

**Title: A critical examination of the interpretation and application of the law relating to Temporary Employment Services in South Africa.**

**by**

**Name: Bonginkosi J Gumede**

**Student number: 211521823**

**Supervised By: Ms. Nicci Whitear-Nel**

**DECLARATION**

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## **ABSTRACT**

*This paper focuses on the law regulating labour brokers which is now termed temporary employment services in South Africa. Labour brokers have made a significant contribution to the South African economic growth including curbing the chronic level of unemployment. In 2014 the Labour Relations Act was amended particularly section 198 to address certain abusive behaviors involved in temporary employment services. Since the amendments came into effect, there have been some speculations on the proper interpretation of this section specifically section 198A (3) (b) which deems workers to be employed by the client after three months, if they were not performing a temporary service and have been earning below the threshold prescribed in section 6 (3) of the Basic Conditions of Employment Act. Section 198(3)(b) has been interpreted to mean that the client and the labour broker become dual/parallel employers after three months and this is supported by section 198(4A) which states that the client and the labour broker are jointly and severally liable for any breach of the law. However, this interpretation has been refuted by the sole employer interpretation which provides that the client becomes the only employer after the deeming section and this is supported by the purposive approach of interpretation.*

*This dissertation examines the interpretation and application of the deeming section in relation to ILO instruments, and the recent judgement in NUMSA v Assign Services & others in which the Labour Appeal Court set aside the Labour Court decision and concurred with the CCMA ruling, that the client becomes the sole employer for the purposes of the Act. It argues that, while the LAC decision brings clarity and certainty to the confusion regarding the sole and dual employer interpretation there are some negative and positive consequences of the judgment.*

## **LIST OF ACRONYMS:**

ANC	African National Congress
BCEA	Basic Conditions of Employment Act 75 of 1975
CAPES	Confederation of Associations in the Private Sector
CC	Constitutional Court
CCMA	Commissioner for Conciliation, Mediation, and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
DOL	Department of Labour
EEA	Employment Equity Act 55 of 1998
ESA	Employment Services Act 4 of 2014
ILO	International Labour Organization
LA	Labour Court
LAC	Labour Appeal Court
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 6 of 2014
NEDLAC	National Economic, Development and Labour Council
NUMSA	National Union of Metalworkers of SA
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
TES	Temporary Employment Services

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## CHAPTER 1: INTRODUCTION

### 1.1 BACKGROUND

The concept of labour broking is not something new in the South African employment law. In terms of the 1956 Labour Relations Act, labour broking was defined as a person who for payment secures and places workers with its client and who is responsible for paying these workers.<sup>1</sup> According to the Labour Relations Amendment Act 3 of 1983 a labour broker was deemed to be the employer of the workers placed with the client.<sup>2</sup> The rationale behind these provisions was to avoid the employers' obligations to provide labour broker employees with protection in respect of statutory wage regulating mechanisms.<sup>3</sup>

The Labour Relations Act 66 of 1995 (LRA/the Act) retained the provisions of labour brokers as now provided by section 198(1) of the Act, however, with the little renovation as now termed as Temporary Employment Services (TES).<sup>4</sup> As such, these terms are used interchangeably in this dissertation. The LRA presented a new section which provided jointly and severally liability of the labour broker or the client for violation of labour laws including the Basic Condition of Employment Act<sup>5</sup>, an arbitration award, a collective agreement or a sectoral determination.<sup>6</sup> However, there were a number of shortcomings of the LRA namely: it was the labour broker that was responsible for disputes arising in respect of unfair dismissal or unfair labour practices; the labour broker employees were underpaid when compared to those employees employed by the client directly; even though the nature of their employment was meant to be temporarily but it was often for indefinite period; they were also subjected to unfair payment of benefits such as pension fund, and medical aid,<sup>7</sup> it was also impossible and complicated for these employees to identify the

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<sup>1</sup> Benjamin, P 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act (2016) 37 *ILJ* 29; Brassey, M & Chealdle, H 'Labour Relations Amendment Act 2 of 1983 (1983) 4 *ILJ* 37.

<sup>2</sup> Section 1(3) (a) of the Labour Relations Act 3 of 1983.

<sup>3</sup> Benjamin (note 1 above) 30.

<sup>4</sup> *Ibid* 30; Aletter C & Van Eck C 'Employment agencies: Are South Africa's recent legislative amendments compliant with the International Labour Organisation's standards?' (2016) *SA Merc LJ* 289.

<sup>5</sup> The Basic Conditions of Employment Act 75 of 1997 (BCEA).

<sup>6</sup> Section 198(4) of the Labour Relations Act 66 of 1995 (LRA); Benjamin (note 1 above) 30.

<sup>7</sup> Forere, A 'From exclusion to labour security: To what extent does section 198 of the Labour Relations Amendment Act of 2014 strike a balance between employers and employees' (2016) *SA Merc LJ* 378.



identity of their true employer because of the arrangement of this triangular employment relationship.<sup>8</sup>

The use of labour brokers expanded in South Africa because it was considered as most cost-effective in that it reduces labour costs and risks related to employment.<sup>9</sup> In its 2009 election manifesto, the African National Congress (ANC) announced that labour broking, outsourcing, and subcontracting should be regulated in order to avoid the exploitation faced by the TES employees and ensure decent work for all employees.<sup>10</sup> However, the Confederation of Associations in the Private Sector (CAPES) was against the ANC's proposal for the regulation of labour brokers, thus advocating self-regulation.<sup>11</sup> According to the study conducted by the Department of Labour (DOL) in 2009, a number of cases were referred for adjudication to the Commission for Conciliation, Mediation, and Arbitration (CCMA) involving temporary employment services.<sup>12</sup> In its findings, the DOL pointed out that in most of these cases there is usually inequality between the TES employees and those employed directly by the client in respect of the provision of benefits, equal payment, job security and equal treatment.<sup>13</sup>

In an attempt to curb these injustices faced by these employees a number of proposals for amendments of the LRA were made. In 2010 the DOL suggested that labour legislation including the LRA be amended to provide protection for vulnerable workers.<sup>14</sup> One of the important proposals was the Labour Relations Amendment Bill of 2010 which proposed a change of the

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<sup>8</sup> Benjamin, P 'To Regulate or to Ban – Controversies over Temporary Employment Agencies I South Africa ad Namibia' points out that there is evidence that employees are often not aware whether they are employed by an agency or by the business where they work: "Arbitration awards show that employees who are dismissed refer cases against the enterprise they consider to be their employer, only to be met with the defence that the legal employer is an agency who recruited them or to whom they were transferred."

<sup>9</sup> Benjamin (note 1 above) 30-31; Theron "Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship" 2005 26 *ILJ* 626.

<sup>10</sup> The African National Congress 2009 election manifesto said that: 'In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, we will introduce laws to regulate contract work, subcontracting and outsourcing, to address the problem of labour broking and prohibit abusive practices' available at <http://www.anc.org.za/docs/manifesto/2009/manifesto.pdf> accessed on 17 September 2017.

<sup>11</sup> Benjamin (note 1 above) 32.

<sup>12</sup> Ibid 32; CCMA Report on Difficulties with Labour Brokers (unpublished 2009).

<sup>13</sup> CCMA Report on Difficulties with Labour Brokers (unpublished 2009).

<sup>14</sup> The Department of Labour Republic of South Africa, available at [www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendments-bills/](http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendments-bills/) accessed on 29 August 2017.

definition of an employee.<sup>15</sup> Other proposed amendments, suggested a complete banning of labour broking and repealing of the provisions relating to temporary employment, however, these proposals were rejected and severely criticized by the National Economic Development and Labour Council (NEDLAC) on the basis that it was going cause many job losses.<sup>16</sup> In 2012 another policy process began at NEDLAC which proposed significant changes to the law relating to non-standard employment which led to the coming into effect of the 2014 Labour Relations Amendment Act.<sup>17</sup> One of the significant amendments was section 198A which was introduced to deal effectively with the abusive practices and exploitation relating to labour broking or temporary employment services.

## 1.2 PROBLEM STATEMENT

As stated in the background temporary employment services<sup>18</sup> workers have been subjected to unfair and unequal employment terms and conditions, inferior income, and benefits.<sup>19</sup> Being the most vulnerable and insecure group in the labour market, these employees have been confronted with difficulties in identifying their true employers because of the abusive practices involved in the triangular employment relationship.<sup>20</sup> Therefore, the LRA was amended and came into operation in January 2015.<sup>21</sup> The LRA (as amended) amended section 198 and introduced section 198A with an aim of preventing the exploitation faced by the TES employees.<sup>22</sup> Section 198A (3)(b) of the LRA as amended introduces the ‘deeming provisions/section’ in terms of which workers earning below the earning threshold as contemplated in section 6(3) of the BCEA, and who have been placed with a client for more than three months are deemed to be employees of the

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<sup>15</sup> The Labour Relation Amendment Bill 2010.

<sup>16</sup> Memorandum of Objects: Labour Relations Act Amendment Bill, 2012 available at <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf> accessed on 17 October 2017.

<sup>17</sup> Benjamin (note 1 above) 28-40.

<sup>18</sup> Section 198 of the Labour Relations Act as amended in 2014, defines a temporary employment services as any ‘person who for reward procure for or provides to a client and who is remunerated by the temporary employment service.’

<sup>19</sup> Cohen, T ‘The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships’ (2014) 35 *ILJ* 2607.

<sup>20</sup> Forere (note 7 above) 376.

<sup>21</sup> The Labour Relations Amendment Act 6 of 2014.

<sup>22</sup> Benjamin (note 1 above) 29.

client<sup>23</sup> The purpose of this dissertation is to critically inspect the interpretation and application of section 198A(3)(b) of the LRA as amended. It also aims at examining the issues that have created a huge debate on whether after the three-month period the client becomes the sole employer and the labour broker ceases to be the employer of the placed employees. Or whether section 198A(3)(b) means that the TES and its client become dual employers of the workers.<sup>24</sup> Another issue to be considered is what happens to the placed employees if the client decides to terminate the commercial contract with the labour broker, whether this would mean that the employee is dismissed by client or not.<sup>25</sup> Additionally, it will examine whether a client is entitled to conduct a retrenchment procedure if it no longer needs the services of the placed employees.<sup>26</sup> In responding to these issues, the research will critically analyse the recent judgment in *NUMSA v Assign Services and Others*,<sup>27</sup> in which the Labour Appeal Court held that once section 198A (3)(b) kicks in, it makes the client the sole employer for the purposes of the LRA.<sup>28</sup>

### 1.3 LITERATURE REVIEW

For the purposes of this dissertation, it is important to limit the discussion to instances that led to the 2014 amendments and the debate over the interpretation of section 198A (3)(b).<sup>29</sup> Section 198 of the LRA provides a definition for TES from which it can be inferred that the atypical employment relationship comes into existence at the time the labour broker provides employees to its client.<sup>30</sup> Temporary employment services involves a binding commercial contract between the labour broker and its client and a contract of employment between the labour broker and the

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<sup>23</sup> Ibid 28.

<sup>24</sup> Aletter, C & Van Eck, S 'Employment agencies: Are South Africa's recent legislative amendments compliant with the International Labour Organization's standards?' (2016) *SA Merc LJ* 294.

<sup>25</sup> Maeso, M 'Who is the 'Employer'?' (2017) available at [www.polity.org.za/print-version/who-is-the-employer-2017-03-17](http://www.polity.org.za/print-version/who-is-the-employer-2017-03-17) accessed on 18 May 2017.

<sup>26</sup> Ibid.

<sup>27</sup> (2017) ZALAC 45.

<sup>28</sup> Ibid 42.

<sup>29</sup> Section 198A(3) of the Labour Relations Act, Note 9 above, 287.

<sup>30</sup> Botes, A 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments' (2015) *SALJ* 101.

workers.<sup>31</sup> Section 198 goes further to provide that any person employed by the TESs is the employee of that TES and the labour broker is the employer of that person.<sup>32</sup>

Although an employee by definition in term of section 213 of the LRA<sup>33</sup> is granted the true employee status, it is sometimes difficult for these employees to enforce their rights conferred to them by various labour legislation, because of the abusive practices in the triangular employment.<sup>34</sup> Despite the provision of section 198(2)<sup>35</sup> in practice, there have been some instances where the TES client shift employees to the labour broker while the employee continues to work for the client<sup>36</sup> By so doing TES clients have been able to hide their true nature of employer status and thus avoid the labour laws and the liability that arises as a result of contravening them.<sup>37</sup> Furthermore, workers end up confused about the identity of their true employer.<sup>38</sup> TES usually relied on contractual clauses to deny that an employee has been unfairly dismissed, thus arguing that the termination was fair as it terminated automatically by operation of law or sometimes placed the employee on standby while seeking for further assignment.<sup>39</sup> As such, these kind of practices have been pronounced to be in violation of the LRA.<sup>40</sup>

In some instances, these workers have been regarded as ‘independent contractors’, despite the fact that they are employed by the TES or client.<sup>41</sup> In *Mandla v LAD Brokers*<sup>42</sup>, the employee claimed remedies after being unfairly dismissed, the labour broker, however, contended that the employee was an independent contractor. In terms of the labour law, an independent contractor cannot claim

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<sup>31</sup> Ibid 101.

<sup>32</sup> Section 198 (2) of the Labour Relations Act.

<sup>33</sup> Section 213 of the Labour Relations Act provides a definition of an employee.

<sup>34</sup> Gericke, S ‘Temporary employment services: Closing a loophole in section 198 of the Labour Relations Act 66 of 1995’ (2010) 31 *Obiter* 13.

<sup>35</sup> Section 198(2) of the LRA provides that ‘a person whose services have been procured for or provided to a client by a temporary employment service is the employee of the temporary employment service, and the temporary employment services is that person’s employer.’

<sup>36</sup> See *Dyokwe v De Cock* (2012) 33 ILJ 2401 (LC); *National Union of Metalworkers of SA & others v Abancedisi Labour Services* (2013) 34 ILJ 3075 (SCA).

<sup>37</sup> Ibid; Cohen, T ‘Debunking the Legal Fiction - *Dyokhwe v De Kock No & Others* (2012) 33 ILJ 2318’ (2012) *ILJ* 2318

<sup>38</sup> Ibid

<sup>39</sup> Harvey, S ‘Labour brokers and workers’ rights: Can they co-exist in South Africa?’ 2011 *SALJ* 108-109.

<sup>40</sup> See *Chillibush v Johnston & others* (2010) 31 ILJ 1358 (LC), para 38 Basson J held that ‘automatic termination’ contravenes section 5(2)(b) and 5(4) of the LRA and the right of the employees to fair labour practices enshrined in the Constitution.

<sup>41</sup> Ibid 38.

<sup>42</sup> *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807 (LC)

remedies after being dismissed.<sup>43</sup> The court held that the employer was in fact employed by the labour broker, the court applied the common law test for an employment relationship.<sup>44</sup> Therefore the court held that the dismissal of the employee was unfair, and he was awarded compensation of a twelve-month remuneration.<sup>45</sup>

In *Dyokwe v De Cock*<sup>46</sup> the applicant was employed by a company (Mondi) for two years. He was then informed to sign a new employment contract with a labour broker Adecco. After concluding the contract with Adecco, he continued to render his services for Mondi except that he was now paid by the labour broker and not Mondi and the fact that his salary was reduced.<sup>47</sup> The main issue before the court was centered on the true identity of the employer at the time of his dismissal.<sup>48</sup> In coming to its decision the court considered the meaning TES and decided that Adecco never procured or provided employees to Mondi but rather Mondi secured the applicant for Adecco.<sup>49</sup> The court held that the employment relationship between Mondi and the applicant was never terminated by virtue of the applicant concluding a new contract with TES, as such Mondi was held to be the employer of the employee at the time of the dismissal.<sup>50</sup>

It has been suggested that our labour legislation are over-regulated and too restrictive.<sup>51</sup> Some neo-liberal opined that the labour broking should be deregulated in South Africa.<sup>52</sup> However, there are some commentators who are of the view that deregulation of the TES is not a good idea because it plays a significant role in the functioning of the economy of the country.<sup>53</sup> There has been quite a number of literature on whether the 2014 LRA amendments have gone far enough in protecting TES employees and whether they meet the international labour standards in providing protection

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<sup>43</sup> Ibid 41.

<sup>44</sup> Ibid 41; In terms of the Common-law test for determining an employment relationship is whether the employer had full control over the employee in respect of what duties the employee can perform, how, when, where he or she can perform the job.

<sup>45</sup> Ibid 42.

<sup>46</sup> *Dyokwe v De Cock* (2012) 33 ILJ 2401 (LC).

<sup>47</sup> Ibid 17.

<sup>48</sup> Ibid 17.

<sup>49</sup> Ibid 18.

<sup>50</sup> Ibid 18.

<sup>51</sup> Aletter & Van Eck (note 24 above) 307-310.

<sup>52</sup> Bhorat...et al 'Employment effects in the temporary employment services (TES) sector: Post-regulatory amendment effect (2015)

<http://www.lmip.org.za/sites/default/files/documentfiles/Temporary%20employment%20services%20in%20South%20Africa.pdf> accessed on 20 September 2017.

<sup>53</sup> Ibid; Aletter & Van Eck (note 24 above) 297-306.

to such employees.<sup>54</sup> It has been argued that these amendments do not go far enough in providing a provision in respect of responsibilities being transferred from the labour broker to the client after the prescribed three-month period.<sup>55</sup> Some commentators such as Aletter and Van Eck opines that although the amendments provide for the jointly and severally liability of the client and the TES, it failed dismally to provide an explanation as to which employer is responsible in case of a dispute arising in respect of unfair dismissal or unfair labour practices.<sup>56</sup>

In respect of the international standards, the International Convention No. 181 of 1997 protects workers working for agencies by allowing them join trade unions of their choice and bargain collectively and measures for these workers to be recruited by the client.<sup>57</sup> However, it has been argued that it becomes impossible to implement or fulfill these rights and obligation because of the typical nature of agency employment i.e. the agency workers are employed by the agency but renders services at the behest and more often at the workplace of the client with the client's supervision.<sup>58</sup>

In relation to section 198A(3)(b) this provision has the potential of curbing the exploitation and abusive behavior experienced by labour broker employees as it seems to strike a balance between the need for flexibility of the labour market and the protection of these employees.<sup>59</sup> However, as discussed above, the interpretation and application of this section have created a great debate in the labour law. According to Van Niekerk...et al the employees should remain the employees of the TES and can only be considered employees of the client for the purposes of enforcing their rights in terms of the LRA.<sup>60</sup> Other scholars are of the view that the deeming provision means that the employees become the workers of the client after the expiry of three months and that all the responsibilities of the labour broker in regard to the workers are being transferred to the client.<sup>61</sup>

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<sup>54</sup> Aletter & Van Eck (note 24 above) 300.

<sup>55</sup> Ibid 300.

<sup>56</sup> Geldenhuys, J 'Inequality in equality' *SA Merc LJ* (2016) 435.

<sup>57</sup> Article 4 of the ILO Convention on Private Employment Agencies.

<sup>58</sup> Benjamin (note 1 above) 40-42.

<sup>59</sup> Botes (note 30 above) 101.

<sup>60</sup> Van Niekerk...et al 'Law@work' (2015) 70.

<sup>61</sup> Ibid 70.

However, some argue that there is nothing in the wording of the legislation that suggests that a transfer of employees takes place in section 198.<sup>62</sup>

As academics were speculating on the possible interpretation of section 198A(3)(b), a case was taken as a test to the CCMA, the case of *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd and National Union of Metal Workers of South Africa (NUMSA)*<sup>63</sup> and it went all the way to the Labour Appeal Court (LAC) and possibly the LAC may not have the last word. The CCMA was called upon to pronounce on a proper interpretation of section 198A (3)(b) of the LRAA the (deeming provision).<sup>64</sup> The Commissioner had to decide whether this section provided for a ‘sole employment’ relationship or a ‘dual employment’ relationship after the three months of rendering a temporary service.<sup>65</sup>

According to the sole employment approach, the labour broker employees who are earning below the earning threshold currently (R205 433,30) and who are not performing a temporary service for the TES client, become the employee of the TES client and the client not the TES becomes the employer of the employee.<sup>66</sup> In terms of this approach, the TES client assumes LRA’s duties and obligations in respect of the employee and the TES is relieved from the employment relationship.<sup>67</sup>

The dual employment approach on the other hand, when section 198A(3)(b) read together with sections 198(4)<sup>68</sup> and 198A(4A)<sup>69</sup> implies that the TES and its client are dual employers in relation to instituting proceedings. This approach, therefore, suggests that the TES client is in effect added as an employer and thus giving the employee more protection and an election as to who to hold liable for breaches of the LRA or the BECA.<sup>70</sup>

These are the main approaches placed before the CCMA to decide upon in order to determine the identity of the true employer of the labour broker employee. It of particular interest of this

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<sup>62</sup> Scheepers, J ‘Interpretation ‘Deeming Provision’: The Labour Relations Act – South Africa’ (2015) available at <https://jscheepers777.wordpress.com/2015/07/14/interpretation-deeming-provision-the-labour-relations-act-south-africa/> accessed on 23 June 2017.

<sup>63</sup> *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd and others* (2015) 36 ILJ 2408.

<sup>64</sup> Ibid 4.

<sup>65</sup> Ibid 4.1- 4.2.

<sup>66</sup> Grogan, J ‘Let the “deemed” be damned Section 198A(3)(b) deconstructed’ (2015) *De Rebus* 4. See also *Assign Services* (note 63 above) 4.4.

<sup>67</sup> *Assign Services* (note 63 above) 4.4.

<sup>68</sup> Ibid 4.5; See discussion of section 198 of the Labour Relations Act below in chapter 3.

<sup>69</sup> Ibid 4.5

<sup>70</sup> Ibid 4.5.

dissertation to examine and analyse these approaches in more details but before doing so it is important to consider the method that will be utilized in order to achieve this aim.

#### **1.4 RESEARCH QUESTIONS**

- a) What has been the difficulties in the interpretation and application of the deeming provision (sole or dual employment relationship)?
- b) Once the deeming provisions kick in should the labour broker demote the employee without following the proper procedure, could an unfair labour practice complaint be lodged against the client?
- c) What are the implications and significance of the Assign Services decision?
- d) How does the Assign Services bring clarity to the confusion relating to the Sole or Dual employment interpretation?

#### **1.5 METHODOLOGY**

The method used in compiling this dissertation is a desktop study, as such different primary and secondary sources have been consulted. The study is about the interpretation and application of the law regulating TE. As such data will mainly come from legislation and decided cases that are relevant to the interpretation and application of the law relating to labour broking in South Africa. The literature is primarily drawn from journal articles, books, articles from the internet, case law as well as statutes. Being a desktop study, various online databases have been utilized such as EBSCOhost, Google Scholar, HeinOnline, Juta, Lexis Nexis, Sabinet, Saflii and other sources from the internet. Therefore, these sources will be used in addressing the above-mentioned critical issues.

#### **1.6 CHAPTER OUTLINE**

This dissertation is comprised of six chapters. The first chapter provides an overview of the research topic. It sets out the purpose of the dissertation, it then provides a brief background whilst introducing critical issues that are to be examined and analyzed. It further sets out the methodology



used in writing this dissertation. It also identifies the loopholes of the 2014 Amendments particularly in relation to the TES.

Chapter two examines the International labour law standards in relation to the South African labour law rights afforded to TES employees or every employee in the labour market. By referring to International Labour Organization Conventions and Recommendations.

Chapter three discusses the rights of employees as provided for in various labour legislation such as the BCEA, Employment Equity Act<sup>71</sup>, Employment Services Act and Other legislation that give effect to the LRA. It further considers the difficulties associated with the deeming provision.

Chapter four examines the interpretation and application of the law relating to TES, in doing it discuss the *Assign Services (Pty) Ltd v CCMA & Others*<sup>72</sup> judgment. It starts with the CCMA judgment, the Labour Court decision and then the Labour Appeal decision. It deliberates on the critical issued put forward by the parties as well as the reasoning of these different courts in coming to their decisions.

Chapter five examines the implications of the above-mention judgment (chapter three) in relation to the TES and the law as it stands after the LAC decision. Basically, it examines the implications and significance of the Assign Services decision. It also discusses the consequences that might arise from the judgment and suggest viable solutions.

Chapter six is the conclusion of the research and it evaluates the findings of the dissertation.

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<sup>71</sup> The Employment Equity Act 55 of 1998.

<sup>72</sup> *Assign Services* (note 63 above) 5.

## CHAPTER 2

### LABOUR BROKING IN THE CONTEXT OF INTERNATIONAL STANDARDS

#### 2.1 INTRODUCTION

The Constitution of South African is shaped and consistent with the International law which recommends for equal treatment before the law and prohibits any form of unfair discrimination.<sup>73</sup> Several legislations have been enacted in South Africa to give effect to these rights i.e. the right to equality and the right against unfair discrimination.<sup>74</sup> This chapter examines the relevance of the International Labour Organization Conventions and Recommendations to South African employment law particularly the LRA.

##### *2.1.1 What is Labour Broking*

Temporary employment service has been defined in different ways which fall outside the common law definition of employment.<sup>75</sup> Temporary employment service is recognised globally and is called agency work. The term agency will be used to refer to TES or labour brokers. Generally, labour broking involves an employee rendering or performing work for the client which concluded a contract with an agency to supply whatever work the client requires.<sup>76</sup> In terms of this kind of employment relationship the client does not pay the employee directly but pays the agency and it is the agency that remunerates the employee and remains responsible for whatever employment dispute that may ensue.<sup>77</sup> Put differently, in the case of disciplinary of an employee or management of their work performance, it is the agency that is responsible in this regard and not the client. The employee renders his/her services at the client's workplace, at the command and often with the

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<sup>73</sup> Article 26, of The Covenant on Civil and Political Rights of 1966; Geldenhuys (note 56 above) 401.

<sup>74</sup> See Sections 9, 23 of the Constitution; Employment Equity Act; and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>75</sup> Benjamin...et al 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Condition of Employment Amendment Bill 2010 and Employment Services Bill 2010' available at [www.labour.gov.za/DOL/downloads/.../useful.../labour-relations/RIA13Sept2010.pdf](http://www.labour.gov.za/DOL/downloads/.../useful.../labour-relations/RIA13Sept2010.pdf) accessed on 28 August 2017.

<sup>76</sup> Ibid.

<sup>77</sup> Bosch, C 'The Proposed 2012 Amendments Relating to Non-Standard Employment: What will the New Regime Be? 2013 34 *ILJ* 1632.

supervision of the client and without any contractual relationship between them.<sup>78</sup> Practically, the labour broker employee appears to be working and employed by the client. In terms of the ILO Private Employment Agencies Convention of 1997 No.181 agency work includes labour broking (agency), services relating to job-seeking and recruiting agencies.<sup>79</sup>

## 2.2 THE CONSTITUTION AND SIGNIFICANCE OF INTERNATIONAL STANDARDS

The relevance of international standards in this dissertation is that South Africa is a member state of the ILO and ratified the ILO Convention of 1951 (No. 100) which requires equal pay for all workers regardless of their gender, sex or age who perform identical or same work.<sup>80</sup> The ILO Convention No 111 of 1958 also requires all its member states to establish mechanisms that aim at prohibiting discrimination in the workplace. Accordingly, it is important that when interpreting labour legislation to adhere to the international law or such interpretation to accord with the Republic's obligation as a member of the ILO.<sup>81</sup>

The ILO has played an important role in developing labour laws of its member states including South Africa. As such, The Constitution of the Republic as the supreme law of the country gives effect to international law by empowering courts to adopt a reasonable interpretation that is consistent with international law when interpreting any legislation.<sup>82</sup> Even though the Constitution does not define the meaning of the term international law, but courts have held on numerous occasions that ILO Recommendations and Conventions must be regarded as international law.<sup>83</sup> In terms of section 39(1)(b) of the Constitution courts or tribunal must consider international law when interpreting the Bill of Rights.<sup>84</sup> The customary international law is considered as the law of South Africa unless it is in conflict with the Constitution or an Act of Parliament.<sup>85</sup> These

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<sup>78</sup> Ibid 1632.

<sup>79</sup> The Private Employment Agencies Convention of 1997 No.181.

<sup>80</sup> Gledenhuis (note 56 above) 401.

<sup>81</sup>The BCEA gives effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of the basic condition of employment and thereby to comply with South Africa's obligation as a member state and a signatory of the ILO.

<sup>82</sup> Section 39 (1) of the Constitution of the Republic of South Africa, 108 of 1996 (1996 Constitution).

<sup>83</sup> *Murray v Minister of Defence (2006) 11 BCLR 1357 (C)* para 1358 the court said s39(1) of the Constitution obliges the courts to consider international law such as the ILO Conventions and Recommendations when interpreting any right to fair labour practice'; *S v Makwanyane and another*1995 (3) SA 391 para 35.

<sup>84</sup> Ibid.

<sup>85</sup> Section 232 of the 1996 Constitution.

provisions show that the Constitution places value to the international law.<sup>86</sup> In *SA National Defence Union v Minister of Defence & another*,<sup>87</sup> the Constitutional Court had to consider the meaning of the term ‘worker’ whether it is applicable to military staff and in relation to section 23 of the Constitution which guarantees the right to fair labour practices to everyone. The Defence Act<sup>88</sup> prohibited members of the military from joining and establishing trade unions. After considering the Freedom of Association and the Right to Organize Convention<sup>89</sup> and recommendations of the ILO the court held that employers and workers are allowed to form and participate in the organization of their choice and this right is also extended to military staff.<sup>90</sup> The court referred to article 7 of the 87 Convention and found that this right is also applicable to members of armed forces and police.<sup>91</sup> Accordingly, the section of the Defence Act was held to be invalid and inconsistent with the Constitution because it infringed the right to fair labour practices.

The LRA also gives effect to the Constitution and recognizes the importance of the international law.<sup>92</sup> One of the primary objects of the LRA is to ensure that the Republic’s obligation as a member of the ILO to be fulfilled.<sup>93</sup> Section 3 of the Act requires any person interpreting it to comply with the international laws.<sup>94</sup> Accordingly, ILO Conventions are legally binding to all member states who ratified them.<sup>95</sup> However, ILO Recommendations, on the other hand, are not binding but provide guidelines in shaping and developing labour policies.<sup>96</sup> It is submitted that it is important for member states to consider international instruments as they are useful tools in drafting and enforcing employment legislation and social policy.

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<sup>86</sup> Van Niekerk...et al (note 60 above) 29.

<sup>87</sup> (1999) 20 ILJ 2265 (CC).

<sup>88</sup> 42 of 2002.

<sup>89</sup> The Freedom of Association and the Right to Organize Convention 1948 (No. 87).

<sup>90</sup> Article 2 of the Freedom of Association and Protection of the Rights to Organise Convention.

<sup>91</sup> Article 9 provides the Convention applies to all workers including members of the armed forces and the police as determined by national laws and regulations.

<sup>92</sup> Section 1 of the LRA.

<sup>93</sup> Section 1(b) of the LRA.

<sup>94</sup> Section 3 of the LRA.

<sup>95</sup> Aletter, C ‘International Labour Standards and Private Employment Agencies-Are South Africa’s Recent Legislative Amendments Complaint?’ (2015) 12, available at <http://isssl.org/wp-content/uploads/2015/10/SouthAfrica-CandiceAletter.pdf> accessed on 15 October 2017.

<sup>96</sup> Ibid 12.

### *2.2.1 Private Employment Agencies No 181 of 1997*

Article 2 of this Convention states the purpose of the Convention as to enable the use of private agency employment and to provide protection on employees.<sup>97</sup> This, therefore, shows that this convention is aware of if the abusive practices and exploitation involved in the labour broker industry, as such it attempts to provide mechanisms in which these injustices can be curbed.

Article 4 of the Convention requires all member states to take measure to ensure that employees employed by labour brokers have the right to freedom of association and the right to collective bargaining.<sup>98</sup> However, Aletter argues that it is difficult for the placed employees to enforce this right because they are often placed in different companies.<sup>99</sup> The organizational right is also difficult to enforce because, these employees although they are employed by an agency, they work at the workplace of the client and not the agency's workplace.<sup>100</sup>

Article 5 provides that agency employees must be treated equally without any form of discrimination protected by national law and practices.<sup>101</sup> However, Aletter and Van Eck argue that the problem with this article 5 is that it does not mention the equal treatment of these employees in the workplace.<sup>102</sup> As much as these employees should not be discriminated against, but they should be afforded the right to equal treatment as that provided to permanent employees or those employed directly by the agency. As stated above, they should be entitled to benefits such as pension, death and disability cover, and medical benefits.

The ILO Guide to Private Employment Agencies (ILO Guide)<sup>103</sup> was adopted to provide guidelines to all its member states when drafting national legislation to be consistent with the Private Employment Agencies. The ILO Guide provides that the No.181 Convention was adopted to repeal the earlier norms which aimed at abolishing the use of agency work.<sup>104</sup>

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<sup>97</sup> Article 2 of the Private Employment Agencies, 1997.

<sup>98</sup> Article 4 of the Private Employment Agencies, 1997.

<sup>99</sup> Aletter (note 97 above) 15.

<sup>100</sup> Ibid 15.

<sup>101</sup> Article 5 of the Private Employment Agencies, 1997.

<sup>102</sup> Aletter & Van Eck (note 24 above) 289.

<sup>103</sup> ILO Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007.

<sup>104</sup> Aletter (note 97 above) 17.

### ***2.2.2 Private Employment Agencies Recommendations***

The Recommendations provides that member states must adopt proper procedures to guide against unethical practices in respect of the use of agency employment<sup>105</sup> and that the contract of employment of agency employees should be in writing.<sup>106</sup> This, therefore, is to ensure that agency employees understand their rights and obligations and they can also provide conclusive proof of their employment.<sup>107</sup> This convention recognizes the significant role which private employment agencies are playing in the functioning of the labour market.<sup>108</sup> It regulates the functioning of private employment agencies and to protects its employees.<sup>109</sup>

The Recommendations also considers the need to provide health and safety measures for agency workers and to prohibit unfair discrimination by implementing programmes that aimed at promoting affirmative action and equality.<sup>110</sup> Article 13 provides that member states should adopt appropriate measures to promote section methods that are fair, proper and efficient in recruiting workers employed by agencies.<sup>111</sup> Article 15 provides that employment agencies should not prevent placed employees from being employed by the client directly, and their occupational mobility should not be prohibited or punished for taking employment opportunities elsewhere.<sup>112</sup>

### ***2.2.3 The LRAA 2014 accommodates the ILO Instruments?***

It is significant to note whether the LRAA is consistent with the ILO Conventions and Recommendations. Deputy Director General of the Department of Labour acknowledged that there is a need for protection of vulnerable workers (TES employees) and also the importance of adopting labour legislations that are flexible in order to ensure that the South African labour market is not over-regulated.<sup>113</sup> According to the Deputy Director General, a balancing approach must be adhered to, to ensure that workers' rights and employers' rights are not unfairly infringed. The

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<sup>105</sup> Article 4 of the Private Employment Agencies Recommendation, 1997 (No. 188).

<sup>106</sup> Article 5, of the Private Employment Agencies Recommendation, 1997.

<sup>107</sup>The ILO Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement 2007

<sup>108</sup> Article 2 of Private Employment Agencies Recommendation.

<sup>109</sup> Article 3, ILO Guide to Private Employment Agencies — Regulation, Monitoring and Enforcement Geneva, International Labour Office 2007.

<sup>110</sup> Aletter (note 97 above) 18.

<sup>111</sup> Article 13 of the Private Employment Agencies, Recommendations, 1997.

<sup>112</sup> Article 15 of the Private Employment Agencies, Recommendations, 1997.

<sup>113</sup> Esternhuizen, I 'Changing SA's labour law not the answer, says DDG' (2013) Polity.org.za available at <http://www.polity.org.za/print-version/changing-sas-labour-law-not-the-answer-says-ddg-2013-07-31> accessed on 15 August 2017.

Memorandum of Objects clearly states that the primary aim of the amendment is to provide additional protection to workers earning below the earning threshold. Therefore, it can be argued that the LRAA has fulfilled the ILO standards on the part of providing protection for agency workers.

However, on the part of flexibility, it is submitted that it is not clear as the LRAA particularly section 198A(3)(b) deems employees to be employed by the client for an indefinite duration. As such, clients are not at liberty to choose who they want to employ as they deemed to be employers by operation of the law and employees are not allowed to secure any other employments other than those they are assigned to them by the TES, thus not in line with article 15 of the Recommendations. Section 198(4A) does not specify the obligations of the TES and that of the client instead they provide the jointly and severally liability provisions which allows a TES employee to enforce this right in cases of contravention of employment laws.<sup>114</sup> However, this provision has created confusion on the interpretation of section 198A(3)(b), this confusion is illustrated in the next chapter below.

## **2.3 CONCLUSION**

As pointed out previously, the ILO standards have played a significant role in promoting or reforming labour legislation of its member states including South Africa. This is reflected in the 2014 LRAA which strengthen the right to collective bargaining, the right to equal treatment, as deemed employees may not be treated on less favourable terms and conditions than workers employed by the client directly. However, this chapter has indicated that some of the other ILO standards have not been adhered to by the amendments including article 15 of the Recommendations.

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<sup>114</sup> Aletter (note 97 above) 21; see also section 198(4A) of the LRA.

## CHAPTER 3

### LABOUR BROKING IN THE SOUTH AFRICAN CONTEXT

#### 3.1 INTRODUCTION

As pointed out above, just after the coming into effect of the LRAA uncertainties arose in respect of the interpretation of section 198A(3)(b) of the amendments. The purpose of this chapter is to examine the principles of statutory interpretation and the provisions of the LRA and other employment legislation that give effect to the LRA. It will also examine how this section has been interpreted by both academics and courts.

#### 3.2 THE PRINCIPLES OF STATUTORY INTERPRETATION

Section 198A affords protection to vulnerable employees earning below the prescribed earning threshold, however, one of the controversial provisions of this section is section 198A(3)(b) which has resulted in the most debate and uncertainty in relation to its interpretation.<sup>115</sup> Before considering the application and interpretation of this section it is, therefore, necessary to examine the applicable principles of statutory interpretation. In terms of the law of interpretation, the golden rule of interpretation is to establish the intention of the legislature and give effect to it and such intention has to be deduced from the ordinary grammatical meaning of the words used in the legislation unless it would lead to absurdity.<sup>116</sup> The rationale behind this principle is that the legislature expresses its intention in a clear and unambiguous manner and any interpretation contrary to the intention of the legislature should be impermissible.<sup>117</sup> However, concerns have been raised with this golden rule, in that it imposes difficulties.<sup>118</sup> It is difficult to ascertain a common purpose of the legislation as the legislature consists of hundreds of members.<sup>119</sup> Statutes

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<sup>115</sup> Venter, D 'Who is the Employer' (2015) *Without Prejudice* 25.

<sup>116</sup> *Ibid* 25.

<sup>117</sup> *Ibid* 26.

<sup>118</sup> See The South African Institute of Chartered Accountants: General 2150, Interpretation of Statutes (2013) Issue 160 available at <https://www.saica.co.za/integritax/2013/2150. Interpretation of Statutes.htm> accessed on 19 October 2017.

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



are often redrafted by parliamentary committees and sent to the public for opinions, after which further revision or amendments are made before it can finally be enacted into law.<sup>120</sup> Therefore it becomes impossible to determine and give effect to the intention of the legislature after such a long process of enacting a legislation.

As discussed above the Constitution gives a mandate to courts to promote the values that are essential for a well-functioning democratic society based on freedom, equality and human dignity.<sup>121</sup> Section 1 of the LRA states that its primary purpose is to advance economic growth, social justice, to bring labour peace and democracy in the workplace by fulfilling its objectives such as to give effect to the Constitution, fulfill the obligation of South Africa as a member state of the ILO and to provide mechanisms within which workers and employers can participate in organizations of their choosing in order to bargain collectively to establish and discuss matters relating to wages, terms and conditions of employment and other matters related to employment.<sup>122</sup> According to section 3 of the LRA, effect must be given to the Constitution and international law when interpreting the LRA.<sup>123</sup> In *Mahlamu v Commission for Conciliation, Mediation & Arbitration & Others*<sup>124</sup> it was stated that when interpreting the LRA a purposive approach must be adopted to ensure that such interpretation is consistent with the Constitution. It must be interpreted in a way that provides protection to workers against unfair dismissals.<sup>125</sup> It is submitted that this approach adopted in this case accords with the new approach of interpretation of statutes discussed below.

### ***3.2.1 A new approach to the statutory interpretation***

At the time of writing, the *Natal Pension Fund v Endumeni Municipality*<sup>126</sup> decision is a leading judgment regarding principles of interpreting any legislation. Wallis JA noted the significant

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<sup>120</sup> Ibid.

<sup>121</sup> Section 39(1) of the 1996 Constitution.

<sup>122</sup> Section 1 of the LRA; Van Niekerk...et al (note 60 above) 30.

<sup>123</sup> Section 3 of the LRA.

<sup>124</sup> (2011) 32 ILJ 1122 (LC).

<sup>125</sup> Ibid 12.

<sup>126</sup> (2012) 4 SA 593 (SCA).

developments that have taken place in the Republic and in other different jurisdictions in respect of principles governing the interpretation and stated the following:

- The test of interpretation should be objective instead of being subjective;
- A sensible interpretation should be favoured and an insensible, un-businesslike or that undermines the main purpose of the document should be avoided;
- Cautioned judges in respect of their duties, in that they should be alert to and to avoid substituting words used in a document with what they believe is reasonable, sensible or businesslike for others to say. This is to ensure that the dividing line between interpretation and legislation is maintained;
- It is significant to consider the language and its context together without each prevailing another;
- South African courts should start following this approach and do away with citing the earlier authorities that are no longer appropriate or relevant;
- The phrase ‘the intention of the legislature’ should be avoided because it is misleading because it suggests that the interpretation involves an inquiry to the mind of the draftsmen;
- The rationale behind the phrase ‘intention of the legislature’ is to warn courts that the task they are engaged on is to discern the meaning of the words used by others and not to impose their own views as to what would have been sensible for others to say.<sup>127</sup>

Accordingly, the court held that a purposive approach must be adopted when interpreting any document or legislation and if such material is capable of more than one meaning every possible meaning must be considered in relation to the ordinary grammatical rules, context, and syntax of that provision.<sup>128</sup>

### **3.3 THE EMPLOYMENT SERVICES ACT**

The Employment Services Act<sup>129</sup> was subsequently introduced when the LRA 2014 amendments were formulated. According to this Act, all employment agencies must be registered, and it

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<sup>127</sup> Ibid 19.

<sup>128</sup> Ibid 19.

<sup>129</sup> Act 4 of 2014 .

encourages the formation of schemes that promote job creation.<sup>130</sup> One of the main purposes of the ESA is to promote the employment of young job seekers or other vulnerable employees i.e. TES workers.<sup>131</sup> Section 198(4F) of the LRA gives effect to the ESA provisions by determining that no TES may function without being registered in terms of the applicable legislation.<sup>132</sup> According to the ESA, it is a criminal offence for an employment agency, including TES to function in without such registration.<sup>133</sup>

### **3.4 THE RELEVANT SECTION 198 OF THE LRA DETERMINES THE FOLLOWING:**

“Section 198(1) provides that a temporary employment service means any person who for reward, procures for or provide to a client other people who:

- (a) perform work for the client, and
- (b) remunerated by the temporary employment service.”<sup>134</sup>

“Subsection (2) provides that for the purposes of the LRA, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service and the temporary employment service is that person’s employer.”<sup>135</sup>

“Section 198A provides the application of section 198 to employees earning below the prescribed threshold. Subsection (1) states that a 'temporary service' means work for a client by an employee-

- (a) for a period not exceeding three months;
- (b) as a substitute for an employee of the client who is temporarily absent; or
- (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).”<sup>136</sup>

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<sup>130</sup> Van Niekerk...et al (note 60 above) 73.

<sup>131</sup> Section 2(1)(a) of the Employment Services Act 4 of 2014.

<sup>132</sup> Section (4F) of the LRA.

<sup>133</sup> Cohen (note 18 above) 2618; P Benjamin ‘Law and Practice of Private Employment Agency Work in South Africa’ Sector Working Paper 292 available at [www.ilo.org/wcmsp5/groups/public/---ed.../---sector/.../wcms\\_231442.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed.../---sector/.../wcms_231442.pdf) accessed on 18 October 2017.

<sup>134</sup> Section 198(1) of the LRA.

<sup>135</sup> Section 198(2) of the LRA.

<sup>136</sup> Section 198A (1)(a) to (c) of the LRA.

“Subsection (2) provides that this section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.”<sup>137</sup>

“Subsection (3) determines that for the purposes of this Act, an employee-

(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198 (2), or

(b) not performing such temporary service for the client is-

(i) deemed to be the employee of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.”<sup>138</sup>

“Subsection (4) the termination by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3) (b) or because the employee exercised a right in terms of this Act, is a dismissal.”<sup>139</sup>

“Subsection (5) an employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.”<sup>140</sup>

Section 198(2) confidently identify the TES as the employer of the placed employees.<sup>141</sup> Section 82(1) of the BCEA provides a similar definition of the TES to the LRA.<sup>142</sup> Section 82(3) of the BCEA provides for jointly and severally liability against either the client or TES for violating the employment law.<sup>143</sup> However, the Employment Equity Act (EEA) provides a different definition of the TES from that of the LRA and BCEA. Section 57(1) of the EEA provides that a person whose services has been procured by a TES will be deemed to be an employee of the client if the

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<sup>137</sup> Section 198A (2) of the LRA.

<sup>138</sup> Section 198A (3) (a) to (b) of the LRA.

<sup>139</sup> Section 198A (4) of the LRA.

<sup>140</sup> Section 198A (5) of the LRA.

<sup>141</sup> Theron..et al ‘The Rise of Labour Broking and its Policy Implications’ *Development Labour Monograph Series* (2005) 5.

<sup>142</sup> Budlender, D ‘Private Employment Agencies in South Africa’ Sector Working Paper No.291, *International Labour Office* 9.

<sup>143</sup> Ibid 9.

client uses that employee for a period exceeding three months.<sup>144</sup> According to the above section, it is clear that provided that the employee performs a genuine temporary service the duties and obligations stipulated in section 198(2) will be applicable, as such the TES will be considered as the employer. Whereas if the worker is not on a genuine temporary service he or she will be deemed to be employed by the client after the three-month period has elapsed. The client will then be entrusted with all the rights and obligations as a result of being deemed to ensure that the employees work under the conditions prescribed in all labour legislation.

As discussed above, the definition of the TES has been slightly modified with the new provision which states that the employee is deemed an employee of the client. However, it is not clear from this section whether the employment contract with the TES comes to an end automatically after the three-month period and/or the client offers the employee a new employment contract immediately on coming to effect of this section.<sup>145</sup> The LRA is silent in respect of this issue, as such some academic commentators have been of different views about the possible meaning of this section, these views will be discussed in more details below.

### **3.5 COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASE ACT**

Section 1 of the Compensation for Occupational Injuries and Disease Act defines the term ‘employer’<sup>146</sup> (COIDA). According to the Act, a labour broker is deemed to be the employer of the employees placed with the client. Section 35 of this Act gives the TES immunity in respect of disputes arising in respect of damages relating to occupational injuries.<sup>147</sup> According to this Act any disablement caused by diseases or injuries contracted or sustained during the course of their employment at the workplace of the client and because of the client’s negligence or his employer’s negligence, the TES employee can institute legal proceedings against the client and not against the labour broker.<sup>148</sup> In *Crown Chickens (Pty) Ltd t/a Rockland Poultry v Rieck*<sup>149</sup> the court, in this case, had to decide the matter in respect of section 35 of the COIDA, the client contended that it

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<sup>144</sup> Section 57(1) of the Employment Equity Act; Budlender (note 144 above) 9.

<sup>145</sup> Forere (note 7 above) 383.

<sup>146</sup> The Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>147</sup> Section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>148</sup> Van Niekerk...et al (note 60 above) 70.

<sup>149</sup> (2007) 2 SA 118 (SCA).

was not an employer, therefore, it was not liable for damages. The court rejected this argument and held that the immunity clause applies to the TES and not the client, as such the client was held vicariously liable for the damages.<sup>150</sup>

### 3.6 JOINTLY AND SEVERALLY LIABILITY

Section 198(4A) provides for the joint and severally liability of both the TES and the client:

“(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198 (4) or is deemed to be the employer of an employee in terms of section 198A (3) (b)-

- (a) the *employee* may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;
- (b) a labour inspector acting in terms of the *Basic Conditions of Employment Act* may secure and enforce compliance against the temporary employment service or the client as if it were the employer or both; and
- (c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.”<sup>151</sup>

As pointed out above, before the 2014 amendments the LRA was silent about this the jointly and severally liability provision in respect of unfair labour practices or unfair dismissal disputes, yet the client had an entire control over an employee and could even dismiss an employee without facing any consequences.<sup>152</sup> The *April v Workforce Group Holdings*<sup>153</sup> case is a good example in this instance because in this case, the employee’s contract of employment contained a restrained clause allowing the client to terminate the contract where it no longer requires the services of the employee. Since the coming into effect of section 198(4A), it is unlikely that disputes such as the one in *April* case will occur again. Subsection (a) of this section has been relied upon to justify the argument in favour of the dual employer interpretation as discussed below.<sup>154</sup> Benjamin argues, however, that this is an incorrect interpretation because section 198(4A) (a) can only be applicable if the client and the TES decide to keep their triangular employment.<sup>155</sup> Section 198A(4A)

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<sup>150</sup>Ibid 28.

<sup>151</sup> Section 198 (4A) of the LRA.

<sup>152</sup> Forere (note 7above) 381.

<sup>153</sup>*April v Workforce Group Holdings* 2005 (26) ILJ 2224 (CCMA) paras 228 - 2234.

<sup>154</sup> *Assign Services* (note 63 above) 4.5; Forere (note 7 above) 384-385.

<sup>155</sup> Benjamin (note 1 above) 41.

however, creates the impression that both the labour broker and its client are liable in respect of unfair dismissal and unfair labour practices claims.

### ***3.6.1 Unfair Dismissal***

According to section 185 of the LRA, an employee has a right against unfair dismissal. Dismissal is defined in section 186(1)(a) of the LRA as an act or conduct by an employer that terminates the employment contract of the employee with or without notice.<sup>156</sup> According to section 198A(4) termination of employment of the placed workers with a client, by either the client or the labour broker, with an aim of evasion of section 198A(3)(b) or because an employee enforced his or her rights provided by the Act, constitutes a dismissal.<sup>157</sup> This is the new type of dismissal introduced by the amendments. The onus of proof is on the employer to prove that the employee was fairly dismissed and in accordance with a fair procedure.<sup>158</sup> It is not, however, stated in the provision of section 198A (4) whether the dismissal will be considered unfair and who will be held liable for such a dismissal.<sup>159</sup> It is also not clear from the LRA whether the dismissal is unfair or whether an employee can institute proceedings for unfair dismissal in terms of s186(1)(a) of the LRA on the grounds that the dismissal was with or without a notice.<sup>160</sup> Clause 38, of the Explanatory Memorandum to the LRA Bill provides that in such instances the employee can institute proceeding against the TES to challenge the fairness of the dismissal.<sup>161</sup> It submitted that for the purposes of the deeming provision, if that occurs after the expiry of the three-month period, then the client will be considered as having committed unfair labour practices. This submission is consistent with the purposive approach adopted by the LAC in the Assign Services judgment.

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<sup>156</sup> Geldenhuys, J 'An Evaluation of the right of Fixed-Term Employees in South Africa (unpublished LLD thesis University of South Africa) 2015 31 available at <https://core.ac.uk/download/pdf/43173928.pdf> accessed on 13 September 2017.

<sup>157</sup> Cohen (note 18 above) 2617; Section 198(4) of the LRA.

<sup>158</sup> Cohen (note 18 above) 2617.

<sup>159</sup> Botes, A 'Answers to the Questions? A Critical Analysis on the Amendments to the Labour Relations Act 66 of 1995 with regard to Labour....' (2014) 26 *SA Merc LJ* 130.

<sup>160</sup> Geldenhuys (note 56 above) 415; Section 186 of the LRA.

<sup>161</sup> The Explanatory Memorandum Labour Relations Act Bill sets out the main purpose of the amendments to section 198 and the introduction of section 198A.

In *National Security and General Workers Union Obo Members v Brilliant Image Personnel and others*<sup>162</sup> employees of a labour broker and whose services were terminated on the date after the date upon which section 198(3)(b) would have become applicable, alleged that their dismissal was for the purposes of avoiding the operation of the deeming section. The employees decided to base their claim on section 198A (4) instead of using the provision for unfair dismissal provided in section 189 of the LRA.<sup>163</sup> The Commissioner was not satisfied with facts and evidence presented that the dismissal was merely for the purposes of avoiding the deeming provision.<sup>164</sup> The Commissioner found that the employees failed to prove that a dismissal occurred, as such it was unnecessary for the Commissioner to examine the fairness of the dismissal.<sup>165</sup> These findings seem questionable because the Commissioner agreed with the labour broker that the nature of the dismissal was indeed operational and that no appropriate methods were used in dismissing the employees.<sup>166</sup>

In *United Chemical Industries Mining Electric State Health and Aligned Workers Union Obo Mbobo v Primeserv and another*,<sup>167</sup> the applicant referred an unfair dismissal disputed, he was employed by a TES as a driver. He was assigned to the TES client for more than three months. The issue to be decided by the Commissioner was whether the employee's dismissal was fair or not. In deciding this issue, the Commissioner adopted a purposive approach and referred to section 198B (3) of the LRA which provides the basis in which an employee can be employed on a fixed term contract. In terms of section 198B (5) an employment on a fixed term that is longer than three months and there is no justifiable reason for keeping the employee a fixed term contract, the employment will be deemed to be of an indefinite duration.<sup>168</sup> Having considered the Act the Commissioner concluded that the dismissal was substantively and procedurally unfair.

Although CCMA awards do not serve as precedents, it is submitted that these cases discussed above indicate the challenges associated with section 198(4) of the LRA. It is still a problem for vulnerable employees to prove the unfairness of the dismissal in disputes involving the operation

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<sup>162</sup> (2016) 5 BALR 509 (CCMA).

<sup>163</sup> *Ibid* 9 –10.

<sup>164</sup> *Ibid* 38.

<sup>165</sup> *Ibid* 40.

<sup>166</sup> *Ibid* 41–42.

<sup>167</sup> (2017) 2 BALR 135 NBCRFLI.

<sup>168</sup> Section 198B (5) of the LRA.



of section 198A (3)(b).<sup>169</sup> It is submitted, however, that each case must be decided or considered upon its facts and merits.

### ***3.6.2 Unfair Labour Practices***

As previously discussed, the Constitution gives everyone the right to fair labour practices, the BCEA, LRA and the Employment Equity Act (EEA) gives effect to this Constitutional right.<sup>170</sup> Section 186 (2) (a) to (d) of the LRA provides a definition for unfair labour practices by referring to an omission or conduct of an employer.<sup>171</sup> The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town & Others*<sup>172</sup> stated that the right to fair labour practices also covers job security, namely the right not to be unfairly dismissed. Section 185 of the LRA provides for the right to employment security which states that an employee should not be subjected to unfair dismissal.<sup>173</sup> The right to fair labour practices also include the employees' right to organizational right or participate in a collective bargaining.<sup>174</sup> Sections 198A, 198B, and 198C refer to the right to equal treatment in the workplace which includes the right to equal benefits. The LRA also provides for the right to equal treatment in the workplace which also extends to the right of the provision of equal benefits.<sup>175</sup> As such a failure by an employee to provide equal benefits could constitute an unfair labour practices.<sup>176</sup> In *Louw v Golden Arrow Bus Services (Pty) Ltd*,<sup>177</sup> the court stated that even though the right to equal treatment and benefits is not specified in the right to unfair labour practices, it can be considered when deciding an infringement of an employee's right to fair labour practices.

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<sup>169</sup> Geldenhuys, (note 56 above) 430.

<sup>170</sup> Section 23(1) of the 1996 Constitution.

<sup>171</sup> Section 186(2) of the LRA; Van Niekerk...et al (note 60 above) 185; see also A Rycroft & B Jordaan 'A Guide to South African Labour Law' 163.

<sup>172</sup> 2003 (3) SA 1 (CC) 42; Harvey, S 'Labour brokers and workers' rights: Can they co-exist in South Africa?' (2011) *SALJ* 103.

<sup>173</sup> Harvey S 'Labour Brokers and Workers' Rights: Can They Co-Exist in South Africa' (2011) *SALJ* 103.

<sup>174</sup> Section 23(2)(a); and 23(5) of the 1996 Constitution; Benjamin, P 'Law and Practice of Private Employment Agency Work in South Africa' *Sector Working Paper No 292* available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/publications/wcms\\_231442.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publications/wcms_231442.pdf), 13 accessed on 23 October 2017.

<sup>175</sup> Section 198A, 198B and 198C of the Labour Relations Amendment Act 2014; Geldenhuys 421.

<sup>176</sup> Geldenhuys (note 56 above) 421; Section 198 (6)(a) of the LRA.

<sup>177</sup> (2000) 3 BLLR 311 (LC).

As pointed out above, before the amendments came into operation labour brokers and their clients used contracts of employment to disguise their employer status, as such they were able to avoid the obligation to provide employment security for vulnerable workers.<sup>178</sup> In *Nape v INTCS Corporate Solutions (Pty) Ltd*<sup>179</sup> in this case, the TES employee was found guilty of sending an inappropriate and offensive email to a colleague using a client's computer. The contract of employment allowed automatic termination where the client no longer requires the services of the worker. The court held the contract to be contrary to public policy and breaches the employee's right to fair labour practices as provided by the Constitution.<sup>180</sup> The court held further that the labour broker and their clients should refrain from structuring their employment relationship in a manner that used the employees as items to be passed on and exchanged at the impulse and fancies of the client.<sup>181</sup> On unfair dismissal, it was stated that courts are not bound but contractual terms of the parties and it would perpetuate wrongs exercised by parties who wield powerful bargaining power.<sup>182</sup> Therefore, the terms of the contract, in this case, was found to be inconsistent with public policy and undermined the worker's right to fair dismissal and thus unenforceable.<sup>183</sup>

In *SA Transport & Allied Workers Union on Behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*<sup>184</sup> the court held that the dismissal of the employee based on operational requirement was fair as alternative employment was offered. The court further held that section 198 (4C) will restrict TES and their client from hiding behind the contractual agreement to avoid the responsibilities vested to them in term of the LRA.<sup>185</sup> Therefore, any contractual clause that allows automatic termination of employment will constitute unfair labour practices and will be invalid.<sup>186</sup>

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<sup>178</sup> *SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* (2015) 36 ILJ 1923 (LC) 56 (SATAWU).

<sup>179</sup> (2010) 31 ILJ 2120 (LC).

<sup>180</sup> Ibid 60.

<sup>181</sup> Ibid 60.

<sup>182</sup> Ibid 67.

<sup>183</sup> Para 85.

<sup>184</sup> *SATAWU* (note 178 above) 60 – 61.

<sup>185</sup> Ibid 59.

<sup>186</sup> Ibid 59.

### **3.7 SOLE AND DUAL EMPLOYER INTERPRETATION OF SECTION 198A (3)(b)**

As pointed out above, since the LRA 2014 Amendment came into effect there have been different interpretations given to section 198A (3)(b). In terms of the amendments, a TES worker earning below the earning threshold as provided for in terms of the BCEA and who is performing a temporary service is deemed as the employee of the client. The main focal point of the debate is what was the intention of the legislature when saying that a TES worker is deemed to be an employee of a client. It has been argued that there are two possible interpretation in this regard, it could mean that the employee is being transferred from the TES to the client with the client becomes the sole employer or to mean that the labour broker and its client are dual employers of the employees for the purposes of the LRA. Once the deeming provision comes into effect if the employment terms are for an indefinite period that means the client has an obligation to retain the employee until retirement or a justifiable ground for dismissal ensues. As such, there have been some arguments in favour of the sole employer interpretation and some in favour of the dual employer interpretation.

#### ***3.7.1 Arguments in Favour of Sole Employment Relationship***

As been stated above the interpretation of section 198A(3)(b) of the LRA has been subjected to a hotly debated by courts and academics. In *Refilwe Esau Mphirime and Value Logistics Ltd & BDM Staffing (Pty) Ltd*,<sup>187</sup> Mr, Mphirime was employed by a labour broker on a fixed-term contract and was assigned to a client, Value Logistics. His employment was terminated after ten months. The arbitrator said that the main purpose of the deeming provision in section 198A was to counter the abusive and exploitation faced by TES employees before the amendments.<sup>188</sup> In interpreting the deeming provision the arbitrator pointed out that it is important to adopt a holistic approach in considering the main purpose of this provision and the context in which it is used.<sup>189</sup> The arbitrator said the provision of section 198A is applicable to all employees and employers, accordingly, it is

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<sup>187</sup> *Refilwe Esau Mphirime and Value Logistics Ltd & BDM Staffing (Pty) Ltd BC Case No FSRBFBC34922 (Value Logistics)*.

<sup>188</sup> Geldenhuys (note 56 above) 425; Grogan 'Deemed employer' *Employment Law* 2015 (31) 4; *Value Logistics* (note 187 above) 23 – 24.

<sup>189</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC) 89.

important that the words used in a legislation their ordinary grammatical meaning is adhered to.<sup>190</sup> In this case the arbitrator held in favour of the sole employment relationship and found that Mr, Mphirime had been providing his services to Value Logistics (client) for more than three months and was earning below the earning threshold and the kind of employment he performed was not a temporary service, as such the deeming provision was triggered.<sup>191</sup>

The CCMA also had another opportunity to pronounce on a proper interpretation of the deeming provision in the case of *Assign Services Proprietary (Pty) Ltd v Krost Shelving & Racking Proprietary (Pty) Ltd & Another*<sup>192</sup> the Commissioner held that the dual employment relationship interpretation would lead to many uncertainties in respect of the obligations vested in the true employer. Accordingly, it was held that section 198A(3)(b) makes Krost Shelving & Racking (client) the sole employer of the employees who had been working for the company for a period exceeding three months and who have been earning below the threshold.<sup>193</sup> As indicated above, the reasoning of the CCMA in respect of its decision, in this case, is discussed fully in chapter four below. It has been also argued that a ‘parallel/dual’ employer interpretation is inconsistent with the plain language of the provision of section 198A(3)(b) and when reading in its context, it is the sole employer interpretation that gives effect to the purpose of the amendments and rights enshrined in the Constitution.<sup>194</sup>

### ***3.7.2 Arguments in Favour of Dual Employment Relationship***

In support of the dual employer interpretation it has been contended that when looking at the meaning of the word ‘deemed’ in section 198A(3)(b)(i), it means to consider or regarded, therefore it should be read as enhancing or extending protection of the placed workers with the provision of section 198(2) of the LRA.<sup>195</sup> Section 198(3)(b)(i) and section 198(2) should be read together in order to enhance or provide additional protection for the placed employees. In *United Chemical*

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<sup>190</sup> Geldenhuys (note 56 above) 425.

<sup>191</sup> *Value Logistics* (note 187 above) 29.

<sup>192</sup> *Assign Services Proprietary (Pty) Ltd v Krost Shelving & Racking Proprietary (Pty) Ltd & Another* para 5

<sup>193</sup> Para 5.13.

<sup>194</sup> *NUMSA v Assign Services & CCMA & Others* 25.

<sup>195</sup> Bosch ‘Section 198A (3) (b) (i) of the Labour Relations Act: The Argument in Favour of Dual Employment’; Collins Dictionary and Thesaurus.

*Industries Mining Electric State Health and Aligned Workers Unions*,<sup>196</sup> the court held that the deeming provision should be interpreted as an additional protection as opposed to a replacement and therefore the labour broker remains the employer of the placed workers, it creates a parallel employer relationship. The main aim of the deeming provision is to provide additional protection on these employees being regarded as workers of the client while remaining the workers of the labour broker.<sup>197</sup> If the lawmakers had intended the sole employer interpretation, it could have explicitly provided so. For example, section 197(2)(a) which deals with the transfer of a business as going concern expressly provides that if a business is being transferred, the new employer is by operation of the section the new employer is vested with all the responsibilities of the old employer including the employees' employment contracts.<sup>198</sup> Had the continuation of employment contracts been expressly prohibited, this would have been challenged and attacked on the basis that it infringes the Constitutional right of labour brokers to participate in trading operations.<sup>199</sup>

It has also been argued that if the legislature intended that the client become a sole employer after the prescribed period it would have unambiguously used the concept transfer of employment of the labour broker to its client.<sup>200</sup> Other academic commentators are of the view that the worker remains the employee of the labour broker, as such this provision should be regarded as transferring the responsibilities of the TES to the client.<sup>201</sup> In terms of section 198(4A) where the employees are deemed as per section 198A(3)(b) the client and the TES are jointly and severally liable.<sup>202</sup> Therefore, an inference that can be drawn in this provision is that both the TES and the client dual employers, otherwise section 198 would serve no purpose if it was interpreted in terms of the sole employer relationship.<sup>203</sup> Craig Bosch says this:

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<sup>196</sup> Ibid.

<sup>197</sup> The Labour Relations Amendment Bill of 2012, determines that the main objective to amend section 198 is to provide additional protection to vulnerable employees' who earns on or below the earning threshold.

<sup>198</sup> Section 197(2)(a) provides that when a 'transfer of a business occurs; the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer'; Bosch 'Section 198A(3)(b)(i) of the Labour Relations Act: The Argument in Favour Of Dual Employment.'; see also *NUMSA v Assign Services and Others* (JA96/15) [2017] ZALAC 45 para 43.

<sup>199</sup> Section 22 of the Constitution; See also Benjamin (note 1 above) 40.

<sup>200</sup> Bosh, C 'Section 198A(3)(b)(i) of the Labour Relations Act: The Argument in Favour of Dual Employment'.

<sup>201</sup> Tshoose & Tsweledi, 'Law, Democracy & Development' (2014) 342; Malebakeng (note 7 above) 376.

<sup>202</sup> Section 198(4A) of the LRA.

<sup>203</sup> Bosch (note 198 above).

“... The effect of s 198(4A) is to set up a general joint liability (for infractions of the LRA and BCEA) once the client has been deemed to be the employer of the TES employees in terms of s 198A (3). The client is in effect added as an employer party and the employees are given an election who to hold liable for infringements. The client (although it is referred to as the employer of the employees) is not solely responsible for what happens to them.”<sup>204</sup>

Section 198A (5) which provides for equal treatment of the employees, would have no purpose if the TES does not remain the employer of the deemed workers after the three months. This section protects the placed employees against any form of discrimination by the client by treating them on less favourably than employees employed directly by the client, rendering same work.<sup>205</sup> If the dual employer interpretation is not the one that was intended by the lawmakers, it would negate the operation of the triangular employment relationship and thus make the entire section 198 inapplicable. Gorgan, argues that the use of the word ‘deemed’ in section 198A(3)(b)(i) serves a significant purpose in the interpretation of this provision.<sup>206</sup> It seems to indicate that the client becomes the fictitious employer by operation of the law, but in reality, the labour broker remains the true employer of the placed employees.<sup>207</sup> CAPES argues that when the deeming provision comes into effect the TES and its client should be parallel employers for the purposes of the LRA and that is the only manner in which the BCEA and the LRA can be reconciled after the coming into effect of section 198A(3)(b).<sup>208</sup>

### 3.8 CONCLUSION

Having considered the ILO norms it can be argued that the international instruments endorse the use of agency employment in that it should be allowed to operate within the labour market. At the same time agency employees should be protected against any form of unjustified treatment or exploitation. Although the LRA Amendments of 2014 provides some measures to meet the international standards there are some shortfalls in protecting TES employees as discussed above.

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<sup>204</sup> Bosch, C ‘The Proposed 2012 Amendments Relating to Non-Standard Employment: What will the New Regime Be? 2013 34 *ILJ* 1638.

<sup>205</sup> *NUMSA v Assign Services and Others* (2017) ZALAC 45 39; see also section 198A (5) of the LRA.

<sup>206</sup> Gorgan, J ‘The New Dispensation, Part 1: The Amendments to the LRA’ (2014) 30 (3) *Employment Law* 4.

<sup>207</sup> *Ibid* 4.

<sup>208</sup> *NUMSA v Assign Services* (note 205 above) 27.

Section 198A of the LRA aimed at restricting to the three-month period in which the TES client may use the placed employees, by providing that the assigned employee earning below the threshold are to be deemed to be employees of the client for an indefinite duration.<sup>209</sup> In respect of the controversy that has arisen over the interpretation and application of this section, the CCMA Commissioner in *Assign Services* held that the client becomes the employer once the deeming provision comes into effect.<sup>210</sup> However, the LC held that the agreement between the labour broker and the worker continue after the three-month period, thus giving the employer more scope to exercise the rights in terms of the employment contract against the TES or the client.<sup>211</sup> The LAC, however, overturned the LC decision and upheld the Commissioner's decision that the client becomes the true employer for all intents and purposes of s 198(3)(b).<sup>212</sup> The *Assign Services* case is discussed fully in chapter four below.

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<sup>209</sup> Section 198A (3)(b)(i) of the LRA.

<sup>210</sup> *Assign Services Proprietary (Pty) Ltd v Krost Shelving & Racking Proprietary (Pty) Ltd & Another* para 4.5.

<sup>211</sup> *Assign Services Proprietary (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2015) 36 ILJ 2853 (LC).

<sup>212</sup> *NUMSA v Assign Services* (note 205 above) 42.

## CHAPTER 4

### *NUMSA V ASSIGN SERVICES & CCMA & OTHERS*

#### 4.1 INTRODUCTION

As indicated previously, although there have been few cases that have been referred to courts for adjudication in respect of the amended section 198 of the LRA. This chapter will discuss the *NUMSA v Assign Services* judgment as from the CCMA, Labour Court, and the Labour Appeal court decisions. It discusses the approaches adopted by these courts in interpreting section 198A (3)(b) of the LRA.

#### 4.2 CCCM

The facts of the Assign Services case can be summarized as follows:

The Applicant Assign Services (Pty) Ltd (Assign Ltd), a temporary employment service responsible for providing workers when required to the first respondent Krost Shelving & Racking (Pty) Ltd (Client).<sup>213</sup> The National Union of Metalworkers of SA (NUMSA) is a trade union and was the second responded in this case.<sup>214</sup> The client is a company that offers storage solutions and has 40 permanent employees and about 90 wage workers.<sup>215</sup> In April 2015 Assign Ltd placed twenty-two employees to the Client for a period exceeding three months.<sup>216</sup> As such, the employees fell within the ambit of section 198A(b)(b) of the Act.<sup>217</sup> The parties then referred the matter as a test case to the CCMA in terms of 198D(1)<sup>218</sup> seeking for a proper interpretation of section 198A (3)(b) on the triangular employment once this provision comes into effect.<sup>219</sup> Assign Ltd argued the effect of section 198A(3)(b) is that the placed employees remain the employees of

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<sup>213</sup> *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & another* (2015) 36 ILJ 2408 (CCMA).

<sup>214</sup> Para 1.4.

<sup>215</sup> Para 2.3.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> Section 198D(1) allows the Commission for Conciliation, Mediation and Arbitration to adjudicate on matters relating to the interpretation and application of section 198A of the LRA.

<sup>219</sup> *Ibid* 2.4 and 3.1.



the TES (Assign Ltd in this case) for all intent and purposes of the Act and this was called as the dual employer relationship.<sup>220</sup>

On the other hand, NUMSA contended that once section 198A (3)(b) kick in the employees become the employees of the client and not the employees of the labour broker (Krost Shelving & Racking (Pty) Ltd), and this was named the ‘sole employment’ position.<sup>221</sup> NUMSA argued that the word ‘deemed’ meant ‘regard as being’ (referred to the Pocket Oxford Dictionary which defines the term ‘deem’ as a verb to mean ‘regard as being’.) and it was utilized in a manner that creates a legal fiction to mean that the client is the employer of the workers when the deeming section kick in.<sup>222</sup> Section 198B of the LRA was used to support the sole employer interpretation in that the placed works are employed by the client for an indefinite period and that section 198 (4A) is not applicable in terms of the deeming section but rather in terms of section 198(4).<sup>223</sup> The applicant on the other hand argued that on the expiry of the three-month period the employment contract between the TES and the deemed workers is not terminated nor does it terminate the commercial contract between the labour broker and the client, therefore the effect of the deeming provision is that it creates greater protection for these employees by making both the TES and client dual employers.<sup>224</sup> In support of the dual employer, the Applicant relied on section 198(4A) which provides for jointly and severally liability as discussed in chapter 3 above.<sup>225</sup> It was further argued that the dual employment in relation to section 198(4A) allows the workers to institute proceedings against either the TES or the client or both and they may enforce an order or award made against either party or both.<sup>226</sup>

#### ***4.2.1 Decision***

The Commissioner stated that the deeming section should be considered in terms of the law governing adoption. The law of adoption creates a legal fiction because the adoptive parents are

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<sup>220</sup> Ibid 3.2.

<sup>221</sup> Ibid 3.3.

<sup>222</sup> Ibid 4.2.

<sup>223</sup> Ibid 4.7.

<sup>224</sup> Ibid.

<sup>225</sup> See section 198 (4A) of the LRA; Bosch, C ‘The Proposed 2012 Amendments Relating to Non-Standard Employment: What will the New Regime Be? 2013 34 *ILJ* 1638.

<sup>226</sup> *Assign Services* (note 213 above) 4.6 - 4.7.

not considered to be the parents of the adopted child.<sup>227</sup> It does not consider the biological parents as dual parents because this could lead confusion and uncertainty in the law.<sup>228</sup> In the present case, therefore, the dual employer interpretation could lead to confusion in relation to which party will be responsible to discipline the workers.<sup>229</sup> Section 198(4A) does not create the impression that the deeming section should be construed to mean a dual employment relationship.<sup>230</sup> The deeming section was passed to give additional protection for vulnerable workers earning below the threshold.<sup>231</sup> Therefore, the sole employer interpretation is the correct one, irrespective of how the labour broker and its client decide in respect of their commercial contract.<sup>232</sup> Accordingly, the workers placed with the client, in this case, were deemed to be workers of the client in terms of the deeming section.<sup>233</sup> Assign Ltd was not satisfied with this decision and applied to the Labour Court for the review of the commissioner's decision.

It is submitted that the findings of the commissioner that s198(4) is not applicable in terms of section 198(3)(b) is subject to questions because the section provides otherwise. Section 198(4A) provides that if the client of the temporary employment service is jointly and severally liable in terms of s198(4) *or* is deemed to be the employer of an employee in terms of section 198A(3)(b)-

- (a) “an *employee* may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client.”<sup>234</sup>

Therefore, having considered this section it is submitted that the jointly and severally liability applies in both section 198(4) and also section 198(3)(b) of the LRA.

### **4.3 LABOUR COURT DECISION**

This court was tasked to review the findings of the CCMA as discussed above, the parties maintained their arguments in respect of the sole and dual employment positions. Brassey AJ stated

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<sup>227</sup> Para 5.12.

<sup>228</sup> Ibid.

<sup>229</sup> Para 5.13.

<sup>230</sup> Ibid.

<sup>231</sup> Para 5.15.

<sup>232</sup> Paras 5.17 - 5.18.

<sup>233</sup> Paras 5.19 - 6.3.

<sup>234</sup> Section 198(4A) (a) of the LRA.

that the sole employment argument advanced by NUMSA was misleading because the union conceded that the contractual relationship between the TES and the employee remained in force.<sup>235</sup> On argument raised by Assign Services Ltd, Brassey AJ found that the dual employer interpretation as misleading as well, because it not clear whether on the coming into effect of the deeming provision the client is vested equally with the rights and obligations of the TES in respect of employment contracts of the deemed employees.<sup>236</sup> After considering the wording of section 198A the court held beyond doubts that the labour broker was the employer of the deemed employees according to both the statute and the common law.<sup>237</sup> As such, the labour broker is jointly and severally liable with its client as provided for by section 198(4A). It was further held that it is evident from the provision of section 198(3)(b) that the placed workers become the employees of the client when three months lapses for the purposes of the LRA.<sup>238</sup> There is nothing in the deeming section which renders the employment agreement between the labour broker and its employees to be invalid after three months.<sup>239</sup> There is no reason why the TES should not remain the employer of the workers and there is nothing in principle or in the Act that suggests that the labour broker is relieved from its obligations as a result of the operation of section 198A (3)(b), as such, the employment contract is created by coming into effect of the section.<sup>240</sup>

When concluding the contract of employment with the TES, the workers become entitled to certain statutory protection and there is no public policy consideration to imply that this protection falls away.<sup>241</sup> The deeming provision is consistent with the provision of section 198(4A) (b) and 198(4E),<sup>242</sup> accordingly the correct interpretation is that the workers were ‘placed dually’ for the purposes of the LRA.<sup>243</sup> Moreover, the court discouraged hearing of suits that entails no concrete dispute between the parties and stated that the CCMA should not have considered the matter.<sup>244</sup>

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<sup>235</sup> *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2015) 3.

<sup>236</sup> *Ibid* 4.

<sup>237</sup> *Ibid* 9.

<sup>238</sup> *Ibid*.

<sup>239</sup> *Ibid* 11.

<sup>240</sup> *Ibid* 12

<sup>241</sup> *Ibid*.

<sup>242</sup> Section 198 (4E) states that in any proceedings brought by an employee, the Labour Court or an arbitrator may-

(a) determine whether a provision in an employment contract or a contract between a temporary employment service and a client complies with subsection (4C); and

(b) make an appropriate order or award.

<sup>243</sup> *Assign Services* (note 234 above) 15.

<sup>244</sup> *Ibid* 21.

On the basis of the review, Brassey AJ found that the commissioner's decision contained a material error of law, in that the commissioner erred in concluding that the client was the only employer of the employees.<sup>245</sup> The court said that the commissioner had no exclusive jurisdiction to decide a matter, section 198D does not empower arbitrators to adjudicate on matters that require the actual interpretation of the section, but it gives them the power to determine matters arising from the interpretation of section 198 as amended.<sup>246</sup> Accordingly, the court concluded that the commissioner's decision was reviewable and on that basis, it was set aside.<sup>247</sup>

However, this decision has been criticized by some academics on the basis that it is unlikely to have practical effect in cases where employees seek to exercise their rights in terms of section 198A against the client.<sup>248</sup> Forere argues, that as much as the court acknowledged the ambiguity associated with the interpretation of section 198A(3)(b), but it did not go far enough in examining the contracts of employment between the employees and the TES.<sup>249</sup> As such, had the court embraced a purposive approach it could have come to a different conclusion.<sup>250</sup> Benjamin argues that the court was incorrect in assuming that the relationship between the TES and the placed employees was that of contractual employment. It was incorrect to conclude that section 198(2) is consistent with the common law position while section 198(3)(b) is a deeming provision. According to him sections 198(2) and 198A(3)(b) cannot be used at the same time to establish the identity of the true employer.<sup>251</sup>

It is submitted that the main findings of this decision are that there is no transfer of contractual employment from the TES to the client. The labour broker remains the employer after three months. Post-deeming the employees can institute proceedings arising in respect of unfair dismissal or unfair labour practices against either the TES or the client directly.<sup>252</sup> The labour broker and the client are jointly and severally liable for any violation of the law.<sup>253</sup>

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<sup>245</sup> Ibid 22.

<sup>246</sup> Ibid 23.

<sup>247</sup> Ibid 28.

<sup>248</sup> Benjamin (note 1 above) 43.

<sup>249</sup> Forere (note 7 above) 391.

<sup>250</sup> Ibid 391.

<sup>251</sup> Benjamin (note 1 above) 38.

<sup>252</sup> Worman-Davies, B & Vatalidis, A 'Labour brokers and their clients are both employers of assigned employees in all respects' available at <http://www.labourguide.co.za/most-recent/2137-labour-brokers-and-their-clients-are-both-employers-of-assigned-employees-in-all-respects> accessed on 25 October 2017.

<sup>253</sup> Ibid.

#### 4.4 THE LABOUR APPEAL COURT DECISION

NUMSA was not satisfied with the manner in which the LC handled the matter and decided to Appeal to the Labour Appeal Court contending that the LC misdirected itself in finding that the Commissioner made an error of law in finding that Assign continued to be the employer of the placed employees after the expiry of the three months.<sup>254</sup> The CCMA correctly held that when the deeming section kick in the client is the sole employer for the purposes of the Act.<sup>255</sup> It was also contended that the sole employer interpretation is consistent with the plain language of section 198A(3)(b) when reading in its context and it also gives effect to the purpose of the amendments and to the rights enshrined in the Constitution and the dual employer interpretation was not supported in this regard.<sup>256</sup>

The court held further that the sole employer interpretation is in accordance with the main thrust of the amendments as contemplated in the Explanatory Memorandum of the Amendment Bill.<sup>257</sup> According to the court, the unfair dismissal and unfair discrimination protection in relation to section 198A should not be construed to mean that the TES and the client become employers of the placed workers.<sup>258</sup> This, therefore, is to ensure that the deemed employees are integrated into the business as workers of the TES client.<sup>259</sup>

In respect of section 198(4A),<sup>260</sup> the court stated that this provision was enacted as a measure of protection for lower-paid employees and to restrict or discourage labour brokers from using temporary workers and from further involvement in the administrative arrangements regarding the placed workers for a period exceeding three months.<sup>261</sup>

Therefore, the sole employer position does not aim at banning or deregulating labour broking but at limiting temporary employment arrangements in relation to the main intention of the

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<sup>254</sup> *NUMSA v Assign Services and Others* (2017) ZALAC 45, 20.

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid* 25.

<sup>257</sup> *Ibid* 38.

<sup>258</sup> *Ibid* 40.

<sup>259</sup> *Ibid.*

<sup>260</sup> Section 198(4A) of the LRA allows the deemed workers to initiate legal proceedings against either the labour broker or the client or both for any breach of the provisions of the BECEA and a labour inspector may issue and enforce a compliance order against the labour broker or the client or both and any order or award made against either TES or client is enforceable against either of them or both).

<sup>261</sup> *NUMSA v Assign Services* (note 253 above) 41.

amendments.<sup>262</sup> The TES must remain the employer prior to the three months and once the deeming section comes into effect then the client will be the employer.<sup>263</sup> There is no provision in section 198A to suggest that the employment contract of the placed workers is transferred from the TES or that the client steps into the shoes of the labour broker after three months.<sup>264</sup> Neither do the section suggest that the parties become joint employers or the client is added as an employer.<sup>265</sup> Otherwise it would make no sense to keep the TES in the employment equation if the client has assumed all the obligations of the labour broker unless the TES wants to be an unwarranted ‘middle-man’ adding no value to the employment relationship.<sup>266</sup> The court held further that although it was immaterial and bears no bearing in the outcome of the decision of the court the Commissioner erred in comparing the deeming provision to the adoption scenario because these are different provisions, therefore, linking them could lead to unintended results.<sup>267</sup>

#### 4.5 CONCLUSION

The main purpose of this chapter was to examine the Assign Services Ltd case in more detail in order to establish how each court dealt with the interpretation of the deeming section particularly regarding the sole and dual employer interpretation. As discussed the main findings of the Commissioner was that the sole employer interpretation is the correct one and it should be interpreted in relation to the law of adoption. However, the LC on review set aside the findings of the CCMA on the basis that the Commissioner erred in interpreting the deeming section. On appeal to the LAC the decision of the LC was set aside on the basis that it misdirected itself in interpreting the section,<sup>268</sup> as such, it adopted a purposive approach and concurred with the findings of the CCMA that the deeming section should be interpreted to mean that the client becomes the sole employer when section 198A(3)(b) kicks in. therefore this interpretation was held as giving enough protection for the vulnerable workers.<sup>269</sup> It is submitted that the approach adopted by the LAC is

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<sup>262</sup> Ibid 42.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid 43.

<sup>266</sup> Ibid 44-45.

<sup>267</sup> Ibid 47; Section 242 of the Children’s Act 41 of 2007 determines that an adoption order terminates all parental obligations and rights of the natural parents and transfer them to the adoptive parents.

<sup>268</sup> *NUMSA v Assign Services* (note 253 above) 47.

<sup>269</sup> Ibid 46.

consistent with the new approach of interpretation adopted in the Natal Pension Fund case discussed above in chapter 3.

## CHAPTER 5

### THE IMPLICATIONS AND POSSIBLE CONSEQUENCES OF THE LAC DECISION

#### 5.1 INTRODUCTION

The Labour Appeal court judgment in Assign Services Ltd was the most highly anticipated one on the ruling in respect of the interpretation of section 198A(3)(b) of the LRA which deems employees placed with the client by a labour broker for a period exceeding three months and who earns below the earning threshold to be workers of the client.<sup>270</sup> This judgment, therefore, provides clarity on the interpretation and application of the deeming provision and on the hotly debated issue of the sole employer and dual employer relationship. This chapter aims at examining the implications and significance of this judgment, it will also explore possible consequences of the judgment and possible approaches in guiding against these consequences.

#### 5.2 THE IMPLICATION AND SIGNIFICANCE OF THE ASSIGN SERVICES DECISION

It is significant to acknowledge that this judgment is an indication that courts will be very strict when applying the provisions of the LRA in ensuring that its objects are given effect to. This is a caution to the labour broking industry and their clients that they should refrain from engaging or placing employees on temporary work or fixed-term contracts for longer periods without any reasonable justification for doing so.<sup>271</sup> As indicated previously, where the literal meaning of a word in a statute or document produces unintended or absurd results, a purposive approach to interpretation must be followed. When considering a purposive approach in the context of the LRA the courts must take into account the objects and purpose of the LRA and its Explanatory Memorandum accompanying the LRAA Bill<sup>272</sup> to ascertain the meaning. The court applied a purposive approach, in doing so it undoubtedly stated that after the expiry of the three-month period the TES employment relationship with the workers come to an end and the client is deemed

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<sup>270</sup> See Benjamin, P 'Battle over Labour brokers Takes to the Courts' available at <http://www.labourguide.co.za/most-recent/2164-battle-over-labour-brokers-takes-to-the-courts> accessed on 25 October 2017.

<sup>271</sup> Forere (note 7 above) 387.

<sup>272</sup> The Explanatory Memorandum to the Labour Relations Amendment Bill tabled in Parliament in 2012.



to be the employer.<sup>273</sup> The finding of the court plays a significant role in that it strengthens the provision that a termination of employment of the employee to avoid the operation of the deeming provision would amount to a dismissal. Therefore, the current position of the law in respect of the deeming provision is that the labour broker is the employer of the employees placed with the client until the deeming section kick in.<sup>274</sup> The TES bears all the responsibilities regarding the workers before the operation of section 198A(3)(b).<sup>275</sup>

The practical implications of this decision are that:

- The protection against unfair dismissal and discrimination in respect of section 198A does not mean that both TES and the client are employers of the deemed employees.
- Section 198(4A) does not mean or support the dual/parallel employer relationship but it aims at restricting labour brokers from employing employees to perform temporary services for a period exceeding three months without a valid reason. It also discourages labour brokers from being involved in administrative arrangements in respect of the employees post-deeming.
- The employment relationship is not transferred from the TES to the client.
- The employment relations between the workers and the client is created by operation of law.
- Therefore, the sole employer relationship does not suggest that the TES is prohibited but instead it is regulated.

Although the LAC decision might have far-reaching consequences for the labour broking industry, it is significant to note that the court did not ban the use of labour broking but to control it with an aim of ensuring that it is consistent the primary of objects of the amendments.

### **5.3 POSSIBLE CONSEQUENCES OF THE ASSIGN SERVICES DECISION**

Although the intention of the legislature was to provide greater protection for vulnerable employees by introducing the provisions of section 198A, it seems the problem will continue given

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<sup>273</sup> See *NUMSA v Assign Services* (note 253 above) 37, 40 – 43.

<sup>274</sup> *Ibid* 42.

<sup>275</sup> *Ibid*.

the recent LAC interpretation of section 198(3)(b). Given the typical nature of section 198A (1) (a) to (b), it seems employers or TES clients will find a way to place employees on temporary services or fixed-term contracts to avoid the deeming provision.

### ***5.3.1 Fixed-Term Contracts instead of TES***

As mentioned previously, a dismissal occurs when the employer by either his or her act or conduct decide to terminate the employment with or without a notice.<sup>276</sup> However, a termination of a fixed-term contract does not amount to a dismissal and the LRA provision do not apply i.e. disputes for unfair dismissal.<sup>277</sup> A fixed-term contract comes to an end when the specified event contracted upon has been accomplished or after a certain date or a specified time<sup>278</sup> According to section 198B of the LRA, an employer cannot be employed on a fixed-term contract for more than three months without a valid justification.<sup>279</sup> It seems, therefore, that employer may find a justifiable way to employ workers on fixed-term contracts that are longer than the prescribed three-months instead of using TES. This is because using fixed-term contracts would be cheaper for employers than having to employ the placed employees for an indefinite period when the deeming provision kicks in. For example, an employer may treat an employee employed on fixed-term contract on no less favourable terms than permanent employee during the period of the contract and then decide not to advertise new posts for permanent employment. In such a case there will be no legitimate expectation on the employee that his or contract will be renewed. Thereby, allowing an employer to bypass unfair dismissal litigation that may arise.

### ***5.3.2 Economic ramifications***

The court adopted a purposive approach when interpreted the deeming provision and mainly focused on the main thrust of the Amendment without giving a full explanation on how it relates

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<sup>276</sup> See section 186(1) (a) of the LRA.

<sup>277</sup> Cohen, T 'The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships (2014) 35 *ILJ* 2609.

<sup>278</sup> *Ibid.*

<sup>279</sup> Sections 198B (3) and 198B (4)(a) –(i) of the LRA.

to the sole employer interpretation.<sup>280</sup> It is significant to note that the court acknowledged that there is no provision in the LRA Amendments that specifically states that the client steps into the shoes of the TES in relations to the responsibilities after the deeming section.<sup>281</sup> Neither do the Act specifically provide that the client is added as an employer.<sup>282</sup> However, the court preferred the sole employer interpretation and stated that there is no need for the labour broker to remain in the employment equation for an indefinite duration when the deeming section comes into effect. This finding ignores the fact that there is a binding commercial contract between the TES and the client, this therefore, restricts the right to freedom of trade guaranteed by the Constitution. Although, employees have the right to fair labour practices,<sup>283</sup> and it has been argued that the main purpose is to create jobs that are of acceptable quality and not just simple job creation,<sup>284</sup> but every person has the right to freedom of trade. It can be contended that in South Africa the right to fair labour practices predominates the right to freedom of trade, therefore, this justifies the strict regulation of labour broking.<sup>285</sup> However, in *National Health and Allied Workers Union v University of Cape Town*<sup>286</sup> the Constitutional Court held that the right to fairness does not apply only to employees but also applies to employers. Botes argues that applying strict labour laws on labour broking might have serious economic ramifications and infringes the right to conduct business in the country.<sup>287</sup> It is submitted that this argument concurs with the argument made by the Deputy Director General that there is a need for labour laws that are flexible in order to attract investments and thus enhance the economy of the country.

It is submitted that the primary purpose of the LRA is to promote economic growth,<sup>288</sup> therefore, in ensuring that this obligation is fulfilled it is significant that the government take steps to protect vulnerable employees by creating decent employment in order to reduce the alarmingly high

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<sup>280</sup> See *NUMSA v Assign Services* (note 253 above) 38.

<sup>281</sup> *Ibid* 43.

<sup>282</sup> *Ibid*.

<sup>283</sup> Section 23 of the 1996 Constitution.

<sup>284</sup> Clarence, T & Benjamin, T 'A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South African' *Law Democracy & Development* 2014 (18) 346.

<sup>285</sup> BPS Van Eck 'Temporary Employment Services (Labour Brokers) in South Africa & Namibia' *PER/PELJ* 2010 (13) 2 121.

<sup>286</sup> (2003) ILJ 95 (CC).

<sup>287</sup> Botes, A 'The History of Labour Hire in Namibia: A Lesson for South Africa' 2013 (16) *PER/PELJ* 529.

<sup>288</sup> Section 1 of the LRA.

unemployment rate. There is no doubt that temporary employment service plays a significant role in reducing the unemployment rate engulfing South African labour market.<sup>289</sup>

### ***5.3.3 Contracts of employment***

The sole employer interpretation has practical problems in respect of the contract of employment, as the court said that the relationship between the workers come into existence by operation of law. It is not clear whether the client is required to offer the deemed employees new contracts of employment as permanent employees. If this is not the case, the deemed employees will face difficulties because a contract of employment is the sole basis of proving an employment relationship between the workers and the employer. The BCEA empowers a labour inspector to ensure that employees work under the terms and conditions prescribed under labour legislation, this includes having written employment contracts.<sup>290</sup> It is not clear, therefore, whether a labour inspector can issue an undertaking or a compliance order against the client for a failure to comply with the BCEA in respect of the contracts of employment. Presumably, the written contracts of employment would have been more consistent with the ILO Private Employment Agencies and the Recommendations which also requires employees to have employment contracts. Although the court was not obliged to take into account the evidence present by the *Amicus curiae* (CAPES) in support of the submissions made on behalf of Assign Services,<sup>291</sup> it is submitted that had the court considered this evidence perhaps it would have come to a different conclusion than the sole employer interpretation.

## **5.4 AVOIDING UNINTENDED RESULTS OF THE ASSIGN SERVICES DECISION**

Although, it was not the intention of the legislature to left section 198A(3)(b) open for debate and litigation but to address the exploitation faced by vulnerable workers and the abusive practices

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<sup>289</sup> Confederation of Associations in the Private Employment Sector, available at [www.capes.org.za](http://www.capes.org.za) accessed on 30 October 2017; Borat, H. ...et al. 'Temporary Employment Services in South Africa: Assessing the industry's economic contribution' (2016) *LMIP REPORT* 1.

<sup>290</sup> See sections 64, 65 and 66 of the BCEA.

<sup>291</sup> *NUMSA v Assign Services* (note 253 above) 27, CAPES submitted that the only way in which the LRA and the BCEA can be reconciled after the deeming is through the labour broker being parallel employer for all purposes and intent of the LRA when section 198(3)(b) comes into effect.

involved in labour broking. However, neither the sole employer nor the dual employer interpretation attempt to fulfill this purpose. While the sole employer interpretation is more sensible as the CCMA and the LAC found in favour of it, but it has its complications. The dual employer interpretation, on the other hand, is also problematic as it is not clear how the client will be expected to fulfill its rights and obligations and it is not clear what would be the main purpose of the TES post-deeming. As the court held:

‘it would make no sense to retain the TES in the employment equation for an indefinite period if the client has assumed all the responsibilities that the TES has before the expiration of the three-month period. The TES would be the employer only in theory and an unwarranted “middle-man” adding no value to the employment relationship.’<sup>292</sup>

Even though the purposive approach adopted by the court supports the sole employer interpretation, but it can be argued that when section 198 is read entirely there is no provision in the deeming section that suggests that the triangular employment (commercial contract between the TES and its client and the employment contract between the TES and its workers) ends when section 198A (3)(b) kick in. It is, therefore, suggested that the freedom of choice should be left between the TES and the client on whether they wish to terminate their commercial contract or not. If they decide to terminate the contract it is then the client will become the sole employer, and there will be no longer a contractual relationship between the labour broker and the workers. However, if the client and the TES decide to keep their contractual relationship the TES will remain the employer and will still be responsible for administrative arrangements of the workers and the client will still be expected to fulfil its responsibilities conferred to it by the LRA particularly section 198A (5) regardless of the costs associated with keeping the labour broker in the employment relationship.

## **5.5 CONCLUSION**

Even though it may not have been the intention of the legislature to retain the labour broker after the deeming section because this renders the deemed employees indebted to the TES and this is inconsistent with the Memorandum of objects, the purpose, and spirit of the LRA Amendments.

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<sup>292</sup> *NUMSA v Assign Services* (note 253 above) 43.

Section 198(4A) seems to raise difficulties because it is not whether after the deeming section this protection falls away as the court relied on the sole employer interpretation as a correct one. If this is the case, then it means that section 198(4A) becomes meaningless after the coming into effect of the deeming provision. It is therefore suggested that section 198(4A) need to be reconsidered in order to give effect to section 198(3)(b) of the LRA and its purpose and primary object.

## CHAPTER 6

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 CONCLUSION

The main objective of this dissertation was to explore the approaches that have been utilized by courts and academic commentators on the interpretation and application section 198A(3)(b) of the LRA as amended. The dissertation has indicated that the 2014 amendments aimed at providing protection to vulnerable employees and the courts have interpreted the Act to give effect to this aim and to ensure certainty within the law by adopting the sole employer interpretation. It is submitted that the current law is that the client becomes the sole employer after coming into effect of the deeming section and the TES relationship with the deemed employees is terminated by law.

##### *6.1.1 Findings of the Research*

The main finding of this dissertation is that the renovations of section 198 have played an important role the South African labour law, as such, it has some positive and negative implications for the labour broking industry.<sup>293</sup> The positive result of this section is that the exploitation and abusive practices associated with labour broking such as placing an employee on a temporary service for a long time without justification is unlikely to occur again. Employees earning below the threshold are now protected and afforded a chance to be permanent employees and therefore able to institute legal proceedings against the client direct.<sup>294</sup> Vulnerable employees will be protected in terms of provision of benefits, payments, and treatment as the client is required by law to treat these employees on no less favourable terms that permanent employees.

However, there are also the negative connotations of this section on the part of the TES industry. As the LAC decision concurred with the sole employer interpretation it means that labour brokers will incur more expenses as they will be required to employ more temporary workers in every

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<sup>293</sup> Joubert, Y & Loggenberg, B 'The impact of changes in labour broking on an integrated petroleum and chemical company' (2017) *Acta Commercil* 17(1), a44 available at <https://doi.org/10.4102/ac.v17i1.441> accessed on 15 October 2017.

<sup>294</sup> *Ibid* 6.

three months.<sup>295</sup> This has the potential of discouraging the labour broking industry in utilizing this method of employment and consider other forms of employment i.e. fixed-term contracts. If this happens most vulnerable employees will lose their jobs which was the main problem that the legislature was attempting to curb.

## 6.2 RECOMMENDATIONS

- In order for South Africa to continue to compete in the global market, it is significant to have an updated legal system that is compatible with the modern form of employment.
- Flexible legislation and social policies should be adopted in order to ensure that the labor broking industry continues to make an impact in the economy of the country and to provide mechanisms that will promote youth employment and their skills development.<sup>296</sup>
- It is suggested that campaigns must be conducted in promoting and supporting the government and social partners' initiatives of decent work for all workers while continuing to give effect to the rights enshrined in the Constitution, ILO instruments, and all labour legislation.<sup>297</sup>
- In order to ensure that the sole employer interpretation is supported without any doubts, it is recommended that section 198(4A) be revisited in order to clarify the position in respect of whether the protection provided by this section falls away after the deeming section if the sole employer interpretation is adhered to. This will provide certainty regarding the application of section 198A.
- Should section 198(4A) be reconsidered, it is submitted that the ILO instruments should serve as guidelines in order to ensure that a balance is maintained between the rights of both employers and employees.

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<sup>295</sup> Ibid 6.

<sup>296</sup> CAPES, 'Update:Assign Labour Appeal Court Judgement' (2017) available at <http://www.labourguide.co.za/most-recent/2495-update-assign-labour-appeal-court-judgment> accessed on 25 October 2017.

<sup>297</sup> Fourie, E 'Non-Standard workers: The South African Context, International Law and Regulating by the European Union' 2008 (11) 4 *PER/PELJ* 145.



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