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2025

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Nqubelani, Zintle. (2025). Misuse of the ‘Deeming Provision’ of Section 198A(3)(B) of the Labour Relations Act 66 of 1995 in the Triangular Employment Relationship [Master’s dissertation, University of the Witwatersrand, Johannesburg]. WIReDSpace. https://hdl.handle.net/10539/50137

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MISUSE OF THE 'DEEMING PROVISION' OF SECTION 198A(3)(B) OF THE LABOUR RELATIONS ACT 66 OF 1995 IN THE TRIANGULAR EMPLOYMENT RELATIONSHIP

By

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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

Date: 28/02/2025

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DECLARATION

I, **2777736**, 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.

I have submitted my final Research Report through Turnitin and have attached the report to my submission.

ABSTRACT

Previously, numerous companies were considered to exploit Temporary Employment Services (TES) employees. To tackle this issue, in 2014, the South African Minister of Labour suggested changes to the Labour Relations Act (LRA) to manage the novel trends. The proposed revisions led to section 198A being included in the LRA, which primarily focuses on the 'temporary service.' The Labour Relation Act Amendment (LRAA) acknowledged temporary service as an employment agreement for three months or less. This inclusion was designed to protect TES employees from exploitation and illuminate section 198(A)(3)(*b*) (commonly known as the 'deeming provision'), which differentiates if there is a tripartite employment or sole employer agreement. One of the historical cases that managed the deeming provision is *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) 39 ILJ 1911 (CC). The current research report adopted a doctrinal legal research methodology to investigate various approaches in which the deeming provision has been understood and applied by the clients, the TESs, and the TES employees. Furthermore, the research explored the applicability of the provision by the independent contractors and provided a distinction between its application and that of the TES employees. The typical sector with considerable labour cases enlightening the misuse of the deeming provision is the Fast-Moving Consumer Goods (FMCG). This research revealed that the deeming provision has made progress in shielding irregular employees from ill-treatment. However, unresolved issues remain, specifically among TES employees and independent contractors, as they are of the view that the requirement binds them to permanent employment by the clients. As a result of this expectation, the business often experiences labour unrest. The study also highlighted the misuse and abuse of the deeming provision by both the client(s) and the TES in different ways, such as, among others, through contract manipulation, reassigning employees to multiple clients, or rehiring them under new contracts to circumvent the three-month limit. Hence, the following recommendations were put forward to strengthen the application of the deeming provision: (a) amending section 198A to broaden its applicability and ensure that protections are extended to all workers, regardless of classification, and (b) enforcing the principles of fairness, transparency and equality in the workplace to reduce exploitation. These measures will also promote a more stable and equitable labour market, supporting the long-term sustainability of employment relationships.

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CHAPTER 1

I. INTRODUCTION

a) Overview

Prior to the amendment in the labour law, the TES employee and their treatment by the client(s) or potential employer(s) have been considered exploitative and unfair.[1] This issue arose because the law did not adequately protect these TES employees.[2] The oversight was amended by introducing the deeming provision in the Labour Relations Act 66 of 1995 (LRA). The LRA is the principal law controlling and administering challenges in South Africa related to work relations. Section 198(1) of the LRA defines a TES as 'any institution which procures or provides a client with an employee to perform agreed duties for that client, but the employee is remunerated directly by the TES, not the client.'

Additionally, section 198A requires a current contractual agreement between Tes (the service provider) and the client.[3] In addition, section 198A(3)(*b*) of the LRA also specifies that any worker earning lower than the stipulated amount as indicated in section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and is hired through a TES for more than three months should be considered a permanent employee.[4] The section emphasises that TES workers hired by the client after the first quarter should not be treated less favourably than permanent employees conducting the same work.[5] Hence, it is the legislature's responsibility to attempt to reduce the mistreatment of TES employees.

The deeming provision has been a controversial topic, specifically in its relevance to independent contractors and interpretation and application to TES employees. For example, if the TES employee has been contracted for over three months, the contract moves from sole to dual employment. Then, both the client and TES are responsible for employment-related matters involving the TES employees. However, the TES employee is regulated and guided by the client's employment policies concerning labour practices. Hence, in dismissals, the client ought to inherit the responsibilities and obligations of the TES employees as they are no longer carrying out their assigned work.[6]

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[1] Joshua Malambule Nkosi *How Have Temporary Employment Services (TES) in South Africa Responded to the Labour Relations Amendment Act's Regulation of Labour Brokers? A Study of the Assign Case* (unpublished LLM dissertation, University of the Witwatersrand, 2019) at 10.
[2] *Proctor and Gamble Manufacturing SA (Pty) Ltd and another v Mokadi and others* [2018] JOL 42299 (LC).
[3] *Proctor* (supra note 2) para 17.
[4] Basic Conditions of Employment Act 75 of 1997.
[5] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* 2018 (5) SA 323 (CC) para 39.
[6] *Mphirime/Value Logistics Ltd/BDM Staffing (Pty) Ltd* [2015] 8 BALR 788 (NBCRFLI) para 40.

b) Background to the study

Section 198A(3)(*b*) of the LRA defines Temporary Employment Services (TES) as '[a]ny person who, for reward, procures for or provides to a client other persons: who render services to, or perform work for, the client; and who are remunerated by the temporary employment service.' The description established a three-party work correlation unassociated with binary employment. In a triangular employment framework, there is a client, which can be an institution that needs a service, TES,' which are labour brokers and TES employees who render services to the client. Binary employment only involves the client and the employee. There is a rise in unconventional employment methods, such as the TES. However, this approach has also resulted in a 'disguised form of employment.' Disguised employment occurs when a party or parties present(s) a relationship with the intent to disguise the association to evade legal obligations, especially to suit their needs, with due consideration and respect for the law.[7] For example, companies have previously ruled that TES workers are independent contractors rather than employees. [8]

The current case study is the Fast-Moving Consumer Goods (FMCG) sector. In addition, the sector is an ideal case study for the following reasons: (a) the FMCG sector relies heavily on TES to maintain a flexible workforce, especially in manufacturing, packaging, distribution, and retail roles. This widespread reliance creates fertile ground for examining how Section 198A(3)(*b*) is applied or misused in practice[9] and (b) the FMCG sector often requires short-term or fluctuating labour due to seasonal demand, market competition, and supply chain complexities. These conditions create a higher probability of triangular employment arrangements where labour brokers and TES dominate. It also makes this sector a prime setting to analyse the complexities and challenges of deeming provisions in regulating employment relationships.[10]

Lastly, from a legal, scientific perspective, the sector provides an opportunity to examine the interaction between law and legal practice. The current study also offers a lens to assess whether the deeming provision achieves its legislative intent and implementation. The FMCG sector's specific issues allow for a focused analysis of contentious legal concepts, such

[7] Employment Relationship Recommendation, 2006 (No. 198).
[8] Elly Evelyn Tsholofelo Mofokeng *An Analysis of the Deeming Provision Relating to Temporary Employment Services in South Africa* (unpublished LLM dissertation, University of Pretoria, 2020) at 12.
[9] See R Stewart & N Niero 'Circular economy in Corporate sustainability strategies: A review of corporate sustainability reports in the fast-moving consumer goods sector' (2018) 7 *Business Strategy and the Environment* 1005-1022.
[10] Sreeja Rukmini 'Revolutionising HR and talent acquisition in the FMCG Industry with digital transformation and AI' available at https://turbohire.co/resources/blog/revolutionising-hr-and-talent-acquisition-in-the-fmcg-industry-with-digital-transformation-and-ai/, accessed on 27 June 2024.

as determining the 'sole employer' and the extent of rights conferred on employees under Section 198A(3)(*b*).

c) Research problem

TES employees have often faced unfair and unequal employment terms, lower wages, and fewer benefits. As a dominant at-risk population in the job market, these employees have battled with determining their workers as a result of the inhuman practices in the triangular work relationship. As a result, the LRA came into effect in January 2015 after its revision in 2014.

In the LRA (as amended), sections 198 and 198A aim to prevent manipulation, like the experience of the TES employees. Section 198A(3)(*b*) of the LRA introduces the 'deeming provisions,' which posits that underpaid employees, as examined in section 6(3) of the BCEA, as of 1 April 2024, the salary minimum prescribed by section 6(3) is R 254 371,67[11] and who have been recruited to a client for more than a quarter are deemed as permanent workers of the client. Nevertheless, several cases have illuminated the misuse and confusion of this section.[12] Therefore, interpreting and applying the deeming provision is the focal point of this study, with particular emphasis on the operational sectors. The study also considered the misuse of TES workers through contract manipulation to avoid three-month compliance, including various other ways.

d) Aims and objectives

TES workers have experienced unequal and unfair working terms and conditions, as well as minimum wages and limited benefits.[13] This is the most at-risk population in the job market. These workers have struggled with their organisations due to the manipulation tactics intrinsic to the tripartite work arrangement.[14] Although sections 198 and 198A of the LRA aim to prevent the exploitation of the TES employees,[15] there is still a misinterpretation and application of these sections. Therefore, the current study aims to examine how section 198A(3)(*b*) of the LRA has been interpreted and applied in relation to the treatment of TES employees. It also investigates factors that have sparked debate on whether the client becomes the only employer at the end of the three-month term and the labour broker no longer serves as the employer. Additionally, this research explored the issue of 'disguised forms of

[11] Section 6(3) of the BCEA of 1997 in GN 705 GG 50254 of 5 March 2024.
[12] *Assign Services* supra note 6 para 11; *Proctor* supra note 4.
[13] Bonginkosi Jabulani Gumede *A Critical Examination of the Interpretation and Application of the Law Relating to Temporary Employment Services in South Africa* (Unpublished LLM dissertation, University of KwaZulu-Natal, 2018) at 13.
[14] Ibid at 4.
[15] Section 198 of the LRA.

employment' through independent contractors and the contract manipulation of TES employees. To address these challenges, the study critically analysed certain landmark cases concerning this topic.

e) Literature reviews

Prior to 2014, the concept of deeming provision in the LRA and its application was not part of the literature. However, using TES in operational sectors dates back to the early 1950s.[16] It was in the early 2000s that various worker representatives declared such practice illegal and exploitative of the TES, leading to the proposal to disband the practice.[17] However, using TES was still considered beneficial to the country's labour market as it provides respite for the unemployment crisis and allows for some changes in the labour market that benefit the country by alleviating poverty. Hence, the LRA was amended to include Section 198, which aims to protect the TES employees. This section presents selected literature and case laws that illustrate the interpretation(s) of Section 198.[18]

The case of *Refilwe Esau Mphirime v Value Logistics Ltd and BDM Staffing (Pty) Ltd* focused on interpreting section 198A of the LRA. Mphirime, employed by BDM Staffing (TES), was assigned to work at Value Logistics. However, he claimed unfair dismissal after the termination of his work contract. The case explored the legal responsibilities between TES and clients, concluding that when an employee ceases to perform temporary services, the client becomes the employer under the LRA.[19]

In 2018, the case between *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA) and Others* concerned whether a dual employment relationship exists after the three-month lapse between the employee, TES, and the client, or whether the employee solely becomes the client's employee. Both the Constitutional Court and Labour Appeal Court (LAC) ruled that the client becomes the sole employer of the TES employee. However, the ruling rejected the notion of dual employment and emphasised that the TES employee should be treated equally as the client's employees.

The case between *Metal and Engineering Industries Bargaining Council v Metrofile (Pty) Ltd* focused on reflectively applying the deeming provision under section 198A(3)(*b*). The court ordered that the client become the only employee employed by the TES employee

[16] Shezi Nqubeko *Does Section 198A(3) of the Labour Relations Act Create a Sole or Dual Employment Relationship After the Period of Three Months?* (unpublished LLM dissertation, University of the Witwatersrand, 2022) at 10.
[17] Ibid.
[18] GN 629 of 37921 of 18 August 2014.
[19] Ibid.

after 90 days and oversee compliance with labour contracts, including those pertaining to wage disputes.

The case of *Mandla v LAD Brokers (Pty) Ltd* is another significant South African labour law case, particularly dealing with the interpretation of section 198A(3)(*b*) of the LRA regarding TES and the relationship between labour brokers and client employers. The LAC ruled in favour of Mandla, confirming that after three months of employment through the TES, the client (where Mandla was placed) became the sole employer for all purposes under the LRA.[20] The TES would no longer be considered a joint employer. This interpretation aligned with the Constitutional Court's decision in *Assign Services v NUMSA*, which had already clarified that the client becomes the sole employer once the deeming provision in Section 198A(3)(*b*) is triggered.

In the case of *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd* referred a complaint to the Commission for Conciliation, Mediation and Arbitration (CCMA) to seek an understanding of the meaning of 'deemed' and the employment framework (sole versus dual employment). Assign services argued that the meaning of the word 'deemed' must be sought from its context following the established principles and rules legal professionals and courts use to interpret and construe the meaning of Constitutional provisions, statutes, or legal documents.[21] The court ruled that 'deemed' means that, for the purposes of the LRA, the client is considered the sole employer of the TES employee.

Van Staden and Van Eck explored the importance of legal interpretation in identifying the parties involved in the employment relationship and the approach(es) of the judiciary in defining 'deemed.'[22] They highlighted that the interpretation should advance the Constitutional values and illuminate the comparative, historical, contextual, textual, and teleological elements for which the provision was intended.

f) Research questions

Most literature pertaining to case laws focuses on interpreting section 198A(3)(*b*) without carefully examining whether section 198A(1) is adequate for analysing the deeming provision, specifically section 198A(1). Based on the available literature, the following research questions are put forward:

[20] Mofokeng op cit note 10 at 4.
[21] *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another* (2015) 36 ILJ 2408 (CCMA) para 22.
[22] See Marius van Staden & Stefan van Eck 'Deemed' to be an employee: Adopting the teleological interpretation of statutes' (2018) 30.3 *SA Mercantile Law Journal* 416-433.

i. What challenges are associated with the legal interpretation and application of Section 198A(3)(*b*) of the LRA amongst TES employees?

ii. Do the 2014 amendments in section 198 of the LRA adequately protect vulnerable TES employees?

iii. Has section 198A(3), 'deeming provision,' triggered disguised forms of employment?

iv. How has the deeming provision affected the business operations and the TES employees, particularly within the FMCG Sector?

g) Research methodology

Legal research requires systematically analysing laws, judgments, and legal principles. For this study, the doctrinal research methodology has been adopted due to its suitability for examining legal texts and principles,[23] particularly in understanding and critiquing the misuse of the deeming provision under section 198A(3)(*b*) of the LRA. This approach allows for an in-depth analysis of the triangular employment relationship, which is central to the research problem.

Although there has been an ongoing assessment of the applicability of the doctrinal approach in academic research, it remains the preferred approach for legal research.[24] In addition, doctrinal research, also known as 'black letter law' research, is the traditional methodology in legal studies. It analyses authoritative legal sources, including statutes, judicial decisions, and scholarly commentary. Unlike empirical methods, doctrinal research does not rely on social data or statistical tools but provides a theoretical framework for understanding legal rules and principles.[25] This methodology is specifically relevant to this research because it enables a detailed examination of how courts have interpreted and applied the deeming provision. It facilitates the identification of inconsistencies and ambiguities in the legal framework governing triangular employment relationships. It also supports a critique of the legislative and judicial treatment of the deeming provision.[26] The study involved a library-based analysis of primary and secondary legal materials, including primary sources such as case law, statutes, and regulations related to section 198A(3)(B) of the LRA. Secondary sources

[23] Terry Hutchinson & Nigel Duncan 'Defining and describing what we do: doctrinal legal research' (2012) 17.1 *Deakin law review* 83 at 115.
[24] See P I Bhat 'Doctrinal legal research as a means of synthesizing facts, thoughts, and legal principles' (2020) *Idea and Methods of Legal Research* 88-91.
[25] Terry Hutchinson & Nigel Duncan 'Defining and describing what we do: doctrinal legal research' (2012) 17.1 *Deakin law review* 83 at 94.
[26] Ibid.

articles, academic theses, journals, and commentaries focusing on triangular employment relationships and labour law were reviewed.

Lastly, a comparative analysis of the research also considers case laws and statutory frameworks from other jurisdictions where similar deeming provisions exist to draw parallels and highlight distinctive issues in South Africa. The methodology is interpretative and analytical, focusing on understanding how courts have historically approached the deeming provision and its implications for labour relations.

This study acknowledges certain limitations as stated above; doctrinal research focuses on the analysis of authoritative legal texts, including statutes, case law regulations, and scholarly writings.[27] The delimitation is that it does not consider the impact of practices and legal rules on society and individuals. Hence, the approach lacks support from social facts and a practical understanding of the social problems.[28] The research methodology does not incorporate an empirical approach to assess the practical impact of the deeming provision on individuals and society.[29] It can also be subjective, based on the researcher's impressions of the topic matter; another individual may reach a completely different conclusion to the same issue.

In terms of social context limitations, the study primarily focuses on legal texts and interpretations, overlooking broader social implications, such as the lived experiences of TES employees and the societal transformation aspects related to the deeming provision. Therefore, considering that the deeming provision has social aspects, such as addressing the exploitation of TES employees and protecting vulnerable employees, there is a social transformation aspect concerning the deeming provision.

Delimitation may, thus, result from societal aspects that are overlooked. These delimitations reflect the inherent focus of doctrinal research on legal analysis rather than socio-legal impact.[30] However, this methodological choice is justified by the study's aim to critically evaluate legal principles and judicial interpretations. In conclusion, the doctrinal research methodology enabled a comprehensive understanding of the deeming provision under section 198A(3)(*b)* of the LRA. Despite its limitations, this methodology was essential for identifying legal ambiguities and inconsistencies, laying the foundation for potential legal reforms and improved judicial interpretation in the context of triangular employment relationships.

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[27] D Coetsee & P Buys 'A doctrinal research perspective of master's degree students in accounting' (2018) 32.1 *South African Journal of Higher Education* 71at 86.

[28] R A Ngwoke, I P Mbano & O Helynn 'A critical appraisal of doctrinal and non-doctrinal legal research methodologies in contemporary times' (2023) 3.1 *International Journal of Civil Law and Legal Research* 8 at 10

[29] Ibid.

[30] Ibid.

CHAPTER 2

II. THE SOUTH AFRICAN FAST-MOVING CONSUMER GOODS INDUSTRY

a) Overview

The TES supplies workers to a client firm for the completion of particular tasks or services, creating a triangular employment arrangement. This employment arrangement is particularly prevalent in sectors such as manufacturing and retail, where flexible labour solutions are often required to meet fluctuating operational demands. Hence, this study will focus specifically on FMCG. The FMCG sector focuses on perishable products with a short shelf life span and is generally offered at reduced prices.[31] These goods consist of various products, ranging from beverages, toiletries, food, home care and health products, and beauty products.[32] Sectors included in this category are mostly retail and manufacturing sectors.[33] The FMCG sector produces these items intending to distribute and market them to several industries.[34] Though product prices are low, FMCG is one of the profitable industries as it sells its products in large quantities, with fast turnaround at low production costs. Thus, FMCG is based on the low-margin and high-volume business model.[35] Moreover, the industry is agile and has various products, as attested by Unilever, a leading FMCG company globally. In South Africa, organisations and brands like Spar, Danone, Woolworths Pick 'n Pay, Kellogg's, Johnson & Johnson, SABMiller, Shoprite Checkers, OK Stores, Nestlé, Colgate-Palmolive, Procter & Gamble, British American Tobacco, Unilever, Kraft, and Danone the dominate the FMCG sector.

Due to the business requirements, the FMCG sector relies heavily on TES compared to the pharmaceutical sector, for example, which is considered similar in nature. However, recent labour cases have revealed that the TES employees in the FMCG sector experience unfair labour practices as most of them are unskilled. The workforce includes order pickers, forklift drivers, product packers, and other employees working in operations such as warehouses, manufacturing, and distribution centres.[36] In some cases, clients have TES employees who have

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[31] KPMG 'Fast moving consumer goods in Africa' available at https://assets.kpmg.com/content/dam/kpmg/za/pdf/Fast-moving-Consumer-Goods-in-Africa.pdf, accessed 03 June 2023.
[32] XWP van Wyk *An Assessment of Loyalty Towards Temporary Employment Services In The South African Metal And Engineering Industry* (unpublished LLM dissertation, North-West University, 2018) at 2.
[33] Ibid.
[34] C Dhanalakshmi & A Azees 'A study on FMCG (fast moving consumer goods) marketing activities' (2018) 4 *IJARIIE-ISSN(O)* 239 at 366.
[35] Ibid at 368.
[36] Brendan Lynford Dor *Precarious Workers and The Labour Process: A Multi-Sited Case Study Of Management Control And Worker Resistance* (Unpublished LLM dissertation, University of Johannesburg, 2018) at 65.

been employed within the FMCG sector for lengthy periods but are still denied permanent employment status. On the other hand, the South African FMCG sector faces a myriad of challenges, including power outages in manufacturing plants, lack of innovation, potential loss of key suppliers, planning and forecasting, labour issues, and other risks. Furthermore, the sector is plagued by competition for profitability, market share, and long-term survival.[37]

In the FMCG sector, the TES provides valuable services such as creating flexible employment options. They have become a key driver of economic growth through creating employment opportunities in South Africa. At the same time, flexible employment in the workplace presents change and disruptions, impacting how organisations operate.[38] For this reason, organisations that operate in uncertain, short-term, and rapidly evolving environments have found solutions to allocate their resources, enabling them to reduce their risk exposure by ensuring they have business continuity plans. This has been demonstrated to be effective in creating a competitive and sustainable environment for the company.

Furthermore, the TES adds value to client businesses by providing a support function that specialises in sourcing and supplying competent staff. This function is valuable because clients may not have the infrastructure or database required to access skilled staff on short notice. The value is further extended by the client's ability to delegate non-core functions to a service supplier, thereby sharing potential risks.[39]

Nonetheless, manufacturers in South Africa are struggling to compete against their international counterparts due to high wages locally, regulations, stringent labour policies, and labour unrest. In the past years, labour legislation changes have negatively affected the FMCG sector. For instance, employees boycott work and strike due to demands for increased salaries and wages.[40] Labour unrest significantly impacts South Africa's FMCG industry, aligning closely with the regulatory framework established by Section 198 of the LRA. This may be the case because manufacturers in South Africa depend highly on labour. Due to these

[37] K Hirsch, W Niemann & B Swart 'Artificial intelligence and information systems capabilities for supply chain resilience: A study in the South African fast-moving consumer goods industry' (2024) 18 *Journal of Transport and Supply Chain Management* 1 at 3.
[38] O Chakabva, RK Tengeh & J Dubihlela 'A holistic assessment of the risks encountered by fast moving consumer goods SMEs in South Africa.' (2020) 7.4 *Entrepreneurship and Sustainability Issues* 3321 of 3325.
[39] Ibid.
[40] Herbert Jauch 'The Southern Africa retail chain boasts massive profits, but its workers in Namibia are shortchanged,' https://africasacountry.com/2021/04/shoprites-attack-on-workers-rights, accessed on 21 November 2024.

circumstances, FMCG companies face rising wage bills and legal challenges related to compliance, limiting their ability to adapt quickly to market demands.[41]

CHAPTER 3

III. OVERVIEW OF TEMPORARY EMPLOYMENT SERVICES IN SOUTH AFRICA

a) Introduction

In the South African context, TES have been recognised in the LRA of 1956 and the LRA of 1995 before the 2014 amendments. Key clauses included in the 2014 LRA amendments—the deeming clause under section 198A(3)(*b*)—markedly changed the legal environment regulating TES. These amendments sought to address the inherent power imbalances in the triangular employment relationship by clarifying the roles of the TES and the client and ensuring greater protection for employees earning below the earnings threshold determined by the Minister of Employment and Labour.[42] TES has encountered great criticism, particularly from trade union organisations such as COSATU, which advocate for the ban on labour brokers. For example, in 1999, COSATU initiated a campaign to advocate for prohibiting TES.[43] They believed that the employment agencies benefitted by exploiting vulnerable employees by subjecting TES employees to low wages and poor working conditions, amongst other reasons.[44] Such movements played a crucial role in enforcing the 2015 Labour Relation Act Amendment (LRAA). Subsequently, these amendments brought positive changes in the labour law, particularly concerning section 198, which is the main focus of this research. In this section, the TES are viewed post-2014 after the insertion of the deeming provision. This was evaluated by reviewing the legislative framework and justifications for revision.

b) Enactment of the 2015 LRA amendments

A brief reflection on the previous LRA provisions will be provided before discussing the implementation of the 2015 LRAA. Prior to the most recent revisions, section 198 of the LRA struggled to govern the TES industry and could not safeguard workers in the triangular employment relationship. In most cases, TES employees were exploited and suffered abuse by both the TES and the clients, leaving them in a vulnerable position with no protection or

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[41] Shoaib Ahmed 2024 'The biggest challenges faced by the FMCG industry,' https://www.fieldproxy.com/blog/biggest-challenges-fmcg accessed on 27 November 2024.

[42] Sicelo Sidloyi *Legal Position of TES Employees* (Unpublished LLM dissertation, Nelson Mandela Metropolitan University, 2019) at 16.

[43] Sapa 'Labour brokers are parasites - Cosatu' available at *https://www.news24.com/fin24/labour-brokers-are-parasites-cosatu-20130620* accessed 05 June 2023.

[44] Mandlakhe Khawula *How do the 2015 LRA amendments impact on widespread practice in relation to TES employees?* (unpublished LLM dissertation, University of Kwazulu-Natal, 2019) at 3.

improved working conditions.[45] For example, the TES employees would be placed at clients, undertake their duties under their guidance, and be at the client's premises.[46] This confused TES employees as they struggled to tell who their employer was. Thus, a triangular employment relationship caused further issues for the TES employee, and clarity needed to be sought in terms of who the employer is.

Therefore, part of the amendments sought clarity by inserting section 198 A(3)(*b*) into the LRA. This section defines a TES as '[a]ny person who, for reward, procures for or provides to a client other persons: who render services to, or perform work for, the client; and who are remunerated by the temporary employment service.'[47] In contrast to binary employment, the definition sets the employment relationship as triangular. Furthermore, to curb exploitation, section 198A(3)(*b*) of the LRA introduced the 'deeming provisions,' which state that workers earning below the minimum threshold, as set in section 6(3) of the BCEA, are deemed to be employees of the client if they have been placed with the client for more than three months. As of 1 April 2024, the earnings threshold prescribed by section 6(3) is R 254 371,67.[48] This suggests that TES employees must be treated similarly to client employees. Additionally, the TES and the client are both liable for any of the TES workers' contractual agreements, labour law dispute processes, terms and conditions of employment, and/or breaches of the BCEA.[49] The following chapter will explore the function of the International Labour Organisation (ILO) since this one has shown the legislative foundation for the 2015 revisions. It will also discuss its impact and contribution in mitigating some of the challenges highlighted in terms of the misuse of TES employees within the triangular employment relationships.

c) Internation Labour Organisation (ILO) role in TES

The International Labour Organisation (ILO) came into existence a century ago, and since then, its mandate has been to establish and promote social justice and internationally recognised labour laws and standards.[50] This aligns with section 1 of the LRA, which posits that its main objective is to grow economic and social justice and bring democracy and labour to the workplace by implementing the Constitution and meeting South Africa's requirement as a

[45] Mofokeng op cit note 10 at 55.
[46] A Botes 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments' (2015) 132.1 *South African Law Journal* at 106.
[47] Section 198 of the LRA.
[48] Section 6(3) of the BCEA of 1997 in GN 705 GG 50254 of 5 March 2024.
[49] Mofokeng op cit note 10 at 13.
[50] ILO 'Mission and impact of the ILO' available at *https://www.ilo.org/about-ilo/mission-and-impact-ilo*, accessed on 18 December 2024.

member state of the ILO.[51]It will also supply instruments for employees and organisations to participate in collective bargaining to establish and discuss terms and conditions of employment, wages, and other work-related matters.[52] The 2015 LRAA provide measures to meet international standards; however, there are deficiencies in protecting TES employees, as argued above.[53] A relevant example is that the ILO Convention of 100 of 1951 demands equality of wages for all employees, regardless of gender, sex, or age, who perform the same work.[54] The ILO Convention 111 of 1958 also ordered its members to adopt solutions to employee discrimination. Therefore, it is important to comply with international law while clarifying labour laws or complying with the country's obligations as an ILO member. In addition, the ILO has substantially impacted labour legislation in its member nations, including South Africa. The Constitution of the country, the highest legislation in the Republic, operationalises international law by authorising courts to adopt a reasonable interpretation that is in accordance with international law.[55] Although the Constitution does not define the phrase 'international law,' courts have repeatedly found that ILO recommendations and conventions are international law.[56]

The LRA also enacts the Constitution and acknowledges the importance of international law.[57] One of the LRA's key aims is to guarantee that the Republic's obligations as an ILO member are fulfilled.[58] It also compels anybody to follow international laws.[59] As a result, ILO conventions are legally obligatory on all member nations that have ratified them. On the other hand, ILO recommendations serve as guidance for establishing and developing labour policy rather than being legally enforceable.[60] It is contended that member states should assess international instruments since they are valuable for advancing and executing work social policy and legislation.

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[51] Section 1 of the LRA.
[52] Ibid.
[53] Ibid.
[54] Thobeka Dube *A Critical Analysis Of The Equal Pay For Equal Work Or Work Of Equal Value' Provision As It Relates To The South African Labour Market* (Unpublished LLM dissertation, University of KwaZulu-Natal 2017) at 15.
[55] The Constitution of the Republic of South Africa, 1996.
[56] *Murray v Minister of Defence* (2006) 11 BCLR 1357 (C) para 1358 the court said s 39(1) of the Constitution obliges the courts to consider international law such as the ILO Conventions and Recommendations when interpreting any right to fair labour practice; *S v Makwanyane and another* 1995 (3) SA 391 para 35.
[57] Section 1 of the LRA.
[58] Section 1 of the LRA (b).
[59] Section 3 of the LRA.
[60] ILO 'Workers' guide to ILO Conventions concerning minimum standards of social security' available at *https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_855073.pdf*, accessed on 11 December 2024.

In summary, the ILO offers a set of guidelines and standards designed to guarantee fair labour for all employees, including those in triangular employment arrangements like TES contracts. I would like to draw attention to the following conventions:

- The Private Employment Agencies Convention (ILO Convention No. 181, 1997) bolsters the regulation of independent employment agencies to pledge that they support workers' rights and prevent misuse.
- Employee rights to plan and participate in collective bargaining, including in risky employment conditions, is protected by ILO Conventions No. 87 (Freedom of Association) and No. 98 (Right to Organise and Collective Bargaining).
- The ILO Declaration on Fundamental Principles and Rights at Work highlights the need to protect employees from perilous working conditions, forced labour, and discrimination.

Consequently, the ILO performs a vital function.[61]

d) Conclusion

The above-mentioned LRAA has shifted the needle of endeavouring to protect TES employees against exploitation. The ILO standards have notably impacted the advancement or improvement of labour policy in its member countries, including South Africa. This is illustrated in the 2014 LRAA, which supports the right to negotiations and equitable treatment by requiring workers to be treated fairly to those appointed by the client. However, considering that the emergence and growth of an informal economy, including the usage of TES, is on the rise, a significant number of workers globally might be operating outside the ambit of formal labour regulation, which needs to be relooked.

The Employment Relationship Recommendation Convention stressed the significance of enforcing measures to avert the manipulation of at-risk employees by ensuring the fulfilment of actual employment contracts that do not 'disguise' the true situation of the employment relationship.[62] Numerous instruments have been advocated to achieve this, namely, the 'Decent Work Agenda' and the 'Declaration on Fundamental Principles and Rights at Work, 1998.' Ultimately, this is only possible if states follow appropriate labour legislation. Additionally, the deeming provision in section 198A(3)(*b*) was intended to clarify employment obligations, but it also posed interpretation issues that have become a focus point in South African labour jurisprudence. This will be discussed in detail in the next chapter.

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61 Private Employment Agencies Convention No.181 of 1997.

62 Rosita Joanne Otten *Are All Things Equal? Operational Considerations In The Integration Of Deemed Employees Into Workplaces* (unpublished LLM dissertation, University of the Witwatersrand, 2022) at 11.

CHAPTER 4

IV. THE DEEMING PROVISION OF SECTION 198A(3)(B) OF LRA 66 OF 1995: INTERPRETATION AND APPLICATION

a) Introduction

In the previous chapter, the researcher presented the LRAA with a focus on section 198 A revision, which includes the protection of TES employees. Although the amendments were enacted in 2015, some loopholes still prevent the interpretation and application of section 198A(3)(*b*). This chapter aimed to explore the statutory interpretation principles and application, as well as the provisions of the LRA and other employment legislation that actualise it. In addition, a few case laws will also be examined to provide clarification on how section 198 A(3)(*b*) should be interpreted and applied. The regulation of triangular employment relationships in South Africa has been greatly influenced by the interpretation and implementation of section 198A(3)(b) of the LRA. The deeming clause was put in place to safeguard vulnerable workers and encourage decent labour, but its interpretation and application have shown both advantages and disadvantages. Although courts have offered clarification on its purpose and goal, there are still some unclear areas, especially concerning dual employer responsibility and how it affects labour market flexibility.

b) Interpretation & application of Section 198A(3)(b)

It is necessary to briefly review how statute interpretation functions in South Africa to comprehend how these provisions should be interpreted. Statutory interpretation focuses on the principles and rules for constructing and justifying the meaning of legislative provisions to be applied in practical situations.[63] The two approaches that will be discussed are the literal approach, which recognises the significance of language in legislative texts; thus, the interpreter is required to focus on the literal meaning of the provision to be interpreted.[64] The purposive approach infers that the purpose or objective of the legislation is the prevailing factor in interpretation.[65] According to this approach, the courts must consider external factors, such as social and political factors, to establish the purpose of legislation.[66] Section 198A (3)(*b*) was adopted years ago; however, there are arguments over the section's interpretation and

[63] Gilbert Hwani *Interpreting the 2015 amendments to the Labour Relations Act 66 of 1995 in light of the underlying purpose of South Africa's labour laws* (Unpublished LLM dissertation, University of Cape Town, 2015) at 59.

[64] Sweta Bhattacharjee 'Critical analysis: literal rule of interpretation' (2020) (1) *Jus Corpus LJ* 285 at 287.

[65] Usman Ibrahim & Zainab Akinde 'Purposive Approach to Statutory Interpretation: Comparative Analysis and Impact on Nigerian Legislative Drafting' (2024) (11.1) *Journal of Commercial and Property Law* at 60.

[66] Ibid.

application, as well as its limitations and strengths. Having read the explanatory memorandum of the 2014 LRAA, it is evident that Section 198 of the LRA has been revised to effectively address particular problems and abusive practices linked to TES and the clients.[67] The amendments further regulate the employment of persons by a TES in a way that seeks to balance critical Constitutional rights. The revisions strive to restrict the hiring of more at-risk, poorly paid workers by a TES to genuine and relevant 'temporary work' situations and to introduce additional guidelines to protect workers employed in this manner.

Furthermore, the case aimed to rectify the misapprehension and identify when a TES worker changes from being a TES worker to being considered a permanent occupier of the client is *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*.[68] At the CCMA, Assign Services argued that the interpretation of Section 198A(3)(*b)* would be a dual employment arrangement, including the TES and the client. However, the Commissioner understood the provision differently, suggesting that there is only one employee; this was in reference to the client. The Assign Service sought to have the CCMA arbitration award evaluated and rescinded by the Labour Court's (LC) ruling. Accordingly, the LC ruled that a dual work relationship exists.[69]

In addition, NUMSA disputed the LC's ruling on dual employment relationships, supporting the Commissioner's conclusion that 'as soon as section 198A(3)(*b*) is effective, the client should be considered the only employer of the TES employee.' The court recognised the need for a purposeful approach to reading law, considering the provision's plain wording, context, and relationship to other sections of the Act.[70] This ensures that the LRA's primary goals, as outlined in section 23 of the Republic of South Africa's Constitution, ensures the right to acceptable and fair labour standards. The LAC concluded that the LC misinterpreted section 198A(3)(*b*) and ruled that the Commissioner's award was not subject to review. As a result, the Commissioner's decision was upheld.

Recent interpretation of the provision has illuminated legal loopholes that expose temporary employment to exploitation. For example, the introduction of disguised forms of employment, where clients deliberately label positions as temporary although the nature of the work is permanent, keeps employees under the TES for extended periods to reduce liability or

[67] Memorandum of Objects Labour Relations Amendment Bill, 2012.
[68] *Assign services Pty Ltd* supra note 6 para 11.
[69] Ibid.
[70] Ibid.

avoid the costs of employing workers directly.[71] To avoid having employees deemed permanent after three months, clients rotate the TES employees through different positions with new contracts or bring in new TES employees after three months to evade the deeming provision. This often involves TES and clients manipulating employment contracts, making it appear as if workers are not continuously employed at the same site or by the same client, thereby evading the deeming provision. Such misuse of the provision led to most of the TES employees being denied permanent status for the purposes of the LRA.

Employees affected by this misuse may bring disputes to the CCMA or the LC, seeking enforcement of their rights under the deeming provision. The misinterpretation and application of the deeming provision in the tripartite employment relationship undermines the purpose of labour protections, leads to unfair labour practices, and leaves employees vulnerable to unfair treatment and exploitation.

c) Case analysis

The debate concerns the correct interpretation of section 198A(3)(*b*) of the LRA. The researcher will review certain cases to clarify whether, after 90 days have elapsed, the client becomes the sole employer or both TES and the client are dual employers.

In the case of *Assign Services Proprietary (Pty) Ltd v Krost Shelving & Racking Proprietary (Pty) Ltd & Another,* the CCMA took an opportunity to pronounce a proper interpretation of the deeming provision.

The Commissioner affirmed that dual employment relationship interpretation would lead to many uncertainties concerning the obligations vested in the actual worker. Accordingly, it was highlighted that section 198A(3)(*b*) makes Krost Shelving & Racking (client) the sole employer of the workers who have been working for the company for a period exceeding 90 days and who have been earning the minimum wage.[72] In addition, it has been argued that a 'parallel/dual' employer interpretation is inconsistent with the plain language of the provision of section 198A(3)(*b*) as the text suggests that it is the sole employer interpretation that gives effect to the purpose of the amendments and rights enshrined in the Constitution.[73]

Evidently, the award mentioned above indicates that the 'deeming provision' must be interpreted to mean that after a quarter, the client will be the sole employer of the worker in

[71] Jason van der Merwe 'The ABC's of TES: understanding the deeming provision' available at *https://ceosa.org.za/the-abcs-of-tes-understanding-the-deeming-provision,* accessed on 20 June 2024.

[72] *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another* (2015) 36 ILJ 2408 (CCMA)

[73] Ibid.

question. This interpretation attempts to dispel the confusion about the worker's identity at any given time.

Furthermore, in the case of *Refilwe Esau Mphirime v Value Logistics Ltd/BDM Staffing (Pty) Ltd, the National Bargaining Council for the Road Freight and Logistics Industry* (NBCRFLI) faced questions about interpreting section 198A(3)(*b*) of the LRA. The NBCRFLI decided in favour of a sole employment affiliation, concluding that if a worker renders services that fall outside the scope of work to a client of a TES and earns a salary, that worker will be deemed the employee of the client.[74] In other terms, the employment relationship between the TES and the worker would cease to exist. In this view, it was stated that the legislator awarded the duties and obligations in terms of the LRA to the TES only while the worker provided a temporary service, as defined in section 198A (1). The client is regarded as the employer and responsibility-bearer for the purposes of the LRA once the employee ceases to provide impermanent services. Furthermore, the Commissioner declared, 'In the light of the purpose of the amendments which is to address more effectively certain problems and abusive practices associated with a TES, the interpretation of the Act in this way effectively stops the abusive practices.' When considered objectively, the abusive practices are a direct result of the three-party employment agreement in which the client is exempted from all the responsibility in terms of the LRA.[75] Therefore, should the revisions be interpreted to mean joint and several liability for the purposes of the LRA, the abusive practices would not be addressed. Giving the client the duties and obligations of an employer under the LRA protects and enforces the worker's constitutional rights as well as their LRA rights.Furthermore, the Constitution's section 23 guarantees that all individuals are entitled to equitable labour practices.[76] This right applies to employment relationships and relationships affiliated with employment. Despite the intended protection offered by the deeming provision, this provision can be misused, particularly in a tripartite employment relationship, where employees are at their weakest and most vulnerable.[77]

d) Conclusion

Regarding the controversy over interpreting and applying this section, the CCMA Commissioner, in assigning services, opined that the client becomes the worker once the provision is effective.[78] However, the LC was of the view that the agreement between the

[74] *Refilwe Esau Mphirime and Value Logistics Ltd BDM Staffing (Pty) Ltd* (2015) (8) BALR 788
[75] Ibid.
[76] Section 23 of the Constitution.
[77] *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] JOL 25367 (LC) para 59.
[78] *Assign services Pty Ltd* supra note 6 para 11.

worker and labour broker continues after a quarter, thus empowering the worker to assert the rights pertaining to the employment contract against the client and TES.[79] However, the LAC invalidated the LC decision and supported the Commissioner's conclusion that the client becomes the actual employer as a result of Section 198(3)(*b*).[80] Advocates of the sole employer interpretation argue that it is the only one intended by the legislature, as it eliminates any uncertainty regarding the identity of the employer. Based on this view, the sole employer becomes the client once Section 198A(3)(*b*) of the 1995 LRA is in full effect. To fully realise the objectives of the LRA, ongoing legislative improvements are required to properly achieve the LRA's goals. In order to promote an equitable and sustainable work environment, the deeming clause should ultimately fairly balance worker protection with the business requirements of employers and labour brokers. Although the revisions were intended to strengthen safeguards, their actual application has revealed areas of abuse and contention, especially concerning the deeming clause. In the upcoming chapters, these topics will be covered in more detail.

[79] Ibid.
[80] Ibid.

CHAPTER 5

V. HAS 'DEEMING PROVISION' TRIGGERED DISGUISED FORMS OF EMPLOYMENT?

a) Introduction

As noted in the previous chapter, difficulties continue to arise in the interpretation and application of the statute, illuminating legal loopholes that persist in exposing temporary employment to exploitation, contributing to the disguised forms of employment. New employment patterns have emerged, particularly in the aftermath of COVID-19. These patterns include remote work, artificial intelligence-driven employment, independent contractors, and several innovative employment options.[81] However, it came to light that the labour and employment legislation does not adequately cover these new employment opportunities.[82] Disguised forms of employment refer to work arrangements where employees are classified as independent contractors, freelancers, or consultants, but their working conditions resemble those of regular employees. These arrangements often reduce labour costs and legal obligations, such as benefits, taxes, and job security requirements.[83] Workers are misclassified as contractors or third-party employees while performing core organisation tasks such as sales, merchandising, or distribution. For example, many FMCG companies hire merchandisers or in-store brand promoters through third-party agencies.[84] Although they work exclusively for a single brand and follow its directives, they are not directly employed by the company. Implications of such are that it reduces costs related to salaries, benefits, and compliance with labour laws. Employees also face job insecurity, lack of career progression, and limited legal protection.[85] Additionally, most employees are seeking stability, and a permanent position typically determines the level of stability, quality of life, and sense of belonging, while temporary employment can be precarious. The opposite of these employment types, which the LRA does not govern, is that they undermine efforts to ensure equitable labour practices and the safeguarding of workers' rights.

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[81] S D Harris, & A B Krueger 'A proposal for modernizing labour laws for twenty-first-century work: the independent worker' (2015) 10 *Washington, DC: Brookings* at 4.

[82] Elmarie Fourie 'Non-standard workers: the South African context, International law and regulation by the European Union' (2008) 11.4 *Potchefstroom Electronic Law Journal* 110 at 152.

[83] Afrika HR Solutions 'Independent Contractors vs Employees: What are the risks?' available at *https://africa-hr.com/blog/indepedent-contractors-vs-employees/*, accessed on the 17 September 2024.

[84] Ibid.

[85] Ibid.

b) Distinction: TES employee versus independent contractor

The difference between a TES employee and an independent consultant is significant when applying Section 198A(3)(*b*) of the LRA. A TES worker is a person contracted by a TES to provide services to a client at a fee. This agreement creates a three-party working relationship involving the TES, the client, and the worker, as argued in Chapter 3 of this paper. Conversely, an independent consultant works autonomously, provides particular services or produces results as outlined in a contractual agreement, and is not classified as an employee under the LRA. Traditionally, the LRA only protects those involved in the working relationship and excludes independent consultants.[86]

Section 198A(3)(*b*) specifically applies to TES employees earning below the threshold; however, independent contractors do not fall within the scope of section 198A(3)(*b*) since they are not classified as employees. The provision protects vulnerable workers within the triangular employment structure, a status independent contractors do not hold. Since this section is irrelevant to independent contractors and to escape labour legislation, some temporary employees service clients through independent contractors. These new working arrangements result in labour and employment legislation not sufficiently covering such employment forms.[87]

In the FMCG sector, independent contractors might be involved in roles such as independent distributors or sales agents contracted to sell or deliver products to retailers or end consumers in specific territories. They often use their resources (e.g., vehicles and storage facilities) to handle logistics and sales. Independent contractors could handle tasks like transportation, warehousing, or delivery of goods to retailers or distributors. Hiring independent contractors allows FMCG companies to maintain flexibility, manage costs, and scale operations efficiently without increasing their permanent workforce. In contrast, this autonomy is negative because employee benefits such as paid leave, health insurance, or retirement plans do not exist.

Additionally, TES employees are not directly employed by the FMCG company (client), but by the TES provider. For example, FMCG sectors often hire TES employees to handle fluctuating workloads, seasonal demand, or special projects without committing to long-term employment contracts. TES employees in FMCG sectors are commonly hired for warehousing and logistics (e.g., picking, packing, and dispatching goods), manufacturing and

[86] LRA supra note 3 s 213.

[87] Elmarie Fourie 'Non-standard workers: the South African context, International law and regulation by the European Union' (2008) 11.4 *Potchefstroom Electronic Law Journal* 112 at 152.

production (e.g., machine operators or line workers), merchandising, and sales support in retail spaces. TES employment in this sector is an effective way to ensure operational agility while efficiently managing staffing needs. Often, there is confusion between TES employees and those placed as independent contractors at a client through TES.

c) Case analysis

Two cases will be discussed concerning the above topic. The first case is that of *David Victor and 200 others* who were hired by a TES named C-Force to repair pallets for Chep. They undertook this job long before the 2015 LRAA in Section 198. They referred a dispute to the CCMA seeking a declaration deeming them Chep employees.[88]However, Chep and C-Force concluded a new service level agreement (SLA) in the expectancy of the revisions. It was akin to the current employee appointment agreement, although it now referred to C-Force as a 'service provider,' suggesting that it is an independent contractor instead of a TES. Even after this new agreement, C-Force employees continued repairing pallets at Chep, as per the past.[89] In this matter, the LAC agreed with the CCMA regarding the finding and overruled the LC judgement. It became apparent that Chep contractually manages the pallet repair work, which is done by Victor and his 200 colleagues. This is one of the aspects correlated with independent consultants; they are not managed by the organisation for which they provide services.[90] However, in this case, Chep gave C-Force instructions. Therefore, it inferred that they were Chep employees and not C-Force employees. In this context, the C-Force does not enjoy judgement concerning how the work will be performed. [91]In other words, the SLA did not carve a genuinely independent service provider relationship between C-Force and Chep. As a result, the applicants believe they are deemed employees due to the section 198 criterion. Additionally, this contributes to misleading work arrangements, which undermines the purpose of section 198A(3)(*b*) because one of its intentions is to avert the exploitation and abuse of atypical employees.

Furthermore, the *LAD Brokers (Pty) Ltd v Mandla* case illustrates challenges associated with the three-party employment relationship, specifically in identifying the actual employer. This case highlights and gives evidence that these challenges have persisted over time. The issue was whether the respondent (Mandla) had been working for the appellant (Lad Brokers) as proposed in Section 198 or whether he was an independent consultant for Weatherford.

[88] *David Victor & 200 Others v Chep South Africa (Pty) Ltd & Others (2020)* JA55/2019 (LAC) para 1.
[89] Ibid para 12.
[90] Fadia Arnold 'Are you an employee or an independent contractor*?'@ https://www.lexisnexis.co.za/lexis-digest/legal/are-you-an-employee-or-an-independent-contractor, accessed on 02 June 2023.*
[91] Ibid para 43.

Additionally, the appellant gave the respondent a contract called an 'independent contract agreement.'[92] However, based on facts, the LAC found that the relationship between Weatherford and the respondent was that of employer and employee in terms of the definition of employee contained in section 213, as Mandla throughout the supervision and control of Weatherford's senior personnel.[93]

The complexity of an ambiguous employment relation is that employees continue to be exposed to unfair labour practices. For example, in this case, the appellant never registered the respondent for unemployment insurance benefits or tax, nor did it afford the respondent any benefits applicable to the appellant's permanent employees.[94] In terms of the termination process, the appellant's termination by the respondents constituted unfair dismissal. The appellant completely failed to comply with the provisions of section 198, which prescribes the procedures for dismissals for operational reasons. This case reinforced the application of the 'deeming provision' in section 198 of the LRA, establishing clear accountability for TES' in triangular employment relationships. However, the reality is that even after the 2015 LRAA, we are still faced with this predicament.

d) Conclusion

The deeming provision has been a double-edged sword. While it provides significant protections for workers, its unintended consequences have prompted employers to seek loopholes, resulting in disguised forms of employment through independent contractors or various non-standard forms.

In *State Information Technology Agency (SITA) Pty Ltd v CCMA & Others*, the LAC establishes three basic factors to ascertain who the employer is in the TES tripartite affiliation:[95]

i. 'An employer's right to supervision and control;

ii. Whether the employee forms an integral part of an organisation with an employer; and

iii. The extent to which the employee is economically dependent upon the employer.'

The court must analyse the foregoing to assess the hidden employment relationship connection, determine the true employer and protect employees from being exploited by labour practices deemed unfair.[96] The government's primary objective in amending section 198 of the LRA is

[92] *LAD Brokers (Pty) Ltd v Mandla 2001* (9) BLLR 1137 (LAC) para 18.
[93] Ibid para 18.
[94] Ibid para 15.
[95] *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 607 (LAC) para 12.
[96] Ibid.

to address the mistreatment of employees earning below the threshold as defined in BCEA, who have been subjected to inhumane working conditions.[97]

[97] See S Harvey 'Labour brokers and workers' rights: can they co-exist in South Africa?' (2011) (128.1) *South African Law Journal* at 100-122.

CHAPTER 6

VI. CONCLUSION AND RECOMMENDATIONS

a) *Conclusion*

Concerning TES employees, clients and labour brokers in relation to section 198, there are several loopholes and challenges within the FMCG sector in South Africa. For instance, employers may circumvent labour laws intended to limit temporary work arrangements by continually renewing TES contracts or reassigning employees to different roles or entities. In certain circumstances, adherence to the legislation is bypassed through contract manipulation, employee rotation, or deliberate misclassification of employment status, which amounts to an unfair labour practice.

The study also showed that the amendment of section 198 was significant for the South African labour law, but it brought inherited challenges. The positive contribution of the amendment is that it addresses the exploitation and abusive practices, such as placing an employee on temporary service for extended periods without justification, which are no longer a norm compared to the past.[98] Employees earning below minimum wage are now protected and given the opportunity to be recognised as permanent employees with the same protections and rights under the LRA. This minimises exploitation, protects against unfair dismissal, and promotes fair labour practices. Therefore, TES employees can institute legal proceedings against the client directly.[99] Furthermore, TES employees are protected through treatment, payments, and benefits, as the client is legally obligated to treat them on terms no less favourable than those of permanent employees.[100]

The conversations and understanding of section 198(A)(3)(*b*), the 'deeming provision,' which helps differentiate between a sole employer relationship and a three-party working relationship, have made notable progress in protecting atypical employees from abuse and exploitation. TES workers now profit from protection under the BCEA and LRA. However, independent contractors are protected through the corrective provisions of contract law.

b) Recommendations

The following recommendations are proposed:

i. The deeming provision specifically applies to TES, as defined in section 198(1) and the provision under section 198(1) of the LRA, which solely applies to TES

[98] Ibid.
[99] Ibid.

employees and excludes independent contractors. This has created gaps in employee protection under diverse and emerging employment arrangements. The impact of these new employment patterns is that labour legislation does not effectively cover it.[101] Therefore, amending section 198A to broaden its applicability and ensure that protections are extended to all workers, regardless of classification, will help reduce exploitation and align with the equality and fairness principles in the workplace. These measures will also promote a more stable and equitable labour market, supporting the long-term sustainability of employment relationships. For example, where the client has multiple business units or subsidiaries, the rotation of an employee between such units should not interrupt the continuity of service to calculate the three-month period.

ii. Additionally, broadening the 'employee' definition to include independent consultants, freelance employees, and other non-traditional employment categories would ensure that individuals in unconventional employment arrangements are offered the same protection. It will also introduce standards for recognising masked working relationships to avert workers from misidentifying employees as independent consultants to avoid compliance.

iii. The ILO instruments should provide instructions to broaden the 'employment relationship' notion and protect independent workers. By addressing these issues, the FMCG sector can better align with sustainable business practices and fair labour standards. Moreover, to remain competitive in the global economy, South Africa needs updated labour laws aligned with current employment forms and support for labour-broking organisations so that they continue to influence the country's economy.

iv. The suggested recommendations aim to clarify the difference between TES' and independent contractors, as well as regulate emerging employment patterns. South Africa needs a revised legal structure consistent with current employment forms.

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2 Brendan Lynford Dor *Precarious Workers and The Labour Process: A Multi-Sited Case Study of Management Control and Worker Resistance* (Unpublished LLM dissertation, University of Johannesburg, 2018)
3 Elly Evelyn Tsholofelo Mofokeng *An Analysis of the Deeming Provision Relating to Temporary Employment Services in South Africa* (unpublished LLM dissertation, University of Pretoria, 2020)
4 Joshua Malambule Nkosi *How have Temporary Employment Services (TES) in South Africa Responded to the Labour Relations Amendment Act's Regulation of Labour Brokers? A study of assign case* (unpublished LLM dissertation, University of the Witwatersrand, 2019)

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