DOES SECTION 198A (3) OF THE LABOUR RELATIONS ACT CREATE A SOLE OR DUAL EMPLOYMENT RELATIONSHIP AFTER THE PERIOD OF THREE MONTHS?

Submitted in fulfilment of the requirements of the Master of Laws (LLM) (Research Report) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg.

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Date: 15 September 2022

DECLARATION

I, **868150**, declare that this Research Report is my own. It is submitted in fulfilment of the requirements of the Master of Laws (LLM) degree in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any examination or degree in this institution or any other.

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ABSTRACT

This research report is an overview of section 198 of the Labour Relations Act which regulates temporary employment services. It also evaluates the nature of employment of employees who are employed at the instance of the TES after a period of three months from the date of their employment. In 2002 this Act was amended by the Labour Relations Amendment Act which inserted section 198A. The purpose of this insertion was to protect TES employees from being exploited by their employers by making them work for years on a temporary basis. Employees would be deprived from acquiring permanent employment benefits because of the temporary contracts they are working under. However, it has appeared that this amendment did not fulfil its purpose because section 198A(3)(b) leaves employees even more vulnerable as it gives the window period of three months without being clear on what happens to the tripartite relationship between the parties. This section does not explain who the employer after the lapse of three months is, this leaves employees not knowing where they stand with both the client and the TES. Therefore, this research report discusses section 198A (3) of the LRA, with a view of assessing whether the client is the only employer (sole employment relationship) or both TES and the client are employers (dual employment relationship). Further, this paper gives an overview of the case laws that have dealt with this section in trying to analyse and decide on the intention of the legislature when enacting the Amendment Act.

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I INTRODUCTION

Section 23(1) of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution), provides everyone with a right to fair labour practices,[1] which is given effect to by the Labour Relations Act[2] (LRA). In South Africa, people can be recruited by certain companies to perform work for other companies. This creates a tripartite kind of employment where a person is employed by a certain company but renders services for a different company. This employment arrangement makes the identification of the true employer difficult, particularly when employees experience unfair labour practices. Section 198 of the LRA regulates the tripartite relationship between the company that sources out employees, a client which is a company where the employee will render his or her services and the employee. These tripartite relationships are referred to as temporary employment services (hereafter TES) and are regulated by section 198 of the LRA. The application of this section led to the exploitation of employees who were required to work for an employer for years on a temporary basis without being provided employment benefits. To protect these employees, the LRA was amended by the Labour Relations Amendment Act,[3] section 45 of which inserted section 198A into the LRA. Even with this amendment, it is still difficult to establish the true employer of the employee subject to a TES after the lapse of three months.

This research report discusses section 198A (3) of the LRA and assesses whether it creates a sole or dual employment relationship between the TES, the client and the employee. The nature of employment of employees' employed at the instance of TES after a period of three months from the date of their employment will be evaluated. This report will also reflect on the courts' interpretation of this provision. A desktop research method is used wherein available legal academic literature, relevant legislation and cases are reviewed. First, the historical legislative regulation of TES in South Africa will be traced. Second, circumstances that led to the introduction of section 198A of the LRA will be discussed. Third, a critique of the judicial interpretation of section 198A (3) of the LRA will be advanced. Finally, recommendations on how this provision ought to be interpreted will be made.

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[1] Section 23(1) of the 1996 Constitution.
[2] 66 of 1995.
[3] 12 of 2002.

II INTERNATIONAL RECOGNITION OF LABOUR BROKING

The first international recognition of labour brokers was in 1919, when the Unemployment Convention was adopted by the International Labour Organisation (hereafter ILO).[4] The ILO was established among others to: ensure the adoption of just and equal labour standards; encourage the creation of decent employment opportunities; and promote improved working and living conditions for employees.[5] The main goal of the ILO is to advocate for a socially just labour market across the globe and to advance human and labour rights. To achieve this goal, the ILO's members adopted several conventions relating to labour brokers.[6]

Article 2(1) of the Unemployment Convention enjoined each member state after rectifying the Convention to co-ordinate the operations of employment agencies, develop and establish a system of free private employment agencies which will operate as 'free placement services'. It was not anticipated that these agencies would make profit from this arrangement. None of the articles of this Convention made provision for the payment of a fee. However, these agencies made profit and took advantage of employees and jobseekers. This resulted in the ILO assessing this Convention to determine what could be done to better protect employees. As a result, a specific Convention dealing with the charging of fees by these agencies was later adopted.

(a) Fee-charging employment agencies convention 1933 and 1949

Private employment agencies advocated for the provision for payment for their work. This led to the adoption of the Fee charging Employment Agencies Convention in 1933, which sought to distinguish fee charging or profit-making agencies from the non-profit agencies.[7] The Fee-charging Employment Agencies Convention was revised in 1949. The revised Convention gave member states discretion to choose whether to abolish the fee–charging employment agencies in their respective countries.[8] The prescribed period to abolish these agencies was three years.[9]

[4] J Van Daele 'The International Labour Organisation (ILO) in Past, and Present Research' (2008) *International Review of Social History* 487.
[5] ILO Declaration on Fundamental Principles and Rights at Work available at *http://www.ilo.org>lang--en*, accessed on 25 May 2020.
[6] Ibid.
[7] See Article 1 of fee charging Employment Agencies.
[8] N Valticos 'Temporary work agencies and International Labour Standards' (1973) 107 *International Labour Review* 56.
[9] Article 3(2) of the fee charging 1949.

Most member states chose to abolish the fee-charging agencies.[10] Article 10 of the Convention stated that where a member state chooses not to abolish the fee charging agency, this agency shall be subjected to the supervision of the competent authority,[11] shall be in possession of an annually renewed license,[12] shall only charge fees that are scale submitted and approved by the competent authority,[13] and shall only recruit and place employees abroad if permitted to do so by the competent authority.[14] Article 4 of the 1949 Fee-charging Convention focuses on the significance of alienating all abuses connected with the operation of the fee-charging agencies with a view to profit.[15] For the purposes of this report, the most important and relevant instrument is the Private Employment Agencies Convention.[16]

(b) The Private Employment Agencies Convention 181 of 1997

The Private Employment Agencies Convention[17] also deals with private employment agencies and it has not yet been ratified by South Africa. The preamble of this Convention acknowledges the role played by private employment agencies in a 'well-functioning' labour market and the need to protect employees against abuse by these agencies. According to Article 1(b) of the Private Employment Agencies Convention, a private employment agency, which this report refers to as the labour broker or temporary employment services, means:

> 'any natural or legal person, independent of the public authorities, which provides one or more labour market services, this services include 'employing employees with a view to making them available to a third party, who may be a natural or legal person (referred also as a "user enterprise") which assigns their tasks and supervises the execution of these tasks'.[18]

The main purpose of this Convention is to provide for the operation of the private employment agencies and protection of temporary employees.[19] Articles 4 and 5 of this Convention provides that employees recruited by private employment agencies have the right to freedom of association, to bargain collectively,[20] and not to be discriminated against.[21] While this

[10] A S Bronstein 'Temporary work in Western Europe: Threat or complement to permanent employment?' (1991) 130 *International Labour Review* 301.
[11] Article 10(a) 1949.
[12] Article 10(b) 1949.
[13] Article 10 (c) 1949.
[14] Article 10(d) 1949.
[15] Article 4 (2) 1949.
[16] Private Employment Agencies Convention181 of 1997.
[17] Private Employment Agencies Convention 181 of 1997.
[18] Articles 1(b) of the Private Employment Agencies Convention 181 of 1997.
[19] Article 2(3) of the Private Employment Agencies Convention.
[20] Article 4 of the Convention.
[21] Article 5 of the Convention.

Convention recognises these important labour related rights, nonetheless, it does not indicate who the employers are in these tripartite employment relationships. This Convention does not provide recourse to employees who are associated with non-complying private employment agencies, particularly where such agencies do not pay employees their salaries.

There are several international instruments such as Conventions,[22] covenants[23] and declarations[24] that South Africa has signed and ratified, which seek to protect the rights of employees. These international instruments can be made part of domestic law through section 232 of the 1996 Constitution[25] Conventions are binding while covenants, declarations and recommendations are not binding but merely provide guidance regarding the development of domestic legislation and policies .[26] ILO has shifted its focus from right-based methodology to that which emphasises sustainable job creation.[27] South Africa is an ILO member state and has an obligation to ensure that its legislation fall within the ILO labour standards and comply with the provisions of the instruments it ratified.[28] In *Murray v Minister of Defence,* the court stated that the Constitution obliges the courts to consider international law such as the ILO Conventions and recommendations when interpreting any right to fair labour practices.[29]

South Africa appears not to have ratified the Private Employment Agencies Convention because it does not cover all forms of triangular employment services that South Africa recognises, such as outsourcing and contracted services.[30] The lack of regulation which resulted in employees being more exploited fuelled the debate that private employment agencies should be banned. There are still several shortcomings regarding this Convention, such as its failure to state duties and obligations of each party in the triangular relationship. This Convention neither addresses employees' job security nor the controversy of equal

[22] Forced labour convention, 1930 (No.29), Domestic Workers Convention, 2001 (No.189).
[23] International Covenant on Economic, social and cultural rights (ICESCR) 2015
[24] Universal Declaration of human rights 1948.
[25] Section 232 of the Constitution states that customary international law is law in the republic unless it is inconsistent with the Constitution or an Act of parliament.
[26] B J Gumede *A critical examination of the interpretation and application of the law relating to Temporary Employment Services in South Africa* (unpublished LLM mini-dissertation, UKZN, 2018) 13.
[27] BPS Van Eck 'Revisiting agency work in Namibia and South Africa: Any lessons from the decent work agenda and the flexicurity approach?' (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 49 at 66.
[28] T Mavetera *An analysis of the labour law amendments of 2014 pertaining to labour brokers: A comparative study* (unpublished LLM mini-dissertation, North West University, 2016) 7.
[29] *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) para 13.
[30] D Budlender 'Private employment agencies in South Africa; sectoral activities department' Sector Working Paper No.1 291. International Labour Office Geneva. PAGE?

treatment of employees and the working conditions in the workplace. It does not appear as if this Convention would provide TES employees in South Africa with adequate protection. Nonetheless, Article 12 of this Convention provides that member states shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1. Notwithstanding this Convention, temporary employees are still subjected to poor working and living conditions within some of the member states. This indicates that there are no adequate enforcement measures to protect employees from abusive practices from private employment agencies (which are referred to as 'labour broker' and 'TES' in this report) or their clients.[31]

III LABOUR BROKING IN SOUTH AFRICA

(a) Pre-Democratic Era

In South Africa, TES, which are generally referred to as labour brokers, can be traced back to the 1950's.[32] During this time, employees were employed in terms of fixed-term contracts and were recruited by intermediaries which are now known as agencies.[33] Due to the discovery of gold and diamonds in South Africa, these agencies supplied employers with employees in the mining sector which was one of the major sources of employment. Labour broking was taking place mostly in this sector where a person or business would make arrangements for employees to work for a mining company.[34] The person who arranged employment for the employee was not considered an employer of such an employee. The 1956 LRA did not recognise this type of arrangement. This statute neither defined the phrase 'labour brokers' nor provided any guidance as to who was the employer between the client and the person who arranged employment. According to Reiner, 'temporal employment service is when an employer would approach a third party to supply temporary or short-term employees for a specific period or project'.[35] Reiner's definition suggests that the employee's employer in this tripartite relationship is the client of the TES. Labour broking is best defined as a method that enables companies to enter into agreements with third parties to recruit and provide them with

[31] Mavetera op cit note 28 at10.
[32] Y T Joubert & B Loggenberg 'The impact of changes in labour broking on an integrated petroleum and chemical company' (2017) 17 *Acta Commercii* 441.
[33] D Budlender op cit note 30 22.
[34] Ibid at 9.
[35] M Rainer 'Labour brokers and temporary employment services: what are they?' available at *https://schoemanlaw.co.za/labour-brokers-and-temporary-employment-services-what-are-they/,* accessed on 1 June 2020.

employees. This practice is also referred to as outsourcing, when the company obtains services or goods from an outside supplier or service provider who is not contractually employed by the company.[36]

Due to labour unrest as a result of discriminatory labour practices,[37] in 1977, the Wiehahn Commission was requested to investigate the industrial relations in South Africa.[38] This Commission, among others, considered new ways of placement services where the undertaking would lease services of persons to the client.[39] The Commission examined the necessity to provide protection against unfair labour practices.[40] This resulted in appropriate labour brokers' regulation forming part of the amendments that followed.[41]

The Wiehahn Commission also recommended the establishment of the Industrial Court, which was established in terms of section 8 of the Industrial Conciliation Amendment Act.[42] This court was given the power to determine disputes relating to labour broking when the 1956 LRA was amended in 1983. Labour Relations Amendment Act[43] inserted section 77 into the LRA which enabled the Industrial Court to determine whether a labour broker was deemed to be a permanent employer and within which industry.[44] This amendment also provided a definition of the phrase 'labour broker', which was defined as:

> '… any business whereby a labour broker for a reward provides a client with persons to render service to or perform work for the client or procures such persons for him, for either service or work, such persons were remunerated by the labour broker'.[45]

The 1983 Amendment Act through its 'deeming' provision clarified that the labour broker is the employer of the employee. Because B the labour broker will oversee the work done, place

[36] A Botes 'The history of labour hire in Namibia: A lesson for South Africa'(2013) 16 *Potchefstroom electronic law journal* at 506
[37] M Finnemore *Introduction to Labour Relations in South Africa* 11 ed (2013) 29.
[38] Wiehahn Commission available at *https://www.sahistory.org.za/article/wiehahn-commission*, accessed on 1 June 2020.
[39] M S M Brassey *et al Employment and Labour law* (1998) 45.
[40] S R Van Jaarsveld & JD Fourie *Principles and Practice of Labour Law* 1 ed (2002) 115.
[41] Ibid at 118.
[42] Industrial Conciliation Amendment Act 94 of 1979.
[43] 2 of 1983.
[44] Section 77 of Act 2 of 1983.
[45] Section 1 of LRA 1983.

conditions of employment and remunerate the employee while the client usually only provide the workplace.[46] This type of employment created a tripartite employment relationship.[47]

Amongst other problems, employees started complaining about being paid low wages by labour brokers.[48] Employees also complained about the lack of recourse against the client when dealing with fly-by-night agencies,[49] which are those that would disappear without any trace before paying their employees.[50] In such cases, the client would inform employees that they should liaise directly with their employer, the labour broker in this instance. Further that the client would emphasise that there is no employment relationship between the client and TES employees, leaving employees vulnerable. These fly-by-night agencies are able to operate due to lack of adequate regulation and accountability allowing them to unfairly terminate employees' services.[51] In order to protect employees from these agencies, it has been correctly argued that employees must remain the labour brokers' employees when not placed with clients and labour brokers should enter into binding contracts with employees placed with their clients.[52] Further that due to the extensive exploitation that occurs within the TES sector, the legislature must decide which industries can adopt the TES employment style.[53]

(b) Democratic Era

In 1994, South Africa become a democratic country and later adopted a Constitution that constitutionalised employees' rights in 1996.[54] The advent of democracy meant the removal of discriminatory employment practices that were prevalent during the apartheid days.[55] The

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[46] J Theron 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' (2008) 29 *ILJ* 1.
[47] Ibid at 628.
[48] S Harvey *Labour brokers and workers' rights: can they co-exist in South Africa?* (Unpublished LLM thesis, University of Cape Town, 2009) 11.
[49] S Sinanin Naidoo *A Critical Analysis of Temporary Employment Services in terms of Current Legislation* (Unpublished LLM Dissertation, University of Kwa-Zulu Natal, 2016) 15.
[50] P Hlahla 'Fly-by-night' companies exploit staff' IOL News available at *https://www.iol.co.za/amp/news/south-africa/fly-by-night-companies-exploit-staff-41826,* accessed on 25 May 2020.
[51] B Goldblatt & Kirsty McLean *Women's Social and Economic Rights: Developments in South Africa* 1 ed (2011) 271.
[52] Ibid at 272.
[53] Ibid.
[54] P Benjamin 'Law and practice of private employment agency work in South Africa: Sector Working Paper No. 292 (2013).
[55] M Clarke 'Ten Years of Labour Market Reform in South Africa: Real Gains for Workers?' (2004) 38 *Canadian Journal of African Studies* 512.

Constitution provides everyone with the right to fair labour practices.[56] Unfair Labour practice means any unfair act or omission that arises between an employer and employee, involving but not limited to; promotion, benefits of the employee, and disciplinary hearing.[57]

Due to the alleged unfairness that employees experienced from labour brokers, there have been calls for labour brokers to be banned.[58] One of the reasons that contributed to the call for the banning of labour brokers was the alleged unfairness of its practices of exploiting employees without being accountable.[59] Most unions argued that it is extremely difficult to gain membership and mobility from the TES employees because of their employment setup which affect employees' right to unionisation and affiliation in the workplace.[60] In *Phaka and Others v Bracks and Others,* the court held that to establish whether there was an act or omission that resulted in an unfair labour practice it had to first '…establish the true nature of the relationship between the parties, and that the premise that the legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded.'[61] The court must consider the realities of the relationship and not regard itself bound by what the parties have chosen to call it.[62]

Section 39(1) (*b*) and (*c*) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It further obliges courts in their interpretation to consider international law and provides them discretion to consider foreign law.[63] Section 233 of the Constitution further states that 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. South African courts may refer to cases and statutes of other countries when adjudicating labour broking disputes. Courts, however, must refer to international instruments that were discussed above

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56 Section 23 of the Constitution.
57 Unfair Labour Practice available at *www.labourprotect.co.za*, accessed on 25 May 2020.
58 M T Kutumela *Legislative framework governing labour broking in South Africa* (unpublished LLM thesis, University of Limpopo, 2013) 48.
59 B Loggenberg *HR employees' perceptions regarding the changes in labour broking* (unpublished LLM thesis, University of South Africa, 2015) 38.
60 Ibid at 50.
61 *Phaka and others v Bracks and Others* (2015) 36 *ILJ* 1541 *(LAC)* para 31.
62 *SA Broadcasting Corporation v McKenzie* (1999) 20 *ILJ* 585 (*LAC*) para 10.
63 Section 39(1) of the Constitution.

when resolving disputes regarding labour broking, to the extent to which they are relevant and useful to the dispute before them.

IV LEGISLATIVE REGULATION OF LABOUR BROKERS

(a) Section 198 of LRA 1995

The phrase labour broker was replaced by the phrase ‘temporary employment services’ (TES) in the LRA of 1995. Section 198(1) of this LRA describes TES as ‘any person who, for a reward, procures for or provides to a client other persons who perform work for the client and who is remunerated by the TES.’[64] Regarding the identification of the employer, section 198(2) of the LRA provides that ‘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.[65] This provision makes the TES the employer even though the client is responsible for the daily administration of the services performed by the employee in its premises. This effectively makes employees casual employees for labour broker’s clients.

After the enactment of the 1995 LRA which attempted to clarify uncertainties about the TES and the identification of the true employer, the casualization of employees through TES contracts increased. Employers also attempted to avoid a standard employment relationship and the obligations incorporated into this TES relationship,[66] such as ensuring all the employee’s rights and protection enshrined in the Constitution and relevant legislation. TES contracts enabled employers to disregard employees’ rights in pursuit of profit.[67] Employees earned less because of the extra commission that the client had to contractually spare for the broker. TES led to the exploitation of employees and left them vulnerable with no job security and adequate legal protection. Employees worked without employment benefits and decent salaries under TES contracts for longer periods.[68]

Notwithstanding, the definition of the TES and clarity on the identity of the TES employee’s employer, nonetheless, there were still challenges regarding the regulation of the TES. For

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[64] Section 198 (1) of 1995 LRA.
[65] Section 198(2) of 1995 LRA.
[66] J Theron ‘Prisoners of a Paradigm: Labour Broking, the ‘New Services’ and Non-Standard Employment. Reinventing Labour Law’ (2012) *AJ* 59.
[67] P Benjamin ‘Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, Basic Conditions of Employment Amendment Bill, Employment Equity Amendment Bill, Employment Services Bill (2010) 31.
[68] A Botes ‘Answers to the Questions? A Critical Analysis of the Amendments to the Labour Relations Act 66 of 1995 with regards to TESs’ (2014) 26 SA *Merc LJ* 110.

instance, section 198 of the 1995 LRA neither defined 'temporal work' nor prescribed the duration of the TES. This meant that the relationship between the employee, TES and the client could exist indefinitely. The client in certain instances did not intend to use the TES employee for a shorter period but to retain that employee for a longer period under TES contract in order to avoid dealing with the employee's labour rights.[69] TES employees were underpaid and not provided employment benefits.[70] There was an urgent need to hold the client responsible for TES in cases where the employee had worked for the client for a longer period and when the TES was not complying with applicable legislation and international standards that regulate TES and its employees.

Section 198 (4) of the 1995 LRA further provides that the TES and the client are jointly and severally liable if the TES employee contravenes a collective agreement, a binding arbitration, the Basic conditions of Employment and a Wages Act determination.[71] In *Firstrand bank Limited v Malan: Jean-Paul,*[72] the court referred to the *De Villiers CJ in De Pass v The Colonial Government* where it was held that 'the liability is joint and the rights are held in common and each is liable for only his share and not in seldom.'[73] According to Benjamin:

> '…if there are any payments in default owed by the TES to its employees then the client is liable to make those payments. However, this was tested to not be an adequate and sufficient legal protection for the TES employees since the Labour Court held that the client cannot be sued directly in the CCMA or Labour court as it is not the employer. The employee can only proceed against the client if it has obtained a judgement or award against the TES which the TES declines to pay.'[74]

Unemployment rate in South Africa remains high,[75] making TES attractive to unemployed persons. These employees are vulnerable and are sporadically unable to exhaust all legal procedures to hold the client accountable when exploited.[76] TES employees normally choose

[69] Benjamin op cit note 67 at 34.
[70] Ibid at 34.
[71] Section 198(4) of LRA.
[72] *Firstrand Bank Limited v Malan and Another* (33118/2010) [2014] ZAGPJHC 219 para 9.
[73] *De Villiers CJ in De Pass v The Colonial Government* (1886) 4 SC 383 at 390.
[74] Benjamin op cit note 54 22.
[75] SA's Q4 unemployment rate holds steady at 29.1% available at *https://ewn.co.za/2020/02/11/sa-s-q4-unemployment-rate-holds-steady-at-29-,* accessed on 1 June 2020.
[76] Benjamin op cit note 67 at 33.

to enter into contracts that are less favourable to them, since earning less is better than not earning anything at all.[77] TES industry is also dominated by low-skilled employees.[78]

Section 185 of the LRA provides that everyone has the right not to be unfairly dismissed and subjected to unfair labour practices.[79] Section 198(4) of the LRA does not extend a joint responsibility for some of the significant protections to temporary employees, such as protection against unfair dismissal and the constitutional right to fair labour practices.[80] This right is applicable to all employees regardless of the nature of their employment. In *Mavata v Afrox home health care,*[81] the court held that the termination of the contract of employment was fair and that the employer was entitled to refrain from using the services of the employee.[82] Further that the nature of the nurse's employment was casual and that there was no entitlement to future employment beyond a day.[83] Despite the casual nature of the work that the TES employee was offering the client, the termination of the contract of employment amounted to the violation of the constitutional right to fair labour practices because being labelled 'casual' does not mean the employee cannot be afforded any protection by the Act.

In *Nape v INTC Corporate Solutions,* the employee was dismissed by the TES on the instructions of the client in line with the client and TES' contract which stated that 'termination could be effected on any ground acceptable under law'.[84] The court stated that the constitutional right to fair labour practice cannot be taken away from an employee by any agreement concluded by the parties[85] and that a client has a duty to respect the employee's constitutional right to fair dismissal and that it cannot use the contents of the contract between itself and the TES to justify dismissal.[86] This case illustrates the challenge of unfair dismissal that TES employees face in tripartite employment which they are involved. The court held that the TES

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[77] S Sinanin Naidoo *A Critical Analysis of Temporary Employment Services in terms of Current Legislation* (Unpublished LLM mini-Dissertation, University of Kwa-Zulu Natal, 2016) 17.
[78] M A Forere 'From exclusion to labour security: To what extent does section 198 of the Labour Relations Amendment Act of 2014 strikes a balance between employers and employees' (2016) 28 *SA Mercantile Law Journal 375* at 379.
[79] Section 185 of the 1995 LRA.
[80] Section 198 (4).
[81] *Mavata v Afrox home health care* (1998)19 ILJ 931.
[82] *Mavata v Afrox home health care* (1998)19 ILJ 931 at 934.
[83] *Mavata v Afrox home health care* (1998)19 ILJ 931 at 933.
[84] *Nape v INTC Corporate Solutions* 2010 (31) *ILJ* 2120 (LC).
[85] *Nape v INTC* para 53.
[86] *Nape v INTC* para 68-69

employee can be dismissed only on operational reasons that are lawful and fair.[87] This case elucidated the importance of filling-in the gaps in the regulation and protection of TES employees.[88] TES employees earn less, they are not given the same benefits as other employees like medical aid. They are at risk of being dismissed with no recourse. The legislature had to intervene and regulate TES to protect employees. The salaries of TES employees need to be curbed and there should be no employee who should earn less because they are commissioned. A client that chooses to use a TES must be prepared for the extra costs so that employees are not left earning peanuts. However, there are still uncertainties that mainly come from the deeming provision that require legislative intervention.[89] This intervention would assist the judges when deciding cases.

(b) The 2014 amendments to section 198 of the LRA

In 2014, the LRA was amended by the Labour Relations Amendment Act,[90] which inserted section 198A into the Act. This amendment was meant to extend protection to employees who are part of the TES employment and also prevent their exploitation.[91] It was also aimed to ensure equal treatment of all employees in the workplace. Apart from this provision, there are other provisions that also deal with TES employees. For instance, section 82(3) of the Basic Conditions of Employment Act[92] (hereafter BCEA) provides that the TES and the client are jointly and severally liable if the TES, in respect of any employee who provides services to that client, does not comply with the BCEA or a sectoral determination.[93] Section 198 (4A) of the LRA deals with joint and several liability in respect of TES and its client. It states that the TES employee can institute proceedings against either TES or client or both and the order or award may be enforced against either.[94] Section 198 (4A) of the LRA clears the controversy that was raised above by Benjamin that an employee can only proceed against the client if it has obtained a judgement or an award against the TES. Now, it appears that the client can also be held

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87 *Nape v INTC* para 71-72
88 R W Nkhumise 'Dismissal of an employee at the instance of a client: Revisiting Nape v INTCS Corporate Solutions (Pty) Ltd in the context of the Labour Relations Amendment Act of 2014' (2016) 20 *Law democracy and development* 111.
89R W Nkhumise 'Dismissal of an employee at the instance of a client: Revisiting *Nape v INTCS Corporate Solutions (Pty) Ltd* in the context of the Labour Relations Amendment Act of 2014' (2016) 20 *Law democracy and development* 117.
90 6 of 2014.
91 J Theron, S Godfrey, P Lewis *The rise of labour broking and its policy implications: Labour and development monograph* 1ed (2005) 54.
92 Basic Conditions of Employment Act 75 of 1997.
93 Section 82(3) of the BCEA.
94 Section 198 (4A) of the LRA.

accountable in cases where the labour broker is not complying with the TES regulations. However, the most important section for the purposes of this report is section 198A (3) (*b*) of the LRA, which provides that:

> 'For the purposes of this Act, an employee— (*a*) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or (*b*) not performing such temporary 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'.

In terms of this provision, an employee that is not performing temporary service (which means not exceeding 3 months) is deemed to be an employee of the client and the client is the employer of that employee.[95] The legislature's intention was to ensure that after three months, such employees will be treated like permanent employees in order to receive regular wages and employment benefits which are enjoyed by permanent employees who perform the same job as they do. This was also to render the client and the TES legally liable for the TES employee. This provision excludes employees in fixed contracts.[96] According to Forere, the purpose of the amendment was to remedy the abuse associated with TES directed to its employees and by ensuring that temporary jobs are of that nature.[97]

Section 198A (3) (*b*) of the LRA, which deems employees who were employed at the instance of a TES, employees of the client after the lapse of three months has attracted judicial attention. Courts have interpreted this provision in a manner that blurs the clear identification of the employer that the LRA attempted to provide and raises questions regarding the status of the TES after the lapse of three months. The controversy is whether there is a sole or dual employment relationship, which unfortunately, our courts have not adequately dealt with.

V SOLE OR DUAL EMPLOYMENT RELATIONSHIP

(a) Overview

[95] Section 198A (3) (*b*) (i) of the LRA.
[96] Section 198A (3) (*b*) (ii).
[97] M A Forere 'From exclusion to labour security: To what extent does section 198 of the Labour Relations Amendment Act of 2014 strikes a balance between employers and employees' (2016) *SA Merc* LJ 375 at 384.

Section 198A (3) (*b*) of the LRA has led to the development of two schools of thought. The first school of thought argues that this provision creates a sole employment relationship. The second school of thought argues that this provision creates a dual employment relationship. At the centre of these two schools of thought is the determination of the nature of employment relationship created between the labour broker, the client and employees' who render services to the client and the rights and obligations that arise therefrom. In *Refilwe Esau Mphirime v Value Logistics Ltd/BDM staffing (Pty) Ltd*,[98] the commissioner stated that the crux of the interpretation lies in the question of who is responsible for the duties and obligation in terms of the LRA.[99] The commissioner further stated that in light of the purpose of the LRA, section 198A (3)(*b*) effectively stops the abusive practices associated with TES[100] and awarding the client all duties and obligations as an employer for purposes of the LRA ensures that all constitutional rights of the employee are protected.[101]

(b) Sole Employment

In terms of the sole employment approach, section 198A (3) (*b*) of the LRA is interpreted as establishing the client as the only employer of the employee with the TES' status as an employer ceasing after three (3) months. The National Union of Metalworkers of South Africa (hereafter NUMSA) supported the sole employer approach and argued that section 198A (3) (*b*) of the LRA transfers all the rights and obligations of the TES employee to the client after three (3) months.[102] NUMSA argued that the employer-employee relationship is very unequal and employees are always disadvantaged due to the inherent inequality of bargaining power possessed by the employer.[103] Thus, having a single employer reduces the effect of the inequality of bargaining power.[104] The legislature's aim with this section was to counteract this inequality and protect the TES employee.[105] It is submitted that, when carefully evaluated, the sole employment approach appears to be against the rationale behind section 198A of the LRA, which is to regulate TES rather than to interfere with or limit its constitutional right to trade. This approach has the potential to render the TES less attractive to companies that might choose

[98] *Refilwe Esau Mphirime v Value Logistics Ltd/BDM staffing (Pty) Ltd NBCRFLI FSRFBC34922.*
[99] Ibid para 34.
[100] Ibid para 36.
[101] Ibid para 38.
[102] *National Union of Metal workers of SA v Assign Services* (2017) ILJ 1978 (LAC).
[103] Going for broke: A case study of labour brokerage on fruit farms in Grabouw available at *https://www.ifwea.org/resources/title-going-for-broke-a-case-study-of-labour-brokerage-on-fruit-farms-in-grabouw-2008*, accessed 25 May 2020.
[104] O Kahn-Freund *Labour and the law* 3ed (1983) 18.
[105] Ibid.

to completely stop utilising their services and employ people directly. Employers would see no need to use TES and rely on their human resource departments to get employees.

In terms of this sole employment approach, before the deeming provisions are applicable, the TES is the employer, but once the deeming provisions are applicable, the client becomes the sole employer of the employee. In *S v Rosenthal*, the court held that the word ‘deemed’ does not have a precise meaning or meaning outside its context, as such the court must rely on the aim, scope and object of the legislation to determine the meaning of this term.[106] The dictionary meaning of the term deem is ‘regard or consider in a specific way’.

(c) Dual Employment

The dual employment approach entails that both the client and TES are employers of the employee after the lapse of three months. The most plausible interpretation of the deeming provision is that the employee and TES relationship remain active and the client after three months would be deemed the employer for purposes of enforcement of statutory rights against the client.[107] In *United chemical industries Mining Electric State Health and Aligned Workers Union*, the court supported the dual employment interpretation and held that the deeming provision should be interpreted as an additional protection as opposed to a replacement and that the TES remains the employer of the employee parallel with the client.[108] Dual employment relationship arises in respect of the client, for purposes of the LRA and the employee will remain on the ‘books’ of the TES.[109] Employees would be entitled to be treated ‘on the whole no less favourably than an employee of a client performing the same or similar work, unless there is justifiable reason for different treatment’ and they can institute claims such as unfair labour practices, unfair dismissal and discrimination claims against the client’.[110]

(i) The approach of the Labour Court

In *NUMSA v Assign services*, a TES company, Assign services, provided employees to its client, Krost Shelving, upon demand. Several employees were placed with the TES’ client. The

[106] *S v Rosenthal* 1980 (1) SA 65 (A) at 352-353.
[107] A Van niekerk et al *law @ work* 3 ed at 69.
[108] *United Chemical Industries Mining Electric State Health and Aligned Workers Union obo Mbombo v Primeserv and Another* (2017) 2 BALR 135 para 13.
[109] B Workman-Davies, Labour brokers and their clients are both employers of assigned employees in all respects available at *https://www.labourguide.co.za/most-recent/2137-labour-brokers-and-their-clients-are-both-employers-of-assigned-employees-in-all-respects*, accessed on 1 June 2020.
[110] Ibid.

Labour Court (LC) had to determine whether the TES' company continued to be an employer of employees placed with the client and was concurrently vested with the rights and duties generated by the LRA.[111] The placed employees, majority of whom were NUMSA members, were paid differently from permanent employees of the client. In particular, the LC was required to interpret section 198A (3) (*b)* of the LRA to determine the true employer in this tripartite relationship and the rights and obligations of all the parties thereto.

In 2015, Assign services placed twenty-two employees with the client for a period exceeding three months. These employees fell within the ambit of section 198A (3) (*b)* of the LRA. Assign services took the matter to the CCMA seeking the interpretation of the deeming provision, where it argued that the employees remain the employees of the TES after the lapse of three months, thereby creating a dual employment.[112]Assign services further contended that, 'once a placement occurs, the client becomes invested with the rights and obligations that, by operation of the LRA, cleave to an employer and, since the TES has in no sense been deprived of its status as an employer, the two relationships now operate in parallel'.[113]

NUMSA argued that after a period of three months, employees are deemed to be employed by the client, thereby creating a sole employment relationship.[114] This was a departure from its earlier written submissions where it stated that, 'the contractual relationship between the worker and the TES remains in force and, when pressed, it accepted that there is nothing in the innovations that deprives them of rights and obligations embodied in their contract'.[115] 'Since the contractual bond is indubitably one of employment, its continuance must mean that, following the placement, two employment relationships are discernible that operate in tandem.'[116]

It is submitted that the sole employment interpretation by NUMSA is not sound because it does not explain the aftermath of the TES as the previously recognised employer. It also does not consider other sections in the LRA that were introduced at the same time as the deeming

[111] *Assign services Pty Ltd v Commissioner for Conciliation, Mediation & Arbitration* (2015) 36 ILJ 2853 (LC) para 12.
[112] Ibid para 4.
[113] *Assign services Pty Ltd v Commissioner for Conciliation, Mediation & Arbitration* (2015) 36 ILJ 2853 (LC) para 4.
[114] Ibid para 3.
[115] Ibid
[116] *Ibid.*

provision. Section 198 (4A) provides for a joint and several liability for both the TES and the client. The drafters of the amendments introduced both these sections at the same time, this shows that they had no intention of removing the TES as the employer. The sole interpretation by NUMSA also does not take into cognisance other labour related legislation such as BCEA and the Employment Equity Act (EEA). The BCEA explicitly states that the employer of the placed employee is the TES.[117] Further, section 57(1) of the EEA provides that the client is the employer of the placed employee after the employee has worked for that client for three months or for longer periods. Both BCEA and EEA are relevant for TES employees since they are also employees and therefore need the same protection offered to other ‘normal’ employees.

The LC stated that section 198A (3) (*b*) of the LRA makes the client the employer for purposes of the Act only.[118] The LC agreed that the client does not form part of the contractual rights and obligations between TES and the employee.[119] Further that the deeming provision does not invalidate the contract of employment between TES and the employee.[120] The reason the client is the employer for purposes of the Act and does not form part of the contractual rights between the TES and the employee is that there is no transfer of the employment contract. The TES remains a separate employer in its own capacity with its own rights and duties. The LC further held that the relationship between TES and employee cannot be terminated without any substantive reason and a fair procedure.[121] The existence of the client’s obligations in section 198A (3) (*b*) does not bring the contract between the TES and employee to an end. The TES must observe the statutory requirements before terminating its contract with the employee.[122]

The source of control that the TES has with regard to the placed employee would only come to an end when the relationship is terminated by the parties or by the operation of the law and not by the deeming provision.[123] The two employment relationships must be unitary to avoid conflict and confusion with regard to rules and regulations that the employee needs to adhere to. This means that the client when setting tasks for the placed employee must consider the power of control that the TES still holds with regard to the placed employees.[124] The LC further

[117] Section 82(1) of the BCEA.
[118] *Assign services Pty Ltd* supra note 115 para 11
[119] Ibid.
[120] Ibid.
[121] Ibid para 13.
[122] Ibid
[123] Ibid para 17.
[124] Ibid

stated that the employee receives the instructions on how to perform the work from the TES.[125] The scope of the work is determined by the client through its delegated authority from the TES since the employee is still employed and accountable to the TES.[126] If the employment relationship between the TES and the employee comes to an end, the client has an option to employ the employee with its own instructions and scope of work.[127]

It has been contended that 'deemed' basically means 'considered' which in these circumstances can be said to enhance the protection of TES employees by considering the client as the employer together with the TES. The LC concluded that the TES remains the employer after three months.[128] Further, that, if that was not the case, the legislature would have expressed that the rights and obligations of the TES employee as well as the employment contract between the TES and its employee is automatically transferred to the client or is terminated thereof.[129] The LC also referred to the contract of employment between the TES and employee to be the 'source of control' in the employment relationship, therefore the TES retains control despite any new statutory relationship between the client and the employee.[130]

Previously, there have been debates regarding whether the agreement between the TES and employee is an employment contract. This debate was settled by section 198(2) of the 1995 LRA which declared the TES the employer of the employee. Section 198(2) was not amended with the insertion of section 198A. This supports the notion that the TES continues to be the employer alongside the client, thus creating a dual employment relationship. It is submitted that the LC's judgement is correctly that the TES remains the employer for the purposes of the Act. The client is therefore not drawn into the rights and obligations created by the contract between the TES and the employee.[131] Unhappy with the outcome of the LC, NUMSA appealed to the Labour Appeal Court (LAC).

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[125] Ibid .
[126] Ibid
[127] Ibid
[128] B Worman-Davies and A Vatalidis 'Labour brokers and their clients are both of assigned employees in all respects' available at *https://www.labourguide.co.za/recent-articles/2137-labour-brokers-and-their-clients-are-both-employers-of-assigned-employees-in-all-respects* accessed on 25 May 2020.
[129] A Van Niekerk et al *law @ work* 3 ed (Lexis Nexis 2015)70.
[130] *Assign services Pty Ltd* supra note 115 para 17.
[131] Ibid para 11.

In the LAC, NUMSA argued that the LC erred in deciding that the deeming provision makes both the client and the TES employers of the employee.[132] NUMSA argued that the aim of section 198A (3) (*b*) of the LRA is not to uphold the common law relationship between the TES and the employee but to identify the client as the only employer for the employee.[133] Assign services sustained its argument from the LC that the employees should remain the employees of the TES after the lapse of three months, and that both the client and the TES become the employers after the lapse of three months.[134]

Casual Workers Advice Office (CWAO) and Confederation of Associations in the Private Employment (CAPES) were admitted as amicus curiae by the LAC. CWAO supported the submissions made by NUMSA that the parallel/dual employer interpretation of the section 198A of the LRA is not supported by the plain language of this provision. Further that the sole employer interpretation accord effect to the purpose of the LRA amendments and to the right to fair labour practices.[135] CAPES supported the submissions made by Assign services, and argued that the only way to reconcile the LRA and the BCEA is through the TES and the client being parallel employers for the purposes of the LRA when deeming provision takes effect.[136]

Based on these submissions, the LAC reasoned that an employee who is not performing the temporary work as defined is not the employee of the TES.[137] It further referred to section 198(4A) of the LRA as a measure to strengthen protection of lower paid employees and to restrict TES to employ employees for temporary work.[138] Restricting TES to genuine temporary employment arrangements does not ban TES, it merely ensures that TES is in line with the purpose of the LRA amendments.[139] It does not make sense to retain the TES in the employment equation for an indefinite period if the client has assumed all the responsibilities that the TES has before the lapse of three months. The TES would be an unwarranted middleman who serves no value to the employment relationship.[140]

[132] *NUMSA v Assign services and Others* (2017) 38 ILJ 1978 (LAC) para 20.
[133] Ibid.
[134] Ibid para 8.
[135] *NUMSA v Assign services and Others* (2017) 38 ILJ 1978 (LAC) para 25.
[136] Ibid para 27.
[137] Ibid para 36.
[138] Ibid para 41.
[139] Ibid) para42.
[140] Ibid para43.

The LAC held that the LC misdirected itself in its interpretation of section 198A (3) (*b*) of the LRA. It held that the plain language of section 198A(3)(*b*) of the LRA supports the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers.[141] The LAC further stated that the deeming provision as a measure to protect vulnerable employees ensures that all employees are treated equally and any differentiation would demand that the employer (client) justifies it.[142]

It is submitted that the LAC did not attach a sensible meaning to the deeming provision. It is insensible to believe that the relationship of the TES and the employee comes to an end at the lapse of three months without any provision suggesting this. The SCA in the *Natal Joint Pension Fund v Endumeni Municipality* held that a sensible meaning is to be preferred to one that leads to insensible like results or undermines the apparent purpose of the document [143] The LAC approach undermines the purpose of the LRA which is to regulate the TES, particularly because this provision does not provide that client assumes all responsibilities of the TES after the lapse of three months. It is submitted that if the LAC was of the view that the deeming provision removed the TES as the employer, it should have then explained how this is consonant with section 198 (4A) of the LRA. It should have also demonstrated how this section strengthens the protection of employees if the TES is considered as a no value middleman and is totally removed from the tripartite employment relationship.

It is submitted that the LAC failed to interpret section 198A (3) (b) of the LRA in a way that provides employees with adequate protection after the lapse of three months. When section 198A (3) (b) was introduced, the intention of the legislature was to provide greater protection to vulnerable employees (TES employees). It is submitted further that the LAC's approach does not adequately provide protection for these employees. Further that it erred by holding that the dual employment interpretation does not offer more protection to employees and that the protection is merely to ensure that the employees are not treated differently from the employees directly employed by the client.[144] The protection of the TES employees goes beyond the integration of the TES employees into the workplace and equal treatment of all employees. The protection of TES employees includes benefits that they accumulated while

[141] Ibid para 46.
[142] Ibid para 39.
[143] Natal Joint Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 6.
[144] *NUMSA v Assign services and Others* (2017) 38 ILJ 1978(LAC) para 40.

employed by the TES in the past three months and their right to joint and severally liability protection provided for in section 198 (4A).

It is submitted further that the LC's approach should be preferred because it adopted an interpretation that would adequately protect employees. The LC discussed the practical implications of each interpretation and gave examples for the problems that the dual employment interpretation might come across. The legislature recognised that the TES employees are not protected from unfair labour practices and that are treated less favourable from the rest of the other employees and addressed this by considering the client as the employer who can be held responsible and liable. This does not in any sense suggests that the TES is then relieved from its duties as a recognised employer.

(ii) *Constitutional Court Approach*

Assign services applied for leave to appeal to the Constitutional Court (CC). The CC had to determine the correct interpretation of section 198A(3)(*b*) of the LRA. In particular, whether this provision gives rise to a dual or sole employment relationship after the lapse of three months.[145] Assign services argued that the LAC approach resulted in a ban of TES and that this court only considered the purpose of the deeming provision and not the language.[146] Further that the sole employment interpretation offers no protection to the employee, instead it takes away the protection offered in section 198(4) and forces the employee to a new employment relationship without consent.[147]

NUMSA argued that the deeming provision aims to regulate TES rather than to ban them.[148] Further that the deeming provision only changes the contract between the TES and the employee not the contract between the TES and the client. Therefore, TES can continue providing their services for their clients as long as they do not intend to employ the placed employees.[149] CWAO was also admitted as amicus at the CC and submitted that section 198A (3) (*b*) and section 198 (2) of the LRA cannot operate simultaneously.[150] CWAO argued that

[145] *Assign services (Pty) Limited v National Union of Metal Workers in South Africa and Others* 2018 (5) SA 323 (CC).
[146] Ibid para 29.
[147] Ibid para 30.
[148] Ibid para 31.
[149] Ibid.
[150] Ibid para 36.

there are several difficulties associated with the dual employment interpretation, such as the fact that an employee dismissed by the client will automatically be retrenched by the TES because there would be no work for them.[151] As a result, there would be two different claims, one against the client in the CCMA and the other against the TES in the LC.[152]

Dlodlo AJ, writing for the majority of the court, held that the plain language of section 198A (3) (*b*) supports the sole employer interpretation.[153] He held that section 198(2) of the LRA gives rise to a statutory employment contract between the TES and the placed employee, which is altered when section 198A (3)(*b*) is triggered.[154] The triangular relationship continue for as long as the commercial contract between the TES and the clients remains in force and requires the TES to remunerate the employees until the deeming provision kicks in.[155] He emphasised that the client is the sole employer of the TES employee.

In relation to dual employment, Dlodlo AJ held that TES is known to offer lower prices in order to be awarded contracts by the clients leading to lower wages for the placed employees.[156] Further that while triangular relationships exist, companies may and do contract out of their employment obligations in respect of placed workers.[157] This would mean that if TES is retained as an employer the purpose of the amendments are not adhered to.[158] Dlodlo AJ concluded that section 198A (3) (*b*) applies when employees are not performing temporary work and that the provisions of section 198(2) and section 198A (3)(*b*)(i) cannot operate at the same time.[159] In relation to the concern that the sole interpretation leads to the banning of the TES, it has been argued that there is still a place for TES in South Africa but with more restrictions on the application of their services.[160] It is submitted that the continued viability of TES in the labour industry is threatened by the sole interpretation of the deeming provision since companies would rather prefer to use their human resource department rather than utilising TES for employment because of the three months limitation.

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[151] Ibid.
[152] Ibid para 35.
[153] Ibid Para 85.
[154] Ibid para 75.
[155] Ibid para 75.
[156] Ibid para 79.
[157] Ibid para 79.
[158] Ibid para 79.
[159] Ibid para 83.
[160] H Van Niekerk 'Temporary employment- what's changed for employers and labour brokers?' available at *https://www.seesa.co.za/temporary-employment-whats-changed-for-employers-and-labour-brokers/* accessed 30 May 2020.

Cachalia AJ, in his dissenting judgement, held that both the client and the TES jointly continued as employers of the placed employee, thus, supporting the dual employment approach.[161] He reasoned that TES usually engages the employee under a common law employment contract and that section 198A (3) (*b*) of the LRA recognises that the TES is ordinarily the employer as stipulated by section 198(2) of the LRA but that the client is also regarded as the employer after the lapse of three months.[162] He further stated that the deeming provision would have provided that the TES ceases to be the employer at the lapse of three months.[163] Cachalia AJ opined that the sole employment interpretation deprives employees of the joint and several liability protection provided for in section 198(4) after the lapse of three months while the employees in the dual employment interpretation continues to enjoy the protection of this provision.[164] He further stated that the sole employment interpretation by the court means that the employment contract between the TES and employee remains but without the benefits of the LRA.[165] This means that there would be no accrual of leave, bonus and pension for the employee.[166] Cachalia AJ further stated that employees do not have or get new employment contracts with the client, the only protection is that the client is deemed to be the employer and that employees are not less favourably treated than other employees.[167]

It is submitted that Dlodlo AJ was not clear on whether the employee acquires a new contract of employment from the client or would rely on the previous contract between the TES and the client. His judgement is silent on the transitional provisions of the employment. His approach does not give the client, TES and legislature the obligation to address the transition process. This would cause lack of comfortability to the transferred employees.[168]

Both the majority and minority judgments do not adequately answer the question of who should be responsible for the violation of labour rights in this tripartite relationship. It appears that section 198(4A) of the LRA enables the employee to sue either the client or the TES, or even both. It can be argued that both the TES and the client are responsible for the violation of the

[161] *Assign services (Pty) Limited* supra note 147 para 86.
[162] Ibid para 92.
[163] Ibid para 92.
[164] Ibid para 94
[165] Ibid para 100.
[166] Ibid.
[167] Ibid para 101.
[168] Ibid para 102.

employee's labour rights. But on the approach of the majority, since the client is regarded the only employer for purposes of the LRA, it is therefore responsible for the violation of the labour rights that are provided for in the LRA.

The majority judgement recognises that the TES may continue to remunerate the employees if the commercial contract between the TES and the client is still valid. This is proof that the relationship between TES and the placed employee does not fall away immediately when section 198A (3)(b) is triggered but when the client and the TES decides whether to continue with the TES service. On the same breath, the majority judgement states that the TES's liability in terms of section 198 (4A) falls away when the TES stops its responsibility to remunerate the employees.[169] This again proves that the intention of the deeming provision was to extend protection to the employees by ensuring that clients are not kept free from their liabilities since they are also part of the tripartite relationship. This deeming provision did not intend to remove TES as the employer of the TES until if agreed amongst the parties, the contracts entered by the parties are terminated.

It is submitted, with respect, that Dlodlo AJ's approach is incorrect. The intention of the deeming provision is to make the client the employer for the purposes of the LRA and for no other purpose. Further that the deeming provision does not invalidate the contract of employment between TES and the employee.[170] The reason the client is the employer for purposes of the Act and does not form part of the contractual rights between the TES and the employee is that there is no transfer of the employment contract. Therefore, the TES remains a separate employer in its own capacity with its own rights and duties. The approach of the LC is correct because the relationship between TES and employee cannot be terminated without any substantive reason and a fair procedure.[171]

It is submitted that the vulnerability and the inherent inequality between the employer and the employee is not merely created by having two employers but by the contents of the contracts that the parties enter that fail to protect employees. In similar or most contractual cases uncertainties or violations of employees' rights occur where there are overlapping duties and obligations which amounts to lack of accountability. Further, if the legislature intended to end

[169] Ibid para 65.
[170] Ibid para 11
[171] Ibid para 13.

the relationship between the employee and the TES it would have explicitly done so and would have not referred to the TES in section 198(4A). It is submitted that the dual employment interpretation provides more protection for the placed employees. Further that section 198A (3) (*b)* does not remove the TES as the employer but it merely adds the client to be the employer together with the TES.

Furthermore, it is submitted that Cachalia AJ's approach is sound and convincing. However, there are still potential practical problems with the dual employment approach that must be addressed by either legislation or contracts of employment. One of the challenges is that the employee would be subjected to two different disciplinary codes in terms of misconduct and poor performance. The question of who must reinstate the employee should the dismissal be deemed unfair also needs to be addressed. All employees have the right to join a trade union. It is not clear regarding relation to the TES and the client as to which trade union employees would join.

VI CONCLUSION

This research report discussed the legal position regarding the regulation of labour brokers in South Africa. It demonstrated that the necessary amendments were made to the LRA which were aimed at providing some form of protection to vulnerable employees who find themselves being confronted with potentially two employers. It was demonstrated that this amendment is not entirely clear regarding to the type of employment relationship the three parties are going to have after the lapse of three months therefore creating room for the vulnerability of the temporary employees. Herein, the approach of various courts in relation to the sole or dual kind of employment was discussed. It was shown that the Constitutional Court has opted for the sole employment relationship, contrary to a clear and correct position expressed by the Labour Court.

It is recommended that section 198A (3) (*b*) of the LRA makes the client the employer for purposes of the Act only because the client does not form part of the contractual rights and obligations between TES and the employee. Therefore, the deeming provision does not invalidate the contract of employment between the TES and the employee it also does not transfer the employment contract nor does it terminates it. The TES remains a separate employer in its own capacity with its own rights and duties. For a valid termination of contract between the TES and the employee there needs to be a substantive reason and a fair procedure.

The TES must observe the statutory requirements before terminating the contract it has with the employee.

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