

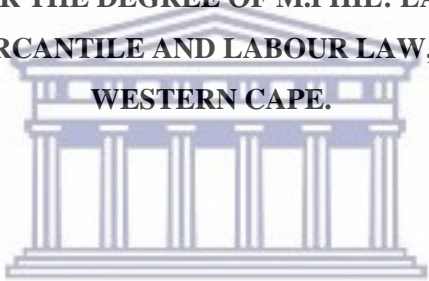
UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

RESEARCH PAPER

**A RESEARCH PAPER TO BE SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF M.PHIL: LABOUR LAW IN THE
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WESTERN CAPE.



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Title of Study: The significance of the amendments made to section
198 of the Labour Relations Act 66 of 1995.

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Date: 12 July 2018

Plagiarism declaration

I, Nomlindelo Mzimba declares that “the significance of the amendments made to section 198 of the Labour Relations Act 66 of 1995” is my own work to be submitted before relevant committee for examination. Reference has been made to certain sources such as books; case law; journals as well as internet. All the sources have been exclusively acknowledged.

Signed: Nomlindelo Mzimba

Date: 12 July 2018



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Dedication

Firstly, I extend my sincere appreciation to my supervisor, Ms E Huysamen for availing herself in ensuring that I am guided in completion of this paper. Her patience, respect for other people, diligence has been outstanding. It was not easy but worth it!! Thank you.

Furthermore, I dedicate this hard-work to my late parents who always believed in my life efforts. I thank God for having parents of their calibre.



TITLE

**The significance of the amendments made to section 198 of the
Labour Relations Act 66 of 1995.**

KEYWORDS

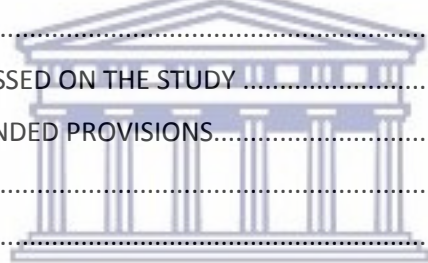
- Labour broker
- Temporary employment services
- Unfair dismissal
- Unfair labour practices
- Organisational rights
- Worker's rights
- Globalisation
- Non-standard employment
- Regulation
- Tripartite relationship



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CHAPTER 1

1.1 INTRODUCTION

In the South African employment context, temporary employment service (hereinafter referred as TES), also known as labour broking, is regulated by the Labour Relations Act.¹ Under the previous LRA (prior 2014 legislative amendments), employees of TES have been challenged in respect of exercising their labour law rights and that subjected them to exploitation. Such exploitation called for the government of South Africa to effect some amendments on the LRA with a view to protect TES employees. This was done through Labour Relations amendment Act no 06 of 2014, which came into force in August 2014.

The relationship in TES involved three parties, such as, client, labour broker and an employee. A labour broker entered into a commercial contract with a client, in terms of which the former would provide employees to the client. An employment contract will then be entered into between labour broker and an employee. The duration of employment contract would mostly be determined by as long as the client requires services of a placed employee.² No employment contract was entered into between an employee and the client. This is despite the fact that a client had directly enjoyed services of the employee.

In South Africa, section 198 of the LRA has for years been debated both at Nedlac³ and in the media. Cosatu⁴ has consistently been calling for complete banning of labour broking.⁵ This was

¹Section 198 of the Labour Relations Act no 66 of 1995.

²Van Eck BPS 'Temporary Employment Services in South Africa and Namibia' (2010) 13 *PELJ* 107 108; Theron J 'The erosion of worker's rights and the presumption as to who is an employee' (2002)6 *Law Democracy & Dev* 27 39.

³National Economic Development and Labour Council – a forum comprises of government; organised business as well as organised labour to discuss issues of social and economic policy.

⁴Congress of South African Trade Union – a trade union federation in South Africa.

⁵Labour Brokers available at <http://www.cosatu.org.za/docs/discussion/2012/discus0726.html> (accessed on 30 April 2015).

largely due to the view that TES employees enjoy much lower job security and that there is constant violation of these employee's employment rights.⁶

Various Commentators have viewed TES arrangement as detrimental to basic employment rights enshrined in the Constitution.⁷ In this context, section 23 of the Constitution is of paramount important. Section 23(1) of the Constitution provides that 'everyone has a right to fair labour practices. The Constitutional right to fair labour practices⁸ includes the right not to be unfairly dismissed.⁹A fair practice is defined as one that is not capricious, arbitrary or inconsistent.¹⁰ The Labour Relations Act accordingly provides in section 185 that, every employee has a right not to be unfairly dismissed.

A right to engage in collective bargaining as entrenched in section 23(5) of the LRA will also be visited in an attempt to qualify a view of its violation.

This research paper will attempt to highlight the shortcomings of previous section 198 of the LRA. In the same breath, legislative amendments made to section 198 of the LRA in terms of Labour Relation 2014 amendment Act no 06 of 2014 will be discussed. The main aim of this research is to evaluate whether the legislative amendments effected to section 198 of the LRA are likely to successfully address the previous challenges of the TES employees.



1.2 BRIEF DISCUSSION OF THE LEGAL FRAMEWORK APPLICABLE TO FAIR LABOUR PRACTICES

The legal framework applicable to fair labour practices will shortly be discussed below. Such discussion will assist in aligning principles of the legal framework with operationalisation of temporary employment services in South Africa.

⁶Cheadle H, Davis D &Hamsom N *South African Constitutional law: The bill of rights* (2002) 18 -4.

⁷Section 23 of the Constitution of the Republic of South Africa.

⁸Section 185 (b) of the Labour Relations Act.

⁹Section 185 (a) of the Labour Relations Act.

¹⁰Du Toit D, Bosch D, et al *Labour Relations Law: A comprehensive guide* 5ed (2006) at pg 481.

1.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The Bill of Rights¹¹ sets out important labour rights in section 23. Everyone has the right to 'fair labour practices.'¹² Workers may form and join trade unions,¹³ and have the right to bargain with employers on conditions of employment.

1.4 THE LABOUR RELATIONS ACT 66 OF 1995

The Labour Relations Act (LRA) gives effect to section 23 of the Constitution. The right to fair labour practices is fundamental and is given expression by the LRA.¹⁴ In the matter between *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 12 BLLR 1097(CC) at paragraph 55 the Constitutional court held that section 23 (1) of the Constitution extends to both employees and employers. In interpreting the content of the right to fair labour practices insofar as it relates to employees, this right affords security of employment.¹⁵

The Constitutional Court recognised in *National Education Health & Allied Workers Union v University of Cape Town & others*¹⁶ that one of the core purposes of the LRA and section 23 of the Constitution is to safeguard worker's employment security, precisely, the right not to be unfairly dismissed. Employment nature of TES employees has been alleged to have threatened employment security and other aspects of the constitutional right to fair labour practices.¹⁷

¹¹ Constitution of the Republic of South Africa.

¹² Section 23 (1) of the Constitution of South Africa

¹³ Section 23 (2) of the Constitution of South Africa.

¹⁴ See section 185 of the LRA.

¹⁵ Ibid.

¹⁶ *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 2 BCLR 154 (CC) at para 42.

¹⁷ *Khululekile Dyokwe v Coen de Kock NO, CCMA, Mondi Packaging South Africa (Pty) Ltd and Stratostaff (Pty) Ltd t/a Adecco Recruitment Services* (2012) 10 BLLR at para 25.

Employment security of all employees gets authority in section 185 of the LRA.¹⁸ To safeguard this right, section 193 (2) of the LRA further provides reinstatement as a remedy in cases of unfair dismissal. In the matter between *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 2507 (CC), the Court held that reinstatement is the primary remedy.¹⁹ The Labour Appeal Court in the matter between *Mongezi Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) 24 SALLR 21 (LAC) at paragraph 50, reiterated that at common law, the only remedy available to a dismissed employee was an action for wrongful breach of contract.

Section 186(1) (a) of the LRA provides meaning of dismissal as follows:

‘Dismissal’ means that-

An employer has terminated a contract of employment with or without notice.

An employee claiming to have been dismissed under this subsection should therefore have had a contract of employment with his/her employer which was terminated at the instance of his/her employer.²⁰ A decision by an employee to resign or a consensual termination between the employer and an employee would not constitute a dismissal at the instance of the employer.²¹ If there is no contract of employment there can be no dismissal. This definition has always been an obstacle for TES employees to enjoy the protection they deserve. Particularly if the dismissal was at the instance of the client, which was always the case.

1.4.1 Section 198 of the Labour Relations Act 66 of 1995 prior amendments

The LRA defined Temporary employment Service as any person, who, for reward, procures for or provides to a client other persons-

- (a) Who render services to, or perform work for, the client; and
- (b) Who are remunerated by the temporary employment service.

¹⁸Every employee has the right not to be-

- Unfairly dismissed; and
- Subjected to unfair labour practices.

¹⁹*Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 2507 (CC) para 36.

²⁰Grogan J *Workplace Law* 10 ed (2009) 148-49.

²¹Grogan J *Workplace Law* 10 ed (2009) 145-46.

Section 198 (2) provided that, 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. Accordingly, the client was jointly and severally liable for contravention of certain legislation; arbitration awards and sectoral determination but not extended to unfair dismissal disputes.²² This legislative fiction posed difficulties on dispute resolution of the matters concerning TES employees. According to Prof Benjamin, the application of TES is not limited to agencies supplying temporary employees despite the use of the term 'temporary employment service'.²³ He blamed failure of extending joint and several liability to unfair dismissal protection. He further believed that contract of employment between TES and employees have led to extensive permanent triangular employment of employees.²⁴

1.4.2 Section 4& 5; 11-22 of Labour Relations Act 66 of 1995

As entrenched in these sections, employees have the right to form and join trade unions,²⁵ and the union would engage in collective bargaining with the employer. For a trade union to access this right would be through organisational rights²⁶, which involves rights of access to the workplace; election of shop steward etc. Trade unions had experienced difficulties in organising as TES employees were never guaranteed to remain within a specific workplace for a long period. As a result, the union would not have organisational rights in the workplaces where they are de facto employed.²⁷ The general rule was always that only a true employer can bestow upon a trade union organisational rights which it could only exercise within that employer's workplace.²⁸ Implying that, the labour broker, being the employer of the temporary employees

²²Section 198 (4) of the Labour Relations Act 66 of 1995.

²³Benjamin P 'To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia' in *Labour law into the future* Malherbe K & Sloth-Nielsen (eds) (2012)196.

²⁴ Ibid.

²⁵Section 23 (2) of the Constitution; see also section 4 and 5 of the LRA dealing with freedom of association and union membership.

²⁶Section 11-22 of the Labour Relations Act 66 of 1995.

²⁷Botes A 'The history of labour hire in Namibia: a lesson for South Africa' (2013) 16 *PER* 525 536.

²⁸Botes A 'The history of labour hire in Namibia: a lesson for South Africa' (2013) 16 *PER* 525 536.

did not have a right to grant trade union various organisational rights to exercise within the client's workplaces. Because of that, trade unions had limited to no opportunity of recruiting and representing TES employees.²⁹

1.5 PRIVATE EMPLOYMENT AGENCIES CONVENTION, 1997 (C181)

This convention³⁰ was adopted in 1997 and came into force 10 May 2000. Its mandate seeks to ensure that workers placed by employment agencies receive adequate protection under labour law regime. For the purpose of this Convention the term "private employment agency" means any natural or legal person which provides one or more of the following labour market services:³¹

- Services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise thereof;³²
- 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 as a 'user enterprise') which assigns their tasks and supervises the execution of these tasks;³³
- Other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organisations, such as the provision of information, that do not set out to match specific offers of and applications for employment.³⁴

²⁹ Ibid.

³⁰The Private Employment Agencies Convention, C181 of 1997. Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326. (Accessed on 03 July 2015).

³¹Article 1 of the Private employment Agencies Convention, C181 of 1997.

³²Article 1 (a) of the Private employment Agencies Convention, C181 of 1997.

³³Article 1 (b) of the Private employment Agencies Convention, C181 of 1997.

³⁴Article 1 (c) of the Private employment Agencies Convention, C181 of 1997.

1.6 SIGNIFICANCE OF THE STUDY

For the purpose of this study, two core constitutional rights viz (right to fair labour practices & right to engage in collective bargaining) will be discussed. The significance of the study will be to evaluate the extent in which 2014 legislative amendments made to section 198 of the LRA are likely to address the challenges experienced by TES employees. In conclusion, by comparing the situation of South Africa to that of Namibia, the study will suggest possible ways of further addressing these challenges, if not satisfactorily addressed by the 2014 amendments.

1.7 SCOPE OF THE RESEARCH

The scope of this research will be restricted to employees employed through Temporary Employment Service in South Africa and Namibia. Both Namibia and South Africa will be compared to ascertain any possible similarities in respect of their history as well as operationalisation of TES. The research will focus only on TES challenges experienced prior 2014 legislative amendments and the impact of those amendments, thereof. The manner in which Namibia has dealt with the situation of TES will also be explored. This approach will therefore assist in benchmarking the likelihood of 2014 legislative amendments to address challenges experienced by TES in South Africa.

1.8 RESEARCH METHODOLOGY

This research will be conducted by reviewing literature published through secondary sources that include relevant journal articles, academic books, and newspapers web publication. The study will also make reference to primary sources such as policies, laws, international conventions and original narratives by independent researchers, academic scholars, labour think-tanks, unions and employer federations on the effects of the endorsement of amendments on section 198.

The study will eventually develop arguments based on an analysis of existing labour laws. In addition it will make strong reference to recent court judgments on the challenges of labour broking as well as the international conventions where applicable. In light of the methods discussed, there would be a justification to ascertain the significance of the amendments made to section 198 of the Labour Relations Act 66 of 1995 in addressing challenges of temporary employment service in South Africa.

CHAPTER 2

LABOUR BROKING CHALLENGES EXPERIENCED UNDER THE LABOUR RELATIONS ACT 66 OF 1995 PRIOR TO THE 2014 LEGISLATIVE AMENDMENTS

2.1 INTRODUCTION

The regulation of labour broking in the LRA prior to the 2014 amendments in summary held that an individual whose services were procured for or provided to a client by a TES was the employee of that TES. The TES was therefore that individual's employer.³⁵ The client was however held jointly and severally liable with the TES for certain contraventions, as listed in section 198 (4) of the LRA. Joint liability in terms of this section was incurred where the temporary employment service, in respect of any of its employees, contravened –

- (a) a collective agreement concluded in a Bargaining Council that regulated terms and conditions of employment;
- (b) a binding arbitration award that regulated terms and conditions of employment;
- (c) the Basic Conditions of employment Act; or
- (d) a determination made in terms of the Wage Act.

Section 198 of the LRA prior to the 2014 amendments has been inundated with various problems. In the case of *Nape v INTCS Corporate Solutions (Pty) Ltd*³⁶ the judge took cognisance that section 198 of the LRA had been endorsed by the relevant parties. The judge however disagreed that such endorsement could simply freely expose TES employees for ill-treatment.³⁷ Accordingly the judge held that “[a]lthough I have found and accepted that the arrangement itself has been given the stamp of approval by organised labour management and the Legislature, this does not mean that the labour broker and the client are at liberty to structure their

³⁵Section 198 (2) of the Labour Relations Act 66 of 1995.

³⁶*Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 8 BLLR 852 (LC).

³⁷*Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 8 BLLR 852 (LC) at para 60.

*contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client.*³⁸

This chapter will focus on a discussion of the four main shortcomings encountered under section 198 of the LRA prior to the 2014 legislative amendments.

2.2 SHORTCOMINGS EXPERIENCED UNDER SECTION 198 OF THE LRA 66 OF 1995 PRIOR TO THE 2014 LEGISLATIVE AMENDMENTS

Section 3 of the LRA requires courts to adopt a construction of the LRA's principles that complies with the Constitution and public international law, while at the same time giving effect to the LRA's primary objects.³⁹ The practice of labour broking as provided for in the LRA has however been argued to be a breach of the constitutional entrenchment of labour rights as guaranteed in section 23 of the Constitution.⁴⁰ Benjamin argued that section 198 was enacted to regulate the labour broking sector, but has been turned into a vehicle for creating triangular employment relationships which inhibited protection of the law.⁴¹

In *Sidumo and Another v Rustenburg mines Ltd and others*⁴² it was confirmed that employees are entitled to assert their rights.⁴³ If by so doing a greater volume of work is generated for the CCMA, then the State is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated.⁴⁴ The Constitutional Court in *Nehawu v University of*

³⁸*Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 8 BLLR 852 (LC) at para 60.

³⁹*Stratostaff (Pty) Ltd t/a Adecco Recruitment Services* (2012) 10 BLLR 1012 (LC) at para 22.

⁴⁰Benjamin P 'To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia' in *Labour law into the future* Malherbe K & Sloth-Nielsen (eds) (2012) 199.

⁴¹Benjamin P 'To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia' in *Labour law into the future* Malherbe K & Sloth-Nielsen (eds) (2012) at pg 196.

⁴²*Sidumo and Another v Rustenburg mines Ltd and others* (2007) 12 BLLR 1097 (CC).

⁴³*Sidumo and Another v Rustenburg mines Ltd and others* (2007) 12 BLLR 1097 (CC).

⁴⁴*Sidumo and Another v Rustenburg mines Ltd and others* (2007) 12 BLLR 1097 (CC) at para 77.

*Cape Town & others*⁴⁵ further declared our Constitution as unique in constitutionalising the right to fair labour practices. The Court however found that this right is incapable of precise definition. The court agreed that the definition would depend on the circumstances of a particular case.⁴⁶ It has subsequently been argued that if a primary objective of the LRA is to advance social justice, then the amendments made to section 198 of the LRA should be concerned with addressing the erosion of employee rights.⁴⁷

The four main shortcomings experienced under section 198 of the LRA prior to the 2014 legislative amendments, and which has been argued to erode employee rights, will now be discussed.

2.2.1 Determining a TES employee's true employer for purposes of employment rights

The first main problem encountered under the pre-2014 amended LRA was determining who the employee's true employer was for purposes of exercising employment rights. This was of particular concern in dismissal matters concerning labour broker employees.

The joint and several liabilities imposed on a TES client for non-compliance with section 198⁴⁸ of the LRA did not extend to the unfair dismissals of TES employees. Accordingly, in the case of *Walljee v Capacity Outsourcing and Another*,⁴⁹ the Court confirmed that in terms of section 198(4) of the LRA the client of a TES could not be held jointly and several liable for unfair dismissal. It could therefore not be joined as a further respondent in an unfair dismissal claim instituted by the employee against the TES.

⁴⁵*National Education Health & allied Workers Union (NEHAWU) v University of Cape Town and others* (2003) 2 BCLR 154 (CC) at para 33.

⁴⁶*Ibid.*

⁴⁷Theron J 'The erosion of worker's rights and the presumption as to who is an employee' (2002) 6 *Law Democracy & Dev* 27 29.

⁴⁸In terms of s 198(4) of the LRA.

⁴⁹*Walljee v Capacity Outsourcing and another* (2012) 33 ILJ 1744 (LC) at para 5.

A lot of critique has been levelled against the provision of section 198 which rendered the TES the employer of the employee in a tripartite relationship.⁵⁰ It has largely been argued that this view did not reflect the reality and that, in many cases, the real employment relationship existed between the client and the employee as opposed to between the TES and the employee.

Arguments were made that strategies involved in temporary employment services sought to conceal the identity of the true employer and effectively deprived employees of labour law protection, thus leaving TES employees vulnerable to abuse. Suggestions were made that the close proximity of the relationship between the employee and the client had to be taken into account in identifying who the true employer was.⁵¹ Some found it odd to simply assume that the TES was the employer under all circumstances, and viewed this approach as an easy way through which to disguise the reality of the employment relationship.⁵² Amongst other, it was argued that it made more sense to consider the client the employer as it enjoyed substantial labour of the employee and also exercised control over the employee's work performance on a daily basis.⁵³

Despite the aforesaid arguments, section 198(2) of the pre-2014 amended LRA maintained the approach that the TES was the employer of the employee.⁵⁴ As a result employees were unable to institute claims of unfair dismissal and unfair labour practices against TES clients, despite the latter in many instances factually being the perpetrator against the employee.⁵⁵

⁵⁰ As example see Botes A 'The history of labour hire in Namibia: a lesson for South' (2013) 16 *PER* 506; Theron J 'Intermediary or Employer? Labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618 649; Benjamin P 'Decent work and non-standard employees: options for legislative reform in South Africa: a discussion document' (2010) 31 *ILJ* 845 871.

⁵¹ Benjamin P 'Decent work and non-standard employees: Options for legislative Reform in South Africa: A discussion document' (2010) 31 *ILJ* 845 846; Benjamin P 'To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia' in *Labour law into the future* Malherbe K & Sloth-Nielsen (eds) (2012) 197.

⁵² Theron J 'Intermediary or Employer? Labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618 619.

⁵³ Botes A 'The history of labour hire in Namibia: a lesson for South Africa' (2013) 16 *PER* 506 522.

⁵⁴ Theron J 'Employment is not what it used to be' (2003) 24 *ILJ* 1247 1249.

⁵⁵ Benjamin P 'Informal work and labour rights in SA' (2008) 29 *ILJ* 1579 1587.

2.2.2 Lack of jurisdiction

A second problem, stemming from the first problem, was the Commission for Conciliation, Mediation and Arbitration's (CCMA) lack of jurisdiction over claims and issues between TES employees and TES clients. This, again, was as a result of the TES clients not legally being regarded as the employers of the TES employees.⁵⁶

In any unfair dismissal dispute before the CCMA, or relevant bargaining council, the existence of an employment relationship between the parties must first be established. Only once such an employment relationship has been confirmed could the CCMA (or relevant bargaining council) turn to consider the existence of dismissal as defined in section 186 of the LRA,⁵⁷ and where relevant, the fairness thereof.⁵⁸ If the employee was unable to prove any employment relationship between itself and the TES client, the CCMA or bargaining council lacked jurisdiction to decide on the matter.⁵⁹

Similarly, if the employee was unable to prove that any dismissal as defined in section 186 of the LRA had in fact taken place, the CCMA or relevant bargaining council similarly lacked jurisdiction to decide on the matter. This was particularly problematic in situations where the TES was unable to place an employee with a client (rendering an employee without an income), yet continued to keep the employee on its books and contended that no dismissal had taken place.⁶⁰ This was the view held in *National Union of Metal Workers of South Africa obo A Kethoiwe & 44 others v Abancedisi Labour Services*.⁶¹ The Court held that the removal of the

⁵⁶ See discussion under 2.2.1 above. See also *Vilane v Sita (Pty) Ltd* (2008) 5 BALR 486 (CCMA).

In this matter the employee of a labour broker contested to have been dismissed by the broker's client, but could not prove that he was the employee of the client.

⁵⁷Section 186 of the LRA.

⁵⁸*Khululekile Dyokhwe v Coen de Kock NO, CCMA, Mondi Packaging South Africa (Pty) Ltd and Stratostaff (Pty)Ltd t/a Adecco Recruitment Services*(2012) 10 BLLR 1012(LC) para 16.

⁵⁹ *Virgin Active South Africa (Pty) Ltd v Mathole N.O. & others* (2002) ZALC 34 (LC) para 5.

⁶⁰Benjamin P 'Decent work and non-standard employees: options for legislative reform in South Africa: a discussion document' (2010) 31 *ILJ* 845 861.

⁶¹*National Union of Metal Workers of South Africa obo A Kethoiwe & 44 others v Abancedisi Labour Services* (2012) 121 ZALC (CC) at para 36.

employees from the client's premises did not constitute termination of the employee's employment contract with the TES, and therefore did not constitute a dismissal within the meaning of section 186(1) of the LRA. The employee could therefore not argue an unfair dismissal case against either the TES or the TES client.

Whilst practically problematic for TES employees, this view enjoyed support from various commentators. It was argued that when placement at a client ended, it did not necessarily terminate the employment relationship between the TES and an employee.⁶² It was further argued that there was no clear reason why forming part of a pool of candidates for available work at a TES should not constitute a valid employment relationship.⁶³ This view suggested that TES employees could remain employees of the TES, even during periods where they were not assigned to render services to any client and therefore not receiving any income.⁶⁴

The above view is somewhat at odds with the ruling in *Fourie v JD Bester Brokers CC*⁶⁵. In this matter the TES failed to find suitable placement for an employee, resulting in the employee ultimately resigning and claiming constructive dismissal. The arbitrator reasoned that a TES, like any other employer, was subject to prevailing labour legislation.⁶⁶ The arbitrator concluded that the TES had an obligation to find suitable placement for an employee, and only where this seemed unlikely could retrenchment procedures be instituted.⁶⁷ It however remained unclear as to exactly how long the employee should be kept on the TES's books if no placement with a client could be secured, and when retrenchment procedures could therefore be instituted.

⁶²Theron J 'Employment is not what it used to be' (2003) 24 *ILJ* 1247 1265.

⁶³Bosch C 'Contract as a barrier to 'dismissal'. 'The plight of the labour broker's employee' (2008) 29 *ILJ* 813 840.

⁶⁴Bosch C 'Contract as a barrier to 'dismissal'. 'The plight of the labour broker's employee' (2008) 29 *ILJ* 813 837.

⁶⁵*Fourie v JD Bester Brokers CC* (2003) 24 *ILJ* (BCA).

⁶⁶*Fourie v JD Bester Brokers CC* (2003) 24 *ILJ* (BCA)1625.

⁶⁷*Fourie v JD Bester Brokers CC* (2003) 24 *ILJ* (BCA)1625.

2.2.3 Problems with commercial contractual nature of TES agreements

A third major problem with TES arrangements was the contractual commercial nature of the arrangement itself between the TES and the client. In the commercial contract between a TES and the client, and implicit to the arrangements on the services, the TES had to render to the client, the client was able to include a clause in terms of which it could request removal of a TES employee, by the TES for a multitude of reasons.⁶⁸ The problem with such commercial arrangement between the TES and the client was however that when such a request for removal was made by the client, the employment contract between the TES and TES employee normally ended automatically (*ex lege*, as this would be an employment term between the TES and the employee),⁶⁹ or, alternatively, the affected employee could be placed at another client, subject to available positions.⁷⁰ Practically therefore, as a result of the nature of the commercial contract between the TES and its client, a third party (the client) had practical input into an employment relationship between the TES and its employee – an employment relationship to which it was not a party.

This left TES employees without much job security since it was ultimately the client's actions which would lead to the termination of a TES employee's employment. Yet the employee had no unfair dismissal recourse against the client.⁷¹ This was confirmed in the matter of *April and Workforce Group Holdings t/a The Workforce Group*.⁷² The commissioner held that the TES employee's contract terminated by operation of law due to the client's request to have him removed from its premises. No dismissal had therefore taken place.⁷³ It is trite that any termination of an employment contract by operation of law is not construed as a dismissal for

⁶⁸Botes A 'The history of labour hire in Namibia: A lesson for South Africa (2013) 16 *PER* 506 526.

⁶⁹ Ibid.

⁷⁰Harvey S 'Labour brokers and worker's rights: Can they co-exist in South Africa?' (2005) 128 *SALJ* 100 112.

⁷¹ Benjamin P 'Subordination, Parasubordination and self-employment: A comparative study of selected African countries' (2010) at pg 131 -available at www.commerciallaw.uct.ac.za/usr/commercial/downloads/2 (accessed on 30 April 2015). Also see discussion under 2.2.2 above.

⁷²*April and Workforce Group Holdings t/a The Workforce Group* (2005) 26 *ILJ* 2224 (CCMA) 2235.

⁷³*April and Workforce Group Holdings t/a The Workforce Group* (2005) 26 *ILJ* 2224 (CCMA) 2236.

purposes of the LRA. Therefore the client could not accrue any liability for purposes of the LRA under these circumstances.⁷⁴

As a result, duration of employment could not be stipulated on the employment contract between a TES and an employee. This essentially then allowed the terms of the commercial contract between the TES and the client to dictate the expiry of the employment contract.⁷⁵

2.2.4 Trade union membership and rights

The fourth and final problem to be discussed stems from continuous rotation of TES employees between different clients. Because of this, trade unions have experienced difficulties in acting for, and organising, the TES sector. South African labour law prescribes membership thresholds in a workplace for recognition of a particular trade union by the employer.⁷⁶ Yet, TES employees are not guaranteed on-going employment within a specific workplace or industry. It was therefore cumbersome for TES employees to effectively organise themselves. To a large extent this difficulty was caused by the fact that these employees would mostly operate in the client's workplace as opposed to their own employer's workplace, being the TES. Furthermore, these employees are scattered within various client workplaces. Effectively a TES employee's affiliation to a certain trade union would also be adversely affected due to limited, or no opportunities for unions to recruit them as members.⁷⁷

As a result of that challenge, TES employees could not freely and easily enjoy their constitutional right to form and join a trade union and freely participate in its activities. Equally, trade unions could not fully enjoy their right to engage in collective bargaining on behalf of

⁷⁴*Mahlangu v Minister of Sports and Recreation* (2010) 5 BLLR 551 (LC).

⁷⁵Grogan J *Workplace law* 10th ed (2008) 3- 29; Theron J 'Intermediary or Employer? Labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618 628.

⁷⁶See section 14 of the LRA.

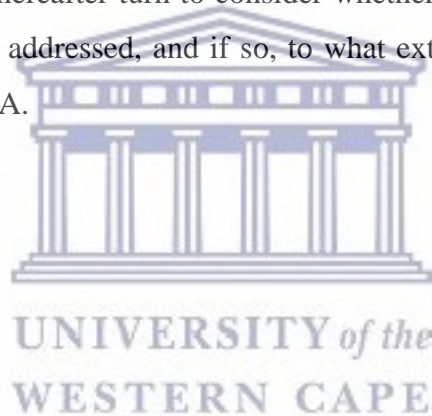
⁷⁷Botes A 'The history of labour hire in Namibia: a lesson for South Africa' (2013) 16 *PER* 525 536.

members. TES employees remained rarely unionised within a given workplace and their voice could not be heard.⁷⁸

2.3 CONCLUSION

This chapter has attempted to highlight some of the most common shortcomings experienced by TES employees in effectively exercising their labour rights under the pre-amended section 198 of the LRA. These difficulties largely stemmed from the existence, practically, of a tripartite relationship in a TES agreement.⁷⁹ Section 198 as read prior to the 2014 legislative amendments could easily be interpreted in such a manner that disregarded the TES employee's labour rights as guaranteed in the Constitution.

In the next chapter the 2014 legislative amendments made to section 198 of the LRA will be discussed. The research will thereafter turn to consider whether the shortcomings highlighted within this chapter have been addressed, and if so, to what extent, by the 2014 amendments made to section 198 of the LRA.



⁷⁸Theron J 'Intermediary or Employer? Labour brokers and the triangular employment relationship' (2005) 26 *ILJ* 618 646.

In the case of *South African National Defence Force v Minister of Defence & Another* (1999) 6BCLR 615 (CC) at pg 618, the importance of this right was more articulated. The court expanded the term "worker" not only limited to those entered into a contract of employment but also to members of the permanent force that are not always referred to as employees. For this reason, Cheadle called for extension of labour rights beyond the ambit of employment contract. See Cheadle H, Davis D & Hamsom N *South African Constitutional law: The bill of rights* (2002) 18-4.

⁷⁹Botes A 'The history of labour hire in Namibia: a lesson for South' (2013) 16 *PELJ* 525 536.

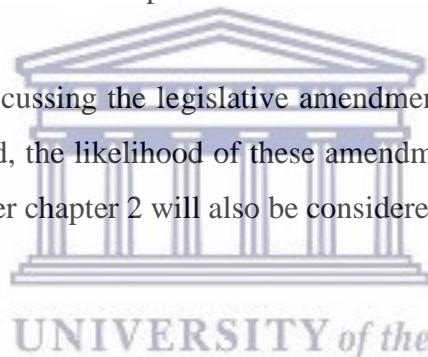
CHAPTER 3

ANALYSIS OF THE 2014 LEGISLATIVE AMENDMENTS TO SECTION 198 OF THE LABOUR RELATIONS ACT 66 OF 1995

3.1 INTRODUCTION

As a result of the problems with section 198 of the LRA prior to the 2014 amendments, as discussed in chapter two, the banning of labour broking received a fair amount of support leading up to the 2014 legislative amendments. The Portfolio Committee on Labour, falling under the South African Department of Labour, however determined that labour broking would not be banned completely, but rather subject to more strict regulation.⁸⁰ Consequently, section 198 of the LRA was amended by sections 37 and 38 of the Labour Relations Amendment Act 6 of 2014 in an attempt to address as best possible the shortcomings highlighted in chapter 2.⁸¹

This chapter will focus on discussing the legislative amendments made to section 198 of the LRA. Following the aforesaid, the likelihood of these amendments to effectively address the shortcomings highlighted under chapter 2 will also be considered.



⁸⁰Document No 449251 Department of Labour, 2010: 10th CEE Annual Report 2009-2010. Available at <http://www.rmi.org.za/wp-content/uploads/2012/08/DoLresponsepublichearings-labourbills.pdf> (accessed on 30 April 2015).

⁸¹Employees earning less than the threshold are not to be employed by labour brokers for a period exceeding three months;

- Employees who perform such services in excess of three months will be deemed to be permanent employees of the client;
- Employees, who are deemed to be employees of the client, must be treated on the whole not less favourable than other employees of the client, performing similar work;
- No person may perform the functions of a temporary employment service, unless it is registered.
- Termination of an assignment to a client by a TES in order to avoid the set principle will be regarded as dismissal;
- Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation.

3.2 2014 LEGISLATIVE AMENDMENTS EFFECTED TO SECTION 198 OF THE LRA

3.2.1 Meaning of 'temporary employment services'

Temporary employment services (TES's) ought to provide exactly that - temporary services rendered by workers at TES clients. That was in many instances however not the case prior to the 2014 legislative amendments. Instead, TES's were regularly used as a shield in creating permanent triangular employment relationships in order to circumvent labour laws.⁸² It was almost always impossible for TES employees to make successful LRA claims against either a client or the TES. This difficulty was informed by the fact that employment agreement was concluded on the basis of commercial agreement between the client and a TES with no consideration of the employee's employment rights. Such arrangement excluded TES employees from exercising their employment rights. Equally, the arrangement presented opportunity on the client to disregard mandatory legislative labour laws.⁸³

Prior to the 2014 amendments there was no legislative prescribed period which qualified the meaning of 'temporary employment'. The 2014 amendments however stipulated that employees earning less than a certain threshold⁸⁴ are not to be employed by labour brokers for a period exceeding three months.⁸⁵ It therefore seems that, as far as this amendment is concerned, TES employees may now no longer be utilised on an indefinite basis, but will be utilised temporarily only. Section 198A (3)(b) provides that, employees not performing such temporary service for the client are deemed to be the employee of that client and the client is deemed to be the employer, and is employed on an indefinite basis by the client. This amendment also seemingly address the utilisation of TES employees for indefinite periods, while earning less than employees hired directly by the client. The 2014 legislative amendments

⁸²See discussion under 2.2.3

⁸³See chapter 2, para 2.2.3

⁸⁴ Set at the Basic Conditions of Employment Act – GNR in government gazette GG 37795 dated July 1, 2014(R205, 433.30 per annum.

⁸⁵ Section 198A (1)(a) Labour Relations Act 66 of 1995.

now stipulate that where TES employees are utilised indefinitely, they shall enjoy same benefits as permanent employees of the client.⁸⁶

3.2.2 Deemed to be an employee

Since the 2014 amendments have now qualified a temporary period into not exceeding three months, the question is what happens at the expiry of the three months period? The amendments are clear that those employees who perform temporary services in excess of three months will be *deemed* to be permanent employees of the client.⁸⁷ Where TES employees are deemed as permanent employees of the client, they can no longer be treated less favourably than other employees of the client.⁸⁸ This provision therefore seeks to prevent inequality, and enforces equal treatment, between the deemed employees and the other employees of the client.

In furthering equality in this regard, section 198 (4A) of the LRA, as amended further provides that where the client is severally liable as prescribed by section 198,⁸⁹ or is deemed to be the employer of the TES employee, the TES employee will have the choice of instituting proceedings against either the TES or the client, or both.⁹⁰ The section as it stands does not refer to a transfer of employment from TES to the client when the deeming kicks in. Neither does the amended provisions anywhere state that the TES is no longer the employer. There is however an indication that when employees are deemed employees they will be treated as if

⁸⁶Section 198A (5) Labour Relations Act 66 of 1995.

⁸⁷Section 198A (3)(b) Labour Relations Act 66 of 1995.

⁸⁸Section 198A (5) Labour Relations Act 66 of 1995.

⁸⁹severally liable if the temporary employment service, in respect of any of its employees, contravened –

- (a) a collective agreement concluded in a Bargaining Council that regulated terms and conditions of employment;
- (b) a binding arbitration award that regulated terms and conditions of employment;
- (c) the Basic Conditions of employment Act; or
- (d) a determination made in terms of the Wage Act.

⁹⁰Section 198 (4A) Labour Relations Act 66 of 1995.

they are employees of the client for purposes of the LRA.⁹¹ That alone still does not afford TES employees the employment enjoyment and protection they deserve. It is therefore a considered view of the writer that drafters ought to have spelled out a true employer in a tripartite arrangement in order to curb previous shortcomings of section 198.

3.2.3 Dismissal after 3 months

With the 2014 amendments it was anticipated that clients could simply terminate assignments with TES at the expiry of three months so as to avoid the obligations discussed above with regards to TES employees.⁹² As such dismissal was provided for in order to avoid the above.⁹³ In doing so, the amendments ordered that termination of assignment to a client by a TES in order to avoid set principle will be regarded as dismissal.⁹⁴ This particular amendment will assist the TES employee when a jurisdictional question pertaining to existence of dismissal is raised.

As per the amendment, should it be established that a client terminated an assignment with the TES at the expiry of three months, this will automatically qualify as a dismissal.⁹⁵ Establishing that a dismissal in fact occurred should therefore be fairly easy for a TES employee. The employee will still however have to show the unfairness of that dismissal. In that regard, the amendments have at least eradicated the challenge previously faced by TES employees pertaining to the existence of a dismissal when the TES employee was removed from the services of the client.⁹⁶

⁹¹Section 198A (5) Labour Relations Act 66 of 1995.

⁹²Being deemed to be their employees and enjoys same benefits with its permanent employees.

⁹³Section 198A (4) Labour Relations Act 66 of 1995.

⁹⁴Ibid.

⁹⁵See footnote 14.

⁹⁶As discussed on para 2.2.2 under chapter 2, pg 15.

3.2.4 Record of who performs TES

In keeping records of who performs temporary services in South Africa, all TES's are obliged to be registered in terms of any applicable legislation.⁹⁷ This amendment serves as a monitoring measure in ensuring that all TES's are subjected to applicable labour laws. Non-registration will not exempt a TES from the provisions of legislative amendments made to section 198 of the LRA.⁹⁸ Operationalisation of this amended can only be confirmed once necessary secondary applicable legislation is in place. In this regard, section 198A (6) mandates the Minister to invite representations from the Public on which categories of work should be deemed to be temporary services in terms of subsection (1) (c)⁹⁹.

3.2.5 Employment contracts of TES employees

Prior to the 2014 amendments, it was commonly understood that employment contracts between a TES and its employees was influenced by the terms of commercial contracts between a client and a TES. The amendments however took cognisance of the fact that employment contracts were essentially concluded in a tripartite relationship where a third party (namely the client) was indirectly involved.¹⁰⁰

The amendments now prohibits employees from being employed by a TES on terms and conditions that are not permitted by any employment law, sectoral determination or collective agreement concluded in a bargaining.¹⁰¹ This amendment purports to nullify employment conditions that encouraged exploitation of TES employees and further compromised their job security. Commercial contracts will no longer have authority, as was the case before, to impose

⁹⁷Section 198 (4F) Labour Relations Act 66 of 1995.

⁹⁸Ibid.

⁹⁹In this section , a 'temporary service' means work for a client by an employee-

in a category of work and for any period of time which is determined to be a temporary service by a *collective agreement* concluded in a *Bargaining Council*, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsection (6) to (8).

¹⁰⁰See discussion under 2.2.3.

¹⁰¹Section 198(4C) Labour Relations Act 66 of 1995.

its terms on the employment contracts of TES employees. Should that happen, a TES employee will be able to approach an Arbitrator or the Labour Court to determine if the provisions in the employment contract complies with subsection 4C.¹⁰²

3.2.6 Disputes emanating from the amended provisions

Under the 2014 legislative amendments, all disputes emanating from section 198 of the LRA can now be entertained without a jurisdictional challenge. Prior to the 2014 amendments, in declaring a dispute a TES employee first had to prove who the true employer was, and secondly the existence of a dismissal. The 2014 amendments have now allowed TES employees to raise any type of dispute in the name of interpretation or application of the provisions of section 198 as amended. Interpretation or application will then be made by the Commissioner, while at the same time entertaining all the disputes associated with section 198. As bestowed in section 198 D of the LRA, any dispute arising from interpretation or application of sections 198A, 198B and 198C may be referred to the CCMA or a bargaining council with jurisdiction for conciliation and arbitration.

3.3 A DISCUSSION ON HOW LIKELY THE 2014 LEGISLATIVE AMENDMENTS TO THE LRA ARE TO ADDRESS THE PROBLEMS HIGHLIGHTED UNDER CHAPTER 2

Some of the provisions of the 2014 legislative amendments have since its incorporation onto the LRA been tested by the Courts. Below selected case laws will be discussed in an attempt to ascertain effectiveness of the amended provisions. The main aim of the discussion below is to evaluate whether the amendments are yielding different results on the challenges experienced by TES employees prior to the 2014 amendments.

¹⁰²See section (4E) Labour Relations Act 66 of 1995.

3.3.1 Identifying the true employer

In the case of *Refilwe Esau Mphirime vs Value Logistics Ltd / BDM Staffing (Pty) Ltd*¹⁰³ the Commissioner dealt with the provisions of section 198A(3)(b)(i) of the Labour Relations Act, as amended. This section provides that an employee not performing temporary services for the client is deemed to be the employee of that client and the client to be the employer of that employee.

In the case under discussion, Mr RE Mphirime (applicant) was employed by BDM Staffing (Pty) Ltd on a one year fixed term contract from 30 June 2014 to 30 June 2015. He was placed at Value Truck Rental as a checker and earned below the earnings threshold, with the result that section 198A (3)(b) was applicable to him. His contract was terminated on 2 April 2015 after receiving one week's notice of termination. It was clear that the applicant had been employed for more than three months, and that he had not been employed in a category that was determined to be a temporary service as per the amended LRA. The Commissioner had to determine the true employer of the applicant.

The Commissioner's interpretation of section 198A (3)(b) was based on the wording of the clause itself. The Commissioner expressly alluded that “[o]nce the employee is not performing such temporary service anymore, the client is deemed to be the employer in terms of the LRA. The client therefore bears the responsibility to ensure that duties and obligations towards the employee in terms of the LRA are met”¹⁰⁴.

The Commissioner's aforesaid interpretation is welcomed since it assists in effectively stopping abusive practises and advances the purpose of the amendments.¹⁰⁵ In line with this interpretation, the client can no longer avoid the responsibility of an employer under the guise of not having an employment contract with the TES employee. This effectively means that TES employees stand to gain protection against unfair treatment persecuted by TES clients. The Commissioner echoed that should the amendments be interpreted to mean joint and several

¹⁰³*Refilwe Esau Mphirime vs Value Logistics Ltd / BDM Staffing (Pty) Ltd* (2015) [Case Reference Number FSRBFBC34922].

¹⁰⁴*Refilwe Esau Mphirime vs Value Logistics Ltd / BDM Staffing (Pty) Ltd* (2015) at para34.

¹⁰⁵*Refilwe Esau Mphirime vs Value Logistics Ltd / BDM Staffing (Pty) Ltd* (2015) at para 36.

liability, abusive practices would not be addressed, and that would defeat the purpose of the amendments.¹⁰⁶ Consequently it seems as if the correct interpretation of section 198A (3)(b)(i) entails that a client of a TES is awarded the duties and obligations of an employer when the employee is no longer performing a temporary service. This implies that any claim brought in terms of the LRA must be brought against the duty-bearer, which in cases such as this is the client.¹⁰⁷

In the matter between *Assign Services (Pty) Limited v Krost Shelving & Racking (Pty) Ltd & National Union of Metal Workers of South Africa*¹⁰⁸ about 22 employees were assigned to Krost Shelving & Racking (Pty) Ltd on a full time basis from 1 January 2015. The placement of the employees fell within the scope of section 198A (3)(b) of the LRA. This meant that these employees were no longer performing temporary service for the client, and were deemed to be employees of the client. The interpretation of the deeming provision however remained ambiguous for the parties. As a result they referred the dispute to the CCMA in terms of section 198D (1)¹⁰⁹ of the LRA. The Commissioner was required to determine the correct interpretation of section 198A (3)(b), in particular ‘the deeming provision’.

The applicant (the TES) was of the opinion that the deeming provision still provided that TES employees remained the employees of the TES for all purposes. Equally, the applicant believed that employees were deemed to be employees of the client for purposes of LRA.¹¹⁰ The applicant therefore argued for a dual employment position. NUMSA, acting on behalf of the employees, was of the view that legislation often used the word ‘deem’ in a very loose sense, and the word could easily be replaced with the word ‘is’.¹¹¹ Henceforth, NUMSA argued that

¹⁰⁶*Refilwe Esau Mphirime vs Value Logistics Ltd / BDM Staffing (Pty) Ltd* (2015) at para 37.

¹⁰⁷*Refilwe Esau Mphirime vs Value Logistics Ltd / BDM Staffing (Pty) Ltd* (2015) at para 40.

¹⁰⁸*Assign Services (Pty) Ltd (Applicant) vs Krost Shelving & Racking (Pty) Ltd & National Union of Metal Workers of South Africa* (2015) [Case Number ECEL1652-15 (CCMA).

¹⁰⁹Which allows the CCMA to determine disputes about the interpretation or application of section 198 A of the LRA, as amended.

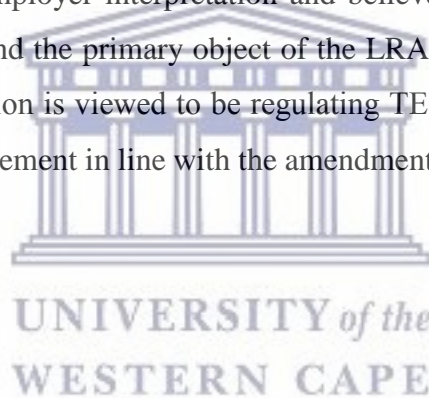
¹¹⁰*Assign Services (Pty) Ltd (Applicant) vs Krost Shelving & Racking (Pty) Ltd & National Union of Metal Workers of South Africa* (2015) at para 3.2

¹¹¹*Assign Services (Pty) Ltd (Applicant) vs Krost Shelving & Racking (Pty) Ltd & National Union of Metal Workers of South Africa* (2015) at para 4.2.

the word ‘deem’ created legal fiction in section 198 (3)(b) (i).¹¹²NUMSA therefore argued for a ‘sole employment’ position, contending that the legislature’s intention was to create better employment conditions and not new liabilities.¹¹³

The Commissioner opted to approach the deeming provision in section 198A (3)(b) in the same manner the law deals with the concept of ‘adoption’.¹¹⁴ In the latter scenario the law did not regard a biological parent and the adoptive parent as dual parents, since doing so would lead to confusion and uncertainty.¹¹⁵ The Commissioner subsequently concluded that the correct interpretation of section 198A (3) (b) was that after the lapse of 3 months, the client became the sole employer of the placed employees, who earned below the BCEA¹¹⁶ threshold.¹¹⁷

On 10 July 2017, the Labour Appeal Court delivered a judgement on the deeming provision.¹¹⁸ The Court aligned itself with a view that section 198A (3) (b) (i) of the LRA was primarily introduced to protect vulnerable employees against abuse by TES. The Labour Appeal court therefore supports the sole employer interpretation and believes it to be consonant with the purpose of the amendments and the primary object of the LRA as well as the Constitution.¹¹⁹ The sole employer interpretation is viewed to be regulating TES’s by restricting it to genuine temporary employment arrangement in line with the amendments.¹²⁰ The Court further reasons



¹¹²Ibid.

¹¹³*Assign Services (Pty) Ltd (Applicant) vs Krost Shelving & Racking (Pty) Ltd & National Union of Metal Workers of South Africa* (2015) at para 4.7.

¹¹⁴*Assign Services (Pty) Ltd (Applicant) vs Krost Shelving & Racking (Pty) Ltd & National Union of Metal Workers of South Africa* (2015) at para 5.12.

¹¹⁵Ibid.

¹¹⁶Section 6(3) of the Basic Condition of employment Act no 75 of 1997.

¹¹⁷*Assign Services (Pty) Ltd (Applicant) vs Krost Shelving & Racking (Pty) Ltd & National Union of Metal Workers of South Africa* at para 5.21.

¹¹⁸*NUMSA v Assign Services and Others* (2017) 10 BLLR 1008 (LAC).

¹¹⁹*NUMSA v Assign Services and Others* (2017) at para 38.

¹²⁰*NUMSA v Assign Services and Others* (2017) at para 42.

that employment relationship between a placed employee and the client arises by operation of law.¹²¹

3.3.2 Automatic termination of contract of employment

In the case of *SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services group (Pty) Ltd*¹²², the Labour court dealt with the provisions of section 198(4C)¹²³ of the amended LRA. This section prohibits the employment of a TES employee on terms and conditions of employment that are not permitted by any applicable employment law, sectoral determination or collective agreement. The Labour court is given authority in terms of section 198(4D) of the LRA to determine whether a provision in an employment contract or a contract between the TES and a client complies with subsection 4C. The Court is further entrusted with the authority to make an appropriate order or award in this respect.

In the above matter the Court had to deal with the issue of automatic termination of an employment contract. In terms of the commercial arrangement between the TES and its client, the client could cancel its contract with the TES at will. The client proceeded to do so. This termination resulted in the applicant employees becoming redundant. SATAWU approached the Labour Court and argued that an automatic termination of the employment contract had taken place, which was unfair. The respondent however argued that termination of the employee's contracts was by operation of law given the nature of the tripartite relationship between the parties and the commercial contract between TES and its client.

The Court reasoned that following the 2014 legislative amendments, a TES could no longer hide behind the shield of a commercial contract to circumvent legislative protection against unfair dismissal claims.¹²⁴ A contractual provision that provided for automatic termination of

¹²¹*NUMSA v Assign Services and Others* (2017) at para 45.

¹²²*SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services group (Pty) Ltd* (2015) ZALCJH 129 (LC).

¹²³An employee may not be employed by a TES on terms and conditions of employment which are not permitted by this act, any employment law, sectoral determination or collective agreement concluded in a bargaining council agreement or sectoral determination

¹²⁴*SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services group (Pty) Ltd* (2015) ZALCJH 129 (LC) at para 59.

employment contracts undermined the employees' rights to fair labour practices.¹²⁵ The provision that caters for automatic termination of the contract is now prohibited and statutorily invalid.¹²⁶ In conclusion, the Court held that a contractual obligation that provided for automatic termination of the employment contract at the will of a third party, or external circumstances beyond the rights conferred to the employee in law, undermined an employee's right to fair labour practices.¹²⁷

3.3.3 Trade union membership and rights

One of the difficulties traditionally experienced by TES employees was the manner in which they were scattered in various workplaces, and the huge impact this had on their ability to exercise organisational rights.¹²⁸ In remedying the situation, section 21(12) of the amended LRA provides that where a trade union seeks to exercise the rights conferred by Part A in respect of TES employees, it may seek to exercise those rights in a workplace¹²⁹ of either the TES or one or more clients of the TES. Furthermore, if a trade union exercises rights in a workplace of a client of the TES, any reference in Chapter III¹³⁰ to the employer's premises must be read as including the client's premises.¹³¹ Section 21(8) of the amended LRA permits commissioners who are deciding whether a registered trade union is representative for the purpose of acquiring organisational rights to consider the composition of the workforce in the workplace.¹³²

¹²⁵*SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services group (Pty) Ltd* (2015) ZALCJH 129 (LC) at para 59.

¹²⁶*SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services group (Pty) Ltd* (2015) ZALCJH 129 (LC) at para 59.

¹²⁷*SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services group (Pty) Ltd* (2015) ZALCJH 129 (LC) at para 51.

¹²⁸See discussion under chapter 2 para 2.2.4; pg 9.

¹²⁹**“Workplace”** (c) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation

¹³⁰Chapter III of the LRA – Collective bargaining.

¹³¹Section 21 (12) Labour Relations Act.

¹³²Bosch C ‘The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?’ (2013) 34 *ILJ* 1631 1634.

Section 21(12) of the amended Act has however been criticised as being too vague.¹³³ It is argued that it creates ambiguity in the sense that it can be interpreted as only allowing employees of the employer that controls the workplace to be counted for purposes of securing organisational rights.¹³⁴ By doing so, TES employees will not be taken into account for purposes of determining representativeness at the workplace of the client at which they work.¹³⁵ A submission in that regard is that the “workplace” could have been spelled out to refer to the workplace of the employer of the employees represented by a union. For that reason it is not believed that section 21(12) goes far enough to address previous challenges as far as organisational rights of TES are concerned.¹³⁶

Contrary to the aforesaid view, some commentators believe that section 21(12) of the amended Act makes it possible for TES employees to access organisational rights.¹³⁷ The section is thought to serve as an encouragement for trade unions to recruit and represent TES employees in such a manner that their needs and interests are adequately addressed.¹³⁸ That being said, there remains a strong view that the drafters of the 2014 amendments ought to have spelled out that TES employees may be taken into account in determining union representativeness at the workplace of the client when seeking to acquire rights against the client.¹³⁹ This also leads to some scholars criticising the current definition of a workplace.¹⁴⁰ It is feared that the current

¹³³Bosch C ‘The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?’ (2013) 34 *ILJ* 1631 1635.

¹³⁴Bosch C ‘The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?’ (2013) 34 *ILJ* 1631 1635.

¹³⁵ *Ibid.*

¹³⁶Bosch C ‘The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?’ (2013) 34 *ILJ* 1631 1635.

¹³⁷ Cohen T ‘The effect of the Labour Relations amendment bill 2012 on non-standard employment relationships’ (2014) 35 *ILJ* 2607 2619.

¹³⁸Cohen T ‘The effect of the Labour Relations amendment bill 2012 on non-standard employment relationships’ (2014) 35 *ILJ* 2607 2619.

¹³⁹Bosch C ‘The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?’ (2013) 34 *ILJ* 1631 1636.

¹⁴⁰See fn 45.

definition is confirming centralisation of bargaining power and only defends trade unions that are already recognised.¹⁴¹ The current definition might be found to conflict with workplace democracy.¹⁴²

3.4 CONCLUSION ON CASE LAW DISCUSSION

Having briefly considered some cases in which the Court was called upon to implement some of the amended provisions, the fear is that many of the challenges faced by TES employees prior to 2014 amendments might still prevail. Of great concerns is the fact that most of the 2014 amendments relating to TES employees only extend protection to those TES employees who earn below the governing BCEA earnings threshold.¹⁴³ Another big concern is the fact that the majority of the amended protections only apply to TES employees after they have been employed at a client for three months. Protection therefore remains limited for TES employees who earn above the earnings threshold, or who has worked less than 3 months at a particular client.

Apart from the aforesaid general shortcomings, there are still specific areas that remain unaddressed, or insufficiently addressed after the 2014 amendments. The 2014 legislative amendments still maintain the fiction that a TES is the employer of the TES employee. This has been a critical shortcoming in the arena of TES in South Africa, as evidenced by all the challenges discussed under chapter 2. The deeming provision introduced by the legislative amendments in this regard remains unsatisfactory as indicated above.

Furthermore, there is still no indication of what would happen to TES employees during periods in which they are not placed at a client. It seems as if a TES still has the opportunity to simply keep unplaced employees on its books and contend no dismissal within the meaning of section 186 of the LRA occurred. Also of concern is the fact that joint and several liabilities of the client

¹⁴¹Theron J, Godfrey S, Fergus E ‘Organisational and collective bargaining rights through the lens of Marikana’ (2015) 36 *ILJ* 849 856.

¹⁴²Theron J, Godfrey S, Fergus E ‘Organisational and collective bargaining rights through the lens of Marikana’ (2015) 36 *ILJ* 849 857.

¹⁴³Refer to fn 5.

and TES are still not extended to breaches of the LRA.¹⁴⁴ The client is not immediately jointly and several liable of any LRA breaches associated with TES employee within the first three months. Joint and several liabilities are only extended once the client becomes a deemed employer of the TES employee. Only then are TES employees afforded leverage to institute proceedings against either the TES or the client, or both. The fear is therefore that many of the challenges experienced prior to the 2014 legislative amendments might still prevail.

3.5 CONCLUSION

In light of the discussion under 3.2 and 3.3 above, it is evident that the legislature has made various amendments to the LRA in an attempt to address previous shortcomings of section 198 of the LRA. But as also shown above, attempts made in this regard are in many respects still insufficient in addressing historical shortcomings. It is contended that the 2014 legislative amendments have omitted critical aspects, which then still renders TES arrangements open to accuse of breaching constitutional rights.¹⁴⁵ There is also no certainty yet on whether these amendments will fulfil its intended purpose. This doubt is informed by the manner in which the amended provisions are crafted. The amendments are found to be too vague for its intended purpose. A comment often made on the amendments is that the impact of these amendments will depend upon its effective enforcement and implementation.¹⁴⁶

Currently, the 2014 legislative amendments seem to be facing challenges as far as interpretation is concerned. As example is the ongoing debate pertaining to the interpretation of the deeming provision (as per section 198A (3)(b)(i)) introduced by the amendments). This is troubling, since the source of most previous shortcomings in a tripartite TES relationship emerged from issues of identifying the true employer. Conflicting views in respect of consistent interpretation of the deeming provision will have a direct impact on the identification of a true employer in a tripartite relationship.

¹⁴⁴Smith N, Fourie E ‘Perspectives on extended protection to atypical workers, including workers in the informal economy, and developed countries’ (2009) *TSAR* 516.

¹⁴⁵Refer to argument under 3.3.

¹⁴⁶ Cohen T ‘The effect of the Labour Relations amendment bill 2012 on non-standard employment relationships’ (2014) 35 *ILJ* 2607 2622.

CHAPTER 4

OPERATIONALISATION OF TEMPORARY EMPLOYMENT SERVICES IN NAMIBIA

4.1 INTRODUCTION

In comparing the nature of labour broking and the shortcomings in regulation thereof in South Africa, Namibia will be used as a comparative jurisdiction. The legal and social contexts within which Namibia and South Africa's policies towards labour broking were formulated bear a number of similarities.¹⁴⁷ For some years both countries were governed by a minority of predominantly white members of society before piloting their first democratic elections.¹⁴⁸ The white population exercised both political and economic power until the early 1990s when first Namibia, and then South Africa transformed into social democracies under their then new Constitutions.¹⁴⁹ In South Africa and Namibia, contract labour was always the way to go in the regime of apartheid capitalism.¹⁵⁰ In both countries, this approach assisted in creating a ready supply of cheap labour, sustaining viability of economy and further distinguishes races.¹⁵¹

Due to the pressure of union movement, the Namibian government made a decision to ban labour broking effective from 2007.¹⁵² Such decision was informed by Namibian common view

¹⁴⁷Van Eck S "Agency Work in Namibia and South Africa: Lessons Gained from the Decent Work Agenda and the Flexicurity Approach" (2013) [paper prepared for labour law research network: International conference – Barcelona] available at http://www.upf.edu/gredtiss/pdf/2013-LLRNConf_SvEck.pdf (accessed on 30 April 2015) at 12.

¹⁴⁸Van Eck S "Agency Work in Namibia and South Africa: Lessons Gained from the Decent Work Agenda and the Flexicurity Approach" (2013) [paper prepared for labour law research network: International conference – Barcelona] available at http://www.upf.edu/gredtiss/pdf/2013-LLRNConf_SvEck.pdf (accessed on 30 April 2015) at 13.

¹⁴⁹Ibid.

¹⁵⁰Fenwick C 'Labour law in Namibia: towards an indigenous solution' (2006) 123 SALJ 665 667.

¹⁵¹ Fenwick C 'Labour law in Namibia: towards an indigenous solution' (2006) 123 SALJ 665 668.

¹⁵²Section 128 of Namibian Labour Act no 11 of 2007.

that conditions of labour broking were not different to those experienced under the apartheid regime.¹⁵³ Banning labour broking in Namibia therefore aimed at relieving its constituents from similar struggles of the apartheid. As a result Namibian Labour Act no 11 of 2007 was promulgated in prohibition of labour broking. Equally in South African context, Labour Relation Act no 66 of 1995, the cornerstones of the post-apartheid regime made provisions for TES.¹⁵⁴ These two countries opted for different approaches as far as TES existence is concerned, Namibia opted to ban completely and South Africa to regulate.

Both SA and Namibia are members of the ILO¹⁵⁵ and each operates under a supreme constitution that guarantees the right to freedom of occupation, trade and profession.¹⁵⁶ Both countries shares similar experiences in dealing with labour broking problems. Namibia first undergone a change in its legislative regime, with South Africa doing so in 2014. The major difference between the two countries is however the approach they took with labour broking. Namibia decided to completely ban labour broking, whereas South Africa opted for strict regulation. The situation between South Africa and Namibia will be compared in this chapter to ascertain if there is any lesson to be learnt from Namibia in the manner they have addressed labour broking.

4.2 A BACKGROUND OF LABOUR BROKING IN NAMIBIA

The issue of labour hire in Namibia surfaced in the late 1990s, when workers demonstrated against labour hire companies in Walvis Bay.¹⁵⁷ The main reason for use of labour hire in Namibia was to concentrate on productivity without destructions of labour laws.¹⁵⁸ Labour hire employees were paid far less than permanent employees and they did not enjoy any employment benefits. This kind of exploitation and vulnerability of employees had been in existence since

¹⁵³Botes A 'The history of labour hire in Namibia: A lesson for South Africa' (2013) 16 *PELJ* 506 536.

¹⁵⁴Theron J, 'The erosion of worker's rights and the presumption as to who is an employee' (2002) 6 *Law Democracy & Dev* 27.

¹⁵⁵ International Labour Organisation.

¹⁵⁶Van Eck BPS 'Temporary Employment Services in South Africa and Namibia' (2010) 13 *PELJ* 107 120.

¹⁵⁷Jauch H 'Namibia's labour hire debate in perspective' (2010) available at www.labournet.de/wp.../09/Labour-Hire-Background-Paper-2010.pdf (accessed on 24/07/2015) at 2-4.

¹⁵⁸*Ibid.*

1990's during slavery regime in Namibia.¹⁵⁹ Labour hire employees had no job security and their employment contract could be termination automatically as per client's need.¹⁶⁰ A similar situation in South Africa was experienced prior to the labour law amendments of 2014.¹⁶¹

Namibia has never regulated labour hire in its post- apartheid Labour Relations Act¹⁶². Only during the congress of the National Union of Namibian Workers (NUNW) in 2006, the union leaders submitted that labour hire was similar to colonial migrant labour system. As a result, proposed that labour hire shall be abolished.¹⁶³ Subsequently, in 2007 Namibian law-makers decided to outlaw labour hire entirely. The ban was effected in terms of section 128 of the labour Act, 2007.¹⁶⁴ The section states:

128. Prohibition of labour hire -

¹⁵⁹Botes A 'The history of labour hire in Namibia: A lesson for South Africa' (2013) 16 PELJ 506 509.

¹⁶⁰Jauch H 'Namibia's labour hire debate in perspective' (2010) available at www.labournet.de/wp.../09/Labour-Hire-Background-Paper-2010.pdf(accessed on 24/07/2015) at 5.

¹⁶¹Amendments iro section 198 of the LRA came into effect on 1 January 2015,as follows:

- Employees earning less than the threshold are not to be employed by labour brokers for a period exceeding three months;

- Employees who perform such services in excess of three months will be deemed to be permanent employees of the client;
- Employees, who are deemed to be employees of the client, must be treated on the whole not less favourable than other employees of the client, performing similar work;
- No person may perform the functions of a temporary employment service, unless it is registered.
- Termination of an assignment to a client by a TES in order to avoid the set principle will be regarded as dismissal;
- Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation.

¹⁶²Namibian Labour Relations Act no 06 of 1992.

¹⁶³Jauch H 'Namibia's labour hire debate in perspective' (2010) available at www.labournet.de/wp.../09/Labour-Hire-Background-Paper-2010.pdf(accessed on 24/07/2015) at 1.

¹⁶⁴Namibian Labour Relations Act no 11 of 2007.

(1) No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party.

(2) [...]

(3) Any person who contravenes or fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding N\$80,000.00 or to imprisonment for a period not exceeding 5 years or to both such fine and imprisonment.

Namibia's Labour Act came into operation on 01 November 2008. Under section 128 (4)¹⁶⁵ of this Act, the Legislature admitted to have interfered with fundamental freedoms expressed in Article 21(l) (j) of the Namibian Constitution¹⁶⁶. This interference was however justified to be in the interest of decency and morality.¹⁶⁷ It is therefore evident that legislature pre-empted potential infringement on the Namibian constitutional right to ‘... practise any profession or carry any occupation, trade or business’.¹⁶⁸

4.3 LABOUR HIRE IN NAMIBIA: TO BAN OR NOT TO BAN?

4.3.1 Africa personnel services (Pty) Ltd v government of the Republic of Namibia (2008)

Shortly after the banning provisions of section 128 of Namibian Labour Act were effected, one of the biggest companies in the country, African Personnel Services (hereinafter referred as APS) approached Namibian High Court. The company argued that section 128 of the Namibian Labour Act, which prohibits labour hire was undermining its constitutional right envisaged under article 21 (1) (j) of the Constitution of Namibia.¹⁶⁹ The respondent rebutted the applicant's

¹⁶⁵In so far as this section interferes with the fundamental freedoms in Article 21(l)(j) of the Namibian Constitution, it is enacted upon the authority of Sub-article 2 of that Article in that it is required in the interest of decency and morality.

¹⁶⁶All persons shall have a right to practise any profession, or carry any occupation, trade or business.

¹⁶⁷Section 128 (4) Namibian Act no 11 of 2007.

¹⁶⁸Research on women on farms project (2009) available at <http://www.wfp.org.za/>. (accessed on 15 April 2015) at 13.

¹⁶⁹All persons shall have a right to practise any profession, or carry any occupation, trade or business.

claim, contending that labour hire businesses had no *locus standi* to bring any application challenging the constitutionality of section 128 of the Labour Amendment Act. In the respondent's opinion, the constitutional right claimed only vests in natural persons who are citizens of Namibia.¹⁷⁰

In its judgment the High Court concluded that labour hire arrangement had no legal basis in Namibian law and was therefore unlawful.¹⁷¹ It was ruled that prohibition of labour hire in Namibia as effected by section 128 of the 2007 Labour Amendment Act was not unconstitutional.¹⁷² The Court cited various reasons in support of the judgment, including: labour hire had no legal basis in Namibian common law, which was based on Roman law;¹⁷³ contracts of employment only have two parties (employer and the employee). Involving a third person (i.e. labour hire company) in an employer-employee relationship was unlawful.¹⁷⁴ The Court further reasoned that provisions of section 21 (1) (j) of the Namibian constitution did not include labour hire companies.¹⁷⁵ APS ultimately could not succeed on the application of striking down provisions of section 128 of Namibian Labour Act no 11 of 2007.

4.3.2 The Supreme Court of Appeal judgement in the African personnel services matter

African Personnel Services had some reservations with the ruling of the High Court. The company filed an appeal in the Supreme Court of appeal of Namibia. In the appeal, APS contended that section 128 of the Labour Act was unconstitutional as it was infringing on its constitutional right to practise any profession, or carry any business, trade or business.¹⁷⁶

As in the High Court, the Respondent argued that the Appellant had no legal basis to seek

¹⁷⁰*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2008) NHC at para 9.

¹⁷¹*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2008) NHC at para 38.

¹⁷²*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia*(2008) NHC at para 44.

¹⁷³*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2008) NHC at para 29.

¹⁷⁴*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2008) NHC at para 25.

¹⁷⁵*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2008) NHC at para 25.

¹⁷⁶*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 18.

constitutional review of section 128. In the respondent's view the right guaranteed in section 21(1) (j) of Namibian constitution is only vested in natural and not juristic person. The fact that section 128 declared labour hire unlawful renders the activity unlawful and therefore can no longer be protected by the constitution.¹⁷⁷

Notwithstanding contrasting views in respect of prohibition of labour hire, the Court strongly considered history of contract labour system applied in Namibia during apartheid era. In remembrance of this regime, the Court expressed itself on the topic as follows:

*In Namibia, the expression "labour hire" is loaded substantive and emotive content extending well beyond its ordinary meaning. Considering in its historical context, it evokes powerful and painful memories of abusive contract labour discrimination. So regarded, it constitutes one of the deeply disturbing and shameful chapters in the book of injustices, indignities and inhumanities suffered by indigenous Namibians at the hands of successive colonial and foreign rulers for more than a century before independency".*¹⁷⁸

Five Judges delivered unanimous judgement and ruled that section 128 of the Namibian Labour Act was unconstitutional and should be struck down.¹⁷⁹ In reaching this ruling, the Court understood the provision of section 21(1)(j) of Namibian constitution as stipulated. i.e. "*all persons shall have a right to practise any profession, or carry any occupation, trade or business*". In the Court's interpretation, "all persons" is applicable to the aggrieved person without distinguishing a natural from a juristic person. In that context, it was acknowledged that an aggrieved person has a right to approach the Court in seeking enforcement or protection of its fundamental freedom.¹⁸⁰ The Court further found that simple statutory prohibition expressed in section 128 cannot prevent constitutional review.¹⁸¹ Above all, the judges gave credence to ILO¹⁸² convention 181 of 1997 on Private employment agencies. This convention recognises

¹⁷⁷*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 18

¹⁷⁸*Africa personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 1.

¹⁷⁹*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 118.

¹⁸⁰*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 44.

¹⁸¹*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 53.

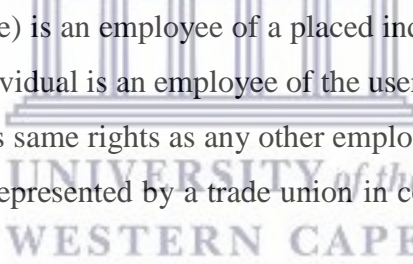
¹⁸²International Labour Organisation.

operations of private employment agencies with due consideration of protection of employees. The Court showed that ILO convention favoured regulation of labour hire and not complete prohibition.¹⁸³ Supreme Court of Appeal held that prohibition of labour brokers was directly infringing on the applicant's freedom to carry on a trade or business. Accordingly it was found that prohibition of labour hire in Namibia restricts commercial activity protected by the Constitution.¹⁸⁴

4.3.3 Lifting of labour hire banning in Namibia

Subsequent to the decision of the Appeal Court in respect of section 128 of Namibian Labour Act no 11 of 2007, provisions of the section were cancelled and replaced. It became mandatory of Namibian government to regulate labour hire. Regulation was done through section 6 of the Namibian Labour Amendment Act no 2 of 2012. This legislation entirely replaced section 128 of Namibian 2007 Labour Act.

New provision of the amendment Act provides that:

- 
- A client (user enterprise) is an employee of a placed individual, except an independent contractor and that individual is an employee of the user enterprise;¹⁸⁵
 - A placed individual has same rights as any other employee including the right to join a trade union and to be represented by a trade union in collective bargaining with his or her employer;¹⁸⁶
 - a placed individual cannot be employed on terms and conditions of employment that are less favourable than those applicable to employees of a client who perform the same or similar work or work of equal value;¹⁸⁷
 - A user enterprise is prohibited from hiring persons through agency during or in contemplation of a strike or lockout; or within six months after a retrenchment to

¹⁸³*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 101.

¹⁸⁴*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 at para 63.

¹⁸⁵Section 6 (2), Labour Relations Amendment Act no 2 of 2012.

¹⁸⁶Section 6 (3), Labour Relations Amendment Act no 2 of 2012.

¹⁸⁷Section 6 (5)(a) & (b), Labour Relations Amendment Act no 2 of 2012.

perform the same or similar work or work of equal value with that of the retrenched employees.¹⁸⁸

- Contravention of these amendments is classified as an offence and criminal penalty of a fine not exceeding N\$80,000 or imprisoned for a period not exceeding two years (or both) is recommended;¹⁸⁹
- The agency and a client are jointly deemed to be the employer of the placed individual and are severally liable for contraventions of this Act in the event the Minister grants an application of exemption of a user enterprise. In that case the employee has an option to seek relief against either employment agency or a client or both.¹⁹⁰

The Amendment Act in Namibia aimed at providing protection to temporary employees of labour hire and to extend entire employment rights to them. At this stage, the lawmakers had strongly considered the crisis of a true employer in a tripartite relationship. As a result the client was reflected as a ‘true’ employer of the employee.¹⁹¹ This is what South Africa has not exclusively outlined in the current amendments provided for section 198. As a result there are differing opinions on what is meant by the ‘deeming’ phrase used to describe the employer. Botes agrees with the wording used in the Namibian Amendment Act, precisely because it is the client who enjoys labour potential of the employee and at the same time exercises control of the TES’s work performance on a daily basis.¹⁹²

The Namibian Act however makes provision for exemption of the client from the responsibility of the employer, on condition that all the parties agree.¹⁹³ The exemption still does not set free the client from being held jointly liable of any contravention of the Act. A placed employee is given a choice of seeking relief against either a client or a labour broker or both in the event of contravention. The employees of the employment agency in Namibia are also guaranteed the

¹⁸⁸Section 6 (2), Labour Relations Amendment Act no 2 of 2012.

¹⁸⁹Section 6 (7), Labour Relations Amendment Act no 2 of 2012.

¹⁹⁰Section 6 (9)(a), Labour Relations Amendment Act no 2 of 2012.

¹⁹¹Section 128 (2), Labour Relations Amendment Act no 2 of 2012.

¹⁹²Botes A ‘The history of labour hire in Namibia: A lesson for South Africa’ (2013) 16 PELJ 506 522.

¹⁹³ Section 128 (8) & (9) of the Labour Relations Amendment Act no 2 of 2012.

same rights and benefits with the employees employed by the client.¹⁹⁴ Important to note, the current amendments in South Africa are only invoking this provision once the employee of the TES is deemed as the employee of the client.

The Namibian amendment Act no 2 of 2012 set certain sanctions in place under circumstances where the client failed to comply with the requirements of not differentiating its atypical and permanent employees. The sanctions are also applicable when the client employs temporary employees within six months after retrenchment.

Number of viewers believes that Namibian government should be commended to have addressed the most important issues concerning labour broking in its legislation. In support, there is a firm belief that legislation can ensure that all employees (regardless of their form of employment) receive deserving protection that is consistent with constitutional entrenched rights.¹⁹⁵ Confirmation of that belief however still remains to be tested in South Africa.

4.4 WAS THAT THE END OF THE CHAPTER FOR LABOUR HIRE IN NAMIBIA?

4.4.1 Discussion of *Africa labour services (Pty) Ltd v the Minister of Labour and Social Welfare (2013) NAHCMD*: post-amendment case

Shortly after promulgation of the amendments of section 128, labour hire business began the outcry in as far as the impact of the regulation is concerned. Such was displayed in the matter of *Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare*.¹⁹⁶

Again, one of the biggest labour hire companies, Africa Labour Services approached Namibian High Court in respect of the amendments made in section 128 through Labour Amendment Act no 2 of 2012. The matter was heard on 03 March 2009, wherein APS argued that amendments

¹⁹⁴ Section 128 (3) of the Labour Relations Amendment Act no 2 of 2012.

¹⁹⁵ Benjamin P 'To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia' in *Labour law into the future* Malherbe K & Sloth-Nielsen (eds) (2012) 209.

¹⁹⁶ *Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare (2013) NAHCMD*.

made in section 128 of Namibian labour Act had a “deleterious effect” on its business.¹⁹⁷ The company contended that the user enterprise is cancelling their agreements since the advent of the amendments. It was further alleged that legislative interference in the arrangement of labour hire has malicious intent to put labour hire companies out of business. The new enactment was equated to a total “overkill”.¹⁹⁸ Namibian government was strongly criticised by labour hire company, in that legislation brought forward in regulation of labour hire has a sound of death knell in Namibian labour hire businesses.¹⁹⁹ The Applicant vehemently stated that legislation of labour hire was deliberately designed to make the environment hostile so as for all practical purposes forces labour hire business to shut down.²⁰⁰ It was alleged that legislature intended to achieve its initial objective of prohibiting labour hire in Namibia.²⁰¹ APS submitted that section 128 of Labour Amendment Act no 2 of 2012 and its experienced impact is directly causing material barrier in the operation of their business.²⁰² In support of that claim, the Applicant showed record of cancellation of agreements since the introduction of amendments. Labour hire company further contended that, no regulations were promulgated prior putting amended Act into operation. In that respect, the company accused the Minister to have acted *ultra vires*.²⁰³

Mr Chaskalson with Mr Markus appeared on behalf of the Respondent. They denied that the section is in any manner causing a material barrier as alleged by the Applicant. They simply argued that the section is merely aimed at affording protection to labour hire employees, who are the weakest in a triangular employment relationship and therefore most deserving of protection.²⁰⁴ Respondent further spelled out prejudices experienced by labour hire employees prior amendments. Identification of a labour hire company as a true employer in a tripartite relationship was most argued. The same was alleged to have deprived employees from labour

¹⁹⁷*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 13.

¹⁹⁸*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 13.

¹⁹⁹*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 14.

²⁰⁰*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 14.

²⁰¹*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 14.

²⁰²*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 17.

²⁰³*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 19.

²⁰⁴*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 20.

law protection and thereby subjected them to exploitation. Respondent further argued that the very same arrangement allowed employees to remain indefinite in the books of the Applicant without any pay.²⁰⁵ In line with the Respondent's argument, the decision taken by legislature was rational and within their objectives. Respondent's objective was purported to ensure equal treatment of labour hire employees; fair labour practices and protection of their collective bargaining rights.²⁰⁶

The Court deliberated on the rationality of regulating labour hire in Namibia. In doing so, it was satisfied that the State is permitted to protect labour rights of labour hire employees. This is regardless of the manner the Applicant would prefer such protection to prevail.²⁰⁷ The Court accordingly found that the Act does not constitute any material barrier as far as the freedom to carry economic activity of the Applicant is concerned.²⁰⁸ A claim of cancellation of contracts as a result of amendments does not prove material barrier as alleged by the Applicant. The Court further reasoned that historical clients of the Applicant might have cancelled their contracts since they find no value in the business if they can no longer avoid their labour statutory obligations.²⁰⁹ As far as the judge was concerned, it was at the discretion of the Minister whether to make regulations prior putting the Act into operation or not. Failure to do so did not prohibit an Act to be put into operation. Accordingly, submission of the Applicant that Minister acted ultra vires had no basis and was dismissed.²¹⁰

The Court concluded that the aim of the amendments was to close the gap in the existing legislative framework, which has allowed circumvention of labour laws in the past.²¹¹ The legislature achieved such an objective in its own peculiar way, but was perceived as far cry from

²⁰⁵*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 20.

²⁰⁶*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 20.

²⁰⁷*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 28.

²⁰⁸*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 28.

²⁰⁹*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 28.

²¹⁰*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 28.

²¹¹*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 31.

being irrational. Accordingly, nothing was found irrational on the regulation of labour hire even though it might amount to ‘overkill’.²¹²

4.5 CONCLUSION

Under the circumstances, Namibia is viewed to have paved the path for South Africa in respect of operationalisation of labour broking. It has provided guidance on not to ban the labour broking but regulate. Again, it has given a profound stance in the event that business might argue that the amendments created a material barrier in its operations.

As correctly submitted by Van Eck, South African courts are not bound by decisions of foreign jurisdictions.²¹³ Foreign laws may however be considered and owing to the similarities of some of the constitutional principles of the two countries; nothing would preclude South African courts from considering what has happened in Namibia.²¹⁴ This view is also expressed in section 39(1)²¹⁵ of the Constitution of Republic of South Africa.

Namibia has to be applauded by leading a way for South Africa. Since the enactment of 2014 amendments in respect of temporary employment services in South Africa, there is no constitutional question raised. All the disputes arose from the actual interpretation of amendments and in so far the Courts are giving intended interpretations.

²¹²*Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare* (2013) NAHCMD at para 31.

²¹³Van Eck BPS ‘Temporary Employment Services in South Africa and Namibia’ (2010) 13 *PELJ* 107 120.

²¹⁴Van Eck BPS ‘Temporary Employment Services in South Africa and Namibia’ (2010) 13 *PELJ* 107 120.

²¹⁵When interpreting the Bill of rights, a court, tribunal or a forum –

(b) must consider international and

(c) may consider foreign law.

CHAPTER 5

5.1 THE SIGNIFICANCE OF THE AMENDMENTS MADE TO SECTION 198 OF THE LABOUR RELATIONS ACT 66 OF 1995

Basic labour rights of TES employees have always been violated in various ways as discussed under chapter 2. Through enactment of 2014 LRA amendments, it is hoped that previous challenges of TES employees may be remedied. Employers, who disguised themselves as ‘clients’ have historically provided jobs through temporary employment agencies. This was done with a view to bypass certain mandatory obligations of the employer and enjoy services at a lower wages scale.²¹⁶ Amendments in section 198 of the LRA were thereafter effected to primarily protect vulnerable and exploited TES employees. These amendments extend significant protection to employees earning up to the BCEA threshold of R 205 433.30 (as amended on 1 July 2014). Protections provided by 2014 amendments only apply to the affected employees after they have been in employment for three months. The Labour Relations Act has a natural duty to give effect to section 23 of the constitution whose fundamental aim is to protect the rights of its citizens as promulgated in the Bill of rights by, ensuring fairness for both the employer and employees in terms of the law.²¹⁷ The Act specifically guarantees employees protection against unfair labour practices perpetrated by employers.²¹⁸ Despite the intended purpose of the LRA, there has been an outcry on the part of the employers, that amendments will minimise better employment opportunities.²¹⁹ The federation of unions had a different view to the employers, that lower wages are not an indication of better job opportunities.²²⁰

The recent adoption of the amendments of section 198 of the LRA on labour broking is promising to bring a new dawn for employees who have been exploited through temporary employment service. The 2014 LRA amendments is now promising equal benefits and better

²¹⁶ See discussion under chapter 1, para 1.1.

²¹⁷ See fn 5.

²¹⁸ Refer to discussion under chapter 1, para 2.2.

²¹⁹ Refer to fn 6.

²²⁰ Ibid.

working conditions despite the fact that employee's services have been procured by temporary employment services.

5.2 MAIN CHALLENGES DISCUSSED ON THE STUDY

The following four main problems have been identified for the purpose of this study and extensively discussed under Chapter 2.

- i) Determination of a true employer in a tripartite relationship for purposes of exercising employment rights;
- ii) Jurisdiction of the CCMA over claims and issues between TES workers and the client;
- iii) Commercial contracts used in a tripartite arrangement; and
- iv) Organisational rights of TES workers.

5.3 COMMENTS ON THE AMENDED PROVISIONS

In all the highlighted problem areas, there are specific amendments made, however there are no obvious solutions given. The provisions provided are subject to be rebutted and still require greater sense of interpretation of law. Concerning the first and second problem, there is still a major crisis of joint liability. In terms of the 2014 LRA amendments, employees will only be regarded as employees of the TES if they are performing temporary services.²²¹

Only those employees falling under the definition will be regarded as actual employees of the TES. Employees that fall outside the ambit of the definition and who earn more than the BCEA earnings threshold are deemed to be employees of the client of the TES. Amendments have brought an ongoing debate about whether the TES is the employer of the employees just for

²²¹ Services limited to a fixed time period of not more than three (3) months, or

- Where the employee is substituting for a temporarily absent permanent employee of another employer i.e. the client of the TES, or
- Where a particular work category is designated as a temporary service, or the maximum temporary period is determined by way of a collective agreement in a bargaining council or by way of a sectoral determination.

three months and thereafter the client is deemed (solely) as the permanent employer of the employee; or the client is added as the employer (dual employment) after three months.²²² It was possible for the drafters of the amendments to articulate on the wording in this instance but opted not to. The fiction in this regard is found to be creating a predicament in as far as the intended purpose of the amendments is concerned. Further relief to TES previous challenges would have been enjoyed by extending joint and several liabilities for TES and the client to unfair dismissals. This extension would have provided an employee with a choice of making a case against any party in a tripartite relationship at any stage of the omission.

Employees falling outside the given definition will be deemed to be employed by the client indefinitely, and will have to be employed on conditions similar to the client's other employees, unless justifiable reason exists.²²³ It is acknowledged that justifiable reason(s) is likely to be informed by various factors and the onus will be on the employer to provide such reasons. This amendment does not guarantee any success to the employee, given the reason(s) the employer might provide for justification.

It is further found interesting that section 198A (4), which provides that, termination of a TES employee's service to avoid being deemed to be the client's employee constitutes a dismissal does not provide that it automatically constitutes an 'unfair dismissal'. This assertion will still require determination to the unfairness of dismissal invoked by amendments.

For the third problem, amendment reads as follows '*An employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services*'.

The Act also provides that, *in any proceedings brought by an employee, the Labour Court or an arbitrator may determine whether a provision in an employment contract or a contract*

²²² Refer to chapter 3, para 3.2.2.

²²³ See fn 86.

*between the temporary employment service and a client complies with subsection 4C and make an appropriate order or award.*²²⁴

There is no doubt that this particular provision has removed the shield of commercial contracts to circumvent labour law protection against unfair dismissal. To this effect the Court has further reinforced that *'it can no longer be debatable that, following this legislative directive, labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment contract and undermines the employee's rights to fair labour practices, or that clads slavery with a mink coat, is now prohibited and statutorily invalid'*.²²⁵

In the same spirit, this amendment left a grey area in determining what an appropriate award would be if an Arbitrator found that the agreement contravened section 198(4C).²²⁶ Perhaps this part required more guidance so as to lead the decision makers. In the absence of such guidance, it is still required of the Courts to develop a test of *'appropriateness'* in similar circumstances.

The amendment made in respect of section 21 (12)²²⁷ concerning organisational rights is viewed as confusing. As a result, Prof Bosch pointed that the gist of the section is not plain and it ought to be re-drafted.²²⁸ He agrees that there is a greater protection provided for TES employees in the amendments but not sufficient for protection of vulnerable TES employees.²²⁹

²²⁴Section 4E (a) & (b) Labour Relations Amendment Act no 6 of 2014.

²²⁵*SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services group (Pty) Ltd* (2015) ZALCJH 129 (LC) at para 59.

²²⁶ See Bosch C 'The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?' (2013) 34*ILJ*1631 1638.

²²⁷ If a trade union seeks to exercise the rights conferred by Part A in respect of employees of a temporary employment service, it may seek to exercise those rights in a workplace of either the temporary employment service or one or more clients of the temporary employment service, and if it exercises rights in a workplace of a client of the temporary employment service, any reference in Chapter III to the employer's premises must be read as including the client's premises..

²²⁸ Bosch C 'The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?' (2013) 34*ILJ*1631 1636.

²²⁹ Bosch C 'The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?' (2013) 34*ILJ*1631 1644.

The viewers had speculations on the amendments made to section 198 of the LRA, that the consequent result might lead the clients to employ the required staff directly, rather than working through a TES. In that regard, that is what the drafters of the amendments are accused to have intended.²³⁰

5.4 FINDINGS

A question to be answered for the purpose of this study is whether the 2014 amendments to section 198 of the Labour Relations Act are likely to successfully address some of the major challenges of labour broking experienced under the previous section 198 of the LRA?

The answer to that will fully depend on effective implementation and enforcement of the amended provisions. If no measures are put in place to ensure compliance and enforcement, it is likely that the amendments might fail its intended purpose. Notwithstanding great work of the drafters to strictly regulate TES in South Africa, there seem to be a lot of ambiguities on the amended provisions. These ambiguities have potential to weaken the system in ensuring fairness towards the deserving employees employed through TES. More effort on the part of our Courts is still required in ensuring basic employment security and to collectivise for bettering employment terms and conditions of TES employees.

In light of the discussion undertaken for the purpose of this research, there seem to be a huge task ahead in giving effect to the amendments made to section 198 of the LRA. Such can be achieved through adherence, monitoring and correct interpretation of the amended provisions

²³⁰See comment on Labour Relations amendments, Worklaw newflash (September 2014) available at <http://www.worklaw.co.za/>. (accessed on 28 July 2015).

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