NUMSA v Assign Services (2017) 38 ILJ 1978 (LAC) - The implications for triangular relationships in the South African workplace

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Submission due date
28 March 2018

Submitted in partial fulfilment of the requirements for the degree of Master of Laws by Coursework and Research Report at the University of the Witwatersrand, Johannesburg
DECLARATION

I, Deborah Jane Byrne, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Word Count: 10,281 words

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Abstract

The use of labour brokers or temporary employment services (TES) is argued to be a driver of inequality and poverty in South Africa and that the Labour Relations Act (LRA) 66 of 1995 contributed to this. The argument held that the triangular relationship created between TES companies, client companies and TES workers, with no time limit to ensure that it was indeed temporary, resulted in these workers having diminished rights and protections.

The amendments to section 198 of the Labour Relations Act (LRA) that came into effect in 2015, aimed to remedy this by introducing protections for lower paid labour broker workers (earning below a regulated threshold), after they have worked for a TES for three months.

This paper begins by considering the social and legal problems caused by the original wording in the LRA. It then looks at the key features of amendments and the competing interpretations that have emerged through the prism of the NUMSA v Assign Services (2017) 38 ILJ 1978 (LAC) judgment.

The central legal question being explored in this paper is whether the amendments create a dual employer relationship after the three months; or whether it shifts to a sole employer relationship between the worker and client company.

Key words
temporary employment services, client company, labour brokers, sole employer, dual employer, deeming.
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<td>National Bargaining Council for the Road Freight and Logistics Industry</td>
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<td>NEDLAC</td>
<td>National Economic Development and Labour Council</td>
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<td>National Union of Metalworkers of South Africa</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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1. Introduction

1.1. The triangular employment relationship in South African law

From as early as 1983, South Africa’s Labour Relations Act (LRA) made provision for the use of ‘temporary employment services’, commonly called labour brokers.¹ The Labour Relations Act of 1995, section 198(1) defined a temporary employment service (TES) 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’.

Although this section acknowledged that a TES worker ‘perform(s) work for the client’, section 198 (2) clarified that the employment relationship is between the worker and the TES. It reads ‘(f)or the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person’s employer’.

This created a triangular employment relationship, where a worker works for the client but is employed by the TES, while the client and the TES are involved in a commercial contractual relationship. The section did not offer a definition for ‘temporary work’, nor did it include a clause to limit temporary work. This meant that, in practice, the triangular employment relationship between a worker, the TES and the client could proceed indefinitely.

In 2014, section 198 of the LRA was amended, to deal with this problem. This paper explores the reasons for this intervention and examines the competing interpretations that have emerged over the amendments, namely: the ‘sole employer’ and ‘dual employer’ interpretations. It concludes with an analysis of the implications of the amendments for future triangular employment relations.

1.2. **Social and legal problems caused by section 198 of the LRA of 1995**

The use of TESs grew rapidly in South Africa after 1995. It began as an industry colloquially referred to as the ‘Bakkie Brigade’\(^2\) in the early 1990s, making reference to the small and informal character of labour broking companies. The industry now consists of publicly listed companies like Adcorp which employs tens of thousands of workers in South Africa alone, and is active as far afield as Australia and south east Asia.\(^3\)

To accurately track the rise of the TES industry using the available statistical data is close to impossible, as shown by Budlender.\(^4\) However, Bhorat reported in 2013 that the Confederation of Associations in the Private Employment Sector (CAPES) ‘estimates that more than 2 million workers are placed annually by TES, which are equal to more than 15 percent of total employment in the third quarter of 2010’.\(^5\) If we apply the 15 percent to recent Statistics SA employment data, this would suggest that with a late 2017 employed population of 22.4 million, approximately 3.3 million of those are in TES work.\(^6\)

World Bank and United Nations commissioned reports on South Africa note that ‘TES employment as a percentage of the financial industry employment increased rapidly in the post-apartheid period… from 26.64 per cent in 1995 to 47.36 per cent in 2014 [and] … as a proportion of total employment … has nearly tripled…’.\(^7\) While these figures only reflect the financial sector, the pattern will be similar for retail, security and other sectors that have increasingly practiced outsourcing in the short and long term.

By the early 2000s, labour broking had become an entrenched feature in South African industry and commerce. Benjamin quotes Bezuidenhout in describing the East Rand Proprietary Mines (ERPM) gold mine strike of 2002

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\(^3\) Adcorp (Pty) Ltd [http://www.adcorpgroup.com/Pages/Geographies/Geographies.aspx](http://www.adcorpgroup.com/Pages/Geographies/Geographies.aspx)


\(^5\) Bhorat (note 2 above) 6.


when it emerged that ‘almost the entire mine’s workforce was employed by a labour broker rather than by the mine owners’.\(^8\) This example highlights why the Stats SA labour force figures are limiting when trying to understand the extent of TES in South Africa. This ‘hidden identity’ of workers in the TES sector arises because TES workers are not classified as a separate sector but as a sub-sector of business services at best or simply as workers within a sector such as mining, construction or retail.\(^9\)

The dramatic rise in labour broking can largely be attributed to the contents of section 198 in the LRA of 1995. It created the legal conditions for this form of triangular employment to continue indefinitely, without a time limit to the notion of ‘temporary’. Van Holdt & Webster noted that the use of a third-party employer suits client companies because it ‘replaces the industrial relations relationship with a commercial relationship’.\(^10\)

However, prior to the amendments to the LRA in 2014, section 198 (4), did place a set of legal obligations on the client company with respect to the treatment of the TES workers who perform work for them:

The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes—

(a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;

(b) a binding arbitration award that regulates terms and conditions of employment;

(c) the Basic Conditions of Employment Act; or

(d) a determination made in terms of the Wage Act.

Beyond these specific clauses in section 198 (4) which rendered the TES and client company jointly and severally liable, the client was still free from all the

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\(^8\) Benjamin (note 1 above) 31.

\(^9\) Bhorat (note 2 above) 14.

other legal obligations that are attributed to the employer in an employment relationship. For example, labour broker workers could not be reinstated with client companies in instances of unfair dismissal, nor could they bargain collectively with it or support such bargaining through industrial action, simply because the LRA did not deem them to be in an employment relationship with the client company, despite these workers ‘working for’ the client. This effectively meant that a TES worker had little legal recourse against the company that they actually ‘perform(ed) worked for’.

In practice, the TES could even be used to shield workers from approaching the client company to access their rights as per section 198 (4) due to the inherent confusion within the triangular employment relationship as to who the employer is. The legal prejudice to workers of the triangular employment relationship thus defined was exacerbated by the failure or unwillingness of trade unions to organise ‘non-standard’ workers, and labour brokers in particular. This meant that even the limited protection on joint and several liability, afforded by section 198(4), was rarely invoked neither by the trade unions nor by affected workers themselves. Most workers would have been unaware of its existence.

The combination of the TES being declared the worker’s employer, the absence of any limitation on the use of temporary labour, even its definition plus the failure of trade unions to organise labour broker workers, led to well documented abuse of such workers. These included arbitrary termination, much lower rates of pay compared to permanent workers doing similar work, denial of benefits such as medical aid and provident fund membership, access to allowances, company clinics and a range of other restrictions such as free movement within the client company premises. Women labour broker workers were also particularly susceptible to sexual harassment and the extortion of sexual favours.

The South African labour movement responded to these developments by calling for the banning of the practice of labour broking. This led to a process of

negotiations within National Economic Development and Labour Council (NEDLAC) from 2009, culminating in a new section 198 being promulgated in August 2014 and being effective from 1 January 2015.\textsuperscript{13}

\subsection*{1.3. The amendments to section 198 of the LRA of August 2014}

The explanatory memorandum accompanying the amendments to the LRA of 2014, described their purpose thus:

Section 198 has been amended, and a new section and further provisions introduced into the LRA, in order to address more effectively certain problems and abusive practices associated with temporary employment services (TES), or what are more commonly referred to as “labour brokers”. The amendments further regulate the employment of persons by a TES in a way that seeks to balance important Constitutional rights. The main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant “temporary work”, and to introduce various further measures to protect workers employed in this way (emphasis added).\textsuperscript{14}

The amendments sought to achieve these objectives in two ways. One was to define ‘temporary service’ and the other to limit such temporary service to a period not exceeding three months in the case of employees earning the BCEA annual earnings threshold of R205 433 and below.

While the definition of a TES did not change from the 1995 section 198, a new section 198A(1) was added, to define temporary work and to limit it to ‘situations of genuine and relevant temporary work’ as explained in the memorandum:

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

Furthermore, section 198(3) was added to impose a limit on the duration of such genuine temporary work:

For the purposes of this Act, an employee-
(a) performing a temporary service as contemplated in section (1) for the client is the employee of the temporary employment services (sic) in terms of section 198(2); or
(b) not performing such temporary employment service for the client is-
(i) deemed to be the employee of that client and the client is deemed to be the employer; and
(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

While the amended 2014 section 198 introduced additional rights to labour broker and other ‘non-standard’ workers such as contract and part-time workers, the definition of temporary service and its restriction to three months, represented significant protection against ‘abusive practices associated with temporary employment services’\(^\text{15}\). This is especially the case, when read with section 198A(5), which holds that a worker who is ‘deemed to be the employee of the

\(^{15}\) Ibid 21.
client […] must be treated on the whole not less favourably than an employee of the client performing the same or similar work’.

1.4. **Interpretation of the amendments by labour tribunals**

As labour broker workers attempted to access the new rights in the months that followed, two contentious issues emerged for interpreting the amendments to section 198 of the LRA. The first issue was interpretation of the legislature’s intention in the ‘deeming’ of workers who had worked for a client company to be the employees of that client company. The second issue was interpretation of the legislature’s intention in their specifying of the client’s obligation to such deemed employees being for the purposes purely of the LRA.

In one of its first arbitration awards regarding section 198A(3) the Commission for Conciliation, Mediation & Arbitration (CCMA), which section 198D entrusts with the task of implementing the new rights, found that the workers of the labour broker, Assign Services, were now the workers of only the client company, Krost Shelving & Racking. This interpretation meant that Assign Services no longer enjoyed an employment relationship with the workers.¹⁶

Assign Services took this award on review to the Labour Court (LC) which, in September 2015, set aside the CCMA award, finding instead that the deeming provision of section 198A(3) and the client company’s restriction to LRA rights, meant that labour broker workers now had two employers with ‘parallel sets of obligations’ to the workers.¹⁷

The National Union of Metalworkers of South African (NUMSA), which had referred the original dispute to the CCMA, took the judgment on appeal to the Labour Appeal Court (LAC) which, in July 2017, found that the Labour Court had erred. The LAC ruled that the deeming provision of section 198A(3) meant that workers became the employees of only the client company after three months.¹⁸

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Within weeks of this judgment, Assign referred the matter to the Constitutional Court, where it was heard on 22 February 2018. While the judgment is awaited, it is clear that the dual versus sole employer interpretation of the amended section 198 of the LRA is of critical, if conflicting significance to the labour broking industry and to labour broker workers.

This paper examines this issue and considers the implications of the courts’ interpretations for the future of triangular relationships in the South African workplace.

2. The growth of triangular employment in South Africa

To make sense of the relatively radical amendment to section 198 of 2014, and its implication for the future of the triangular employment relations, it is necessary to consider the extent to which this form of ‘non-standard’ employment had become increasingly standard by that time.

South Africa’s jurisprudence on temporary employment services (TES) in the post 1994 period highlights a key fault line in the economy – growing worker vulnerability. While termed ‘temporary’, the industry itself concedes that the practice has more to do with outsourcing (61 per cent of TES companies indicated so in a 2010 study) than the need for occasional workers from fluctuations in production.

A range of legal commentators, such as Benjamin, Theron, du Toit and van Niekerk, have noted repeatedly that this practice is causing greater precariousness for the country’s poor. For example, Cohen reflected when commenting on South Africa’s implementation of the International Labour Organisation (ILO) South Africa Decent Work Country Programme 2010-2014 compliance, that ‘it is indisputable that employees of TESs, and part-time and fixed-term employees have been deprived of all four pillars of decent work

19 Assign Services (Pty) Limited v National Union of Metalworkers Union of South Africa and Others (CCT194-17) (judgment awaited).
20 Budlender (note 4 above) 51.
through their commercial exploitation and have been rendered vulnerable and insecure’.21

Employers argue that this form of cost-cutting and efficiency-inducing flexibility in labour recruitment is critical to their financial success. Labour flexibility allows employers legally sanctioned space to avoid what they see as onerous provisions designed to protect workers. Theron has consistently cautioned since the early 2000s, that the ‘adoption of the new LRA, and the establishment of the CCMA, provide(s) added incentive to firms to externalize, to avoid the contingent costs of an adverse finding in unfair dismissal proceedings’.22

Efforts to accept but regulate this demand from business have become known as ‘regulated flexibility’, as theorized by amongst others, Cheadle.23 Van Niekerk criticized Cheadle’s argument, asserting that ‘the most marked difference in labour market regulation when comparing South Africa with Organisation for Economic Co-operation and Development (OECD) countries concerns the use of temporary employment… (and that) unlike South Africa, most OECD jurisdictions place significant limits on the use of temporary work’, and to call ‘South African labour legislation unduly restrictive and overly rigid may be misconceived’.24

By 2004, a study commissioned by the Department of Labour concluded that ‘strategies of externalising work (in particular outsourcing and labour broking) were the major drivers of the informalisation of work in South Africa, rather than casualisation by hiring temporary and part-time workers’.25

The Congress of South African Trade Unions (COSATU) announced its ‘Ban Labour Broking Campaign’ in 1999.26 By this time, the socially damaging effects on workers of triangular forms of employment were manifest.

21 T Cohen ‘The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships’ (2014) 35 ILJ 2607, 2622. Cohen states the following four pillars: promotion of standards and rights at work, the promotion of employment creation and income opportunities, the provision and improvement of social protection and social security, and the promotion of social dialogue and tripartism (ibid).
25 Benjamin (note 1 above) 31.
26 COSATU (note 13 above).
The Casual Workers Advice Office (CWAO) set out in their challenge of the CCMA’s Rule 25 (that served to prevent parties other than the trade unions or attorneys from representing workers in the CCMA), the extent of the problem. CWAO argued that ‘(p)recarious workers have fewer rights in the workplace than permanent workers. They have no job security, perform low paid, demeaning jobs, and are excluded from benefits such as provident fund or medical aid membership. Their wages tend to be lower than those of permanent employees performing the same work’.27

Furthermore, with many of these workers working variable hours, often at piece rates, their incomes are uncertain from one week to the next. The combination of being in precarious work, having fewer rights and being unorganized means the relations of power between employers and precarious workers are far more skewed than is ordinarily the case. Precarious workers have little or no knowledge of the rights they do have, while the skewed power relations mean they are often denied these, even if they are aware of them.28

The unorganized state of precarious workers allows employers to continue substituting permanent workers with such workers, thereby weakening the labour movement, and opening up all workers to a generalised lowering of wages and conditions of employment.29

The submission by the first amicus curiae supporting NUMSA as respondent in the appeal by the employers to the Constitutional Court, summarises the four central problems helpfully. To begin with, workers placed with client companies for indefinite periods have no job security and are vulnerable to dismissal at any point. Secondly, labour broker workers doing the same work as others employed by the client are paid far less. Thirdly, the joint and several liability clause in section 198(4) has allowed the client to remain

unaccountable to either the CCMA or Labour Court because it was not legally the employer. Last, TES workers are unable to engage in collective bargaining because their contractual terms have been decided between the TES and the client company.\textsuperscript{30}

From a legal point of view, labour broking as enabled by the pre-2014 wording of section 198 of the LRA, shielded client companies from many of their legislative responsibilities towards workers working for them, such as rights to bargain collectively, to strike and not being unfairly dismissed. So successful was this triangular relationship that often workers did not know who their real employers were.\textsuperscript{31} This was the context within which the amendments to section 198 of the LRA were promulgated in 2014.

3. The key features of the amendments to section 198 of the LRA

The legislature’s deliberation of 2012 on labour broking, gives important insight into its substantive efforts to address the problems that labour broking poses for those workers with its lack of employment security, wage discrimination, enforcement difficulties and the undermining of their rights to collective bargaining. In reflecting on the extent of the problem, Paul Benjamin asks whether work through labour brokers or TESs ‘amounts to job creation or job displacement’.\textsuperscript{32}

In a Labour Portfolio Committee Workshop in May 2012, the Chairperson (Elleck Nchabeleng) was strong in his view that labour brokers ‘cheated people’ out of getting proper wages. Nchabeleng concluded that ‘(t)he reason for this discussion was the abusive practices of the past, which had been made possible by loopholes in the law. These [are] to be closed by the new legislation, and this should not be seen as an intellectual discussion but a real consideration of whether the laws were relevant’.\textsuperscript{33}

\textsuperscript{30} Assign Services v NUMSA (CCT194-17) (affidavit: first amicus curiae, judgment awaited) para 11-22.
\textsuperscript{31} CWAO (note 12 above) <http://www.cwao.org.za/about-context.asp>.
\textsuperscript{32} Benjamin (note 1 above) 43.
The Explanatory Memorandum to the Labour Law Amendment Act of 2014, speaks to the problems that necessitated the proposed amendments and the memorandum makes clear that the aim of adding sections 198A to 198D is ‘to restrict the employment of more vulnerable, lower-paid workers by a temporary employment service to situations of genuine and relevant temporary work’.34

There are four key features of the amendments to 198 of the LRA that need consideration. First is the ‘trigger’ clause that kicks in on the expiry of three months temporary work by a TES employee. It is section 198A(3) and is a deeming clause in that it states that ‘for the purposes of this Act, an employee performing a temporary service’… would immediately be ‘deemed… an employee of the client and the client deemed to be the employer’. This amendment must be read in conjunction with the original deeming clause that appears in section 198(2) that states that ‘for the purposes of this act… a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person’s employer’. These two deeming clauses now operate in tension with each other.

Second, through section 198A(1)(a) the definition of ‘temporary service’ will henceforth not be allowed to extend beyond three months for workers earning under the threshold. Third, through sections 198A(4), should the TES terminate the employment of such an employee as an avoidance of these protections in the LRA it will be viewed as a dismissal. Last, through section 198A(5) that employees deemed to henceforth be employees of the client ‘must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment’. The first two issues of deeming and temporary service are considered in detail below.

4. First interpretations of the deeming clause - sole versus dual employer

Before discussing the first set of labour tribunal interpretations of section 198 of the amendments, the role of international and foreign law bears consideration in the extent to which it has influenced tribunal decisions thus far.

3.1. International and foreign law

The Constitution of the Republic of South Africa, 1996, commits to using international law when interpreting South African law. It is curious that, despite South Africa having, to a large extent, complied with Recommendation 188 (Private Employment Agencies Recommendation, 1997 No. 188) through promulgating the section 198 amendments to the LRA, South Africa continues to delay signing the ILO Convention 181 (Private Employment Agencies Convention, 1997 No. 181). What is significant about Recommendation 188 is that it assigns responsibility to just one employer. It is explicit that this is to protect the worker from relationship ambiguity and increased vulnerability.

Other ILO Conventions must also be used by South Africa in settling the issues of law raised in the interpretation of the amended section 198 of the LRA. Convention 87 (Freedom of Association and Protection of the Right to Organise Convention, 1948 No. 87) addresses both worker and employer freedoms. Convention 100 (Equal Remuneration Convention, 1951 No. 100) is important because Article 2 requires the elimination of ‘discrimination in respect of employment and occupation’ and this is key for the vulnerability that labour broker workers face. Convention 158 (Termination of Employment Convention, 1982 No. 158) is important as Article 2(3) recognises the fact that employers are tending to circumvent worker protections through disingenuous fixed term contracts.

Foreign law may be considered by South African courts where relevant. The labour broking ruling by the Namibian Supreme Court of Appeal (SCA) is significant. The court held that ‘a blanket prohibition on labour broking is unconstitutional’.35 A further example of foreign law is the EU Framework

Agreement on Part-Time Work that was introduced in 1997, to ensure that part-time workers are not treated in any less favourable a manner than comparable full-time workers. Countries such as the Netherlands have taken this into the law and today their approach to part-time, labour broking through legislation and collective bargaining provides for flexibility of contracting with the caveat that ‘the longer it lasts, the stronger the security of the worker should be’.

3.2. Labour tribunals rule ‘sole employer’

The first TES employers test case was the Assign Services, Krost Shelving & Racking & NUMSA arbitration award by the CCMA in June 2015. Krost Shelving & Racking is the client company and manufactures bespoke steel storage products employing 40 salaried or permanent employees and around 90 wage staff as its own employees at the time of this case.

Assign Services is the TES company and provided between 22 and 40 workers to Krost at any one time. At the time of the CCMA hearing, 22 of these workers had worked for more than three months and were earning below the threshold as per the amended section 198A of the LRA. The Assign workers work side by side with their Krost colleagues, earning the same as their permanent colleagues, and are managed by Krost staff with disciplinary issues attended to by Assign Services. Eighty per cent of the Krost staff are NUMSA members as well as ‘several’ of the TES workers. Commissioner Osman declared:

Section 198A(3)(b) is interpreted to mean that “deemed” means (sic) that the client becomes the sole employer of the placed workers for purposes of the LRA, provided that they earn below the threshold and that the three months period has lapsed… and that parity between the


37 Assign Services & Krost Shelving & Racking and NUMSA (note 16 above).
deemed employees and other indefinite employees of the client should apply as per section 198(A)(5).\(^{38}\)

Another early conciliation was *Refilwe Esau Mphirime, Value Logistics Ltd & BDM Staffing*\(^ {39}\), heard in the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) in June 2015. Mr Mphirime had been appointed on a fixed term contract from 30 June 2014 to 30 June 2015 and had therefore worked more than three months. His contract was terminated on 2 April 2015 after one week’s notice. Mr Mphirime turned to the bargaining council, to claim his section 198 rights to permanent employment by Value Logistics.

The NBCRFLI Commissioner’s award is a well-considered approach to the section 198(3)(b)(i) issue of deeming. Commissioner van Wyk concluded:

> Once the employee no longer performs a temporary service, the client is deemed to be the employer and duty bearer for purposes of the LRA... Subsequently BDM Staffing (Pty) Ltd has no right or obligation to defend this matter. Value Logistics Ltd as deemed employer will bear the onus to prove at arbitration that the termination of Mr RE Mphirimi’s contract was fair in terms of section 188 of the LRA.\(^ {40}\)

### 3.3. *Labour Court rules ‘dual employer’*

Assign Services took the CCMA arbitration award on review to the Labour Court in September 2015. Assign Services argued that the amendments to the LRA should be interpreted to mean that after the three months temporary employment expires, the worker is now also an employee of the client in certain ways ‘for the purposes of the LRA’; and that the TES and the client function as dual employers where both have ‘a parallel set of rights and obligations’.\(^ {41}\)

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\(^{38}\) Ibid para 6.1.

\(^{39}\) *Refilwe Esau Mphirime / Value Logistics Ltd / BDM Staffing (Pty) Ltd NBCRFLI* (2015) 8 BALR 788

\(^{40}\) Ibid para 49, 52.

\(^{41}\) *Assign Services v CCMA* (note 17 above) para 12.
The case turned on the nature of the contract of employment. Brassey AJ considered both NUMSA and Assign Services’ argument as ‘misleading’ because on the one hand NUMSA conceded that the worker’s relationship with the TES remained in force. Brassey asserted that ‘there seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the worker because the client has acquired a parallel set of such rights and obligations’.

Brassey avoided engaging the intention and wording of the deeming clause. He focused on the contract of employment at common law, arguing that ‘nothing in the deeming provision invalidates the contract of employment between TES and employer’. Brassey held that workers now have greater protection because both the TES and the client have parallel but different responsibilities after the three months, with these separate contracts sacrosanct. He ruled that section 198(2) clearly retains the TES as the employer under the common law with there being no doubt that the Assign Services and worker relationship is a contractual employment relationship. He also used the amended provisions in the joint and several liability clauses to argue that the amendments actually strengthen the contract between the TES and worker.

Brassey concluded that the TES and client are dual employers, with their concomitant rights and obligations after the three months triggers section 198(3).

Malebakeng Forere provided a strong criticism of the judgment, concluding:

The Labour Court decision effectively makes employees perpetually indebted to the TES thereby creating bonded labour… in direct conflict with the spirit and purpose of the Amendment Act as clearly reflected in the Memorandum of Objects’.

42 Ibid para 12.
43 Ibid 2854.
3.4. **Labour Appeal Court rules ‘sole employer’**

In 2016, NUMSA took the Labour Court judgment on appeal to the LAC. NUMSA argued on two fronts. NUMSA argued that there were problems with interpretation by the Labour Court and there were problems with Assign Services’ understanding of the underlying principles that should be guiding interpretation of the law.

The central legal question that the LAC had to apply its mind to is, who the employer is of the placed workers, once three months of temporary employment is completed by those workers. Assign Services argued that section 198A(3)(b), the deeming clause, should be interpreted to mean that the placed workers remain employees of Assign for all purposes and in addition are the employees of Krost, for the purposes of the LRA. NUMSA argued that the correct interpretation is that of the client becoming the sole employer and that the role of the TES, by virtue of it no longer being temporary employment, falls away and the employment relationship is taken over in full by the client.

The LAC upheld NUMSA’s appeal that the relationship is one of a sole not dual employer, agreeing with the CCMA commissioner arbitration award of 2015. The LAC reasoned that the Labour Court had ‘misdirected itself in its interpretation’ and that ‘the employment relationship between the placed worker and the client arises by operation of law, independent of the terms of any contract between the placed worker and the TES’.45

The LAC addressed the underlying principles that the amendments are aimed to address, that of protracted vulnerability and unfair discrimination. The judgment concluded that TES employment must be temporary and thereafter, unfair discrimination will set in if the TES workers are not integrated into the workplace on the same terms and conditions as these other co-workers.

4. **Analysis of the LAC judgment**

There are a number of legal issues that arise in the 2017 LAC case of NUMSA v Assign Services. Four of these are examined below. The first is the central issue

45 NUMSA v Assign (note 18 above) para 47 & 45 respectively.
of deeming; the second is the contract of employment; the third is definitions of employee and TES; and the fourth is the meaning of ‘temporary’ employment. Other legal issues raised by the employers, such as the problem that the amendments have caused misalignment between legislations; and the potential conflict created between the Constitution’s right to fair labour practice and the right to choose one’s trade, occupation or profession; are beyond the scope of this paper.

4.1. **Deeming – client as sole employer or as dual employer with the TES**

The LAC grappled with the unique nature of the triangular relationship created between TES, client and workers in South African employment law. The court addressed whether the amended legislation is to be interpreted to mean that a dual or sole employer relationship is created for vulnerable workers earning below the threshold in this relationship.

The LAC began by restating that the employment relationship between the client and worker does not come about through ‘normal recruitment processes of the client’ and that the ‘employment relationship is created by a statutory deeming clause’.

In its very next sentence, the LAC concludes that this effort in the amended legislation to create parity with workers doing like or similar work makes it clear that the parallel or dual employer interpretation would be discordant with the intention of the amendments.

While there is something of a leap in logic in the way that the analysis and decision is set out in the LAC judgment and it would have been more helpful had the conclusion drawn been placed later at the end of paragraph 43 after the LAC’s further analysis of the deeming provisions and the contextual intention, the conclusion drawn remains sound. The LAC is clear that ‘the purpose of the deeming provision is not to transfer the contract of employment between the TES and the placed worker to the client, but to create a *statutory employment relationship* (emphasis added) between the client and the placed worker’.

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46 Ibid para 40.
The court also makes it clear that the amendments were introduced to ensure that ‘temporary employment services is restricted to one of ‘true temporary service’... (and) to free the vulnerable worker from atypical employment by the TES’.48

The LAC considered that what is key in the amendments to section 198 of the LRA is the intention to create a mechanism to ‘ensure that the deemed employees are fully integrated into the enterprise as employees of the client’. The LAC stated that to accomplish this the legislature created section 198A-D which contains a further ‘statutory deeming clause’ to ensure that the ‘placed workers become employed by the client for an indefinite period and on the same terms and condition (sic) applicable to the employees of the client performing the same or similar work’.49

The LAC concluded that the Labour Court had ‘misdirected itself in its interpretation of section 198A(3)(b)’ and it upheld NUMSA’s appeal, noting that ‘the plain language of s198A(3)(b) of the LRA, interpreted in context unambiguously and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers.’50

The LAC judgment restored the situation to the position immediately after the CCMA Commissioner’s award to that of the sole employer interpretation, unless and until the Constitutional Court shifts this position on entertaining the Assign Services appeal.

In its applicant submission for leave to appeal to the Constitutional Court against the LAC judgment, Assign Services elaborates its argument on deeming. In Assign Services’ view, after three months of the temporary employment period expires, ‘the client is deemed to be an employer of the worker but does not replace the TES as her employer. Both of them continue in tandem as employers of the worker’.51

The basis of this argument is Assign Services’ contention that the legislature could not have conceived of creating vulnerability for the worker by ending the

48 Ibid para 43.
49 Ibid para 40.
50 Ibid para 46.
51 Assign Services v NUMSA (CCT194-17) (applicant’s submission, judgment awaited) para 7.
contract after three months and leaving the TES and employee only at common law ‘wholly unregulated by the LRA’ and with ‘no say in the matter’.\textsuperscript{52} In their view, were the deeming provision to be interpreted as triggering a sole employer relationship, it creates a conflict with the Constitution.

The applicant elaborates in its preparation for the Constitutional Court that ‘accrued leave, annual bonus, pension and the like [would not] be transferred from the TES to the client… and that the vulnerable employees… may be forced to accept new terms of employment less favourable than those enjoyed with the TES.’\textsuperscript{53} Their argument, is that it ‘brings the deeming provision into conflict with the employees’ rights to fair labour practices in section 23(1) and to choose her trade, occupation or profession freely in section 22 of the Constitution’.\textsuperscript{54}

Assign Services argues that the legislature would not have left the provisions in section 198 so loose had they had a sole employer intention as there are ‘no transitional provisions’ ensuring smooth handover from the TES to the employer. Assign Services remains convinced that the legislature’s intention was to offer additional protection after the three months and that TES workers now have the protection of both employers going forward with the employers holding complementary roles.\textsuperscript{55}

It is true that the amended section 198 of the LRA does not detail how the transition from TES to the client company should happen, but the question here is what detail would not be stating the obvious? It is the responsibility of the client company to take over all aspects of the relationship on day one of the month following the expiry of the temporary three months.

The applicant \textit{amicus curiae} in the LAC case, the Casual Workers Advice Office (CWAO) argued very differently. Having motivated with examples, they argued in their closing summary that ‘the practical effect of the ‘dual employer’ interpretation is to leave workers unprotected, as they were under the previous dispensation, with the same resultant harm to their rights’.\textsuperscript{56} Other legal

\textsuperscript{52} Ibid para 18, 24.
\textsuperscript{53} Ibid para 18.5-18.8.
\textsuperscript{54} Ibid para 31.
\textsuperscript{55} Ibid para 23.
\textsuperscript{56} \textit{National Union of Metalworkers of SA v Assign Services} (2017) 38 ILJ 1978 (LAC) (applicant first amicus curiae) para 84.
commentators argue that be it sole or dual employers, it is undeniable that the amendments to section 198 of the LRA have brought gains for workers. The argument made is that it has given vulnerable workers who are deemed the right to hold the client to account in relation to dismissals, unfair labour practices and retrenchments, and that this is an obvious advance.\textsuperscript{57}

NUMSA’s submission to the Constitutional Court states that section 198(2) defines the TES and worker relationship ‘for the purposes of the LRA’ as simply the creation of a ‘legal fiction’ and that section 198(2) is already a deeming clause.\textsuperscript{58} NUMSA argues that it was put there because the conventional tests of employment, both at common law and statutorily, are ‘inadequate in the circumstances of triangular employment’.\textsuperscript{59} It goes further to argue that the deeming provisions found in sections 198(2) and 198(3) cannot co-exist: it is either the one or the other. The worker is the employee of the TES as per section 198(2) or the employee of the client, as per section 198(3). She cannot be both at the same time.

It is for the Constitutional Court to provide a conclusive interpretation and to rule on whether the LAC judgment has done justice to the central question of deeming, and whether the Assign Services placed workers are now permanent workers of only Krost Shelving & Racking.

\textbf{4.2. Contract of employment}

The LAC ruled in \textit{NUMSA v Assign Services}, that ‘the employment relationship between the placed worker and client arises by operation of law, independent of the terms of any contract between the placed worker and the TES’\textsuperscript{60} In this, the LAC took issue with Brassey’s insistence that the contract of employment is the central legal issue in this case.

\begin{thebibliography}{9}
\bibitem{58} \textit{Assign Services v NUMSA} (CCT194-17) (first respondent’s submission, judgment awaited) para 5.
\bibitem{59} Ibid para 37.
\bibitem{60} \textit{NUMSA v Assign} (note 18 above) 45.
\end{thebibliography}
The common law is being developed in South Africa to confirm that the TES relationship with the workers it places is one of employment, such as in *Nape v INTCS Corporate Solutions* in 2010 and subsequent cases. This is despite the fact that the relationship tends to be forged through a commercial common law service provider agreement between the TES and client and is therefore not a common law contract of employment.

Du Toit’s reflection in 2008 on the problems inherent in South Africa’s employment law on the common law remain significant. He urged that ‘if employment law were to be codified, the contract of employment would continue to play its part in giving effect to constitutional values within a more clearly circumscribed domain’. His argument recognises that resort to common law principles tends to affirm employer power and entrench worker vulnerability.

In this case, the LAC was concerned with how the contract of employment can be misused and act as a driver of employment vulnerability and that the creation of the legal fiction or deeming feature is to reign in the TES for the period of their role in the triangular relationship. This concern echoes Kahn-Freund’s caution that, when considering the contract of employment, we should remember that it is more ‘command disguised as agreement’. Gericke also argues that the use of the common law contract of employment notion in South Africa ‘has not been at the forefront of worker protection, [and] this role has been played by labour legislation’.

Paul Benjamin in his 2016 critique states that the ‘common law does not necessarily regard the TES as the employer of the placed workers’ citing *LAD Brokers v Mandla* as a case in point. He continues that ‘the purpose of section 198(2) is not merely to confirm the common law contractual position: its effect is

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62 D Du Toit ‘Oil on troubled waters? The slippery interface between the contract of employment and statutory labour law’ (2008) 125 SALJ 95, 95.
64 S Gericke ‘The regulation of successive fixed-term employment in South Africa: Lessons to be gleaned from foreign and international law’ (2016) 1 TSAR 94, 97.
65 Benjamin (note 1 above) 34.
to render the TES as the employer, irrespective of the status of its contract with the worker’.  

In the NUMSA submission in the leave to appeal to the Constitutional Court, NUMSA takes issue with the applicant’s notion that with section 198A(3)(b) triggered, the worker would no longer have a contract with the client. NUMSA argues that the contract terms are the same that were operative under the TES and worker contract. Furthermore, NUMSA cautions that as much as the TES can continue to maintain a contractual relationship with the client and to remunerate the worker/s, when doing so the TES should be mindful that joint and several liability kicks in immediately.  

The TES sector appears to be avoiding staring down the financial and reputational risk potential with the joint and several liability clause in their insistence that they continue a dual role in the relationship with their TES placed workers after the three months. This alone is surely an indicator of the seriousness of the legislature in affording TES workers more certainty and parity after three months.

4.3. Definitions of ‘employee’ and ‘temporary employment services’

While the LAC did not dwell discretely on the definition of employee, the court emphasised how the amendment of ‘section 198A(1) place(s) emphasis on the nature of the service as defined and not on the person rendering the service or the recipient of the service per se to determine who the employer of the placed worker is’ and how the amendments ‘give special meaning to the term ‘temporary service’’. It is a surprisingly cursory analysis by the court.  

It would appear that the LAC’s view, albeit not explicit, is that because it accepts that the LRA is clear in its intention and wording that the role for TES providers in the LRA is definitively short term there is no need to consider the definition of employee in any detail.

66 Ibid 35.
67 Assign Services v NUMSA (CCT194-17) (respondent heads of argument, judgment awaited) para 64-66.
68 NUMSA v Assign (note 18 above) para 35, 36.
It is not surprising however, that the applicant returned to the definition of employee in its submissions to the Constitutional Court, as it tried to clarify its argument. Assign Services stated that section 213 of the LRA defines an employee as ‘any person, excluding an independent contractor, who works for another person or for the State…’. The respondent picked this up in its responding submission to the Constitutional Court, arguing that the very definition that the applicant references actually excludes TES companies from having ‘employees’, because such individuals do not actually ‘work for’ (emphasis added) the TES as required by the definition, but for the client.

NUMSA argued in its submissions, that because TES employees do no actual work for the TES provider and only do actual work for the client company, they should not be defined as employees of the TES at all in terms of the definition in ‘section 213 of the LRA, nor for that matter at common law’.69 It will be interesting to see whether the Constitutional Court returns to this definitional issue or whether it will view it as the LAC appears to have done, as a secondary issue not warranting central attention.

The NUMSA position is not supported by the amended wording in the LRA however. The amendment does allow for the TES to function as an employer but only for a limited period. The respondent’s amicus curiae submission clarifies this, endorsing Benjamin's view in setting out that section 198A(3) now ‘mandates a choice by using the word ‘or’: the employer is either the TES under section 198(2) (when work is genuinely temporary) or the client under section 198A(3)(b) (when work is not temporary). The two sections do not operate in tandem (emphasis added).’70

If the Constitutional Court does probe the definitions, then section 198(1) of the LRA will also need consideration. This defines a TES as ‘any person who, for reward, procures for or provides to a client or other persons…’ who it remunerates. NUMSA has asserted that this supports its argument, as here too ‘the definition does not imply the existence of an employment relationship

69 Assign Services v NUMSA (note 58 above) para 67-69.
70 Assign Services v NUMSA (CCT194-17) (respondent amicus curiae submission, judgment awaited) para 7.1.
between the placed worker and the TES’.\textsuperscript{71} Again here, there is no reference to an employee ‘working for’ the TES in a direct relationship, but simply being procured or provided to a client. In both sections 198 and 213, the LRA is clear that those placed by TES providers are not defined as ‘employees’ of that TES and this could surely have strengthened the LAC’s analysis.

The respondent \textit{amicus curiae} summarises this helpfully in its submission to the Constitutional Court in the leave to appeal. It makes the point that the LRA is clear that the ‘functions of the employer are… split’ with the person working for the client but being remunerated by the TES; and that ‘in such ‘triangular’ employment relationships, the law giver has always expressly allocated employment law obligations to a single employer (emphasis added)’.\textsuperscript{72}

Lastly, NUMSA states in its respondent submission to the Constitutional Court that the original drafters of the 1995 LRA could understandably not tamper with the definition of employee and had already created a legal fiction to allow for the anomaly of the temporary nature of the TES presence in relations.\textsuperscript{73} NUMSA argues that this is why there was already a deeming clause prior to the amendments to section 198 of the LRA, in section 198(2). That deeming clause was retained when the amendments were made to section 198 and reads ‘For the purposes of \textit{this} Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that TES , and the TES is that person’s employer’. The emphasis in this sentence is ‘for the purposes of \textit{this} Act…’.

In NUMSA’s view, section 198A(3)(b)(i) was added ‘because the conventional tests of employment, both at common law and statutorily, are inadequate in the circumstances of triangular employment’.\textsuperscript{74} Section 198(2) simply creates a necessary legal fiction to allow the TES to be an employer for a temporary period so that they hold legal obligation and so that the joint and several liability clause that follows as section 198(4), can hold true.

\textsuperscript{71} Ibid para 4.
\textsuperscript{72} Ibid para 1.
\textsuperscript{73} Ibid para 5, 9.
\textsuperscript{74} Ibid para 38.
What the amendments to section 198 of the LRA have added is a further angle to deeming solely affecting workers viewed to be vulnerable because they earn below the defined earning threshold. Importantly, NUMSA concluded in its submissions, that this ‘legal fiction’ or deeming sections cannot operate at the same time or they create a contradiction; and that the correct position that the Labour Court should have taken was that section 198(2) confirms the ‘statutory employment contract in place between the TES and the worker once the worker is placed with a client’.75

It appears that the LAC chose to keep its analysis and conclusions focused on the deeming clauses to address the central problem of the Labour Court judgment. The LAC viewed these definitional issues as secondary, but the Constitutional Court is likely to have to address definitions in its analysis, if it is to offer certainty in its interpretation of this amended law.

4.4. Temporary employment must be temporary
The LAC judgment included detailed reflection on the Explanatory Memorandum to the LRA Amendment Bill 2012 and the legislature’s intention. The judgment concluded with a succinct summary of the purpose of the amendments being to ‘upgrade temporary service to standard employment and to free vulnerable workers from atypical employment by the TES’.76

The conclusion that the LAC drew from matching the intention of the amendments with the addition of section 198A(1) is that when work exceeds the legislated three months for it to be classified temporary, ‘it therefore means that a placed worker (other than those excluded by definition)… is not rendering a temporary service for the purposes of section 198A and is therefore not an employee of a TES’.77 These workers have therefore become employees of the client. The LAC did not entertain the contractual question posited by Assign Services as being of any consequence.

75 Ibid para 41.
76 NUMSA v Assign (note 18 above) 1980.
77 Ibid para 36.
The courts are required to interpret the law in both a purposive and holistic manner. The Brassey Labour Court judgment falls foul of this requirement and creates a very narrow frame when grappling with the complexity of section 198 as amended. He pays no respect to the intention that begins in the Labour Portfolio Committee’s grappling with the question of labour broking and the increasing precariousness that it is causing in the fabric of life for the majority in the country, the poor and vulnerable.

Likewise, Assign Services does not provide a coherent argument on the central question of time bound contracts and the need for them to be just that. Even in the founding affidavit in the leave to appeal to the Constitutional Court, there is acknowledgment of the concern from the LAC on this issue, but it is not addressed in the motivation for the leave to appeal.78

There are examples of arbitration awards after the amendments to section 198 of the LRA took effect from 1 January 2015, in which significant awards were made addressing this question of vulnerability. One such case was an October 2015 CCMA arbitration award that saw the arbitrator take issue with the contractual vulnerability of workers in Chet Chemicals, Khaya-Povey Muivenna Placement & Euphodia Seema79. The case involved over one hundred workers claiming their new section 198A rights as permanent employees of Chet Chemicals. The arbitrator declared that ‘in view of the common cause fact that the Client is the employer for purposes of the LRA, and further, that no valid fixed-term contracts have been entered into, the provisions of section 198A(3)(b)(ii) finds application and thus the employees are considered to be indefinitely employed by the client’.80

In a February 2016 arbitration hearing involving IMATU, Relefolo & Tlokwe Local Municipality81 at the South African Local Government Bargaining Council (SALGBC), Mr Relefolo had a contract of employment with the Tlokwe Municipality that was ‘renewed on no less than 10 occasions… (and) five of these

78 Assign Services v NUMSA (note 58 above) para 34, 36-66.
79 Chet Chemicals and Khaya-Povey Muivenna Placement (Pty) Ltd and Euphodia Seema CCMA (case no. GAEK 9832-15 October 2015).
80 Ibid para 18.
81 IMATU obo P. Relefolo and the Tlokwe Local Municipality SALGBC (case no. NWD 081506 February 2016).
renewals occurred after 1 January 2015’. On 27 July 2015 Mr Relefolo received a letter telling him that his fixed term contract was to terminate on 31 July 2015. The arbitrator declared that Mr Relefolo was ‘in accordance with the provisions of section 198B, deemed to be employed on an indefinite basis by the respondent’ and the municipality was ‘ordered to pay the applicant... compensation in the amount of R98,104.00... for having unfairly terminated his employment contract with the respondent’. 82

It seems ironic that Assign Services continues to argue in its submissions to the Constitutional Court that the legislature could not have conceived of creating vulnerability for the worker by ending the contract after three months and leaving the TES and employee only at common law and essentially unprotected by the LRA.

The intention of the legislature, confirmed in the LAC judgment, was to address the fundamental problem of deepened vulnerability of workers forced to accept temporary work because of the major decline in permanent work over the past twenty and more years.

The amendments to section 198 of the LRA restore the protections of the right to reinstatement, the right to bargain collectively and the right to protected strike against the client company for vulnerable workers.

5. Implications of the amendments for future triangular employment relations

Since the amendments to section 198 of the LRA did not seek to ban labour broking, neither a ‘dual employer’ or ‘sole employer’ finding by the Constitutional Court will bring to an end to triangular employment relations in South Africa. A ‘dual employer’ finding will be more advantageous for the TES industry since it would be able to continue to thrive. It will be free to continue supplying cheaper and more controllable labour to client companies who would now, ironically, have even greater freedom from their various legal obligations to workers. This would be so not because the law would now allow it but because worker confusion and

82 Ibid para 54 (1-2).
employer evasion are inherent in the triangular employment relationship. A two-employer scenario will actively work against worker interests.

A ‘sole employer’ ruling by the Constitutional Court will have a much more negative impact on triangular employment relations. TES’s will be free to supply temporary employees to clients but individual workers will have to be offered ‘indefinite employment’ by the client companies after 3 months, as per section 198A(3). Moreover, section 198A(5) holds that these ‘deemed’ permanent workers of the client companies must be treated ‘not less favourably’ than the client’s other permanent workers doing the same or similar work. Or, in the words of the LAC, the deemed workers must be ‘fully integrated’ into the client company’s existing workforce. Section 198A(5) thus removes the client’s incentive of using a cheaper form of labour.

However, even in this arrangement of TES employees becoming client employees after 3 months, nothing prevents the TES from continuing to supply the same client with other, ‘fresh’ employees until they, too, fall within the provisions of section 198A(3). But it is clear that such arrangements will be administratively burdensome and perhaps more trouble than they’re worth.

It is more likely, especially with a ‘sole employer’ Constitutional Court ruling, that the TES industry will accelerate a move towards a ‘service provider’ model. TES companies are a highly organised sector and are evolving new strategies in which to reduce the input costs of labour in industry and commerce, and to keep worker wages and conditions to the bare minimum possible. The key strategy appears to be that employers are simply shifting to contracting these TES companies as ‘service providers’ and this exposes a fundamental flaw in the amendments to section 198 of the LRA, that Theron warned of.83

The challenge for labour broker workers, who are fast becoming the majority in workplaces, continues to be a question of finding new ways to self-organise so that they can unite to ensure that these rights are realised. The prospects of workers getting active support from trade unions to support them to claim section 198 rights will continue to be poor. Trade unions have not found effective ways

to organise vulnerable workers, despite a generalised decline in union membership over an eight-year period, to an average of 29 per cent of the workforce.\textsuperscript{84}

In the unlikely event that the Constitutional Court overrules the LAC judgment and the dual employer interpretation is returned, then the vulnerability of these layers of workers in South Africa would be returned to the pre-2014 situation. With the evidence of deepening social crisis for the working class in South Africa appearing in the unemployment and inequality statistics quarter in and quarter out, it is unlikely that the Constitutional Court will allow this high risk of socio-economic vulnerability to perpetuate.

6. Conclusion

This paper has analysed the implications of the amendments to section 198 of the LRA on labour broking, for the triangular relations in the South African workplace, through the lens of the \textit{NUMSA v Assign Services} Labour Appeal Court case of 2017. In so doing, it has considered the intention of the amendments to section 198 of the LRA, as expressed in the explanatory memorandum accompanying the amended act.

The analysis has shown that there is little to support the argument that the amendments to section 198 of the LRA on labour broking were intended to create a dual employer relationship for labour broker workers earning below the threshold, after their first three months of temporary work. It has been demonstrated that the dual employer argument can only create further uncertainty and vulnerability for such workers and will simply add new dimensions of inequality and poverty in South Africa.

The amendments to section 198 of the LRA have offered vulnerable workers in South Africa an important window of opportunity. It is allowing workers hitherto unorganised, to begin to chart a fresh way of tackling employer power in society.

Trade unions have been unable to adapt and remain relevant and agile, and we are seeing these workers search for alternative approaches.

Following Benjamin, what is ultimately needed to effectively protect workers in South Africa today is that the entire labour policy and institutional framework must be overhauled to better align with the dynamic nature of the world of work going forward.\textsuperscript{85}

\textsuperscript{85} Benjamin (note 1 above) 40.
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