend on the facts of each particular case.²³⁶

The court in the case of *Kelly Industrial Ltd v CCMA & others*²³⁷ dealt with this issue. In this case the employees of the labour broker received a letter from the labour broker informing them that their assignment with the client had been terminated as the project they had been working on had been completed, and as a result their employment with the client automatically terminated.²³⁸ The employees had been paid two weeks' worth of wages and provided with a form for the purposes of claiming from the Unemployment Insurance Fund.²³⁹ The employees argued that they had been unfairly dismissed as the project had not been completed and there were still employees working on the project.²⁴⁰ The labour broker on the other hand argued that the employees had not been unfairly dismissed as they were still on the books of the labour broker.²⁴¹

After considering the evidence before it, the court concluded that there was no evidence to support the argument that the project had been completed.²⁴² The court further held that there was no evidence to show that the labour broker had taken steps to find alternative employment for the employees.²⁴³ The court concluded that the facts were indicative of a dismissal²⁴⁴, and that the labour broker had attempted to avoid the obligations as employer and consequences of unfair dismissal.²⁴⁵

It is submitted that the court came to the correct decision. This is because the TES employees had been assigned to the client for the period of the project and the client and TES terminated the assignment before the completion of the project for a reason that was not based on the employees

²³⁵ Bote A. "Answers to 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 pg. 130.

²³⁶ *Ibid.*

²³⁷ [2015] ZALCJHB 12.

²³⁸ *Supra* para 5.

²³⁹ *Supra* Para 5.

²⁴⁰ *Supra* para 6.

²⁴¹ *Supra* para 31.

²⁴² *Supra* para 5.

²⁴³ *Supra* para 73.

²⁴⁴ *Supra* para 82.

²⁴⁵ *Supra* para 85.

misconduct or operational requirements, as required by s188(1)(a)(i) and s188(1)(a)(b)²⁴⁶ respectively. This means that the decision would have been different if the project had really been completed and this was reason given to the employees for the termination of their contracts. This is because the termination of the contracts would have been in accordance with s188 (1)(a)(ii) as the client would have no longer needed the employees (this is classified as an operational requirement).

The LRAA provides that no provision may be inserted into the employee's contract of employment which is a direct contravention of the other labour legislation.²⁴⁷ This may be interpreted to mean that automatic termination clauses may not be included. An automatic termination clause is a clause that stipulates that upon the occurrence of a certain event, the employment contract automatically comes to an end.²⁴⁸ The above mentioned provision could help lower the amount of unfair dismissal cases in the triangular employment relationship as the use of automatic termination clauses will be reduced.

Section 198A (9) provides that the rights granted to the employees in the Amendment Act will be effective three months after the commencement of the Act²⁴⁹ for employees that were employed prior to the Amendment Act.²⁵⁰

The Amendment Act also provides forums within which disputes arising from s198A-C, may be referred to.²⁵¹ Commissioners or Bargaining Councils may deal with the above mentioned disputes. If the dispute is not successfully resolved then the dispute must be referred for arbitration.

²⁴⁶ Section 18(1) provides that a dismissal is automatically unfair where the reason for the dismissal does not relate to (i) the conduct or capacity of the employee, or (b) the employer's operational requirements.

²⁴⁷ Section 198(4) (c) of the Labour Relations Act 6 of 2014.

²⁴⁸ Bote A. "Answers to 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 pg. 125.

²⁴⁹ The Labour Relations Amendment Act came into effect on 1 January 2015.

²⁵⁰ Section 198A (9) of the Labour Relations Amendment Act 6 of 2014.

²⁵¹ Section 198D of the Labour Relations Amendment Act 6 of 2014.

3.3. *Employment Services Act*

The ESA came into force in August 2014. The ESA is aimed at providing for the establishment of a Public Employment Service that “promotes the employment of the youth and vulnerable persons”.²⁵² TES employees fall within the category of “vulnerable” persons. The main focus of the Act is on Private Employment Agencies.²⁵³ The Act defines “Private Employment Agency” as any person providing an employment services for gain.²⁵⁴ The term Private Employment Agencies is the term used in the Act to refer to TESs and other service providers that provide employment services that are not state owned.

Section 13 of the Act requires that every labour broker be registered.²⁵⁵ After registration a certificate is issued confirming that registration was successful.²⁵⁶

The ESA provides a set of rules regarding conduct of the TES in s14 and s15.²⁵⁷ Under these sections the TES is prohibited from charging the employee a fee for the allocation of work.²⁵⁸ This includes deducting a charge from the employees’ salary for such allocation.²⁵⁹ This is in line with the ILO as the ILO's Declaration of Philadelphia,²⁶⁰ states that labour is not a commodity.²⁶¹ This is because by not making the employees pay for the assignment the labour brokers are not treating the jobs given to the employees as a commodity as the assignments are not done in exchange for money, thereby treating the jobs as something that can be bought.

²⁵²Bote A “A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments” (2015) *SALJ* 100 pg. 112.

²⁵³ *Ibid.*

²⁵⁴ Chapter 1 of the Employment Services Act 4 of 2014.

²⁵⁵ Section 13 of the Employment Services Act 4 of 2014.

²⁵⁶ Section 13 of the Employment Services Act 4 of 2014.

²⁵⁷ Bote A “A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments.” (2015) *SALJ* 100 pg. 112.

²⁵⁸ Section 14 of the Employment Services Act 4 of 2014.

²⁵⁹ Section 15 of the Employment Services Act 4 of 2014.

²⁶⁰ 1944

²⁶¹ Van Eck B.P.S “Temporary Employment Services (Labour Brokers) in South Africa and Namibia.” (2010) *PER* 13(2) 107 pg.115.

The Registrar has the authority to withdraw a particular registration certificate if there is a contravention of a provision of the Act.²⁶² The decision to withdraw is however reviewable by the labour court.²⁶³

3.4. Conclusion

The amendments to the LRA²⁶⁴ are expected to have a positive effect on the protection of labour broker employees' rights. The Amendment Act seem to provide better protection to the employees in TES employment relationships. The employees' security of employment is also provided for as the amendments explicitly states that the employment must be of a temporary nature and prohibits the client or the TES from terminating the contract prematurely in order to avoid legislative obligations. This provides certainty as to the duration of the assignment to the client.

The Act is more restrictive than the LRA of 1995, as it explicitly restricts the TES and client from acting in a way that infringes the rights of the employees.

The Employment Services Act²⁶⁵ also has a positive effect on the rights of the employees, as it aims to provide better regulation of the practice. The requirement of registration of TES and the threat of the revocation of the licence encourages labour brokers to comply with labour legislation.

The following chapter will discuss the loopholes with regard to enforcement of the Act and the possible problems with regards to interpretation of the Act that will arise from the amendments and the enactment of ESA²⁶⁶.

²⁶² Section 18 of the Employment Services Act 4 of 2014.

²⁶³ Section 19 of the Employment Services Act 4 of 2014.

²⁶⁴ 66 of 1995

²⁶⁵ 4 of 2014

²⁶⁶ 4 of 2014

CHAPTER 4: LOOPHOLES IN THE LEGISLATION: DO THE AMENDMENTS GO FAR ENOUGH?

4.1. Introduction

The amendments to the LRA and the enactment of ESA are aimed at providing employees in TES arrangements with better protection. Although the amendments achieve this there are still a number of loopholes in the legislation. This chapter discusses these loopholes.

4.2. Interpretation of s198A (3)(b)

Section 198A (3) (b) provides that the client will be deemed to be the employer of the TES employee for an indefinite period of time, where the work being performed by the employee is found not to be temporary.²⁶⁷ One of the problems with the amendments is the meaning of the phrase “the client will be deemed to be the employer” in s198A (3) (b).²⁶⁸ The word “deemed” is problematic because it leads to uncertainty as to whether the client becomes the actual employer and whether the TES remains a party to the employment contract after the three month period has come to an end.²⁶⁹

According to the rules of interpretation, the literal theory of interpretation is the first point of call when interpreting a statute.²⁷⁰ According to this rule, the ordinary meaning of the word will be used unless the ordinary meaning would lead to absurdity or ambiguity.²⁷¹

The golden rule of interpretation states that the literal meaning of the word will not be used where it would lead to the intention of the legislature being circumvented.²⁷² In terms of the golden rule the ordinary grammatical or ordinary meaning of the word may be modified as to avoid absurdity or inconsistency.²⁷³

²⁶⁷ Section 198A (3) (b) of the Labour Relations Amendment Act 6 of 2014.

²⁶⁸ Van Eck B.P.S “Regulated flexibility and the Labour Relations Amendment Bill of 2012.” (2013) *De jure* 600 pg.607.

²⁶⁹ *Ibid* pg. 607.

²⁷⁰ Venter D “Who is the Employer?” (2015) *November Without Prejudice* 25 pg. 25

²⁷¹ *Ibid*

²⁷² *Ibid*

²⁷³ *Ibid*

The purposive theory or the mischief rule of interpretation looks at the purpose of the legislation.²⁷⁴ This requires the reader to take note of the legislature's intention. The purposive theory requires the consideration of internal and external aids in the legislation in order to determine the purpose and objective of the Act.²⁷⁵ The internal aids that can be used are the following; the title, preamble, the short title. The external aids that can be used is the memorandum.

It is suggested that there are four possible ways of interpreting s198 (3) (b);

- a. The client is deemed to be the employee only in name, in order to allow the employee to be able to exercise the rights granted in terms of the LRA;

This interpretation is problematic as it would mean that the contract between the client and TES continues even though the client is responsible for the obligations in the LRA. This is problematic because the TES is unable to meet the obligations in the BCEA as the employees are under the supervision of the client. The only purpose of the TES would be to pay the employees.

- b. The contract of employment between the labour broker and the employee comes to an end, and a new contract of employment is formed between the client and the employee;

This interpretation is more practical, however it would mean that the contract between the client and TES would come to an end as the client would become the employer of the employee and therefore there would no longer be a need for the commercial contract between the client and TES, which is disadvantageous to the TES.

- c. The contract of employment is automatically transferred from the labour broker to the client;

This interpretation has the same consequence as that discussed in (b).

²⁷⁴ Ibid

²⁷⁵ Ibid

- d. The labour broker and the client are both employers of the employee, and both have rights and obligations as employers.²⁷⁶

This interpretation is problematic as it raises the question as to which employer's decision would have more weight in a situation where the two employers decision conflict.

Section 3 (a) of the LRA²⁷⁷ provides that the Act must be interpreted in a manner that accords with the primary objectives of the Act.²⁷⁸ Venter²⁷⁹ suggests that a purposive interpretation be adopted. The preamble of the Act provides that the purpose of the amendment Act is to provide greater protection for workers placed in TESs.²⁸⁰ The above mentioned writer suggests that according to the objectives of the act, s198 (3) (b) should be interpreted to mean that the TES and client are both the employers of the employee.²⁸¹ However the client is only the employer for purposes of the Act.²⁸² This could be problematic as it could lead to confusion as to who the true employer of the employee is, as the client only takes over some of the employer obligations but not all of them. As discussed above it would be problematic where the two employers have conflicting views on a matter pertaining to the employees.

The phrase “deemed to be the employer for purposes of the act” in s198A (3) (b) is problematic because it means that the client is only responsible for obligations in the LRA.²⁸³ This implies that the TES would still be considered responsible for obligations in other legislation such as that in the BCEA²⁸⁴ and Employment Equity Act²⁸⁵ (EEA). If this were the case, then not much would change because the client would still only be jointly and severally liable for contraventions of the BCEA²⁸⁶ and EEA.²⁸⁷

²⁷⁶ Ibid.

²⁷⁷ 66 of 1995.

²⁷⁸ Section 3(a) of the Labour Relations Act 66 of 1995.

²⁷⁹ Venter D. (see note 270) pg. 25.

²⁸⁰ The preamble of the Labour Relations Act 66 of 1995.

²⁸¹ Venter D (see note 270) pg. 25.

²⁸² Ibid.

²⁸³ Bote A. “Answers to 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 pg. 131.

²⁸⁴ Act 75 of 1997.

²⁸⁵ Act 55 of 1998.

²⁸⁶ Act 75 of 1997.

The interpretation of s 198A (3) (b) (i) has been considered by the Road Freight & Logistics Industry bargaining Council and the labour court.

In the case of *Mphirime v Value Logistics Ltd and Another*²⁸⁸, the commissioner held that the section could not be interpreted in isolation and had to be interpreted as a whole with the amendments of s198 and s198A.²⁸⁹

The commissioner used the “golden rule” of interpretation.²⁹⁰ In terms of this rule the words in a statute must be given their ordinary, literal meaning if the words are clear and unambiguous.²⁹¹ In interpreting the section the commissioner referred to s3 of the LRA. Section 3 of the LRA provides that the provisions of the LRA provisions must be interpreted;

- a. To give effect to the primary objects of the Act;
- b. In compliance with Constitution; and
- c. In compliance with the public international law obligations of the republic.²⁹²

The commissioner held that the purpose of the LRA was to advance economic development, social justice, labour peace and democratisation of the workplace by the primary objects of the LRA.²⁹³

According to the Oxford dictionary, the ordinary meaning of the word “deem” is to consider in a specific way.²⁹⁴ Considering the ordinary meaning of the word the commissioner held that the word “deemed” means that the client is now regarded as the employer for purposes of the LRA.²⁹⁵ The court held that the main question is who is responsible for the duties and obligations.²⁹⁶ In this regard the commissioner found that the section should be interpreted to

²⁸⁷ Bote A. “Answers to 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 pg.131.

²⁸⁸ (2015) 8 BALR 788 (NBCRFLI).

²⁸⁹ Supra para 10.

²⁹⁰ Supra para. 11.

²⁹¹ Supra para.11.

²⁹² Section 3 of the Labour Relations Act 66 of 1995.

²⁹³ *Mphirime v Value Logistics Ltd and Another* (2015) 8 BALR 788 (NBCRFLI) para. 15.

²⁹⁴ Supra para 38.

²⁹⁵ Supra para 39.

²⁹⁶ Supra para 41.

mean that that the client is awarded duties and obligations for the purposes of the LRA when the employee is not performing temporary service, and any claims in terms of the LRA must be brought against the client²⁹⁷

It was further held that the wording does not imply that the employee is transferred to the client or that the triangular relationship automatically comes to an end.²⁹⁸ The commissioner came to the conclusion that s198A(3)(b)(i) does not give rise to a dual employment relationship, and that it was up to the parties to decide what will happen after the shift of liability²⁹⁹.

This decision means that the client is solely responsible for the obligations and duties in the LRA, when it is found that the work done is not temporary.

The issue of interpretation of s198A (3)(b) was also dealt with by the Labour Court in the case of *Assign Services (Pty) Ltd v CCMA and others*³⁰⁰. In this case the TES (Assign) argued that where the “client is deemed to be the employer for the purposes of the Act”, then the TES remains the employer of the employee for all other purposes and the client is deemed to be the employer only for purposes of the LRA.³⁰¹ The National Union of Mineworkers of South Africa (NUMSA) who was the second respondent in the matter, argued that for the purposes of the LRA, the employee is deemed only be the employee of the client.³⁰²

The court rejected the argument by the TES that the employment relationship was one of a dual nature, meaning that both the client and the labour broker are employers of the labour broker employee³⁰³ The court found that this argument was misleading, as it suggested that the two employment relationships are co-extensive, therefore giving rise to the same rights, duties and obligations.³⁰⁴

²⁹⁷ Supra para 47.

²⁹⁸ Supra para 40.

²⁹⁹ Supra para 52.

³⁰⁰ *Assign Services (Pty) Ltd v CCMA and others* [2015] ZALCJHB 283.

³⁰¹ Supra para. 2.

³⁰² Supra para. 2.

³⁰³ Supra para. 4.

³⁰⁴ Supra para. 4.

In interpreting s198A (3) (b) (i), Brassey J referred to the case of *S v Rosenthal*³⁰⁵, where it was held that “the effect of the word “deeming” is either to substitute the deemed for the actual or argument the actual with the deemed”.³⁰⁶

Brassey J held that the provision in question was made to operate only for the purposes of the LRA, and therefore can be said to serve as an augmentation rather than a substitute.³⁰⁷ This meant that the client was held to be an additional employer to the TES. The court held this interpretation produces the result that it only operates for the purpose of the LRA.³⁰⁸ This means that the client is deemed to be the employer for purposes of the LRA, while the contract between the labour TES and the employee continues to apply.

The court further found that there was nothing in s198A (3) (b) that could be taken to mean that the contract between the TES and the employee is invalidated.³⁰⁹ It was held that the power vested in the client to have control over the employee is a power that is given to the client as a representative of the TES, and the power continues to be vested in the TES.³¹⁰ Therefore if the TES terminates the employment relationship with the employee then the source of the power of control is lost.³¹¹

The court found that the commissioner erred in finding that the client was deemed to be the sole employer of the workers.³¹² The court further found that the commissioner did not have jurisdiction to decide on the question, and the question should rather have been placed before a superior court.³¹³ The court therefore set aside the decision of the commissioner.³¹⁴

An application for leave of appeal was rejected by Brassey J. The reasons behind the honourable judge’s decision were there was no dispute before the court that had concrete application.³¹⁵ The

³⁰⁵ 1980 (1) SA 65 (A) para 75G-76A.

³⁰⁶ Supra para 76A.

³⁰⁷ *Assign Services (Pty) Ltd v CCMA and others* [2015] ZALCJHB 283 para. 14.

³⁰⁸ Supra para. 14.

³⁰⁹ Supra para 11.

³¹⁰ Supra para 17.

³¹¹ Supra para 17.

³¹² Supra para. 22.

³¹³ Supra para. 23.

³¹⁴ Supra para. 28.

³¹⁵ *Assign Services v CCMA and others* (2015) 36 ILJ 2853 (LC) para. 6.

court found that there was a potential basis for granting leave to appeal under the issue of the interpretation of the term “deemed”. However it was held that the case as not the appropriate case for the issue.³¹⁶

It is submitted that the courts view that the client acts as an agent or representative of the TES is incorrect. If this were the case then the two parties should not be held jointly and severally liable for contraventions of legislation. In terms of the law of Agency a principal will be held liable for the act of his or her agent, where the agent was authorised to act on his behalf.³¹⁷ This is called vicarious liability. If the client is considered to be an agent of the client then the TES should rather be held vicarious liable for contraventions by the client.

The decision to hold that the client is also deemed to be the employer is problematic, because the court seems to contradict itself. The court held the view that no person can have two masters,³¹⁸ however in the end it held that the client is deemed to be the employer together with the TES for purposes of the LRA. The court held that a singular employment relationship is formed. However its reasoning is problematic as it later interprets the clause to mean that in exercising control over the employee, the client is acting as a representative of the TES. If this were the case the TES would be able exercise control on the client’s premise as the client’s principal.

4.3 *Dismissal*

Joint and several liability of the client and TES does not extend to unfair dismissals.³¹⁹ This means that the TES would be held solely responsible where the client has dismissed the employee. In the case of *Mlawuli v Computek (Pty) Ltd*³²⁰ the client had requested that the services of the worker be terminated.³²¹ The employee was told by the TES that the reason for the termination of his services was that the project he had been working on had come to an end.³²² The commissioner found that the duty to prove that the dismissal was fair, was on the

³¹⁶ Supra para 7.

³¹⁷ <http://www.investopedia.com/terms/v/vicarious-liability.asp> accessed on 30/01/2016.

³¹⁸ *Assign Services v CCMA and others* (2015) 36 ILJ 2853 (LC) para 17.

³¹⁹ Tshoose C, Tsweledi B.(see note 6; 343).

³²⁰ (2013) 34 ILJ 450 (CCMA).

³²¹ Supra para 12.

³²² Supra para 12.

TES and not the client.³²³ The commissioner found that although the dismissal of the employee was due to the request of the client, the TES had been the one that dismissed the employee and therefore the TES was responsible for the claim for unfair dismissal.³²⁴

It is submitted that this decision was correctly decided. This is because in the case of *Nape*³²⁵ the court held that the TES does not have to comply with the demands of the client to remove the employee.³²⁶ This means that where the TES wilfully complies with the client's demand by dismissing the employee, then the TES should face the legal consequences.

Section 198A (4) provides that where the client terminates the employees' services before the end of the assignment period, it will be considered dismissal.³²⁷ The provision does not however specify whether the dismissal will be deemed unfair or automatically unfair.

4.4 *Labour broker as the employer*

It is problematic to hold the TES as the employer, because the TES is merely an intermediary that delivers the employee to the client.³²⁸ The relationship between the client and the employee is one that resembles one of a true employment relationship.³²⁹ The work happens at the clients' workplace and the client gives the employee his orders.³³⁰ The client should be deemed to be the employer and should be bound by the duties of an employer in the LRA.³³¹

It is suggested that the TES should not be considered as the employer or be required to ensure a safe working environment for the employee, as the TES does not have control in the clients' workplace.

³²³ *Supra* para 22.

³²⁴ *Supra* para 22-25.

³²⁵ *Nape v INTCS Corporate Solutions* 2010 (31) ILJ 2120 (LC).

³²⁶ *Supra* para 48.

³²⁷ Section 198A (4) of the Labour Relations Amendment Act 6 of 2014.

³²⁸ Bote A. "Answers to 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 pg. 119.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

³³¹ *Ibid.*

In terms of s35 (1) of Compensation for Occupational Injuries and Diseases Act (COIDA)³³² no action may be brought against an employer by an employee or dependant of the employee for recovery of damages in regards to any injury or disease resulting in death or disablement of the employee.³³³ The employer status of the TES means that no action can be instituted against the TES.³³⁴ However such claims can be instituted against the client.³³⁵ The court in the case of *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry*³³⁶ held the client liable for damages suffered by the TES employee during an armed robbery on the client's premises.³³⁷ The court held that s35 (1) of COIDA³³⁸ did not apply and the applicant could claim damages from the client.³³⁹

At first glance this may seem unfair on the client, however it is good because it places an obligation on the client to ensure a safe working environment, which it otherwise would have avoided as it is not the employer.³⁴⁰ This is also advantageous to the employees of the TES because it implies that they will get better working conditions than they would have if it was not for this loophole. This is one of the situations where it is advantageous to the TES to be considered the employer³⁴¹

4.5 *Joint and several liability*

It is problematic that s198 does not provide for individual liability in situations where the other party has no control over the circumstances.³⁴² It is suggested that the client should be held individually responsible for aspects that it has direct control over. One such aspect is ensuring that the employees work in a safe environment. This obligation is supported by the Occupational Health and Safety Act³⁴³ (OHSA).³⁴⁴ In terms of s9 of this Act every employer should conduct

³³² Act 130 of 1993.

³³³ Section 35(1) of Compensation for Occupational Injuries and Diseases Act 130 of 1993.

³³⁴ Bote A. "Answers to 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 pg.121.

³³⁵ *Ibid.*

³³⁶ (2005) 26 *ILJ* 1240 (SE).

³³⁷ *Supra* pg. 1246

³³⁸ 130 of 1993.

³³⁹ *Supra* pg. 1247.

³⁴⁰ In terms of the BCEA the employer has a duty to provide safe working conditions for its employees.

³⁴¹ Bote A. (see note 334) pg. 121.

³⁴² *Ibid.*

³⁴³ Act 85 of 1993.

their business in a manner that ensures as far as reasonably practicable, that persons other than those employed by them who are directly affected by its activities are not exposed to hazards to their health and safety.³⁴⁵ This provision indicates that the client does not only owe a duty to its employees to provide safe working conditions, but also those of the TES.

Joint and several liability of the client and TES should have been extended to include dismissals.³⁴⁶ This would prevent the TES from being held individually liable where the termination of the employee was a result of the clients conduct. A provision providing for the joint and several liability of the two authorities would be more effective because it would deter the client from prematurely terminating the assignment period of the TES employee. This would encourage the labour broker to resist the clients demand to remove the employee or take action against the client to compel the client reinstate the employee. This would be done by the TES in order to avoid the burden of having to find an alternative position for the employee for the rest of the assignment period. If the client is at risk of incurring liability, it will be less likely to dismiss the employee without good reason.³⁴⁷

4.6. Do amendments go far enough to protect temporary employment services employees?

4.6.1 Introduction

The amendments aim to provide better protection for employees in the TES arrangements. The amendments do provide better protection to these employees to a certain extent. The labour broker employees are now enabled to exercise their organisational rights. The amendments also address the issue of job security, by providing that the employee is only to be placed for a period of three months at the client's workplace.³⁴⁸ This creates certainty as to the duration of the assignment to the client's workplace, meaning that the employees will not be assigned to the client's workplace for an indefinite period of time as a temporary employee. In this situation the client would have to sign the TES employee as a permanent member of staff if they wished to have the employee continue to render a service at his or her workplace.

³⁴⁴ Bote A. (see note 334; 121).

³⁴⁵ Section 9 of the Occupational Health and Safety Act 85 of 1993.

³⁴⁶ Ibid pg. 123.

³⁴⁷ Ibid pg.123.

³⁴⁸ Section 198A (1) (a) of the Labour Relations Amendment Act 6 of 2014.

The amendments however lack in some regard. The following issues are not covered by the Amendment Act.

4.6.2 *Unfair dismissals*

The Act does not provide for joint and several liability for unfair dismissal cases. The fact that the TES is regarded as the employer of the employees does not provide the employee with an effective remedy for cases of unfair dismissal.³⁴⁹ This is because the labour broker cannot insist that the client reinstate the employee to the position that he or she previously occupied. Reinstatement in such cases is not likely to be the best solution as the employee is not likely to feel comfortable working for a client who has expressed the desire to have them removed from its premise.

4.6.3. *Wages*

It is submitted that the Amendment Act lacks a provision regarding the determination of wages for TES employees. The Amendment Act does not provide the determination of wages for TES employees. This means that the problem of low wages faced by TES employees will not be eradicated, as the labour broker and the client will still be at liberty to decide what wage the employee will receive. A sectoral determination could be the solution to this problem.³⁵⁰ The sectorial determination would set a minimum wage for TESs employees in that sector.³⁵¹ The client and the TES would then have to agree on a fee to be paid by the client that accommodates the minimum wage.³⁵²

4.6.4. *Job security*

The Amendment Act provides time period that the employees may be as temporary workers. Although this provides some certainty as to how long the employee will be assigned with the client it still does not address the issue of lack of job security in the TESs industry. This is because many of the TES employees remain temporary employees

³⁴⁹ Harvey S. "Labour brokers and workers' rights: can they co-exist in South Africa?" (2011) *SALJ* 100 pg. 113.

³⁵⁰ Bote A. "Answers to 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 pg. 135.

³⁵¹ *Ibid* pg.135.

³⁵² *Ibid* pg.135.

for most of their life, moving from one client to another. It is submitted that the South African legislature could have adopted a stance similar to that in the “One day” rights in the U.K Regulations which provides that the client must give the TES employee access to information on vacancies at the client’s workplace.³⁵³ This would help in addressing the issue of job security in the industry as TES employees would have the opportunity to apply and be considered for suitable positions that become available at the client’s workplace.

4.7. Conclusion

The LRAA has provided TES with better protection than that previously afforded to them in the 1995 LRA. However the LRAA does not provide for a number of issues arising from the TES practice. Section 198A of the LRAA does not provide for a minimum wage or joint and several liability for unfair dismissals. This indicates that the Amendment Act does not go far enough in protecting TES employees and the legislature need to consider making provisions that cover these issues.

In order to find a solution to these loopholes it might be useful to get guidance from international law and foreign law, in order to ascertain what the South African legislature could do differently to improve the regulation of labour brokers. The following chapter will discuss this.

³⁵³ <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> accessed on 03/11/2015

CHAPTER 5 – TEMPORARY EMPLOYMENT SERVICES IN OTHER JURISDICTIONS

5.1. Introduction

The Constitution³⁵⁴ and the LRA³⁵⁵ both provide for the consideration of international and foreign law in interpreting the above mentioned legislation. Section 39(1) (b) of the Constitution provides that in interpreting the Bill of Rights the court, tribunal or forum must consider international law³⁵⁶, while s39(1)(c) provides that foreign law may be considered.³⁵⁷ The LRA³⁵⁸ also provides for the consideration of international law and foreign law. Section 3(c) of the Act provides that any person applying the Act must interpret its provisions in compliance with public international law obligations of the country.³⁵⁹

This chapter looks at how foreign jurisdictions and international law deals with TESs. The jurisdictions that will be considered are Namibia and the United Kingdom. These countries were chosen because they have similar judicial systems as South Africa. The ILO will also be considered as it sets an international standard for labour practices. The foreign jurisdictions and the ILO will be considered in order to compare the stance taken by these jurisdictions with that taken by South Africa and ascertain whether there are aspects of foreign law that the South African legislature could adopt from these jurisdictions.

5.2. International Labour Organisation.

The International Labour Organisation (ILO) provides the international standard regarding the TES practice. South Africa is a member of the ILO. Although South Africa has not ratified the ILO Private Employment Agencies Convention³⁶⁰, it is still helpful to consider whether South African legislation is in line with international standards.

³⁵⁴ The Constitution of the Republic of South Africa 1996.

³⁵⁵ 66 of 1995.

³⁵⁶ Section 39(1)(b) of the Constitution of the Republic of South Africa 1996.

³⁵⁷ Section 39(1)(c) of the Constitution of the Republic of South Africa 1996.

³⁵⁸ 66 of 1995.

³⁵⁹ Section 3(b) of the Labour Relations Act 66 of 1995.

³⁶⁰ 181 of 1997.

The ILO Private Employment Agencies Convention³⁶¹ recognises TES's as a legal and necessary service in the labour market.³⁶² One of the purposes of the convention is to allow for the operation of private employment agencies as well as the protection of workers using the agencies in order to get employment opportunities.³⁶³

The convention provides that such agencies should be registered and issued with a licence before they may lawfully conduct business as an employment agency.³⁶⁴

According to the convention, measures must be taken by member states to ensure that labour broker employees who are assigned to a specific client's workplace are not denied the right to freedom of association and right to collective bargaining.³⁶⁵ The convention further requires that member states take steps to ensure that TES employees are afforded adequate protection in relation to minimum wages, working hours, social security benefits, occupational safety and health compensation in cases of insolvency.³⁶⁶

The LRA³⁶⁷ provides for TES employees' right to collective bargaining and the right to freedom of association. This shows that the country's labour legislation is substantially in accordance with the ILO's Convention on Private Employment Agencies. The ESA³⁶⁸ also provide for the registration of TESs. South African labour legislation however does not provide for minimum wages for these employees.

5.3. *United Kingdom*

Labour broking³⁶⁹ in the United Kingdom (U.K.) is legal and regulated by the Agency Workers Regulations³⁷⁰. Under the Agency Workers Regulation the rights afforded to the TES employees is divided into two categories of rights. The first being "Day one" rights³⁷¹. These rights must be

³⁶¹ 181 of 1997.

³⁶² Van Eck B.P.S "Temporary Employment Services (labour brokers) in South Africa and Namibia." (2010) 13(2) *PER* 109 pg. 116.

³⁶³ Article 2(3) of the ILO Convention of Private Employment Agencies 181 of 1997.

³⁶⁴ Article 3 of the ILO Convention of Private Employment Agencies 181 of 1997.

³⁶⁵ Article 4 of the ILO Convention on Private Employment Agencies 181 of 1997.

³⁶⁶ Article 11 of the ILO Convention on Private Employment Agencies 181 of 1997.

³⁶⁷ 66 of 1995.

³⁶⁸ 4 of 2014.

³⁶⁹ Referred to as agency work in the United Kingdom.

³⁷⁰ 2010.

³⁷¹ <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> accessed on 03/11/2015.

provided by the client on the first day the worker begins work for the client.³⁷² These rights include to the right to access to facilities and the right to access information regarding vacancies in the workplace.³⁷³ These rights provide that should there be any vacancies in the clients business then the client must open such vacancies to the agency worker (TES employee).³⁷⁴ The second types of rights are “Twelve week” rights. These rights come into practice when the worker has been employed by the client for twelve weeks or longer.³⁷⁵ The U.K. regulations provide that the worker is entitled to conditions of employment that are no less favourable compared to the employees of the client.³⁷⁶ Under this regulation the worker is entitled to be treated as if they were directly employed by the client, after twelve weeks of working for the client³⁷⁷ This provision is similar to the provision in s198A (3) (b) (i) of the LRA, which provides that after three months of working on the client’s premises, the client will be deemed to be the employer of the employee.

Under the U.K. regulations the TES employees are not afforded the status of an employee.³⁷⁸ This position is different from South Africa as the LRA affords TES employees the status of an employee³⁷⁹

In the United Kingdom, where the TES³⁸⁰ wishes to terminate the contract of employment, it is required to pay the employee an amount equivalent to four weeks wages.³⁸¹ At first glance this seems rather onerous on the labour broker. However it does provide the employee with some income to survive until they find another assignment.

5.4. *Namibia*

Prior to the year 2004, TES’s in Namibia were unregulated. It was only in the Labour Act 2004³⁸² that the Namibian government first attempted to regulate the practice. Section 126 of the

³⁷² Regulation 12.

³⁷³ <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> accessed on 03/11/2015.

³⁷⁴ Regulation 13.

³⁷⁵ <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> accessed on 03/11/2015.

³⁷⁶ Regulation 12.

³⁷⁷ Department for Business ,Innovation and Skill “Agency Worker Regulation Guidelines” May 2011 1 pg. 18.

³⁷⁸ <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> accessed 20 October 2015.

³⁷⁹ Section 200A of the Labour Relations Act 66 of 1995.

³⁸⁰ The equivalent of TES in the U.K is the Temporary Workers Agency.

³⁸¹ Department for Business, Innovation and Skill “Agency Worker Regulation Guidelines” May 2011 1 pg.40.

³⁸² This refers to a Namibian statute.

Act provided for certain aspects of the TES practice.³⁸³ TES was referred to as “employment and hire services” in the Act.³⁸⁴

The Act however never took effect as members of parliament could not reach agreement on aspects of the act.³⁸⁵

In 2007 the Namibian government was in favour of a total ban on the use of TES.³⁸⁶ As a result section 128 was introduced to the Namibian Labour Act³⁸⁷. The section provided that “no person may for reward, employ any person with the view of making that person available to a third party to perform work for the third party.”³⁸⁸ The effect of the provision was a total ban of the TES industry in Namibia. The section also criminalised the practice and imposed a penalty of a fine or imprisonment on any person found to be carrying on the business of a TES.³⁸⁹

The decision of the Namibian government to ban the practice was largely based on the history of labour hire in the country.³⁹⁰ In the 1900’s a system referred to as “contract labour systems” existed in Namibia.³⁹¹ This was during a time where the Namibian government of the time separated the people of Namibia according to their race.³⁹² The “contract labour system” was regulated by the South West Africa Native Labour Association (SWANLA).³⁹³ The SWANLA provided workers to the mines in Namibia.³⁹⁴ The employees were subjected to inhumane working conditions; they were made to wear labels around their necks indicating the department they worked in, for the duration of their employment they were limited to only being on the employers’ premises, they were limited to the food that the employer provided and were not able

³⁸³ Bote A. “The History of Labour hire in Namibia: a lesson to South Africa” (2013) 16(2) *PER* 506 pg. 516.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

³⁸⁷ 2007.

³⁸⁸ Section 128(1) of the Namibian Labour Act 2007.

³⁸⁹ Section 128(3) of the Namibian Labour Act 2007.

³⁹⁰ Bote A. “The History of Labour hire in Namibia: a lesson to South Africa.” (2013) 16(2) *PER* 506 pg. 517.

³⁹¹ *Ibid* pg. 509.

³⁹² *Ibid* pg. 510.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

to contact their families.³⁹⁵ The argument by the Namibian government was that the use of TES was inhumane and similar to slavery.³⁹⁶

Section 128 was intended to take effect on 1 March 2009, however in February 2009 the implementation was suspended by an order by the Namibian High Court.³⁹⁷ The suspension was done in order to subject the provision to Constitutional review by the Supreme Court of Namibia.³⁹⁸

The matter was brought by Africa Personnel Services, a company carrying on the business as a TES. The company is one of the biggest employers in Namibia; as it employs approximately 6085 employees.³⁹⁹

The applicant challenged the constitutionality of s128, on the grounds that the provision infringed the right to freedom to engage in any profession or carry on any occupation, trade or business.⁴⁰⁰ The Namibian High Court held that the common law contract of employment only had two parties to the contract, and a third party could not be included into the contract.⁴⁰¹ The court further held that the use of TESs was similar to slavery and should be done away with.⁴⁰² The basis for the court's reasoning was based on the ILO's Declaration of Philadelphia⁴⁰³, which provides that labour is not a commodity.⁴⁰⁴ The court found that since s128 rendered the use of TES to be illegal, the applicant could not rely on the right to freedom of occupation, trade or business in order to conduct business as a labour broker.⁴⁰⁵

The court ultimately ruled that s128 was binding. The court did however grant an interdict suspending the implementation of the section until such time as the Supreme Court of Appeal (SCA) of Namibia had decided on the matter.

³⁹⁵ Ibid pg. 511-512.

³⁹⁶ Van Eck B.P.S "Temporary Employment Services (Labour brokers) in South Africa and Namibia" (2010) 13(2) PER 109 pg.113.

³⁹⁷ Ibid pg.114.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ *African Personnel Services v Government of Namibia* (2011) 32 ILJ 205 (Nms) para. 18.

⁴⁰¹ Supra para. 21.

⁴⁰² Supra para. 7.

⁴⁰³ 1994.

⁴⁰⁴ Chapter (i)(a).

⁴⁰⁵ *African Personnel Services v Government of Namibia* (2011) 32 ILJ 205 (Nms) para. 18.

At the SCA the appeal was upheld.⁴⁰⁶ The Namibian government had argued that labour broking was not recognised under common law and therefore was illegal.⁴⁰⁷ The bench held that the government had raised this argument for the first time in the SCA and the applicant had not been given an opportunity to argue against the above mentioned argument before the High Court.⁴⁰⁸ The court expressed the view that significant changes have occurred in the way in which work is done in the contemporary global economy.⁴⁰⁹

The court also rejected the argument by the Namibian Government that the right to freedom of profession, trade or business only applies to natural persons and could not be applied to juristic persons.⁴¹⁰

In reaching its decision the court considered the ILO's Convention on Private Employment Agencies⁴¹¹. This was despite the fact that Namibia did not ratify the convention. The convention recognised labour brokers as a necessary labour market service.⁴¹²

Lastly the court had to decide whether the restriction placed by s128 was reasonable and justifiable in an open and democratic society. The court found that the limitation went beyond the permissible limitations of the rights guaranteed in the Constitution of Namibia.⁴¹³ Section 128 was therefore held to be unconstitutional.⁴¹⁴ The provision was nullified and the ban on the TES practice was lifted.

For a long time after s128 was struck down, the TES practice was unregulated. However in August 2012, the Namibian Labour Amendment Act of 2012 came into effect.⁴¹⁵ This came with an amended s128, governing the TES practice.

The section holds the client as the employer of the employees.⁴¹⁶ This is different to the position in South Africa, where the TES is defined as the employer in the triangular relationship.⁴¹⁷ In

⁴⁰⁶ Supra para. 118.

⁴⁰⁷ Supra para 29.

⁴⁰⁸ Supra para. 29.

⁴⁰⁹ Supra para 24.

⁴¹⁰Supra para. 36-37.

⁴¹¹ 181 of 1997.

⁴¹² Article 2(3).

⁴¹³ *African Personnel v Government of Namibia* (2011) 32 ILJ 205 (Nms) para. 91.

⁴¹⁴ Supra para 91.

⁴¹⁵ Bote A "A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments. "(2015) SALJ 100 pg. 113.

terms of s128 (2)⁴¹⁸ , the client has all the traditional responsibilities of an employer. This position lead to the application by African Labour Services (a TES), to the Namibian High Court claiming that the amended s128 was unconstitutional.⁴¹⁹

In the case of *Africa Labour Services v Minister of Labour and Social Welfare*⁴²⁰, the applicant argued that regarding the client as the employer effectively banned the use of TES. The applicant's reasons for the above mentioned argument was that clients would no longer want to use TES, as the flexibility and other benefits which they had enjoyed as a result of using TES no longer existed.⁴²¹ The court rejected this argument and held that s128 was not irrational and did not infringe on the TES constitutional right to conduct a business of their choice.⁴²² The court held that although s128 placed limitations on the way that TESs were to conduct their businesses, the limitations did not prevent the TES from carrying on business as a TES⁴²³

The Namibian Labour Act allows for the client to be relieved of its employer status.⁴²⁴ This is however only done with the consent of the other parties to the contract.⁴²⁵ However relieving the client from its employer status does not relieve the client of liability arising from a contravention of s128, in such cases the client and the TES are held jointly and severally liable.⁴²⁶ This provision could be problematic as the client could pressure the TES into agreeing to acquit it as the employer by offering to pay the TES a higher price for the supply of the TES employees.

Namibian provisions regarding TES imposes a fine for the contravention of the provisions of the Act, and also imposes criminal sanctions for the contravention of the Act.⁴²⁷ This is different from the position in South Africa, as it is not a criminal offence to contravene the LRA.

⁴¹⁶ Section 128(2) of the Namibian Labour Act of 2012.

⁴¹⁷ Bote A (see note 415) pg. 113.

⁴¹⁸ Namibian Labour Act of 2012.

⁴¹⁹ Bote A (see note 415) pg.113.

⁴²⁰ *Africa Labour Services v Minister of Labour and Social Welfare* (2013) NAHCMD 179.

⁴²¹ Supra para. 32-34.

⁴²² Supra para 20.

⁴²³ Supra para 66.

⁴²⁴ Section 128(8) of the Namibian Labour Act of 2012.

⁴²⁵ Section 128(8) of the Namibian Labour Act of 2012.

⁴²⁶ Section 128(9) of the Namibian Labour Act of 2012.

⁴²⁷ Bote A "The History of Labour Hire in Namibia: A Lesson to South Africa." (2013) 16(1) *PER* 506 pg.522.

South African labour legislation lacks many provisions that are reflected in Namibian labour legislation.⁴²⁸ One of these provisions is the prohibition on the use of TES employees during or in anticipation of a strike.⁴²⁹ This provision is important because if business owners were allowed to make use of TES employees during this time then they would be able to ignore the demands of the striking employees until these employees gave up and returned to work. Another provision that is admirable in Namibian labour legislation is s128 (5), which provides that the use of TES employees is prohibited in the first six months after a large scale retrenchment.⁴³⁰ This is important because it prevents employers from attempting to get cheaper labour by replacing its employees with that of TESs. South African legislature could also adopt the imposition of a fine for contraventions of the LRA and other labour legislation by the client or the TES. This could deter clients from disregarding the rights of the employee.

5.5. Would a an absolute ban be an effective solution

Even though the TES's practice is legally recognised in South Africa, it is not supported by all. One of the biggest opposition to the practice are trade unions.⁴³¹ In 2008 the Congress of South African Trade Unions (COSATU), went on a march in support of a total ban on the practice.⁴³² COSATU argued that the TES practice acted as an obstacle to the achievement of decent work.⁴³³ Another reason why COSATU was opposed to the TES practice, was because it was of the view that the use of TES was the same as human trafficking, as it treated workers as a commodity⁴³⁴ and that the practice lead to the exploitation of employees in this type of atypical employment contract.⁴³⁵

Many trade unions are of the view that their effectiveness is impaired by the use of TESs.⁴³⁶ This is because unions are unable to represent the TES's employees as it is not easy to recruit these

⁴²⁸ Ibid.

⁴²⁹ S128 (5) of Namibian Labour Act of 2012.

⁴³⁰ S128 (5) of the Namibian Labour Act 2012.

⁴³¹ Bote A. "Answers to 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 pg. 113.

⁴³² Bote A "The History of Labour Hire in Namibia: A Lesson to South Africa." (2013) 16(1) *PER* 506 pg.528.

⁴³³ Harvey S "Labour brokers and workers' rights: Can they co-exist?" (2011) *SALJ* 100 pg.117.

⁴³⁴ Ibid.

⁴³⁵ Bote A (see note 431) pg. 113.

⁴³⁶ Ibid.

employees because they move from one employer to another.⁴³⁷ This effects the number of employees that the trade union represents and the trade unions' ability to acquire organisational rights in the client's premises.

However it must be noted that not all trade unions are in favour of a ban of the practice.⁴³⁸ After COSATU's call for an absolute ban of labour broking, United Association of South Africa (UASA) criticised COSATU's call to do so.⁴³⁹ In its statement UASA stated that there would always be a need for temporary workers'. UASA was of the view that TES's should be better regulated because some TES's give the industry a bad name.⁴⁴⁰

5.5.1. Disadvantages of banning Temporary Employment Services.

Some of the disadvantages that may arise from a ban are discussed below.

a. Increase in unemployment

The ban of the TESs practice could lead to the loss of jobs and an increase in unemployment.⁴⁴¹ TESs are meant to provide flexibility in the labour market.⁴⁴² However a ban on the practice would mean that the client would incur additional costs and administrative burden from carrying out the hiring process.⁴⁴³ This could result in the client preferring to spread the work amongst its permanent staff and increasing their salaries.

TESs and employer organisations argue that TESs create new jobs which benefits the South African economy.⁴⁴⁴ It is however questionable whether the industry does in fact create new jobs or whether it merely re-routes existing jobs through the TES, in order to avoid legislative responsibilities.⁴⁴⁵ It is submitted that this argument is partially true, as some employers transfer their employees to labour brokers in order to avoid legislative

⁴³⁷ Ibid pg. 116.

⁴³⁸ Harvey S "Labour brokers and workers' rights: Can they co-exist?" (2011) *SALJ* 100 pg.117.

⁴³⁹ Ibid pg.118.

⁴⁴⁰ Ibid.

⁴⁴¹ Benjamin P, et al "Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010. A Report prepared for the Department of Labour and the Presidency" (2010) pg. 39.

⁴⁴² Ibid pg. 39.

⁴⁴³ Ibid pg.39.

⁴⁴⁴ Harvey S (see note 438) pg. 120.

⁴⁴⁵ Ibid.

obligations towards them. However on the other hand the industry does create temporary jobs.

Research shows that many of the employees that approach TES in order to get a job are young, lower skilled new entrants to the labour market.⁴⁴⁶ Banning the use of TES would make it difficult for this class of people to access job opportunities, as there are circumstances where it is not easy to directly approach the client.⁴⁴⁷ In a Department of Labour's report in 2008, the department recommended the creation of Labour Market Intermediaries, who recruit the unemployed, train them and place them in jobs.⁴⁴⁸ The intermediaries would not act as the employer but would merely act as an intermediary for employers seeking employees and workers seeking work.⁴⁴⁹ It is submitted that this is the role that TESs already play in the labour market.

b. Increased informality and casualization.

An absolute ban could lead to the increased casualization of work.⁴⁵⁰ The ban would not prevent clients from using the "bakkie brigade". This is a term used to describe the situation where companies use workers that they collect from the side of the road or outside the factory⁴⁵¹, to carry out temporary work.⁴⁵²

If a ban were to be carried out, regular inspections would have to be carried out on employers to ensure that their workers were employed by them or that they had entered into some sort of formal contract (such as a fixed term contract) with the worker.

These workers are often desperate, and will often accept exceptionally low amounts of money as compensation for the work done. A ban would therefore not address the issue of low wages associated with temporary employees.

These workers would not be better off, as they would not enter into a contract of employment with the client. The workers' "employment" would also be unregulated, meaning that the employer would be at liberty to pay the employee any amount they

⁴⁴⁶ Benjamin P, et al (see note 441; 18).

⁴⁴⁷ Ibid pg. 39.

⁴⁴⁸ Benjamin P, et al (see note 441; 39).

⁴⁴⁹ Ibid.

⁴⁵⁰ Benjamin P, et al (see note 441; 40).

⁴⁵¹ These may be workers seeking employment from the company.

⁴⁵² Benjamin P, et al (see note 441; 40).

choose to. The client would also be at liberty to dismiss the worker whenever they felt the need to do so and get another worker from the side of the road or gate.

c. *Infringement of right to freedom of occupation and trade.*

i. *Section 36 of the Constitution*

The Constitution⁴⁵³ provides for the right to freedom of trade and occupation.⁴⁵⁴ The section provides that “Every citizen has the right to choose their trade, occupation or profession freely.”⁴⁵⁵ A ban of TESs would result in the infringement of the right.⁴⁵⁶

Section 36 of the Constitution allows for the limitation of rights, where the limitation is reasonable and justifiable in a democratic society.⁴⁵⁷ The limitation would have to meet the requirements of the limitation clause⁴⁵⁸ meaning that the ban would have to be proved to be reasonable and justifiable in an open and democratic society.⁴⁵⁹ In deciding whether a limitation is reasonable and justifiable, a number of factors must be considered. These factor are as follows:

- (a) The nature of the right;
- (b) The importance of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relationship between the limitation and its purpose; and
- (e) Whether there are less extreme means to achieve the purpose.⁴⁶⁰

The right to freedom of occupation or trade is an important right. The court in the case of *Affordable Medicines Trust v Minister of Health*⁴⁶¹, found that rights to freedom of trade and occupation were important rights as they were linked to human dignity, which is one

⁴⁵³ The Constitution of the Republic of South Africa 1996.

⁴⁵⁴ Section 22 of the Constitution of the Republic of South Africa 1996.

⁴⁵⁵ Section 22 of the Constitution of the Republic of South Africa 1996.

⁴⁵⁶ Benjamin P, et al (see note 441; 37)

⁴⁵⁷ Section 36 of the Constitution of the Republic of South Africa 1996.

⁴⁵⁸ Section 36 of the Constitution is also referred to as the limitation clause.

⁴⁵⁹ Section 36 of the Constitution of the Republic of South Africa 1996.

⁴⁶⁰ Section 36 of the Constitution of the Republic of South Africa 1996.

⁴⁶¹ 2006 (3) SA 247 (CC).

of the fundamental rights.⁴⁶² This means that the reason given by the state to limit the TESs' right to choose an occupation or trade, would have to be very good.⁴⁶³

In terms of the second factor, the limitation of the right is important because it is aimed at protecting employees from exploitation. This is an important aim because it aims to protect the employees' rights to dignity, equality and fair labour practices.

The third factor requires that the extent of the limitation be proportional to the harm that it aims to prevent (abuse of TES employees). In terms of the ban, restricting TESs from exercising their right to freedom of trade has an extensive effect on the TESs' right to freedom of trade. It would mean that TESs would not be able to enjoy their right to choose a profession of their choice in any way. This would require the state to put forward a very good reason, why TESs should not exercise this right.⁴⁶⁴ Restricting TESs from exercising their right of freedom of trade in order to prevent exploitation of the employees, would however be proportionate to the harm because it weighs the rights and interests of the two parties involved, and places more weight on the rights of the employees. This is because one of the aims of the LRA⁴⁶⁵ is to protect the employees.

In terms of the relationship between the limitation and its purpose, it would be difficult for the state to produce evidence that shows a link between the prohibition and the reduction in the abuse of TES employees.⁴⁶⁶ As discussed above a ban on the TESs industry would not prevent employers from using the services of casual workers without entering into a formal contract of employment with them. This indicates that an absolute ban would not prevent the abuse of TES employees.

The fifth factor looks at whether there are less restrictive means of achieving the purpose of the restriction on TESs. The purpose of limitation would be to prevent the exploitation of vulnerable employees. The Government would have to prove that there is no other way

⁴⁶² Supra para 274H-275B

⁴⁶³ Brand E.H "The Legal Framework for Protection of Employees of Labour Brokers in South Africa." Unpublished thesis (LLM). (2010) University of Cape Town 1 pg. 47.

⁴⁶⁴ Ibid pg. 47

⁴⁶⁵ 66 of 1995.

⁴⁶⁶ Brand (see note 463) pg.47.

of eliminating the abuse and exploitation associated with the practice.⁴⁶⁷ In this regard it submitted that better regulation of the practice would be a less restrictive way of preventing the abuse associated with the practice, therefore it is unlikely that the ban would be found to be constitutional.

In considering all the factors above, it is unlikely that the court would find that the limitation is reasonable and justifiable. The state should rather draft legislation that addresses the abuse suffered by the TES employees because it is a less restrictive mean of preventing the abuse of TES employees. There is also no evidence that proves that the TES employees would be better off if the TES industry was banned. In this was a ban would not be an effective solution.

ii. The International Labour Organisation

One of the other factors that would have to be considered in deciding whether the prohibition is reasonable and justifiable is international law.⁴⁶⁸ The ILO's Convention on Private Employment Agencies⁴⁶⁹ is of importance in this regard. The convention recognises TESs as legal and necessary, as long as it does not result in the infringement of labour rights.⁴⁷⁰ A total ban on the TESs system would be against the ILO standards.⁴⁷¹ On the one hand it could be argued that a ban would not be entirely against international standards as the practice does lead to the infringement of employee's rights. However legislation could but put in place to curb the infringement of these rights.

iii. Namibia

Namibian labour law is one of the foreign jurisdictions that can be considered when dealing with the question of an absolute ban of the TES system. Namibian law is of significance because the use of TESs was once banned in the country and later re-legalized. The reasons why the practice was banned in 2007 are similar to the reasons put forward by those in favour of a ban in South Africa; being that the practice leads to the

⁴⁶⁷ Benjamin P, et al (see note 441;37)

⁴⁶⁸ Ibid pg.38

⁴⁶⁹ Convention 181 of 1997

⁴⁷⁰ Ibid

⁴⁷¹ Ibid

exploitation of employees and the infringement of the employees' rights.⁴⁷² The use of TESs was however re-legalised in an appeal case where the Supreme Court of Namibia found that the ban limited the right of the labour brokers to engage in an occupation or trade of their choice as provided for by the Namibian Constitution.⁴⁷³

The South African Constitution provides for the same right and therefore it is unlikely that any court would rule that the total ban of the practice would be constitutional.⁴⁷⁴

5.5.2. *Alternatives to a ban on Temporary Employment Services*

An absolute ban seems to have many disadvantages; the following are a number of alternatives to the ban of labour brokers.

i. The introduction of a regulatory body.

The Employment Services Act⁴⁷⁵ provides that all Temporary Employment Agencies⁴⁷⁶ must be registered in order to operate as such.⁴⁷⁷ The Department of Labour however has limited inspection capacity and is therefore unlikely to be able to monitor where there has indeed been compliance with this requirement.⁴⁷⁸

The partnership between the public and private sector in establishing an inspectorate that would supplement the existing inspectorate, would assist in monitoring the compliance with registration requirement.⁴⁷⁹ It is suggested that this private-public inspectorate could comprise of government, business and labour.⁴⁸⁰ Each industry could be charged a fee that goes towards the funding of the regulatory body dealing with TESs.⁴⁸¹ This

⁴⁷² In the Namibian High Case of *African Personnel Services v Government of Namibia* (2011) 32 ILJ 205 (Nms) para. 19, the state argued that the practice lead to the exploitation of employees in this type of employment relationship.

⁴⁷³ *African Personnel Services v Government of Namibia* (2011) 32 ILJ 205 (Nms) par. 53-57.

⁴⁷⁴ Bote A "The History of Labour Hire in Namibia: A Lesson to South Africa." (2013) 16(1) PER 506 pg.529.

⁴⁷⁵ Act 4 of 2014.

⁴⁷⁶ Also known as labour broker. The act uses this term instead of labour broker.

⁴⁷⁷ Section 13 of the Employment Services Act 4 of 2014.

⁴⁷⁸ Benjamin P, et al "Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010. A Report prepared for the Department of Labour and the Presidency" (2010) pg. 41.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

regulatory body could also ensure compliance with the LRA requirements and ensure that decent wages are paid to the labour broker employees.

ii. Effective protection against unfair dismissal for Temporary Employment Service employees.

One of the biggest challenges facing labour broker employees is that they are often unfairly dismissed without any remedy.⁴⁸² This infringes their right to fair labour practices. To avoid having to ban the TES practice in order to bring an end to the type of exploitation faced by the employees, better protection should be provided to these employees in relation to unfair dismissals.

iii. Restrict Temporary Employment Services to certain categories of work.

In order to avoid the exploitative nature of TESs employment relationship, the practice could be restricted to certain types of work.⁴⁸³ This approach has been adopted in many other countries, where the work is usually restricted to categories of work that are short term or temporary such as the following:

- Substitutes for employees when workers are absent due to illness, vacation, training or leave.
- Placements for specified periods to meet fluctuations in demand for labour (including seasonal work) or to cope with emergency situations.⁴⁸⁴

This would ensure that TES employees are only used in genuinely temporary situations. This would in effect help with the problem of employees being retained at the client's workplace for an indefinite period of time without being signed on as the client's employee.

5.5.3. To ban? Or not to ban?

⁴⁸² Van Eck BPS "Temporary Employment Services (Labour brokers) in south Africa and Namibia" (2010) 13(2) *PER* 107 pg.111.

⁴⁸³ Benjamin P, et al "Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010. A Report prepared for the Department of Labour and the Presidency" (2010).pg. 47

⁴⁸⁴ *Ibid* pg. 47

The Confederation of Associations in the Private Employment Sector (CAPES) statistics provide that the TES industry place approximately 500000 workers per day in all industries, 32% of those placements are appointed permanently by the client each year.⁴⁸⁵ The TES industry also provides approximately 20 000 learnerships each year.⁴⁸⁶ This means that TESs assist in skill development of the workers, and will result in the workers being more employable in the future.

Banning the TES industry would be detrimental to the economy, as there would be a loss of jobs and an increase in unemployment. The TES companies also contribute to the country's economy by paying taxes.⁴⁸⁷ A ban on the practice would mean that the country would lose potential revenue.

An absolute ban on the practice would also not necessarily be beneficial to the employees as they would have to approach the client directly in order to obtain work with the client.⁴⁸⁸ The TES makes work easier to find for those who seek employment as the TES is aware of the company's need for temporary employees, which the worker may not know of.

As discussed above the ban is not likely to pass the constitutionality test for the following reasons. Firstly a ban would be limitation on the TESs' right to freedom of occupation or trade. Although the employees' rights are also effected by the use of TESs, legislation could be put in place in order to combat the exploitation faced by these employees. In terms of the limitation clause⁴⁸⁹, the limitation is unlikely to be found to be reasonable and justifiable, as better regulation of the industry is a less restrictive way of preventing exploitation of these employees. The Namibian case of *African Personnel Services v Government of Namibia*⁴⁹⁰ is an indication that the courts in South Africa are unlikely to

⁴⁸⁵ Van Eck B.P.S "Temporary Employment Services (labour brokers) in South Africa and Namibia" (2010) 13(2) *PER* 107 pg.119.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ <http://www.apso.co.za/news/226009/LABOUR-LAW-AMENDMENTS-DEVASTATING-FOR-BUSINESS-THE-WORKFORCE-AND-THE-SA-ECONOMY.htm> accessed 25 November 2015.

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Section 36 of the Constitution of the Republic of South Africa 1996.

⁴⁹⁰ *African Personnel Services v Government of Namibia* (2011) 32 *ILJ* 205 (Nms).

find that an absolute ban is constitutional. Finally a ban on TESs would be against international standards as many countries recognise TESs as legal. It would also be against the ILOs standards as the organisation recognises TES as being a necessary part of the labour market. The most suitable alternative to a ban is better regulation of the practice.

5.6. Conclusion

As discussed above South African law regarding TESs is in some respects similar to that of foreign jurisdictions discussed. There are however some aspects of foreign law that are different from South African law. Some of the aspects that South African legislature could adopt from foreign law of Namibia and the United Kingdom is the imposition of a fine for contraventions of labour legislation and the prohibition of the use of TESs during strikes and major retrenchments.

TESs are recognised by the ILO, this indicates that South African labour legislation regarding TESs is in accordance with international labour legislation. This is one of the reasons why a ban in the TES practice is not desirable.

After considering the ILO, Namibia and the limitation clause, it is clear that a ban on the TESs practice would be unconstitutional and would not be an effective solution to the problems associated with the TESs industry. This is because a ban would be an infringement on the right to freedom of trade and occupation and is unlikely to prevent business owners from using vulnerable casual workers without entering into a formal contract with them.

CHAPTER 6- CONCLUSION

6.1. Introduction

Temporary Employment Services is an industry that has been in existence for many years in South Africa. The system aims to provide flexibility into the labour market. This is the reason why the industry has been popular with employer organisations. The use has not been popular with everyone though (trade unions being the biggest opposition to the practice), this is because of the abuse and exploitation of employees associated with this industry.

Although the industry has benefits to employers and the economy in general, there are disadvantages to the employees in this type of employment relationship. Amongst these disadvantages are the following: lower wages, less statutory protection and the infringement of the right to fair labour practices and organisational rights.

The legislature has identified that the employees in TES employment relationships are vulnerable and need better statutory protection, as a result the 1995 LRA was amended, and the ESA was enacted.

6.2. How do the Labour Relations Amendment Act and the Employment Services Act affect the Temporary Employment Services industry?

The amendments cover a wide range of issues such as; the organisational rights of these employees⁴⁹¹, joint and several liability of the client and the labour broker, the time frame that the employee may work for the client as a temporary employee.

The Amendment Act now provides better protection for labour broker employees. The Act does this by enabling the employees to effectively exercise rights that they were previously restricted from enjoying. The Act now enables trade unions to obtain organisational rights in respect to the employees from either the client or labour broker, depending on where the employees are located.⁴⁹¹ This means that the employees will be able to exercise their right to collective bargaining as they will now be able to be represented by a trade union.

⁴⁹¹ Section 21(12) of the Labour Relations Amendment Act 6 of 2014.

The amendments also provide stricter regulations, than the previous version of the Act. The LRAA prevents the client from making work the employee for them for an indefinite period of time, as the Act provides that the work will be only considered to be temporary if it is for a period of three months.⁴⁹² The Act now provides for situations where the client or the TES attempts to circumvent the obligations as provided for by the Act.

The ESA prohibits labour brokers from charging employees a fee in return for assigning them to a client.⁴⁹³

The overall effect that the LRAA and ESA have on the practice is that it limits flexibility of the practice, as the client and TES are now bound by stricter legislation which prevents them from dealing with the TES employees as they please.

The amendments have however had positive effects on the TESs industry. According to a survey done by the Confederation of Association in the Private Employment Sector (CAPES) on its members, there have been TESs employees who have been kept on by the client.⁴⁹⁴ The survey shows that 20% of the employees were kept on the client, and given permanent jobs.⁴⁹⁵

6.3. Do the Amendments go far enough?

Although the Act now provides for greater protection to labour broker employees, it does not go far enough to protect the employees. It still does not address a number of issues. These issues are; the provision for a minimum wage for employees in this type of employment, unfair dismissals and disguised employment. The establishment of a sectorial determination on minimum wages for TES employees would prevent the client and TES paying the employee a low wage. The legislature also include unfair dismissal of TES employees as one of the arrears where the client and TES are jointly and severally liable. This would give the TES employee a remedy where they have been unfairly dismissed, and it would deter clients from insisting on the removal of the TES employees for arbitrary reasons.

⁴⁹² Section 198A (1) of Labour Relations Amendment Act 6 of 2014.

⁴⁹³ Section 15(1) of Employment Services Act 4 of 2014.

⁴⁹⁴ [http://c.ymcdn.com/sites/www.apso.co.za/resource/collection/4C98A79B-6CA6-4B52-A46D-E7880B210DA0/Overcoming_Objections_to_'labour_brokers'_ \(APSO\).pdf](http://c.ymcdn.com/sites/www.apso.co.za/resource/collection/4C98A79B-6CA6-4B52-A46D-E7880B210DA0/Overcoming_Objections_to_'labour_brokers'_ (APSO).pdf) accessed 10/02/2016.

⁴⁹⁵ Ibid.

After considering foreign and international law, it is evident that the LRA amendments and the ESA do not meet the international standards of the ILO as it lacks some of the features of the ILO Convention on Private Agencies⁴⁹⁶. It is recommended that the legislature should adopt some of the provisions in the Namibian and United Kingdom legislation. Section 128(5) of the Namibian Labour Act⁴⁹⁷ which provides that clients are prohibited from making use of TES employees in anticipation of a strike.⁴⁹⁸ This would prevent clients from ignoring the demands of their employees by making use of TES employees in anticipation of a strike. The provision further prohibits the use of TES employees immediately after a large scale retrenchment.⁴⁹⁹ This is aimed at preventing the client from replacing his/her staff with TES employees. A United Kingdom provision that should be adopted is Regulation 13 which provides that a client must provide the TES employees with access to information about vacancies at its workplace.⁵⁰⁰ This will help TES in order to be able to be considered for permanent positions at the client's workplace.

The most important question is whether the Employment Services Act and the Labour Relations Amendment Act will be the solution to the problems associated with the use of TESs. This question will depend on the enforcement of the provisions of these two statutes.

Currently it does not seem as though the amendments to LRA have been the solution to the issue of abuse of TES employees. There have still been a number of calls for the ban of the practice. The Congress of South African Trade Unions (COSATU) continues to call for the ban of the practice.⁵⁰¹ There have also been a number of protests by employees at various institutions calling on the client to take the employees on as permanent employees as they had been working for the client for many years.⁵⁰² This is evidence that although there has been enactment of new legislation, the clients and TESs still fail to comply with the provisions. It is evident that the

⁴⁹⁶ Number 181 of 1997.

⁴⁹⁷ 2012.

⁴⁹⁸ Section 128(5) of the Namibian Labour Act of 2012.

⁴⁹⁹ Section 128(5) of the Namibian Labour Act of 2012.

⁵⁰⁰ <http://www.polity.org.za/article/alternatives-to-labour-broking-2013-08-13> accessed on 03/11/2015.

⁵⁰¹ <http://www.sabc.co.za/news/a/6fa7018049c38b31b17ef9c59f56a7b6/Cosatu-to-protest-against-labour-brokers-20150709> accessed on 15/12/2015.

⁵⁰² http://groundup.org.za/article/pietermaritzburg-municipal-workers-demand-permanent-jobs_3585#sthash.u3Bbc7Ws.dpuf accessed on 15/12/2015.

problem is not the lack of legislation protecting these employees but rather the enforcement of these provisions. This means that the provisions in the LRA and ESA alone are not alone sufficient in curbing abuse of these employees; there is a need for a regulatory body which is responsible for checking that clients and TES comply with the provisions of the legislation.

It must however be noted that the two pieces of legislation are fairly new and therefore whether there will be a change the industry as the years go by is yet to be seen.

6.4. Would a ban be an effective solution?

For many years trade unions have argued that the solution to the problems associated with the TES is an absolute ban on the practice, while employer organisations have argued that regulation is the better approach.⁵⁰³ As discussed above an absolute ban is not likely to be constitutional. The reason for this is that the ban would lead to a limitation on the exercise of the TES's right to choose a trade, occupation or profession of their choice. The limitation is not likely to be found to be "reasonable and justifiable" as required by the limitation clause. This is because better regulation of the practice would be a less restrictive means to achieving the prevention of abuse of TES employees.

An absolute ban would not be an effective solution as it would not prevent business owners from using desperate casual workers without entering into a formal employment contract and paying them a very low wage.

A ban would also not be in line with international standards. The Supreme Court of Namibia found that a ban was unconstitutional as it infringed labour brokers' right to freedom of trade or occupation. The ILO recognises TESs and considers TESs to be necessary part of the economy. Other foreign jurisdictions such as the United Kingdom also legally recognise the use of TES. This means that if South Africa were to ban the practice it would be going against international standards.

This shows that the TES industry is likely to remain in practice for many years to come. What is also evident is that the industry is under development and constantly being scrutinised.

⁵⁰³ <http://www.retreachmentassist.co.za/index.php/ra-newsletters/107-labour-brokering-temporary-employment-services-section-198-of-the-labour-relations-acts> accessed on 16/04/2015.

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