A Critical Analysis of Temporary Employment Services in terms of Current Legislation

by

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Supervised by Ms Nicci Whitear-Nel

DECLARATION

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

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ABSTRACT

This paper focuses on the protection of vulnerable employees in South Africa, especially in regard to Temporary Employment Services (hereinafter referred to as "TES").

The protection of employees against unfair labour practices is crucial for job security.[1] According to Odeku, "decent work and decent conditions of employment are components of sustainable socio-economic development frameworks around the world."[2] However, according to Van Eck, "over the past two decades, business owners in South Africa have increasingly sought to 'externalise' the traditional full-time, permanent, employer-employee relationship into a triangular labour broker connection"[3] and "this [is done] when [TESs] make employees available to [clients] (third parties) and the client assigns duties to the employee and also supervises these services."[4]

The tripartite relationship involving the TES is regulated by s 198 of the Labour Relations Act[5] (hereinafter referred to as "LRA"). A TES is defined as a person who for reward, provides to a client, persons to render services to or to perform work for the client and obtains remuneration from the TES.[6] This triangular relationship is established by an employment contract (which forms the basis of the employment relationship) and a commercial contract between the TES and the client.[7] In terms of this relationship, the employee provides his or her services to a client, and such relationship is then regulated by a commercial contract between the client and the TES.[8] Van Eck stipulates that in such a case, the TES entering into an employment contract with the employee administers the payroll and deducts taxes from the employee's remuneration and "the commercial agreement usually incorporates a clause that such agreement will continue only for as long as the client needs the services of the employee".[9] Thus there is no contractual relationship between the client and the employee, even though the client supervises the services of the employee.[10] The Labour Relations Amendment Act 6 of 2014 (hereinafter referred to as

[1] KO Odeku 'Labour broking in South Africa: Issues, Challenges and Prospects' (2015) *J Soc Sci*, 43(1): 19-24 20.
[2] Ibid.
[3] BPS Van Eck 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010) *PER/PELJ* (13) 2 108.
[4] Ibid.
[5] Labour Relations Act 66 of 1995 (hereinafter referred to as the "LRA").
[6] Section 198(1) of the LRA.
[7] E Gericke 'Temporary Employment Services: Closing a loophole in Section 198 of the Labour Relations Act 66 of 1995' 99.
[8] Ibid.
[9] Van Eck (note 3 above) 108.
[10] Ibid.

the “LRAA”) came into effect on the 1 January 2015 and made changes to the law relating to the regulation of tripartite relationships. The amendments to s 198 will be discussed in this dissertation and in particular, there will be an analysis pertaining to whether these changes provide adequate protection to vulnerable employees engaged by TESs.

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CHAPTER 1: INTRODUCTION

1.1.Introduction

According to Theron, TES comprises of a scenario where a client provides work for the employee but is not accountable for the conditions in which the TES employees work in; this is referred to as non - standard employment.[11] The workplace was considered the place where the employees worked and the employer was the person in actual control of the workplace until about the 1900s.[12] Such employment was in line with the legal definition of "workplace."[13] When explaining "non-standard employment", Theron used the term "externalisation" to describe the form of employment where the conditions of work are regulated by an ordinary commercial contract and not an employment contract.[14] Prior to the LRAA, South Africa's system of labour regulations was built around a binary relationship (opposed to a triangular relationship).[15] According to Van Der Burg,[16] a standard employment relationship entails that the employment is full-time and the employee has one employer, that the employee works on the employer's premises, that the employment is ongoing and that an employment contract is in place. The addition of the TES in this triangular relationship does not equate to a standard relationship.

Therefore, the use of TESs in South Africa led to those employees engaged by TESs being left without adequate protection. Further to this, the rights afforded to the standard employees were not available to the non-standard employees such as; the right not to be unfairly dismissed or not to be subjected to unfair labour practice;[17] the onus of the employer to prove that the dismissal was fair once the dismissal is established by an employee;[18] and the remedies (an order to the employer to re-instate the employee, to re-employ the employee or to pay compensation) available upon the establishment of an unfair dismissal or unfair labour practice.

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[11] J Theron 'Prisoners of a paradigm: Labour broking, the 'new services' and non-standard employment. Reinventing Labour Law' (2012) *AJ* 59.
[12] Ibid60.
[13] Section 213 of the 1995 Act defined "workplace" as the place where the employees of the employer work.
[14] Theron (note 11above) 65.
[15] Ibid67.
[16] A Van Der Burg 'A case study of Labour Brokerage on Fruit Farms in Grabouw' (2009) _www.wfp.org.za (Last accessed on the 22 December 2016).
[17] Section 185 of the 1995 LRA. The meaning of "dismissal" and "unfair labour practices" is set out in s 186 of the LRA.
[18] Section 192 of the LRA.

The rights that are mentioned in this paragraph are crucial to job security as highlighted by Odeku.[19]

The rise in casualization in South Africa is a result of employers attempts to avoid a standard employment relationship and the obligations incorporated into this relationship.[20] As Van Der Burg[21] stated, the law provided mainly for the standard employment relationship without taking into account TES employees.[22] In most cases the TES employees were prejudiced as they did not have access to the right not to be unfairly dismissed or to be protected against unfair labour practices (as will be discussed in the dissertation). In an attempt to avoid circumvention of the employees' rights and in view of the constitutional right to choose one's trade and profession, Parliament chose to regulate TESs rather than ban TESs from operating.

1.2 Aims and Objectives

This mini – thesis aims to explore and to analyse the Labour legislation dealing with TESs. The history and conception of TESs are highlighted and the development of the law relating to the protection of the TESs employees' rights. This mini-thesis further aims to provide recommendations (extracted from various legal writings and court cases) which are able to develop the law and provide solutions to the gaps in the law.

1.3 Research Questions

The research questions in this dissertation are: a) whether the amendments to s 198 of the LRAA provide adequate protection to the employees engaged by TESs and; b) are there any ways in which the gaps in the current legislation can be rectified.

1.4 Research Methodology

This is a quantitative, book-based study. Primary and secondary sources from the library and the internet will be analysed. No original information will be collected.

[19] Odeku (note 1 above) 20.
[20] Van Der Burg (note 16 above) 18.
[21] Van Der Burg (note 16 above) 21.
[22] Van Der Burg (note 16 above) 22.

1.5 Structure of Dissertation and Chapter Outline

Chapter One gives an introduction into TES's and the nature of the employment it entails.

Chapter Two discusses the International Labour Organisation (ILO) and the influence of International law in South Africa. This is highlighted in order to consider whether South African law is consistent with international standards relating to TESs. Namibian law, which has close similarities to South African law, is also discussed in this chapter.

Chapter Three sets out the history of TESs in South Africa and the laws that regulate them. It indicates the changes that occurred in the law over the past years which led to the enactment of the LRAA. The issues relating to TESs and the non-regulation thereof is also set out in depth.

Chapter Four discusses the changes that are brought about by the LRAA and case law dealing with this Act. It also analyses whether the current labour legislation is adequate in addressing the issues set out in Chapter Three.

Chapter Five sets out the conclusion which entails a summary of each chapter in this dissertation and provides an answer to the research questions. It further sets out recommendations to bridge the gaps identified in the dissertation.

CHAPTER 2:

THE ROLE OF THE ILO AND THE POSITION IN NAMIBIA REGARDING TESs

2.1. The ILO

2.1.1. Introduction

The ILO was created in 1919 and is seated in Geneva.[23] "The main aims of the ILO are to promote rights at work, encourage decent employment opportunities and enhance social protection."[24] It attempts to achieve these aims "by bringing together governments, employers and [employees] to set labour practices [and develop] policies."[25] The ILO has three main parts, namely, "the International Labour Conference, the Governing body and the International Labour Office, which comprise governments', employers' and workers' representatives."[26] Despite the existence of the different functions of the respective bodies, each one has the ultimate aim of establishing international standards for decent work in the world.[27] The International Labour Conference is the highest organ of the ILO and meets annually in Geneva. The ILO has created many conventions and policies regarding TESs in an attempt to ensure decent work.[28] There were various conventions adapted over a period of time which eventually encouraged the regulation of TESs, as TESs played a role in reducing the unemployment rate in economies. In this chapter, the various ILO Conventions are discussed, which highlight the role of TESs in society and reflects upon the fact that regulation thereof is crucial. The specific conventions are discussed in the paragraphs below.

2.1.2. Unemployment Convention 1919

This was the first instance in which TESs were recognized on the international plane and given approval at a certain level. However, the drafters of the convention never had the intention that

[23] International Labour Organisation 'Origins and History' http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (Last accessed on 20 December 2015).
[24] International Labour Organisation 'How the ILO works' http://www.ilo.org/global/about-the-ilo/how-the-ilo- works/lang--en/index.htm (Last accessed on 20 December 2015).
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.

the brokers should make a profit, as the convention did not permit a fee.[29] Each member which ratified the convention had to establish a system of free public employment agencies under the control of the central authority.[30]

2.1.3. Fee Charging Employment Agencies Convention 1933

This convention banned brokers who charged fees with the view of making a profit.[31] The convention stated that the role of the TES is to place workers with clients and stipulated that brokers for profit had to be abolished within a three-year period.[32] According to Muvanga,[33] the convention displayed a good regulatory system regarding nonprofit brokers. Benjamin[34] conceded that this convention was given little support by the members of the ILO. "Fee-charging employment agencies not conducted with a view to profit [were] required to have authorisation from the competent authority and was subject to the supervision of the said authority; [could] not charge [more than] the scale of charges fixed by the competent authority with strict regard to the expenses incurred; and [could] only place or recruit workers abroad if permitted to do so by the competent authority and if their operations were conducted under an agreement between the countries concerned."[35]

2.1.4. Fee-Charging Employment Agencies Convention 1949

This convention revised the 1933 Convention discussed in the preceding paragraph. If member states were going to abolish the fee charging TESs, then it had to be done within the regulatory mechanisms and within the prescribed three-year period. The TESs had to be regulated by a competent authority and could only charge fees within a scale that was agreed upon by the said authority.[36] In terms of this convention, if the member state decided to abolish the fee charging agent, they had to set up a public employment agency first.[37] The writer is inclined to come to the conclusion that this was an indication that TESs were a crucial part of the labour economy

[29] RA Mavunga, University of Pretoria, 2010, Critical Analysis of Labour Brokers: Should they be regulated or banned in South Africa, LLM Dissertation, 8.
[30] http://www.ilo.org/dyn/normlex/en/ (Accessed on the 15 December 2015).
[31] Mavunga (note 29 above) 9; Article 1 of the Fee-Charging Employment Agencies Convention 1949.
[32] Article 3 of the Fee-Charging Employment Agencies Convention 1949.
[33] Mavunga (note 29 above)10.
[34] P Benjamin. 'Untangling the Triangle: The Regulatory Challenges of Triangular Employment' (2009) Preliminary Draft for Presentation to the "Regulating Decent Work Conference in Geneva" 11-12.
[35] (note 24 above).
[36] Mavunga (note 29 above) 11.
[37] Ibid; International Labour Organisation 'Private Employment Agencies Temporary Agency Workers and their contribution to the Labour Market' (2009) Issues Paper for discussion at the Workshop to Promote the ratification of the Private Employment Agencies Convention 1997 (No. 181) 4-6.

and that they were necessary to curb job losses at the time. Therefore, this convention regulated the obligatory step of setting up a public service agency, even if the member state decided to abolish the TES industry.

2.1.5. Homework Convention 1996

A "home worker" is defined as a person who provides a product or service in their home or other premises, excluding the premises of the employer. This is done irrespective of which party provides the equipment (either the home worker or the employer).[38] The term "employer" means a person who either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity.

This Convention[39] "provides protection for home workers, giving them equal rights with regard to workplace health and safety, social security rights, access to training, remuneration, minimum age of employment, maternity protection, and other [labour] rights". Article 4 sets out the various rights that are afforded to the home worker:

> "(a) the homeworkers' right to establish or join organizations of their own choosing and to participate in the activities of such organizations;
>
> (b) protection against discrimination in employment and occupation;
>
> (c) protection in the field of occupational safety and health;
>
> (d) remuneration;
>
> (e) statutory social security protection;
>
> (f) access to training;
>
> (g) minimum age for admission to employment or work; and
>
> (h) maternity protection".[40]

[38] Article 1 of the Homework Convention 1996; Mavunga (note 29 above) 11.
[39] Preamble to the Homework Convention 1996.
[40] Ibid

The member state has control over the extent of implementation of these rights, by means of enacting national laws in terms of Article 5.[41] The member state exercises the implementation of these rights and subsequently impacts the laws governing TESs. Thus even if the member state is not part of any of the Conventions, national law can regulate TESs. South Africa has adopted legislation which is in line with the Conventions.[42]

2.1.6. The Private Employment Agencies Convention of 1997

"One purpose of this Convention is to allow the operation of private employment agencies as well as the protection of the workers using their services, within the framework of its provisions."[43] Article 1 sets out that the meaning of "private employment agency" as follows:

> "Private employment agency [referred to] any natural or legal person [who provided] one or more of the following labour market services:
>
> (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
>
> (b) services consisting of employing workers with a view to making them available to a third party, [who] may be a natural or legal person (referred to below as a 'user enterprise') which assigns their [employment] and supervises the execution [thereof]"[44].

This article introduced the acceptance of the TES and allowed its operations, provided that the content of this Convention was promulgated into the member state's national laws. This supported the ILO's attempts to regulate rather than ban TESs. According to this convention, the TES's employees should not be denied the right to freedom of association or collective bargaining.[45] Article 5 of this convention sets out that "a Member shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability".

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[41] The national policy on homework shall be implemented by means of laws and regulations, collective agreements, arbitration awards or in any other appropriate manner consistent with national practice.
[42] Such as the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 11 of 2002.
[43] Article 2 of the Private Employment Agencies Convention of 1997.
[44] Ibid.
[45] Ibid Article 4.

2.1.7. Do the ILO conventions apply to South Africa?

In 1919, South Africa was one of the founding members of the ILO. However, due to the enactment of apartheid laws and because of political pressure from the members of the ILO, South Africa withdrew its membership in 1964.[46] South Africa remained isolated for a period of thirty years until it was readmitted as a member on 26 May 1994.[47] Today, the ILO has an office in Pretoria.[48] "South Africa is a member of the Governing Body and also chairs the Africa Regional Committee of the Africa Group (ARLAC) and also participates in ILO Sub-committees."[49] In order for any convention to be applicable to South Africa, the national law of South Africa would have to incorporate the content thereof. In South Africa, the highest law of the land is the Constitution of the Republic of South Africa Act 108 of 1996[50] (hereinafter referred to as the "1996 Constitution"). The 1996 Constitution provides that when interpreting the Bill of Rights,[51] a court, tribunal or forum must consider International law.[52] South Africa is a member of the ILO and is therefore expected to give effect to the obligations set out in the ILO conventions.[53]

2.1.8. Conclusion

The ILO conventions discussed in this chapter would have an influence on South African law as s 39 of the Constitution places an onus on the courts to consider International law and further to this, South Africa is a member of the ILO. The conventions discussed earlier encourage the regulation of TESs, which led to their regulation and not the mere banning of them in South Africa. As the conventions are drafted by the international community, it is important to consider them as they reflect the ways in which South Africa can regulate TESs.[54]

[46] Department of International Relations and Cooperation http://www.dfa.gov.za/foreign/Multilateral/inter/ilo.htm (Last accessed on 01 December 2015).
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the "1996 Constitution").
[51] Chapter 2 of the 1996 Constitution.
[52] Section 39 of the 1996 Constitution.
[53] Mavunga (note 29 above) 17.
[54] Ibid.

2.2. The Namibian Position

2.2.1. Background

Namibia is discussed as a case study as there are similarities between the law in Namibia and South Africa. According to Van Eck, both parties are members of the ILO but neither has adopted the Agencies Convention.[55] Further to this, both countries have a Constitution which is their supreme law, which guarantees the right to freedom of occupation, trade and profession.[56] Van Eck further states that both countries have had issues with the regulation of TESs. According to Van Eck, South African Courts are not bound by the judgments of foreign cases but they are obliged to consider Foreign law. Therefore, South Africa should look at the position of Namibia for guidance in this regard.[57]

2.2.2 *Case law*

According to Van Eck,[58] "Arguments in favour of the regulation of TES were countered in the Namibian Parliament by the view that it would be similar to regulatory attempts made by the opponents to the abolitionists' struggle against slavery. It was said that slavery could not be regulated in an attempt to give it a humane character." The result of this debate was the implementation of s 128 of the Namibian Labour Act[59] (hereinafter referred to as the "NLA") which prohibited the operation of TESs in Namibia. In *Africa Personnel Services (Pty) Ltd v Government of Namibia* [60](hereinafter known as the "*Africa Personnel Case"*) an application was brought by the Africa Personnel Company, which challenged the constitutionality of s 128 of the NLA and sought an order striking down the provision.[61] The Respondent contended that the applicant had no locus standi to take the matter to court as the rights vested in Article 21(1)(j) vested in natural Namibian citizens.[62] Article 21(1)(j) protects a person's right to practise any profession, carry on any occupation, trade or business.[63] This argument was based on the fact that Article 21(1)(j) was linked to human dignity and therefore only natural persons

[55] Van Eck (note 3 above) 120.
[56] Ibid; Section 23 of the South African Constitution.
[57] Ibid.
[58] Van Eck (note 3 above) 112-113.
[59] Namibian Labour Act 11 of 2007.
[60] *Africa Personnel Services (Pty) Ltd v Government of Namibia* SA 51/2008 2009 NASC 17.
[61] Ibid para 1.
[62] Ibid para 9.
[63] A similar provision is found in s 22 of the Constitution 1996.

could exercise this right.[64] The Supreme Court of Appeal stated that a generous and purposive approach should be followed and that "all persons" included both natural and juristic persons.[65]

The Namibian High Court relied on Roman law regarding the letting and hiring of personnel services in return for money, to guide it.[66] The Supreme Court of Appeal found in favour of the Personnel Services and stated that "had contracts of service remained marooned in Roman or common law of pre-modern times, the narrow scope of their application would have been entirely inappropriate to address the demands of employment relationships in the modern era."[67] The Respondent in this case also addressed the issues relating to TESs, including the difficulty of unionisation of TES employees.[68] The unionisation of employees has its foundation in the standard employment contract as it is "based on four key assumptions [being] that the workplace is the place [that] workers work, [the] employer controls the workplace, that [the] employment is a binary relationship; and that [employment] is ongoing."[69] This would ensure that employees can be represented at the workplace, by unions.

The Court further highlighted the issues raised by the Respondent relating to TESs such as the client escaping legal responsibilities and duties; the client not having a responsibility to pay the TES employees; the fact that the client could remove the workers without having to satisfy the procedural and substantive fair dismissal laws; that the client has no duty to resolve disputes between employees at the workplace; the client can avoid allowing a trade union to represent the employee; the client can just pay hours worked to the TES employees instead of paying a permanent employee; the TES escapes liability as they provide clauses which stipulate the "no work, no pay" principle and workers could be placed on or off duty at the whim of the TES.[70]

The TES offers remuneration to the employees but can also terminate their employment, leaving employees without legal recourse. These reasons have been discussed in Chapter Three of this dissertation as they also apply to South African TES employees. The Respondents submitted that TESs facilitate casualization of work; clients retrench permanent workers so that TES employees can be used at cheaper rates; this results in an under-regulated environment

[64] Van Eck (note 56 above) 23.
[65] (Note 60 above) para 36-37.
[66] Ibid para 23.
[67] Ibid.
[68] Van Eck (note 56 above) 107.
[69] Ibid 108.
[70] Ibid 112.

and the possibility of adversely affecting the employees bargaining power, skills and development training; and thus their request to ban TESs was justified in light of the above.[71]

According to the Court, in reference to Hall,[72] these issues have been addressed in many countries which opt for high regulation of TESs. Examples of addressing the issues are: regulating the length of agency contracts; placing restrictions on the purpose for which agency contracts should be allowed; guaranteeing equal treatment between TES employees and permanent employees, with specific reference to their terms of remuneration and their terms of employment.[73] Further to this, the Court highlighted eight countries[74] that have laws that guarantee equal pay between and conditions of employment for TES employees and permanent employees.[75] The issues highlighted by the Respondents were the same issues raised in South Africa by the Congress of South African Trade Unions (hereinafter referred to as "COSATU"), which called for a total ban of TESs in South Africa.[76] ANC Head of Economic Transformation, Enoch Godongwana, rejected Cosatu's call to ban labour brokers.[77]

The Court further stated that with proper regulation, structured in accordance with the 1996 Constitution and Convention No 181, agency work would be temporary and would not adversely affect standard employment relationships or unionisation, and that it could contribute to flexibility in the market place.[78] The Court struck down s 128, as the blanket prohibition infringed upon the right to exercise the freedom to carry on any trade or business, resulting in the provision being unconstitutional.[79] The Court held that the 1997 Convention, which facilitates agency work and regulative measures in other democratic societies, could be used to effectively regulate agency work in Namibia without transgressing upon the rights in Article 21.[80] The Court stated that s 128 "substantially overshoots permissible restrictions" which may be placed on the exercise of the Article 21 right contained in the Namibian Constitution.[81] The

[71] Ibid 114.
[72] Ibid.
[73] Ibid.
[74] Australia, Belgium, France, Italy, Luxembourg, Italy, Netherlands, Portugal and Spain.
[75] (Note 60 above) para 114.
[76] D Harrison 'ANC head of economic transformation Enoch Godongwana insists Cosatu's recent resolution is not economically viable and borders on unconstitutional' http//mg.co.za/article/2015-11-26-anc-rejects-cosatus-call-for-a-ban-on-labour-brokers (Last accessed on 18 June 2016).
[77] Ibid.
[78] Van Eck (note 56 above) 117.
[79] Article 21(1) (j) of the Namibian Constitution Act 1 of 1990.
[80] Van Eck (note 56 above) 117.
[81] Ibid 118.

Court held that the ban fell outside of reasonable restrictions and was disproportionately severe as opposed to what was necessary in a democratic society.

2.2.3 Conclusion

The SCA in the *African Personnel Case* took into account the ILO's Agency Conventions, even though the ILO was not a signatory of the Convention.[82] According to Van Eck,[83] it was clearly the intention of the ILO to regulate TESs and not to ban them. He further stated that the aim of the ILO was to recognise TESs and to regulate them in order to ensure that employees engaged by TESs were not exploited.[84] The writer is of the opinion that South Africa made the correct decision to regulate TESs. If Parliament chose to ban TESs, the outcome would have certainly been similar to that of the Namibian outcome, as s 22 of the South African Constitution would have been infringed. If Parliament had decided to ban TESs in South Africa, the courts would have come to the same conclusion as was held in the *African Personnel Case*.

[82] (Note 60 above) para 36.
[83] Van Eck (note 3 above) 116.
[84] Ibid.

CHAPTER 3:

THE HISTORY OF TESs AND THE PROBLEMS RELATED TO THE LAWS REGULATING TESs

3.1. Background

TESs have been used in South Africa since the 1950s, but have been unregulated by the Labour Relations Act[85] (hereinafter referred to as the "1956 LRA"). The 1956 Act did not contain a definition for these types of services.[86] TESs became more popular in the 1980s, and were granted legal recognition by means of a statutory definition contained in the Labour Relations Amendment Act[87] (hereinafter referred to as the "1983 Amendment Act") which legally recognised TESs.[88] The definition in the 1983 Amendment Act has remained in s 198 of the more recent Labour Relations Act[89] (hereinafter referred to as "the 1995 LRA"), apart from the replacement of the words "labour brokers" with "temporary employment services".[90] In s 1(3)(a) of the 1983 Amendment Act, the TES was identified as the employer, with the employees engaged by the TES regarded as its employees. Under s 1(3)(b) of the 1983 Amendment Act, the TES and employees associated with it were considered to perform work in the industry or trade in which the employee's activities ordinarily fell, irrespective of the trade or industry in which the client carried on his business.

The 1995 LRA replaced the 1983 LRA and legitimised TESs to an extent as it left out the word "deemed" in s 198(2).[91] The section states as follows: "For the purposes of *this Act*, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer." In terms of the 1995 LRA, protection was only given to employees when a TES breached a collective agreement.[92]

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[85] Labour Relations Act 28 of 1956.
[86] A Botes 'Answers to the questions? A critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to TESs' (2014) 26 *SA MERC LJ* 110.
[87] Labour Relations Amendment Act 2 of 1983.
[88] Botes (note 86 above) 110.
[89] Labour Relations Act 66 of 1995 (hereinafter referred to as the "1995 LRA").
[90] Botes (note 86 above); 110.
[91] This section stipulated that the employee engaged by the TES is deemed to be the TES employee. This deeming provision allowed for the interpretation of the facts and circumstances whereas the 1995 LRA clearly stipulated that the TES engaged employee is the employee of the TES.
[92] Section 198(4)(a) – (c) of the 1995 LRA.

In the 1956 LRA,[93] there was no definition of TES and as such it was only incorporated into the 1983 Amendment Act. According to Botes,[94] s 1(a) of the 1983 Amendment Act identified the TES as the employer of its employees, in terms of a tripartite relationship. Section 1(3)(b) regulated the trade of employers and directed disputes to be forwarded to the Labour Court. Section 1(3)(c) of the Amendment Act deemed the clients premises where employees worked to be the TES's premises. In doing so, the employee had the chance to be a part of a trade union and to be represented by the trade union. Unfortunately, when legislators drafted the 1995 LRA, they did not incorporate s 1(3)(b) and (c). This omission meant that the TES employees were uncertain of who their employer was when a dispute arose and as such did not know which party they should institute proceedings against. In addition to this, the Labour Court had no jurisdiction to hear disputes regarding the TES employees.

According to Botes,[95] there were other sections in the Amendment Act which would have been very useful in our current LRA, such as s 1 (3)(d) which provides that any acts or omissions by a client are deemed to be actions of the TES. Despite triangular relationships being dealt with in the LRA, there were certain aspects not covered, which has led to the exploitation of employees. When the proposed amendments were drafted by the Minister of Labour, they highlighted that TESs would be banned and all temporary employment should be permanent unless the employer can provide a valid reason why the employment should be for a fixed term.[96] However, due to the rising unemployment rate in South Africa, there is a need for TESs as they allow for flexibility in the economy and provide employment to unemployed people.[97] This is aligned with the discussion above regarding the position of the ILO and the conventions which favour regulation as opposed to the banning of the TESs.

3.2. *Problems associated with the Regulation of TESs*

Even though a definition of TESs was included in the 1995 LRA, there were issues relating to the regulation of the TESs, which resulted in inadequate legal protection for the employees engaged by TESs.

[93] Labour Relations Act 28 of 1956.
[94] Botes (note 80 above) 110 -111.
[95] Ibid.
[96] Ibid.
[97] According to Mavunga (note 29 above)30 - TES helps married women achieve a balance between family responsibilities and occupations. It further assists new entrants into the Labour market as they do not possess the experience required to enter into the labour market on their own.

According to Benjamin,[98]"While the 1983 amendment clarified the identity of the employer of indirect employees, it gave rise to other problems. Employees became vulnerable to abuse by 'fly-by-night' TESs. If a TES who had engaged workers for a client failed to pay them, the employees had no recourse against the client because the client was not their employer."

Section 198 of the LRA was intended to regulate the TES employees who were rendering work on a temporary basis, but the provisions were instead used to justify indefinite relationships between the client and the employee, leading to negative consequences for the employees.[99] The client, in certain instances, did not intend to use the TES employee as a temporary employee, but rather intended on retaining the employee for a period longer than three months without having to pay benefits or the same rate of remuneration as it had to pay to its permanent employees who were entitled to such benefits in terms of labour legislation. Further to this, s 198 allows "employers to deprive employees of protection against unfair dismissals, to exclude them from collective bargaining and to apply less favourable terms and conditions of employment".[100] This is as a result of an employment contract which regulates the TES and employee relationship and which often incorporates provisions that are detrimental to the employee's rights. Some of these instances will be discussed in this chapter.

Section 198 of 1995 LRA made the client and the TES "jointly and severally liable for breaches of the BCEA, sectoral determinations, collective agreements and arbitration awards. If a TES fails to pay amounts owing to its employees, the client for whom the employees worked is liable to make those payments – regardless of whether the client has paid the TES or not."[101] In theory, this joint and several liability transfers the risk of the TES defaulting on its obligations from the employer to the client. "However, the Labour Court has held that a client cannot be sued directly in the CCMA or Labour Court as it is not an employer.[102] The employee can only proceed against the client if it has obtained a judgment or award against the TES, which the TES declines to pay. In practice, vulnerable workers are seldom able to exhaust these

[98] P Benjamin 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010, Employment Services Bill 2010'. 31. http://www.labour.gov.za/DOL/downloads/documents/useful-documents/labour-relations/RIA13Sept2010.pdf (Last accessed on the 10 June 2015**).**

[99] Ibid

[100] Ibid.

[101] Ibid.

[102] Ibid.

procedures in order to hold the client accountable."[103] The CCMA and the Labour Court did not have jurisdiction to hear disputes between the client and the worker, arising from unfair dismissal and unfair labour practice.[104]

Despite s 198 of the 1995 LRA and in light of the "atypical nature" and the complexity of the construction of the employment relationship relevant to TESs,[105] there was a deficiency in the regulation of the TESs and s 198 simply did not cater for all the elements and possible obstacles that TES employees experience in the triangular employment relationship.[106] The 1995 LRA provided "umbrella" provisions (general provisions) which recognised the TESs but omitted to include protection against unfair dismissals and unfair labour practices. As time passed, it became clear TESs needed to be statutorily recognised and regulation was required in order to prevent the exploitation and infringement of any of the parties' rights, especially those of a vulnerable employee.[107]

TES employees are disadvantaged in terms of the bargaining power they have to negotiate wages and other conditions of service, as the client remains the dominant party in the bargaining process between TES and the employees.[108] According to Van Eck,[109] if a TES is unable to provide an employee to a client within the client's budget, the client will seek the services of another TES which is able to meet its budget requirements.[110] This results in the client comparing the offers that are available by the various TESs and accepting the lowest offer.[111] Therefore the TES employees do not receive the same wages and other conditions of service as the employees who are permanently appointed by the same client.[112]

Another issue is that a client can easily instruct a TES to remove the employee with no obligation on the TES to find a new placement for such employee.[113] The TES is the employer, which means that the employee can only challenge the TESs' termination of their services, and not the decision by a client to terminate their assignment.[114] "As employees are not guaranteed

[103] Ibid.
[104] Van Eck (note 3 above) 110.
[105] Ibid 112.
[106] Ibid.
[107] Ibid.
[108] Van Eck (note 3 above) 111
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.

work by a TES, they have no effective protection against unfair dismissal, even when they have worked for one client for a considerable period of time."[115] The client's request to the TES to remove an employee from its premises or from an assignment, is covered in their commercial contract and therefore falls beyond the reach of labour law.[116]

With the incorporation of the TES into the legislation[117] as discussed above, TESs became increasingly popular.[118] According to Gericke,[119] this increase is not a result of the labour laws. It is suggested that the labour laws have, created an inflexible labour market by not properly regulating the TESs. The reasons clients' use TESs include avoidance of employment risks and costs related to unfair dismissals[120]. Furthermore, during times of economic recession, TESs are most welcome in an economy as they enable flexible work for employees and clients. In some instances, employers use TESs because it cannot afford to pay the employees a permanent staff rate.[121] Therefore, it seems that regulation instead of an outright ban was the better option.

According to Gericke, s 23(1) of the 1996 Constitution guarantees a fundamental right which everyone has, ie the right to fair labour practices. This fundamental right that is afforded to every citizen, is also applicable to TES employees. Despite having the right to fair labour practices, employees sometimes choose to enter into employment contracts that are less favourable to them. They do this because when they are faced with choosing between earning an income in terms of a tripartite employment relationship, or being unemployed because employers are unwilling or unable to employ permanent staff, employees would generally choose to work despite unfavourable conditions.[122] When a person is faced with the option to earn a lower salary to sustain himself and his/her family, the decision to earn less than a permanent employee is easier than not earning a salary.[123] A breadwinner merely wants to ensure that his family has basic nutrition to survive, even if it means that they have to be exploited to achieve this result.[124]

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[115] Ibid.
[116] Ibid.
[117] Starting from the 1983 LRA until the regulation in the 1995 LRA.
[118] Gericke (note 7 above) 94.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid 96.
[123] As evident from the various disputes at the Council for Conciliation Mediation and Arbitration (hereinafter referred to as the "CCMA") which are discussed throughout this dissertation.
[124] Gericke (note 7 above) 96.

In terms of South African law and the principle of sanctity of contracts,[125] employers can easily get away with drafting contracts of employment which are beneficial to them. Therefore, it was crucial to strictly regulate tripartite employment relationships in order to prohibit exploitation (resulting from contracts that are beneficial to the employer) from taking place, and to confer liability for unfair dismissals and unfair labour practices on both clients and TESs.[126] Section 198(2) of the Act legitimises the contract which exists between the vulnerable employee and the TES. This section sets out the foundation of the relationship by stating that a person whose services are procured for the client, is the client of the TES, and the TES is the employer. This section was in essence the very reason that tripartite relationships were permitted in our country.

Benjamin highlights two grounds which would violate the Constitution if TES were to be banned.[127] Firstly, it would violate the fundamental right to choose a trade, occupation or profession freely[128] and secondly, the scope of who qualifies as an employee under labour law would be drastically changed. For the purposes of this dissertation, the violation of the right to choose a trade, occupation or profession freely is discussed.

TES workers have additional problems when it comes to exercising their organisational rights and engaging in collective bargaining, because they are required to engage with the TES as their employer and not the client themselves. According to Benjamin,[129] a change in the law in this regard was necessary as trade unions found it difficult to recruit union membership and to retain their membership during periods when they were not earning an income due to non-placement. According to Botes,[130] the 1995 LRA provided that there were two contracts that would be created, that is the commercial contract between the client and the TES and the one between the TES and the employee. In terms of s 198, the TES was the employer's employee. It was necessary to have one employer designated to the employee in order to alleviate any confusion.[131] Nonetheless, despite the allocation of such rights to the employee, the atypical

[125] When parties enter into a contract with each other, unless a party was forced to sign it, they will be bound to it as the contract was freely entered into.
[126] P Benjamin 'Labour Law beyond Employment' (2012) *ILJ* 31.
[127] See note 98.
[128] Section 22 of the 1996 Constitution.
[129] Benjamin (note 126 above) 48.
[130] A Botes 'A Comparative study on the regulation of TESs' (2015) *SALJ* 132 , 103.
[131] Ibid 104.

nature of such employment relationship made it difficult for the employee to access such rights.[132] The employee, when faced with a labour dispute, often went to the CCMA and instituted the dispute against the client, but the CCMA would throw the matter out based on the fact that it was instituted against the incorrect party.[133] In terms of the Regulatory Impact Assessment,[134] the TES employees received lower salaries compared to their permanent counterparts and were also subject to less favourable conditions.[135]

Further to this, TES employees could not join trade unions as the TES employees' work place would be the TES premises, and not the client's premises, which created a problem in respect of representation. Section 12(1) of the 1995 LRA provides that trade unions can enter the workplace to recruit or communicate with workers. According to Budlender,[136] this provision is meaningless in terms of a trade unions organisation and freedom of association, because the TES is not in control of the workplace. Further to this, issues arise when determining representativeness as workers are scattered throughout different companies operating in various sectors.[137]

According to Botes, TESs tried to withhold labour rights from the TES employees by identifying them as independent contractors, which in effect excluded them from the protection of the LRA and other labour legislation, and exempted the employer from the responsibility attached to their role as employer.[138] These types of cases are referred to as "disguised employment."[139] In the case of *Mandla v LAD Brokers (Pty) Ltd*,[140] the learned Judge Basson stated the real relationship should be gathered from the entire contract and in doing so, it would be quite easy to ascertain if the contract is a disguised contract.[141]

Another issue pertaining to the 1995 LRA was the lack of security available to the TES employees, as the client was able to terminate the contract or place the employee on short notice

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[132] Ibid.
[133] Ibid.
[134] Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010.
[135] Ibid.
[136] D Budlender 'Private Employment Agencies in South Africa' p52 www.ilo.org/wcmsp5/groups/public. (Last accessed on the 18 June 2016).
[137] Ibid.
[138] Botes (note 130 above) 104.
[139] Ibid.
[140] *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807 (LC).
[141] Ibid para 41.

whenever they wanted to.[142] In this instance the TES would include a resolutive clause in the contract whereby the contract would terminate automatically by operation of law should the client terminate the commercial contract.[143] When a contract terminates by operation of law there are no legal remedies available to the employee, however, in this case, this is in actual fact an unfair dismissal thereby depriving the employees of their labour rights to not be unfairly dismissed.[144]

According to Botes,[145] another obstacle in this tripartite relationship concerns the status of the TES.[146] It is the TES which was responsible for the infringement of any of the employee's rights and unfair labour practices that are inflicted on the employee by the TES.[147] As Botes states,[148] it may be impractical to hold the TES responsible since the TES has very little control over the employee's actual place of work or any working conditions. He further states that it is therefore unjustified to expect the TES to be responsible for such liability despite the legislation allowing such liability.[149] Further to this, the provision[150] which held that the TES and the client shall be jointly and severally liable in certain circumstances caused much confusion to the employee, who was uncertain as to whom to institute an action against.[151]

3.3 *Conclusion*

The various issues discussed above clearly reflected that Parliament had to make a decision regarding TESs and the future regulation thereof. As discussed in Chapter Three, an outright ban would not be the proper decision, especially taking into account that the courts in our country would have to take into consideration the ILO and the Namibian position. In so doing, the most appropriate course of action would be to regulate TESs. This chapter set out the issues associated with TESs and the challenges that TES employees experienced due to the inadequate regulation of their tripartite relationship.

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[142] Botes (see note 130) 105.
[143] Ibid.
[144] Ibid; *Nape v INTCS Corporate Solutions* 2010 (31) ILJ2120 (LC*)*, where the court found that such resolutive clauses were not fair as it was against public policy.
[145] Botes (note 130 above) 106.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Section 198(4).
[151] Botes (note 130 above) 107.

CHAPTER 4:

CHANGES IN THE LAW – THE 2014 LRAA

4.1. Introduction

Chapter Four set out the challenges associated with the law regulating TESs. It further reflects that it is necessary to regulate TESs and that Parliament made the correct decision in regulating and not banning TESs. This chapter aims to discuss these changes and to look at the changes brought about by the 2014 LRAA.

4.2 Background

Section 21 of the 1995 LRA was amended by adding that if a dispute relating to organizational rights arises, the commissioner should take the workforce into account, including the TES employees.[152] In terms of s 21(12) of the LRAA, the trade union may seek to exercise its rights on the TESs or the client's premises, taking into account where the employee is at that time.[153] Section 22 of the LRA states that any arbitration award made in respect of organizational rights shall be binding upon the TES as well as the client provided that the client is permitted to participate in the proceedings.[154] This consequently deals with the issue regarding trade unions.

Section 198(4) of the LRA was also expanded as follows:

Subsection 4A deals with the joint and several liability of the client and permits the employee to institute action against the TES, the client, or both parties should they wish to do so.[155] According to Coetzee and Patel, "a more complex question is posed by s 198(4A)(c) [as] this section [envisages] that a TES employee could approach a client with an award or order [taken] with the TES's name on it and enforce such order or award against the client, which marks a statutory departure from the common law position."[156] The common law position is set out in *Ngema & Others v Screenex Wire Waring Manufacturers.*[157] The Labour Appeal Court

[152] Botes (note 130 above) 108.
[153] Botes (note 130 above) 109.
[154] Ibid.
[155] Botes (note 130 above) 110.
[156] F Coetzee & A Patel. 'A cause for dispute: The amended Section 198. The South African Labour Guide' (2015) www.labourguide.co.za (Last accessed on 22 November 2015).
[157] *Ngema & Others v Screenex Wire Waring Manufacturers* (2013) 34 ILJ 1470 (LAC).

(hereinafter referred to as the "LAC") explored the said substitution in the context of a s 197 transfer and accordingly referred to *Ex Parte Body Corporate of Caroline Court,*[158] which highlighted as follows: "It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest" and that "there is no express exclusion in the LRA that an interested party should not be afforded an opportunity to be heard in a matter where it has a direct and substantial interest."[159]

This equated to the common law position which prohibited a TES employee from enforcing an order or award against a client unless such client had been joined as a party to the proceedings.[160] Section 198(4A)(c) now deviates from the common law position that such an order or award may be enforced against a client of a TES only where the TES is cited in the proceedings and on the order.[161] Should an order or an award be given against a TES, the TES employee could in terms of this section, submit an affidavit to obtain a warrant of execution, requesting both the TES and the client be cited for such execution.[162] One can envisage a number of factual disputes being raised regarding whether a TES employee may enforce an order or what the position is with an award which cites only the TES against the TES's client.[163]

Section 4A(b) allows a labour inspector to enforce the provisions of the BCEA against either the TES or the client both concurrently.[164] Subsections 4B and 4C sets out that the TES is obliged to provide the employee with a written contract and that the employee cannot perform work under terms that are inconsistent with labour legislation.[165] Subsection 4D deals with the bargaining council and the sector that the client is operating in, and subsection 4E stipulates that the Labour Court or an arbitrator may determine whether the provisions of the employment contract or the commercial contract adheres to subsection 4D in every case brought forward by the employee.[166] These provisions now gives the employee an opportunity to have their disputes heard and resolved. It further enables the Labour Court or the arbitrator to make any

[158] *Ex Parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA).
[159] Coetzee & Patel (note 156 above).
[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] Ibid.

order or reward in resolving the issues.[167] Subsection 4F stipulates that TESs need to be registered in terms of the relevant LRA in order to be operative.[168] These sections apply to atypical[169] employees who earn below the threshold of R205 433.30 per annum which is determined by the Minister of Labour.[170]

4.3 Do the provisions relating to TESs in the LRAA adequately regulate TESs?

The deeming provision which is dealt with in *Assign Services (Pty) Ltd v CCMA and Others*[171] makes the temporary employee a permanent employee of the client three months after placement. According to section 198B, employment that is conducted in terms of a fixed term contract that exceeds three months will be deemed to be permanent employment subject to certain exceptions.[172] The exceptions entail the employer successfully proving that the nature of the work for which the employee is employed is of a limited or definite duration; or there is another justifiable reason for the temporary appointment such as section those exceptions listed in s 198B(3).[173] The exceptions listed in this section are as follows: If the employee is replacing another employee who is temporarily absent from work; is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; is employed to work exclusively on a specific project that has a limited or defined duration; is a non-citizen who has been granted a work permit for a defined period; is employed to perform seasonal work; is employed for the purpose of an official public works scheme or similar public job creation scheme; is employed in a position which is funded by an external source for a limited period; or has reached the normal or agreed retirement age applicable in the employer's business.[174] This provision ensures that the employee is not exploited by the employer who attempts to use a fixed contract when the employee is not really temporary or

[167] Ibid.
[168] Ibid.
[169] According to N Smith & E Fourie, "Atypical", "non-standard" or "marginal" are terms used to describe workers who are employed in the new non-standard employment.
[170] Ibid.
[171] *Assign Services (Pty) Ltd v CCMA and* Others (JR1230/15) [2015] ZALCJHB 298 (8 September 2015*).*
[172] Section 198B (3) of the 2014 LRAA.
[173] 2014 LRAA
[174] Section 198B (3) of the 2014 LRAA.

where the employer opts for a temporary employee in order to reduce the cost associated with permanent employment, such as non-payment of bonuses, medical aid etcetera.[175]

The question that arises here is whether the TES's relationship with the employee terminates and if not, whether the one that remains with the client is an employment one.[176] In terms of the dispute before the Court, the placed workers remain the employees of Assign for all purposes and are deemed to be the employees of Krost (the client) for the purposes of the Act.[177] According to the National Union of Metalworkers of South Africa (hereinafter referred to as "NUMSA") though, the placed workers are deemed to be employees of only Krost, in terms of the LRA.[178] According to Assign, its position is one of dual employment which according to the Court is misleading.[179] Assign provided no arguments that the contractual rights and obligations vest equally with the client upon placement but contended that once a placement occurred, the client became entitled to the LRA rights and obligations and further, that the two relationships operate in parallel and that the contracts of employment with the TES remain in force.[180] According to the Court, neither position suggests that the client, upon placement, becomes a part of the TES contract or otherwise becomes vested with the contractual rights and obligations.[181] The focus is only on the statutory rights and obligations contained in the LRA governing the employer's interaction with the employee.[182] Assign submitted that the rights and obligations were conferred equally on the TES and the client but NUMSA contended that they were only inferred on the client.[183]

Upon interpreting the provision of s 198 A (3) (a), the Court found that the provisions make the client the employer for the purposes of the Act only and that the client is not joined into contractual rights that exist between the TES and worker.[184] The Court further agreed with the concession that this section only attributed employer status for the purpose of the LRA.[185] The only issue before the Court was whether the TES continued to be the employer for the purposes

[175] J Griessel "Temporary Employees- The 2015 Landscape' www.labourguide.co.za/most-recent/2004. (Last accessed on 17 June 2016).
[176] Ibid para 1.
[177] (note 171 above) para 2.
[178] Ibid.
[179] (note 171 above) para 4.
[180] Ibid.
[181] (note 171 above) para 5.
[182] Ibid.
[183] Ibid.
[184] (note 171 above) para11.
[185] Ibid.

of the LRA and it was found that there was no reason why the TES's statutory rights and obligations should be terminated.[186] It was further stated by the Court that the worker became entitled to the statutory protections which resulted automatically from their engagement with the TES, and that the worker should not be expected to sacrifice the statutory protection because the TES has found placement with a client of the TES's designation.[187] According to the Court, neither party chose to rationalize the position of the TES, thus the remarks are made abstractly and in speculation.[188]

The Court further stated that the operative amended clause[189] stipulates beyond doubt that the TES and the client are equally responsible for the purposes of the LRA.[190] The TES is therefore obliged to observe the provisions of the Act. This is reinforced by a clause making the client jointly and severally liable for breaches of the instruments and the provisions under the Basic Conditions of Employment Act (hereinafter referred to as the "BCEA").[191] Section 198A (3)(i) deemed the employee to be the employee of that client and the client is deemed to be the employer and in terms of ss (3)(ii) (subject to the provisions of s 198B), is deemed to be employed on an indefinite basis by the client.[192]

According to the Court, much of the argument was aimed at the meaning of the word "deemed".[193] It was found that the deeming provision is only enforceable for the purposes of the LRA, therefore, the clause would not be enforceable against the client as an employer in the absence of this clause.[194] The Court further stated[195] that the scope of these protections will give rise to considerable litigation in the future and set out an example as follows: In the event of a contract being concluded between the TES and the employee and the client contract containing a clause obliging the employee to stop working for the client if the TES directs.[196] If the clause was incorporated merely to circumvent the clients duty to comply with the requirements of a fair dismissal, the transfer would constitute a dismissal in terms of Section

[186] Ibid.
[187] Ibid.
[188] (note 171 above) para 8.
[189] Section 198 of the LRA.
[190] (note 171 above) para 9.
[191] Ibid.
[192] Ibid.
[193] (note 171 above) para 14.
[194] Ibid.
[195] Ibid para 16.
[196] Ibid.

198A (4).[197] Would this then not lead to the client raising the point that it had no alternative but to submit to the "contractually – sanctioned" decision to terminate taken by the TES? This could be determined by ascertaining whether the client requested the TES to withdraw the worker from its workplace.[198] The Court stated that if it is a unilateral decision by the TES to withdraw the employee in order to enhance its own interests then it is difficult to condemn a client.[199]

A "deeper conundrum" is that a contract of employment is one in which the employee "subjects his or her productive capacity" to the employer.[200] If the employer were to exploit this capacity and if their conflict needs to be avoided, the source of control must always be unitary.[201] The Court states further that once a TES concludes a contract of employment, it becomes a source of control and continues to hold this power, and when the client sets the task for the employee it does so as an agent or representative and the TES is the one in control.[202] Should the TES terminate the contract of employment with the employee, the relationship between the client and the employee must come to an end,[203] unless a fresh contract is entered into between the client and the employee.[204] If there is an unfair dismissal claim by the employee it will be directed against the TES alone. It is interesting to note that the Court questioned whether the drafters of the amendments realised their ambitions and further stated that this will be determined with time and litigation.[205] The Court found, in this instance, that the commissioner had erred in finding that Krost was the sole employer.[206] According to the Vice President of the Federation of African Professional Staffing Organisation (hereinafter referred to as "APSO"), such judgment has "brought optimism for stability to businesses, temporary workers and the TES industry, which have witnessed job losses and the folding of businesses during this time of uncertainty."[207]

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[197] Section 198A (4) of the 1995 LRA. This section deems a termination of an employee's services with the client, by the TES, to be a dismissal by the client if the object is to avoid the operation of the deeming provision.
[198] Ibid.
[199] Ibid.
[200] (note 171 above) para 17.
[201] Ibid.
[202] Ibid.
[203] Due to supervening impossibility of performance.
[204] Ibid.
[205] (note 171 above) para 18.
[206] (note 171 above) para 22.
[207] 'The labour court rules on temporary employment' www.webmail.co.za/latest-news (Last accessed on 01 December 2015).

Regarding the same issue, in the case of *Mphrime v Value Logistics Ltd and BDM Staffing (Pty) Ltd,*[208] the Court stated that section 198A(3)(b)(i) cannot be interpreted in isolation and therefore, the ruling would consist of an interpretation of s 198 and s 198A holistically.[209] The Court stated that the legislator acknowledges the existence of a unique triangular relationship and that for the purposes of the LRA, the person whose services have been procured is the employee of the TES and the TES is that persons employer, thus resulting in the TES being the duty bearer in terms of the duties and obligations towards the employee.[210]

In terms of s 198 (4) of the LRA, the TES and the client are jointly and severally liable if the TES contravenes:

a. A collective agreement in a bargaining council regulating the terms and conditions of employment;
b. A binding arbitration award regulating terms and conditions of employment;
c. The Basic Conditions of Employment Act 75 of 1997 (BCEA);
d. A sectoral determination made in terms of the BCEA[211].

According to the Court, the legislator set very specific boundaries to the joint and several liability and these were related to s 198(4)(a) – (d).[212] Section 198 (4A) to (4E) was introduced into the legislation by the Labour Relations Amendment Act 6 of 2014 and this section cannot be interpreted in isolation.[213] Section 198 (4A) stipulates that if the client of a TES is jointly and severally liable in terms of s 198(4) of the LRA or is deemed to be the employer of an employee in terms of section 198 A(3)(b) –

a. The employee may institute proceedings against either the [TES] or the client or both the [TES] and the client;

[208] *Mphrime v Value Logistics Ltd and BDM Staffing (Pty)* Ltd (2015) FSRFBC34922 NBCRFLI [24 June 2015].
[209] Ibid para 4.
[210] (note 208 above) para 10.
[211] Basic Conditions of Employment Act 75 of 1997.
[212] (note 208 above) para 12.
[213] (note 208 above) para 14.

b. A [TES] acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the [TES] or the client as if it were the employer, or both
c. And any order or award made against a [TES] or client in terms of this subsection may be enforced against either.

According to the Courts interpretation, the section deals with the liability of the client in two situations:[214]

- The liability of the client in terms of s 198(4) amounts to joint and several liability and there are no immediate issues as s 198(4A)(a) – (c) deals with the recourse of the joint and several liability in terms of contravention by the TES of the BCEA, sectoral determinations, collective agreements and awards regulating terms and conditions of employment;[215] and
- The liability in terms s 198A (3) (b) where the client is deemed to be the employer of the employee for the purposes of the LRA. In this instance there is confusion as the Court states that one wants to automatically assume that the employee can institute a claim jointly and severally for his dismissal but the joint and several liability in s 198(4) is not extended to a claim for unfair dismissal under the LRA.

The Court, in determining the section, looked at the Memorandum of Objects as contained in the Labour Relations Bill 2012, which states that s 198 continues to apply to all employees and retains the general provisions that a TES and its clients are jointly and severally liable for specified contravention of employment laws.[216] The Court stated that this was a clear indication that joint and several liability is limited to the specified grounds in s 198(4) only.[217] The memorandum further stipulates that, "An employee instituting an action against either the TES or the client or both may enforce any award made against either of them."[218] According to the Court, the Memorandum makes no provision for the enforcement of all types of awards against the TES or the client, but it is limited to claims for joint and several liability. It went on to state

[214] (note 208 above) para 16.
[215] Ibid.
[216] (note 208 above) para 17.
[217] (note 208 above)) para 18.
[218] (note 208 above) para 19.

that when one considers the entire s 4 holistically, it deals with the BCEA.[219] The joint and several liability in not indicative of dual employment and the Court draws attention to s 197 (8) – (9)[220] wherein the old employer and the new employer are held jointly and severally liable where the old employer is clearly not the employer anymore.[221] In terms of s 198A, it introduces additional protection for vulnerable employees and applies only to employees who earn below the threshold prescribed in terms of s 6(3) of the BCEA.[222] In highlighting the abuse and the additional protection required for TESs, the Court referred to four cases:[223]

- *SATAWU obo Dube and 2 Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*[224] which dealt with the issue of the automatic termination by a client of a contract with the TES. The Court held that s 198 (4C) permits the Labour Court or the Arbitrator to determine any claim made by an employee in order to ascertain whether the employment contract or the commercial contract complies with subsection 4C, and to make an appropriate order or award.[225] According to the Court in this case, automatic termination clauses in contracts which undermine the right to fair labour practices are prohibited, and TESs can no longer use this contract as a shield to circumvent legislative protections afforded to the employee.[226]

- *Kelly Industrial Ltd v CCMA and Others*[227] dealt with an employment contract that stipulated that upon the termination of the assignment by the TES, the agency agreement comes into operation and the TES will *try* to find alternative assignments for the employee however, during that time , the employee will not receive remuneration or benefits and should not expect that another assignment will be given to them.[228] It was found that the so called "agency agreement" puts the

[219] (note 208 above) para 20.
[220] Section 197(8) -(9) 1995 LRA.
[221] (note 208 above) para 22.
[222] (note 208 above) para 23.
[223] (note 208 above) para 24.
[224] *SATAWU obo Dube and 2 Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* [2015] ZALCJHB *129*; Judgment that was handed down on the 17 April 2015 by the Labour Court.
[225] (note 208 above) para 24.1.
[226] Ibid.
[227] *Kelly Industrial Ltd v CCMA and Others* JR 1237/13*;* Judgment handed down on the 21 January 2015 by the Labour Court.
[228] (note 208 above) para 24.2.

employee at the mercy of the TES, makes the employee vulnerable, infringes the right to security of employment and contradicts the definition of employment.[229]

- *Nape v INTCS Corporate Solutions (Pty) Ltd*[230] where the employees' employment contract with the TES was cancelled due to the client no longer requiring his services. The employer argued that the contract allowed for this situation and this amounted to an automatic termination.[231] The Court disagreed with the TES and struck down the provision of the contract as it clashed with the provisions of s 198 of the LRA.[232] It further held that a contractual provision that permitted a TES to withdraw an employee from the client's placement was against public policy and in breach of the employees' constitutional rights entitling him or her fair labour practices.[233] The Court further added that it is not bound by contractual limitations created by parties who exercise great bargaining power over vulnerable employees and held that any contractual clause in the employment contract that permits the client to undermine the employee's right not to be unfairly dismissed is against public policy.[234]
- *NUMSA and others v Abancedisi Labour Services*[235] where the employees were asked by the client to leave the premises as they refused to sign documents at the worksite and were "suspended" by the TES. The TES submitted to the Court that the employees were not dismissed but merely suspended indefinitely.[236] The employees were not provided with an alternative assignment and neither were they paid after being removed from the client's premises. In this instance, the Court found that prohibiting the employees from working, which they were employed to do, may constitute a "wrongful repudiation and a fundamental breach" of the contract which entitles the employee to terminate the contract.[237]

[229] Ibid; Definition of "employment" is where the employer provides work to an employee who in return offers their services for remuneration.
[230] *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC*).*
[231] (note 208 above) para 24.3.
[232] Which requires the employer to conduct the retrenchment process where it is unable to provide work for the employee.
[233] Ibid.
[234] Ibid.
[235] *NUMSA and others v Abancedisi Labour Services* (2013) 12 BLLR 1185 (SCA).
[236] (note 208 above) para 24.4.
[237] Ibid.

Section 198 A (1) interpreted "temporary work" as work by an employee for a period less than three months, when the temporary employment services employee substituted an employee of the client who is temporarily absent.[238] The Court referred once again to the Memorandum of Objectives which stipulates that employees in terms of this section are employees of the TES for the purposes of the LRA only if they are employed to carry out genuine temporary work.[239] The Court further referred to s 198A (3) (a) which sets out, for the purposes of this Act, an employee who performs a temporary service in terms of the work set out in ss (1) is the employee of the TES.[240] The Court[241] went on to state that as long as the employee is performing genuine temporary work, joint and several liability will be applicable in terms of any contravention of s 198A(4)[242] by the TES. An interesting stipulation in the Memorandum reads as follows: "If the employees are not employed to perform genuine temporary work, then they are deemed for the purposes of the Act to be employees of the client and not the TES."[243] The Memorandum of Objectives[244] in terms of the LRA includes rights such as freedom of association, organisational rights, collective bargaining, strikes and lock-outs, workplace forums, trade unions and employment organisations, dispute resolution, unfair dismissals and unfair labour practices.[245]

The Court then referred to s 198A(3)(b) which provides that an employee who is not performing a temporary service for the client is deemed to be the employee of that employer on an indefinite basis.[246] Giving the word "deemed" its ordinary grammatical meaning, it means that in the absence of any evidence to the contrary an employer –employee relationship between the employer (the client) and the employee exists in terms of the LRA which means that there is no transfer of the employee.[247] The wording of the Act is not clear as there is no implication that the employee is being transferred to the client and

[238] (note 208 above) para 25.
[239] (note 208 above) para 26.
[240] (note 208 above) para 27.
[241](note 208 above) para 28.
[242] Ibid.
[243](note 208 above) para 29.
[244] Department of Labour 'Memorandum of Objectives' http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf (Last accessed on 01 December 2015).
[245] Ibid (footnote 2 on page 23 of the Memorandum).
[246] (note 208 above) para 30.
[247] (note 208 above) para 32.

neither is there an indication that the triangular relationship is automatically dissolved once the employee is deemed to be an employee of the client.[248]

The question that the Court highlights in interpreting the section, is that of who is responsible for the duties and the obligations in terms of the LRA. The Court found that based on the wording in the LRA, it is clear and unambiguous in that once the employee is not performing temporary services, the client is deemed to be the employer and therefore the party responsible for the fulfilment of the duties and obligations.[249] The Court further stated that if the legislator had intended for the TES and the client to be jointly and severally liable, such liability would have been expressly stipulated in the Act.[250] Furthermore, it stated that if the amendments were to be interpreted to mean joint and several liability in terms of the LRA only, the abusive practices would not be addressed and awarding the client with duties and obligations as employer, ensures that their constitutional rights and those of the employee are protected and enforced.[251]

The Court then applied this interpretation to the case law examples[252] used previously in this judgment and in this dissertation. In the *Satawu Case*[253] if the client carried the duties and obligations as employer in terms of the LRA, it would have to follow the procedures laid down in s 189 of the LRA and the client would have to ensure that the dismissal for operational requirements was fair and would have led to the employees' rights being protected.[254] In the *Kelly case,*[255] if the client carried the duties and obligations in terms of the LRA, it would have to ensure that in the event that the employee was no longer needed due to operational reasons. that they carried out the proper process in terminating the contract.[256] In doing so, this would have afforded protection to the employee from abusive practices and provided the client with the security that goes along with permanent employment.[257]

[248] (note 208 above) para 33.
[249] (note 208 above para 34.
[250] (note 208 above) para 35.
[251] (note 208 above) para 37-38.
[252] (note 208 above); para 39.
[253] Ibid.
[254] (note 208 above) para 39.1.
[255] Ibid.
[256] (note 208 above) para 39.2.
[257] Ibid.

In the *Nape Case,*[258] if the client had carried the responsibilities as employer in terms of the LRA, the client should have retrenched the employee at the time the employees services were no longer required and even though this would not have prevented the retrenchment, it would have safeguarded the employee from being removed at the whim of the client.[259] Once again, the Court highlighted that it is against public policy and in breach of the employees constitutional right to fair labour practices. Furthermore, if the client was deemed to be the employer it would prevent the employees from being treated as commodities that can be traded as clients see fit.[260]

In the *NUMSA case,*[261] had the client been deemed the employer, the client would have had the duty to ensure that the employee was charged with the appropriate form of misconduct, consequently dismissed and excluded from the premises. Had the employees been suspended, the client would have had to ensure that the employees were fully paid during the suspension period.[262] In doing so, the employees' constitutional and statutory rights would have been protected.[263] The Court's conclusion of the interpretation of s 198(3) (b) (i), is that the duties and obligations are placed on the client in terms of the LRA when an employee is not performing temporary services and if there are any claims by an employee in terms of the LRA, it must be taken against the client.[264]

The Court further stated that there is nothing in the wording of the LRA amendments which indicate or infer a s 197 transfer occurs and neither does it indicate that the triangular relationship dissolves and that the commercial contract terminates.[265] In the absence of the wording which would suggest either of these instances, one cannot assume such consequences.[266] Further to this the legislator did not create joint and several liability or dual employment for the purposes of the LRA.[267] In determining what happens to the commercial contract after the shift in liability to the client, the contract will have to be renegotiated between the parties and incorporated into the business agreement. If such

[258] Ibid.
[259] (note 208 above) para 39.3.
[260] Ibid.
[261] (note 208 above) para 39.4.
[262] Ibid.
[263] Ibid.
[264] (note 208 above) para 40.
[265] (note 208 above); para 44.
[266] Ibid.
[267] (note 208 above) para 45.

agreement is in conflict with the employees' rights it will not be binding and will be rejected by the courts.[268] In conclusion, the Court highlighted that the TES will be liable for the duties and obligations for the purposes of the LRA when the employee is not performing temporary services.[269] The Court subsequently held that the employee was employed by the TES on a fixed term contract, that the employee earned below the threshold, was employed for more than three months and did not substitute an employee who was temporarily absent from work due to ill health or other issues, neither was he employed in a category determined as temporary service in terms of a collective agreement.[270] Therefore, the deeming provision in terms of s 198A(3)(b)(i) of the LRA was triggered, which resulted in the client being the employer in terms of the LRA and the TES had no right or obligation to participate in the legal proceedings.[271] The client bears the onus to prove that the termination of the employees contract was fair and satisfied s 188 of the LRA.[272] In terms of this judgment, the Court placed all the duties and the obligations on the client (not the TES) in terms of the LRA when the employee was not performing temporary services, which would then ensure that the client would follow the proper procedures in terms of the LRA for dismissals and operational terminations which has been the heart of most of the cases dealing with these triangular relationships.

4.4. *Conclusion*

This chapter highlights that there are many issues that arise in terms of the LRAA which falls short of adequately regulating TESs. The various judgments discussed indicate that there will be court battles between the client, TES and the employees engaged by TESs in the future, in an attempt to give clarity to the provisions of the LRAA.

[268] (note 208 above) para 47.
[269] (note 208 above) para 51.
[270] Ibid.
[271] (note 208 above) para 52.
[272] (note 208 above) para 53.

CHAPTER 5:

CONCLUSION

5.1 Introduction

According to Mavunga[273], the difficulty in obtaining employment in South Africa and the stigma attached to being unemployed leads to the deterioration of the quality of family life and as a result, there is a greater need for TESs in our country. The use of TESs creates job opportunities for people entering the labour market and who have little or no experience. It further assists those people who prefer not to be employed on a permanent basis in order to assist them to study or take care of their children.[274] Mavunga further states that[275] it is difficult for employers to find workers who are willing to take on temporary work when the labour market tightens and at the same time it is difficult for employers to pay employees, especially skilled ones.[276] It is important to note that in many instances TESs offer workers a better selection of employment even if it is just temporary, as employees are spread across a pool of companies to render services to them.[277] Further to this, the efficiency of TESs together with the fact that they take on the administration of the recruitment and facilitation of employment, is an attractive option to clients as the client is not responsible for these duties. In some instances, this takes the burden off of the client as they specifically require the assistance of an employee for a short period of time in order to complete an assignment.[278]

According to Mavunga, clients should be allowed to choose whether they want to use temporary workers[279]. There is however, a positive duty on the government to regulate such relationships by creating proper legislation.[280] The TESs' employees have skills ranging from low to high and the TES is able to assign such employees according to the specific needs of the clients.[281] Such assignments can even facilitate the allocation of specific employees to a client for short periods of time, which is beneficial to the client and enables the client to concentrate on more pressing issues relating to the core business.[282]

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[273] Mavunga (note 29 above) 30.
[274] Especially females who prefer working part-time and rearing their children.
[275] Mavunga (note 29 above) 32.
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Hutchinson & Le Roux (2000),52.

5.2. *Chapter Review*

Chapter One sets out the background and introduction to the tripartite employment relationship in South Africa. Chapter Two discussed the ILO and the conventions that regulate TESs and more specifically whether the provisions of the ILO conventions apply to South Africa. It further discusses the Namibian position and the *Africa Personnel case* in detail, investigating the similarities in the law between South Africa and Namibia. Both countries are members of the ILO but were not signatories to the Agency Convention and both countries have a similar Constitution which provides individuals with the right to choose a profession, trade or occupation. It was concluded at the end of Chapter Two that it was highly probable that South African Courts would have followed the judgment in the *Africa Personnel Case* had there been an outright ban placed on TESs in South Africa. One of the factors leading to this conclusion is the fact that South Africa must adhere to s 39 of the 1996 Constitution which places an onus on courts to consider foreign law.

Chapter Three set out the history of TESs in South Africa and commenced with a discussion of TESs, setting out the various applicable Labour Relations Acts, beginning with the 1956 LRA and ending with the 2014 LRAA. The changes to TESs were discussed in detail in respect of each of the LRAs and the problems associated thereto which eventually led to the enactment of the LRAA. Chapter Four set out the changes to s 198 of the LRAA regulating TESs and analysed South African case law to determine whether TESs are adequately regulated by the LRAA. The chapter also set out the challenges applicable to the interpretation of the LRAA and concluded that the LRAA does not adequately provide protection to the employees engaged by TESs, the TES or the client.

5.3. *Answer to the Research Question*

The research question set out in Chapter One is whether the amendments to s 198 of the LRAA provides adequate protection to the employees engaged by TESs.
In answering the question, the writer treads carefully and respectfully states that the regulations do not adequately take into consideration the discussion in *Mphrime v Value Logistics Ltd and BDM Staffing (Pty) Ltd and Assign Services (Pty) Ltd v CCMA and Others,* as discussed in Chapter Four. The Courts stated that there will be many disputes in the future due to the

interpretation of the LRAA. According to the Court, "the wording of the Act is not clear as there is no implication that the employee is being transferred to the client and neither is there an indication that the triangular relationship is automatically dissolved once the employee is deemed to be an employee of the client."[283] Further to this the Court highlighted that "the scope of these protections will give rise to considerable litigation in the future."[284] In this regard the writer also refers to Theron[285] who stipulates that as long as the employees workplace is the clients workplace and not the TESs, the challenge that remains is in making the TES accountable for matters that are out of its hands. This study supports the regulation of the TES and applauds the South African government for taking steps to regulate TESs. However, to ensure fewer disputes in terms of these tripartite relationships and to afford the TES employees with job security, the LRAA regulating TESs should be amended in order to address some of the challenges and gaps raised in this document, as opposed to merely providing theoretical answers and protections which will inundate our Labour Courts in the future.

[283] (note 208 above)
[284] Ibid.
[285] J Theron 'Prisoners of a paradigm: Labour Broking, the "new services" and non-standard employment' 2012 AJ 55.

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