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Labour brokers under section 198 of the Labour Relations Act after *Assign Services v NUMSA 2018 (5) SA 323 (CC)*

by

862261

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: 1 October 2024

DECLARATION

I, 862261(Student number), declare that this Research Report is my own unaided work. It is 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. 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.

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ABSTRACT

This research will focus on Temporary Employment Services ("TES") in South Africa, more commonly known as labour brokers and will consider the 2014 related amendments in legislation and the case of *Assign Services v NUMSA 2018 (5) SA 323 (CC)* which arose and set the precedent for the future of labour brokers in South Africa. The Labour Relations Amendment Act 6 of 2014 ("LRA") and the Basic Conditions of Employment Amendment Act 20 of 2013 ("BCEAA") were both passed into law and will have an effect on the TES relationship within South Africa. Trade unions and many civil society organisations have called for the banning of TES in South Africa. The South African government, rather than banning them, decided to amend the existing laws regarding TES in order to regulate them further and provide employees with more job security.

This research report will focus on the regulation of TES in South Africa, the nature and implications of the LRA on TES in South Africa after the *Assign Services v NUMSA* case. The research report will offer conclusions on the impact of the amendments and thoughts on improvements for the future.

In terms of the LRA and Sections which regulate TES employment as well as the *Assign Services v NUMSA* case, this research will consider what affect the amendments and case had on the TES relationship. It will identify problems that were associated with the case and how the case impacted on TES within South Africa as well as discuss any gaps in the legislation that can be identified and how to possibly address these issues in conclusion.

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CHAPTER 1. INTRODUCTION TO THE RESEARCH

Current South African legislation allows the use of TES companies, more commonly known as “labour brokering” as it is set out under section 198 of the Labour Relations Act.[1] Labour brokering involves a triangular employment relationship between the labour broker, the client who utilises the labour supplied by the labour broker, and the employee[2] who is employed by the labour broker. The statutory definitions of an employee are silent on the question of whether a person who has applied for employment is an employee.[3] (For the purpose of this research report, employee and worker can be used interchangeably). In the matter of *Wyeth SA (Pty) v Manqele and Others*[4] the argument was raised in court that the term 'works for another person' is cast in the present tense in the definition of 'employee' and that an applicant becomes an employee only when they actually begin working for the employer.[5]

As an application of an employee for TES the Court in the matter of *Crown Chickens (Pty) Ltd* t/a *Rocklands Poultry v Rieck*[6] read in conjunction with COIDA[7] confirmed

1 66 of 1995.

2 s213 of The Labour Relations Act 66 of 1995 defines an employee as “(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration”.

3 Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law @ Work* (2015) 62. See also Le Roux ‘The Employment Equity Bill: An Update’ (1998) CLL (7) 91.

4 *Wyeth SA (Pty) v Manqele and Others* [2005] 6 BLLR 523 (LAC).

5 See also *Herbst v Elmar Motors* (1999) 20 ILJ 2465 (CCMA) at 2468J - 2469J and *Whitehead v Woolworths* (Pty) Ltd [1999] 8 BLLR 862 (LC) where it was held that an applicant only becomes an employee when he or she actually starts working at the employer.

6 *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* (2007) 28 ILJ 307 (SCA).

7 s1 of the Compensation for Occupational Injuries and Diseases Act 61 of 1997 defines an employee as "a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing and weather the remuneration is calculated by time or work done, or is in cash or kind."

that the definition of an 'employer' includes a labour broker who, against payment, provides a person to a client for the rendering of a service and for which work or services such person is paid, by the labour broker.

In terms of this arrangement the labour broker would employ an employee and supply this employee to a client, who then supervises and controls the employee. Even though the client supervises and controls the employee, the labour broker remains the employer and is responsible for paying the employee. This is commonly referred to as a non-standard working relationship[8]. To avoid the costs commonly associated with employment,[9] the work can be contracted out and the use of TES workers can occur.[10]

Prior to the 2014 amendments to the LRA, the use of labour brokers in South Africa had increased exponentially because it provided employers with an opportunity to circumvent the exceptionally regulated provisions of constitutional, foreign, and statutory law; including that of the LRA, which seeks to protect workers.[11] The new amendments seek to address the abuse by labour brokers and to protect the most vulnerable workers in society which are those employees earning under the threshold as contained in the Basic Conditions of Employment Act.[12] ("BCEA"). The threshold amount is currently set at R241 110.59 per annum.[13]

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8 Oliver 'Extending Labour and Social Security Protection: The Predicament of the Atypically Employed" (1998) 18 *ILJ* 845. See also Fourie ES "Non-Standard Workers: The South African Context, International Law and Regulation by the European' (2008) 11 PER/PELJ 110.

9 In terms of statutes such as the Unemployment Insurance Act 63 of 2001 and the Compensation for Occupational Injuries and Diseases Act 61 of 1997 and any benefits that may accrue to the employees in terms of a collective agreement.

10 Hutcheson and Le Roux 'TES and the Labour Relations Act' (2000) 9:6 CLL 51. See also KO Odeku 'Labour brokering in South Africa: Issues, Challenges and Prospects' (2015) *J SocSci*, 43(1): 19-24 20. E Gericke 'Temporary Employment Services: Closing a loophole in Section 198 of the Labour Relations Act 66 of 1995' 99.

11 Hendrik Brand The legal framework for the protection of employees of brokers in South Africa (unpublished LLM thesis, University of Cape Town 2010) 1.

12 75 of 1997.

13 S6(3) of the Basic Conditions of Employment Act 75 of 1997 as amended.

The LRA stipulate that employees are “deemed” to be employees of the client after a period of three months of being placed under the supervision and control of the client and are to receive the same benefits as employees that are currently fully or permanently employed under contract by the client. Section 189A introduces additional protection and mechanisms for TES employees and provides that a TES employee who earns below the threshold will be “deemed” to be the employee of the client for the purposes of the LRA only.[14] A TES employee will only be engaged in TES services in the following circumstances

> ‘(a) if the period of service does not exceed three months; (b) the work is performed as a substitute for an employee who is temporarily absent; or (c) the work falls into a category or is conducted over a period deemed to be a temporary service, a bargaining council agreement or sectoral determination.’

The inclusion of this provision and the subsequent case law that followed was introduced to ensure that TES employees were not subject to discrimination and abuse in terms of less favourable terms and conditions of employment than other permanent employees who were employed by the client who utilised the services of TES employees. The LRA under Section 198A aims to address the imbalance of power between employees and the labour brokers and thereby work towards creating a harmonious business relationship in which all parties profit whilst retaining the perceived benefits of a TES company.[15]

In terms of the 2014 amendments to the LRA, the labour brokering industry in South Africa suffered a significant decline and thousands of workers lost their jobs as a result of the “deeming” provision of the amended legislation[16] This is due mainly by the

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14 Zola Mcaciso Did the Constitutional Court decision in Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa (unpublished LLM thesis, University of Cape Town, 2020) 29.

15 Explanatory Memorandum of the 2014 LRA Amendments.

16 Theto Mahlakoana ‘Change in labour broker law hits workers’ Business Report 8 April 2015

reluctance of clients to make use of labour brokers while still carrying the risks and liabilities of being a primary employer. Whilst political parties prefer a regulatory solution, believing this will stop the abuse of workers employed by labour brokers, the Congress of South African Trade Unions ('COSATU') and other unions maintain their call for a complete ban of labour brokering.[17]

Due to labour being so highly regulated within South Africa, alternative options have been made available.[18] TES stem from the business need to employ at a minimal cost to company in order to maintain high efficiency and productivity within the business and remove the need for the company to be concerned with the administration associated with employing the labour themselves. These challenges are exacerbated by high unemployment rates, which encourage those who are unemployed to seek any employment.[19]

This is a major contributing factor to workers having little choice but to be employed and put to work by labour brokers. The changes to the LRA which came about in 2014 sought to protect TES employees employed under section 198. The intention of the amendments was to provide greater regulation in order to ensure job security for vulnerable workers who are employed by the labour brokers; however, the regulations fell short both in intention and in practical implication.

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available at *https://www.iol.co.za/business-report/economy/change-in-labour-broker-law-hits-workers-1841959*, accessed on 26 September 2023.

17 Congress of South African Trade Unions (COSATU) 'COSATU maintains the call for a complete ban on labour brokers and responds to other submissions on the Labour Law Amendment Bills' 2012 available at *http://www.cosatu.org.za/show.php?ID=6400*, accessed on 26 September 2023.

18 P Benjamin, 'Bend debate around labour flexibility back to the facts' Business Day 2010 available at *http://www.businessday.co.za/articles/Content.aspx?id=74361*, accessed on 28 May 2023.

19 Statistics South Africa 'Unemployment Rate' 2017 - 2018 available at *http://www.statssa.gov.za/?s=unemployment+rate&sitem=content*, accessed on 11 May 2023.

The purpose of this research report is to firstly consider what the current position of TES companies in South Africa are, and further what effects the deeding provision had after the Assigned Services case on the TES relationship. Secondly, a critical analysis will be undertaken of the current position of labour brokers in South Africa and whether the system can be improved to create labour harmony in the workplace.

Finally, this research report critiques the amendments and suggests ways in which they may be further amended or supplemented in order to effectively benefit all parties in the TES relationship. Essentially this will consist of proposing deviations from the current regulations by providing practical legal solutions that are designed for the protection of labour broker employees in South Africa, whilst still maintaining a balance between labour broker employees' needs for protection and employers' needs for labour market flexibility.

CHAPTER 2. LABOUR BROKERS IN SOUTH AFRICA

2.1. Introduction

TES companies have been utilised in South Africa since the 1950s and they are regulated primarily in terms of section 198 of the LRA.[20] The amendments to the LRA were somewhat vague, and on the whole, have not made significant changes in regulating TES companies considering their triangular nature and the complexity of their construction.[21] The amendments failed to adequately address all the issues relating to the employment relationship with labour brokers. These changes are still being tested by the courts and other bodies, such as the Commission for Conciliation, Mediation and Arbitration ("CCMA"). Labour brokers are subject to the same labour laws as any other business, and the amendments to numerous pieces of legislation, including the LRA, have impacted on how labour brokers operate in South Africa.[22]

This chapter will firstly consider what sources of law regulate the current position of TES companies in South Africa, and what effects the LRA has had on the TES companies' relationship.

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20 A Botes 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers' (2014) 26 *Samerc LJ* 110 at 111.

21 See also John Grogan, 'Corporate employees: Unmaking the bed' (2005) 21(6) Employment Law 9 at 16; Tamara Cohen 'Placing substance over form — Identifying the true parties to an employment relationship' (2008) 29 ILJ 863 at 872; Nicola Smit & Elmarie Fourie 'Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries' (2009) 3 TSAR 516 at 530; Ezette Gericke 'Temporary employment services: Closing a loophole in section 198 of the Labour Relations Act 66 of 1995' (2010) 31 Obiter 92 at 99; *NEHAWU obo Pienaar v Nursing Services of SA* (1998) 19 ILJ 188 (CCMA) 193.

22 P. Benjamin, 'Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document' (2010) 31 ILJ 845.

Secondly, a critical analysis will be undertaken of the current position of labour brokers in South Africa and whether the system can be improved to create labour harmony in the workplace by understanding the impact the recent changes to the legislation have had on the regulation of labour brokers in South Africa.

The basic sources of labour relations law in South Africa is the Constitution of the Republic of South Africa ("the Constitution"),[23] international law, legislation, and common law. Labour legislation is enacted to give substance to the constitutional guarantee of fair labour practices.[24]

The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.[25] This provision is to ensure that workers are protected under any Act that is applicable to them and should any law be inconsistent with it then it will be invalid. As in the case with labour brokering, it is often seen as an abuse of the workers, which in the recent amendments has been addressed and will be discussed below in more detail. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. The Bill of Rights sets out the fundamental rights of all South Africans and is contained under Chapter 2 of the Constitution and lays out fundamental human rights which include section 23, providing that:

> '(1) Everybody has the right to fair labour practices.[26]

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23 of 1996.

24 Du Toit, Cooper, Cohen, Conradie and Steenkamp *Labour Relations Law A Comprehensive Guide* (2015) 73.

25 s 2 and 172(1) of the Constitution.

26 The Constitutional Court held in *NEHAWU v University of Cape Town & Others* 2003 (2) *BCLR* 154 at paragraph 42 that the right to fair labour practices encompasses security of employment: specifically the right to not be unfairly dismissed. Employment security is extensively regulated in the Labour Relations Act, which provides under section 185 that every employee has the right not to be unfairly dismissed.

(2) Every worker has the right –

(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union and
(c) to strike.

(3) Every employer has the right –

(a) to form and join an employer's organisation and
(b) to participate in the activities and programmes of an employer organisation.'

The LRA and BCEA are designed to give effect to the rights contained in section 23 of the Constitution.[27] These statutes are to be interpreted in compliance with the Constitution.[28] All labour legislation is thus subject to constitutional oversight to ensure that the rights of both the employee and the employer are protected.[29] The rights set out in section 23 provide a primary framework within which labour legislation must be interpreted.[30] In *NEHAWU v UCT*[31] the Constitutional Court held that the LRA gives effect to section 23 of the LRA and in doing so must be applied consistently and therefore the interpretation of the LRA will be a constitutional issue.[32]

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27 n 24 above 74.

28 s 3(b) of the Labour Relations Act and s 2(a) of the Basic Conditions of Employment Act.

29 In Certification of the Constitution of the RSA, 1996 1996 (10) *BCLR* 1253 (CC). See also Section 210 of the LRA which provides that "*If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail."* See also *Booysen v SAPS and Another* [2008] 10 BLLR 928 LC at para 37 and 38 where it was stated that "*The right to fair labour practices is given effect to by the LRA and other labour legalisation"* and see also *SANDU v Minister of Defence & Others* [2007] 9 BLLR 785 (CC).

30 n 24 above 75.

31 *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (NEHAWU v UCT).

32 Para 14.

What the interpretation from the courts means is that in this way, the courts and the Legislature act in partnership to give life to constitutional rights. Accordingly, it is clear that labour practices must apply fairly to everyone in the employment relationship and the result of the deeming provision into the LRA ensures that the rights of employees under the Constitution to fair labour practices will ensure that the exploitation of TES employees by labour brokers is stopped.

The entrenchment of labour rights has led to the development of constitutional jurisprudence by the civil courts and the Constitutional Court that has far reaching consequences for the way that the contract of employment and the employment relationship, such as the TES companies' relationship, is approached in the future, given the interpretation of section 23 of the Constitution.[33] The amendment of Section 21 of the LRA is an example of this and which amendment allows unions to now obtain organisational rights in terms of union membership from either the client of the TES or the TES depending on where that worker is located. Before the amendment, unions struggled to get membership in terms of TES employees as they did not provide a service to the "employer" and would be in the move constantly which means that they did not have a single workplace.[34]

2.2. Labour Brokers in South Africa

The LRA and guiding legislation such as the BCEA and EEA have had the effect of significantly varying the laws which govern the TES companies' relationship, and this chapter will focus on what these particular amendments are and the impact in relation to the TES companies' relationship. TES companies' relationships will exist between the TES Company and the client, and the client will remunerate the labour broker who in turn will pay a salary to the employee.

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33 Grogan *Workplace Law* (2014) 6.

34 A Botes (2014) South African Mercantile Law Journal 116.

A tripartite relationship is usually created between the TES Company and the client, the TES Company and the employee, and the client and the TES Company's employee.[35]

Section 198 of the Labour Relations Act defines a labour broker thus:

> '(1) In this section, "temporary employment services" means 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.
>
> (2) For the purposes of *this Act,* a person whose services have been procured for or provided to a client by a temporary employment service is the *employee* of that temporary employment service, and the temporary employment service is that persons employer.'

South African labour makes extensive use of labour brokers within the economy. It is often found that businesses utilise labour brokers since it is more cost effective.[36] More often than not, it is the view of businesses that temporary employees are regarded as being more productive than permanent workers.[37]

Valodia is of the view that casual workers who do not have permanent employment contracts and are hired when labour is needed through the services of a TES companies are often more productive because they wish to become permanently

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35 Desire Mostert *The Constitutionality of the contracts of labour brokers in South Africa* (unpublished LLM thesis, North West University 2011).

36 See also Kennelly *An analysis of the labour brokering industry of South Africa* (unpublished LLM research report, University of Cape Town 2000) 8, 29 – 30.

37 Mmanoko Mathekga T*he political economy of labour market flexibility in South Africa* (unpublished LLM thesis, Stellenbosch University 2009) 54.

employed.[38] It could be argued that human nature leads one to believe that hard work and dedication do not go unnoticed; many employees believe that their hard work may set them apart and lead to the possibility of permanent employment, which labour brokers are known to exploit.

2.3. The legislative framework in South Africa governing labour brokers under the LRA

Labour legislation is necessary in all countries around the world since it is vital for the regulation of sound employee and employer relationships. In South Africa labour legislation is derived from several Acts such as the LRA, the BCEA, the Employment Equity Act ("EEA") and the Employment Services Act.[39] ("ESA") These Acts govern the framework within which the employer and employee relationship is built and maintained.

The LRA, sets out the laws which govern labour in South Africa. It is read in conjunction with the Constitution and the BCEA, and ensures social justice by establishing the duties of employers and employees.

3.1 The Labour Relations Act

The LRA governs labour related issues, and its primary objectives are to advance economic development, social justice, labour peace, and the democratisation of the workplace.[40] The LRA also takes into account fundamental rights conferred by section 27 of the Constitution and seeks to protect and uphold these rights.[41]

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38 Valodia "Increase in casual and temporary labour: The case of shopworkers" 2001 *SALB* 15(7) 48-50.

39 4 of 2014.

40 s1 of the Labour Relations Act.

41 s 27, which is in the Chapter on Fundamental Rights in the Constitution entrenches the following rights: (1) Every person shall have the right to fair labour practices and (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form

It can be argued that the LRA is a critical piece of legislation regulating and governing labour relations in South Africa. It is through the LRA, read in conjunction with the Constitution and various other Acts and common law, that labour relations in South Africa is regulated. With the most recent amendment, employers and employees wish to see that the LRA is capable of striking a balance between the employer's need for flexibility and the employee's need not to be treated as a commodity.[42] Parties wish to advance economic development, social justice and promote equal rights for all employees which the 2014 amendments to the LRA seek to address.

Legislative changes that govern the labour brokering relationship have been brought about in order to attempt to stem the tide of abuse by labour brokers and protect workers and which are discussed in more detail below. For instance, amendments to the LRA in 2024 which now allow employees to exercise organisational rights, as well as the 'deeming' provision which now change the employment status of a worker placed at a client of the TES company. Joint and severable liability has improved working conditions as an employee can now cite both the client and the TES company in an unfair dismissal claim.

Trade unions have argued that an employee's job security and rights are severely compromised by the current TES company's relationship, which has been compared to modern day slavery.[43] Any amendments that benefit the industry are welcome but not to the degree of over regulation which could stifle growth. The contention of addressing labour brokers in South African legislation has not been adequate enough to provide protection for employees who are provide non-standardised employment[44]

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and join employers' organisations.

42 Evju 'Labour is Not a Commodity: A Reappraisal' Working Papers in Labour Law 2012 (6), Institutt for privatrett Detjuridiskefakultet 3.

43 Congress of South African Trade Unions available at *http://www.cosatu.org.za/show.php?ID=6311*, accessed on 15 August 2023.

44 The International Labour Organisation defines as "Non-standard forms of employment" is an umbrella term for different employment arrangements that deviate from standard employment. They include temporary employment; part-time and on-call work; temporary agency work and

through the use of labour brokers.[45] South African labour legislation was, prior to the 2014 amendments, not adequate enough to provide enough protection for employees in TES company work relationships.[46]

It can therefore be said that the LRA set out to effectively address certain problems and abusive practices associated with temporary employment services.[47] The Labour Court has held that section 198 and contracts that enforce labour brokering arrangements must be strictly interpreted so as to protect the employment security of vulnerable workers.[48] This was expressly confirmed in *Kylie v CCMA*[49] whereby the Court confirmed that the main object of the constitutional right and the legislation giving effect to that right is to structure employment in a manner that counteracts the inequality of bargaining power that is inherent in the employment relationship.[50]

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other multiparty employment relationships; as well as disguised employment and dependent self-employment available at *http://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm*, accessed on 21 October 2023.

45 Tawanda Masimbe 'Protection v Flexibility: A critical analysis of the new labour brokering provisions introduced by the 2014 amendments to the Labour Relations Act 66 of 1995' (unpublished thesis University of Cape Town 2016) 61.

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 *SALJ* 100 at 101.

47 n 15 above 99.

48 *Dyokhwe v De Kock NO* [2012] 10 BLLR 1012 (LC).

49 *Kylie v CCMA* [2010] 4 SA 383 (LAC). This was also confirmed in the case of *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others* (2008) (2) SA 24 (CC).

50 Para 53.

CHAPTER 3. THE DEEMING PROVISION AND ASSIGN SERVICES V NUMSA CONSTITUTIONAL COURT CASE

The legal debate surrounding once of the most contentious section of the LRA being Section 198A and phrased as “the deeming provision” was eventually settled by the Constitutional Court in the matter of *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22. The majority view in the case ruled that the sole employment interpretation is the way and the correct interpretation of the law and which interpretation is said to be in line with the deeming provision. Despite the majority decision, there was a minority view that interpreted the deeming provision differently and favoured a dual employment interpretation.

3.1 The deeming provision

Section 198A(3)(b)(i) of the LRA introduced by the 2014 amendment is one of the most highly contested provisions of the amendments and deals with what is commonly known as the “deeming provision”. Section 198A(3) of the Labour Relations Act provides that:

> ‘For the purpose of this Act, an employee –
>
> (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the TES in terms of section 198(2); or
>
> (b) not performing such temporary service for the client is –
>
> (i) deemed to be the employee of that client and the client is deemed to be the employer; and
> (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.’

The amendment dealing with what is known as the “deeming provision” has raised much litigation in the courts and created many issues and uncertainty within the Temporary Employment Services’ environment and is the subject of much debate.

The deeming provision is a controversial provision in terms of which the client of a labour broker is “deemed” to be the employer of a TES employee assigned to the client, by a labour broker, for a period of more than three months. This deeming provision, which is only applicable to employees under the earnings threshold, has been interpreted in two ways; either to support the creation of a dual employment relationship, with both the labour broker and the client as employers, or to support the creation of a sole employment relationship, with only the client deemed to be the employer. The controversy around this section develops when parties consider the different interpretations that can be given to its application.[51]

The most contested amendment of the “deeming” provision of the LRA is section 198A(3) which states that:

> ‘For the purposes of *this Act,* an employee -
>
> (a) performing a temporary service as contemplated in subsection (1) for the client is the *employee* of the TES in terms of section 198 (2); or
>
> (b) not performing such temporary service for the client is -
>
> (i) deemed to be the *employee* of that client and the client is deemed to be the employer; and
>
> (ii) subject to the provisions of section 198B'

In *Denel (Pty) Ltd v Gerber,*[52] Zondo JP held, when deciding whether an employee is

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51 n 33 above 69.

52 *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

employed by a TES or the client, that:

> 'When a court or other tribunal is called upon to decide whether a person is another's employee or not, it is enjoined to determine the true and real position. Accordingly, it ought not to decide such a matter exclusively on the basis of what the parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not to reflect the true position.'[53]

In my view the above *dictum* confirms that the test is qualitative, used to gain an understanding of underlying reasons, opinions and motivations and helps to provide insights into the problems, rather than quantitative, which is used to quantify the problem by way of data which can transformed into usable statistics. Even if there is a specific set of indicators that the court has to consider, the nature of the relationship cannot be determined by simply comparing the number of indicators for and against each other against the existence of who the employer is. It stands to reason that the courts will have to look deeper into the underlying contracts and not just rely on the "deeming" provision as an automatic transfer of employment.

This difficult relationship between the employer, employee, and the client was placed under the spotlight and the two opposing viewpoints were tested in the case of *Assign Services (Pty) Ltd v CCMA & others.*[54] Brassey AJ stated that:

> 'Beneath these examples is a deeper conundrum. A contract of employment is one in which one person (the employee) subjects his or her productive capacity to the behests of another (the employer).

Assign's version had contended that the deeming provision simply meant that the placed workers remained employees of Assign for all purposes, and for the purposes of the LRA are also deemed to be employees of the client for the purposes of the dual employment interpretation.

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53 Para 19.

54 [2015] 11 BLLR 1160 (LC).

3.2 The CCMA

In the CCMA the Commissioner had to deal with the questions before him dealing with Section 198A(3)(b)(i) of the LRA to determine if a worker who was placed and working at the client for a period exceeding three months becomes an employee of the client and the client becomes the sole employer. Assign expressed the view that supported the dual employment relationship which indicated that both the client and the TES are the employers, whilst NUMSA argued for the sole employment approach and supported the view that the client must be considered the sole employer. The CCMA Commissioner ruled in favour of NUMSA and supported the view that after the three-month period has elapsed, the employee is deemed to be an employee of the client thereby agreeing with the sole employment approach.

3.3 The Labour Court

Assign took the matter on review to the Labour Court and in the matter before the labour court on review, Basson AJ supported the dual employer interpretation of Assign and that nothing in the deeming provision invalidated the contract of employment between the TES company and the placed workers. In effect what had happened was that the TES company had acquired a dual set of rights and obligations which were parallel.[55]

In terms of the LRA and legislation governing TES companies and the “deeming” provision, it seems that in the first three months, the TES is the sole employer, but the employee may sue the TES and its client, or both, for infringements of the BCEA, applicable collective agreements, or arbitration awards dealing with terms and conditions of employment or sectoral determinations (section 198(4)). However, the TES company is solely liable for infringements of other labour legislation, including the LRA. The same applies with deemed employees (section 198(4A)).

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[55] Para 17.

This may mean that the placed employees are not deemed employed by the client for purposes of other Acts and regulations promulgated such as dismissals, unfair labour practices, the interpretation of collective agreements, organisational rights, strikes, and lockouts which are all regulated by the LRA.

The Labour Court subsequently ruled in favour of Assign Services and confirmed in its ruling by dismissing the arbitration award from the CCMA Commissioner which had confirmed that section 198A(3)(b)(i) created a sole employment relationship and held that the deeming provision in the legislation did not terminate any dual employment relationship between the parties and the TES. The Court further concluded that the deeming provision still created a relationship between the employees and the TES which was regulated under common law and the other was between the client and the LRA.[56] This essentially means that the client who was Krost and Assign Services who was the TES had both obtained obligations towards the employees thereby creating a dual employment relationship.

3.4 **Labour Appeal Court**

The matter was taken on appeal and in *Assign Services (Pty) Ltd v CCMA*[57] the labour appeal court on a full bench set aside the judgment of the labour court and confirmed the view that the client becomes the sole employer of an employee assigned to the client by a labour broker for more than three months.[58] This judgment is of critical importance to all businesses making use of labour brokers and could change the way in which the industry operates in future in South Africa.

In the CCMA at the first sitting of this matter before litigation commenced in the courts, the commissioner held in favour of the sole employment interpretation, whilst the labour court, on review, held in favour of the dual employment interpretation.

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56 Mandlakhe Khawula How do the 2015 LRA amendments impact on widespread practice in relation to TES Employees (unpublished LLM thesis, University of Kwazulu Natal, 2019) 28.

57 [2017] ZALAC 44.

58 Para 46.

On appeal, the labour appeal court's submissions can be concluded that the Labour Appeal Court dismissed the findings of the Labour Court and ruled that the client was the sole employer of the employees after three months in terms of Section 198A(3)(b)(i). The Court summarised and ruled in favour of NUMSA that after the three-month period, the workers became the employees of the client and not the TES. This decision by the Labour Appeal Court reinforced the concept and interpretation of the sole employer approach, meaning that after the three months period, the employees' rights and obligations would become that of the client company and now the employer and not the TES company.

It can be argued that the reason for the inclusion of the deeming provision was implemented due to the constant abuses committed by labour brokers on their employees. The result of this provision is that it seeks to impose a penalty by deeming the client of the labour broker to be the employer of the employee after a period of three months for the purposes of the LRA.[59]

Due to the extent of the wording of the provision, and the result of the employees deemed to be employees of the client and not the labour brokers, all parties including trade unions, employers and employees, are more anxious to obtain certainty on its application and clarity on the understanding of its implementation.

3.5 **The Constitutional Court**

The matter was then referred to the Constitutional Court and in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*[60] the majority judgement confirmed that the language used by the Legislature in section 198(3)(b) of the LRA is plain and when interpreted in context, it supports the sole employer interpretation.

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59 n 14 above 69.

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

The Court further confirmed that the language is in line with the purposes of the 2014 amendments, the primary object of the LRA and the right to fair labour practices in section 23 of the Constitution.

The preliminary view of the judgment is one that gives more clarity than the Labour Appeal Court judgment and expands upon issues that were not dealt with in that judgment. This judgment of the Constitutional Court is about the limited interpretation of whether there are two employers or one. It also does not deal with whether employees are permanent or not after three months as this would be determined by the type of contract. For the labour brokering industry the critical paragraph in the judgment is paragraph 75 which reads:

> 'Section 198(2) gives rise to a statutory employment contract between the TES and the placed worker, which is altered in the event that section 198A(3)(b) is triggered. This is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship. The triangular relationship then continues for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers.'

The judgment clearly indicates that the TES and client relationship continues beyond three months, and that for legitimate TES providers where the provisions of the LRA amendments have already been implemented, the judgment does not affect their ability to operate at law. Further clarity is gained from paragraph 61 that implies that employees could have a claim on both the TES and the client.[61]

In terms of the wording of the legislation the term "deemed" is the cause of the majority of the debate and what many labour brokers contest such as whether or not it means that the labour broker is no longer considered to be the employer.

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61 Para 61.

The Constitutional Court has provided that the client of the Temporary Employment Service provider becomes the sole employer of the TES employees in the event that the employees earn below the earnings threshold in the BCEA and after the provision of services to the client in excess of three months. The Constitutional Court further held that the sole employer interpretation of the deeming provision is the correct interpretation. This interpretation ensures that the provision of temporary services is in fact temporary.[62]

The judgement does not seek to ban labour brokers but rather it retains the triangular relationship that exists between the Temporary Employment Service, the employee and the client. This relationship continues for as long as the commercial contract exists. What does change is the sphere of responsibility within the employment relationship. Once the contractual relationship comes to an end between the client and the Temporary Employment Service provider, the client remains the employer of the employees.

Labour brokers have supported and endorsed the view that the employee does not become an employee of the client and that the labour broker still remains the employer.[63] On the opposite side of the fence, the trade unions have supported the view that the employee becomes an employee of the client and there is a sole employment relationship.[64] It can be argued that the above *dictum* supports the strict interpretation of the law. The unions will support the court's view that the employee is deemed to be an employee of the client and the labour brokers will thus lose an employee, negating the effectiveness of the labour brokering model.

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62 Cliffe Dekker Hofmeyer "Temporary Employment Services Guideline" available at *Employment-Law-Temporary-Employment-Services-Guideline.pdf (cliffedekkerhofmeyr.com),* accessed on 29 September 2024.

63 n 10 above 70.

64 Haralambous (2015) *Without Prejudice* 40.

Benjamin[65] is of the view that section 198(A) of the LRA performs an important function in that it provides additional protection to workers who are paid less by TES companies and labour brokers.[66] Benjamin is of the opinion that section 198A(3)(b) of the recent LRA amendments has been brought about to replace section 198(2) of the LRA Act before the amendments that deems the TES companies or labour broker to be the employer.[67] Benjamin's argument is that section 198A(3)(b) has been put in place to operate where section 198(2) of the previous LRA did not, and it is therefore reasoned by Benjamin that there exists no situation where the two sections operate at the same time and therefore duel employment is confirmed[68] Given the Constitutional Courts interpretation of the section

I believe that there will still be many disputes in the future due to the interpretation of the amendments to the LRA. The changes and regulations of the TES in South Africa are welcome and the South African government must be applauded for taking steps to regulate this employment relationship. However, to ensure that fewer disputes are referred to the courts and to ensure that the employees of TES are protected, further amendments should be concise and clear and address the challenges raised above as opposed to rather providing a theoretical amendment which will result in numerous referrals to the Labour Court for interpretation.

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65 Benjamin 'Restructuring Triangular Employment: The interpretation of section 198A of the Labour Relations Act' (2016) *ILJ* 28.

66 Ibid 37.

67 Ibid 38.

68 Ibid 38.

3.6 The Impact of Assign Services after the Constitutional Court in terms of TES and the way forward

TES employees and normal employees who earn above the threshold will fall outside the scope of the deeming provision and are therefore not affected by this provision. Despite the deeming provision and the changes in the LRA, there is not a ban on TES and the judgement does not ban TES but seeks to ensure that the temporary services are in fact temporary in nature and that TES employees are not taken advantage of.

In terms of disciplining an employee, the question has now arisen, who is entitled to discipline an employee in light of the deeming provision? In the case of *General Industrial Workers Union of South Africa obo Hlophe/Little Green Beverages (Pty) Ltd t/a The Beverage Company and another*[69] the employee was dismissed by the TES and not the client despite the fact that the deeming provision was applicable to the employee who raised the defence that he was dismissed by the wrong employer and had to be disciplined by the client itself who was not the employer. The CCMA Commissioner agreed and confirmed the Constitutional Courts judgement of the deeming provision. It would therefore seem that once the deeming provision has been triggered, the client is required to discipline the employee even if placed by a TES.

In the case of *Khumalo & another and Adcorp Blu, a division of Workforce Solutions (Pty) Ltd & another*[70] the question arose if a TES was entitled to participate in an arbitration relating to dismissal once the deeming provision has come into effect. The CCMA Commissioner found that once Section 198A(3)(b) is triggered that the client will be the employer of the employee irrespective of the contractual relationship between the client and the TES and therefore the Commissioner ruled that the TES was not the employer and could not participate as the client was the employer. This

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69 *General Industrial Workers Union of South Africa obo Hlophe/Little Green Beverages (Pty) Ltd t/a The Beverage Company and another* (2020) 3 BALR 248 (CCMA).

70 *Khumalo & another and Adcorp Blu, a division of Workforce Solutions (Pty) Ltd & another* (2019) 40 ILJ 1910 (CCMA).

case indicates that once the deeming provision has been triggered that a TES is not the employer and that they do not have the right to participate in arbitration proceedings for a dismissal where the employee is no longer their employee. In case where the client of a TES has been deemed to be the employer, the client will then be liable to any reinstatement and consequences towards the employee unless the employee was not deemed to be an employee of the client, the TES will then be liable.

In terms of retrenchment, once the deeming provision has applied, the client will be liable for retrenchment and any retrenchments costs such as severance pay towards the employees. If the client terminates the contract with the TES prior to the deeming provision being applicable, then the TES will be liable to retrench any employees. Taking into consideration the Constitutional Courts wording on the deeming provision, it would also seem that once an employee is deemed to be an employee of the client, that any severance pay is only applicable from the date on which the employee was deemed to have been employed by the client. This may have an impact on the severance pay due to employees and clients who are now employers of TES employees need to ensure that there is a valid reason for retrenchment not just based on the deeming provision, failing which any retrenchment may be construed as an unfair dismissal.

All employees have the right to join a trade union and with the Constitutional Court confirming the single employer approach, trade unions who are seeking to establish organisational rights can now do so due to the fact that once the deeming provision applies, deemed employees will be permitted to join the trade union and engage in union activities at the workplace of the client who is now the employer of the employees. This is due to the Constitutional Court ruling confirming that the union may seek Section 21 rights in terms of the LRA at the workplace of the client or at the workplace of the TES.

One of the major impacts of the deeming provision judgment by the Constitutional Court is that an employee that is deemed to be the employee of the client and in terms of section 198A(5) must be treated on the whole no less favourable than an actual employee of the client who performs the same work unless a reason can be justified.

This means that once the employee is deemed to be an employee of the client, the client must treat the employee the same as any one of their employees and this may entitle the employee to the same minimum remuneration and benefits that are applicable to the client's employees. Some academic scholars such as Grogan are of the opinion that the labour broker may continue the relationship with the client simply for the sake of remunerating the employee.[71] The continuous existence of the TES player in the relationship with the client is not necessary in the circumstances and it was not the legislatures intention to create further costs onto the client.[72]

Conduct that amounts to avoiding the deeming provision may relate to when the TES or the client elects to terminate the services of an employee to avoid the deeming provision or when an employee elects to exercise a right in terms of the LRA and is then terminated will constitute a dismissal and in accordance with the Constitutional Courts judgement, any dismissal where the client elects to terminate the employment of the TES after the expiry of the three month deeming provision would render the client liable for an unfair dismissal dispute. This ensures that the employees have a fair option for justice for any unfair dismissal based on the deeming provision.

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71 J Grogan 'Bashing the Brokers: Does Assign spell the end of labour brokering?' (2018) 32.5 (1) *Employment Law Journal* 44.

72 Madala Zwivhuya *Standard and Non-Standard Workers: A Critical Analysis of the Regulation of Temporary Employment Services in South Africa* (unpublished LLM thesis, University of Venda, 2022) 10.

CHAPTER 4. CONCLUSION AND RECOMMENDATIONS

There is a place in South Africa for the use of regulated labour brokers and the services which they provide. This service must, however, be in compliance with the Constitution and relevant guiding labour legislation in order to protect workers employed in this relationship which is often a complicated one. The changes in the current legislation are designed to do this and achieve cohesion and protection against exploitation.

The measures introduced by the LRA seek to protect vulnerable workers against termination of their services, either by the TES company or by the client and to avoid the operation of subsection 1983(b) of the LRA. Alternatively, the services were terminated because the employee exercised a right in terms of the LRA by declaring such termination a dismissal.[73]

In addition, subsection 198(5) of the LRA protects the employee against unfair discrimination by preventing the client from treating the employee less favourably than an employee permanently employed by the client who may be performing the same or similar work. If the employee is deemed to be an employee of the client, then the client will need to justify any differentiation in treatment if any takes place.[74] The LRA does not ban the use of TES companies in the workplace, but they do regulate the TES by restricting them to genuine temporary employment arrangements in line with the purpose of the amendments to the LRA. This is to curb exploitation of vulnerable workers by employers.

The LRA amendments were incorporated to stem the abuse of vulnerable workers by unscrupulous TES employers and those who utilise them. It is contended that the changes were needed and do not overregulate the industry, and although several changes such as the infamous deeming provision are still to be tested, these changes

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73 Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others [2018] ZACC 22. Para 39.

74 Ibid Para 39.

have been welcomed. The changes may place a more regulated approach on the parties and the way in which they approach a labour brokering agreement and the handling of staff.

The changes should be welcomed by both workers and employers as the changes were brought to protect the vulnerable and often abused workers in the triangular agreement of labour brokering. Workers previously lacked the means by which to ventilate disputes. The relationship also created much confusion as to who the actual employer of the employee was, although this is often still the case with the recent amendments.

With these amendments now being tested in the courts, it is difficult to foresee how they may be beneficial to both the TES companies and its employees. The "deeming" provision is still not clear, and this leaves both the TES companies and their clients in the dark, and that further amendments to this section may be necessary in the future.

The Constitutional Courts decision in *Assign Services v NUMSA* has resulted in the Court interpreting the provision of the so-called deeming provision to mean that once a three-month period has passed, the client in the TES relationship becomes the sole employer and TES provider falls away. The Constitutional Court has concluded and determined that it is in favour of the sole employment approach.[75] As a result of this approach, the court was of the view that it would serve no purpose to keep the TES provider in the role if the client is not the sole employer and this was supported by the majority view.

Taking into consideration all the research into the current issue of labour brokering, It is the writer's view that whilst the amendments do not solve all the problems they are a step in the right direction and the policy makers should be commended. In terms of section 198(4)(F), which confirms that TES companies must be registered in terms of legal provisions, it will be the responsibility of the government to establish a regulatory

[75] Para 63.

body which will provide the oversight to enforce any new laws and ensure that all TES companies are compliant.

Despite the changes to the LRA regarding labour brokers, it is clear that the relevant parties and stakeholders gave the issues due consideration. The only way that one can now determine if the amendments will be successful is when they are being correctly applied in practice and business. Given the recent case law which has been considered and numerous articles from commentators, it is clear that the amendments will have a great impact on the TES industry. Van Wyk is of the opinion that it will not survive and that labour brokering has met its end in South Africa.[76]

Whilst this may be true, and if TES companies and labour brokers wish to continue to operate, they will have to adapt and be open to changes within the industry. TES companies will need a dynamic and new approach in line with the amendments and operate in a way that benefits the whole industry, including TES companies and employees.

In final conclusion and perhaps on what the relevant parties can consider for future amendments to ensure that the rights of workers employed under TES are protected, one can consider the inclusion of medical aid, pension, bonuses, equal pay for equal work, inclusion into Bargaining Councils under specific industries to ensure that all workers regardless of who they work for after three months will be able to enjoy dignified work with adequate protection and remuneration.[77]

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[76] Jacques Van Wyk 'Labour broking changes explained' available at https://www.moneyweb.co.za/archive/r-1738/, accessed on 21 October 2023.

[77] C Aletter & PBS Van Eck 'Employment Agencies: Are South Africa's Recent Legislative Amendments Complaint with the International Labour Organisation?' 2016 SA Merc LJ 285.

The amendments do not go far enough to address other topical issues such as minimum wages, unfair dismissals of TES employees and disguised employment relationships within the various sectors. Some of these issues above could be addressed by the implementation of a Sectoral Determination which addresses TES employees.[78]

Another recommendation that could be made is that those in Government with the power to intervene need to address any shortcomings identified by established precedent such as what happens to the employees' rights if the deeming provision is activated and then the TES cancels the contract which will result in the TES not having a part to play in the relationship. There also needs to be clarity and changes with regards to law in terms of the deeming provision and the contract of employment as the Constitutional Court only addressed the issues arising out of the LRA.

[78] Siziphiwe Shoba *Temporary Employment Services in Contemporary South Africa: A Critical Analysis* (unpublished LLM thesis, University of Kwazulu Natal, 2016) 64.

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