A CRITICAL ANALYSIS OF TEMPORARY EMPLOYMENT SERVICES IN CONTEMPORARY SOUTH AFRICA

By

NOKUZOLA GLORIA KHUMALO

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College of Law and Management Studies, and

School of Law,

Howard College, University of KwaZulu-Natal

Supervisor

Ms Rowena Bronwen Bernard

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DECLARATION

I, **NOKUZOLA GLORIA KHUMALO**, do hereby affirm that this dissertation is my own original work researched from various articles, journals, books, and has not been submitted to any other university for execution of the academic requirements of any other degree or other qualification.

I have prepared this dissertation in fulfilment of LLM in Advanced Labour Law at the University of KwaZulu-Natal, Howard College.

Dated and signed at DURBAN on this 10 day of January 2020

NG Khumalo

Signature:_____

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Dated and signed at DURBAN on this 10 day of January 2020

NG Khumalo

Signature:_____

ABSTRACT

The study focuses on the critical analysis of temporary employment services in contemporary South Africa and specifically looks at the Labour Relations Amendment Act 6 of 2014 which introduced a controversial provision of section 198A. The analysis discusses the history of the Labour Relations in South Africa as it progresses over the years from 1956 to the latest amendments of the Labour Relations Act in 2014. As part of the history of the TES the analysis touches on the Namibian LRA and case law, a country that dealt with a similar issue of TES abusive labour. Also touches on the ILO standards of employment which affects the world globally.

The study analyses the South African case law that deals with the TES abuse of vulnerable labour, in particular, an outstanding recent case of *Assign Services v NUMSA* which ended up in the Constitutional Court of South Africa. In critical analysis of the deeming provision, joint and several liability clauses, a use of other related employment statutes is discussed.

The dissertation focuses on the outcome of the recent Constitutional case and of *Assign Service v NUMSA* where the Constitutional Court finalised the word to mean a sole employer for the purpose of the LRA only in exclusion of other employment statutes. This is a fascinating debate, which requires legislature to deal with before it yields further disputes.

The study also provides some recommendations to be considered to amend the LRA legislation in section 198A in order to provide a clear interpretation.

LIST OF ABBREVIATIONS:

ANC	African National Congress (MANIFESTO)
BCEA	Basic Conditions of Employment Act 75 of 1975
BUSA	Business Unity South Africa
CCMA	Commissioner for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
COSATU	Congress of South African Trade Unions
EEA	Employment Equity Act 55 of 1998
ESA	Employment Services Act 4 0f 2014.
ILO	International Labour Organisation
LC	Labour Court
LAC	Labour Appeal Court
LRAA	Labour Relations Amendment Act 6 of 2014
LRA	Labour Relations Act 66 of 1995
NEDLAC	National Economic Development and Labour Advisory Council
NHC	Namibian High Court
NLA	Namibian Labour Act 6 of 1992
NUMSA	National Union of Metal Workers of South Africa
SCA	Supreme Court of Appeal
TES	Temporary Employment Services.
UIF	Unemployment Insurance Fund

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CHAPTER ONE:
INTRODUCTION

1.1 Introduction

The dissertation focuses on the controversy created by interpretation of the deeming phrase in the Labour Relations Act (LRA)as amended in section 198A(3)(b)[1] and its joint and several liabilities clause. This confusion is created by the tripartite employment relationship involving Temporary Employment Services (TES), workers and clients.

Temporary Employment Services are also recognised as labour brokers. "A labour broker or TES is any person who, for reward, procures for or provides to a client other persons, who render services to or perform work for the client, and who are remunerated by the TES.[2]" The client pays the TES for work done by the TES employees. The LRA[3] and Basic Conditions of Employment Act (BCEA)[4] refers to TES as an employer, unless the personnel employed is an independent contractor. TES employment thus creates a tripartite affiliation linking TES, worker and client.

An employee is placed in the employment of a client by the TES. The worker's employer is the TES, the management of the employee is conducted by the client, and the work itself is for the client.[5] This creates problems for vulnerable employees in that they are subjected to unfair labour practices by clients not recognising them as employees. They are deprived of fair labour practice[6] and subject to unfair dismissals. The problem which arises is to determine which employer bears the legal onus to prove fair dismissal[7] and which employer should honour liability for remedies for unfair dismissal or unfair labour practices[8].

[1]Labour Relations Act 66 of 1995.
[2]J Theron, S Godfrey & P Lewis P 'The Rise of Labour Broking and its Policy Implications' (2005) *Development & Labour Law Monographs* 18."
[3]Labour Relations Act 66 of 1995 Section 198(2).
[4]Basic Conditions of Employment Act 75 of 1997 Section 82(1).
[5]J Theron 'Prisoners of a Paradigm: Labour Broking, the New Services and Non-Standard Employment. Reinventing Labour Law' (2012) *Acta Juridica* 59.
[6]Labour Relations Act 66 of 1995 Section 185.
[7]Labour Relations Act 66 0f 1995 Section 192.
[8]Labour Relations Act 66 of 1995 Section 193.

TES employees suffer unequal treatment when compared with permanent employees. They earn inferior earnings, and lack benefits, such as medical aid and pension.[9] The LRA amendments in January 2015 introduced further protection for vulnerable TES employees. This protection is designed for TES employees earning below the threshold of R205433.30.[10] The security of vulnerable workers against unfair labour practices and dismissals is critical in order to create sustainable socio-economic development.[11] Protection is offered against unfair dismissals as these vulnerable employees are commonly dismissed without following proper procedure.

The Amendment Act introduces considerable modifications to section 198[12] that have influential implications for the safeguarding of personnel who work in labour broking schemes.

1.2 Research questions

The research will deal with the following questions:

1.2.1 What is the meaning and consequences of the 'deeming' phrase as set out in section 198A(3)(b) of the LRA?

1.2.2 Do the changes in section 198 of the LRA adequately protect vulnerable TES employees?

1.2.3 Is section 198(4) of the LRA dealing with joint and several liabilities effective?

1.2.4 Does a permanent contract of employment automatically exist when the section 198A(3) deeming clause is triggered?

1.3 Rationale and purpose of the study

The aim of this dissertation is to provide recommendations and solutions for the gap in legislation regarding the amended section 198A(3)(b) with regards to the deeming provision.[13] The purpose of this dissertation is to clarify the controversial interpretation of the deeming clause set out in section 198A(3)(b)[14] and the consequences of its misinterpretation.

[9]C Tshoose & B Tsweledi 'A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South Africa (2004) *Law Democracy & Development*18.
[10]Basic Conditions of Employment No. 75 of 1997 Section 6(3).
[11]KO Odeku'Labour Broking in South Africa: Issues, Challenges and Prospects' (2015) *J SocSci'* 43(1), 19-24.
[12]Labour Relations Act 66 of 1995 updated in 2015.
[13]Labour Relations Act 6 of 2014 Section 198A(3)(b).
[14]Labour Relations Act 6 of 2014 Section 198A(3)(b).

The dissertation will also deal with the consequences of the dual responsibility created by the deeming provision, interpretation of the provision, and will provide recommendations for the joint and several liability clauses.[15]

The objective is to determine the position of the work correlation where workers are deemed workers of a client in regards to section 198A(3)(b)(i),[16] or whether a TES retains the position of being an employer of employees placed at a client despite section 198A(3)(b)(i) being triggered.[17]

1.4 Methodology of the research

The research method used in this dissertation is desktop. This study comprises of an analytical, historical and comparative approach and the interpretation of legislation in an effort to uncover the problem caused by the deeming provision and the dual liability created by the LRA amendments in the tripartite affiliation involving a TES, a temporary worker and a client.

The research method shall be based on secondary various sources of data, such as statutes, case law, journal articles and Internet sources, and analyses or foreign law and international law to ascertain probable clarification of the issues raised by the TES tripartite contracts.

1.5 Structure overview of chapters

The dissertation is structured into five chapters.

Chapter 1

Chapter one describes the overview of the topic, the methodology used for the dissertation and the problem question.

Chapter 2

Chapter two discusses the background of TES, labour relations legislation, TES practices in South Africa preceding the stated modifications and a literature review.

[15]Labour Relations Act 66 of 1995 Section 198(4).
[16] Labour Relations Act 6 of 2014 Section 198A(3)(b)(i).
[17]*NUMSA v Assign Services and Others* (JA96/15) [2017] ZALAC 45).

The chapter also discusses legislation related to TES practices and the reasons which led to the change in the LRA.

Chapter 3

A critical analysis of case law related to the TES is discussed to uncover the issues raised: by the dual employment relationship caused by the LRA amendments, the deeming provision, as well as joint and several liabilities. This chapter addresses the problem question raised in chapter one with reference to case law.

Chapter 4

Chapter four scrutinises the possible gap which may be caused by the 2014 LRA amendments to section 198 and any ambiguity which might occur when legislation is interpreted. This chapter provides recommendations or solutions to be considered in changing the legislation.

Chapter 5

Chapter five provides the researcher's opinion on the TES/labour broker employment relationship and highlights the gap caused in the legislation as a result of the 2014 Labour Relations Amendment Act.

Chapter 6

Chapter six delivers a summary of the discussions raised in the dissertation.

1.6 Conclusion

The above chapter provided an overview of this dissertation, a definition of the TES and the triangular affiliation which exists between the TES, clients and employees. The chapter touched on the rationale and purpose of the dissertation, and also outlined the structure, problem question and the research methodology used in this dissertation.

CHAPTER TWO
HISTORICAL OVERVIEW OF TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA

2.1 Introduction

Chapter two covers a brief summary of the TES history in South Africa, it critically analyses the TES history and practices in South Africa prior to the January 2015 LRA amendments, and the reasons which led to this change of the LRA. This change is inspired by the labour rights entrenched in the Constitution and to align the LRA with the requirements of the Constitution. Below is an analysis of the Constitution.

2.2 The Constitution of South Africa Act 106 of 1996

The Constitution of South Africa[18] states that the "Constitution is the supreme law of the Republic and all other law or conduct must be interpreted and applied in a manner which conforms to the Constitution". Law which is inconsistent with the Constitution must be struck out or developed to give effect to the Constitution.

The Constitution encourages a more inclusive and non-discriminatory approach to interpretation. The Constitution[19] provides that every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing either the common or customary law. The Constitution is therefore the starting point in interpreting all legislation.[20]

Section 23[21] of the Constitution guarantees basic rights for labour by stating that everyone has a right to fair labour practices, thus including TES employees. According to this right every employee has the right to form and join trade unions, to participate in the lawful activities and programmes of a trade union; and to strike. Whereas with TES employee's, the freedom of employment seems to be restricted by tripartite arrangements between TES and employer. Section 23 brought about significant changes. Prior to 1994 there was exploitation of labour and limited rights for labour.

[18]The Constitution of the Republic of South Africa Act 108 of 1996(1996 Constitution) Section 2.
[19]1996 Constitution Section 39(*SATAWU Obo Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2)
[20]2016 Candidate Commissioner Training Notes, 45.
[21]1996 Constitution Section 23.

Section 23 of the Constitution recognises trade unions, the organisational rights of trade unions and conferred rights to strike. The purpose of this section was to combat the abuse of labour and provide labour rights as protected in the Bill of Rights.

Section 233 provides that when interpreting all legislation, each tribunal ought to choose rational interpretation of legislation which is consistent with international law.[22] Therefore, the interpretation of section 198A of LRA must be rational in line with the Constitution and be consistent with the international law. Below is a discussion of TES under international law.

2.3 TES under international law

South Africa as a member of the International Labour Organisation (ILO) has a duty to ensure that its domestic legislation complies with ILO labour standards. The ILO established the Decent Work Agenda that requires member states to warrant that all workers are afforded basic labour rights.[23]

> "The ILO presents the minimum standards for employees of labour brokers in the Private Employment Agencies Convention 181 of 1997 and the Private Employment Agencies Recommendation 188 of 1997 which establish the minimum level of protection for temporary employees who are involved in a triangular employment relationship.[24]"

In *National Education Health and Allied Workers Union v University of Cape Town and others,*[25] it was held that one of the essential parts of the LRA and section 23 of the Constitution is to protect workers 'employment wellbeing and their right against unfair dismissal, and this includes vulnerable workers.[26]

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[22]1996 Constitution Section 233.

[23]P Benjamin Labour Market Regulation: International and South African Perspectives' 2005.

[24]The Older instruments that regulated labour brokers include the Unemployment Convention No. 2 of 1919, the Unemployment Recommendation No. 1 of 1919, the Fee-Charging Employment Agencies Convention No. 34 (1933) and the Fee-Charging Employment Agencies Convention No. 96 of 1949;Private Employment Agencies Convention No. 181 of 1997 (referred to as the Private Employment Agencies Convention) and the Private Employment Agencies Recommendation No. 188 of 1997 (referred to as the Private Employment Agencies Recommendation)."

[25]*National Education Health and Allied Workers Union v University of Cape Town and Others* (3) SA 1 (CC); (2003) 24 ILJ95 (CC) 42.

[26]'President Zuma in opening address to the 12th African Regional Meeting of the ILO in October 2011 entitled Empowering Africa's People with Decent Work http://www.ilo.org/global/meetings-and-events/regional-meetings/africa/arm-12/WCMS_165077/lang--it/index.htm. As early as 2007 the ANC committed in the Polokwane Declaration to 'making the creation of decent work opportunities the primary focus of economic policies.'

2.4 The historical overview of TES in South Africa

In the 1950's TES were used in South Africa, but was not regulated by the LRA.[27] The LRA Act 28 of 1956[28] had no definition for the TES.[29] The TES definition was recognised in the 1983 Labour Relations Amendment Act.[30] This definition remained in section 198 of the 1995 LRA.[31] However, the reference to 'labour broker' was replaced with TES.[32]

The 1956 LRA did not refer to labour brokers.[33] In accordance with the1956 LRA, the TES supplied clients with a workforce to execute work for the client, at a cost payable to the TES, which in turn remunerated such workers.

In 1956, the LRA was not clear who the employees should cite in dispute proceedings; hence the triangular relationship was not regulated.[34] Provisions for minimum employment benefits of these vulnerable workers were thus not adequately regulated.

There were no provisions for the legal responsibility of the TES or client in regards to disputes arising from unfair dismissals and unfair labour practices. Temporary employees were abused, either by the TES or the client, due to their lack of protection by the 1956 LRA.[35] Thus it was viewed necessary to establish legislation to regulate TES in South Africa.[36]

[27]Labour Relations Act 28 of 1956.
[28]Labour Relations Act 28 of 1956.
[29]A Botes 'Answers to the questions? Critical Analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to Labour Brokers' South African Law Journal. Vol 26.(2014)
[30]Labour Relations Amendment Act 2 of 1983.
[31]Labour Relations Act 66 of 1995.
[32]A Botes 'Answers to the questions? Critical Analysis of the Amendments to the Labour Relations Act 66 of 1995 with Regard to Labour Brokers' (2014) South African Law Journal. Vol 26.
[33]Labour Relations Act 28 of 1956 (1956 LRA).
[34]BPS. Van Niekerk *et al. Law @ Work* 69.
[35]SW Mills (2004) *ILJ* 1216.'A case study was once carried out in the hotel industry, particularly Southern Suns, to illustrate the abuses and exploitation that the workers in the cleaning industry faced. It was reported that the status of these workers was indeterminate in that they were considered to be independent contractors when in actual fact they were temporary employees. Moreover, if a worker did not get through a specific number of rooms per day, that employee was compelled to work overtime, with no pay to meet a minimum salary. If the employees had grievances regarding either wages or conditions of employment, they were often referred from one authority figure to the other in their own time. As a result, these employees seldom managed to have their grievances resolved.'
[36]Section 39(1)(b), (c), s 232, s 233 of the Constitution of the Republic of South Africa Act 108 of 1996.

Section 23 of the Constitution provides every person the right to fair labour practices.[37] The legislature pronounced that the LRA was to be developed to give effect to section 23 in order to look after the workers' rights, thus including these vulnerable workers.[38] South Africa also has a responsibility to comply with ILO labour standards.[39] Therefore, section 198 of the LRA 1995 attempted to legalise TES standards[40] and pronounced a triangular work relationship amongst the TES, client and worker.[41]

2.4.1 History of LRA, 1983

The TES definition was established in the 1983 LRA amendment that branded TES as an employer in a triangular employment relationship.[42] Section 1(3)(b)[43] promulgated the trade of employers and guided conflicts to be dealt with by the Labour Court.

Section 1(3)(b) and (c)[44] were omitted from the 1995 LRA. This omission resulted in uncertainty as to who the employer of TES workers was when a dispute arose and which party should be cited when instituting legal proceedings.[45]

Section 1(3)(a)[46] identified the TES as the employer of TES employees. This proviso, with a diverse construction, was passed through to section 198(2) of the 1995 LRA.[47]

[37]1996 Constitution Section 23.
[38]BPS. Van Niekerk *et al. Law @ Work* 42. 'The right safeguards one from unfair labour practices relating to work security and employment opportunities as codified in the LRA; it guarantees one minimum standards set out in the *Basic Conditions of Employment Act* and lastly, the right is related to the adjudication of disputes of right and not disputes of interests. In *South African Defence Force and another v Minister of Defence and Others* (2003) 24 ILJ 1495 (T) (SANDU 1) para 48, it was held that the right to fair labour practices is an overarching right that encompasses other labour relations rights including collective bargaining rights and trade union rights.
[39]Department of International Relations and Cooperation Republic of South Africa 2004 http://www.dfa.gov.za; ILO 2016 http://www.ilo.org; '*Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment.'*
Amendment Bill 2010, "Employment Equity Amendment Bill 2010 and Employment Services Bill 2010,"
"A Report prepared for the Department of Labour and the Presidency 13; Van Niekerk et al *Law @ Work* 21. It should be noted that it was only in 1994 that South Africa re-joined the ILO. This explains why its compliance with the ILO labour standards was not mentioned before the promulgation of the *LRA* of 1995. See para 2.5.1."
[40]Benjamin 2010 *ILJ* 851.
[41]Labour Relations Act 66 of 1983Section 198.
[42]Labour Relations Act 2 of 1983.
[43]Labour Relations Act 66 of 1983Section 1(3).
[44]Labour Relations Act 28 of 1995Section 1(3).
[45]A Botes 'Answers to the Questions? A Critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with Regard to TESs' (2014) 26 *SA MERC IJ* 110.
[46]Labour Relations Act 2 of1983.
[47]J Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (2005) 26 *ILJ* 618 -623.

2.4.2 The regulation of labour brokers under the LRA, 1995

The intention of the LRA in 1995 was to move forward labour peace, economic improvement, social justice, and democratisation of the place of work by satisfying the basic aim of the Act, to achieve the basic rights entrenched in the Constitution to advance effective labour dispute resolutions.[48] The 1995 LRA introduced the phrase 'Temporary Employment Services' to replace labour brokers.

Earlier to 1995, the terms of a contract of employment permitted unlawful grounds for dismissal of employees. With effect from 1995, a worker could only be dismissed for misconduct, operational requirements and incapacity due to ill-health or poor performance.[49]

The Commission, Conciliation, Mediation and Arbitration (CCMA) was introduced in 1995. The CCMA's duty is to resolve differences between labour forums. If conciliation is not successful, the dispute is referred to arbitration. The whole process is at no cost, and is accessible to low income earners, including vulnerable workers employed by any TES.[50]

The LRA of 1995 created an improvement in that TES were recognised as the employers of TES workers.[51] It is debated that this understanding is a legal innovation in which the TES worker executes labour at the client's place of work, and at the client's commands. The worker is offered tools of the trade to work with by the client, and the worker becomes part of the latter's workplace personnel. Theron argues that "since the identities of both employer and employee are clear, perhaps a triangular employment relationship should not exist at all.[52] It is argued that it is anomalous that the TES is regarded as the employer, yet the client is the dominant party in the triangular employment relationship.[53]"

[48]T Cohen. The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships15 (2012)Potchefstroom Electronic Law Journal No. 2 (PELJ)

[49]T Potgieter, The History of Labour Law in South Africa 2014.
[50]T Potgieter, The History of Labour Law in South Africa 2014.
[51]BPS Van Eck 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010), *Potchefstroom Electronic Law Journal* 13(2), 107–204.
[52]J Theron'*The Shift to Services and Triangular Employment: Implications for Labour Market Reform*' (2005) 26 *ILJ* 618 -623
[53]J Theron'*The shift to services and triangular employment: Implications for labour market reform*.' (2005) 26 *ILJ* 618 -623

Section 198[54] provides joint and several liabilities for the TES and client concerning dispute claims relative to work conditions. Notwithstanding efforts by legislature to legalise the TES through section 198, it fell short of adequate security for vulnerable workers.

In regards to the complication of the construction of the employment relationship pertinent to TES in the 1995 LRA, the South African labour legislation was relatively tenuous and on the whole deficient in regulating TES. Section 198[55] simply did not address all the basics and potential hindrances in the triangular employment relationship; it only provided umbrella provisions.[56]

Around the year 2000, trade unions, together with COSATU, called for a ban of TES practices as it was viewed as slavery. This is because of the abusive and unfair labour practices against vulnerable workers,[57] since the use of TES placed employees in an unprotected and exploitative position.[58] Ultimately, the legislative position in the 1995 LRA failed to adequately protect such employees.

In 2009, just before the national elections, the argument entered the public domain. The ANC's manifesto stated that in efforts to avoid the exploitation of workers and ensure decent work for all workers, as well as protect the employment relationship, it would introduce laws to regulate contract work, sub-contracting and outsourcing, and thus address the problem of labour broking and prohibit certain abusive labour practices.[59]

The amendments drafted by the Minister of Labour, Nelisiwe Mildred Oliphant, emphasised that TES would be banned and all temporary employment would become full-time employment unless an employer justified the need for temporary employment.

[54]1983 LRA.

[55]1995LRA.
[56]A Botes 'Answers to the Questions? A Critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to TESs' (2014) 26 *SA MERC IJ* 110.
[57]*Industrial Law Journal*(October 2014) 35.
[58]A Botes, "Answers to the Questions? A Critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to TESs' (2014) 26 *SA MERC IJ* 110.'
[59]Memorandum of Objectives on Labour Relations Amendment Bill (2012).

It was, however, envisaged that the use of TES would still be beneficial to the country's labour market since they provide relief for the unemployment crisis and allow for some flexibility in the labour market that benefits the country in alleviating poverty.[60]

The recent 1995 Labour Relations Amendment Act was introduced to start operating on 1 January 2015, and placed significant limitations on the use of atypical employees, a category to which TES employees belong.

The purpose of the amendments is to counter certain exploitative practices by employers, like employing workers on short term contracts while the job is not actually temporary. Employers can no longer check if the employee is suitable, and if not, simply appoint someone else at the end of the contract. Employers prefer using TES employees because the cost of employment is lower than employing permanent staff. This is because TES employees are not given benefits such as medical aid, a pension or bonuses.[61] The case below reflects the historical practices of TES and the unjust dispute resolution of the past amendments of the LRA in 2014.

2.4.2.1 Case law

The Labour Appeal Court confirmed the TES as the employer in the case of *Mandla v LAD Brokers (Pty) Ltd.* The LAC explains the exploitation of TES employees, and holds that the contract connecting employee and a TES generates a "unique and *sui generis"* triangular affiliation in which the employee provides personal service to their employer's client.[62]

This employment relationship can be described as a triangular arrangement and likened to modern day slavery. South African unions are strongly against such practices, which are also rejected internationally. Respected legal practitioner, Professor Paul Benjamin, notes that triangular employment has become the primary vehicle for labour law avoidance.[63] In accordance with section 198,[64] if a worker wishes

[60]A Botes 'Answers to the Questions? A Critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to TESs' (2014) 26 *SA MERC IJ* 110'
[61]O Kahn-Freund 'Labour and the law (3rded) 1983) 18, in B Hepple (ed.) *The Making of Labour Law in Europe*(1986); R Dukes Constitutionalising employment relations: Sinzherimer, Khan-Freund, and the Role of Labour Law (2008) 35 *Journal of Law and Society* 341; A Davis *Perspectives on Labour Law* (2004).
[62]*Mandla v LAD Brokers (Pty) Ltd* [2000] 9 BLLR 1047 (LC).
[63]*Post-Graduate Diploma Industrial Relations Module 2: Supplementary Notes*(2016) 9.
[64]Labour Relations Act 2 of 1983.

to refer an unfair dismissal dispute, he or she must refer the dispute against the TES and not the client, even where the actions of the client have led to a dismissal.

Labour Law is intended as a powerful authority to work against the disparity of bargaining power integral in employment affiliations. Section198 of the LRA undermines this ambition by legitimising the commoditisation of labour through TES. The statutory ring-fencing of labour broking arrangements contributes to an externalised labour market and the humiliation of contract workers as mere units of labour in terms of which employees are employed under a commercial contract, on an indefinite basis with inferior remuneration, benefits, terms and conditions and no security of employment.[65]

The recent LRA amendments in section 198A(5) afford further security to vulnerable TES employees by stating that a worker who is "deemed to be an employee of the client must be treated, on the whole, no less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for differential treatment."[66] Inferior working conditions and inadequate remuneration which have, in many cases, been imposed on labour broking workers are not permitted anymore in the absence of appropriate good reason for this differential treatment.

Prior to the LRA amendments to section 198, the client was able to bypass the statutory and contractual commitments which are binding in a standard employment relationship.[67]

In *Dyokhwe v De Kock,* the LC held that section 198 and contracts which enforce labour broking arrangements must be strictly interpreted in order to safeguard security of employment for the genus of vulnerable workers. It was held that courts and arbitrators should be cautious of labour broking appointments as presumptively legitimate once a signed employment agreement is presented by the employer; but

[65]T Cohen &L Moodley Achieving Decent work in South Africa 15 (2012)Potchefstroom Electronic Law Journal No. 2 (PELJ)
[66]*Post-Graduate Diploma Industrial Relations Module 2: Supplementary Notes*(2016) 11.
[67]*Post-Graduate Diploma Industrial Relations Module 2: Supplementary Notes* (2016) 9.

should instead adopt a purposive interpretation in establishing the true identity of the employer.[68]

In *State Information Technology Agency (SITA) Pty Ltd v CCMA & Others,*[69] the LAC lays down three main criteria to determine who the employer is in the TES tripartite affiliation:

- "An employer's right to supervision and control;
- Whether the employee forms an integral part of an organisation with an employer; and
- The extent to which the employee is economically dependent upon the employer."

A Court has to consider the above to determine the disguised hidden employer relationship, to establish the true employer, in order to protect vulnerable employees from abuse by unfair labour practices.

2.4.3 Literature review

South Africa explored the Namibian system to assess the development of their policy on TES, as labour broking was a major type of employment in Namibia.[70] "In Namibia labour broking was characterised by unfair labour practices. When Namibia joined the International Labour Organisation (ILO), it came under scrutiny and was forced to introduce legislation to ensure fair labour practices."[71]

In the Namibian government labour broking was banned in pursuit of combating the abuse of vulnerable workers. Section 128[72] of the Namibian Labour Act did not recognise labour appointments by a third party.

[68] *Post-Graduate Diploma Industrial Relations Module 2: Supplementary Notes* (2016) 10
[69] *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 607 (LAC) per Davis JA, Tlaletsi and Leeuw JJA concurring, at para 12.
[70] A Botes) 2013; Van Eck (2010).
[71] A Botes (2013).
[72] Namibian Labour Act 2007 Section 128.

In *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others*, this employment agency disputed the decision in the Namibian Supreme Court of Appeal, stating that it was unconstitutional to dispossess a business of its economic activity, and its right to carry out business.

> "The court held that section 128 of the Labour Act was unconstitutional. Namibia's Labour Commissioner regulated labour contract workers to be paid rates equivalent to the full-time workers" who were on the same or a similar level.[73]

Due to the growth in temporary workers it has been complex for unions to arrange membership amongst vulnerable workers. This difficulty prompted unions to call for the abolition of TES employment.[74]

The change to section 198 of the LRA was robustly opposed by Business Unit South Africa (BUSA), but government approved the Bill.

The government's underlying principle for amending section 198 of the LRA[75] is intended to circumvent maltreatment of employees earning below the threshold as defined in BCEA, who were subjected to inhumane working conditions.[76]

2.5 Conclusion

This chapter indicates that there has been much deliberation on the inadequate regulation of TES worldwide and attempts to regulate the TES have been an on-going. The Namibian labour law experience of the regulation of the TES and the judgement on *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others*[77] has played a fundamental part in the improvement of South African labour relations amendments, with the decision not to ban TES completely. The recent Labour Relations Amendment Act aims to adequately address the nuisance and

[73]BPS Van Eck 'Temporary employment services (labour brokers) in South Africa and Namibia' (2010) *Potchefstroom Electronic Law Journal* 13(2), 107–204.
[74]M Finnemore & YJoubert (2013) Introduction to Labour Relations in South Africa. 11th ed. LexisNexis, Durban.
[75]LRA 1995.
[76]S Harvey Labour Brokers and Workers' Rights: Can they Co-exist in South Africa? (2011) *South African Law Journal* 128(1), 100–122.
[77] Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others(SA51/2008)

abusive practices linked to TES. Section 198A seeks to regulate such arrangements in a manner that the abuse of labour is no longer possible. This chapter has also covered the developmental history of the LRA in South Africa.

CHAPTER THREE
AN ANALYSIS OF THE DEEMING PROVISION

3.1 Introduction

This chapter shall cover the meaning and consequences of the 'deeming' provision as set out in section 198A(3)(b) of the LRA and whether these amendments effectively protect vulnerable TES employees.

This chapter attempts to address two important research questions and is therefore separated into two parts. The first part of the chapter addresses the meaning and consequences of the deeming provision as amended in the LRA[78] in January 2015. The second part addresses the adequacy of the joint and several liabilities for both the TES and the client.

3.2 Part 1: The meaning and consequences of the deeming provision

Part 1 of this chapter focuses on two aspects, that is:-

a) The meaning and consequences of the deeming provision and

b) Whether the LRA[79] amendments provide adequate protection.

3.2.1 The deeming provision

"Section 198A(3)(b)(i) provides that an employee performing temporary service for a client is deemed to be the employee of that client and the client is deemed to be the employer."[80]

3.2.2 Dictionary meaning of the word 'deemed'

The Oxford Dictionary[81] describes synonyms for the word 'deem 'as being: regard as, consider, judge, adjudge, and hold to be. The Oxford Learner's Dictionary[82] describes the word 'deem 'to mean: to have a particular opinion about something; the synonym is consider.

[78]Labour Relations Act 66 of 1995 Section 198A.
[79]Labour Relations Act 6 of 2014 as amended.
[80]Labour Relations Act 66 of 1995.
[81]https://en.oxforddictionaries.com/thesaurus/deem.
[82]https://www.oxfordlearnersdictionaries.com/definition/english/deem.

3.2.3 The Constitutional Court's interpretation of the term 'deem'

Interpretation of the word 'deem 'and its impact on the LRA section 198A(3)(b)[83] led to an understanding that the word 'deemed' means 'actually are'. The *Assign Services v NUMS A* case[84] which deals specifically with the issue at hand is explained in more detail below.

The "National Union of Metalworkers of South Africa (NUMSA)[85] argued on the basis of the Country Council of Norfolk[86] and the Oxford dictionary definition that 'deemed' may possibly be substituted with 'it.' Assign Services relied on Rosenthal[87] and Haffejee[88] to sustain the dispute that the phrase has no meaning outside of its context."

A debate concerning an interpretation of the deeming clause centres on the aspiration of legislature. The LRA intention is for a worker to be employed by a client after three months of temporary service.

In *Chirwa v Transnet*, the Constitutional Court held that where there is ambiguity, the court must prefer a probable interpretation which promotes the most important objectives of the LRA.[89]

In order to grasp the goal of legislature and correctly interpret the effect and application of the deeming phrase in regards of section 198A(3)(b)(i) of the LRA as amended, consideration was given to the explanatory memorandum for the 2014 LRA amendments.[90] In terms of the memorandum, section 198 was amended to address some problems connected with the TES. Temporary employees performing temporary work are deemed to be workers of the client beyond three months (sole employer interpretation).[91]

[83]Labour Relations Act 6 of 2014 as amended in January 2015.
[84]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22.
[85]*Assign Services (Pty) Limited v National Union of Metal workers of South Africa and Others*[2018]ZACC 22.
[86]*R v Country Norfolk* (1891) 65 LT 222.
[87]*S v Rosenthal* 1980 (1) SA 65 (A).
[88]*S v Haffejee* 1945 AD 345.
[89]*Chirwa v Transnet* 2008 (4) SA 367 CC.
[90]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*[2018] ZACC 22
[91]Memorandum of Objects, Labour Relations Amendment Bill (2012).

3.2.4 The consequences of the deeming provision

The amendments in the LRA of 1995 caused uncertainty as to whether there must be a sole or dual employment relationship amongst the TES, its client and the placed worker. Confusion resulted in different interpretations of the LRA amendments between trade unions and the TES.

"Section 198A may be interpreted in two different ways: firstly in terms of section 198(3)(b), the employee turns out to be an employee of the client and stops being an employee of the TES; secondly, the worker remains an employee of the TES but is also deemed to be an employee of the client.[92] The predicament in interpreting the provision arises from the explanation found in the memorandum of objectives[93] and an appropriate application of the principles of interpretation of the statutes led to different results."[94]

The deeming provision has the following consequences for the sole-employer interpretation; the employee stops being a worker of the TES for the purposes of the LRA only; a client becomes the employer without consent and benefits accrued are not transferred.

Transferred workers have no contract with the client, hence the automatic taking over of employees by operation of law at the end of three months' service. "The employees are deemed to be employed by the client on an indefinite basis in terms of section 198A(3)(b)(ii)[95] and cannot be treated less favourably than an employee performing the same or similar work under section 198A(5)."[96]

These provisions are of less assurance to workers transferred to a client where there is no comparable job or similar work to determine equal treatment.

An observable effect of the sole employer option is that workers may be left defenceless should a client be liquidated. If it occurs that the employer is being

[92]C Tshoose& B Tsweledi A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment. Law Democracy and Development (2014).18.
[93]Memorandum of Objects, Labour Relations Amendment Bill, 2012.
[94]*Board of Executors Ltd v McCafferty* (1997) 7 BLLR 835 (LAC).
[95]Labour Relations Act 6 of 2014 as amended.
[96]Labour Relations Act 6 of 2014 as amended.

liquidated, the vulnerable workers will not get protection from the TES for the consequences of a loss of employment.

3.2.5 Legislation which led to the misinterpretation of the deeming provision

The LRA amendments define a temporary service to be a service not beyond three months. Section 198A(3)(b) of the LRA pronounces that a temporary worker not engaged in genuine temporary service is deemed a worker of the client, and the client is their employer.

Section 198A(3)(b) changes this affiliation by operation of law after three months of service, and not by transfer to a new employment relationship. The goal of the LRA is to intensify or broaden the pre-existing protection granted to TES workers. The deeming provision is formed as an expansion instead of a replacement of active statutory defence of TES employees against clients.

The legislature made no transitional provisions intended to reassign employees from the TES to the client in section 198A. Employees are compelled without negotiations to be full time employees of the client, and this arrangement conflicts with section 22 of the Constitution that provides the right to freely choose a profession and occupation.

“The dual employment interpretation is aligned to the provisions of the LRA and the Basic Conditions of Employment Act (BCEA).Section 1 of the BCEA describes a worker and a TES in the same language as the LRA. Section 82(1) of the BCEA matches section 198(2) of the LRA.”[97]

The dual interpretation gives rise to the joint and several liabilities of the TES and the employer for LRA disputes. This interpretation raises concerns in matters of dismissal as to who is liable to reinstate the employee or compensate them in accordance with section 193 of the LRA.

[97]Basic Conditions of Employment Act 75 of 1997.

3.2.6 Case law that dealt with the deeming provision in section 198A(3)

In the *Assign Services (Pty) Ltd* case, a TES placed 22 employees with Krost Shelving; some of them were NUMSA members. Temporary employees at Krost Shelving, worked beyond the term of three months. Assign Services' view was that section 198A(3)(b) generated a dual employer relationship involving itself (the TES) and the client, while NUMSA asserted that this section generated a sole employer who was the client. The dispute was lodged with the CCMA for arbitration.[98]

In 2015, the CCMA upheld NUMSA's sole employer interpretation and issued a verdict that the client was the sole employer. The Commissioner articulated further that this was the very objective of the LRA amendments; and that reaching this conclusion was the only way to afford proper protection to TES workers.

The Labour Court rejected the CCMA award that the deeming phrase generated a sole employer construction in respect of the TES and the client. The Labour Court's decision favoured the dual employer option which was subsequently overturned by the LAC where the court ruled in favour of the sole employer construction a role which offers the best security of the rights to the workers placed with a client. The Constitutional Court upheld the Labour Appeal Court decision that the client is the sole employer. In order for the deeming provision to apply:

1. "The temporary service by the TES employee must exceed a period of three months 'working for the same client;
2. The TES employee is not a substitute for an employee of the client who is temporarily absent;
3. The employee's position must not be in a category of work which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectorial determination or a notice published by the Minister; and
4. The deeming provision is only applicable to employees earning below the threshold of R205 433 per annum."[99]

[98] *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others* (2018) ZACC 22
[99] Basic Conditions of Employment Act 75 of 1997 Section 6(3).

The Constitutional Court held that section 198Ahas to be contextualised within the framework of section 23 of the Constitution and the intention of the entire LRA.

The Constitutional Court recognised Krost Shelving and Packaging (Pty) Ltd as an employer for workers placed by a TES after the deeming provision was triggered by section 198A(3)(b).

The minority judgment favoured a dual employer approach that TES continue to be employers after three months.[100] The dissenting judgement of Cachaliain was that the Constitutional Court was unable to agree with the explanation of section 198A(3)(b) of the LRA, that the client substitutes the TES as an employer. It was argued that both TES and client should carry on jointly as employers of such employees and those sections 198 and 198A regulate the TES.

Assign placed much emphasis on section 198(2), and as such argued that the deeming phrase could only account for a dual relationship so as not to be in breach of the above. Section 198(2) gives rise to a statutory employment contract that is altered when section 198A(3)(b) is activated. This suggests that the contractual arrangements of the TES and the placed employee continue and the TES remains obliged to pay the placed employee. The TES remains in the picture, and is not excluded in the triangular employment relationship. This creates a dual employer relationship for the objective of the Act.

3.2.7 Critical analysis

The drafters of the LRA legislation could simply have excluded the word ‘deemed’ from section 198A; this would have made the interpretation of the section absolutely clear and could have resulted in an unambiguous statement.

A sole employer approach after the first three months of placement with a client means that a TES is effectively excluded as an employer under any other employment law. However, the TES still incurs liability under the LRA. It is submitted that the sole employer approach is not correct as there would then be no need to include a joint

[100] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22.

and several liabilities clause. If the employee is transferred to the client under the sole employer approach, then joint and several liabilities will cease to exist. The dual employer interpretation sees the employee remain employed by the TES, which allows the employee to pursue disputes about working conditions, pay or dismissals against the client.

The word 'deemed' creates problems in the interpretation of section 198A(3)(b).The fact that a client is deemed the employer of a placed worker for the objectives of the LRA only is problematic in that it excludes other employment law in the context of the triangular employment affiliation between TES workers, the TES and clients. This means a client does not turn out to be the employer for the objective of the Basic Conditions of Employment (BCEA),[101] the Compensation for Occupational Injuries and Diseases Act (COIDA),[102] the Employment Equity Act[103] and the Skills Development Act.[104] When the client is the employer for the objectives of the LRA only, who is responsible for the payment of severance pay in terms of section 41 of the BCEA? The legislature has to incorporate a 'catch all' phrase to accommodate the inclusiveness of all employment legislation in section 198A to correct the judgement in *Assign Services v NUMSA* that the deeming provision relates only to the LRA.

3.2.8 Summary: The meaning and consequences of the deeming provision

This part of the chapter clarifies the meaning and consequences of the word 'deemed'. It covers a crucial analysis of the TES LRA amendments and case law related to the deeming provision, as pronounced in the LRA section 198A(3)(b).

The word 'deemed 'is ruled to mean 'is' by the Constitutional Court in the *NUMSA case*,[105] but there is still confusion concerning the deeming provision in that a tripartite employment arrangement continues amongst the client and the TES while the commercial contract continues and the TES continues to pay employees' salaries. The ruling thus only affects the LRA and does not apply fully to other employment legislation, which is problematic.

[101]Basic Conditions of Employment Act 75 of 1997.
[102]Compensation for Occupational Injuries and Diseases Act.130 of 1993.
[103]Employment Equity Act, No. 55 of 1998.
[104]Skills Development Act, No. 97 of 1998.
[105]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*[2018] ZACC 22.

The consequences of the interpretation of the deeming provision give rise to two different views: one of a sole employer and another of dual employers. The deeming provision is ambiguous and needs to be amended to provide a clear and unambiguous meaning.

3.3 Do the amendments in section 198 of the LRA adequately protect vulnerable TES employees?

3.3.1 Introduction

Part two of this chapter addresses the question of whether the LRA amendments adequately protect vulnerable TES employees.

The LRA sets out to adequately tackle some problems and abusive practices linked to the TES. Section 198A seeks to regulate arrangements in such a manner that the exploitation of labour is no longer possible and employers are made accountable to their employees.[106]

The main goal of the LRA changes is to confine the services of vulnerable workers to circumstances of legitimate temporary work.

3.3.2 The objective of labour law in protecting workers

The intention of labour legislation is generally a foundation for securing justice for employees in the workplace. The perception is that there is inequality in the working relationship. The employer has dominant power over workers, and workers are deprived of the capacity to negotiate a fair deal for their services. Labour legislation is viewed as remedial to this inequality. “Kahn-Freund disputes that the main purpose of labour legislation will be to act as a countervailing force to neutralise the inequality in bargaining power which is inherent in the workplace.”[107]

[106] *Post-Graduate Diploma Industrial Relations Module 2: Supplementary Notes*,(2016) 10.
[107] Kahn-Freund O *Labour and the law* (3rd ed, London, Stevens & Sons Ltd, 1983) 18; “For further reading in this regard see Hepple B (ed.) *The making of labour law in Europe* (London: Mansell Publishing 1986); Dukes R Constitutionalising employment relations: Sinzheimer, Kahn-Freund, and the role of labour law” (2008) 35 *Journal of Law and Society* 341; Davies A “*Perspectives on labour law* (Cambridge: Cambridge University Press 2004).”

Once a worker becomes permanent, he/she has to be on an equal footing with the rest of the workers of the client who are on the same level.[108]

When workers employed on the same or similar level are not paid equally, the LRA amendment requires an explanation or a good reason for the differentiation. Inequality in the workplace is prohibited and will not be permitted without good reason.

A TES may not operate a business without the required legal registration[109] and Section 198 (4C) offers further protection that prohibits exploitation for TES workers.[110] Section 198(4B) provides that a TES shall supply a worker whose services are provided to a client with a written contract when the employee commences employment, which must be equivalent to those applicable in the sector where the client is located. Previously, TES employees were not given written contracts of employment. A contract provides certainty of employment and employees can use it when disputes arise, but without a contract they were exposed to exploitation, such as dismissal without a valid reason.[111]

In providing further protection, section 198(4) creates joint and several liabilities in the triangular employment affiliation. If the client of the TES is jointly and severally liable, a worker can institute action proceedings against either the TES or the client, or both.

In respect of section 198(4F), a TES has to be registered in accordance with the relevant legislation and cannot operate without such registration; this registration is required to limit the abuse of vulnerable employees so that the legislature may place controls in law with which the TES must comply, such as the Employment Services Act 2014.[112] The Employment Services Act 2014 (ESA) establishes a framework for regulating private employment agencies, including a TES, in terms of which it will be a criminal offence to operate without such registration.[113]

[108]LRA 2014 Section 198A.
[109]Employment Services Act 4 of 2014.
[110]Post-Graduate Diploma Industrial Relations Module 2: Supplementary Notes, (2016)11.
[111] J Geldenhuys The Effect of Changing Public Policy on the Automatic Termination of Fixed-Term Employment Contracts in South Africa [2017] PER 45
[112]Employment Services Act 2014.
[113]Post-Graduate Diploma Industrial Relations Module 2: Supplementary Notes (2016)11.

Section 21(12) of the LRA pronounces that a trade union can effect organisational rights in regards to the TES workers at the workplace of the TES or their client. These workers will no longer be unorganised and unrepresented, and are therefore no longer vulnerable. In this area, the LRA has provided effective protection to such vulnerable employees.

3.3.3 Relevant case law

Below is an analysis of the relevant case law to determine whether the LRA amendments adequately protect vulnerable TES employees.

The concept of temporary service and the new statutory protection of vulnerable employees replicate the judicial distaste articulated in a number of judgements. For example, employers can dispense with vulnerable employees without being accountable for an unfair labour practice or unfair dismissal.

In the following cases that presented before the Labour Court, one of the issues was automatic termination clauses commonly incorporated into contracts generally used by the TES.

In Kelly Industrial Ltd v Commission for Conciliation, Mediation and Arbitration and Others, *a* case for automatic termination of employment, the court held that the employees were unfairly dismissed. This shows the abuse of vulnerable employees by employers, which the LRA amendments are intended to address.[114]

In *SATAWU Obo Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd,* another case which dealt with the automatic termination of employment when the client ended its contract with the TES; the court held that the phrase was invalid, in accordance with section 5 of the 1995 LRA, because employees were prohibited from waiving their defence against unfair dismissal afforded by the LRA. Section 198A(3) is intended to combat such unfair situations. “The court held that a contractual provision which provides for automatic termination at the behest of a third party

[114] *Kelly Industrial Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 6 BLLR 606 (LC) (at 1877).

undermines the employees' right to fair labour practices and is contrary to public policy and unenforceable."[115]

In Mahlamu v CCMA and Others, the court noted that such phrases are forbidden and invalid in accordance with the LRA amendments. The amendments to the LRA have certainly discouraged the abuse of temporary workers. Therefore, the TES cannot simply allow their workers' employment contracts to end when the client ends a contract with the TES. Section 198A has extended significant protection to protect the TES employees.[116]

3.3.4 Critical analysis of adequate protection of vulnerable employees

The exploitation of non-standard or atypical employment arrangements is very real and prevalent. TES employees are often subjected to poor working environments as compared to permanent employees. There may be significant differences in wages and benefits where an employee is carrying out the same or similar work to a permanent employee. TES employees are denied access to benefits, like medical aid, a pension fund and even maternity benefits. There is also a lack of access to skills development opportunities.

There are a lot of insecurities associated with temporary work. The client may at any time decide to terminate employees' services for no reason what-so-ever. At the other end of the spectrum, unscrupulous employers make use of TES employees for indefinite periods without the payment of any benefits.

Therefore, the biggest injustice in relation to TES employees is that they may be dismissed without proper procedure. Prior to the LRA amendments, TES employees were not unionised and employers did not extend bargaining council agreements to these employees. Some TES contracts went as far as to exclude the right to strike and to join a trade union. The LRA amendments have made significant inroads to counteracting such practices which were aimed at exploiting TES employees.

[115] *SATAWU Obo Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* (JS 879 / 10) [2015].
[116] *Mahlamu v CCMA and others* (2011) 4 BLLR 381 (LC).

"In accordance with the LRA section 198A(1), temporary services are described as only one of three things, namely: services restricted to a fixed time period of not beyond three months; where a worker is standing-in for a temporarily absent full-time worker of another employer; where a particular work category is designated as a temporary service; or where the maximum employment period is determined by way of a collective agreement in a bargaining council or by sectorial determination."[117] This section[118] prohibits clients from making use of TES employees as they please.TES employees can only be used if they are fulfilling a genuine temporary service. The client shall be deemed the employer of the employee if the work executed is beyond three months.

In relation to *Assign Services*[119] the Labour Court posed as many questions as it answered. There are practical problems in having two employers recognised under the LRA. For example, where would the responsibility to ensure that dismissals are procedurally and substantively fair lie; is it with the TES or the client? Further, if the client is the employer for the objectives of the LRA only and not the Employment Equity Act, would it mean that a client is only potentially liable for unfair dismissal claims and not unfair discrimination?

The LRA amendments brought about a significant decrease in the labour force which they did not intend. Although their immediate effect may have been negative, the amendments are to be welcomed as they definitely make it far less attractive and more complicated for employers to use temporary workers where a job is not genuinely temporary. Employees who are engaged for reasons other than temporary services will be afforded the same rights and protections as full-time workers, and will be paid the same full benefits which the client offers its full-time employees.

3.3.5 Summary: Do amendments in section 198 of the LRA adequately protect vulnerable TES employees?

These amendments to the LRA intend to do away with the most important incentive to use TES employees on a permanent basis. It could be costly for a client to pay such

[117]Labour Relations Act 66 of 1995.
[118]Labour Relations Act 6 of 2014Section 198A.
[119]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*[2018] ZACC 22.

TES staff identical salaries to those of the permanent workers, and compensate the TES with its levies or fees. The client might choose to terminate the arrangement with the TES in respect of its employees and pay them directly, but is not obliged to do so. The client's preference in this regard has no impact on the rights of the employees under the LRA. However, if the TES remains in the relationship, it shall be jointly and severally liable for any default by its client.

Although there are many legal debates over the interpretation of the new amendments, the bottom line for employers is simply that if they have TES employees on their premises who are not in a temporary service and are earning less than the BCEA threshold for more than three months, they will be at risk of being categorised as employers in respect of rights and obligations under the LRA. The amendments have humanised the gross abuses which clients have had free reign over in the past and have improved on the rights of employees engaged via a TES.

3.4 Part 2: Is Section 198(4) of the LRA relating to joint and several liabilities effective?

3.4.1 Introduction

This chapter investigate whether the provisions of section 198(4)[120] on joint and several liabilities have adequately addressed their purpose after the amendments to the LRA. This part of the chapter shall further explore case law prior to and after the LRA amendments on the joint and several liabilities clause.

3.4.2 Defining joint and several liabilities

"Joint and several liabilities is a form of responsibility which is used in civil cases, where two or more persons are found legally responsible for damages.[121] Defendants in a civil suit can be held jointly and severally liable only if their co-existing conduct brings about harm to the plaintiff. The acts of the defendants do not have to be simultaneous; they should merely contribute to the identical event."[122]

[120]Labour Relations Act 66 of 1995Section 198(4).
[121]Jeffrey Lehman;Shirelle Phelps; West's*Encyclopedia of American Law*2nd ed. (2008).
[122]Jeffrey Lehman; Shirelle Phelps;*West's Encyclopaedia of American Law* 2nd ed.(2008).

3.4.3 The intention of legislature

The objective of the legislature in the 2014 amendments to the LRA[123] was to present further security for TES workers who earn below the threshold.[124] The focus is on TES employees placed with a client beyond three months.

The LRA Amendment of 2014 is seen as a corrective measure for the vulnerable employee's disparity.

The BCEA simulates the LRA's section 198, that both TES and client are liable for nonconformity with sectorial determination. The improvements by the 2014 LRA Amendments brought a required protection to vulnerable TES workers in South Africa.[125]

Section 198[126] of the LRA maintains the general provisions that the TES is the employer of temporary workers that it pays to work for a client. ATES and a client are jointly and severally liable for the purposes of the LRA.[127]

3.4.4 Restrictions imposed by the LRA 2014 amendments

The LRA amendments intend to clarify provisions linked to the TES by stating that:

- An employee could institute proceedings jointly and severally on either the TES or client, or both,[128]
- "A labour inspector acting in terms of the BCEA may secure and enforce compliance against the TES or the client, as if each or both were the employer;"[129]
- A TES cannot appoint workers on unlawful prohibited conditions of employment. A TES must be lawfully registered to operate a business.[130]
- On commencement of employment a TES should supply a worker with a written employment contract.

[123]Labour Relations Act 6 of 2014.
[124]Basic Conditions of Employment Act 75 of 1997 Section 6(3) (revised 2016).
[125]Basic Conditions of Employment Act 75 of 1997Section 82(3) (revised 2016).
[126]Labour Relations Act 66 of 1995 Section 198.
[127] Labour Relations Act 66 of 1995Section 198(2) and Section 198(4A).
[128]C Tshoose& B Tsweledi 'A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South Africa (2004) *Law Democracy & Development* 18.
[129]J Sheepers'The South African Labour Guide, Interpretation, Deeming provision, Labour Relations Act' (2015).
[130]Employment Services Act 4 of 2014.

Section 198A[131] provides further protection by pronouncing that TES employees are constrained to three month's placement. Such protection is restricted to temporary employees earning less than the BCEA threshold.[132]

3.4.5 Joint and several liability protections in cases of dismissals

The LAC[133] found that section 198(4A) of the LRA protects the deemed employee on termination of employment by a TES or client to evade process of section 198(3)(b)(i),[134] by binding both jointly and severally liable.

A TES may possibly carry on paying the wages of the deemed workers with various motives. Failure of the TES to pay wages to workers may institute action proceedings on the TES or client, or both, in accordance with section 198(4A)(a).[135] However, this shall not promote the TES to the position of being an employer.

"The Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others, LAC found that the placed employees become employed by the client for an indefinite period, and on the same terms and conditions as those employees of the client performing the same or similar work."[136]

3.4.6 Case law prior to the 2014 LRA amendments

Case law illustrates abuses suffered by TES employees before the LRA amendments; this signifies the need for protection to be afforded to vulnerable employees. The TES is an unnecessary central point, with no value to the employment relationship.

The TES as an employer has an uncertain role in the work relationship which is not of direct employment of a commercial nature because the bona fide employer is the dominant entity in the employment relationship. The real employer is concealed by a corporate veil which makes it difficult for workers to pierce the veil in order to litigate.[137]

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[131]Labour Relations Act 6 of 2014 Section 198A.
[132]Basic Conditions of Employment Act 75 of 1977Section 6(3).
[133]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22.
[134]Labour Relations Act 6 of 2014 Section 198(4A).
[135]Labour Relations Act 6 of 2014 Section 198(4A).
[136]*NUMSA v Assign Services and Others* (JA96/15) [2017] ZALAC 44; (2017) 38 ILJ 1978 (LAC); [2017] 10 BLLR 1008 (LAC) (10 July 2017).
[137]C Tshoose& B Tsweledi 'A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South Africa (2004) *Law Democracy & Development* 18.

The *LAD Brokers (Pty) Limited v Robert Madlala*, this case illustrates the above predicament. “The employees entered into contracts with the TES entitled Independent Contractor Agreements. The employees worked on the drilling rig under the control of the UK Company until such time that the company gave notice of termination of their agreements.”[138]

One employee lodged an action against the TES. In investigating the real employer, the court confirmed the UK Company to have been the employer; though the TES continued paying the salaries. This reflects the position of two interchangeable employers both refuting liability.

A TES may not enter into employment contracts that give rise to automatic termination of employment at the end of the client’s contract. In the South African Post Office Limited v Mampeule, the LAC emphasised the view that parties may not enter into contracts that exclude the dismissal regulations of the LRA. The joint and several liability clause was incorporated into the LRA to further protect vulnerable employees.[139]

Looking at the above case law, it is apparent that the LRA amendments have brought much essential protection in legislating temporary services in South Africa, by extending legal protection to non-standard workers.

Joint and several liabilities were established for further security so that if a TES fails to pay employees, the client as employer shall become liable. The client could not be sued because it was not regarded as an employer.[140]

3.5 Conclusion

The first part of chapter three covered the meaning and consequences of the deeming provision in detail. In this chapter the writer further explored the consequences of the deeming provision and has reflected on the confusion and misinterpretation of the provision using case law.

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[138]*LAD Brokers (Pty) Limited v Robert Mandla (*CA14/00) [2001] ZALAC 9; (2002) 6 SA 43 (LAC) (Lad Brokers).
[139]*South African Post Office Limited v Mampeule* JA29/09) [2010] ZALAC 15; (2010) 31 ILJ 2051 (LAC).
[140]P Benjamin ‘Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa’(2010) 32 *ILJ* 845-850.

The second part of the chapter looked at whether the LRA amendments adequately protected vulnerable TES employees. The chapter discussed the abuse of labour using case law, where there were automatic clauses for termination of employment which allowed the employers to terminate employment unfairly. It further discussed the abuse of vulnerable employees by being deprived of employment benefits. The writer also presented that the recent LRA amendments have provided further improvements in extending adequate protection for temporary workers by fixing the term of temporary service to three months, further equalising the fair treatment in terms of benefits.

CHAPTER FOUR
A CRITICAL ANALYSIS OF THE DEEMING PROVISION ON THE TRIGGERING OF SECTION 198A (3)

4.1 Introduction

Chapter four examines the question of whether a permanent contract of employment automatically arises after the deeming provision is triggered as a result of section 198A(3)(b) of the LRA.[141]

4.2 Concerns raised by the LRA amendments in section 198A(3)(b)

Concerns regarding the LRA amendments have been considerably debated. "The debate centres on what the legislature intended by introducing the deeming provision. Two main schools of thought have emerged from this debate. The first school of thought is that once the deeming provision kicks in, the TES' client becomes the sole employer of an employee, meaning that TES employees are effectively transferred to the employ of the client. The second is that a dual employment relationship arose with both the TES and client as employers."[142]

The amendment of section 198A(3)(b)[143] has been controversial and highly debated in the various courts. This section makes provisions for TES employees earning less than the threshold to be 'deemed' fulltime workers of the client after three months in their service.[144]

The issue starts with the use of a 'deeming' clause in contrast to an absolute phrase validating the transfer, or non-transfer, of vulnerable workers.

4.3 Case law illustration of the deeming provision

"In *R v Verrette* the Canadian Supreme Court, explained the deeming provision as analogous to the word includes."[145]

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[141]Labour Relations Act 6 of 2014.
[142]JScheepers'*The South African Labour Guide, Interpretation, Deeming provision, Labour Relations Act*' (2015).
[143]Labour Relations Act 6 of 2014 Section 198A(3)(b)(i).
[144]Basic Conditions of Employment Act 75 of 1997.
[145]*R v Verrette* (1978) 2 SCR 838.

The deeming proviso is projected to enhance and not displace the responsibilities of the TES, and the phrase 'deemed' aspired to increase the security granted to TES workers by including the client as the employer where workers can assert their rights. If the legislature intended a worker to automatically become a worker of the client, then this should have been mirrored in the wording of section 198A.

Therefore, the deeming provision is argued to account for a dual employer relationship so that it is not in breach of the LRA's section 198(2). This argument was fortified by the provisions of section 198(4A), which states that if the TES' client is jointly and severally liable in respect of section 198(4), or is deemed the employer in terms of section 198A(3)(b),a worker can lodge action against the TES or the client, or both. One wonders why the legislature decided to include joint and several liabilities if it intended to have a sole employment relationship with a client.[146]

"The LC in the *NUMSA* case disagreed with the dual employer argument and held that section 198(2)[147] gives rise to a statutory contract of employment amongst the TES and the placed worker, which is changed when section 198A(3)(b)[148] is triggered."

The statutory contract that takes place is not a transfer of employment from the TES to a client.[149] This suggests that the contractual affiliation between the TES and the temporary worker is that the TES remains obliged to pay the placed worker. This means that the TES remains in the picture hence the commercial contract linking the TES and the client remains active. The obligation to pay the deemed workers thus remains with the TES.[150]

All other rights contained in the LRA apply to statutory employment relationships generated by the deeming provisions and exist amongst the 'deemed' workers and the client. No consent is required to change the identity of the employer in these circumstances.

[146]Labour Relations Act 6 of 2014 Section 198(4A).
[147]Labour Relations Act 66 of 1995 Section 198.
[148]Labour Relations Act 6 of 2014 Section 198A(3)(b).
[149]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) ZACC 22.
[150]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (2018) ZACC 22*

The change in the statutory employment relationship is not a transfer from a TES to a client, as contemplated by section 197.[151] As a result, there is no requirement in law to transfer automatically, nor is there an obligation for a past service history with a TES to transfer to the client.

4.4 Conclusion

It is evident that the change of status of employment for the TES employee after the deeming provision is triggered by operation of law. It is a statutory requirement based on section 198A(3)(b) of the LRA. It is not a transfer of employment; it does not automatically transfer the benefits for workers from a TES to the client once workers are deemed full time workers of a client. Section 198A(3) is unclear and lacks any explanation of the various consequences of deeming, such as what happens to contracts of employment. Is the TES employee expected to serve a resignation letter? Is a client supposed to generate a new employment contract? Are both client and TES required to furnish a notice of termination in accordance with the BCEA?

[151]Labour Relations Act 66 of 1995Section 197.

CHAPTER FIVE
REFLECTION OF GAPS SUBSEQUENT TO LRA 2014 AMENDMENTS

5.1 Introduction

The Chapter will examine the possible gaps which may be caused by the 2014 LRA amendments in section 198, and the ambiguity that might take place in interpreting the legislation. The chapter provides the writer's opinion on the TES employment affiliation.

A client is deemed as an employer and is capable of being sued. The TES' liability continues as long as its contractual affiliation with a client continues and the TES carries on paying deemed employees. There is nothing to prevent a client and a TES from terminating their Service Level Agreement when section 198A(3)(b) is triggered.[152] Nothing stops a client from assuming the obligation to remunerate deemed employees, with the TES then falling out of the picture.

The single employer solution could create a problem should the client wish to change the TES and engage a different service provider. The moment that the client terminates the TES agreement, notionally all deemed employees remain with the client and the TES falls out of the picture. It seems unlikely that another TES will enter the relationship and simply become the outsourced payroll administrator, while at the same time attracting joint and several liabilities in the event of any claims.

A permanent contract of employment does not automatically arise after the deeming provision is triggered in terms of LRA section 198A(3)(b), but arises in terms of the law.

5.2 What is meant by a client being deemed the employer of a placed employee for the purposes of the LRA?

A client does not become an employer for the objectives of the BCEA, COIDA, the Skills Development Act, PAYE or the Income Tax Act. For example, a minimum

[152]Labour Relations Act 6 of 2014 Section198 (3)(b)(i).

severance pay is an obligation afforded in the BCEA section 41; this entitlement might not be applicable to vulnerable employees who face retrenchment as they are presumably placed employees for the intention of the LRA. These workers are probably not covered by COIDA[153] and the Skills Development Act[154] and will also not be obligated to contribute PAYE or income tax as they are placed for the purposes of the LRA only. The expressed protection for the purposes of the LRA is flawed as it excludes other employment law in the relationship of employment for vulnerable employees. The LRA and other employment laws may not be split; they are integrated by the nature of their origin for the holistic protection of employees.

5.3 Why have joint and several liabilities if there is to be a single employment relationship with the client?

"It appears that the Labour Appeal Court[155] embarked on a course of interpreting the deeming clause in isolation from the other LRA provisions in section 198 and section 198A,thus resulting in numerous provisions being rendered redundant."[156]

Therefore, clauses covering equal treatment and joint and several liabilities ought to be redundant after the deeming clause has been interpreted to refer to a sole employer. Similarly, because equal treatment is covered by the Employment Equity Act[157] and the Code of Good Practice on Equal Pay, it should not have been echoed in section 198A to protect vulnerable employees.[158]

If the TES workers become the statutory employees of a client, there should be no requirement for the equal treatment clause in section 198A, because that will be covered under equal pay provisions in terms of section 6 of the Employment Equity Act.[159] Hence, the equal treatment clause becomes redundant.[160]

[153]Compensation for Occupational Injuries and Diseases Act. No. 130 of 1993.
[154]Skills Development Act 26 of 2013.
[155]*NUMSA v Assign Services and Others* (JA96/15) [2017] ZALAC 44; (2017) 38 ILJ 1978 (LAC); [2017] 10 BLLR 1008 (LAC) (10 July 2017).
[156]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) ZACC 22
[157]Employment Equity Act 55 of 1998.
[158]Code of Good Practice on Equal Pay for Work of Equal Value (2015).
[159]Employment Equity Act 55 of 1998 Section 6.
[160]Labour Relations Act 6 of 2014 Section 198B.

Therefore, a requirement for joint and several liabilities should be redundant since the client is a direct employer, and by virtue of being the employer is already liable for claims. A TES should not be cited in action proceedings since it has ceased to be the employer. There is no need for a TES to continue to remunerate deemed employees after three months because they are deemed full-time workers of the client. The joint and several liability clause, as set out in section 198(4A), should become redundant.

In these circumstances it is hard to conceptualise how a CCMA reinstatement order could be binding for a TES, as entrenched in the LRA section 198(4A),[161] if the TES is not an employer and the sole employer is the client.[162]

A TES may not be an employer merely for the administration of remuneration for deemed employees after three months. A TES does not fit in as the employer of the employee under the definition of the presumption of whom an employee is, as stated below. ATES does not control the factors from (a) to (g) under the definition of the employee. Moreover, a TES cannot be interpreted to be an employer after three months once the deeming clause is triggered. Therefore, the TES cannot be liable jointly and severally with the client, as the TES does not perform the functions of an employer to employees after three months. A client will be the sole employer because the client controls the employee, based on section 200A of the LRA.

The debate amongst employment law and human resources practitioners raises questions, whether due to the transfer of workers where a client becomes the sole employer, or whether the provision creates a dual employment relationship. Although clarity has been provided by the Constitutional Court for the sole employer in *Assign Services*,[163] there are still many unanswered questions, such as:

- Will the Basic Conditions of Employment Act apply to TES workers, given that the employee is employed for the purposes of the LRA only?[164]

[161]Labour Relations Act 6 of 2014 Section 198(4A).
[162]Employment Equity Act 55 of 1998.
[163]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) ZACC 22.
[164]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) ZACC 22.

- The court is silent on what will happen to the accrued employee benefits once workers are deemed permanent employees of the client?
- If the sole employer option is for the purpose of the LRA only, who will be the employer for the purposes of the Compensation for Occupational Injuries and Diseases Act (COIDA),[165] the Employment Equity Act, the Skills Development Levies Act (Schedule 4.2)[166] which describes the employer as being the TES, and for the purposes of the income tax schedule 4 part 2[167] which defines the TES as the employer, and accordingly the obligation to deduct tax remains with the employer/TES?
- Who is responsible for the employee's income tax?

5.4 The interpretation advanced by the CCMA is, amongst others, the following:[168]

Section 198A(3)(b) must be interpreted in a similar manners the interpretation of an adoption. In adoption for instance, the biological and adoptive parents are not dual parents.

The dual employment interpretation caused a lot of uncertainty with regards to:-

a) Establishing which employer would be responsible for the disciplinary actions for deemed employees?
b) Establishing which employer's disciplinary code would apply?
c) Establishing how to deal with the CCMA reinstatement award?

Where TES employees perform genuine temporary work for a client section 198A[169] does not apply.

[165]Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[166]Skills Development Levies Act 9 of 1999.
[167]Income Tax Act 58 of 1962.
[168]*Assign Services (Pty) Ltd v CCMA and Others* (JR1230/15) [2015] ZALCJHB 283.
[169]LRA 2014

CHAPTER SIX
RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

This chapter gives a succinct synopsis of the discussions raised in this dissertation. It will forward recommendations or solutions to be considered for changes to the legislation.

6.2 Recommendations

The central concern for the interpretation of section 198A(3)(b), the deeming provision of the LRA, is its ambiguity and the capricious way the section is drafted. Because of the awkward language of the section, convincing arguments have been made for either a sole or dual employer structure. The Constitutional Court majority judgement favoured the sole employer interpretation, and the minority judgement favoured the dual employer.

The argument ought to have been avoided, and would have been, had the drafters simply used clear and simple language indicating that a TES employee shall be an employee of the client after three months of continuous service, instead of stating that a client is 'deemed' the employer for the purposes of the LRA only.

The phrase 'deemed' in drafting statutes often creates confusion as the phrase is capable of diverse meanings.

Both *Assign Services* and *Krost Shelving* focused on the meaning of 'deemed' and both agreed that it has a meaning which is not easily pinned down. Both, naturally, sought to stretch the elasticity of the word in their own favour.[170]

The ambiguity of 'deemed' in section 198A placed the Constitutional Court in the undesirable situation of having to guess the intention of the legislature, particularly from the perspective where it is detrimental for the TES industry.

[170]J Grogan 'Let the deemed be damned – section 198A(3)(b) deconstructed' (2015) Dec *EL,* 4.

It is an essential feature of the rule of law that statutes ought to be clear and unambiguous to craft legal certainty.

"The Constitutional Court held that the legislature is under a duty to pass legislation that is convincingly clear and precise, enabling citizens and officials to understand what is expected of them."[171]

Section 198A(3) has generated deep-rooted vagueness regarding who the employer is. In this situation it might be desirable for the Constitutional Court to merely consign section 198A(3) back to the legislature for re-drafting, in order to gain clarity.

Section 198A(3)(b) could be interpreted either way: sole or dual employer construction is theoretically possible. Why use 'deemed' if the intention is 'to become'? The drafting of the section is not clear and it obstructs the rule of law. The Constitutional Court will need to send this section back to the legislature to redraft it clearly and unambiguously.

When South Africa drafted the recent LRA amendments, Namibian labour law was considered while dealing with whether or not to ban the TES completely in South Africa. The call from the Unions (COSATU) is that the government must ban the TES in South Africa. South Africa learnt from Namibian legislation on how to deal with the issue of TES. In Namibia the TES operations were banned completely and re-legalised later. The ban of TES was challenged in the case of *Namibian African Personnel (Pty) Ltd* on the constitutionality of section 128 of the Namibian Labour Act. This was challenged because it deprived the constitutional right to freedom to conduct any trade, occupation or business. The Namibian High Court held that the use of the TES was like slavery and must stop.

The Namibian Supreme Court of Appeal rejected this argument that constitutional rights did not apply to juristic persons, and the court considered the ILO's Convention on Private Employment Agencies and recognised labour brokers as a necessary labour market service. South Africa learnt from Namibia and did not ban the TES, and instead regulated their operations.

[171]J Grogan 'Let the deemed be damned – section 198A(3)(b) deconstructed' (2015) Dec *EL* 4.

6.3 Conclusion

The decision of the Constitutional Court in *Assign Services* in interpreting the LRA's section 198A(3)(b)[172] deeming provision gave clarity for the time being that the provision refers to a sole employer for the purposes of the LRA. The fact that the TES and client are jointly and severally liable for claims arising from their triangular employment relationship after a deeming clause has been triggered is problematic. The Constitutional Court should have stopped this confusion by terminating the TES relationship completely after three months.

A TES is not genuinely an employer after three months; it is merely recognised if it continues to pay the remuneration of the workers on behalf of the client. This type of service is a consultancy service, not an employer service. After the deeming clause has been triggered the TES is not involved in giving instructions for work to employees, and the TES does not control or supervise the employees. ATES does not set conditions of employment for employees after deeming provisions come into effect. The TES does not control the time and attendance of the employees. ATES has no association with employees after the deeming provision kicks in, except in being instructed by the client to pay them remuneration. This service provided by the TES does not warrant that the TES be recognised as an employer.

The interpretation of the deeming provision set out in section 198A(3)(b)[173] of the LRA has to be revisited by the Constitutional Court. The fact that the sole employer interpretation is for the purposes of the LRA, to the exclusion of other employment law raises a serious concern. The deemed employees are excluded from other employment law, as stated above, and will only enjoy the protection of the LRA. The fact that section 198 raises a dual interpretation of a sole or dual employer has to be corrected, despite the final judgement of the Constitutional Court[174] of the sole employer interpretation. As stated above, the interpretation of the deeming provision is not consistent with the rest of the related clauses, such as equal treatment, and joint and several liabilities in which if the client is the sole employer, and the related clauses are therefore not necessary.

[172]Section 198A(3)(b)(i) Labour Relations Act 6 of 2014.
[173]Labour Relations Act 6 of 2014 Section 198A(3)(b).
[174]*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) ZACC 22

The overview of the topic has been discussed, as set out in chapter one, including an explanation on the methodology used for the dissertation, and the targeted problem questions have been countered.

Chapter two narrated the background history of the TES, the history of labour relations legislation, the history of TES practices in South Africa prior to the stated amendments and the grounds that led to the changes in the LRA. A literature review regarding the history of labour relations, TES practices, as well as the ILO and Namibian history has been covered in this part. South Africa has learnt a lesson from Namibian practices regarding the TES, in that the TES were completely banned and re-legalised later after taking into account the constitutional rights of the TES.

A critical analysis and the consequences of the deeming provision set out in the LRA section 198A(3)(b) have been explored in detail, reflecting on the purported protection of vulnerable employees and highlighting the flaws in the make-up of the deeming provision in the LRA amendments.

The question whether amendments in section 198 of the LRA adequately protected vulnerable TES employees has been answered in chapter three. The LRA 2014 amendments have humanised the gross abuses which clients have had free reign over in the past. The LRA 2014 amendments have improved the rights of employees employed via TES. The case law prior to and after the LRA amendments was explored to reflect the change brought by the LRA 2014 amendments.

The question whether section 198(4) of the LRA dealing with joint and several liabilities is effective, has been answered. The objective of the legislature in amending the 2014 Labour Relations Act was to improve the working conditions, and the connection between temporary workers and their employers.

The effectiveness of the LRA changes to joint and several liabilities provision has not been tried in court, and as such there is limited case law covering this area after the 2014 LRA amendments. The intention of the legislature was to protect temporary workers against abuse of their labour. The adequacy of the joint and several liabilities

provision provides a right to temporary employees to institute legal proceedings against both the TES and the client for unfair dismissals. This provision in theory seems to have provided a reasonable protection. However practically as the law stands, it might be difficult to put this provision into practice because after three months of continuous service, the client becomes the employer; and the TES ceases to be an employer, under the sole employer interpretation.

The dissertation answered the question in chapter four, of whether a permanent contract of employment automatically arises after the deeming provision is triggered in accordance with section 198A(3)(b),[175] provided that it is triggered by the operation of law.

Chapter five dissected the possible gap which may be the consequence of the recent LRA amendments, and dealt with the ambiguity which may arise in interpretation of the amendments. This chapter also provided recommendations that may be considered in improving the legislation, and the conclusion.

[175]Labour Relations Act 6 of 2014.

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NOTES

- The Older instruments that regulated labour brokers include the Unemployment Convention No. 2 of 1919, the Unemployment Recommendation No. 1 of 1919, the Fee-Charging Employment Agencies Convention No. 34 (1933) and the Fee-Charging Employment Agencies Convention No. 96 of 1949;Private Employment Agencies Convention No. 181 of 1997 (referred to as the Private Employment Agencies Convention) and the Private Employment Agencies Recommendation No. 188 of 1997 (referred to as the Private Employment Agencies Recommendation).
- Mills, SW.,2004 *ILJ* 1216. (A case study was once carried out in the hotel industry, particularly Southern Suns, to illustrate the abuses and exploitation that the workers in the cleaning industry faced.
- Van Niekerk, BPS., *et al. Law @ Work* 42. The right safeguards one from unfair labour practices relating to work security and employment opportunities as codified in the LRA.
- Clarke, M., (2004). Budget Vote Speech by the former Minister of Labour, Membathisi Mdladlana (MP), Parliament, Cape Town, 13 April 2010. Labour rights violations in the agriculture sector in South Africa are on the rise due to the use of unregulated labour contractors.

- Gericke, E., Closing a loop-hole (2010) 13(2) *Potchefstroom Electronic Law Journal*92–106Availablehttp://0-reference.sabinet.co.za.oasis.unisa.ac.za/document/EJC86769Accessed26 April 2014
- Brand, J., Todd, C., & Laubcher, T., *Labour law amendments*. Lecture notes, Bowman Gilfillan Attorney Group, Johannesburg (2012).
- President Zuma in opening address to the 12th African Regional Meeting of the ILO in October 2011 entitled Empowering Africa's People with Decent Work:Availableathttp://www.ilo.org/global/meetings-and-events/regional-meetings/africa/arm-12/WCMS_165077/lang--it/index.htmaccessed 27 July 2018. 'As early as 2007 the ANC committed in the Polokwane Declaration to 'making the creation of decent work opportunities the primary focus of economic policies.'

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

3 September 2018

Adv. Nokuzola Gloria Khumalo 203518460
School of Law
Howard College Campus

Dear Adv. Khumalo

Protocol reference number: HSS/1377/018M
Project title: Temporary employment services in contemporary South Africa: A critical analysis

FULL APPROVAL – No Risk/Exemption Application

In response to your application received 2 August 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Professor Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Rowena Bernard
cc. Academic Leader Research: Dr Shannon Bosch
cc. School Administrator: Ms Robynne Louw/ Mr P Ramsewak