HOW DO THE 2015 LRA AMENDMENTS IMPACT ON WIDESPREAD PRACTICE IN RELATION TO TES EMPLOYEES?

by

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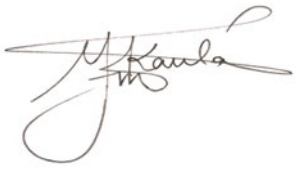
DECLARATION

I, **Mandlakhe Florian Khawula,** declare that **"How do the 2015 amendments of the Labour Relations Amendment Act 66 of 1995 impact on the widespread practice in relation to Temporary Employment Service employees?"** is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.



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SIGNATURE

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ABSTRACT

In 2014, the Labour Relations Act 66 of 1995 went through significant changes that were aimed at improving the protection of workers in non-standard employment relationships. It is an undisputed fact that prior to the amendments, section 198 provided little protection regarding this type of employment. One of South Africa's leading labour federations, the Congress of South African Trade Unions (COSATU) was amongst the unions that were protesting against the Temporary Employment Service (TES) system, arguing that the system was exploiting workers and that TESs were the main drivers of the casualisation of labour. The TES system promotes low wages and poor conditions of employment. TES is equivalent to the trading of human beings as commodities therefore they must be banned.

To address the dissatisfaction, learning from the Namibian experience in particular, the South African legislature opted for the regulation of the TES industry hence the Labour Relations Amendment Act 4 of 2014 where section 198 was amended to also include section 198A to D of the LRAA. This paper seeks to examine the impact of the amendments on the widespread practice in the workplace specifically in relation to the TES employees, bearing in mind the insistence by trade unions that the TES must be done away with. This dissertation demonstrates that the amendments of the LRA and common law to a certain extent provide a solution to several problems the employees of TES have had prior to the amendments. This development has a significant impact on the improvement of working conditions.

LIST OF ACRONYMS

NEDLAC	National Economic, Development and Labour Council
CCMA	Commission for Conciliation, Mediation and Arbitration
LC	Labour Court
LAC	Labour Appeal Court
CC	Constitutional Court
BCEA	Basic Conditions of Employment Act 75 of 1975
BCEAA	Basic Conditions of Employment Amendment Act 20 of 2013
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 6 of 2014
EEA	Employment Equity Act 55 of 1998
PEAC	Private Employment Agencies
NLA	Namibian Labour Act 6 of 1992
NHC	Namibian High Court
NHC	Namibian High Court
TEA	Temporary Employment Act 4 of 2014
ILO	International Labour Organisation

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CHAPTER 1
INTRODUCTION

1.1. Background

Prior to the 2015 Labour Relations Act[1] (LRA) amendments, there was a huge outcry, particularly by the trade unions; in particular, the Congress of South African Trade Unions (COSATU) that (TES) commonly known as Labour Brokers should be abolished due to the exploitation of employees. In fact, it was not only the workers who were employed by TES who were vulnerable, but also workers on fixed-term employment. Section 198 of the LRA and the legitimate expectation principle which finds expression in Section 186 (1) (b) of the (LRA) have proved to be inadequate. To address this legitimate complaint the government opted for the regulation of the industry hence the amendment of the LRA and other relevant statutes such as the Basic Conditions of Employment Act (BCEA)[2] and the Employment Service Act (ESA).[3] This research seeks to examine the impact of the amendments on widespread practice in relation to the TES employees, bearing in mind the insistence by trade unions that the TES must be done away with. To achieve this goal, various sections in the LRA were critically examined, including Sections 21; 22; 198; 198A to 198D. Case law is examined to show the *status quo* prior to and after the amendments. This dissertation demonstrates that Sections 21; 22; 198; 198A to 198D of the LRA and common law to a certain extent provide a solution to several problems the employees of TES have had prior to the amendments. This development has a significant impact on the manner in which employees of the TES are now treated.

The amendments *inter alia* came with a new phenomenon called "deeming provision" which requires a "justifiable reason for fixing the term of employment where the nature of work is not of

[1]Labour Relations Act 66 of 1995.
[2] Basic Conditions of Employment Act 75 of 1997.
[3] Employment Service Act 4 of 2014.

limited duration".[4] Failure by the employer to furnish a justifiable reason for fixing the term, would result in the employment being deemed as indefinite employment.[5] This principle is also applicable if an employee of TES has worked for the employer for a period longer than three months.[6] In the absence of a justifiable reason, the employee is deemed to be an employee of the client on a permanent basis.[7] There is also additional protection in that such "employees may not be treated less favourably compared to permanent employees of the client unless there is a justifiable reason."[8] The amendments also introduce a new statutory form of dismissal that seeks to prevent the TES from terminating an employee's contract of employment with a client to circumvent the deeming provision.[9] In this regard, Section 198 (4C) of the LRA has a significant impact in that it prevents TES from employing workers on conditions that violate the LRA and this ensures that workers are protected. Section 198A of the LRA deals with vulnerable employees. This section provides protection to low-income earners in the triangular relationship.[10]

1.2. Research Problem

The trade unions still insist on the ban of TES despite the significant impact the amendments have made in the workplace. Therefore, such discontentment invites an examination of the impact of the amendments in the workplace in terms of establishing whether they adequately protect vulnerable employees against job insecurity including unfair termination of employment without any recourse, low salaries, continuous renewal of fixed-term contracts, disguised employment relationships, and the right to bargain.

1.3. Rationale of the Study

The purpose of this study is to illustrate the manner in which the amendments of the LRA have impacted the workplace save to say that they do not provide adequate protection and that the dual or parallel employer principle creates more questions than answers hence it is unsustainable.

1.4. Research Questions

[4] Section 198B (3) of the LRA.
[5] Section 198B (3) of the LRA.
[6] Section 198A (3) of the LRA.
[7] Section 198A (3)(b)(ii) of the LRA.
[8] Section 198A (5) of the LRA.
[9] Section 198A (4) of the LRA.
[10] The threshold in terms of the Basic Conditions of Employment Act 75 of 1997 is currently at R205 433.30

The research questions that will be addressed in this study are:

1.4.1. How do the 2015 amendments impact the widespread practice in the workplace in relation to TES employees?

1.4.2. Do the 2015 LRA amendments adequately protect TES employees earning below the ministerial threshold?

1.4.3. Is the dual or parallel employer principle as was pronounced by the court in *Assign Services (Pty) Ltd* 2015 (36) ILJ 2853 (LC) sustainable?

1.4.4. Should TES be banned completely as advocated by the trade unions?

1.5. Research Methodology

The methodology of this study is based on a review of relevant literature and an analysis of case law. No empirical data was used or gathered for the purposes of this study. Therefore, the sources used include legislation, journal articles, labour law books, case law and the Constitution. Sources were obtained from the internet and the library**.**

1.6. The Research Structure

There are six chapters in this dissertation. Chapter One provides a brief overview of the topic, including the rationale of the study, research questions and methodology followed in the dissertation. Chapter Two examines the status quo prior to the amendments. Chapter Three focuses on a critical literature review. The focus of this chapter are the amendments, particularly their impact in the workplace in relation to vulnerable employees of TES. Chapter Four critically examines the dual employer principle in the triangular relationship. Chapter Five discusses the trade unions call for the ban of TES. In this chapter, the constitutional rights of both TES and employees are critically scrutinised. Chapter Six is the conclusion. It is a brief summary of the issues raised and provides answers to the questions asked in the previous chapters. The chapter also provides the writer's opinion on the topic and possible solutions to the challenges in the triangular relationship.

CHAPTER 2
THE STATUS QUO PRIOR TO THE AMENDMENTS

2.1. Introduction

While labour law was intended as a means to do away with the notion of inequality relating to bargaining power inherent in the employment relationship,[11] Section 198 of the LRA subverted this goal by validating the commoditisation of labour.[12] Prior to the amendments, section 198 of the LRA was unable to protect workers in the triangular relationship and struggled to regulate the industry. Although courts would on few occasions endeavour to intervene, there were no statutory provisions in place to support the courts' stance. Sections 198 and 185 of the LRA, ensures every worker the right to employment security and specifically the "right not to be unfairly dismissed and subjected to unfair labour practice is protected." Workers in the TES industry suffered abuse at the hands of the TES's and their clients. Job insecurity including automatic termination of employment contracts, low wages, unfair dismissals at the behest of the TES client were major predicaments faced by the TES employees.

2.2. Job Security

The most obvious challenge in triangular relationships was that of job security. As a result of job insecurity, employees of the TES could not be trusted by any financial institution. This was due to the nature of their employment services which were terminated without any recourse at the discretion of the client.[13] It was common in the commercial contract that the client had the authority to tell the TES that it no longer wanted to utilise the worker assigned to it.[14] As a result, the TES would find itself with a worker without a position, or stuck with a worker that it did not need,

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[11] Kahn-Freud, O 'Labour and the Law' (1972) at *Stevens and Son 8*; Benjamin, P 'Labour Law Beyond Employment' [2012] *Acta Juridicata* 21 at 22.
[12] T Cohen, "Debunking the Legal Fiction - Dyokhwe DE Kock NO & Others" (2012) *ILJ* 2321
[13] P.A.K Le Roux "Protecting the employees of temporary employment services"(2012) Contemporary Labour Law Vol 22 (3) 2012
[14]PAK Le Roux see note 13 page 22-23.

because of various allegations including incapacity alleged by the client.[15] Although a dismissal under these circumstances may have good grounds of justification, the TES might not be willing to institute the necessary disciplinary action against the employee because the client would not co-operate.[16] According to Le Roux[17], many TES's had decided to utilise the "contractual mechanism of an automatic termination of employment."[18] Under the circumstances, TES employees were in no position to plan for the future because even if they had been removed from site by the client, the TES would argue that the worker had not been dismissed because he was still on its books as a standby waiting for an assignment which might not materialise. Unfortunately, such worker would not receive any income.[19]

2.3. Automatic Termination of Employment Contract

The employment contracts between the TES and the workers would frequently be made based on the continuation of the business arrangements between the TES and its client. Where this was an agreement between the parties the courts had confirmed that the dissolution of the contract with the TES did not constitute a dismissal.[20] The hallmarks of such contracts is that they would be couched in a manner that would stipulate the commencement and end date. However, the termination dates would be in two forms, first, it would be a determined date between TES and the employee. The second date would be based on the termination of contract between the client and TES depending on what took place first.[21]

Due to the limited bargaining power of the employee, the employee in essence accepts that the employment contract may be terminated at any time at the sole discretion of the client, or at the effluxion of time. Consequently, that would mean that such employee has no entitlement to any severance pay as this is not construed as a retrenchment.[22]

This does not suggest that our law does not recognise fixed-term contracts as our law protects the

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[15] Ibid page 24.
[16] Ibid page 22.
[17] PAK Le Roux see note 13 page 26.
[18] Ibid page 26.
[19] Harvey S "Labour Brokers and workers' rights: Can they co-exist" (2011) SALJ 107.
[20] BPS van Eck, "Temporary Employment Services (Labour Brokers) in South Africa and Namibia" PER/ PELJ 2010 (13) 2. Available at https://www.scielo.org.za/pdf/pelj/v13n2/v13n2a05.pdf
[21] Ibid
[22] Ibid

citizen's right to freedom to contract. The duration of a contract may be determined either by stating a "termination date" or by stipulating "a particular event the occurrence" of which will bring the contract to a natural end.[23] When the contract is terminated, the employer has the onus to demonstrate that the agreed task has been fulfilled and/or the event has taken place, therefore, the contract was due for termination.[24] The courts look at "fixed-term contracts" critically, particularly those which the duration depends on the occurrence of an event. Those which stipulate for example, that they expire automatically if the employee is found guilty of any form of misconduct or incapacity or if the employer or one of its clients takes a particular operational decision are ruled *pro non scripto* because they prevent employees the enjoyment of their constitutional and statutory protection against unfair dismissal.[25] In the absence of a valid agreement, a fixed-term contract cannot be terminated prior to its expiry date without a good cause.[26] It must be stated that some fixed-term contracts provide for termination on notice even before the termination date. Such provisions are allowed in law, such contracts are termed "maximum duration contract", which means that the contract continues only for the agreed period, but may be terminated on notice before the expiry date.[27]

In *Sindane v Prestige Cleaning Services*,[28] the court held that "the termination of a commercial agreement between the TES and a client that resulted in the coming to an end of a worker's contract of employment did not constitute a dismissal"[29] The consequence of this approach was that if the termination could not be construed as a dismissal, the CCMA lacked the necessary jurisdiction to listen to the dispute and the affected employee was left without a remedy even though the manner in which an employee was terminated might be grossly unfair.[30] Clearly, this interpretation of the law was not in conformity with the purpose of the LRA, thereby violating an employee's right to fair labour practice. The law makes it clear that courts are expected to adopt an interpretation that is not in conflict with the Constitution and public international law while giving effect to its primary

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[23] Ibid
[24] Bottger v Ben Nomoyi Film & Video CC (1997) 2 LLD102 (CCMA)
[25] J Grogan, *Work Place Law*, 12th Edition Juta (2017) page 37
[26] Ibid page 37
[27] Ibid page 37
[28] *Sindane v Prestige Cleaning Services* (2009) BLLR 1249 (LC).
[29] Ibid
[30] BPS Van Eck, "Temporary Employment Services (Labour Brokers) In South Africa And Namibia" *PER/PELJ* 2010 (13) 2. Available at www.scielo.org.za/pdf/pelj/v13n2/v13n2a05.pdf accessed 4th June 2019

object.[31] Furthermore, the Constitution[32] requires courts when interpreting the law, "to seek to promote the spirit, purport, and objects of the Bill of Rights.[33]"In *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia,*[34] it was noted that "a balance needed to be struck between the employer's need for flexibility and employees' interest in not being treated as mere commodities."[35] Similarly, the Labour Court in *Simon Nape v INTCS Corporate Solutions (Pty) Ltd*[36] noted that workers in labour broking arrangements, being the most vulnerable and weakest party, are not to be treated as mere commercial objects and traded to the client. The manner in which these contracts are drafted demonstrates a clear intention to abuse the vulnerable TES employees. The whole intention behind such drafting is to circumvent labour laws. The terms of the contract are said to be fixed, but while the period when the contract commences is specific, the actual term is vague, and frequently framed in the alternative.[37]

There are three examples of standard contracts utilised by the TES's that illustrate this fact. The first contract states the term e.g. 6 months, however, it concludes with the following sentence: 'thereafter the labour broker will review the situation.'[38] This suggests that whatever number of weeks or months that are filled in, the contract may continue beyond the broker's discretion.[39] A second contract states 'the contract shall continue until the completion of the project for which the employee was employed, being the provision of general labour services ("the fixed period"). The third states that employment terminates on the earlier of one of the following events being "the completion of the specific tasks for which the client desires the employee's services or if the client informs the TES that the worker must be withdrawn."[40] The contract even refers to the retirement date of the employee. In all three cases, the terms of the contract are in effect determined either by the TES or the client.[41] In all three scenarios, an employee referring a dispute concerning unfair

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[31] Supra see note 1, Section 3
[32] South African Constitution Act 108 of 996, Section 39 (2)
[33] Ibid
[34] (2011) 32 ILJ 205 (Nms)
[35] ibid 17
[36] 31 ILJ 2120 (LC) para 54
[37] J Theron, 'Intermediary or Employer-Labour Brokers and the triangular Employment Relationship' (2005) 26 *Indust. L.J.* (Juta) p618.
[38] National Contract Cleaners Association, "Supercare Services Group (Pty) Ltd -Standard Contract of Employment" Reference HR8-Revision No.5 dated 01.08.12 page 2-7 www.ncca.co.za
[39] Ibid.
[40] Ibid.
[41] Ibid.

dismissal will first have to overcome the obstacle of proving that he or she was dismissed. This is because the decision to terminate is clothed as the expiry of the term, an objective event.[42] Even the first contract, which speaks of the TES reviewing the situation at the expiry of the period, has somewhat contradictory provision on the completion of the assigned contract, this contract shall automatically terminate. Irrespective of the term, TES's on most occasions expect employees to comprehend that such termination should not be interpreted as a retrenchment but the termination of a fixed-term contract, consequently, the worker has no entitlement to severance pay. Likewise, employees had to accept that there was no expectation of renewal of the contract, irrespective of how many times it had been renewed.[43] However, it must be pointed out that the Court in *Nape v INTCS Corporate Solutions*[44] held that "the Court is not bound by contractual limitations created by the parties and may not perpetuate wrongs exercised by private parties who wield greater bargaining power."[45]

2.4. Dismissal of an employee by the client

It has been common practice that TES's would rely on the refusal by the client to accept the worker on its premises as a fair reason for dismissal.[46] They would argue that this was a fair dismissal, because they had no control over the client or because the client threatened to cancel the service contract if the worker was not removed. Alternatively, where the client rejects the worker, and the TES has no alternative assignment for him or her, the TES retrenches the worker and claims that it was a fair dismissal for operational reasons.[47] The problem in such cases is that, often, clients have no good reason to demand the removal of an employee in the first place. Even if an employee has committed a misconduct or is incapacitated, the employee would, in the ordinary course, have been entitled to due process.[48] In such a case, access to the possibility of reinstatement by convincing an independent tribunal of an unfair dismissal is replaced by notice and severance pay. Particularly in a society with a high unemployment rate, this does not seem fair. In addition, a retrenchment in these circumstances masks the real reason for the dismissal, which is the incident that made the client

[42] Ibid para 37.
[43] Ibid para 38
[44] NAPE v INTCS Corporate Solutions [2010] 8 BLLR 852 (LC)
[45] Ibid
[46] S Harvey 'Labour Brokers and Workers' Rights: Can They Co-Exist In South Africa' (2011) *South African Law Journal* 128 (1) 100-122.
[47] Ibid
[48] Ibid

demand the removal of the worker.[49] The court in *Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distribution*[50] faced with such a situation said, "This is not one of those classical retrenchment cases which is heard on a regular basis by this Court, but for the demand by Metcash, the applicant would still have been employed by the respondent at Metcash's premises."[51] Where a TES employee is retrenched because the client refused to have him anymore, the legality, validity or fairness of the real, underlying reason for the client no longer wanting the worker will determine the fairness of the TES's downstream dismissal for operational reasons.[52] As the Court found in *Nape v INTCS Corporate Solutions (Pty) Ltd*,[53] the court held a demand that is unlawful and cannot be used to dismiss a worker for operational requirements. The court further stated that the TES and client are forbidden from contracting outside the realm of the LRA and any such terms that violate the LRA are illegal and unenforceable.[54]

Generally, the dismissal of an employee at the request of a third party is allowed. In *East Rand Proprietary Mines Ltd v United People's Union of SA*,[55] the court held that "an employer may dismiss an employee at the behest of a third party, but it truly must have no alternative to the dismissal. In other words the test is one of strict necessity." According to *Lebowa Platinum Mines Ltd v Hill*[56] an employer must follow certain principles when a demand is made for the dismissal of an employee by a third party:

- "The mere fact that the third party demands the dismissal of an employee would not render such dismissal fair;
- the demand for the dismissal must usually enjoy a good foundation; the threat by a third party to impose a sanction must be a real one;
- the employer should assess the probable effect of the sanction threatened by the third party;
- the mere fact that a dismissal would ensure continued smooth commercial operation is not sufficient to justify termination of employment;
- the employer should make reasonable endeavours to dissuade the party making the demand for the dismissal of the employee from persisting therein;

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[49] Ibid.
[50] Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distribution [2002] 26 ILJ492 (LC)
[51] Ibid
[52] *Nape* Supra note 43 para 45
[53] [2010] 8 BLLR853 (LC)
[54] Ibid
[55] (1996) 17 ILJ 1134 9 LAC
[56] Lebowa Platinum Mines Ltd v Hill (1998) 19 ILJ 1112 (LAC) para 22

- the employer should investigate all alternatives to dismissal;
- the employer must consult properly with the employee and afford him an opportunity to make representation;
- it is incumbent on the employer to ensure that the employee is aware that non-acceptance by him of an identified reasonable alternative or alternatives could result in his dismissal;
- in all its deliberations the employer must properly consider the extent of the injustice to the employee that would be occasioned by a dismissal and relevant to the consideration of justice to the employee would be the question whether any objectively blameworthy conduct on his part gave rise to the demand for his dismissal."[57]

2.5. Lower wages

Despite working long hours, TES employees were unjustifiably paid lower salaries compared to their counterparts employed by the client on a permanent basis.[58] The reason for that was that the workers' wages were paid from the fee the client paid to the TES.[59] After the TES made deductions for its expenses, the employee would be paid out of what was left. The sector was not regulated by any laws or ministerial sectoral determinations for minimum wages hence, employees were so exploited.

2.6. Conclusion

In this chapter some of the challenges the TES employees were experiencing prior to the amendments and the decisions of the courts aimed at the protection of the rights of vulnerable employees of the TES were highlighted and discussed. Even today, courts and arbitrators are becoming increasingly intolerant of the use of fixed-term contracts to avoid employees' constitutional and statutory rights to a fair dismissal.[60] This is particularly so in the case of TES's and outsourced contractors who provide workers to perform services for others.[61] The trend was set

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[57] Supra note 53 para 53
[58]Botes, A "Answers to the questions? Critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to Labour Brokers" (2014) *Samerc ILJ* 110. available https://www.researchgate.net/publication/301828525_Answers_to_the_Questions_A_Critical_Analysis_on_the_Amendments_to_the_Labour_Relations_Act_66_of_1995_with_regard_to_Labour_Brokers_-_A_Botes accessed 16 August 2019
[59] Ibid.
[60] J Grogan, See note 25 page 147.
[61] Ibid

in *SA Post Office v Mampuele*[62] in which both the Labour Court and Labour Appeals Court held that "contracts which provide for automatic termination on the occurrence of a stipulated event are in conflict with the LRA and cannot be relied on to claim that the employee was not dismissed." *In NUM obo Milisa and Others v WBHO Construction*,[63] a *pro forma* contract which entitled a construction company to unilaterally decide when general workers were no longer required on site was ruled unenforceable because it gave the company unrestricted discretion to decide when that moment had arrived. The court's intervention proved to be inadequate; hence, there has always been a need for the regulation of the industry.

[62] (2009) 30 ILJ 664 (LC) para 46
[63] [2016] 6 BLLR 642 (LC).

CHAPTER 3
CRITICAL LITERATURE REVIEW
(AMENDMENTS IN THE LABOUR RELATIONS ACT AND THE IMPACT THEREOF)

3.1. Introduction

The major problem that led to the frustration of TES employees was *inter alia* the failure of the LRA to properly define the workplace to enable TES employees who were assigned to a client to exercise organisational rights, provide means to identify the real employer where the client and TES were involved; low wages, to address the disguised employment relationship; the automatic termination of contracts of employment, the continuous renewal of fixed-term contract and unfair dismissals without recourse.[64]

Whilst it is true that courts play an important role in addressing the problems the employees of the TES were facing, it is submitted that some of the decisions created even more confusion. *Mahlamu v CCMA*[65], illustrates such confusion whereby the CCMA Commissioner accepted that the clause in the employment contract that says that employment would terminate automatically if the client decides that it no longer wants the services of the employee was fair. In the circumstances, the Commissioner found that "no dismissal for the purposes of section 186 of the LRA had taken place because the client of the TES had indicated that the employee's services were no longer needed."[66] This is a clear indication that TES employees had no job security. To address these shortcomings, amendments were made to the LRA as a means to provide added protection for vulnerable employees in a triangular relationship and TES employees at large. The introduction of the amendments attempt to ensure an equilibrium between "employers' genuine objective economic need for temporary labour and society's interest in stability and employment security".[67] The Constitutional Court in *National Education Health & Allied Workers Union v University of Cape*

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[64] 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) *Samerc ILJ* 110.
[65] Mahlamu v CCMA [2011] 4 BLLR 381 (LC)
[66] Ibid para 23
[67] CCMA Specialist Training Course Material on Regulation of Non-Standard Employment 2017. Available https://webcache.googleusercontent.com/search?q=cache:mQ0iXnGPrE8J:https://www.caeo.co.za/wp-content/uploads/2019/04/CCMA-user-training-material-database-as-at-May-2018.docx+&cd=1&hl=en&ct=clnk&gl=za accessed on 17 August 2018

Town and Others[68] stated that "one of the core purposes of the LRA and Section 23 of the Constitution[69] is to safeguard workers and employment security, especially the right not to be unfairly dismissed."[70] The most relevant law in this regard is Section 198A of the LRA. The legislation ensures that any attempt to limit labour broking contracts to periods of less than three months with the intention to circumvent the deeming provision is forbidden.[71] In a nutshell, the above act provides that the "termination of an employee's service with a client, by either the TES or the client, with the aim of avoiding the operation of the provision or to prevent an employee exercising a right in terms of the LRA constitutes a dismissal".[72]

3.2. Overview of the Amendments

As stated earlier, prior to the amendments, Section 198 of the LRA was unable to effectively deal with pertinent issues relating to the commoditisation of TES employees, hence the first noticeable change is the definition of a TES. The amended Section 198 (1) of the LRA defines the TES as "any person, who for reward, procures for or provides to a client, other persons who perform work for the client, and who are remunerated by the TES." Section 198 (2) of the LRA stipulates that "for the purposes of this Act, a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person's employer." It is imperative to point out that the original section 198 of the LRA remains unchanged save for the additional subsections 4A; 4B; 4C; 4D; 4E; and 4F. Irrespective of earnings, all employees who are assigned to the TES enjoy the protection of section 198 of the LRA. The amendments in section 198 of the LRA, as well as its insertions, 198A to 198D provide increased protection to the categories of employees employed in non-standard relationships, i.e. "TES employees, fixed-term contract employees, and part-time employees respectively".[73] It is important to mention that such protection is afforded to employees after they have been working for a period of three months.[74]

3.2.1. Section 198 Amendments

The crux of the amendments of section 198 of the LRA was to ensure that the vulnerable workers of

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[68] National Education Health and Allied Workers v University of Cape town and others 2003 (3) 1 (CC)
[69] Constitution supra note 31.
[70] Ibid
[71] Section 198 A (5) of the Labour Relations Amendment Act 6 of 2014
[72] Ibid
[73] Supra see note 65
[74] Supra see note 65 Section 198A (1)(b)

the TES are assigned to render true temporary service to the client hence the insertion of Section 198A (3) (a) and (b) which stipulates that "for the purposes of this Act, an employee performing temporary service for the client, is the employee of the TES in terms of Section 198 (2) or if not performing such temporary service for the client, is deemed to be an employee of that client and the client is deemed to be the employer; and subject to the provisions of Section 198B, employed on an indefinite basis by the client."[75] The subject to section 198B simply means that for as long as there are justifiable reasons, a worker may be assigned to the client for a period exceeding 3 months. For example, where an assigned worker replaces an employee who is temporarily absent from work. The impact thereof is that in the event that the client is deemed to be an employer after the expiry of the three months, additional protection is applicable as the worker is considered to be employed indefinitely unless there is a valid fixed-term contract. A placed worker must be treated similarly to other workers of the client unless there are justifiable reasons for the differential treatment in accordance with Section 198D (2). A justifiable reason may include a consideration of "seniority, experience, length of service; merit; the quality or quantity of work performed or any other criteria of a similar nature".[76]

According to Section 198 (4) of the LRA, a "TES and the client are jointly and severally liable in respect of any of its employees for the contravention of a collective agreement, arbitration award that regulates terms and conditions of employment, provisions of the Basic Condition of Employment Act (BCEA) or the sectoral determination made in terms of the BCEA." It is submitted that this was the only protection available to vulnerable employees of the TES, hence the argument that added protection was an imperative requirement.

Joint and several liability simply means that parties are jointly liable, for the amount owing.[77] Proportionate liability, arises where parties are liable for only their portion of the obligation. "Under joint and several liability, a claimant may pursue an obligation against any one party as if they were jointly liable and it becomes the responsibility of the defendants to sort out their respective proportions of liability and payments. This means that if the claimant pursues one defendant and receives payment, that defendant must then pursue the other obligors for a contribution to their

[75] Supra see note 65 198A (3)
[76] Supra see note 65 Section 198D (2) (a) to (d)
[77] Supra see note 65

share of liability."[78] Section 198 (4A) of the LRA provides that "if a client of the TES is jointly and severally liable in terms of Section 198 (4) or is deemed to be an employer of an employee in terms of Section 198A (3) (b) of the LRA, the employee may institute proceedings against either the TES or client or both." If this section of the statute is purposively interpreted, it would appear that the joint and several liability now extends to unfair dismissals and unfair labour practice disputes. This is a significant development in the triangular relationship. However, it appears impractical to apply the joint and several liability principle where an employee seeks to enforce an order for reinstatement. It would appear that "the joint and several liability for the TES and the client as referred to in section 198 (4) may only arise during the first three months of employment when the TES is considered the only employer of the employee"[79] as reference is made to the TES being in breach of certain instruments i.e. Basic Conditions of Employment Act; Bargaining Council Collective Agreement; a Sectoral Determination or an award in terms of section 74 (5) of the LRA as amended.[80]

The legislation also creates the impression that the "joint and several liability" doctrine would not be applicable if the client contravenes the same instruments and that it does not apply in disputes relating to dismissal. However, the insertion of the law as contained in section 198 (4A) which also refers to the deeming provision in section 198 (3) (b) does create the impression that after three months of employment, TES and the client may be held "jointly and severally liable" for dismissal.[81]

In view thereof, it is clear that the inclusion of unfair dismissal in the joint and several liability doctrine is a new phenomenon that came with the new amendments hence this is a significant development with huge impact in this regard. It would thus seem that only an order for compensation may be made "jointly and severally" against the client and TES. It is submitted that before the deeming provision is triggered, only the TES may be obliged to reinstate the dismissed employee, but the joint and several liability principle may be applied where backpay is due. Once

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[78] CCMA Specialist Commissioner Training Course Material 2017 on Regulation of Non-Standard Employment. http://pmg-assets.s3-website-eu-west-1.amazonaws.com/80154_CCMA_Strategic_Plan_201516_to_2019to_2020_.pdf accessed on 10 March 2019 page 12
[79] Ibid
[80] Ibid
[81] Supra note 76 page 14

the deeming provision is triggered, the employee may proceed against either the client or TES or both, an employee may elect to be reinstated by either the TES or the client. Therefore, should there be backpay due following the reinstatement, an employee may recover same from either TES or client in terms of the "joint and several liability doctrine". Although the dual employer approach creates confusion about who the real employer is, the amendments have to a certain extent shed light on who the employer is in this regard.

Amendments also compel the TES to give the employees contracts of employment in line with Section 29 of the BCEA.[82] This is a very important development because the contract would clearly spell out the terms and conditions of employment. For the first time, arbitrators are empowered to scrutinise the employment contract to determine if it complies with subsection (4C).[83] The TES is therefore required to comply with the regulated employment conditions of the client.[84] Thus, the TES is forbidden from employing workers outside the provisions of the LRA or other regulations or laws that govern employment relationships. The changes came with a strict requirement that TES's must be registered in terms of the relevant law.[85] The fact that the TES is not registered cannot be used as a defence[86]. Thus if a TES has failed to comply with a regulated employment condition of employment, the TES cannot hide behind non-registration to avoid having to deal with a claim against it.

Section 198D of the LRAA as alluded to above, plays a significant role in the amendments as it provides the Commissioner with new powers to interpret and apply Section 198A to C of the LRAA. This grants Commissioners extensive new powers including; "the power to inquire into contracts and conditions of employment; the power to override certain contractual provisions by deeming fixed-term contract of employees to in fact be indefinite or permanent employees in their workplaces; the power to evaluate the reasons for fixing the term of temporary contracts and the power to identify comparable full time or standard employees and ensure that non-standard

[82] Supra 69 S 198 (4B)
[83] S 198 (4E)
[84] S 198 (4C)
[85] S 198 (4F)
[86] Supra note1

employees receive the same treatment and benefits".[87] The deeming provision is analysed in greater detail later.

Section 198A (4) of the LRAA has introduced a new type of dismissal. It provides that if the "employee's contract of employment was terminated in order to circumvent the deeming provision, such termination is a dismissal".[88]

3.2.2. Organisational Rights

The definition of the workplace has always been a problem that employees of the TES have faced. Prior to and even after the amendments, the LRA still defines workplace in all other instances except those relating to the public service to mean the premises where employees work.[89] The client's premises were and are still excluded in the definition. The client was not accountable for the conditions under which TES employees perform their duties; hence, it was easy to get rid of the TES employees without following any legal processes. The situation whereby a client despite the fact that it is a source of work, was not accountable by law for the conditions under which the TES employees were performing duties is not compatible "with the employment paradigm on which our system of labour relations is premised".[90] Theron[91] holds the view that the jointly and severally liable principle does not provide a solution to the problem of incompatibility, for as long as the premises of the TES continue to be regarded as the workplace of a placed worker, instead of the premises of the client. The reason is that the workplace is where workers should comfortably exercise organisational rights and even bargain collectively.[92]

In this regard, the amendments brought about a huge change to the effect that Section 21 of LRAA[93] has been amended to include employees working at the client's premises where organisational rights may be exercised. The change places the TES employees at an advantage because TES employees may exercise those rights in a workplace of either the client or TES

[87] CCMA Labour Law Amendment Resource Guide - November 2014, available https://www.worklaw.co.za/SearchDirectory/PDF/CCMA_LLAR_March_2016.pdf access on 15 July 2018 page 5
[88] Ibid page 8
[89] Supra note 1 Section 213 of the LRA as Amended.
[90] J Theron, 'Prisoners of paradigm: Labour Broking, the new services and non-standard employment' (2012) *Acta Juridica* page 58.
[91] Ibid
[92] Supra see note 89
[93] Supra see note 72

premises. It is submitted that such development is welcome because even without a specific change in the definition of the workplace, the manner in which section 21 (12) of the LRAA is structured, redefines the workplace as such that TES workers are now able to exercise organisational rights at the client's premises.

Another significant impact of the amendments finds expression in section 22 of the LRAA. The effect of the "changes to this section are such that, an arbitration award in an organisational rights dispute, in addition to being binding on the employer, may be made binding on the client of a TES".[94] The effect of this change as already mentioned above, is that "where the award is made binding on the client of the TES, the union will be entitled to exercise the organisational rights at the premises of the client and/or the TES".[95]

3.2.3. Picketing

The amended section 198 of the LRA, had a significant influence in the amendment of other sections of the LRA including section 69 (6). Picketing rules in section 69 (6) of the LRAA have also been changed so that the picketing rules established by the CCMA may allow employees to picket in a place which is not owned by the employer, provided that the person has been given a chance to make representation to the CCMA even prior to the establishment of the rules.[96] Once again, this amendment seeks to address problems that have always been encountered by picketers in places owned by landlords, such as shopping malls where owners of the malls "have previously been able to prevent picketing on their premises, by effectively removing the picketers from the vicinity of the employer's premises"[97]. The effect of the amendment is that TES employees, other than the fact that they may now picket at the premises of a client, the right to picket has been extended to the place or premises owned or controlled by the landlord.

3.2.4. Employment Service Act 4 of 2014

The importance of the ESA is that it provides for compulsory registration of private employment

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[94] Supra see note 69 s5
[95] CCMA Labour Law Amendment Resource Guide – May 2014.
[96] Supra see note 69 s69(9)
[97] Ibid

agencies, which includes recruitment agencies and TES.[98] The registration of TES's has never happened before, and was a huge development aimed at the regulation of the industry. Section 198 (4F) of the LRAA makes it compulsory that employment agencies are registered.[99] Subsequent to the registration, a certificate is issued as proof of successful registration. The rules of conduct that find expression in section 14 and 15 of the ESA respectively[100] prohibit any person from charging a fee to any work-seeker for the allocation of work. This has the effect of stopping the TES's from selling the workers to the lowest bidder or the commoditisation of workers. The Act further prohibits the TES from deducting any money from the salary of an employee or requiring or permitting a worker to pay any amount in respect of his placement with the client.[101] This was also a very important development because some unscrupulous TES's were unfairly deducting almost half of an employee's salary as a fee as *quid pro quo* for placement. The law also stipulates that any agreement in the triangular relationship, must show separately the salary that the employee will earn and the fee that the client is paying to the private employment agency which the TES is part of.[102] This development is very important to the employees of the TES because it prohibits TES's from deducting its commission from the worker's remuneration and also promotes transparency. The Act provides the registrar with powers to cancel the registration of an agency for failure to comply with the requirements of this Act or any regulations or prescribed procedures made in terms of this Act.[103] The effect thereof is that if the registration is withdrawn, the name of the TES is removed from the register of private employment agencies. The Labour Court has the jurisdiction to review the decision of the registrar.[104] This satisfies the requirement in section 198 (4F) of the LRAA which does not allow any person to perform the functions of a TES unless it complies with the registration requirements.

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[98] Employment Services Act 4 of 2014; Section 13.
[99] Supra see note 69
[100] Supra see note 99 section 14 and 15
[101] Supra see note 99 section 15 (4)
[102] Supra see note 99 section 15(5)
[103] Supra see note 99 section 18(1) .
[104] Supra see note 99 section 18 (3)

3.2.5. Conclusion

The amendments seem to provide extensive protection to those working for a TES as compared to the *status quo* prior thereto. In addition, the ESA provides strict regulations which if transgressed may see the TES registration withdrawn.[105] For the first time, the workers of the TES are able to practice and enjoy organisational rights at the premises of the client.

CHAPTER 4
THE DUAL EMPLOYER RELATIONSHIP

4.1. Introduction

The critical issue has always been the correct interpretation of section 198A (3) (b) (i) of the LRA, the principle that has always been known as the "deeming provision. Labour law experts and scholars are divided on this issue. Therefore, the Constitutional Court in *Assign Services (Pty Ltd) v NUMSA and Others*[106] was called upon to determine on the preponderance of probabilities whether a dual or sole employer relationship is formed, when the deeming provision that finds expression in section 198A (3) (b) is triggered. The converse position that the Constitutional Court had to examine, is "whether 198A (3) (b) creates a sole employment relationship between client and employee to the exclusion of the TES".[107] The majority Judges held that the deeming provision created a sole employer relationship, between the employee and the Client.[108] The decision has undoubtedly supported the arguments made in this dissertation that the amendments have a positive impact on the protection of vulnerable employees of the TES save to say that the judgement has loopholes and that the categorisation of vulnerability by such a small amount is questionable, as it leaves so many disparate employees who are unfortunately outside the ministerial threshold bracket still vulnerable.

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[105] Ibid para 101
[106] *Assign Services (Pty Ltd) v NUMSA and Others* [2018] 9 BLLR 937 (CC)
[107] Supra see note 104 para 1
[108] Supra see note 104 para 84

4.2. Dual or sole employer?

4.2.1. CCMA

The *Assign Services (Pty) Ltd v Krost Shelving and Racking (Pty)* and *National Union of Mine Workers of South Africa (NUMSA)*[109] matter came before the CCMA after 20 workers, (mostly NUMSA members), had been placed by the TES known as Assign Services (Pty) Ltd (Assign) with its client Krost Shelving And Racking (Pty) Ltd (Krost) for more than three months thus triggering the deeming provision.[110] The Arbitrator had to interpret section 198A (3) (b) (i) of the LRAA, to establish "whether after a worker earning below the threshold has been placed with the client for a period exceeding three months, the client becomes the sole employer".[111]

Assign and NUMSA expressed conflicting views in this regard. According to Assign the deeming provision creates a dual employment relationship so that the client and the TES are both employers.[112] NUMSA, argued differently, that for as long as the worker is not rendering temporary service to the client, the client must be considered as the sole employer.[113] The court found itself faced with a situation whereby it was clear that the section of legislation may be construed in support of both legal positions, the arbitrator in line with the Explanatory Memorandum favoured an interpretation that provides greater protection for the placed employees by TES's.[114] The Arbitrator rejected Assign's contention in favour of that of NUMSA that once employees ceased in providing temporary service after the third month, the client would be deemed the sole employer.[115] The Arbitrator further found that the commercial relationship between the Assign and Krost continues, but the award was unable to shed light on *modus operandi* in terms of how this would work. The Arbitrator preferred the sole employer construction on the basis that the dual employer would create confusion for the vulnerable workers in respect of who would discipline the assigned employees and whose disciplinary code would be applicable. As a result of its discontentment, Assign took the arbitrator's award on review to the Labour Court.[116]

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[109] *Assign Services (Pty) Ltd v Krost Shelving and Racking (Pty)* and *National Union of Mine Workers of South Africa* (2015) ECEL 1652-15 (Unreported).
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Assign Services (Pty) Ltd v CCMA and Others [2015] BLLR1160 (LC)

4.2.2. Labour Court

The Labour Court ruled in favour of the dual employer construction as Assign argued, thereby dismissing the Arbitrator's interpretation that section 198A (3) (b) (i) created a sole employer relationship. The Court held, the deeming provisions do not terminate nor nullify the contract between employees and TES.[117] The Labour Court's interpretation, stated that the deeming provisions create a dual employment relationship, the first relationship is between client and employees created by the LRA and the second employment relationship is between employees and TES, created by contract under common law.[118] In essence, the client, Krost, and the TES, Assign, both had attained a dual set of rights and legal obligations that operated equivalently. NUMSA's application to appeal the LC decision was denied. Subsequently, NUMSA successfully petitioned the Labour Appeal Court.[119]

4.2.3. Labour Appeal Court

The Labour Appeal Court (LAC) dismissed the dual employer construction and held that the client was the sole employer of the assigned employee after three months of temporary work. In the process, the LAC analytically examined the meaning of the term "temporary service."[120] The LAC concluded that section 198A (1), when defining who the employer is, is more concerned with the nature of service rather that the service provider or the recipient. Therefore, if a placed worker is not providing temporary service, he is not an employee of the TES but deemed to be an employee of the client in line with section 198A (3) (b). The Court held further that the "sole employer interpretation was in keeping with the explanatory memorandum accompanying the LRA Amendment Bill, tabled in 2012."[121] The Memorandum of Objects[122] was formulated in order to give credence, aim and objectives to the amendments. The key aim of the objectives was to balance, regulate and protect workers employed by TES, in quintessence, the amendments sought to ensure that the constitutional rights of employees were not circumvented.

One of the most fundamental impacts of the amendments dealt with the right of workers not to be

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[117] ibid
[118] ibid
[119] (2017) 38 ILJ 1978 (LAC); (2017) 10 BLLR 1008 (LAC)
[120] Ibid.
[121] Ibid.
[122] Labour Relations Amendment Bill, 2012.

unfairly dismissed. The determination of who the employer is between the client and TES has an essential connotation in regards to an employee/s right to protection against unfair dismissal and discrimination. As canvassed in Chapters 2 and 3, prior to the amendments, clients of the TES had untrammeled powers where they could unilaterally dismiss employees without any substantive or procedural outcomes. In the LAC, the court took cognisance of these factors in the interpretation of the deeming provisions. The LAC had to weigh up the best manner in the interpretation that would protect employees from unfair dismissals and unfair discrimination. This was critical in deciding whether a sole or dual employment relationship exists, as this was a determining factor for the protection afforded to employees after the three months' period expires.

The LAC held three critical essential points in its rejection of the LC decision of the dual relationship. The first point was that the intention of the amendments was to ensure that employees placed by TES's are treated equally to the permanent employees of the client.[123] Equal treatment ensures the employee's right to fair labour practices and ensures that the employees' dignity in the workplace is preserved. The second point that the court held was that TES's have had a historic overreach in their mandate, if the dual relationship is upheld then TES's cease to be Temporary employment services as envisaged by the LRA.[124] Thirdly the court stated that once an employee had exceeded three months and was employed by the client for an indefinite period then the position of the TES becomes redundant.[125] In summary the court wanted to protect the employees, to ensure that TES maintains its mandate as a temporary employment service but more importantly that workers are protected under LRA. Consequently the TES's are regarded as the employer only by name, and are reduced after 3 months to an agent/spectator with no say in the employment relationship between the employee and the client. [126] Dissatisfied with the decision of the LAC, Assign petitioned the Constitutional Court; in *Assign Services (Pty) v NUMSA*.[127]

[123] 2017) 38 ILJ 1978 (LAC); (2017) 10 BLLR 1008 (LAC).
[124] Ibid.
[125] Ibid.
[126] (2017) 10 BLLR 1008 (LAC).
[127] [2018] 9 BLLR 837 (CC)

4.2.4. The Constitutional Court Decision

This judgement consists of two conflicting decisions, firstly that of the majority written by Dlodlo A.J. and the minority written by Cachalia A.J. The issue to be determined was the proper interpretation of section 198A (3) (b) (i) of the LRA, whether the deeming provision supported a sole or dual employer construction.[128] Assign contended that the LAC decision constitutes a ban on labour broking which has a serious implication in the labour market.[129] Assign argued that the LAC did adequately consider the language of the deeming provision, the court failed to apply an actual textual interpretation, instead it applied a purposeful interpretation of the provisions.[130] This argument has credence, the Constitution[131] states that courts are there as the judicial authority and must "apply the laws, without fear, favour or prejudice." The courts have limitations, the courts limitations are to apply the law, the courts cannot create and can only expand on common law. It was therefore trite that the textual provisions be considered by the courts.

The word "deemed" is intrinsically abstruse, it must be properly scrutinised in its statutory context.[132] Assign argued that the LAC, "failed to properly consider section 198A (3) (b) in the context of the rest of section 198 and 198A in that the LRA still allows a TES to offer employment services after the three-month cut-off".[133] Assign argued that Section 198 (2) was not amended by section 198A. Thus the argument advanced by Assign meant that the TES still remains the employer of the worker even after three months.[134] Assign further argued that the sole employment interpretation does not grant employees better protection, in reality employees lose "protection of several provisions of the LRA", one of those section 198 (4A).[135] The argument advanced by Assign is a novel argument but it also points at the poor drafting of the legislation. Section 198(4A) is the jointly and severability clause, imposed on both the TES and the client, the adoption of the sole employment relationship interpretation eradicates this clause in terms of the employee's protection. The sole employment interpretation renders the above clause redundant as the TES is not an employer and therefore there is no legal relationship and all liability is extinguished.

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[128] Ibid.
[129] *Assign Services* Supra see note 106 para 29
[130] *Assign Services* Supra see note 106 para 29
[131] South African Constitution Act 106 of 1996
[132] *Assign Services* Supra see note 106 para 29
[133] *Assign Services* Supra see note 106 para 29
[134] *Assign Services* Supra see note 106 para 30
[135] *Assign Services Supra* see note 106 para 30

The contrast position put forward by NUMSA was that, Sections 198 and 198A produced two separate deeming provisions which could not function concurrently nor be reconciled.[136] NUMSA further argued that the sole employment relationship interpretation does not ban TES, but regulates the TES's, as truly temporary employment services. The amendments in their true form were introduced to protect the most vulnerable workers, workers that earn a minimum wage or below the threshold. It was important that the interpretation of the deeming provisions be conducted in a manner that protects the right to trade of the TES's, the right to freedom of contract, but most importantly protects the workers.

One of NUMSA's arguments was that the employment relationship between a TES and an employee only commences once the employee is placed with the client. The "TES becomes the statutory employer of the worker once they are placed".[137] This means that in the absence of the contract between the TES and the client, there is no employment relationship. In dealing with section 198A of the LRA, the Court stated that "it is trite that legislation is to be interpreted textually, contextually, and purposively"[138]. "The purpose of section 198A must be contextualised within the right to fair labour practices in section 23 (1) and (2) of the Constitution and the purpose of the LRA as a whole".[139]

The Court held that every provision of the LRA must be read in manner that provides clear and detailed structures through which both employers and employees can eloquently participate in labour relations. The CCMA, LC, LAC and the Constitutional Court acknowledged that section 198A (3) (b), on the appearance of it, deficiencies clarity and certainty.[140]

The Court went further to deal with section 198 (2) of the LRA which reads "a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer".[141] It stated that for "the purposes of section 198(2), it is immaterial whether an employee and TES enter into an employment contract. Once the employee provides a service to the

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[136] *Assign Services Supra* see note 106 para 31
[137] *Assign Services Supra* see note 106 para 32
[138] *Assign Services Supra see note 106 para 41*
[139] *Assign Services Supra* see note 106 para 42.
[140] *Assign Services Supra* see note 106 para 43
[141] Assign Services Supra see note 106 para 44

TES's client, it automatically becomes the TES's employee".[142]

Referring to the 1956 and 1995 LRA in its endeavours to deal with the controversy relating to the word "deemed," the Court said that "TES was expressly designated as an employer for the purposes of the LRA. Section 198A (3) (b) applies a different regime to employees who have provided a service for more than three months if they fall within the ministerial specified threshold. But section 198A (3) (b) does not proclaim that a worker "is" the client's employee".[143] Rather, the worker is "deemed to be the client's employee".[144] This does not mean that "deemed to be" is lesser than "is" as both sections are considered "deeming provisions".[145]

To bring even more clarity on this issue, the Court stated that, "labour legislation historically tended towards express allocations of employment law obligations to a single employer in both the 1956 and 1995 LRA, but this is no longer the case". Section 200B (2) of the LRA recognises that there may be more than one employer for the purposes of liability.[146] In terms of section 1 of the Occupational Health and Safety Act the client is regarded as the employer[147] (OHSA) with the TES being excluded from the definition of employer. However under the BCEA the TES is regarded as an employer. [148] In so far as sections 198A (3) (b) and 198 (2) are concerned, the two sections do not expressly refer to each other or indicate how they ought to relate.[149] The Court emphasised that "neither section is made subject to the other, nor is there explicit mention that the two sections can operate simultaneously."[150] The Court explained that to determine the true meaning of section 198 (3) (b), "it must be read in its context and in the light of its constitutional purpose."

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[142] Ibid.
[143] *Assign Services Supra* see note 106 para 45
[144] Ibid.
[145] Ibid.
[146] *Assign Services Supra* see note 106 para 46
[147] Act 24 of 1993.
[148] *Assign Services Supra* see note 106 para 46
[149] Ibid.
[150] *Assign Services Supra* see note 106 para 47

4.2.5. Cachalia A.J. does not agree

In her minority judgement, Cachalia A.J. provides reasons why the dual-employer interpretation is correct. The legislation does not specifically mention that the TES would no longer be the employer after the deeming provision has been triggered.[151]

Accordingly, if the drafters of section 198A (3) (b) had intended to achieve such legal position, they would have said it in plain language. According to Cachalia A.J., the dual employer interpretation provides added or greater protection for employees earning below the ministerial threshold which is the section's primary purpose.[152] In other words, the TES and client proceed jointly as employers after three months.

In arriving at her decision, Cachalia A.J. pointed to a number of adverse consequences of the sole employer relationship, as it is a well-known fact that she supports the parallel employer construction.[153] Firstly, there is no contract of employment that is concluded between the assigned employee and the client.[154] The employee only relies on the fact that he is deemed a permanent employee in line with Section 198A (3) (b) and a promise that the employee would not be treated "in less favourable terms" compared to employees that are directly employed by the client. The judges' observation is that if an employee is absorbed into the business of the client who has no comparator to be used as a yard stick, chances are that such promise cannot be measured.[155]

4.2.6. The Judgement left loopholes

Whilst the sole employer construction is correct, it bears mentioning that the judgement left many questions unanswered. Some of them were exposed in the minority judgement of Cachalia A.J.[156] The deeming provision in Section 198A (3) (b) (i) of the LRAA could be construed either way in that the sole or dual employer construction was theoretically possible. We cannot run away from the fact that the loopholes that we observe in the judgement are the consequence of poor drafting of the said piece of legislation. There is no reason why the drafters used the word "deemed" if the aim was

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[151] Assign Services Supra see note 106 para 92
[152] *Assign Services Supra* see note 106 para 91
[153] *Assign Services Supra see note 106 para 109*
[154] *Assign Services Supra* see note 106 para 101
[155] *Assign Services Supra* see note 106 para 102
[156] *Assign Services Supra* see note 106 para 30

that the client should "become" the sole employer.[157] It is not proper that when the Constitutional Court is called upon to interpret the law, finds itself required to do damage control as a result of poor drafting. The purpose of the amendment is clear as the Constitutional Court correctly pointed out that it was to "provide additional protection", to vulnerable employees of the TES, but the language used by the drafters undoubtedly created the impression that the intention of the legislature was to have a parallel employer relationship after the deeming provision had been triggered. However, it is not in dispute that the section can be interpreted either way. A purposive interpretation, to a larger extent, favours the sole employer construction. The Constitutional Court's interpretation of the word 'deemed' to mean 'is' appears more as damage control than a proper and sound interpretation based on the language of section 198A (3) (b) (i) of the LRAA. Cachalia A.J., correctly noted that the "deeming provision" is normally used in a statute to give the subject matter a meaning not ordinarily associated with it.[158] It is submitted that this reasoning makes a lot of sense, for example, if a person is not the biological father of a child, there is no way that he can be deemed the father of the child. Therefore you are deemed because you are in fact regarded as what you are actually not.[159] She insisted that if "the intention of the legislature was to make the client the sole employer after three months, section 198A (3) (b) (i) of the LRAA, "instead the deeming provision, could have been drafted such that it specifically mentions that after three months the TES ceases to be the employer."[160] Notwithstanding that, she agreed that the section can be interpreted to mean sole employer relationship.

Those who argue in support of the dual employer construction are of the view that looking at the word "deemed" in section 198A (3) (b) (i) of the LRAA, it means consider or regarded, therefore it should be read as enhancing or extending protection of the placed workers.[161] Irrespective of which side of the fence a scholar might be standing, they are in agreement that the source of the problem about the correct interpretation of section 198A (3) of the LRAA is the ambiguous manner in which the piece of legislation was drafted.[162] As a result, persuasive arguments can be made for either a

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[157] R Harper, T Mulligan, & J Horn "Where to for Labour Brokers-Third option for Constitutional Court by deeming section189A unconstitutional" available at https://www.mcmlegal.co.za
[158] Ibid:
[159] Ibid.
[160] *Assign Services Supra* see note 125 para 92
[161] Ibid.
[162] R Harper, T Mulligan, & J Horn "Where to for Labour Brokers-Third option for Constitutional Court by deeming section 189A unconstitutional" available at https://www.mcmlegal.co.ca accessed 12 June 2019

sole or dual employer construction.[163] This could have been prevented had the legislation been drafted to specifically indicate that the employee "would become" the employee of the client after the deeming provision had been triggered, instead of deeming the client an employer for the purposes of the LRA.[164] The LRA does not shed light on the role of the TES going forward if any.[165] Clearly, the vagueness of this section placed the Constitutional Court in a precarious position whereby it is perceived as guessing the intention of the legislature. As a result, this attracted negative comments like the one made by Cachalia A.J. in her minority judgement that, it is inevitable not to think that the interpretation is biased in favour of the union because compared to the TES, the union is perceived to be advancing the interests of vulnerable workers.[166] It is important to mention that the rule of law requires that acts or statutes must be drafted in a vivid and accessible manner in order to ensure legal certainty and transparency.[167] The courts should not be seen to be drafting legislation. In light of this conclusion, the court further stated that, "it is impermissible, as the majority judgement does, to attach an interpretation to the section which is not suggested by its context. To do so is an exercise in drafting, not interpretation. Drafting should be left to the legislature."[168]

In the *Assign* case, when interpreting the intention of the legislature, the CCMA Commissioner and the Constitutional Court placed its reliance on section 198A explanatory memorandum because the language of the section is vague, such that it could be interpreted in favour of both the dual or parallel employer relationship. As the Constitutional Court pointed out in *Bertie van Zyl*,[169] that for the Court to try textual surgery, would suggest it deviating from its constitutional responsibility. The court further stated that it is trite but true that its role is to review, rather than to redraft legislation.[170]

It is clear that the Constitutional Court's conceptualisation of the sole employment relationship after the deeming provision is only applicable at statutory level otherwise it does not hinder the

[163] Ibid.
[164] R Harper, T Mulligan, & J Horn "Where to for Labour Brokers-Third option for Constitutional Court by deeming section 189A unconstitutional" available at https://www.mcmlegal.co.ca accessed on 23 June 2019
[165] Ibid.
[166] Assign Services Supra see note 106 para 89.
[167] Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others (2010) 2 SA 181 CC para 100
[168] Ibid
[169] Ibid
[170] Ibid

continuation of the relationship between the assigned worker and the TES.[171] In any event, this is consistent with the words "under the LRA" and "for the purposes of the LRA" that are found in the judgement of the majority.[172] It also appears as if there is no "change in the statutory attribution of responsibility or liability in respect of claims under the BCEA and other statutes".[173] This continuous relationship between TES and worker which exists solely for the purposes of the BCEA and other statutes, in the exclusion of the LRA creates nothing but confusion and uncertainty. Whilst it is correct that the Constitutional Court had preferred the sole employer construction, it must be mentioned without any hesitation that the Court had failed to deal decisively with the question of who the employer is after the deeming provision kicked in. This failure should be attributed to the poor drafting of Section 198A. The Court's decision has left behind serious areas of confusion. For example, it remains unclear; "what becomes of the employee's accrued rights as against the TES if a client elects, at the point of deeming, to terminate its contractual relationship with the TES, causing the TES to fall out of the picture.

The majority judgement has failed to pronounce, for instance, that there is a transfer of rights and obligations as between the TES and the placed worker, to the client *vis*-à-*vis* placed worker. It is also not clear from the majority judgement what becomes of the common law contract concluded between the placed worker and the TES. The judgement goes no further than determining the position only in so far as the LRA is concerned.

It appears to be arguable, on the construction adopted in the majority decision, that any common law contract of employment concluded between the placed worker and the TES endures and may give rise to enforceable employment related to contractual claims vis-à-vis the TES. It appears likely that this question and others flowing from the Constitutional Court's judgement will form the subject of future litigation."[174]

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[171] R Itzkin "Assign Services (Pty) Ltd//NUMSA & Others, Observations: Implication of key findings in the Constitutional Court findings" available at www.adcorpgroup.com accessed on 23 June 2018.
[172] *Assign Services Supra* see note 106 para 81.
[173] Ibid.
[174] R Itzkin "Assign Services (Pty) Ltd// NUMSA & Others, Observations: Implication of key findings in the Constitutional Court findings" available www.adcorpgroup.com accessed on 23 June 2018.

4.3. Conclusion

As much as the loopholes in the judgement have been identified and discussed, in line with the purposive interpretation, it must be mentioned that the court decision has managed to address critical issues described in the explanatory memorandum accompanied by the proposed changes to section 198 of the LRA. As such, the Constitutional Court's preference of the sole employer construction was a victory for the vulnerable employees of the TES. The judgement provided some protection for the placed employees of which part is to ensure they are fully integrated into the workplace as employees of the client, in that placed employees automatically become employed on the same "terms and conditions" of employment applicable to the permanent similar workers of the client. This addresses some of the reasons raised by COSATU about why there should be a legislative ban of the TES industry, i.e. medical aid, bonuses, pension, equal salary for equal work, training etc.

CHAPTER 5
UNIONS STILL INSIST ON THE BAN OF TEMPORARY EMPLOYMENT SERVICE

5.1. Introduction

The debate about the complete ban of TES has been in existence for a long time. The protagonists in the South African labour fraternity have been engaged in vigorous debate pertaining to the regulation or total ban of the TES on the industry.[175] The debate continued despite the existence of the original section 198 of the LRA, which in my view regulated the industry in a very limited manner. In its original format, the LRA of 1995 applied to all workers regardless of the level of remuneration and the size of the client where they rendered service.[176] The LRA of 1995 provided that in instances where a TES procures other persons, for reward, to render services for a client, and where the TES is responsible to remunerate the workers, the TES is the *de facto* employer of the workers.[177] This original section was clear in its operation in so far as it merely clarifies who the employer is in the "triangular relationship" and removes the deeming provision of the LRA of

[175] I Mohammed "Labour Brokers-Real Remedies" (2010) *Without Prejudice : Labour Law* 48.
[176] C Aletter & PBS Van Eck "Employment Agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisation?" 2016 SA Merc LJ 285
[177] Ibid

1956.[178] Furthermore, workers received limited protection only in so far as both the TES and client being "jointly and severally liable" in respect of the transgressions of collective agreements and the provisions of the BCEA.[179] Amongst others, the major stumbling blocks in protecting TES employees were that the client and the TES were only liable for unfair labour practices or unfair dismissal of the TES workers; TES employees often received comparatively less salaries than their counterparts who were in direct employment of the client; they were excluded from the medical aid benefit; and they were excluded from the pension fund benefit, and even though the TES work was meant to be temporary in nature, it was widely used for employment that was indefinite in nature; and most of the workers were unsure about who the employer was, whether it was the TES or the Client.[180]

In October 2009, at NEDLAC parties had engaged in robust discussions relating to the issue of ban or the regulation of the industry, and as expected, they could not agree on future reforms.[181] COSATU and NACTU were for the legislative ban of TES. Whilst, organised businesses and FEDUSA wanted the existing *modus operandi* to be kept but conceded that meaningful regulations were required.[182] The quarrelsome debates amongst the stakeholders between 2007 and 2014 resulted in eventual reforms that witnessed the LRAA 4 of 2014 becoming effective as from 1 January 2015. In the previous chapter, the amendments and other relevant statutes were discussed. It was demonstrated how the Constitutional Court decision impacted the amendments in relation to who the employer is after the deeming provision has been triggered. The question is whether the unions' arguments about the ban still have a place in our labour fraternity.

5.2. Arguments in favour of the ban of the TES

COSATU and other unions were at the front of the fight for the total ban of TES. On 6 March 2012, in anticipation of strike action, the General Secretary of COSATU, Zwelinzima Vavi (Vavi) in his address gave reasons why there should be a legislative ban of TES.[183] It would appear that his argument encompasses all the relevant and important issues in this regard, According to Vavi,

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[178] Ibid.
[179] Ibid.
[180] Ibid.
[181] PBS Van Eck "Temporary Employment Service (Labour Brokers) in South Africa (2012) *PER* 13(2) 107-204.
[182] Ibid .
[183] V Zwelinzima "COSATU General Secretary's address to the National Press Club, CSIR International Convention Centre" (2012) available at www.politicsweb.co.za accessed on 14 September 2019

TES's are guilty of casualisation of labour for the purposes of selling workers to clients as objects to make profits. In the process, employees' salaries would be reduced in order to convince the client to agree to a deal. Such conduct is in violation of the decent work agenda. TES's collude or enter into agreements with employers or clients to convert permanent employment to casual jobs to enable clients to circumvent labour laws. The victims in such transactions are always black people and youth. When such agreements are negotiated, the prospective worker who would be assigned to the client is excluded. In the circumstances, employees are deprived of the opportunity to negotiate their wages. The practice takes away employees' constitutional rights to fair labour practice and their rights to bargain collectively. Employees' rights to receive equal pay for work of equal value is completely violated. TES's are used to assist their clients to reduce employees' wages in order to reduce the costs of running the business at the expenses of the workers. Notwithstanding the fact that for all intent and purposes, the client is the true employer, workers are unable to enforce their rights against the client. He further argued that it would not be advisable to regulate the TES industry because the department of labour fails to even enforce existing legislation. Therefore, to ban the TES industry is more convenient.[184]

5.3. Arguments against the Ban

Even though there are arguments against the ban, it appears as if there has always been consensus about the fact that workers of TES's were suffering tremendous exploitation by some of the agencies. The CAPES, which represents a larger number of TES's, consistently argued that the existing laws are adequate to protect the TES employees.[185] CAPES placed the blame squarely at the door of the Department of Labour. Instead of a ban, CAPES proposed a statutory Private Employment Agency Council to license and regulate the TES industry and the establishment of pension fund for those falling outside the scope of existing bargaining councils and sectoral determination.[186] According to CAPES in its endeavours to counter the COSATU argument, it stated that statistically, since the year 2000 TES's have placed about 3.5 million temporary, part-time, and contract employees with various clients.[187] Approximately 2 million of the said workers

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[184] Ibid
[185] Harvey, S "Labour Brokers and Workers' Rights: Can they co-exist in South Africa" (2011) 128 *SALJ* 100.
[186] Ibid.
[187] CAPES "11 Myths behind COSATU's war on labour broking" (2013) available at https://.politicsweb.co.za accessed on the 17 May 2019

were employed for the first time, 92% were Africans, and 85% were youth aged between the ages of 18 and 35. More than 32% of these workers had obtained traditional, permanent jobs within 12 months, and 47% achieved same within a period of 3 years.[188] Services SETA revealed that in 2008 and 2009 respectively, TES's contributed the sum of R415 million to the National Skills Fund.[189] Moreover, according to Statistics SA, "atypical employees represent between 13.1% and 59.2% of total sector employment in South Africa, with the highest proportions of atypical employees found in construction (59.2%), wholesale and retail industry (42.8%), and transport and communications (39.7%)".[190]

In support of CAPES and to down play COSATU's valid argument, the Business Unity South Africa (BUSA) submitted that only a small number of TES's are to blame for the exploiting of contract workers and that TES is an important form of job creation.[191] BUSA correctly stated that TES is a significant type of employment and is required for businesses to compete with low wages paid by countries like China and Brazil.[192] According to BUSA, standard employees are a big expense for a business, and, due to rigid labour laws and the union's unrealistic demands, it is difficult and burdensome to keep permanent employees in the business[193] This argument was also raised by ADCORP in 2014, which showed a decrease in permanent jobs increase temporary employment. BUSA's argument was also that TES should be regarded as a solution for "poverty and poor economic growth in South Africa".[194]

5.4. Could banning be a solution?

It is an undisputed truth that most of the issues raised by COSATU in Vavi's thirteen reasons why there should be a total ban on TES have been addressed. However, the TES has become a significant industry to the extent that a complete ban could be disastrous to our staggering economy. The Chief Operations Officer of CAPE stated that "TES is a massive industry and requires the highest level of engagement to ensure an equitable outcome for all role players, but most of all, for

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[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Y TJoubert & B Loggenberg 2017, "The Impact of changes in labour broking on an integrated petroleum and chemical company" (2017) *Acta Commercii* 17 (1) ,441, available at https://doi.org/10.4102/ac.v17i1.441 accessed on the 14 August 2018
[192] Ibid.
[193] Ibid.
[194] Ibid.

the employee."[195] If all parties agree that there is a crisis, it becomes easier to find the solution. In South Africa, we derive comfort from Namibia, because it has been in a similar situation regarding labour broking and we share a similar political pedigree; therefore, it is wise to learn from their experiences.

5.4.1. A lesson from Namibia

The Namibian TES industry has a long history of slavery and unfair treatment of workers. Workers who at that time were referred to as natives were forced to stomach difficult working conditions whilst earning salaries that were next to nothing, with no benefits and no protection from unfair labour practices.[196] In view thereof, the Namibian government took a decision to ban labour broking completely.[197] It is important to mention that "section 28 of the Namibian Labour Act of 2007 does not recognise labour hire or a third party in the employment relationship".[198] In 2007, in the case of *Africa Personnel Services v Government of Namibia and Others,* the Namibian High Court ruled that "it is illegal to conduct business as a TES because the employment contract has only two parties."[199] Africa Personnel Services was unhappy with this decision and appealed to the Namibian Supreme Court of Appeal. In *Africa Personnel Services v Government of Namibia and Others*, it was claimed that "it is unconstitutional to deprive a company of economic activity and the right to conduct business and provide employment."[200] The Court ruled that "section 128 of the Namibian Labour Act is unconstitutional and that current labour hire activities cannot be compared with labour hire during colonial times."[201] The ruling also mentioned that "TES is a major part of economic activity and should rather be regulated, as prescribed by the ILO's Private Employment Agencies Convention (No. 181 of 1997)."[202] The Namibian legislation was only amended in 2012. Consultation between the Namibian Government and ILO experts resulted in the enactment of the Labour Amendments Act 2 of 2012 and Employment Service Act 8 of 2011.[203]

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[195] Supra see note 188
[196] CAPES "11 Myths behind COSATU's war on labour broking" Supra see note 188
[197] Ibid
[198] Ibid.
[199] Ibid.
[200] ibid
[201] Ibid.
[202] Ibid.
[203] PBS Van Eck "Temporary employment services (Labour Brokers) in South Africa and Namibia" (2012) *PER* 13(2) 107-204.

5.4.2. Ban or not ban?

The most important issue to consider in the debate on whether to ban or not is the South African economy. Our energy should be used in trying to improve the country's economic growth and unemployment, particularly of the youth. In so doing, we must encourage companies to grow their businesses, with the full understanding that in our Constitution, freedom of trade and choice of occupation or profession is guaranteed in section 22.[204] It is not in dispute that the TES is a multibillion-rand industry. Similarly, it is not in dispute that the exploitation of the TES workers is a reality. Courts have tried to intervene, and the intervention of the legislature was of paramount importance; hence, the amendment of section 198 of the LRA and other relevant statutes.[205] If we learn from the Namibian situation, it would be unconstitutional to legislatively ban TES's because that would be a violation of the right to freedom of trade. However, there must also be an equilibrium between the latter and the right to fair labour practices in section 23 of the Constitution.[206] The amendments have played an important role in achieving this goal. Therefore, employees of TES's must be protected against all forms of exploitation. The law makes provision for the regulation of the industry. The fact is that "Namibia and South Africa are members of the ILO and, they are obliged to comply with relevant international law norms."[207] In the Decent Work Agenda policy the ILO adopted the "Private Employment Agencies" Convention Number 181 with the stated purpose of allowing the operation TES and the protection of workers.[208] The ESA[209] was promulgated to regulate the TES industry in South Africa.

5.5. Conclusion

In light of the arguments that have been revealed in this discussion paper, it has become apparent that to ban is impractical. The "most important thing is the extent to which the TES practice is regulated to meet essential components of the rule of law, fair labour practices, equal treatment, socio-economic emancipations and labour rights."[210] In a proper analysis of the arguments by those who are for and those against the ban, it would appear that there are no compelling reasons for the ban of the TES industry. The ban is not supported by any legislation. Unemployment particularly

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[204] The Constitution of the Republic Act 108 of 1996
[205] Labour Amendments Act 6 of 2014.
[206] PBS Van Eck Supra see note 204
[207] Ibid
[208] CAPES "11 Myths behind COSATU's war on labour broking" Supra see note 188
[209] Supra see note 260
[210] K O Odeku "Labour Broking in South Africa : Issues Challenges and Prospects" (2015) *J Soc Sci* 19-24.

that of the youth, is alarming. In South Africa, we need to create jobs. The TES industry contributes immensely toward achieving that goal. Therefore, a legislative ban is not viable. When the Namibian Government attempted to forbid TES through legislation, it failed. The Supreme Court of Appeal of Namibia, ruled that the law that prevented labour broking from operating was unconstitutional, and concluded that such prohibition interfered with the "companies right to manufacture and do business",[211] similar to section 22 of the Constitution which guarantees everyone the right to trade and choose their occupation and profession freely.[212] It is submitted that if the South African government could attempt the same, the decision might not stand constitutional scrutiny. According to the limitation clause in section 36 of the Constitution,[213] "the rights in the bill of rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including the nature of the right, the importance of the purpose of limitation, the nature and the extent of limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose."[214] Otherwise, there is no law that may limit any right that is enshrined in the bill of rights. It is submitted that, to regulate the TES industry constitutes less restrictive means to achieve the purpose of preventing the exploitation of TES workers.

[211] C Aletter & PBS Van Eck Supra see note 177
[212] South African Constitution Act 108 of 1996.
[213] Ibid.
[214] Sec 39 of the South African Constitution 1996.

CHAPTER 6
CONCLUSION

6.1. Introduction

The main purpose of this dissertation was to examine the amendments to demonstrate that they have a significant impact in the workplace and that parallel employer construction is not sustainable. The protection might not be adequate, but it has been established that the amendments have provided enormous protection to vulnerable employees. However, there is still room for improvement. The dissertation further demonstrates that the ban of TES is impractical, unconstitutional and has the potential to collapse the economy of the country. Furthermore, there are no compelling reasons for the legislative ban. Credit must go to both the amendments and courts intervention, particularly the manner in which section 198A (3) (b) of the LRAA has been interpreted.

6.2. Findings of the Research

The amendments have, to a larger extent, addressed the issue of job security. There is now certainty with regard to how vulnerable employees are to be remunerated and who the employer is. The Constitutional Court[215] interpreted section 198A (3) (b) of the LRAA to mean that after the deeming provision kicked in, the client becomes the sole employer of the placed employee only for the purposes of the LRA, and the worker is integrated into the business of the client. In other words, placed employees are to be treated in no less favourable terms than the permanent employees of the client. The implication thereof is that placed workers are entitled to all the benefits that are enjoyed by similar employees of the client, such as equal pay for equal work, medical aid, and pension funds if applicable. TES employees are also protected by the National Minimum Wage Act.[216]

The amendments also influenced the changes to the BCEA and the promulgation of the Employment Service Act,[217] which is aimed at regulating the TES industry. As a result, unlike before, the TES industry is regulated. The effects of the regulations amongst other things are that TES's must be registered, and must not deduct any fee from the wages of their employees as *quid*

[215] (2018) 9 BLLR 837 (CC).
[216] The National Minimum Wage Act 9 of 2018.
[217] Labour Relations Amendment Act 4 of 2014.

pro quo for placement irrespective of the deeming provision.[218] This is a massive development in ensuring greater protection of TES employees.

Another positive impact is that the deeming provision ensures that employees may now provide genuine temporary service, otherwise, after three months, they are deemed to be permanent employees of the client for the purposes of the LRA. They will no longer work for the client indefinitely without any defined status being moved from client to client. Should the TES or client terminate the services of the worker with a view to circumventing the deeming provision, such conduct constitutes a dismissal of which an employee has a recourse. Under the circumstances, both the client and TES are "jointly and severally liable".

The amendment of section 21 of the LRA[219] allows the unions to obtain organisational rights from either the TES or client depending on where the worker is located.

In light of these developments, it is submitted that the amendments have had a positive impact on the widespread practice in relation to TES employees. As demonstrated in the previous chapter, the total ban of the TES industry is not the solution and deserves to be rejected. It is now left to the unions and the Department of Labour to ensure that the amendments are implemented effectively.

6.3. Recommendations

It is recommended that the legislature must intervene to address the loopholes that have been identified in Chapter 4, for instance, it remains unclear what happens to the employee's rights against the TES, should it happen that when the deeming provision kicks in, the client chooses to cancel the commercial contract with the TES which results in the TES no longer forming part of the triangular relationship. It must also clarify whether the rights and obligations existing between the TES and the assigned employee are transferred to the client. It must also provide answers on what becomes of the common law contract concluded between the placed worker and the TES, as the Constitutional Court in *Assign* case determined the legal position only in so far as the LRA was concerned.[220] The legislature must also revisit the threshold, as it excludes many vulnerable

[218] Employment Service Act 4 of 2014; section 15.
[219] Supra see note 1, section 21(12).
[220] (2018) 9 BLLR 837 (CC).

employees who earn slightly above it.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

30 June 2017

Mr Mandlakhe Florian Khawula (204516078)
School of Law
Howard College Campus

Dear Mr Khawula,

Protocol reference number: HSS/0942/017M
Project title: How do the 2015 LRA amendments impact on widespread practice in relation to TES employees?

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, 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

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Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Ms Rowena Bernard
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak