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"*Are all things equal? Operational considerations in the integration of deemed employees into workplaces*".

by

2401926

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Abstract

This research report is a policy-based study of the regulation of temporary employment services in South Africa. It is set against a contextual background of the development of Labour Brokers in South Africa as well as a contextual understanding of the regulation of temporary or atypical employees under International Labour Organisations Standards (ILO). The scope of this research is limited to only considerations of ILO Standards and does not consider a comparator of other countries. Future research could take it further in this regard to measure how Labour Brokers are offered labour law protections globally.

This research report considers the development of labour law in South Africa and how the changes in the South Africa's labour law policy have introduced mechanisms to afford and ensure greater protection of this vulnerable employee. The research reviews the recent legislative overhaul, in consideration of having the purpose to offering progressive protection to various atypical forms of employees and specifically a temporary employee who attains a deemed employment relationship status.

The research aims to assess the extent to which the amendments to the South African labour legislative framework has been able to achieve its desired aims, by first considering how the provisions relating to temporary employment services, should be interpreted and applied. Secondly reviewing various operational considerations that impact the full integration of the deemed employee into the workplace in order to ensure on the whole not less favourable treatment and finally in having reviewed such operational considerations, assess and critique the impact these amendments have achieving protection of this vulnerable class of employee.

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I. INTRODUCTION

Prior to the amendments to s198 of the Labour Relations Act[1]in 2015, the atypical or non-standard employment environment and specifically the utilisation of labour brokering was fraught with 'exploitive labour practices' such as payment of lower wages than permanent employees and no access to provident fund or medical aid benefits.[2]

A common trend in employment practices in South Africa is the sourcing and utilising of "casual" employees from time to time through a Labour Broker , also commonly understood to be a 'Temporary Employment Services' "TES".[3] In this paper the term Labour Broker or TES are interchangeable and have the same meaning. The nature of this arrangement creates a concept of parties in a triangular relationship. The employee and the labour broker, the employee and the client and the commercial arrangement between the client and the TES.[4] This commercial arrangement does not fall under the ambit of labour legislation or any labour tribunal such as the Commission for Conciliation, Mediation and Arbitration (CCMA)[5] or the Labour Court.[6]Due to the nature of the type of casual labour offered many workers were left exposed with little or no labour law protections.[7]

The Labour Brokering relationship created a platform where a client requests on adhoc, temporary employees to render a service for which they pay the Labour Broker an hourly wage for the service rendered. This situation, confirmed by the Department of Labour's 1996 Green Paper on Employment Standards, noted the rise of non-standard employment relationships which also revealed a 'lack of labour law protections'.[8] Even though the TES employee under the instruction and supervision of the client, the TES still administered the 'employment relationship'.[9] A situation emanated where workers were subjected to unequal treatment of

[1] No. 6 of 2014: Labour Relations Amendment Act.
[2] Zwelinzima Vavi '13 reasons why labour brokers must be banned – Vavi' available at *https://www.politicsweb.co.za* accessed on 4 January 2022.
[3] Deloitte Article ' Labour broking and outsourcing' available at https://www2.deloitte.com/ accessed on 9 April 2022 at 3.
[4] Decent work and non-standard employees: Options for legislative reform in South Africa – A discussion document *http://us- cdn.creamermedia.co.z*a accessed on 4 January 2022 at 3.
[5] CCMA Strategic Plan 2015–2016 -*https://www.ccma.org.za/* assessed 15 April 2022 at 5.
[6] n 4 at 3.
[7] Ibid 4 at 1.
[8] n 4 at 1.
[9] Ibid4 at 3.

payment of lower wages than the client's permanent employees, oppressed from exercising employment rights and often replaced at the arbitrary discretion of the client.[10]

Investigation into this precarious relationship revealed many employers used this brokering arrangement, as a tool to 'deprive vulnerable employees of labour law protections' amongst other types of strategies such as the outsourcing of specific services and continued utilisation of fix term contracts.[11] Research concluded that many workers suffered lack of protection of 'basic labour law', in an ever increasing labour market environment utilising TES employees. As a result with no or little protection, labour legislation change is necessary as the traditional nature of permanent employees in the workplace has evolved into hybrid forms of informal employment relationships.[12]

Due to the regulatory challenges faced in this sector, during the period of 2010 – 2014, trade unions along with business and government started engaging to address what changes required to current labour legislation, to offer necessary protection to vulnerable workers. Trade unions took a strong view and sought to ban labour brokering while business saw the value of this type of employment relationship and called for the industry to be regulated.[13] In 2012, the National Association of Bargaining Councils (NABC) had recorded approximately 979, 539 Labour Broker workers active in South Africa and held that this number could be much larger.[14] This is the premise of my paper in which the author intends to explore the changes in such labour legislation and to evaluate the impact of such changes.

This paper will first review the landscape of labour brokering in South African prior 2014 and assess the gaps or lack of labour law protection that resulted in the need to make radical amendments to section 198 of the Labour Relations Act[15]. Secondly consider International Labour Standards which create a platform for countries to regulate this working arrangement. The limitations of this scope of this research does not extend to comparisons of other countries. Thirdly, analyse the 2015, LRA amendments and consider the impact this has to offer protection to deemed employees(TES). Fourthly assess how the amendments to various labour legislation, in particular the focus being on the LRA was interpreted and incorporated into the workplace. Fifthly analyse how a TES employee, after been declared deemed, should be fully integrated into the workplace and assess whether the LRA amendments have had the desired impact of

[10]n3 at 3.
[11]Ibid 4 at 2.
[12]Ibid 4 at 1.
[13] Botes, A. 'A Comparative Study on the Regulation of Labour Brokers in South Africa and Namibia in Light of Recent Legislative Developments ' (2015) SALJ vol. 132 at 101-2.
[14]n2.
[15]Act 65 of 1995.

labour law protections for TES employees to be treated fairly and equitably in the workplace to achieve '… treatment on the whole not less favourably…'[16]

II. HISTORY OF LABOUR BROKERING IN SOUTH AFRICA PRIOR 2014

(a) Contextual Background

There is no denying that the nature of how the rights of workers evolved in South Africa is clouded with much oppression and was a 'long and complicated' struggle.[17] Discovery of gold and diamonds early in the 1880's brought about the development of a mining industry and resulted in the emanating of a labour relations environment in South Africa.[18] The apartheid system that dominated South Africa during the period of 1948 until 1993, set the foundation for the manner in which labour legislation developed and how employment relationships were governed.[19] According to Finnemore and Van der Merwe, the first documented trade union in South Africa occurred in 1881, however there was still oppression of South African black workers by oversea miners who flocked to South Africa and saw them as unskilled cheap labour commodities.[20] The amended Industrial Conciliation Act of 1937 introduced the concept of "job reservation" which further exacerbated racial divide and your class of black workers resulting in further oppression in the labour market. Of importance was that the Industrial Conciliation Act of 1956[21], which had in the main 'consolidated and restructured the Industrial Conciliation Act of 1924' made provision for the definition of an employee but this was to the exclusion of persons being classed as a Bantu.[22] This situation changed when amendments of the Industrial Conciliation Act in 1930 provided that the Labour Minister to establish 'minimum wage rates and maximum working hours for the Bantu's who were not considered employees in terms of this Act.[23] In these prevailing conditions it can be argued that the rise of the informal or casual worker had to evolve.

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[16] n15 , s 198A (5).
[17] Mpfariseni Budeli 'Workers' right to freedom of association and trade unionism in South Africa: an historical perspective' available at *https://uir.unisa.ac.za* accessed 15 April 2022 at 57.
[18] n17 at 57-58.
[19] ibid17 at 58.
[20] ibid 17 at 59.
[21] Act 28 of 1956.
[22] s1 of Act 28 of 1956.
[23] Dennis Moeketsi Matlou '*Has the labour relations act 66 of 1995 achieved its purpose of advancing economic development and social justice*?: a critical assessment (University of Pretoria 2018) available at *https://repository .up.ac.za* / accessed 15 April 2022 at 3.

(b) The existence and nature of Labour Brokering

Notwithstanding the 1956 LRA, making provision for the TES and client to be held jointly and severally liability when a TES employee is dismissed[24], it is difficult to determine exactly when non-standard forms of employment and specifically the concept of agencies – Labour Brokers emerged, according to Benjamin this form of employment emerged in the apartheid era and boomed after 1994.[25]

It appears that in the onslaught of a rise in worker militancy and government's ability to act in a less bias manner, which favoured this class of employee, resulting in a more conducive and balanced environment for the worker. A culmination of change and development in the labour market facilitated this change since the early 1970's, thus favouring the emergence and growth of the Labour Broker position in South Africa.[26]

The change in the labour market created distrust between business and labour due to the change of attitude and unionising of these workers. Unfortunately the change in the labour market impacted job security and rise in unemployment, the precarious situation lent itself to a situation where more workers were attracted to reaching out to labour brokers in an attempt to work.[27] The Labour Broker having access to information i.e. clients and workers who have an array of skills, created a relationship of dependency on the part of the non-standard employee due to the uncertainties of securing future employment. [28] Any employer faced with economic uncertainty, ' conflict and power struggles' and controlling a workers performance and conduct would indeed find a commercial relationship with the Labour Broker beneficial especially if this arrangement resulted in a lower on cost to business.[29]

Schoeman et al highlighted that the continued growth of labour brokers stems from the 'dysfunctional and ineffective formal labour market' and not necessarily a creator due to unemployment in South Africa.[30]

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[24] Benjamin "South African Labour Law: A Twenty-Year Assessment" 2016, available at *www.cth.co.za* accessed 15 April 2022 at 28.
[25] n 24 at 28.
[26] Schoeman C, & Blaauw P.F. ''*The flourishing nature of labour brokerage in South Africa: An investigation into the role of employment and performance uncertainty'* (2016) JEF 9(1) 137 at 150
[27] n 26 at 149.
[28] Ibid 26 at 147.
[29] Ibid 26 at 143.
[30] n 26 at 138.

What impact does labour law then have on the manner in which employees and employers position themselves in the market? Understandably labour legislation creates the necessary framework to regulate employment relationships and parties are offered protection when acting within the ambits of the law. Abuse of power or arbitrary actions in the manner in which the law is interpreted and applied has resulted in the current labour climate and conflict in this labour market. For this reason the emergence of a thriving Labour Broker environment, in the informal labour market prevailed.[31] The unfortunate impact of this tenuous labour market resulted in a climate where non-standardised employees faced less labour legislative protection and more inequality.[32] Notwithstanding the imperfections of this type of labour model the reality faced in South Africa lends it to retain this type of model as labour brokering arrangements are vital to the contribution it plays in the South African economy as well as being 'a mitigating factor in a country having an astronomically 'high unemployment 'rate.[33]

SSETA research in 2013 reflects 64 per cent of clients utilising a TES for seasonal peaks, 49 per cent to cover shift pattern requirements and 61 per cent 'outsource' labour. Remainder of the clients utilised TES in order to do away with 'the administrative and other burdens of labour legislation and/or not having to meet the wage, benefits and other requirements'.[34] The study was not specified to a sector or industry but rather focused on private employment agencies in South Africa[35] Theron et al (2015)[36] proclaims that the nature of 'temporary employment services' finds origin in South Africa's mining industry in the nineteenth century, when this industry started utilising agents to recruit fix term contract workers.[37] Elsley & Petersen's having done extensive interviews found that sectors utilising temporary staffing arrangements were 'construction, health care (caregivers and part-time nurses), retail and wholesale trade, telecommunications and manufacturing'. It was exposed that these sectors no longer appointed permanent staff but rather chose the flexibility of securing TES workers.[38]

(c) The triangular relationship

[31]Ibid 26 150.
[32]Ibid26 at 149-150.
[33] n 3 at 3.
[34] Debbie Budlender, Private employment agencies in South Africa International Labour Office, Sectoral Activities Department.- Geneva: ILO, 2013 available at *https://www.ilo.org* accessed 26 March 2022 at 4.
[35] n 34 at 1.
[36] n 34 at 9.
[37] n 34 at 9.
[38] n 34 at 27.

Numerous conditions or factors resulted in the rise of the triangular relationship. Statistics South Africa reviewing unemployment in 2010 highlighted 47 per cent of young people were impacted by unemployment. Contraction of unemployment in the first and second quarter of 2010 resulted in over 180 000 job losses, with high levels in construction, transport and the manufacturing sectors. Coupled with further declines in the formal employment sector and the South African economy saw a spike in atypical employment. The period of 2000 – 2010 revealed an increase of the atypical worker by 28 per cent.[39] Factors contributing to this rise varied where some businesses opted for a mix of flexible and permanent employees to accommodate the fluctuating 'cyclical or project-related changes' and so needed to utilise various staffing requirements.[40] The rise in businesses outsourcing or sub-contracting work, not considered a core function also contributed to the steep growth experienced.[41] Another salient factor was that the employer had very limited obligations using this type of worker due to the limited regulation or protection under labour law provisions, allowing a more cost effective business model because of lower rates of pay and not contributing to payment for various benefits for such workers.[42]

The nature of a triangular relationship is regulated by a commercial arrangement that created a tri-party relationship between the client, Labour Broker and the worker having a segregation of obligations over the worker. The agent responsible to recruit, place and terminate the services but not classed as an outsourced relationship.[43] The Labour Broker mostly administrative functions as employer, while the TES was placed at a client and was managed and issued work instructions by the client.[44] The unfortunate reality was that this tri-party arrangement was not considered unlawful but an industry lacking regulation.[45] The International Labour Organisation "ILO" classed this as a "temporary work agencies" arrangement[46] with research holding that such arrangements left workers vulnerable with limited labour legislation protection of this emerging type of worker in the labour market because much legislation provided for formal

[39] Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010 available at *https://cisp.cachefly.net* accessed 01 April 2022 at 4.
[40] n 39 at 14.
[41] Ibid 39 at 14.
[42] Ibid 39 at 14.
[43] n4 at 3.
[44] Ibid at 3.
[45] n 43 at 4.
[46]Ibid 43 at 4.

employment relationships.[47] Notwithstanding the concerns around vulnerability of this type of worker, it is apparent that companies who require 'seasonal, large-scale, temporary staff or that run an event that demands short-term staff ' are still utilising labour brokers to fulfil this staffing need and this type of agent plays a valuable and positive contribution to affording workers access to jobs.[48]

In order to identify what forms of protection are recognised and if South Africa has incorporated international standards it is necessary to consider international instruments that regulate the protection of this type of worker.

III INTERNATIONAL INSTRUMENTS REGULATING LABOUR BROKERING, DECENT WORK AND FAIR LABOUR PRACTICES.

(a) "ILO" Conventions and Standards relating to Labour Brokering

Documenting of agency work stems back to 1919 in ILO Conventions[49] addressing unemployment and providing for state control over non-profit employment agencies and prohibited agencies charging fees in order to make a profit.[50] Banning of such agency work was later incorporated into the Fee-Charging Employment Agencies Convention 1933 (No. 34) declaring an agency established to make profit, had to be abolished within a three year period after the convention had been put in force.[51]

The ILO's Private Employment Agencies Convention, 1997 (No. 181) 'Convention 181', was created and amended the Fee-Charging Employment Agencies Convention (Revised),1949 (No. 96) . These changes recognised more flexibility requirements in how the 'labour markets' functioned and how employment agencies now operated differently since Convention 96 was effected. The changes also recognised ensuring protection of labour along with recognising of freedom of association and the right to collective bargaining.[52]

Whilst the ILO recognises the concept of labour brokering,[53] Convention 181 placed an obligation on 'member states' to effect mechanisms of protection of workers employed through agencies by utilising existing laws that address aspects such as freedom of

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[47]Ibid 43 at 1.
[48] n3 at 3.
[49] ILO Convention on Unemployment 1919 (No. 2) and the ILO Recommendation on Unemployment 1919 (No. 1).
[50] Candice Aletter; Stefan Van Eck, "*Employment Agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisation's Standards*," (2016) SAMLJ 28(2) 285 at 301.
[51] n 50 at 301.
[52] C181 - Private Employment Agencies Convention, 1997 (No. 181) available at *https://www.ilo.org* accessed 27 June 2022.
[53] n 52 Article 1.

association, right to collective bargaining, basic conditions of employment e.g. working times, minimum wages and access to benefits such as social security.[54]

The Employment Relationship Recommendation Convention 'the recommendations'[55] reinforced the need to ensure that protections are implanted to eliminate the abuse of vulnerable workers by ensuring the effecting of true employment contracts that do not 'disguise' the true nature of the employment relationship.[56] Numerous tools to effect this have been promoted .i.e. the Declaration on Fundamental Principles and Rights at Work, 1998[57] and the Decent Work Agenda.[58] Ultimately only achievable when states comply with relevant labour legislations.[59]

The Constitution of South Africa (the Constitution)'[60] gives effect to the application of international law by the courts when there is a need to interpret legislation.[61] The Constitution also emphasises the obligation when there is a need to interpret the Bill of Rights, that international law must be considered.[62] Aletter questions whether international law only refers to international standards, bearing in mind that South Africa has not assented certain ILO conventions and recommendations that regulate employment agencies.[63] Aletter confirms that the Constitutional Court which is the highest court in South Africa and having binding authority, declared in *S v Makwanyane and another* 1995 (3) SA 391, the imposing an obligation to equally consider 'binding and non-binding international instruments' when the courts interpret South African law.[64]

(b) Decent work

As mentioned, the decent work agenda is a principle guiding tool to be utilised in the protection of workers. How then does the decent work agenda provide for protection of a vulnerable Labour Broker worker? First the ILO defines decent work as 'productive work for women and men in conditions of freedom, equity, security and human dignity'.[65]Secondly the '*ILO*

[54] Ibid 52 Article 11.
[55] R198 - Employment Relationship Recommendation, 2006 (No. 198).
[56] n 55 4 (a).
[57] ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022, available at https://www.ilo.org/ accessed 27 June 2022.
[58] n 43.
[59] n 55 section 4 (b).
[60] Act 108 of 1996.
[61] n 60 section 233.
[62] Ibid 60 section 39 (1) (b) and (c).
[63] n 50 at 298.
[64] n 50 at 299.
[65] Employment and Decent work' European Commission article available at *https://ec.europa.e*u accessed 2 July 2022.

is concerned with all workers'[66]. The ILO has regard of workers in formal and informal sectors inclusive of unregulated 'wage workers, the self-employed, and homeworkers'.[67] The decent work agenda sets out four key elements to aim to offer protection, being the promotion of rights at the workplace, ensuring employment, offering social protection and creation of a platform for social dialogue.[68]

Theron questions the ability and 'limitations of the decent work concept' in the context of the triangular relationship, where the worker on the one hand is in a legal employment relationship with one employer but economically dependent on the other employer. For this reason he critiques the decent work concept as it seems not to offer viable suggestions how the objective can be implemented in ever changing employment structures.[69] The African National Congress (ANC) in their 2009 National Congress Manifesto affirmed decent work necessary to address poverty and inequality, therefore a need to protection against exploitation and provide decent work for those in any form of employment relationship'.[70] This is only achievable by introducing laws to regulate 'contract work, subcontracting and out-sourcing' and curtail past abusive practices labour brokering.[71] Decent work embraces the need for more jobs and for better quality jobs. Kelly Group's (an employment agent) confidently boasted having adopted and supported the ILO's four pillars of decent work throughout operating divisions" so able to promote decent work in how they operate.[72]

(c) Fair labour Practices

The ILO has developed and implemented legal instruments to address numerous worker protections as well as developed labour standards to address fair labour practices. Eight fundamental Conventions were identified by the ILO Governing Body addressing topics considered core principles and rights at the workplace. The ILO Declaration on Fundamental Principles and Rights at Work (1998) reflects principles of the right to associate and collectively bargain, eradication all forms of 'forced or compulsory labour' abolishing child labour as well as eliminating discrimination associated with a person's occupation or employment.[73] Other conventions and recommendations that address protection of work are The Termination of Employment Convention, 1982 (No. 158),[74] and

[66] n 43 at 3.
[67] Ibid 43 at 4.
[68] Ibid 43 at 3.
[69] Jan Theron ' *Decent Work and the Crisis of Labour Law in South Africa (2014) 35 ILJ 1829* at 1835.
[70] African National Congress 2009 manifesto available at *https://www.anc.org.za* accessed 04 April 2022.
[71] n 70.
[72] n 34 at 14.
[73] n 57.
[74] Came into force on 23 November 1985.

Recommendation (No. 166), regulates fix term or temporary work contracts to avoid abuse of continued renewal of contracts, lacking sufficient grounds of validity.[75]

Recommendation No. 198 expanded on guiding 'the existence of an employment relationship…' and records inter-alia factors such as who remunerates a worker, who does a worker report or is subordinate to, when required to make this determination.[76] Further development are to ensure equal pay for work of equal value principles.[77] The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has frequently identified non regular workers as most vulnerable to forms of discrimination and readily takes action to address this.[78]

Notwithstanding South Africa being a member state albeit not ratifying employment related conventions, has been influenced by ILO standards to effect measures of protection to regulate temporary work and temporary agency work in order to address the ambiguity of disguised employment relationships.[79] An example being labour legislation reform in 2006 introducing the Code of good practice – who is an employee[80] and the deeming provisions in 2015.[81] My research reflects on how the protection of temporary employees has developed in South Africa and assesses how labour legislation has achieved this.

IV LEGISLATIVE RECOGNITION OF LABOUR BROKERS

(a) Legislation prior 1995 amendments

As indicated protection of workers in South Africa was riddled with obstacles. Not only lack of labour legislation protection and legislation rather oppressed workers to live and working in certain areas and prohibited working in certain occupations and earning decent wages.[82] Apartheid was declared state policy when the National Party took over in 1948. This entrenched oppression of certain racial denominations and eroded equality.[83] This research will consider various labour legislation but focuses predominantly on the LRA and the progress made in the protection of the a-typical worker.

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[75] Non-standard forms of employment - Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16–19 February 2015) available at *https://www.ilo.org* accessed 03 July 2022 at 33.
[76] n 75 at 35.
[77] The Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Convention No. 100.
[78] n 75 at 39.
[79] Up-to-date Conventions and Protocols not ratified by South Africa available at *https://www.ilo.org* accessed 22 June 2022.
[80] Notice 1774 of 2006.
[81] Section 198A of the Labour Relations Act Amendments 2014.
[82] Bennett Gwynn **'**Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid*'* available at *https://www.sahistory.org.za* accessed 8 July 2022.
[83] The Struggle against Apartheid: Lessons for Today's World available at *https://www.un.org* accessed 8 July 2022.

South African legislation recognised the existence of Labour Brokering by first defining a Labour Broker in the Industrial Conciliation Act 28 of 1956 (renamed the Labour Relations Act 28 of 1956) as 'businesses providing clients with persons to perform work for the client at a fee, where such persons are paid by the broker'.[84] In most instances the nature of this relationship was of a fixed or short duration and easily terminated after the specified period or on agreement of the parties.[85]

Aletter predisposes the development of agency work in South Africa occurred in three stages. First with recognition and regulating of the 'triangular relationship.[86] Changes affected in 1983 with the amendment of the 1956 LRA saw the law providing for 'supplying skilled workers to the manufacturing sector' by agencies.[87] For the first time the concept of imposing a deeming obligation as employer of the Labour Broker instead of the client was introduced.[88] The Labour Broker was also obligated to register with the department of labour.[89] Creation of this triangular relationship did not come without its own difficulties, such as employees not paid by the Labour Broker having no recourse against the client and if the Labour Broker disappeared or did not have assets that could be attached, the worker was left vulnerable and had no labour law protection.[90] By s198 of the 1995 LRA having kept the 'formulation of the labour broker' it ensured that the law incorporated the identity of the employer of a temporary employee was important, intended to ensure protection of this type of employee under the ambit of LRA as well as aim to regulate such form of employment.[91] Further s1 (3)(*d)* of the LRA of 1965 provided to hold the TES and the client jointly and severally liable in the event of an employee being dismissed.[92] In *Bhandi v Kelly Girl Temp Services/First Direct* (1997) GA 952, a temporary employee placed as a secretary lodged a complaint about wage discrepancies and was terminated by the client. Citing the client as employer, the CCMA failed in assessing the essence of her complaint and reason for termination and dismissing the application and advised her to lodge a new referral against the Labour Broker agency.[93] Failure to address joint and several liability in relation

[84] n13 at 101.
[85] Yonela Ciliwe ' *An evaluation of the amended Temporary Employment Service Provisions in the South African Labour Relations Act*' (unpublished , University of Western Cape 2016). available at *http://etd.uwc.ac.za* accessed 08 July 2022 at 18.
[86] n 50 at 287.
[87] n 34 at 9.
[88] n 34 at 9.
[89] n50 at 288.
[90] n 4 at 5.
[91] n39 at 32.
[92] A Van Niekerk. ,N Smit, MA Christianson et al Law@work 5ed (2019) 71.
[93] n 86.

to a dismissal creates a negative inference in achieving the purpose of the amendments. Compliance was now also required in relation to LRA obligations in terms of liability for collective agreements, any 'notice, award, orders or determination issued, were now binding on the Labour Broker as employer.[94] The effect of this amendment was aligned with justifications set out in the Explanatory Memorandum to the 1983 Bill, which would ensure 'fly-by-night' Labour Brokers are held liable. This created and ensured protection of TES employees to earn statutory wages and a channel to recover unpaid wages from the Labour Broker.[95] Some other noteworthy amendments were affording union representivity rights to blacks and the concept of fair labour practices which established a platform to move away from the old regime concept of 'master and servant' employment relationships.[96]

(b) Legislation Prior 2014 amendments

According to Aletter the second phase of addressing protection of workers employed by Labour brokers occurred when the overall revamp of the LRA in 1995, in her view such attempts were not successful as the industry was still not regulated at this time.[97] These amends to the LRA came after the end of the apartheid regime when South Africa obtained democracy and aligned itself with the ILO.[98]

Section 198 of the 1995 LRA made provision to define temporary employment services (TES) and expanded on the formulation of this arrangement by identifying the TES and the nature of the employment arrangement. Even though defining the employer, what lacked was how labour brokers should be regulated.[99] Section 198 in the 1995 LRA Amendments had abolished provisions in relation to the obligation of the Labour Broker to be registered and did not retain defining the workplace of the placed employee.[100] At that point when the LRA of 1995 was introduced, no earning threshold had been linked to these provisions.[101]

The LRA also recognised the concept of joint liability under narrow conditions for breaches of the Basic Conditions of Employment Act 'BCEA' [102] or Wage Act, [103]sectoral

[94] N A Cassim 'The Labour Relations Amendment Act 2 of 1983' available at *https://journals.co.za* accessed 08 July 2022 at 27.
[95] n 39 at 31-32.
[96] n 96 at 27.
[97] n50 at 288.
[98]n50 at 288.
[99]n13 at 101.
[100]n4 at 850.
[101]n50 at 289.
[102] Act 77 of 1997.
[103] Act 5 of 1957.

determinations, collective agreement or compliance of arbitration awards. Amendments to the BCEA also incorporated recognition of the TES employer and attached joint and several liability of the client if the TES as employer breached provisions of the BCEA.[104]

A report by department of Labour in 2010, reflected the struggles faced by atypical employees to enforce rights due to the lack of 'specific protections' and legislation that created loopholes with lack of regulatory bodies to do the necessary checks and issue compliance orders.[105]

Gradual steps were being made to address and protect the rights of atypical employees and afford them a recourse to address problems however continued uncertainty prevailed in identifying the employer. Benjamin identified a continued behaviour of the parties in the Labour Broker relationship to circumvent the rights of such vulnerable workers under the labour law provisions in utilising 'outsourcing and sub-contracting arrangement' in order to 'disguise or obscure' who the actual employer is having a view that this further hampered the ability of this worker to exercise their constitutional rights and seek legal protection.[106]

To curb continued attempts to circumvent labour law obligations, amendments to the LRA[107] and BCEA[108] introduced the presumption of employment.[109] Seven descriptors were introduced to consider in a determination of who the employer is.[110] Benjamin reflects that the courts started interrogating and 'look beyond the wording' in the employee's contract to identify the exact nature of such employment relationship.[111]

Notwithstanding apparent exploitation and disguised employment conditions, the rise of the Labour Broker industry continued as a source of offering of employment services to business. According to Aletter, the 'Adcorp Employment Index at May' reflects an industry having approximately '19 500 internal staff and more than 'one million agency workers or temps in South Africa'.[112] What then was required by the legislature to try and regulate this vast growing industry? The revolution of change commenced when in 2010, the trade union federation COSATU putting pressure on business and government to ban Labour Brokers. The creation of a 'Parliamentary Portfolio Committee' resulted in a decision to rather

[104] s82 (1) & (3).
[105] n39 at 14.
[106] n4 at 846.
[107] Section 200 A.
[108] Section 83 A.
[109] n 4 at 846.
[110] LRA s200A (a) – (g); BCEA s83A (1)(a) – (g).
[111] n4 at 846.
[112] n50 at 286.

regulate the industry in order to offer the necessary protection to this type of worker.[113] Numerous labour legislation Bills – LRA, BCEA and the Employment Equity Act reflected various amendments being considered to address the various vulnerable categories of workers.[114] A team tasked to assess the regulatory impact of the proposed amendments in an aim to consider protection, decent work opportunities and regulating the industry in terms of 'sub-contracting, contract work and outsourcing' was implemented. Also requiring review was if this was aligned to the Constitution relating to fair labour practices, collective bargaining and non-discrimination for various non-standard type of employees.[115] Some salient inclusions into the bill attempted first to align with the issues set out in the 'ANC's 2009 Election Manifesto', secondly ensure compliance with ILO obligations and lastly align the law to 'labour market' developments.[116]

(c) 2014 Legislative Amendments

Notwithstanding various amendments to numerous labour legislation such as the BCEA,[117] EEA[118] and the Employment Services Act (ESA),[119] which addressed the regulating of employment agencies,[120] the focus of this research considers the Labour Relations Amendment Act (LRAA of 2014),[121] introduced to address aspects such as better regulating the labour brokering industry and address gaps in terms of rates of pay of TES employees, provide access to benefits such as medical aid and provident fund. Further to enhance the rights of such workers in relation to collective bargaining, access to join trade unions and strike in order to effect such rights.[122] The ultimate aim was to enhance job security as well as provide sufficient protection for a TES to claim against the Labour Broker and client when labour legislative breaches occurred.[123]

Central to the amendments was the overarching changes to s198 of the LRA. Changes introduced made provision for 'four new sections 'to address temporary employment

[113] ADCORP 2010 Employment Index Report- available at https://www.adcorpgroup.com accessed 050422 at 22.
[114] n39 at 12.
[115] n39 at 12.
[116] n39 at 12-13.
[117] Act 20 of 2013.
[118] Act 47 of 2013.
[119] Act 4 of 2014.
[120]Candice Joy Aletter' *Protection of Agency Workers in South Africa: An Appraisal of Compliance with ILO and EU Norms*' (University OF Pretoria 2016) at 134.
[121] Act 6 of 2014.
[122] n39 at 16.
[123]n115 at 23.

services,[124] fix term contracts[125], part time employment[126] and general provisions[127] related to the three categories mentioned.[128] Further to that the inclusion of s198 (4A) – (4F) was done in order to boost as well as outline how the provisions would establish clear joint and several liabilities between the Labour Broker and the client, in adherence to labour legislation, collective agreements relevant to specific industries as well as in conjunction with the obligations of section 29 of the BCEA.[129] Here the law modified who these provisions apply to by limiting these provisions to employees earning below the BCEA earnings threshold.[130]

While legislative amendments were effected for various atypical form of employees, this research focuses predominantly on the impact of the amendments on TES employees. For this reason a critical analysis is required to consider first the impact these changes had on the employer obligations of the client, secondly the impact on job security and fair labour practices and lastly ensuing that the TES employee is afforded treatment on the whole not less favourable.

The definition of a TES was slightly modified to incorporate '…any person who, for reward, procures for or provides to a client other persons – (a) who perform work for the client; and (b) who are remunerated by the temporary employment service'.[131] The overarching protection being to ensure that a TES employee is not disguised as an Independent contractor.[132]

A major change arose in the defining of what constitutes a 'temporary service'. Along with this s198A saw the introduction of a time frame and incorporated a distinction between a true TES employee[133] and declaring that in the event that a TES employee tenders their services for more than 3 months, this is not construed as a temporary arrangement and the client become the deemed employer of the TES worker.[134] The capping of the time period brings certainty to what true temporary work is versus work being more of a permanent

[124] S198A.
[125] S198B.
[126] S198C.
[127] S198D.
[128] Darcy Du Toit, Shane Godfrey, Carole Cooper et al '*Labour Relations Law , A Comprehensive Guide*' 6 ed (2015) 42.
[129] n128 42.
[130] 'Regulation of 'non- standard' or 'a-typical employment' – South Africa available at *https://www.linkedin.com* accessed on 4 January 2022.
[131] S 198(1).
[132] Forere, M.' *From Exclusion to Labour Security: To What Extent Does Section 198 of the Labour Relations Amendment Act of 2014 Strike Balance between Employers and Employees'*. (2016) SAMLJ 28(3), 375 at 382
[133] n 123 s 198A(1) (a),(b), (c).
[134] n 123 s198(A)3(b).

nature, on order to eradicate past abuse of years of continues use of this type of worker, without creating any form of permanency or offering certain protections for them. In *Boitumelo Mphahlele and 2 others and Transman Bakery Biscuits and Snackworks Pty Ltd* GAEK2146-18[135] the commissioner hade to make a determination under section 198D of the LRA. The dispute related to a reduction of pay that the applicants refused to accept, and whether not reporting for work after the introduction of the new rate of pay, resulted in their abandonment of employment.[136] Evidence reflected the applicants working as TES employees at the client for a protracted period of time (some up to two years already) and still not deemed employees of the client. A clear example of what the law was trying to afford protection against. [137]

What then is the impact and operational considerations in the client being the deemed employer? Does the interpretation lend itself to the fact that a TES employer on day 91 now enters into a contract of employment with the client? What then happens to the contracts that the TES employee had with the Labour Broker. Forere recognises that 'the LRA is silent on this point', for this reason the interpretation and application of this deeming provision was required.[138]

Since the commencement of the deeming provisions numerous matters have been adjudicated to consider the interpretations of the deeming provisions and the ultimate impact of the TES employee and client when the law now declares that such work is no longer a temporary arrangement. Dispute resolution tribunals had to grapple with was what the intention of the legislature was in making such a declaration in the law – was the employee to transfer to the client and thus the client is the 'sole employer' or die the legislature intend the creation of a 'dual employment relationship'.[139]

However uncertainty persisted due to numerous considerations of the deeming provisions heard and ruled on at the CCMA, making it difficult for an employer to consider what is required when having to adopt the deeming provisions. In *Mustek Ltd v Tsabadi NO and other* 2013 8 BLLR 798 (LC) the court supported that in the absence of precedence in the

[135] GAEK2146-18.
[136] n137 para 11-12.
[137] n137 para 7, para 18.
[138] n132 at 383.
[139] 'CCMA ruling on the interpretation of the deeming provision in section 198a of the labour relations act' available at *https://www.cliffedekkerhofmeyr.com* accessed 17 March 2022.

law, a commissioner is not bound by the decision of another commissioner.[140] Thus numerous interpretations were the order of the day.[141]

In *Assign Services (Pty) Ltd (Applicant) and Krost Shelving & Racking (Pty) Ltd (First Respondent)* ECEL1652-15, first heard at the CCMA and progressed to the Constitutional Court found the Labour Broker referred the dispute to the CCMA and as the applicant was seeking certainty on 'the correct interpretation of Section 198 A (3) (b) of the LRA (*"the deeming provision"*)'. It was the applicants' view that the intention of the legislature was to create a dual relationship situation whereas both the second respondents were of the view that the intention creates a sole employment relationship.[142]

The CCMA held that in accordance with s198A(3)*(b)* the client is the sole employer 'for purposes of the LRA' and substantiated this position in consideration of first 'how the law deals with adoptions' secondly the confusion that results in establishing of a dual employment relationship, i.e. who disciplines, which rules are used and who must reinstate an employee, thirdly considerations of work performed outside the true grounds to utilise a TES employee, fourthly under consideration of where the provision of joint and several liability falls in terms of s198(4A) and s198A(3)(b), fifthly in consideration of the indefinite employment basis after three months have passed and lastly in consideration of the 'memorandum of objects to the LRA amendments' which confirms application of the LRA only.[143]

As alluded, this matter was not settled at CCMA. On 26 July 2018 the Constitutional Court *in Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (*herein after refer to as Assign*)* [2018] ZACC 22 *[144]* gave finality on the intention of the legislature. The crux of what the court had to consider was essentially whether 'section 198A (3) *(b)* creates a 'dual employment relationship' or 'does it create a sole employment relationship' between the employee and the client when the deeming provisions become applicable for the purposes of the LRA? The court confirmed the sole employer interpretation, also held that joint and several liability does not hinder the sole employer interpretation as 'Section 198(4) creates a 'substantive and statutory form of joint

[140] 'Interpretation 'Deeming Provision' Labour Relations Act' available at *https://dev.labourguide.co.za* accessed 26 January 2022.
[141] See as examples Mphirime and Value Logistics Ltd & Another (2015) 36 ILJ 2433 (BCA) and *Pecton Outsourcing Solutions CC v Pillemer NO & others* (2016) 37 ILJ 693 (LC).
[142] n132.
[143] n139.
[144] [2018] ZACC 22.

and several liability…' thus 'a statutory accessory liability'[145], that there was no transfer of employment[146], no entitlement to permanent employment[147] and recognition of the continuation of the triangular relationship for the duration of the commercial agreement.[148]

A minority judgment in this matter favoured the creation of a dual employment relationship.[149] Cachalia AJ's position was based on considerations of the common law contract of employment[150], deeming provisions attach recognition of dual parties being the employer[151]barriers with the application of s198 (4) and s198 (4A)[152] and the aim of offering additional protection to this type of employee[153]and the alignment of s82 (1) of the BCEA and s198 (2) of the LRA.[154]

Forere contends that if one adopts the purposive approach in addressing the impact of the deeming provisions this results in the TES contract falling away when the deeming provisions are invoked. She relies on her positon because of the amendments now declaring that it would be unlawful to terminate the contract to evade the deeming provisions.[155] Further her argument juxtapositions that it cannot be right that this deemed employee remains 'indebted to the TES' whilst being an employee.[156] It is my view that Forere takes this position too far as *Assign* clearly has declared there to be no entitlement to permanent employment thus no obligation under the law for a TES to be issued a contract of employment with the client. *[157]*

In the courts having settled the intention of the legislature in the overhauling of S198 amendments, a review of the practical implications of integrating a deemed employee into the workplace is necessary. Numerous aspects in this research paper have been assessed and consideration in order to determine if uncertainty still exits and consider whether a balance has been achieved to ensure treatment on the whole not less favourable.

V. INTEGRATION OF THE DEEMED EMPLOYEE

(a) Introduction

[145] n144 para [58].
[146] Ibid para [75].
[147] Ibid para [101].
[148] Ibid para [75].
[149] Ibid para [86].
[150] Ibid para [91].
[151] Ibid para [92].
[152] Ibid para [92].
[153] Ibid para [92].
[154] Ibid para [106].
[155] n132 at 387.
[156] n132 at 388.
[157] n 144 para 75.

Has the desired balance been attained and do the amendments provide sufficient protection to the atypical type of employee, in terms of this research particularly for the TES Employee. This is assessed based on considerations of the integration of the deemed employee into the workplace and the granting of equal treatment and whether this has been achieved. In order to assess, his one must consider what the impact of integrating a deemed employee into the workplace offers such employees. According to Forere in having analysed s198, she holds that the LRAA has duly maintained temporary flexibility by allowing employers to use non-standards employees, but that the amendments now offer sufficient protection and offered the necessary 'labour security 'thereby striking the required 'equilibrium'.[158] For this reason we review a few elements that reflects this view.

(b) Identifying the employer

Section 198(4B)(a) of the LRAA now enforces certain conditions to ensuring that the employer is identified by requiring the TES to comply with the provisions of s29 of the BCEA and must issue a contract of employment to the TES employee. However the place of work identified on such contract would be the name and address of the TES and not the client.[159] In the instance when the employee transitions to deeming recognition, but this does not change and the clients name and address does not reflect on the contract of employment. In the amendments being effected, as per *Assign*, the court declares that amendments do not confirm a transfer of employment bur rather a shift 'in the statutory attribution of responsibility as employer within the same triangular employment relationship'.[160] This in itself should create certainty to the TES employee of who the employer is after the TES employee is declared deemed.

Forere implies that due to this protection, the client is 'expected to employ the placed employee on the 91st day'.[161] I respectfully differ from this view in that this deeming provision is not akin to a transfer of a business that entitles an employee to retain conditions of employment in entering into a new contract with their new employer. What I concede in her argument is the position that the integration of the deemed employee lends itself to permanency for all intents and purposes and having ensured equal treatment that the Client may as well just offer a permanent contract of employment.[162] What I cannot accede to is her argument that the employee should automatically transfer as any

[158] n132 at 397-398 .
[159] n132 at 392.
[160] n144 para [75].
[161] n132 at 389.
[162] n132 at 388-389.

contractual obligation rests under the ambit of the BCEA. In the matter of *Olympic Print (Pty)Ltd and 1 Other 'Olympic'* GAJB24662-18[163], the commissioner cited that the *Assign* matter confirmed the ability of a continued existence of a relationship between the TES and deemed employee.[164]Notwithstanding this declaration there remains a continued expectation to be made a permanent employee of the client. Years later after the Assign matter has settled that the client is deemed the sole employer for purposes of the LRA, matters arising at dispute tribunals are still having to unpack this and demands for permanency still seems to be the order of the day.

In *GIWUSA obo Mgedezi & others and Swissport SA(Pty) Ltd and The Workforce Group (Pty) Ltd* WECT 18795- 18 *'Swissport'*[165] the TES employees demanded to be employed by Swissport, the Commissioner referencing *Assign* affirmed this as not an entitlement and held *"*This does not imply that the applicants must be "on the books" of Swissport…*'* [166]*Swissport* confirms permanency in terms of LRA which is different to BCEA obligations whilst also confirming that there is an entitlement to retain a contractual relationship with the deemed employee.[167] For this reason *Swissport* confirms that there exists no right to 'transfer the contract the client' and thus not entitled to permanent employment with the client.[168]

In *ITU obo Kekana, Carol and 2 others and Amrod Corporate Gifts and Clothing and Assign Services* GAJB17283-19,[169] identifying of the true nature of the employment relationship and addressing the demand of permanent employment with the client was challenged. The CCMA confirmed that there was a commercial TES agreement, that the deeming provisions were applicable but that there can be no transfer to the 'books' of the client.[170] Notwithstanding the conclusion that the decision in *Assign* that the provisions of the LRA lends itself to a sole employer relationship, the deemed employee still in terms of the various labour law legislations finds themselves caught between two employers, it is therefore my view that a dual employer relationship still exists beyond the *Assign* determination especially in light of the recognition of the existence of the triangular

[163] GAJB24662-18.
[164] N163 para 16.
[165] WECT 18795- 18.
[166] 'Just because you are deemed to be an employee does not mean you need to be employed by the client of the Labour Broker '- The next case in the Labour Broker debate' available at *https://www.fasken.com* accessed 15 Sept 2022.
[167] N169 para 18.
[168] N169 para 17.
[169] GAJB17283-19.
[170] N170 para 31, 38 – 40.

relationship. It seems apparent that there will always be a cry from a deemed employee to be made a permanent employee of the client.

(c) Joint and several liability

The amendments to various labour law further enhances the protection of the TES employee. Where the law previously was silent on the regulation and registration of a Temporary Employment Services Agency, amendment to the BCEA and LRA now address this. In terms of s33A, the law prohibits seeking money from a TES employee in order for them to be secured of a placement with a client.[171] Section (4F) of the LRAA now compels the registration of the TES agency and further protects the TES employee in that where the TES in not registered this may not be used as a defence to obligate the regulating of the work and holding them liable for breached of the law.

Botes reflects on the legislature having expanded on s198 (4) that provides for greater clarity of how this triangular relationship affirms certain duties on the Labour Broker and client in relation to joint and several liabilities. This has been achieved he notes by the legislature having included s (4A) – (4F) into s198 provisions. Various conditions and protections such as rights of labour inspectors to enforce BCEA provisions,[172] the right to a contract of employment,[173]protection under existing collective agreement provisions[174]and the right of the intervention of an Arbitrator or the Labour Court to interrogate and make an order on whether the contract of employment is compliant in terms of s(4D)[175] and as mentioned above s(4F) regulates registration of the TES. [176]

The Constitutional Court in *Assign* addressed considerations of whether the sole employer interpretation hampers with the provisions of sS198 (4A) by declaring that it does not and that while the section does not purport to determine who an employer may be from time to time. It provides that, while the client is the deemed employer, the employee may still claim against the TES as long as there is still a contract between the TES and the employee'.*[177]* The court also considered that the TES may still be paying the TES employee a salary and that protection is also found under the provisions of s200B of the LRA that also places general liability on the employer. Where in the past the TES employee had to first take action against the labour broker, s198 (4A) allows for action to

[171] n13 at 112.
[172] n123 s198 4A(b).
[173] Ibid s198 (4B) & (4C) .
[174] Ibid s198 (4D).
[175] Ibid s198 (4E).
[176] n13 at 110.
[177] n144 para [61].

be taken 'against either… or both the temporary employment service and the client'. Thus giving enhanced protection for the employee when lodging a dispute, should the need arise to demand compliance. The *Olympic* matter affirms the amendments in line with the A*ssign* judgment, that a TES employee may choose who to lodge a claim against.[178] In *AMITU obo Dube, Sipho and 90 others and Snackworks and Adcorp Blu* KNDB16842-18 ,[179] TES employees having seasonal contracts with limited duration challenged an alleged suspension when they were issued notice of termination and decided to refer the dispute against the Labour Broker and the client.[180]

(d) Equal Treatment

The deeming provisions also provide to ensure that when a TES is deemed, this employee should be treated equally in comparison to a permanent employee of the client. The inclusion of paragraph *(b)* of s198A(3) of the LRAA introduces the concept of the entitlement of equal treatment in that they 'must be treated on the whole not less favourable…' and that this is measured against a permanent employee of the client who is performing 'the same or similar work'. However the law makes provision that this is justifiable and a client would be put to the test to provide justifiable reasons not to do so. This ties in with s 6(4) of the EEA when considering issues of wages and other type of equal treatment entitlements.[181] It is critical to realise that there cannot be a 'blanket' comparison of all the client's employees.[182] How then must equal treatment be realised? We review a number of considerations to determine the impact of integrating equal treatment of the deemed employee.

According to Forere there are three pertinent issues to consider – working hours, equal rates of pay and overtime payment in terms of the BCEA? She also reflects that the TES employee in most instances did not have access to a provident fund, medical aid or even leave entitlements. So what is there expected to address these factors. Her position is that in the intention of the legislature was to ensure normal hours of work, overtime payment and equalisation of wages.[183]

We first review working hours and how this has been considered. In *AMITU obo Mnguni, Victoria and 39 others and Capacity Outsourcing and 1 other* KNDB11394-17[184], the

[178] n169 para 14.
[179] KNDB16842-18.
[180] n179 para 8 , 9.
[181] n13 at 111.
[182] n166.
[183] n132 at 394-395.
[184] KNDB11394-17.

CCMA dealt with an unfair labour practice of suspension of deemed employees. The issue pertained to provisions in their contract allowing the client to determine working hours and having no guaranteed hours[185], while the union demanded 44 guaranteed hours per week for the applicants.[186] The CCMA held that the employer was adhering to provisions in the contracts, there was no entitlement to guaranteed hours and this did not fall under an unfair labour practice so dismissed the matter.[187]

I reflect on two conflicting judgments that address the concept of 'Zero Hour contracts'. In *Letjeka Virginia Makaepeya and 137 others and National Brands Limited and Transman (Pty) Ltd* GAEK7719-18 *'Makaepeya',*[188] the CCMA had to consider whether the deemed employees were entitled to 44 hours per hours per week.[189] Commissioner Cellier held that the claim falls under S198C (3), the comparator rather that of a perm part time employee if considering the nature of the working hours of the deemed employee.[190] Zero guaranteed hours were not in dispute but the Applicants view was that this amounted to a form of dismissal by not having guaranteed hours.[191] Cellier held that in consideration of the concept of zero working hours not outlawed in South Africa, the parties relationship and the operational needs of the client, granting of guaranteed hours 'would be tantamount to rewriting their contracts of employment' and place NBL in an 'unsustainable position',[192] thus the claim was dismissed. In the matter of *Uchimushawu Nkosana Ackerman Lupindo and 91 others v Ferrero SA (Pty) Ltd and Adcorp Blu* GAVL 3153-18 (*Lupindo)*[193] deemed employees were seeking same minimum working hours as their full time comparator employees (40 hours) and wanted to belong to Ferrero Rocher's provident fund. The commissioner had to determine 'whether flexible working hour arrangement with no guaranteed hours of work, amounts to less favourable treatment…'.[194] The applicant's contention was that 'zero hour contracts are less favourable than guaranteed hours of work on a full time basis'.[195]

[185] n184 para 6.
[186] n184 para 10.
[187] n184 para 47-48.
[188] GAEK7719-18.
[189] n188 para 10.
[190] Ibid para 15.
[191] Ibid para 16.
[192] Ibid para 17.
[193] GAVL 3153-18.
[194] n193para [8].
[195] Ibid para [59].

The commissioner rejected the argument that operational needs of the client justified differential treatment[196], nor did he accept that s198(C) finds application and held that 's198A (5) is not subject to s198(C)'.[197] Ultimately he held that this was less favourable treatment, 'contrary to s198A (5) and public policy'[198]and there was an 'obligation to guarantee the Applicants forty hour per week and a provident fund…'.[199]

I respectfully disagree with the conclusion in *Lupindo*. The fact that a TES employees' main purpose is to accommodate flexible operational needs, notwithstanding being deemed, cannot mean that the working hours of a permanent employee be used as a comparator for equal treatment. Evaluation of the TES employees' actual hours over the three month period could be utilised to arrive at a fair conclusion, along with a comparison of the clients perm part timer employee, if such exists. A client might require a perm part timer might but indeed not at the same hours. I favour Cilliers' position in *Makaepeya* that the statutory change leans towards a deemed employee being considered a perm part timer. There can be no demand for equalisation of hours. This would defeat the purpose of the flexibility requirements of part timers in a workplace.

Secondly we consider a demand for belong to the provident fund of the deemed employer. As in Lupindo a demand was made and granted that employees be provided with a provident fund benefit similar to that of the comparable employees' of Client.[200] The question posed though whether it is it possible to transfer persons not having a contract of employment with the client to a provident fund. The general rule of application as to who may belong to the provident or pension fund are regulated by the Pension Fund Act.[201] Specialists in the industry have confirmed that the funds are regulated by certain Acts and a particular funds rules prescribe who may join. As South Africa has different types of retirement options which included an annuity available a suitable alternative would be available for contract or temporary workers.[202] Thus in the deeming provisions affording a TES employee the right to accessing provident fund benefits, the client is entitled to pursue alternative options to offer this benefit. In the matter of *SACWU obo Skemjana & Others v Allied Printing and Transman* GAJB 23063-16 [203] the Applicants

[196] Ibid para [226].
[197] Ibid para [224]-[225].
[198] Ibid para [190].
[199] Ibid para [236.2].
[200] Ibid para [260].
[201] Act 24 of 1956.
[202] Rowan Burger 'On contract, can I join a provident fund?' available at https://*www.news24.com* accessed 11October 2022.
[203] GAJB 23063-16.

contended an entitlement to the same guaranteed '40 hours normal work per week' and also be provided provident fund benefits. The Commissioner held that a provident fund be provided but 'in accordance with the rules and practices applicable to those'.[204]

Prior to the deeming provisions and a right to benefits, CAPES in 2009 developed a provident fund for TES employees, not having access, in order to promote the well-being of TES employees. Challenges were that CAPES fund required monthly contribution by employees.[205] If a TES is not guaranteed hours, no contribution is made. Even in being deemed and even if this were an option for the Labour Broker to access, the TES employee is still not offered guaranteed working hour. Affording access to a provident fund by a deemed employer may still be challenging. It seems the only option is to contribute for a TES to source an annuity policy.

Thirdly in assessing recognition of years of service two issues come to mind. Severance pay and entitlement to qualify for benefits based on years of service. If such a claim arises this can only be considered from the commencement of the deeming provisions and not retrospectively. What is problematic is that recognition of employment and severance pay calculation finds application in the BCEA.[206] Who then is responsible for severance pay and would this be an operational consideration in relation to joint and several liability of s198 (4) of the TES and client, if the commercial agreement of the parties is silent on this. How does one align yourself to the deeming provisions not being retrospective but the history of labour brokering reflect that some TES have been in the employ of the client for many years.

In *Premnath Rampersad and Adcorp Blu & National Brands Ltd* KNDB 6257-21[207] *a*lbeit a condonation ruling, the dispute pertained to a deemed employee, now permanently employed, seeking recognition of years of service held with the Labour Broker, alleging he would suffer prejudice in losing '10 years of services rendered'.[208] The Commission recognised the deeming provisions having no 'retrospective application' and 'the reference to "treatment" and "must be treated on the whole not less favourably" in section 198A (5) cannot be construed to be a reference of recognition of years of service.[209]

[204] n203 para 29.
[205] n34 at 12.
[206] n102 s84, s41.
[207] KNDB 6257-21.
[208] n207 at para 11.
[209] Ibid para 5.

Lastly in affording entitlement to union participation and recognition, the inclusion of subsection 5 in section 22 of the LRA provides for enforcing arbitration awards relating to organisation rights on a client, if such third party has participated in the arbitration. This affords trade unions in terms of s21 (12) the right to organise TES employees, at the premises of the client.[210] Where a dispute results in strike action, the TES may initiate strike action against the client as well.[211] At time of having completed this research report, I have not been privy to information that has shown the extent of how these rights have been tested or materialised for the deemed employee, however the integration of the TES protects the right to participate in trade union activities and enforce the right to collective bargaining. In *Adcorp Workforce Solutions (Pty) Ltd v CCMA and others*(2021) 30 LC 1.13.24*[212]* the Labour Court confirmed that a deemed employee if dissatisfied, in how they were being integrated into the workplace may pursue the necessary internal avenue or dispute resolution mechanism, through trade union representation, to address their concerns. [213]

(e) Dismissals

The shift of legislative responsibility now obligates the client following prescribes of the LRA to terminate the deemed employee, be it for misconduct, incapacity[214] or operational requirements.[215] The CCMA interpretation implies that the client must include a TES employee in 'any retrenchment procedure' due to indefinite employment after deeming commences. [216] This could be burdensome to a client especially if a TES, having only working a few days during the three month period is now deemed indefinitely, must have followed an operational requirements procedure to terminate services. Benjamin having considered the options for legislative reform in south Africa, recognised that the TES is an employer for purposes of other legislation and that the impact of this relates to the rules that are applicable under the 'different labour Acts.[217] Even after the LRA amendments the TES is still recognised as the employer under the BCEA.[218] Here dynamics of recognition of years of service, leave entitlement. Severance pay as per s43

[210] n13 at 109.
[211] Employment Law 'From Recognition to Strike' available at *https://www.cliffedekkerhofmeyr.com* accessed 26052021.
[212] (2021) 30 LC 1.13.24.
[213] n224 at para [11].
[214] s188.
[215] s189.
[216] n143.
[217] n4 at 851.
[218]n102 s82.

of the BCEA, of which are contractual obligations have to be addressed when operational requirements processes are triggered. By implication it requires the involvement of the TES in the clients process as it impacts the commercial arrangements and triggers the termination of the employment contract of the deemed employee. For this reason a hybrid relationship still exists and thus in the client pursuing operational requirements the TES must be a party involved in the process.

The LRAA,[219] also provides protection to a deemed employee in the event of a client attempting to evade the deeming provisions of s198A (3)*(b*) by having included s198A(4). This amendment imposes the removal of a TES by a client, prior to the three month lapsing, to be classed as a dismissal. The TES employee may refer an unfair dismissal dispute against the client or TES.[220]

VI CONCLUSION

The history of the evolution of the a-typical employee has been long and arduous. The road to equal treatment and legislative protection has being fraught with abuse, minimal protection and not always paved with good intentions. The labour legislative protection of this type of employee has been slow and has failed to keep up with the needs for flexibility and alternative methods of employment models or needs in the labour market. This research report reflects that as far back as 1956 labour law recognised the concept of labour brokering and the need to attach joint and several liability. However the law has been slow to evolve and offer proper protection. In the labour law amendments during the period of 2013 and ultimately the introduction of the deeming provisions under the LRAA in 2015, one reflects on the intentions, as discussed in the memorandum of objective of the amendments to the LRA, being the ultimate aim to regulate labour brokers, offer better job security and afford conditions on the whole not less favourable.

Bhorat, Magadla and Steenkamp suggest that 50% of agency workers lost their jobs subsequent the amendments and 20% secured indefinite positions.[221] Adcorp Blu reported having a Temporary Employment workforce of 45 500[222] versus having employed 'over 90 000 contract and temporary employees on assignment at any point in time' in 2010. [223] Some Labour Brokers did not survive post the amendments. Companies such as Transman liquidated leaving

[219] n121.
[220] n13 at 111.
[221] Aletter, Candice, and Stefan Van Eck. "Employment Agencies: Are South Africa's Recent Legislative Amendments compliant with the International Labour Organisation's Standards." South African Mercantile Law Journal, vol. 28, no. 2, 2016, p. 285-310. accessed 26 March 2022 at 286.
[222] Adcorp Integrated annual report 2021- available at *https://www.adcorpgroup.com* assessed 05 April 2022
[223]n113 at 38.

thousands of TES stranded and vulnerable.[224] Of course the legislative amendments have not been the only contributing factor but indeed an influencer. The battle of legal interpretations to test what the deeming provisions imply and how this should be interpreted continues. What is clear is that an employee is offered job security and cannot just be reallocated at the 'whim of the client'. Some confusion still rests in relation to the true impact of day 91 and the continued nuance of rather a dual relationship because the sole employment test rests only under the provisions of the LRA as confirmed in *Assign*.[225]

Having reflected on numerous case law, it further suggests that the enforcing of who the employer affords the employee the right to equal payment and treatment but reflects challenges of equal treatment existing in areas such as working hour rights. However the courts are still being tasked to identify the true nature of the employment relationship, in order to ensure that companies do not shy away from their deeming obligations under s198 A (3) (b). In *David Victor and 200 others v Chep South Africa (Pty) Ltd and others*[226] the court 'conducted an exhaustive factual survey of the working arrangements' and held that a TES relationship existed and employees were entitled to equal treatment. [227]

Research reveals challenges still exist in integrating a deemed employee into the workplace and reflects a continued demand by workers for permanency and being offered equal working hour opportunities. Overall I support Foreres' sentiment that the spirit of s198 to the exclusion of s198 (4A) seems to have been achieved.

[224] Case No 10238/2020.
[225] n132 at 398.
[226] JA 55/2019 (16 September 2020) (LAC).
[227] 'Without Prejudice Employment Law Feature' Nov 2020 *https://0-journals-co-za.innopac.wits.ac.za* accessed 26 October 2022 at 26 accessed 27 October 2022

Bibliography

1 Legislation

1.1 Labour Relations Act 66 of 1995

1.2 Labour Relations Amendment Act 6 of 2014

1.3 Industrial Conciliation Act of 1924

1.4 Industrial Conciliation Act of 1924 as amended 1930

1.5 Industrial Conciliation Act 28 of 1956 (renamed the Labour Relations Act 28 of 1956)

1.6 Constitution of South Africa Act 108 of 1996

1.7 Code of good practice - who is an employee - Notice 1774 of 2006

1.8 Basic Conditions of Employment Act 77 of 1997

1.9 Basic Conditions of Employment Amendment Act 20 of 2013

1.10 Employment Equity Amendment Act 47 of 2013

1.11 Employment Services Act 4 of 2014

1.12 Wage Act 5 of 1957

2 International Instruments

2.1 ILO Convention on Unemployment 1919 (No. 2)

2.2 ILO Recommendation on Unemployment 1919 (No. 1)

2.3 Fee-Charging Employment Agencies Convention 1933 (No. 34)

2.4 C181 - Private Employment Agencies Convention, 1997 (No. 181)

2.5 R198 - Employment Relationship Recommendation, 2006 (No. 198)

2.6 ILO Declaration on Fundamental Principles and Rights at Work (1998);

2.7 ILO Declaration on Fundamental Principles and Rights at Work amendments in 2022

2.8 The Termination of Employment Convention, 1982 (No. 158),

3 Case Law

3.1 S v Makwanyane and another 1995 (3) SA 391.

3.2 Bhandi v Kelly Girl Temp Services/First Direct (1997) GA 952.

3.3 Mustek Ltd v Tsabadi NO & Others 2013 8 BLLR 798 (LC).

3.4 Boitumelo Mphahlele and 2 others and Transman Bakery Biscuits and Snackworks Pty Ltd GAEK2146-18.

3.5 Gcaba v Minister of Safety & Security & Others (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 680 (CC).

3.6 Assign Services (Pty) Ltd (Applicant) and Krost Shelving & Racking (Pty) Ltd (First Respondent) ECEL1652-15.

3.7 Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others [2018] ZACC 22.

3.8 Olympic Print (Pty)Ltd and 1 Other 'Olympic' GAJB24662-18.

3.9 GIWUSA obo X Mgedezi, Z Mndawo and T Nogenge and Swissport SA (Pty) Ltd and Workforce Group (Pty) Ltd WECT 18795-18.

3.10 ITU obo Kekana, Carol and 2 Others // Amrod Corporate gifts & Clothing & Assign Services CCMA award 11 March 2022 GAJB17283-19.

3.11 AMITU obo Dube, Sipho and 90 others and Snackworks and Adcorp Blu KNDB16842-18.

3.12 *AMITU obo Mnguni, Victoria and 39 others and Capacity Outsourcing and 1 other* KNDB11394-17.

3.13 *Letjeka Virginia Makaepeya and 137 others and National Brands Limited and Transman (Pty) Ltd* GAEK7719-18.

3.14 Uchimushawu Nkosana Ackerman Lupindo and 91 others v Ferrero SA (Pty) Ltd and Adcorp Blu GAVL4153-18.

3.15 SACWU obo Skemjana & Others v Allied Printing and Transman GAJB 23063-16.

3.16 *Premnath Rampersad and Adcorp Blu & National Brands Ltd* KNDB 6257-21.

3.17 Adcorp Workforce Solutions (Pty) Ltd v CCMA and others (2021) 30 LC 1.13.24.

3.18 David Victor and 200 others v Chep South Africa (Pty) Ltd and others JA 55/2019 (16 September 2020) (LAC).

4 Literature

4.1 Books

4.1.1 A Van Niekerk, N Smit, MA Christianson et al *Law@work* 5ed (2019).

4.1.3 Darcy Du Toit, Shane Godfrey, Carole Cooper et al '*Labour Relations Law, A Comprehensive Guide*' 6 ed (2015).

4.2 Dissertation

4.2.1 Candice Joy Aletter' *Protection of Agency Workers in South Africa: An Appraisal of Compliance with ILO and EU Norms*' (University OF Pretoria 2016).

4.3 Thesis

4.3.1 Dennis Moeketsi Matlou '*Has the labour relations act 66 of 1995 achieved its purpose of advancing economic development and social justice*?: a critical assessment (University of Pretoria 2018).

4.3.2 Yonela Ciliwe '*An evaluation of the amended Temporary Employment Service Provisions in the South African Labour Relations Act*' (unpublished, University of Western Cape 2016). available at *http://etd.uwc.ac.za* accessed 08 July 2022.

4.3 Articles

4.2.1 Botes, A. '*A Comparative Study on the Regulation of Labour Brokers in South Africa and Namibia in Light of Recent Legislative Developments* ' (2015) SALJ vol. 132.

4.2.2 Jan Theron '*Decent Work and the Crisis of Labour Law in South Africa'* (2014) 35 ILJ 1829.

4.2.3 Schoeman C, & Blaauw P.F. '*The flourishing nature of labour brokerage in South Africa: An investigation into the role of employment and performance uncertainty'* (2016) JEF 9(1) 137.

4.2.4 Candice Aletter; Stefan Van Eck, "*Employment Agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisation's Standards*," (2016) SAMLJ 28(2) 285.

4.2.5 Forere, M.' *From Exclusion to Labour Security: To What Extent Does Section 198 of the Labour Relations Amendment Act of 2014 Strike Balance between Employers and Employees'*. (2016) SAMLJ 28(3), 375.

5 Internet Sources

5.1 Zwelinzima Vavi '13 reasons why labour brokers must be banned – Vavi' available at *https://www.politicsweb.co.za* accessed on 4 January 2022.

5.2 Deloitte Article 'Labour broking and outsourcing' available at https://www2.deloitte.com/ accessed on 9 April 2022.

5.3 Decent work and non-standard employees: Options for legislative reform in South Africa – A discussion document *http://us- cdn.creamermedia.co.z*a accessed on 4 January 2022.

5.4 CCMA Strategic Plan 2015–2016 -*https://www.ccma.org.za/* assessed 15 April 2022.

5.5 Mpfariseni Budeli **'**Workers' right to freedom of association and trade unionism in South Africa: an historical perspective*'* available at *https://uir.unisa.ac.za* accessed 15 April 2022.

5.6 Benjamin "South African Labour Law: A Twenty-Year Assessment" 2016, available at *www.cth.co.za a*ccessed 15 April 2022.

5.7 Debbie Budlender, Private employment agencies in South Africa International Labour Office, Sectoral Activities Department.- Geneva: ILO, 2013 available at *https://www.ilo.org* accessed 26 March 2022.

5.8 Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010 available at *https://cisp.cachefly.net* accessed 01 April 2022.

5.9 ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022, available at https://www.ilo.org/ accessed 27 June 2022.

5.10 Employment and Decent work' European Commission article available at *https://ec.europa.e*u accessed 2 July 2022.

5.11 Non-standard forms of employment - Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment (Geneva, 16–19 February 2015) available at *https://www.ilo.org* accessed 03 July 2022.

5.12 The Struggle against Apartheid: Lessons for Today's World available at *https://www.un.org* accessed 8 July 2022.

5.13 Yonela Ciliwe 'An evaluation of the amended Temporary Employment Service Provisions in the South African Labour Relations Act' available at http://etd.uwc.ac.za accessed 08 July 2022.

5.14 NA Cassim 'The Labour Relations Amendment Act 2 of 1983' available at *https://journals.co.za* accessed 08 July 2022.

5.15 ADCORP 2010 Employment Index Report- available at https://www.adcorpgroup.com accessed 050422.

5.16 Regulation of 'non- standard' or 'a-typical employment' – South Africa available at *https://www.linkedin.com* accessed on 4 January 2022.

5.17 CCMA ruling on the interpretation of the deeming provision in section 198a of the labour relations act' available at *https://www.cliffedekkerhofmeyr.com* accessed 17 March 2022.

5.18 'Interpretation 'Deeming Provision' Labour Relations Act' available at *https://dev.labourguide.co.za* accessed 26 January 2022.

5.19 'Just because you are deemed to be an employee does not mean you need to be employed by the client of the Labour Broker '- The next case in the Labour Broker debate' available at *https://www.fasken.com* accessed 15 Sept 2022.

5.20 Rowan Burger 'On contract, can I join a provident fund?' available at https:*//www.news24.com* accessed 11October 2022.

5.21 Employment Law 'From Recognition to Strike' available at *https://www.cliffedekkerhofmeyr.com* accessed 26052021.

5.22 Adcorp Integrated annual report 2021- available at *https://www.adcorpgroup.com* assessed 05 April 2022.

5.23 'Without Prejudice Employment Law Feature' Nov 2020 *https://0-journals-co-za.innopac.wits.ac.za* accessed 26 October 2022 at 26 accessed 27 October 2022.