

# The interpretation of the “deeming provision” in terms of section 198A (3)(b) of the Labour Relations Act 66 of 1995: Who is the employer?

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## **Declaration**

I, Tankiso Moses Moeketsi with student number 24500615, declare that the mini-dissertation titled **The interpretation of the "deeming provision" in terms of section 198A(3)(b) of the *Labour Relations Act 66 of 1995: Who is the employer?*** is my original work and has not been submitted for examination anywhere before. This mini-dissertation is submitted for examination to the NWU in partial fulfilment of the requirements for the degree LLM in Labour Law.

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Tankiso Moses Moeketsi  
2 December 2019

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Dr Anri Botes

## **Acknowledgments**

To Dr Botes: thank you for being an excellent supervisor and a teacher. I am a better researcher and writer after this worthwhile process.

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## **LIST OF ABBREVIATIONS**

BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation, and Arbitration
CCR	Constitutional Court Review
EL	Employment Law Journal
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LDDev	Law, development and democracy
LRA	Labour Relations Act
Nedlac	National Economic Development and Labour Council
NUMSA	National Union of Metalworkers of South Africa
PER/PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
TES	Temporary employment service
TSAR	Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg

## **Abstract**

The utilisation of temporary employment services (TES), or Labour Brokers as they are commonly referred to, has been a controversial issue precisely because of the inherent exploitation of provided employees by TES' clients. Provided employees have historically been denied the enjoyment of their full complement of rights contained in the *Labour Relations Act* 66 of 1995 (1995 LRA) because the party who had control over them and enjoyed the fruits of their labour, the client of the TES, was not regarded as their employer. This anomaly meant that provided employees struggled to enforce their rights against the client as the 1995 LRA or its predecessors hardly imposed any liability on it. One of the 1995 LRA's stated purposes as contained in section 1(a) thereof is to democratise the workplace by giving effect to the *Constitution of the Republic of South Africa*, 1996 (the Constitution). Section 23(1) of the Constitution guarantees everyone, including TES's, their clients and provided employees, the right to fair labour practices. However, the failure of the 1995 LRA to strike a balance in its giving effect to the constitutional right left provided employees vulnerable to exploitation as the Act did not adequately regulate their relationship with the clients of TES's. Because provided employees have historically been regarded as employees of TES's as opposed to those of their clients, and because the duration of these relationships seemed unlimited, clients have been able to exploit provided employees with impunity.

Amongst the amendments introduced to the 1995 LRA in 2014 were those to section 198 of the 1995 LRA which included the insertion of section 198A. The iridescent drafting of section 198A(3)(b)(i) of the 1995 LRA left academics and courts tussling about the actual interpretation of the section. The section read with section 198A(1)(a) of the 1995 LRA states that after three months of placement with a client, that client will be *deemed* to be the employer of that provided employee. Courts and academics tussled about whether, after the effluxion of the initial three months period of employment by a TES and placement with a client, the client becomes the sole employer or both the TES and the client become dual employers. This study addresses the question of the employer's identity between the TES and its client for the purpose of ensuring that provided employees know against whom to enforce their labour rights. The differing academic views are dispassionately presented in this regard. An analysis of both the Labour Court's

and Labour Appeal Court's decisions is presented before the study submits that a dual employment relationship commences and that the Constitutional Court in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) 39 ILJ 1911 (CC) respectfully decided the matter incorrectly by preferring the sole employer interpretation. Ultimately the study proposes that an amendment to section 198A(3)(b)(i) of the 1995 LRA be effected to eliminate the ambiguity inherent in the section.

**Key terms:** Temporary employment services, clients, provided employees, section 198A(3)(b) of the 1995 LRA.

## **Uittreksel**

Die gebruik van tydelike werkverskaffingsdienste (TWD), of arbeidsmakelaars soos ook algemeen na hulle verwys word, is sedert die ontstaan daarvan 'n omstrede kwessie. Die rede hiervoor blyk te wees die inherente uitbuiting van die agentskapwerknemers deur die TWD se kliënte. Agentskapwerknemers was histories die genieting van hulle volle stel arbeidsregte, soos in die *Wet op Arbeidsverhoudinge* 66 van 1995 (1995 WAV) vervat, geweier. Laasgenoemde is waar aangesien die party wat beheer oor die werknemers uitgeoefen het en wat die vrugte van hulle arbeid gepluk het, dit wil sê die kliënt, nie as die werknemers se werkgever beskou is nie. Hierdie verskynsel het daartoe aanleiding gegee dat die agentskapwerknemers dit moeilik gevind het om hulle regte teen die kliënt af te dwing, aangesien die 1995 WAV of die voorgangers daarvan skaars aanspreeklikheid aan die kliënt toegeskryf het. Een van die 1995 WAV se doelwitte, soos in artikel 1(a) daarvan gestipuleer, is om die werkplek te demokratiseer deur aan die *Grondwet van die Republiek van Suid-Afrika*, 1996 (die Grondwet) gevolg te gee. Artikel 23(1) van die Grondwet verseker aan elkeen, insluitend TWD, hulle kliënte en die agentskapwerknemers die reg op billike arbeidspraktyke. Alhoewel, die versuim van die 1995 WAV om 'n balans te handhaaf in die beskerming van die gemelde grondwetlike reg het agentskapwerknemers weerloos gelaat vir uitbuiting. Dit is so weens die feit dat die Wet nie die werknemers se verhouding met die kliënte en die TWD behoorlik gereguleer het nie. Siende dat die agentskapwerknemers van meet af aan as die werknemers van die TWD beskou was en nie dié van die kliënt nie, en aangesien die duur van die betrokke verhoudings blyk nie beperk te gewees het nie, was kliënte daartoe in staat om die werknemers met relatiewe vryheid uit te buit.

Onder die verskeie wysigings wat aan die 1995 WAV in 2014 aangebring is, is daardie wysigings aan artikel 198, wat die toevoeging van artikel 198A insluit. Die onduidelike formulering van artikel 198A(3)(b)(i) het akademië en hulle laat worstel met die ware interpretasie van die betrokke bepaling. Die artikel, gelees saam met artikel 198A(1)(a) van die 1995 WAV, stel dat nadat 'n periode van drie maande verstryk het sedert 'n agentskapwerknemer by 'n kliënt geplaas is, sal die kliënt as die werkgever van die werknemer beskou word. Howe en akademië was onseker of, nadat die drie maande van plasing by die kliënt afgeloop het, die kliënt alleenlik die werkgever van die

agentskapwerknemer word en of die TWD en die kliënt gesamentlik die rol van werkgewer aanneem. Hierdie studie ondersoek die vraag na die identiteit van die werkgewer tussen die TWD en die kliënt, met die uiteindelijke doel om te verseker dat agentskapwerknemers weet teen watter party om hulle regte af te dwing. Die uiteenlopende akademiese opinies in hierdie opsig sal objektief aangebied word. Verder sal 'n analise van die beslissings van die Arbeidshof en Arbeidsappèlhof voorsien word, voordat hierdie studie sal bevind dat 'n tweevoudige diensverhouding ontstaan en dat die Konstitusionele Hof in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) 39 ILJ 1911 (KH) met respek gefouteer het deur die enkel-werkgewer interpretasie te verkies. Uiteindelik stel die studie voor dat wysigings aan die bewoording van artikel 198A(3)(b)(i) aangebring moet word ten einde die dubbelsinnigheid in die bepaling te verwyder.

**Sleutelwoorde:** Tydelike werkverskaffingsdienste, kliënte, agentskapwerknemers, artikel 198A(3)(b)

# Chapter 1

## Introduction

### 1.1 Background

The *Constitution of the Republic of South Africa, 1996* (1996 Constitution) guarantees a panoply of rights which includes every citizen's right to choose their trade or occupation freely,<sup>1</sup> the right to fair labour practices,<sup>2</sup> and the right to equal protection and benefit of the law.<sup>3</sup> In the context of labour relations and amongst the regulatory legislation, the *Labour Relations Act*<sup>4</sup> (1995 LRA) in its regulation of employment through temporary employment services (TES's) regards the employees provided by such services as those of TES's and not of their clients.<sup>5</sup> The gapping *non-sequitur* of regarding the TES as the employer is a historical anomaly that has been statutorily acknowledged since 1983.<sup>6</sup> The existence of TES's creates a triangular employment relationship where a company that needs workers to perform tasks (the client) contracts with another party (the TES) whose principle task is to find workers who are then provided to the client, as part of the contractual agreement between the client and the TES.<sup>7</sup> The TES was historically considered the employer of these employees despite them spending their work time at the client's workplace under the client's control.<sup>8</sup>

Clients were under no legal obligation to provide fair wages to provided employees, and these employees could also be dismissed at clients' whims. Even though they were termed temporary employees, provided employees were routinely regarded as temporary indefinitely as there was no statutory limit on the duration of their temporary employment.<sup>9</sup> Regarding provided employees as those of TES's has over the years resulted in the fissure that culminated in the amendment of section 198 of the 1995 LRA

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<sup>1</sup> S 22 of the *Constitution of the Republic of South Africa, 1996* (1996 Constitution)

<sup>2</sup> S 12(1) of the 1996 Constitution.

<sup>3</sup> S 9(1) of the 1996 Constitution.

<sup>4</sup> 66 of 1995 (1995 LRA).

<sup>5</sup> S 198(2) of the 1995 LRA.

<sup>6</sup> S 1(d) of the *Labour Relations Amendment Act 3* (1983 LRAA) and s 1(3) of the *Labour Relations Act 28* of 1956 (upon amendment by the 1983 LRAA).

<sup>7</sup> S 198(1)(a) of the 1995 LRA.

<sup>8</sup> Forere 2016 (3) *SA Merc LJ* 378.

<sup>9</sup> See chapter 2 for a full analysis.

in 2014.<sup>10</sup> This amendment and consequent insertion of section 198A of the 1995 LRA commenced a vexed debate among academics as to the true identity of the employer. The root of the debate is the iridescent nature of the section. The section provides that an employee performing temporary services for a client for a period exceeding three months is deemed to be that client's employee while the client is deemed to be their employer. What the section does not clarify is the TES's position at this juncture. Does it cease to be the employer, or does a dual employer relationship ensue? Cogent arguments can be raised in support of either interpretation.<sup>11</sup> Precisely identifying the employer is important because it provides legal certainty and enables provided employees to enforce the provisions of the 1995 LRA against the correct party between the TES and its client.

## **1.2 Scope and limitations**

Section 198A of the 1995 LRA contains various provisions aimed at regulating TES's. However, only section 198A(3)(b)(i) of the 1995 LRA is given specific attention in this study as it is the one that deems clients of TES's to be the employers of the provided employees. Other legislative provisions are perused only to the extent that they assist in providing clarity to the ambiguity contained in section 198A(3)(b)(i) of the 1995 LRA.

## **1.3 Rationale and justification**

TES's are generally the *bête noire* of trade unions as they are regarded as the exploiters of the working class.<sup>12</sup> The rationale for this study is to determine whether section 198A(3)(b)(i) of the 1995 LRA is capable of identifying the employer with the precision necessary to negate the exploitation of workers who join workforces through TES's.

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<sup>10</sup> Benjamin 2016 *ILJ* 30 – 33.

<sup>11</sup> Some of the academic support for the sole employer interpretation has been advanced by Forere 2016 (3) *SA Merc LJ* 376-378 and 387-388; Grogan (2018) 34.5 *EL*. Among the supporters of the dual employer interpretation are Venter *Without Prejudice* 26 and Ciliwe *An evaluation of the amended temporary employment services provisions* 32.

<sup>12</sup> Matlapeng 2018 <http://www.sabcnews.com/sabcnews/cosatu-welcomes-concourts-ruling-on-labour-brokers/>.

## 1.4 Aims and objectives

This study aims to identify who, between the client and the TES, should be the employer in situations of triangular employment once the deeming provision is triggered.

The following are set as secondary objectives:

- To identify who the employer was before the 2014 amendments.
- To investigate the circumstances that led to the amendments to the previous section 198.
- To determine the views of the academics on both ends of the interpretation spectrum.
- To analyse the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*<sup>13</sup> to determine whether its ultimate interpretation of the deeming provision should be regarded as correct and able to protect provided employees better.

## 1.5 The proposed structure of the study

This study comprises five chapters:

- Chapter One contains the introduction and lays the theoretical foundation for the entire study.
- Chapter Two traces and critiques the identity of the employer before the 2014 amendments. The impact of the 2014 amendments is critiqued to the exclusion of the Constitutional Court's decision in *Assign Services*.
- In Chapter Three, the views of various academics on the iridescent section 198A(3)(b)(i) of the 1995 LRA are presented. The purpose of presenting these views is to portray how ambiguous drafting opened the section to at least two reasonable interpretations.

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<sup>13</sup> *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) 39 ILJ 1911 (CC).

- In Chapter Four, the courts' decisions in the *Assign Services* matter are analysed, including that of the Constitutional Court to determine its equitability.
- Chapter Five concludes the study with a general conclusion as well as recommendations.

## **1.6 Research methodology**

Qualitative research was engaged throughout this study. The Constitution, case law and national legislation were perused in answering the research question. Newspaper articles, academic articles and conference papers were also perused as this study would be incomplete without their inclusion.

## Chapter 2

### A historical overview of the regulation of TES'

#### 2.1 Introduction

Labour brokers have been recorded as having been in existence in South Africa since the 1950s.<sup>14</sup> However, the legislation that regulated labour relations during the early to mid-1900s (the *Industrial Conciliation Act* 11 of 1924,<sup>15</sup> the *Industrial Conciliation Act* 36 of 1937 and its successor, the *Labour Relations Act* 28 of 1956 (1956 LRA) did not acknowledge the existence of labour brokers.<sup>16</sup> The first step in acknowledging their existence was taken upon the amendment of the 1956 LRA in terms of the *Labour Relations Amendment Act* 3 of 1983 (1983 LRAA).<sup>17</sup>

Since its amendment in 1983, section 1(a) of the 1956 LRA identified the labour brokers as the employers of the employees provided to clients.<sup>18</sup> One may deduce that this provision inadvertently granted authority to the two authoritative figures because while labour brokers had statutory authority, clients could be considered as the *de facto* employers since the employees spent their working hours at clients' premises and under their control. The characterisation of labour brokers as the employers was at odds with the common law principles developed by the courts to identify an employment relationship. To determine the existence of an employment relationship in terms of the common law, the courts consider the dominant impression left after considering factors such as whether the employer supervised and controlled the employee, whether the employee formed part of the organisation and whether the employee was economically dependent on the employer.<sup>19</sup> Identifying the labour broker as the employer in legislation seemed flawed from the onset as provided employees spent a large part of their workday on the clients' premises where they were subjected to their supervision and control in all

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<sup>14</sup> Botes 2014 26 *SA Merc LJ* 110; Brassey and Cheadle 1983 34 *ILJ* 37.

<sup>15</sup> It was later renamed the *Labour Relations Act* 28 of 1956; Botes 2014 26 *SA Merc LJ* 110.

<sup>16</sup> Botes 2014 26 *SA Merc LJ* 110.

<sup>17</sup> Botes 2014 26 *SA Merc LJ* 110; Benjamin 2016 *ILJ* 29; Theron 2005 26 *ILJ* 622.

<sup>18</sup> Section 1(a) of the 1956 LRA; Benjamin 2016 *ILJ* 30.

<sup>19</sup> *South African Broadcasting Corporation v McKenzie* (CA8/98) [1998] ZALAC 13 (15 October 1998) para [8]; van Niekerk, Smit and Christianson *Law@work* 63; Grogan *Workplace law* 15.

aspects of their employment.<sup>20</sup> It was at the clients' premises where workplace grievances primarily arose, but because the clients were not the employers, provided employees were unable to remedy these problems in terms of the 1983 LRA as no statutory relationship existed between them and the clients.<sup>21</sup> It is for such reasons that some scholars argued that labour broking assisted clients in avoiding their "employer" responsibilities towards provided employees, resulting in their exploitation.<sup>22</sup>

Constitutional developments in the early 1990s necessitated the repealing of legislation that was not in line with the 1996 Constitution,<sup>23</sup> and the amended 1956 LRA did not survive the axe. To address limited regulation in the amended 1956 LRA, the 1995 LRA was promulgated. It was in terms of this Act that labour brokers were rebranded and regulated as temporary employment services (TES) in terms of section 198 thereof. However, as will be seen below in this study, TES's were still subjected to very limited regulation by section 198 of the 1995 LRA, and the exploitation of provided employees persisted. The dissatisfaction with section 198 of the 1995 LRA as it was, resulted in the inclusion of additional provisions upon the amendment of the 1995 LRA in 2014 "to provide greater protection for workers placed in temporary employment services."<sup>24</sup>

The purpose of this chapter is to evaluate the historical development of the regulation of TES's since their inception and to identify the challenges caused by their limited regulation. This chapter portrays how the multiple authority figures convoluted the employees' exercise of their rights by obfuscating their employers identity. The chapter commences with a perusal of the regulation of TES's before 1995, and then focuses on how constitutionalism necessitated the promulgation of a different statute to regulate labour relations in South Africa from 1995 onwards. From this chapter the reader will discern how TES's were regulated since 1995. The chapter then proceeds to discuss the unsuccessful attempt by legislators to elucidate the employers' identity and the duration

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<sup>20</sup> Gerbers "The meaning of employee" 73; Theron 2005 26 *ILJ* 620- 621.

<sup>21</sup> van Niekerk, Smit and Christianson *Law@work* 57.

<sup>22</sup> Theron 2005 26 *ILJ* 626; Gericke 2010 *Obiter* 96.

<sup>23</sup> S 2 of the 1996 Constitution.

<sup>24</sup> See the preamble of the *Labour Relations Amendment Bill* 16 of 2012; Memorandum of objects of the *Labour Relations Amendment Bill* 16 of 2012.

of the employment contract between TES's and provided employees through the 2014 amendment of section 198 of the 1995 LRA.

## **2.2 Statutory regulation of TES's prior to 1995**

Labour broking created triangular employment relationships, which resulted in clients entering into commercial contracts with labour brokers.<sup>25</sup> Labour brokers would then provide their employees to clients, and in return, the clients would pay a service fee.<sup>26</sup> Before regulation, clients paid labour brokers a fee which included employees' wages.<sup>27</sup> Labour brokers would deduct the percentage due to them before giving the remainder to employees as wages.<sup>28</sup> Because both labour brokers and employees had to share the fee that the client paid, labour brokers paid meagre wages to keep labour broking economically viable.<sup>29</sup>

Having noted that provided employees were exploited in the absence of statutory regulation, the legislature amended the 1956 LRA through the 1983 LRAA. The purpose of regulating labour broking at the time was to ensure that provided employees had security of employment and employers were prevented from dodging their responsibility to, amongst others, provide for employees' social security.<sup>30</sup> Beyond providing definitions for labour broker and labour broker office,<sup>31</sup> the 1983 LRAA provided scant regulation to TES's.<sup>32</sup> In this sense then, the amendment Act seemed to have failed to achieve the above objective. The absence of comprehensive statutory regulation meant that the parties in authority could seemingly manage the relevant relationship as they deemed fit resulting in employment insecurity for the provided employees.<sup>33</sup>

After the amendments made in 1983, section 1 of the 1956 LRA defined a labour broker as any person who conducted or carried on a labour broking office.<sup>34</sup> A labour brokering

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<sup>25</sup> Theron 2005 26 *ILJ* 620-621.

<sup>26</sup> Brassey and Cheadle 1983 34 *ILJ* 36.

<sup>27</sup> Brassey and Cheadle 1983 34 *ILJ* 36-37.

<sup>28</sup> Brassey and Cheadle 1983 34 *ILJ* 36-37.

<sup>29</sup> Brassey and Cheadle 1983 34 *ILJ* 37.

<sup>30</sup> Brassey and Cheadle 1983 34 *ILJ* 37; Benjamin 2016 *ILJ* 30.

<sup>31</sup> S 1 of the 1956 *LRA*; Cassim 1984 *de Rebus* 27.

<sup>32</sup> Cassim 1984 *de Rebus* 27.

<sup>33</sup> Theron 2005 26 *ILJ* 619 and 629.

<sup>34</sup> Section 1 of the 1956 *LRA* (as amended); Cassim 1984 *de Rebus* 27.

office was defined as a business which obtained monetary rewards for procuring employees who provided services to or worked for clients. The responsibility to remunerate such employees was that of the labour broker.<sup>35</sup> A few aspects are apparent from these definitions. Firstly, before a person could conduct labour broking services, that person had to have an office from which they operated. The intention was to avoid fly-by-nights who were untraceable for not being pinned to a specific location since some unregistered labour brokers fled with employees' monies.<sup>36</sup> Once such a person had an office, they would then be permitted by the Department of Manpower to procure employees who would provide their services to or work for clients in return for remuneration.<sup>37</sup> It is therefore evident that labour brokers' offices had to be registered for their activities to be lawful.<sup>38</sup>

Theron<sup>39</sup> observes that the fundamental anomaly in deeming labour brokers to be the employers was that the primary relationship was between clients and provided employees. Clients determined the services they required, dominated the relationship, and decided its parameters.<sup>40</sup> From a common law perspective, it was consequently possible to also, if not rather, view the client as the employer. However, recognising the TES as the statutory employer left the relationship between clients and employees partly unregulated by the amended 1956 LRA since the clients' conduct was not sufficiently regulated.<sup>41</sup>

Given the aforementioned state of affairs, it is clear why provided employees could easily be exploited. No provision was made for the client's obligation regarding minimum standards for provided employees' working conditions, minimum wage, working hours, a disciplinary code, and the like. The client had no obligation to provide for the aforementioned since it was not the statutory employer.

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<sup>35</sup> S 1(c) of the 1983 LRAA; Cassim 1984 *de Rebus* 27.

<sup>36</sup> Benjamin "To regulate or to ban?" 196.

<sup>37</sup> Brassey and Cheadle 1983 34 *ILJ* 36; Cassim 1984 *de Rebus* 27.

<sup>38</sup> S 7 1983 LRAA; Cassim 1984 *de Rebus* 27; Brassey and Cheadle 1983 34 *ILJ* 37.

<sup>39</sup> Theron 2005 26 *ILJ* 619.

<sup>40</sup> Theron 2005 26 *ILJ* 619.

<sup>41</sup> Cassim 1984 *de Rebus* 27.

Employers have a common law duty to provide a safe and healthy working environment.<sup>42</sup> It is submitted that this duty extends to the instances in which employees, such as those of labour brokers, found themselves in workplaces belonging to clients.<sup>43</sup> Provided employees could have relied on this position to force labour brokers to safeguard their rights while they were at clients' workplaces. Labour brokers would then have had to take up the employees' grievances with their clients, despite the existent trepidation of losing clients due to decisive intervention.<sup>44</sup>

Section 63(3) of the amended 1956 LRA empowered the Director-General of the Department of Manpower to take action, including the cancelling of the registration of any labour broker who failed to comply with the Act's provisions.<sup>45</sup> Moreover, section 63(5) of the same Act enjoined labour brokers to keep records of their activities in case labour inspectors sought them.<sup>46</sup> Labour brokers were forced to comply with the Act's provisions since any contravention thereof was regarded as a criminal offence.<sup>47</sup>

Various omissions in the amended 1956 LRA enabled labour brokers and clients to continue in their rogue ways despite the Act's attempts to regulate labour broking. The Act contained no provision making both labour brokers and clients jointly and severally liable for its violations.<sup>48</sup> This left provided employees with no recourse when labour brokers fled with their money or when they had been exploited at clients' workplaces. Fly-by-night labour brokers that fled with provided employees' monies were not deterred by the threat of imprisonment. In fact, according to Benjamin,<sup>49</sup> one of the unintended consequences of the 1983 LRAA was the creation of fly-by-night labour brokers.

The non-regulation of the relationship between clients and the provided employees gave clients nearly unlimited freedom in their practices towards the employees. One particularly important issue regarding the provided employees' job security was that

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<sup>42</sup> *Mankayi v AngloGold Ashanti Ltd* 2011 (5) *BCLR* 453 (CC) par [3] (Mankayi).

<sup>43</sup> Mankayi par [3].

<sup>44</sup> Le Roux 2009 19 (3) *Contemporary Labour Law* 24.

<sup>45</sup> Cassim 1984 *de Rebus* 27.

<sup>46</sup> Cassim 1984 *de Rebus* 27.

<sup>47</sup> Ss 63(7) and 82(1) of the of the 1956 LRA; Cassim 1984 *de Rebus* 27.

<sup>48</sup> Benjamin "To regulate or to ban?" 196.

<sup>49</sup> Benjamin "To regulate or to ban?" 196.

clients could instruct labour brokers to terminate the employment of certain employees without providing compelling reasons for such an instruction.<sup>50</sup> The other cause for employment insecurity was that provided employees only worked for the duration of the commercial contract between the TES and the client.<sup>51</sup> The full terms of the contracts between TES's and their client were not disclosed to the provided employee, and for that reason, it was difficult even to request detailed reasons for the termination of employment.<sup>52</sup> To protect themselves from potential employment loss liability, TES's often included contractual terms that enjoined provided employees to agree that any termination of employment could not create the expectation of a severance package since it would not be construed as a retrenchment.<sup>53</sup>

Despite the 1983 LRAA having one of its purposes as the regulation of provided employees' wages,<sup>54</sup> no provision expressly regulating them was included in the Act.<sup>55</sup> Perhaps it was optimistically acknowledged that labour brokers had the power to maintain parity in remuneration between clients' employees and those provided by labour brokers, and for that reason, it was unnecessary to outright ban wage inequality.<sup>56</sup> Such an argument was, however, a non-starter for failing to appreciate how labour broking operates. A request by one labour broker to its client that the fee be increased to create parity could have encouraged the client to contract with another labour broker who was willing to accept the lower fee that the client was offering. A uniform request for remuneration parity by labour brokers would have risked collapsing the system since one of the reasons clients remain attracted to labour broking is that it reduces expenses.<sup>57</sup> By any stretch of the imagination, the above-mentioned practices by clients and labour brokers were ultimately unfair to the provided employees and had to be addressed to grant the employees better protection.

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<sup>50</sup> Le Roux 2009 19 (3) *Contemporary Labour Law* 25.

<sup>51</sup> Theron 2005 26 *ILJ* 629.

<sup>52</sup> Theron 2005 26 *ILJ* 629.

<sup>53</sup> Theron 2005 26 *ILJ* 633.

<sup>54</sup> Brassey and Cheadle 1983 34 *ILJ* 37.

<sup>55</sup> Brassey and Cheadle 1983 34 *ILJ* 37.

<sup>56</sup> Brassey and Cheadle 1983 34 *ILJ* 37.

<sup>57</sup> Brassey and Cheadle 1983 34 *ILJ* 37.

### 2.3 The advent of constitutionalism

In 1979, the Wiehahn Commission realised that fair labour practices are fundamental to the existence of strong labour relations between the various stakeholders involved.<sup>58</sup> Disappointingly, it was only at the birth of democracy that this realisation was truly given effect to. The early 1990s saw South Africa stepping into an exciting epoch of constitutional supremacy underpinned by egalitarianism, first through the *Constitution of the Republic of South Africa*, Act 200 of 1993 (interim Constitution). This constitution declared that all were equal before the law and were protected from unfair discrimination based on, amongst others, employment and that all had the right to fair labour practices.<sup>59</sup>

These rights were assented to in the subsequent 1996 Constitution.<sup>60</sup> What makes the 1996 Constitution unique is that it enjoins laws to be in line with it as it is the supreme law of the Republic.<sup>61</sup> The pre-democracy epoch was characterised by an unchecked abuse of power,<sup>62</sup> something epitomised by the amended 1956 LRA's provisions regarding labour brokers. By failing to comprehensively regulate labour broking in the period before and after the amendments to the 1956 LRA, the legislature had given the authority figures, particularly clients, an unbridled ability to determine the terms of employment for provided employees.

As part of South Africa's break from its dark past, the state outlawed and replaced all legislation, including the 1956 LRA, which was not in line with the 1996 Constitution.<sup>63</sup> Tshoose and Tsweledi<sup>64</sup> observe that one of the aims of democratic labour legislation is to improve labour standards, especially for marginalised workers. The 1996 Constitution has placed fairness, which had until democracy somewhat eluded labour relations, at the

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<sup>58</sup> Conradie 2016 22 *Fundamina* 193.

<sup>59</sup> S 8(1), s 8(2), s 27(1) of the *Constitution of the Republic of South Africa*, Act 200 of 1993.

<sup>60</sup> S 9(1), s 9(4), s 23(1) of the 1996 Constitution.

<sup>61</sup> S 2 of the 1996 Constitution.

<sup>62</sup> *Economic Freedom Fighters v Speaker of the National Assembly* 2016 *BCLR* 618 (CC) para 1.

<sup>63</sup> S 2 of the 1996 Constitution provides that the Constitution is the supreme law of the Republic and law or conduct inconsistent with it is invalid. The obligations imposed by the 1996 Constitution should be fulfilled.

<sup>64</sup> Tshoose and Tsweledi 2014 18 *LDDev* 338.

centre of labour law regulation in South Africa.<sup>65</sup> Section 23(1) of the 1996 Constitution entitles everyone to fair labour practices. The right to fair labour practices, like the other rights in section 23 of the 1996 Constitution, is important for promoting the dignity and other core rights of those who find themselves in employment relationships.<sup>66</sup> In this context, labour legislation should be understood to be seeking justice for provided employees since clients undoubtedly have more power than TES's and the provided employees.<sup>67</sup> The 1995 LRA was introduced to eliminate the incompatibility with section 23 of the 1996 Constitution that had been entrenched in the 1956 LRA and its amendments.

#### **2.4 Post-1995 regulation of TES's (before the 2014 statutory amendments)**

The use of TES's transcended the pre-democracy era, and for this reason, their regulation is inevitable.<sup>68</sup> The 1995 LRA was introduced to configure labour relations in general, and the regulation of TES's was included. Amongst the Act's purposes is the advancement of social justice, labour peace and the democratisation of the workplace through ultimately affording everyone, including provided employees, the right to fair labour practices as contained in section 23(1) of the 1996 Constitution.<sup>69</sup> Apart from renaming labour brokers as temporary employment services, section 198 of the 1995 LRA contains a range of provisions to regulate employment through TES's. Section 198(1) of the 1995 LRA in particular provides that:

..."temporary employment service" means any person who, for reward, procures for or provides to a client other persons-

- (a) who render services to, or perform work for, the client; and
- (b) who are remunerated by the temporary employment service.

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<sup>65</sup> Conradie 2016 22 *Fundamina* 198; Frahm-Arp *Without Prejudice* 16 and 17.

<sup>66</sup> *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT14/02) [2002] ZACC 30 para [13].

<sup>67</sup> Tshoose and Tsweledi 2014 18 *LDDev* 340.

<sup>68</sup> Gericke 2010 *Obiter* 94.

<sup>69</sup> S 1(a) of the 1995 LRA; Gericke 2010 *Obiter* 94; *NEHAWU v UCT* para [41].

For one to be regarded as a TES, they have to procure for or provide employees to clients. Those employees are remunerated by the TES. Anything that falls outside this definition is not a TES.

Having only discussed one subsection of section 198 of the 1995 LRA, the focus of this chapter shifts to discussing the identity of the employer in the knowledge that further provisions of section 198 are apparent in the latter parts of this chapter.

#### ***2.4.1 Identity of the true employer***

Similar to this Act's predecessor, section 198(2) of the 1995 LRA still regards the TES as the employer. The TES is also still the party that pays the wages of the provided employee.<sup>70</sup> Section 198(4) of the 1995 LRA provides that in the event a TES contravenes a collective agreement,<sup>71</sup> binding arbitration award,<sup>72</sup> or the *Basic Conditions of Employment Act*<sup>73</sup> in respect of a provided employee, both the client and the TES will be held jointly and severally liable.<sup>74</sup> Employees have to first institute proceedings against TES's, and only when TES's do not comply can such employees institute proceedings against clients.<sup>75</sup> This particularly leaves employees confused by who their real employer is.<sup>76</sup>

One glaring omission by section 198 of the 1995 LRA with regards to joint and several liability is that of unfair dismissal. On closer scrutiny, it becomes apparent that an unfairly dismissed provided employee has no recourse.<sup>77</sup> The non-existence of a statutorily recognised employment relationship between the client and the provided employee negates the jurisdiction of the Commission for Conciliation, Mediation, and Arbitration (CCMA) and that of the Labour Court in respect of disputes between the client and the provided employee.<sup>78</sup> Such an employee has to institute proceedings against their

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<sup>70</sup> Gericke 2010 *Obiter* 99.

<sup>71</sup> S 198 (4)(a) of the 1995 LRA.

<sup>72</sup> S 198 (4)(b) of the 1995 LRA.

<sup>73</sup> 75 of 1997.

<sup>74</sup> S 198 (4)(c) and (d) of the 1995 LRA.

<sup>75</sup> le Roux 2009 19 (3) *Contemporary Labour Law* 24; Botes 2015 (1) *SA Merc LJ* 106.

<sup>76</sup> Botes 2015 (1) *SA Merc LJ* 106.

<sup>77</sup> Theron 2005 26 *ILJ* 623 and 641; Gericke 2010 *Obiter* 96; Tshoose and Tsweledi 2014 18 *LDDev* 338; van Eck 2010 13 (2) *PER* 109/204; Bosch 2008 29 *ILJ* 815.

<sup>78</sup> van Eck 2010 13 (2) *PER* 110/204; Forere 2016 (3) *SA Merc LJ* 376.

employer – the TES. The difficulty with this is that if the CCMA rules in the employee's favour, the TES cannot risk forcing the client to reinstate the employee because that could mean losing a valuable client.<sup>79</sup>

An optimist may argue that TES's as employers can reasonably be expected to ensure that provided employees do not lose their jobs for meagre reasons by demanding that clients disclose the actual reasons for their dismissal instruction.<sup>80</sup> If the employee loses their job, the TES has the responsibility to ensure that such an employee is placed with another client as soon as possible, lest such employee enforces their right not to be unfairly dismissed against the TES.<sup>81</sup> However, this argument does not reflect a full appreciation of how triangular employment works. The client, as the party with the most power in the relationship, sets the terms of the relationship which are usually slanted in its favour.<sup>82</sup> It is also up to the client and not the TES whether an employee is placed with that particular client as it is the client with the necessary budget.<sup>83</sup> The most a TES can do is to enquire from other clients about the need for an additional employee.

Before provided employees began their placement with clients, they signed employment contracts with TES's.<sup>84</sup> To shield themselves from liability, TES's tended to include automatic termination clauses in the employment contracts of the provided employees in terms of which such employees' employment would automatically terminate when clients no longer needed their services or terminated their commercial contracts with the TES's.<sup>85</sup> The CCMA has regrettably approved such clauses on the basis that the provided employees entered into the agreements cognisant of their implications and therefore made it impossible for them to successfully claim that they had been unfairly dismissed.<sup>86</sup> It can hardly be asserted that such contracts represent the will of the contracting parties when some provided employees sign contracts they do not even understand due to their

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<sup>79</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 *ILJ* 2120 (LC) para [2] – [3].

<sup>80</sup> *Sindane v Prestige Cleaning Services* 2009 *BLLR* 1249 (LC) para [6] (Sindane).

<sup>81</sup> S 185(1)(a) of the 1995 LRA; *Sindane* para [4].

<sup>82</sup> *Bosch* 2008 29 *ILJ* 814; *van Eck* 2010 13 (2) *PER* 111/204; *Theron* 2005 26 *ILJ* 630

<sup>83</sup> *van Eck* 2010 13 (2) *PER* 111/204.

<sup>84</sup> *le Roux* 2009 19 (3) *Contemporary Labour Law* 22.

<sup>85</sup> *van Eck* 2010 13 (2) *PER* 108/204; *Theron* 2005 26 *ILJ* 629 and 633; *Gericke* 2010 *Obiter* 98; *le Roux* 2009 19 (3) *Contemporary Labour Law* 26.

<sup>86</sup> *April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* (2005) 26 *ILJ* 2224 (CCMA); *Bosch* 2008 29 *ILJ* 814 - 815.

illiteracy.<sup>87</sup> Fairness is central to labour relations.<sup>88</sup> Unfair contractual terms and those in terms of which an employee signs away statutory rights should be disregarded for being against public policy and the spirit of the Constitution.<sup>89</sup>

In *Barkhuizen v Napier*,<sup>90</sup> the Constitutional Court regarded fairness as doing simple justice between the parties. This is the one thing that is singularly lacking when courts decide whether or not to accept an automatic termination clause. In *Sindane v Prestige Cleaning Services*, the employee had been provided to a client until his employment was terminated automatically as stipulated in his employment contract.<sup>91</sup> The client had instructed the TES to cease providing the employee.<sup>92</sup> The Labour Court accepted that there was no dismissal on the basis that the TES was not the cause of the job loss.<sup>93</sup> In reaching this conclusion, the court failed to enquire about whether there was an alternative placement opportunity for the employee. Despite the inherent injustices in such agreements, provided employees still enter into them because they are better than unemployment.<sup>94</sup> It is fathomable that these provided employees enter into such agreements because they are usually employees who have low levels of skills and are illiterate.<sup>95</sup> Such employees jump at every job opportunity they get because their lack of skills makes finding decent employment a daunting task.<sup>96</sup>

After getting into these employment contacts and being assigned to a particular client, provided employees were more often than not permanently regarded as temporary employees.<sup>97</sup> The Act did not set a limit to how long these arrangements could last or how long one would work before ceasing to be regarded as a temporary employee.<sup>98</sup>

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<sup>87</sup> *Dyokhwe v De Kok NO and Others* [2012] 10 *BLLR* 1012 (LC) para [8] (Dyokwe).

<sup>88</sup> S 23 (1) of the 1996 Constitution.

<sup>89</sup> *Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5 para [30] (Barkhuizen); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para [72]; *Mahlamu v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 *ILJ* 1122 (LC) para [10] – [11]; Dyokhwe.

<sup>90</sup> *Barkhuizen* para 51.

<sup>91</sup> *Sindane* para [2]-[4] and [7]-[8].

<sup>92</sup> *Sindane* para [3].

<sup>93</sup> *Sindane* para 16; van Eck 2010 13 (2) *PER* 110/204.

<sup>94</sup> Forere 2016 (3) *SA Merc LJ* 377; Theron 2005 26 *ILJ* 631.

<sup>95</sup> Dyokhwe para [8]; Forere 2016 (3) *SA Merc LJ* 377; Gericke 2010 *Obiter* 96.

<sup>96</sup> Gericke 2010 *Obiter* 98.

<sup>97</sup> Forere 2016 (3) *SA Merc LJ* 377; Botes 2014 26 *SA Merc LJ* 129; Tshoose and Tsweledi 2014 18 *LDDDev* 340; le Roux 2009 19 (3) *Contemporary Labour Law* 23; Benjamin "To regulate or to ban?" 196.

<sup>98</sup> Forere 2016 (3) *SA Merc LJ* 377; Benjamin "To regulate or to ban?" 196.

Clients preferred provided employees because they carried out the same work as their directly employed colleagues, but at a reduced cost.<sup>99</sup> Perhaps this explains why there was a need to set a limit to how long a provided employee could temporarily be placed with a client before they were regarded as permanently employed by the client.

Disciplining provided employees became a conundrum because such employees were not on their employers' workplace premises.<sup>100</sup> What happened when a provided employee constantly arrived late for work? Clients arguably did not have a right to discipline the provided employees since they were not their employers.<sup>101</sup>

Another predicament inherent in the use of TES under the 1995 LRA was the difficulty experienced by provided employees to engage in collective bargaining. Collective bargaining enables employees to stand up to their employers as groups for the sake of enforcing their labour rights.<sup>102</sup> Individually, employees are incapable of standing up to their employers out of fear of losing their jobs or being victimised in some or other way.<sup>103</sup> TES employees were difficult to organise as trade union representation was only permitted at their own employers' workplaces.<sup>104</sup> Clients, not being the statutory employers, were under no obligation to permit trade unions to access the workplace to recruit and organise provided employees and were under no obligation to bargain with the trade union to the benefit of said employees as no statutory provision enjoined this. The net effect of this was the increased vulnerability of TES employees to exploitation as there was no one to look out for their interests by bargaining on their behalf.<sup>105</sup>

On closer observation, it is apparent that the nub of the problem was and perhaps still is the employer's identity. Courts grappled with this question and at times, produced

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<sup>99</sup> Tshoose and Tsweledi 2014 18 *LDDev* 337; Theron 2012 *Acta Juradica* 73; Theron 2005 26 *ILJ* 642; Gericke 2010 *Obiter* 96.

<sup>100</sup> Botes 2015 (1) *SA Merc LJ* 103.

<sup>101</sup> *Nape v INTCS Corporate Solutions (Pty) Ltd* (JR 617/07) [2010] ZALC 33 para [84].

<sup>102</sup> Forere 2016 (3) *SA Merc LJ* 380; Theron 2012 *Acta Juradica* 63.

<sup>103</sup> Theron 2005 26 *ILJ* 641; Theron 2012 *Acta Juradica* 78 - 79; van Eck 2010 13 (2) *PER* 111/204.

<sup>104</sup> S 11 of the 1995 LRA; Theron 2012 *Acta Juradica* 62 and 79; Forere 2016 (3) *SA Merc LJ* 380; Botes 2015 (1) *SA Merc LJ* 106.

<sup>105</sup> Theron 2005 26 *ILJ* 631; Gericke 2010 *Obiter* 96, 97 and 105; Benjamin "To regulate or to ban?" 200; Dyokhwe para [11].

diametrically opposed decisions.<sup>106</sup> In *LAD Brokers (Pty) Ltd v Mandla*,<sup>107</sup> a client based in the United Kingdom had approached and interviewed the employee and another worker for work in Mossel Bay. One of the client's representatives later informed the employee that he would be employed through a TES called LAD Brokers.<sup>108</sup> After the employee's commencement of work at Mossel Bay, he was contacted by the TES, informing him that it would contract his services as an independent contractor.<sup>109</sup> The employee signed a contract to that effect in December 1998.<sup>110</sup> The client and the TES then concluded a commercial contract in terms of which it was agreed that the TES would hire the employee.<sup>111</sup>

The client supervised and controlled the employee, determined his employment terms and conditions, and remunerated him via payments to the TES. The client also determined any bonuses that the employee would receive.<sup>112</sup> In April 1999, the employee was notified by the TES that his employment would be terminated by the end of that month.<sup>113</sup> The employee instituted proceedings in the Labour Court after unsuccessfully taking the matter up with the client.<sup>114</sup> The question before the Labour Court was whether the contract between the TES and the employee was that of employment or whether it created an independent contractor relationship.<sup>115</sup> The Labour Court stated that sections 198(1) and 198(2) designated the TES as the employer despite the client also fitting the definition of employer.<sup>116</sup> Not satisfied with the outcome, the TES approached the Labour Appeal Court. In the appeal the same legal question was presented before Labour Appeal Court.<sup>117</sup> The Labour Appeal Court upheld the decision of the Labour Court and also

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<sup>106</sup> *LAD Broker (Pty) Ltd v Mandla* (CA14/00) [2001] ZALAC 9 (2001); *State Information and Technology Agency v CCMA* [2008] 7 BLLR 611 (LAC) (SITA v CCMA).

<sup>107</sup> *Lad Brokers (Pty) Ltd v Mandla* (CA14/00) [2001] ZALAC 9 (2001) (LAD Brokers LAC).

<sup>108</sup> LAD Brokers LAC para [6].

<sup>109</sup> LAD Brokers LAC para [7].

<sup>110</sup> LAD Brokers LAC para [8].

<sup>111</sup> LAD Brokers LAC para [9].

<sup>112</sup> LAD Brokers LAC para [10].

<sup>113</sup> LAD Brokers LAC para [11] and [12].

<sup>114</sup> LAD Brokers LAC para [12].

<sup>115</sup> LAD Brokers LC para [7].

<sup>116</sup> LAD Brokers LC para [14].

<sup>117</sup> LAD Brokers LAC para [2].

stated that the TES had provided the employee to the client in terms of section 198(2) of the 1995 LRA.<sup>118</sup>

For section 198(2) of the 1995 LRA to find application, the employee had to have been procured or provided by the appellant.<sup>119</sup> In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>120</sup> the Supreme Court of Appeal held that where more than one reasonable interpretation is possible, the more sensible and reasonable one has to be preferred. The LAC in *LAD Brokers* failed to attribute a sensible meaning to the words “provided to” in section 198(2) of the 1995 LRA.<sup>121</sup> The finding of the court could have led to a situation where clients instructed TES’s to employ and then provide to them the employees that clients would have already vetted for the sole purpose of avoiding being identified as employers. This would have defeated the purpose of the 1995 LRA, which includes ensuring that everyone, including TES employees, enjoyed the right to fair labour practices.<sup>122</sup>

In 2002, mineworkers who incorrectly believed to have been directly employed by a TES’s client embarked on a strike demanding that the TES pay them the money they believed was due to them.<sup>123</sup> This strike prompted the Department of Labour to commission a research project by Bezuidenhout, Godfrey, Theron and Modisha wherein it was found that clients used TES's to minimise labour costs and to avoid employer responsibilities.<sup>124</sup> Among the recommendations emanating from the research project, amendments to section 198 of the 1995 LRA were recommended to demystify the identity of the true employer.<sup>125</sup> Despite the findings of the research project having been tabled before the 2004 National Economic and Labour Council (NEDLAC), no action was taken regarding the recommendations.<sup>126</sup> In 2008, the Department of Labour recommended the banning

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<sup>118</sup> LAD Brokers LAC para [32].

<sup>119</sup> In LAB Brokers LC para [36] the Labour Court held differently. According to it, s 198(2) applied because, even though the TES did not procure the employee, it provided him.

<sup>120</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) para [18].

<sup>121</sup> LAD Brokers LAC par [32].

<sup>122</sup> S 1 of the 1995 LRA.

<sup>123</sup> Benjamin 2016 *ILJ* 30; Benjamin “To regulate or to ban?” 189.

<sup>124</sup> Benjamin 2016 *ILJ* 31; Theron 2005 26 *ILJ* 619.

<sup>125</sup> Benjamin 2016 *ILJ* 31.

<sup>126</sup> Benjamin 2016 *ILJ* 31.

of TES's that decreased the remuneration of their employees.<sup>127</sup> Trade unions were of the view that there should be a total ban on TES's while employers' organisations were of the view that tighter regulation would be the better option.<sup>128</sup> Trade unions were further of the view that if the client was identified as the employer, the challenges of unequal treatment faced by provided employees would vanish.<sup>129</sup> One of the disadvantages of identifying the client as the employer from the beginning was that it would eliminate the flexibility that attracted clients to triangular employment.<sup>130</sup> The other disadvantage was that it would increase the cost of doing business since the client would be required to create parity in remuneration and other social security benefits between the provided employees and those directly employed.<sup>131</sup> Meanwhile, battles regarding the employer's identity continued to rage in court.

In *State Information Technology Agency (SITA) (Pty) Ltd v CCMA and Others*<sup>132</sup> SITA (the client) approached the third respondent (employee) asking if he wanted employment.<sup>133</sup> Because both parties understood that direct employment would have been unlawful as the South African National Defence Force had retrenched the employee,<sup>134</sup> it was agreed that he would be employed by Inventus CC (TES) which would also remunerate him while he supplied his services exclusively to the client.<sup>135</sup> When the client decided that it no longer needed the employee's services, the Labour Court had to decide who the employer was between the client and the TES.<sup>136</sup> The LAC relied on three factors to determine who the employer was: supervision and control, employee workplace integration, and economic dependence.<sup>137</sup> Based on these factors, the Court did not see

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<sup>127</sup> Benjamin 2016 *ILJ* 31. The recommendation was made after the controversy that TES's had caused in Namibia. The Namibian parliament had decided to ban triangular employment.

<sup>128</sup> Benjamin 2016 *ILJ* 31; le Roux 2009 19 (3) *Contemporary Labour Law* 26; van Eck 2010 13 (2) *PER* 107/204; Botes 2015 (1) *SALJ* 101.

<sup>129</sup> Forere 2016 (3) *SA Merc LJ* 378.

<sup>130</sup> van Eck 2010 13 (2) *PER* 107/204.

<sup>131</sup> Benjamin et al 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 and Employment Services Bill 2010 (2010) 6.

<sup>132</sup> *SITA v CCMA*.

<sup>133</sup> *SITA v CCMA* para [5].

<sup>134</sup> *SITA v CCMA* para [5] it would have been unlawful to employ the employee because his severance package outlawed such an action.

<sup>135</sup> *SITA v CCMA* para [5], [6] and [7].

<sup>136</sup> *SITA v CCMA* para [4] and [7]-[9].

<sup>137</sup> *SITA v CCMA* para [12].

the need to place reliance on section 198 as the answer could be provided by placing reliance on the identified factors to hold that SITA was the employer since the substance of the relationship was between SITA and the employee.<sup>138</sup>

In 2010, plans to ban TES's were set in motion when the *Labour Relations Amendment Bill* with proposed amendments to the 1995 LRA was published.<sup>139</sup> If the proposed amendments had seen the light of day, all employees would have been regarded as permanently employed by clients unless valid reasons were provided for keeping them on fixed-term contracts.<sup>140</sup> The proposed amendments were subjected to a Regulatory Impact Assessment that was commissioned by the Employment Promotion Program.<sup>141</sup> Various obstacles to a total ban on labour broking, including a possible violation of section 22 of the 1996 Constitution,<sup>142</sup> were identified.<sup>143</sup> In any event, a total ban would have been disastrous for the country's economy as well as the provided employees it sought to protect. TES's provide labour flexibility by making it possible for clients to access employees and then let them go when they no longer need them without having to undergo the stringent dismissal or retrenchment processes set out by the 1995 LRA.

The Confederation of Associations in the Private Employment Sector (CAPES) estimated that by 2010, approximately 850 000 people were employed by TES's. A ban on TES's would have possibly taken employment from them.<sup>144</sup> A ban would have also risked creating legal uncertainty regarding the status of provided employees, creating a backlog in the CCMA and the Labour Court.<sup>145</sup> In the end, the Labour Department ended up

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<sup>138</sup> SITA v CCMA para [14] and [16].

<sup>139</sup> Benjamin 2016 *ILJ* 32; Benjamin "To regulate or to ban?" 207; Botes 2015 (1) *SALJ* 130.

<sup>140</sup> Botes 2014 26 *SA Merc LJ* 113.

<sup>141</sup> Botes 2014 26 *SA Merc LJ* 114.

<sup>142</sup> S 22 provides that every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

<sup>143</sup> Benjamin et al 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 and Employment Services Bill 2010 (2010) 4.

<sup>144</sup> Benjamin et al 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 and Employment Services Bill 2010 (2010) 5.

<sup>145</sup> Benjamin et al 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 and Employment Services Bill 2010 (2010) 5-6.

deciding against a complete ban on TES, and the 2010 Bill was roundly rejected.<sup>146</sup> In the meantime, challenges in regards to the employer's identity presented by the wording of section 198 of the 1995 LRA still persisted.

In *Dyokhwe*<sup>147</sup> the applicant (employee) had initially been directly employed by the client until he was told to sign an employment contract with a particular TES. At the time he signed his employment contract with the TES, the employee, unable to read or write in English, was assured that nothing would change regarding his employment.<sup>148</sup> When he was dismissed, the question of his employer's identity arose.<sup>149</sup> The court found that the TES had not procured for or provided to the client the employee as he had already been directly employed by the client when he was alleged to have changed employment.<sup>150</sup> On this basis, the court found that section 198 of the LRA did not apply to the parties' relationship.<sup>151</sup> The contract between the TES and the applicant was *void ab initio* because it had been misrepresented by the TES when the applicant was assured that nothing would change.<sup>152</sup> Unlike in *LAD Brokers*,<sup>153</sup> the Court in *Dyokwe* gave a sensible meaning to "procured for or provided to" contained in section 198(2) of the 1995 LRA. Basically, for one to have been "procured for or provided to" the client, the client should not have previously employed that particular employee itself.<sup>154</sup> The difference in decisions on similar facts highlights the difficulty inherent in the construction of section 198 of the 1995 LRA.

The wording of section 198 of the 1995 LRA necessitated amendments to ensure that the employer's identity does not become an impediment to employees' exercise of their right to fair labour practices espoused by section 23 of the 1996 Constitution.<sup>155</sup> Clients and TES's kept employees temporary for longer than was just and in the process, denied such

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<sup>146</sup> Benjamin 2016 *ILJ* 32.

<sup>147</sup> *Dyokhwe v de Kok NO and Others* (2012) 33 *ILJ* 2401 (LC) (21 June 2012).

<sup>148</sup> *Dyokhwe* para [8].

<sup>149</sup> *Dyokhwe* para [2].

<sup>150</sup> *Dyokhwe* para [54]- [58].

<sup>151</sup> *Dyokhwe* para [58].

<sup>152</sup> *Dyokhwe* para [59].

<sup>153</sup> *LAD brokers* LC [36].

<sup>154</sup> *Dyokhwe* para [54].

<sup>155</sup> Gericke 2010 *Obiter* 105.

employees their full complement of labour rights.<sup>156</sup> For the exercise of provided employees' rights to be realised, the client and the TES needed to be regulated to the point where the employee could enjoy their rights while TES's could function to the economy's benefit.<sup>157</sup>

## 2.5 Current legal position under the amended section 198 of the 1995 LRA

In 2012, the *Labour Relations Amendment Bill* aimed at amending section 198 of the 1995 LRA was submitted to Parliament.<sup>158</sup> The Memorandum of Objects to the Bill stated that the amendments were meant to provide adequate protection to vulnerable employees, to ensure that those employees were treated with equality and to ensure their enjoy of fair labour practices.<sup>159</sup> The Bill also proposed the insertion of section 198A to the 1995 LRA in terms of which employees not performing temporary work would be deemed to be employees of the client.<sup>160</sup> The 2012 Bill culminated in the *Labour Relations Amendment Act*,<sup>161</sup> which inserted section 198A into the 1995 LRA.<sup>162</sup> The provisions of section 198A of the 1995 LRA apply to workers earning an amount not exceeding that determined by the Minister of Labour in terms of section 6(3) of the 1997 BCEA.<sup>163</sup>

Section 198A(1)(a) of the 1995 LRA provides that temporary service is work by an employee for a client for a period not longer than three months. Section 198(3)(b)(i) of the 1995 LRA provides that an employee not performing temporary services is *deemed* to be that client's employee, and the client is *deemed* to be their employer.<sup>164</sup> If the employee's contract of employment with the TES exceed three months, the employee will, from that point onwards, be deemed to be employed by the client. However, what the section does not say is what happens to the TES's relationship with the employee at

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<sup>156</sup> Dyokhwe para [2]; le Roux 2009 19 (3) *Contemporary Labour Law* 23.

<sup>157</sup> Forere 2016 (3) *SA Merc LJ* 378 sees it differently. For her, the client had to be identified as the employer.

<sup>158</sup> Benjamin 2016 *ILJ* 32.

<sup>159</sup> Memorandum of Objects *Labour Relations Amendment Bill*, 2012 1.

<sup>160</sup> Memorandum of Objects *Labour Relations Amendment Bill*, 2012 23.

<sup>161</sup> 6 of 2014.

<sup>162</sup> S 38 of the Labour Relations Amendment Act 6 of 2014.

<sup>163</sup> 75 of 1997. Currently the amount is R 205 433.30 per annum.

<sup>164</sup> van Niekerk, Smit and Christianson *Law@work* 72; Grogan *Workplace law* 21; Gerbers "The meaning of employee" 76.

that point.<sup>165</sup> It is possible to be deemed to be employed by the client while the TES continues to be the other employer.<sup>166</sup> Depending on how one interprets section 198A(3)(b)(i) of the 1995 LRA, both the dual and the single employer interpretations could prevail.<sup>167</sup> Whether it is either or both, employees need to know who their employer is. Employees do not only derive their dignity from being called such,<sup>168</sup> they also need to know with certainty who their employer is to enable them to enforce their rights against the correct party. The ambiguity inherent in section 198A(3)(b)(i) of the 1995 LRA arguably denies the affected employees this opportunity.

On the one hand, some academics have argued that a dual employment relationship commences post the three months as this is the only way of granting greater protection to vulnerable employees.<sup>169</sup> However, keeping the TES in the picture through the dual employer interpretation beyond the initial three months could have the undesired effect of creating confusion with regards to the true employer's identity.<sup>170</sup> On the other hand, some academics regard the client as becoming the sole employer beyond the initial three months.<sup>171</sup> The sole employer interpretation creates standard employment and removes the vulnerability inherent in being a provided employee.<sup>172</sup> Section 198(4A) of the 1995 LRA in the relevant part provides that if the client of the TES is jointly and severally liable or is deemed to be the employer in terms of section 198A(3)(b) of the 1995 LRA, a provided employee may institute proceedings against either or both the TES and the client. This section makes it possible to hold both parties accountable for any violations of the provided employees' rights.<sup>173</sup> If implemented, the sole employer interpretation negates this section. The conundrum then becomes which interpretation adequately protects the affected employees seeing that although both are reasonable, neither is

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<sup>165</sup> Van Staden and Van Eck (2018) 30 *SA Merc LJ* 422.

<sup>166</sup> Benjamin 2016 *ILJ* 36.

<sup>167</sup> *Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (2018) 39 *ILJ* 1911 CC; Harper, Mulligan and Horn Without Prejudice 18; Venter Without Prejudice 25; Aletter and Van Eck (2016) 2 *SA Merc LJ* 293; Botes (2014) 26 *SA Merc LJ* 132; Tshoose and Tsewedi *LDDev* 18 (2014) 342.

<sup>168</sup> Van Staden and Van Eck (2018) 30 *SA Merc LJ* 420.

<sup>169</sup> Venter D *Without Prejudice* 26.

<sup>170</sup> Forere 2016 (3) *SA Merc LJ* 378.

<sup>171</sup> Nkhumise 2016 20 *LDDev* 125.

<sup>172</sup> Van Staden and Van Eck (2018) 30 *SA Merc LJ* 432; Grogan (2018) 34.5 *EL*.

<sup>173</sup> Botes 2014 26 *SA Merc LJ* 120.

without fault. Ordinarily, interpreting legislation should not be such a brain cracking exercise. Legislators could have avoided the confusion simply by being lucid in their drafting of section 198A (3)(b)(i) of the 1995 LRA.<sup>174</sup>

## **2.6 Conclusion**

Since their statutory regulation, TES's have proven to be difficult to comprehensively regulate with the effect that provided employees fell victim to unscrupulous clients and TES's who exploited them. The language preferred by legislators when they drafted the successive versions of the sections regulating the triangular relationship created by TES's has not helped to put the question of the employer's identity to rest. The insertion of section 198A to the 1995 LRA was meant to achieve this, but it failed as legislators opted to "deem" instead of expressly identifying the employer post the initial three months period of employment by a TES.<sup>175</sup> With the Labour Court and LAC having grappled with the employer's identity, it was left to the Constitutional Court to determine the employer's identity with finality.

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<sup>174</sup> Aletter and Van Eck (2016) 28 *SA Merc LJ* 293; Harper R, Mulligan T and Horn J <https://www.chmlegal.co.za/where-to-for-labour-brokers/>.

<sup>175</sup> S 198A (3)(b)(i) of the 1995 LRA.

## Chapter 3

### The sole and dual employer interpretation of section 198A(3)(b) of the 1995 LRA

#### 3.1 Introduction

Following the 2014 insertion of section 198A into the 1995 LRA, the Labour Court delivered the judgment, *Assign Services (Pty) Ltd v CCMA and Others*,<sup>176</sup> which commenced a vexed debate on the true identity of the employer in instances of employment through TES's. The resultant academic debate provided a timely reminder that judgments are a great source of debate among legal scholars.<sup>177</sup> Section 198A(3) of the 1995 LRA provides that:

For the purposes of this Act, an employee-

- (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or
- (b) not performing such temporary service for the client is—
  - (i) *deemed* to be the employee of that client and the client is deemed to be the employer; (own emphasis)

Legal scholars could not agree on whether, the newly inserted section 198A(3)(b)(i) of the 1995 LRA creates a sole or dual employment relationship once it is triggered. Stated differently, the debate centred on whether once triggered, section 198A(3)(b)(i) of the 1995 LRA eliminates the TES from the equation and thereby regards the client of the TES as the sole employer of the provided employee or whether the client joins the TES resulting in them becoming dual employers. The force of the arguments from both ends of the academic spectrum greatly enriched this study, and for that reason, it was necessary to consider both views in detail.

This chapter commences with a presentation of the views of those who regard section 198(3)(b)(i) of the 1995 LRA to create a sole employer relationship. The views of those

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<sup>176</sup> *Assign Services (Pty) Ltd v CCMA and Others* (2015) 36 *ILJ* 2853 (LC) (Assign LC).

<sup>177</sup> Marumoagae 2017 *PER/PELJ* 2017 (20) 2.

academics who consider the section to create a dual employment relationship, views with which this study is aligned to, are then considered before the chapter is concluded.

### **3.2 The sole employer interpretation**

It is not difficult to comprehend why the sole employer interpretation finds favour with some scholars. The basis of their argument is a lucid one. They argue that having noted the exploitation inherent in the existence of two authoritative figures in the client and the TES,<sup>178</sup> it is perplexing that the amendments meant to cure the exploitation would continue with the practice of having two figures in a position of authority.<sup>179</sup> If the TES does not cease to exist post the initial three month period, the provided employees' bondage to TES's exists perpetually, and the purpose of the 2014 amendments is defeated.<sup>180</sup> It is on this basis that the client assumes the role of the sole employer to the provided employee until the relationship between the client and the provided employee comes to an end in terms of established labour law principles.<sup>181</sup> The possible pernicious effect of the absence of an employment contract between the client and the provided employee upon the triggering of section 198A(3)(b)(i) of the 1995 LRA is mitigated by the containment of employees' employment terms and conditions in collective agreements.<sup>182</sup> Another view is that the contract between the TES and the provided employee is transferred to the client and is then amended where necessary to put the provided employee on par with the existing employees of the client.<sup>183</sup>

Section 198A(3)(b)(i) of the 1995 LRA creates a statutory employment relationship that elevates provided employees to standard ones.<sup>184</sup> The argument goes that it would be pointless to retain the TES post the initial three months as the client will be performing all the responsibilities that come with being an employer.<sup>185</sup> However, as pointless as it

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<sup>178</sup> Memorandum of Objects *Labour Relations Amendment Bill*, 2012 23.

<sup>179</sup> Forere 2016 (3) *SA Merc LJ* 376-378 and 387-388; Grogan (2018) 34.5 *EL*.

<sup>180</sup> Forere 2016 (3) *SA Merc LJ* 389.

<sup>181</sup> Benjamin 2016 *ILJ* 38.

<sup>182</sup> Benjamin 2016 *ILJ* 40.

<sup>183</sup> Botes 2014 26 *SA Merc LJ* 133-134.

<sup>184</sup> Grogan 2018 34.5 *EL*.

<sup>185</sup> Grogan (2018) 34.5 *EL*.

comes across, some among these scholars accept that the TES may remain in the picture post the initial three months period simply for the sake of remunerating the employees.<sup>186</sup>

Section 198(4A)(a) of the 1995 LRA provides that if the client is jointly and severally liable in terms of section 198(4) of the 1995 LRA<sup>187</sup> or is deemed to be the employer in terms of section 198A(3)(b) of the 1995 LRA, the employee may institute proceedings against either or both the TES and the client. This section seems to present an insurmountable hurdle to the proponents of the sole employer interpretation in that at least on the face of it, it lends support to the dual employer interpretation by catering for instances where both the client and the TES are part of the equation. Forere<sup>188</sup> accepts that the joint and several liability espoused by section 198(4A)(a) of the 1995 LRA applies beyond the initial three months period. Having accepted this, she does not explain the capacity in which the TES continues to play a role in the relationship beyond the initial three months period seeing that she is of the view that the TES ceases to be the employer after the initial three months.<sup>189</sup>

Grogan,<sup>190</sup> asserts that the TES may continue in the relationship for the sake of paying the employee. However, this argument flies in the face of one that retaining the TES beyond the initial three months period may prove too expensive for the client.<sup>191</sup> Over and above the fee the TES would be entitled to receive, the client is obliged to remunerate the provided employee on par with the clients directly employed employees.<sup>192</sup> Far from

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<sup>186</sup> Grogan 2018 34.5 *EL*, Benjamin 2016 *ILJ* 40 – 41; Forere 2016 (3) *SA Merc LJ* 390.

<sup>187</sup> S 198(4) of the 1995 LRA provides that “[t]he temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its *employees*, contravenes –

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

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

(c) the Basic Conditions of Employment Act; or

(d) a sectoral determination made in terms of the *Basic Conditions of Employment Act*.

<sup>188</sup> Forere 2016 (3) *SA Merc LJ* 390.

<sup>189</sup> Forere 2016 (3) *SA Merc LJ* 390.

<sup>190</sup> Grogan 2018 34.5 *EL*.

<sup>191</sup> Forere 2016 (3) *SA Merc LJ* 388.

<sup>192</sup> S 198A(5) of the 1995 LRA.

promoting the dual employer interpretation, Benjamin<sup>193</sup> regards section 198(4A)(a) of the 1995 LRA as accommodating the TES if it chooses to stay for whatever reason.

A decision to ban TES's would be susceptible to a constitutional challenge on account of it unjustifiably limiting section 22 of the 1996 Constitution.<sup>194</sup> By enabling provided employees to hold TES's responsible for clients' unlawful conduct, section 198(4A)(a) of the 1995 LRA discourages TES's from being part of the equation beyond the initial three months without necessarily banning them and thereby avoiding constitutional challenges. If the TES is undeterred by its effect, the section exposes it to possible sanctions for the client's unlawful conduct.<sup>195</sup> The net effect of the section is to ensure that neither the TES, nor the client escape any liability for failing to uphold their duties as persons in positions of authority over the provided employee.<sup>196</sup> Between the TES and the client, either one can be held accountable for the failure of the other to uphold their duties irrespective of who is at fault.<sup>197</sup>

Even in their contestation for the sole employer interpretation, some of its proponents do accept that the dual employer interpretation does not harm provided employees in any way because they remain free to exercise all their 1995 LRA rights.<sup>198</sup>

### **3.3 Dual employer**

Although its proponents have nuanced differences in premise, they make quite compelling arguments on why the dual employer interpretation should be preferred over the sole employer interpretation. Legislative interpretation commences with the ascertainment of legislators' intentions simply by considering the ordinary meaning of the words preferred in the drafting of a particular section.<sup>199</sup> The word "deem" means "consider or regard".<sup>200</sup> The fact that a foster child considers or regards the woman who takes care of him to be

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<sup>193</sup> Benjamin 2016 *ILJ* 41.

<sup>194</sup> S 22 of the 1996 Constitution provides that "[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by law."

<sup>195</sup> Benjamin 2016 *ILJ* 40.

<sup>196</sup> Botes (2014) 26 *SA Merc LJ* 120.

<sup>197</sup> Botes (2014) 26 *SA Merc LJ* 120.

<sup>198</sup> Benjamin 2016 *ILJ* 39.

<sup>199</sup> Venter *Without Prejudice* 26.

<sup>200</sup> Venter *Without Prejudice* 26.

his mother does not make that woman the child's mother. If understood in this manner, the legislators' intentions of providing additional protection to provided employees are given effect to because having the client as an employer alongside the TES adds the intended additional protection.<sup>201</sup> There is no additional protection provided by the sole employer's interpretation. Rather, there is a subtraction in that one party – the TES – is removed from the equation. It is quite telling that the section is silent on any transfer of the employment contract. If the section had intended for termination of the relationship between the TES and the provided employee, legislators could and would have stated that much.<sup>202</sup>

Section 198A(3)(a) of the 1995 LRA provides that an employee performing temporary service for the client is an employee of the TES in terms of section 198(2) of the 1995 LRA.<sup>203</sup> Ciliwe<sup>204</sup> submits that section 198A of the 1995 LRA does not purport to limit or qualify the application of section 198(2) of the 1995 LRA. Furthermore, section 198A(4) of the 1995 LRA in relevant parts states that the termination by the TES of the employee's work for having exercised any right in terms of the 1995 LRA constitutes a dismissal.<sup>205</sup> If the TES is not intended to be part of the equation beyond the initial three months, what purpose does sections 198A(3)(a) and 198A(4) of the 1995 LRA serve? Thus, it follows that the TES continues to be the employer despite the triggering of section 198A(3)(b)(i) of the 1995 LRA.<sup>206</sup> A dual employment relationship commences on the triggering of section 198A(3)(b)(i) of the 1995 LRA.

Clients use every resource available to them, including employees, in a manner necessary for them to meet their economic needs.<sup>207</sup> It is for this reason that some employees are left in the employ of a TES. The joint and several liability imputed by section 198(4A) of the 1995 LRA caveats how clients may meet their economic needs in that it imposes

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<sup>201</sup> Venter *Without Prejudice* 26; Memorandum of Objects *Labour Relations Amendment Bill*, 2012 23.

<sup>202</sup> Venter *Without Prejudice* 27.

<sup>203</sup> S 198(2) of the 1995 LRA provides that "[f]or the purposes of *this Act*, a person whose services have been procured for or provided to a client by a temporary employment service is the *employee* of that temporary employment service, and the temporary employment service is that person's employer."

<sup>204</sup> Ciliwe *An evaluation of the amended temporary employment services provisions* 32.

<sup>205</sup> Ciliwe *An evaluation of the amended temporary employment services provisions* 32.

<sup>206</sup> Venter *Without Prejudice* 27.

<sup>207</sup> Tshoose and Tsweledi 18 2014 *LDDev* 340.

liability on either or both the TES and the client for the clients' failure to adequately protect and promote the rights of provided employees.<sup>208</sup> Thus, if the TES was meant to cease to be the employer of the employee post the initial three months period, legislators would not have seen the point of inserting section 198(4A) of the 1995 LRA simultaneously with section 198A. The fact that both were inserted into the 1995 LRA at the same time manifests the view that a dual employment relationship was meant to be created.

### **3.4 Conclusion**

Ardent proponents of both the sole and the dual employer interpretation find common ground in rooting their respective conclusions in section 198A(3)(b) of the 1995 LRA and the purpose for which it saw the light of day. To eliminate the obfuscation of the employer's identity, the proponents of the sole employer interpretation regard it to be the only one intended by the legislature because it eliminates all uncertainty about the employer's identity. The sole employer is the client once section 198A(3)(b) of the 1995 LRA has been triggered. Any disadvantage that employees may encounter once they are absorbed into the client's workforce is negated by section 198A(5) of the 1995 LRA, which enjoins the client to treat these employees as it does to all its other employees.

Proponents of the dual employer interpretation point out that section 198A of the 1995 LRA does not limit the application of section 198(2) of the 1995 LRA which identifies the TES as the employer of a provided employee. Both section 198A(3)(b) and 198(2) of the 1995 LRA can exist in tandem when the dual employer interpretation is preferred. The sole employer interpretation hinders section 198(2) of the 1995 LRA because it removes the TES from its employer role. Furthermore, deeming the client to be the employer does not eliminate the TES from the picture. If the elimination of the TES had been intended, the legislature would have made that much clear. In any event, why would the legislature intent on eliminating the TES introduce, at the same time as section 198A of the 1995 LRA, a provision in the form of section 198(4A) of the 1995 LRA that permits an aggrieved employee to institute proceedings against both the TES and the client?

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<sup>208</sup> Tshoose and Tsweledi 18 2014 *LDDev* 341.

It rarely happens that diametrically opposed interpretations of the same statutory provision provide conclusions so reasonable that neutral observers ponder, yet fail conclusively to take a side. With the legislature having completed its task of passing legislation, only the courts are capable of breaking the existent intellectual stalemate created by section 198A(3)(b)(i) of the 1995 LRA.

## Chapter 4

### **Belt and braces job: the dual employer interpretation should have prevailed**

#### **4.1 Introduction**

Court decisions are important because they settle existent disputes between litigants. They are also important for informing the populace about the current state of the law to enable the relevant persons to arrange their affairs accordingly.<sup>209</sup> It is for these reasons that decisions need to be as accurate as possible. The Constitutional Court in *Assign Services (Pty) Limited v NUMSA*,<sup>210</sup> recently announced that in terms of section 198A(3)(b) of the 1995 LRA, clients become the sole employers of provided employees once such employees exceed a period of three months of providing labour to clients.

This decision is significant because it addresses a thorny societal issue – the use of TES's by clients. Provided employees have traditionally fallen in the category of non-standard employment because their work had initially excluded them from the definition of "employee" contained in the 1995 LRA.<sup>211</sup> When they were catered for,<sup>212</sup> the legislation was not capable of providing an interpretation that enabled them to exercise all the rights as those being exercised by standard employees, such as the right to join trade unions,<sup>213</sup> which is an essential aspect of collective bargaining.<sup>214</sup> The difficulty of provided employees to bargain collectively left them unable to promote their socio economic interests adequately.<sup>215</sup>

As noted in the previous chapters, clients prefer provided employees because they enable them to save labour costs, have access to labour when they need it and to do away with it when it is no longer necessary without following the tedious processes contained in the 1995 LRA.<sup>216</sup> For reasons such as these, trade unions regard TES's as treating employees

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<sup>209</sup> Ngcukaitobi 2012 *Acta Juridica* 155; van Staden and van Eck (2018) 30 *SA Merc LJ* 418-419.

<sup>210</sup> *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 (Assign CC case).

<sup>211</sup> See sections 200A(1) and 213 of the 1995 LRA for the various definitions of employee.

<sup>212</sup> S 198(2) of the 1995 LRA.

<sup>213</sup> See paragraph 2.4.1 where the issue is discussed in greater detail.

<sup>214</sup> S 4(1)(b) of the 1995 LRA; Du Toit 2018 *ILJ* 2091.

<sup>215</sup> Du Toit 2018 *ILJ* 2093.

<sup>216</sup> Tshoose and Tsweledi 18 (2014) *LDDev* 340.

as profit-generating commodities.<sup>217</sup> On this score, the proper determination of the *Assign* case by the Constitutional Court would not only have resolved a dispute between the parties, but it would have also resolved this thorny societal issue.

Firstly, this chapter demonstrates how the law should be interpreted. Secondly, it sets out the facts of the *Assign* case. Thirdly, the chapter provides an analysis of the decisions of the courts, starting with that of the Labour Court.

## 4.2 Statutory interpretation

It is trite that legislation is passed by parliament. Ngcukaitobi<sup>218</sup> observes that by passing legislation, parliament is providing answers to matters in respect of which society differs. The logical assumption is that this legislation is consistent with the will of the majority of the populace since parliament is assumed to be giving effect to the majority's will. In this respect, legislation is important because it is the assumed voice of the people.<sup>219</sup>

However, the legislation does not interpret itself; it is presiding officers who do.<sup>220</sup> To ensure objectivity, the view that the interpretation of legislation entails placing reliance on neutral principles should be embraced.<sup>221</sup> Such a view negates any predilections that presiding officers might harbour.<sup>222</sup> In other words, presiding officers should be guided by the law and the principles derived therefrom when deciding cases. As positivist as this view might appear, it ensures consistency and impartiality. Presiding officers should not invent legal principles based on who the litigants are or what they are perceived to represent because doing so would be the same as giving effect to those presiding officers' predilections.<sup>223</sup> If presiding officers are not alive to this fact, there is a real danger that the outcome of cases will be dependent to a large extent on which presiding officer occupies the bench in a particular matter.<sup>224</sup> Courts could lose their legitimacy if losing

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<sup>217</sup> Sapa 2013 <https://www.fin24.com/Economy/Labour-brokers-are-parasites-Cosatu-20130620>.

<sup>218</sup> Ngcukaitobi 2012 *Acta Juridica* 165.

<sup>219</sup> Ngcukaitobi 2012 *Acta Juridica* 163.

<sup>220</sup> van Staden and van Eck (2018) 30 *SA Merc LJ* 419.

<sup>221</sup> Tsele (2016) *CCR* 196.

<sup>222</sup> *Assign* CC para [90].

<sup>223</sup> Tsele (2016) *CCR* 196.

<sup>224</sup> See Tsele (2016) *CCR* 198 wherein the author points out that the number of Constitutional Court judgments in which judges pen dissenting judgments based on differences on principles is increasing. My personal observation is that some Constitutional Court judges seem to too frequently dissent

parties can assert that they lost because certain judges manned the bench or because society wanted a certain outcome.<sup>225</sup> Litigants must lose cases because the law, objectively considered, was stacked against them. The pertinent question at this juncture is on the location of these neutral principles.<sup>226</sup> In the South African context, the answer lies in section 39 of the 1996 Constitution, which provides that:

- (1) When interpreting the Bill of Rights, a court... must (a) promote the values that underlie an open and democratic society based human dignity, equality and freedom...
- (2) When interpreting any legislation...every court... must promote the spirit, purport and objects of the Bill of Rights.

The reward of aligning interpretation to section 39(1) of the 1996 Constitution is that presiding officers are reminded never to stray away from the context which gave rise to the 1996 Constitution. The 1996 Constitution came at the back of severe injustices. To heal the resultant wounds, presiding officers should be minded to interpret the law in a manner that ensures that every citizen receives equal protection of the law and enjoys an improved quality of life.<sup>227</sup>

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,<sup>228</sup> Ngcobo J stated that two propositions are immediately discernible from section 39(2) of the 1996 Constitution. Firstly, legislation must be interpreted in a manner that advances constitutional values.<sup>229</sup> Secondly, the legislation must reasonably be capable of the intended interpretation.<sup>230</sup> The relevant foundational constitutional values are

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together (*AfriForum and Another v University of the Free State* [2017] ZACC 48; *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51).

<sup>225</sup> In *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 at para [55] the Court assumed that a public official will react negatively to adverse findings being made against them. However, in *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 para [94] the same Court suddenly gave public officials the benefit of the doubt and shied away from making any negative assumptions about their conduct. It seems reasonable to conclude that when the then president, Jacob Zuma approached the Court the assumption was that he would act in bad faith and when it is other public officials in court then the bad faith assumption miraculously disappears.

<sup>226</sup> See Tsele (2016) *CCR* 195-199 for these principles.

<sup>227</sup> Preamble of the 1996 Constitution.

<sup>228</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15 (Batho Star Fishing).

<sup>229</sup> This principle was reinforced in *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Ltd and Another* (CCT20/18) [2019] ZACC 45 (26 November 2019) para [16] – [18].

<sup>230</sup> *Bato Star Fishing* para [72].

located in section 1(a) of the 1996 Constitution, which proclaims that South Africa is founded on human dignity, equality and the advancement of human rights. It is in that context that presiding officers should interpret legislation.<sup>231</sup>

The factors to be taken into consideration in the interpretation process include understanding the particular provision in the context of the entire Act. Consistent with the foregoing, section 198A of the 1995 LRA should be understood in the context of the entire 1995 LRA and within the framework of the 1996 Constitution.<sup>232</sup> Words in a provision should be understood within the context in which the provision saw the light of day.<sup>233</sup> This is because context is everything in law.<sup>234</sup> The Memorandum of Objects, which predicates section 198A of the 1995 LRA, provides that the section should be inserted to ensure that the employees who fall within its reach are protected from clients who might intend to keep such employees as perpetual temporary employees.<sup>235</sup> In other words, the section should be subjected to a teleological interpretation.<sup>236</sup> In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>237</sup> Wallis JA provides a reminder that during the interpretation process, when various meanings are possible, each one should be weighed in light of the factors that include the context of the legislation.<sup>238</sup> Nuances caused by interpretation are ultimately settled by preferring the more sensible interpretation over the other.<sup>239</sup>

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<sup>231</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12 para [22].

<sup>232</sup> Botha Statutory interpretation 7.

<sup>233</sup> Bato Star Fishing para [90].

<sup>234</sup> *Minister of Home Affairs v Scalabrini Centre, Cape Town* (735/12 & 360/13) [2013] ZASCA 134 (27 September 2013) para [89].

<sup>235</sup> Memorandum of Objects *Labour Relations Amendment Bill*, 2012.

<sup>236</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12 para [21].

<sup>237</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012). The Constitutional Court cited the Endumeni case with approval in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (2) BCLR 165 (CC) para [29].

<sup>238</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012) para [18].

<sup>239</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012) para [18]; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) para 46.

## 4.3 The *Assign* case

### 4.3.1 Background

Does a provided employee become permanently employed by the client of a TES after three months of placement with the same client?<sup>240</sup> In the *Assign* case a TES had provided employees to one of its clients for a period exceeding three months.<sup>241</sup> The trade union acting on the provided employees' behalf, the National Union of Metalworkers of South Africa (NUMSA) interpreted section 198A(3)(b) of the 1995 LRA to regard the client as having become the sole and permanent employer of the provided employees once the section was triggered.<sup>242</sup> The basis for this argument was that the use of the word "deemed" in section 198A(3)(b)(i) of the 1995 LRA reflected the legislature's imposition of the client as the sole employer despite this not being so at the beginning of the relationship where the employee contracted with the TES and not the client.<sup>243</sup> The TES interpreted the section to create a dual employment relationship in terms of which the TES employed the provided employees, and on the triggering of the section, the client became an additional employer whose existence was only for the purposes of the 1995 LRA.<sup>244</sup> The CCMA ruled in favour of the sole employer interpretation.<sup>245</sup>

### 4.3.2 LC decision

When faced with the question of who the employer is post the initial three months period of placement, the Labour Court regarded the dispute as academic in nature and despite setting aside the CCMA's arbitration award, the court refused to show its position in the debate, rather opting to regard the issue as moot. The *ratio decidendi* is as follows:

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<sup>240</sup> *Assign Services (Pty) Ltd v CCMA and Others* (2015) 36 ILJ 2853 (LC) para 1 (Assign LC).

<sup>241</sup> Assign LC para [13].

<sup>242</sup> Assign LC para [3].

<sup>243</sup> Assign LC para 14.

<sup>244</sup> Assign CC para [14].

<sup>245</sup> *Assign Services (Pty) Ltd v Krost Shelving and Racking (Pty) Ltd and Another* ECEL 1652-15 para [5.17]; Assign CC para [19].

- The client is liable only for those employer duties that arise from the 1995 LRA, and the employment contract that exists between the employee and the TES has no bearing on the client.<sup>246</sup>
- There is no reason why the provided employee should cease to be that of the TES, given that if that happened, the employee would forfeit the entitlements they obtained as a result of the existence of the employment contract.<sup>247</sup>
- The function of the word "deemed" in section 198A(3)(b)(i) of the 1995 LRA is simply to increase the number of employers and not to substitute them. The client becomes an additional employer only for purposes of the 1995 LRA.<sup>248</sup>
- The dual employer interpretation is in line with section 198(4A)(b) of the 1995 LRA. It beggars belief that the legislature would insert a provision that enables enforcement under the BCEA,<sup>249</sup> against both the client and TES if it intended to remove the TES from the picture after three months. Section 198(4A)(b) of the 1995 LRA enables the enforcement of the BCEA against the client. Without this section, the enforcement of the BCEA against the TES would be impossible since section 198A(3)(b)(i) of the 1995 LRA deems the client to be the employer for 1995 LRA purposes only.<sup>250</sup>
- The dual employer interpretation will cause confusion on who has authority over the provided employee, between the TES and the client. This possibility is emboldened when one remembers that those who are usually employed on these terms are illiterate employees with low skill levels. The court regarded the TES as retaining its employer status past the initial three months period. According to the court, the client's exercise of control over the provided employee reflects the TES's delegation of its authority as the employer.<sup>251</sup>

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<sup>246</sup> Assign LC para 11.

<sup>247</sup> Assign LC para 12.

<sup>248</sup> Assign LC para 14.

<sup>249</sup> 75 of 1997.

<sup>250</sup> Assign LC para 15.

<sup>251</sup> Assign LC para 17.

- If the TES dismisses the provided employee, the employment contract as the source of the relationship would cease to exist, making it impossible to give effect to the object of the relationship - to serve the client. In these circumstances, even the client ceases to be the client, at least in respect of that employee.<sup>252</sup>

### ***4.3.3 LAC decision***

Not satisfied with the Labour Court's outcome, NUMSA approached the Labour Appeal Court, which ruled in its favour. The Court endorsed outright the sole employer interpretation.<sup>253</sup> The basis for the Labour Appeal Court's finding is this:

- Section 198A(1) of the 1995 LRA excludes provided employees from being regarded as employees of the TES if they have been with a client for longer than three months and were not replacements for temporarily absent employees. Instead of such employees becoming unemployed, section 198A(3)(b)(i) of the 1995 LRA deems them to be employees of the clients provided that they do not earn more than the amount determined by the Minister of Labour.<sup>254</sup> However, for them to be deemed as such, the TES that employed them should not have done so in terms of a fixed-term contract.<sup>255</sup>
- The sole employer interpretation ensures that TES's are nothing more than temporary employers.<sup>256</sup>
- Section 198A(4) of the 1995 LRA regards the dismissal of provided employees for the purpose of avoiding to trigger the provisions of 198A(3)(b) of the 1995 LRA as a dismissal precisely because it wants the employees to join the clients' workforce permanently.<sup>257</sup> Permanent employment provides job security that is essential in the promotion of fair labour practices.<sup>258</sup> Alive to the peculiar circumstances in

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<sup>252</sup> Assign LC para 17.

<sup>253</sup> *NUMSA v Assign Services and Others* (2017) 38 ILJ 1978 (LAC) para [38] (Assign LAC).

<sup>254</sup> Assign LAC para [36]; S 198A (1) and (2) of the 1995 LRA.

<sup>255</sup> Assign LAC para [37]; s 198A (3)(b)(ii) of the 1995 LRA.

<sup>256</sup> Assign LAC para [38] and [42].

<sup>257</sup> Assign LAC para [39].

<sup>258</sup> *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* [2018] ZACC 44 para [1].

which provided employees join the workforce, section 198A(5) of the 1995 LRA negates any unjustified inequality in treatment between clients' existing employees and those who join the workforce as a result of section 198A(3)(b) of the 1995 LRA.<sup>259</sup> The dual employer interpretation is irreconcilable to section 198A(5) of the 1995 LRA.<sup>260</sup>

- The Labour Appeal Court regards sections 198(4) and 198(4A) of the 1995 LRA as deliberately enabling provided employees to institute proceedings against either the TES or the client to discourage TES's from being part of the relationship post the initial three months period.<sup>261</sup> This reasoning is not convincing. Firstly, the fact that section 198(4A) of the 1995 LRA seeks to discourage and not to impose an outright ban suggests that the section does not shun the dual employer interpretation. This, on its own rips the gut of the sole employer interpretation. Secondly, if TES's can choose whether to stay or not and section 198A(4A) of the 1995 LRA is there to discourage them from staying, what will the LRA's answer be to an unscrupulous client who convinces a TES to stay as a proxy?
- With regards to the purpose of section 198A(3)(b) of the 1995 LRA, the court held that the section creates a statutory employment relationship between a client and the provided employee.<sup>262</sup> The section frees the provided employee from the hardships that come with being provided to a client, such as earning lower wages than their directly employed colleagues who do the same work. For the Court, it is senseless to retain the TES in the equation through the dual employer interpretation despite the client having assumed all the employer responsibilities. Furthermore, the court held that once section 198A(3)(b) of the 1995 LRA has been triggered, the dismissal of the employee by the TES will be inconsequential because by then, the client would be the employer by operation of law.<sup>263</sup> In

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<sup>259</sup> Assign LAC para [39] and [40].

<sup>260</sup> Assign LAC para [40].

<sup>261</sup> Assign LAC para [41].

<sup>262</sup> Assign LAC para [43].

<sup>263</sup> Assign LAC para [45].

essence, the court held that the TES cannot lawfully dismiss an employee who is not its own.

#### ***4.3.4 Constitutional Court decision***

##### ***4.3.4.1 Section 198***

Dlodlo AJ started off her majority decision on the wrong foot. By considering "deemed to be", as contained in section 198A(3)(b) of the 1995 LRA, to be equivalent to "is", she displayed a leap in logic that laid the foundation for what ultimately became a flawed conclusion.<sup>264</sup> Section 198(2) of the 1995 LRA properly analysed unequivocally proclaims that the starting point is that provided employees are those of TES's.<sup>265</sup> Section 198(4) of the 1995 LRA provides for the joint and several liability of both the TES and the client if the TES makes certain contraventions. Section 198(4A)(a) of the 1995 LRA then provides that an employee may institute proceedings against either or both the TES and the client if the client is held jointly and severally liable or is deemed to be the employer in terms of section 198A(3)(b) of the 1995 LRA. The wording of 198(4A) of the 1995 LRA acknowledges that the TES is the employer in terms of section 198(2) of the 1995 LRA. By expressly providing that "If the client ... is deemed to be the employer... the employee may institute proceedings against [either or both]", section 198(4A)(a) makes provision for the subsequent stage when the client is a part of the equation. In this way, provided employees benefit from the intended additional protection because they may enforce their rights against two employers. This is the only way of making section 198(4A) of the 1995 LRA intelligible.<sup>266</sup>

Section 198A(3)(b) of the 1995 LRA does not eliminate the TES. It augments the relationship by adding the client.<sup>267</sup> Deeming provisions often create meanings that ordinarily would not be so.<sup>268</sup> What is the reason for holding both the client and the TES jointly and severally liable other than it being intended for them to co-exist post the initial

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<sup>264</sup> Assign CC para [45].

<sup>265</sup> Assign CC para [92].

<sup>266</sup> Assign CC para [95] - [96].

<sup>267</sup> Assign CC para [92].

<sup>268</sup> Assign CC para [92].

three months period? Dlodlo AJ glossed over this predicament by simply stating that section 198(4) of the 1995 LRA regulates the first three months when section 198A(3)(b) of the 1995 LRA has not been triggered.<sup>269</sup> Dlodlo AJ regards section 198(4) of the 1995 LRA as creating a statutory form of liability that a provided employee can unleash on the client when the TES fails to meet its obligations. To her, section 198(4) of the 1995 LRA does not create dual employment. However, Cachalia AJ, in his lone dissent, correctly points out that section 198(4) of the 1995 LRA states that the client and the TES are completely liable, and for that reason, either one can be sued by the provided employee. Furthermore, an award or order against any of the two parties can be enforced by the provided employee against either.<sup>270</sup> If the sole employer interpretation is accepted, its inherent anomaly would be to impose an employer's liability on the client despite it not being the employer because, according to the court, section 198(4) of the 1995 LRA applies during the initial three months period when the TES is still the employer.

Cachalia AJ perceived that under the dual employer interpretation, section 198(4) of the 1995 LRA would still be of assistance to a provided employee if the TES violated the 1995 LRA or the employment contract after the initial three months period. The sole employer interpretation has the pernicious effect of exonerating the TES because it will no longer be the employer, and for that reason, the provided employee will have no recourse against it.<sup>271</sup> This would be at odds with the intended additional protection of the 2014 amendments.

#### *4.3.4.2 Contextual and purposive reading of section 198A of the 1995 LRA*

Sections 198A(3)(a) and (b) of the 1995 LRA are separated by "or". Dlodlo AJ<sup>272</sup> observed that the use of "or" mandates a choice. It is either a provided employee is employed by the TES or by the client. It cannot be by both. This according to the court forms the basis of the sole employer interpretation.<sup>273</sup> This begs the question why the legislature did not

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<sup>269</sup> Assign CC para [58].

<sup>270</sup> Assign CC para [98] - [99].

<sup>271</sup> Assign CC para [94].

<sup>272</sup> Assign CC para [51].

<sup>273</sup> Assign CC para [51].

use clear language to that effect. Had the legislature intended for such a choice, the most obvious thing to do would have been to state it unequivocally.<sup>274</sup>

#### 4.3.4.3 *Which interpretation is to be preferred?*

Dlodlo AJ<sup>275</sup> provides a timely reminder that the dual employer interpretation may be an antithesis to the 2014 amendments' purpose in that it may enable TES's and clients to continue to obfuscate the employer's identity. While at first glance this appears to be a reasonable trepidation, section 198A(5) of the 1995 LRA enjoins the equal treatment of provided employees with their directly employed colleagues. It would be pointless to obfuscate the employer's identity, because despite that provided employees will still be entitled to equal remuneration and treatment. In any event, even if the employer's identity were to remain a mystery, provided employees may seek the enforcement of an order or award against either or both employers in terms of sections 198(4) and 198(4A) of the 1995 LRA.<sup>276</sup>

Dlodlo AJ presents security of employment as one of the gambits for her preference for the sole employer interpretation. Cachalia AJ<sup>277</sup> provides a reminder that if the client is liquidated, the provided employee will not be able to return to the TES because by then, the TES would have ceased to be their employer. This, on its own rips the gut of Dlodlo AJ's argument. The sole employer interpretation severely weakens the security of employment that is found in the dual employer interpretation ability to permit the employee to count on the TES for employment when the client is liquidated.

One of the biggest criticisms of the triangular relationship between the TES, client and the provided employee was that the provided employees could not exercise their full complement of rights in terms of the 1995 LRA. Dlodlo AJ<sup>278</sup> points out that the dual employer interpretation would make it impossible for provided employees to go on a protected strike since an issue of mutual interest with one employer may not necessarily

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<sup>274</sup> Assign CC para [92].

<sup>275</sup> Assign CC para [79].

<sup>276</sup> Grogan J (2018) 34.5 *EL*.

<sup>277</sup> Assign CC para [103].

<sup>278</sup> Assign CC para [82].

be so in respect of the other employer. Section 198(4A) of the 1995 LRA permits provided employees to enforce their rights against either or both parties. This means that if the provided employees meet the requirements of a protected strike in respect of one employer, they may exercise their right against either or both employers without the risk of being dismissed by either.<sup>279</sup>

The Constitutional Court in *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*<sup>280</sup> reinforced the principle that courts should embrace interpretations of legislation that promote the 1996 Constitution over those that do not.<sup>281</sup> Cachalia AJ identifies the drawbacks of the sole employer interpretation. Firstly, this interpretation coerces the provided employee into a relationship whose terms were not agreed on and thereby violates section 23(1) of the 1996 Constitution.<sup>282</sup> The coercion also violates section 22 of the 1996 Constitution in that it deprives provided employees the opportunity to choose their occupation.<sup>283</sup> The dual employer interpretation causes none of these violations. Over and above the identified complications of the sole employer interpretation, provided employees lose their benefits, such as pension and leave days; they might have accrued from the TES.<sup>284</sup>

While section 198A(5) of the 1995 LRA may provide a soft landing to provided employees in their sole employment if the client has existing employees who do work akin to that of the provided employees, the section offers no protection whatsoever when the provided employees arrive at a workplace where they are the only ones who do their kind of work.<sup>285</sup> The lack of an employment contract with the client, especially because these employees are usually illiterate, exacerbates provided employees' problems in that they have no visible undertaking to which they may hold their employer accountable.

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<sup>279</sup> See s 64 of the 1995 LRA for the requirements of a protected strike.

<sup>280</sup> *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2016) 37 *ILJ* 2730 (CC).

<sup>281</sup> *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2016) 37 *ILJ* 2730 (CC) para [135]; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC para [23].

<sup>282</sup> Assign CC para [108].

<sup>283</sup> Assign CC para [108].

<sup>284</sup> Assign CC para [100].

<sup>285</sup> Assign CC para [101].

It is undoubtable that there was meant to be an alignment of the 1995 LRA and BCEA in that the BCEA's definition of TES is identical to that found in section 198(1) of the 1995 LRA.<sup>286</sup> Section 82(1) of the BCEA is the mirror image of section 198(2) of the 1995 LRA. The sole employer interpretation fragments the intended alignment when section 198A(3)(b) of the 1995 LRA is triggered by considering the client to be the sole employer.<sup>287</sup>

Section 3 of the 1995 LRA envisages interpretations of the Act that are consistent with the 1996 Constitution as well as the Republic's international law obligations. While some, like the majority in the *Assign* case, may stretch their interpretation abilities to accommodate the sole employer interpretation, the lingering precedent is that only the interpretation that is in complete harmony with the 1996 Constitution should prevail.<sup>288</sup> The dual employer interpretation fits snugly into this interpretation paradigm.<sup>289</sup>

#### **4.4 Conclusion**

The majority decision purports to be based on principles, but on closer scrutiny, the principles are blurred by what seems to be the majority's determination to square the circle created by triangular employment. In settling disputes, courts are not there to do what seems to be good for society, or in this case, what seems to be good for provided employees. Courts should apply the law through the prism of the 1996 Constitution and accept whatever resultant decision.

While the majority decision may be lauded as having reined in the *bête noire* of the working class that is TES's, among lawyers, it leaves the impression that precedent and objectivity are negligible when the court is eager to reach a predetermined outcome. One litigant in this case lost what was supposed to be an honest victory, the other, the peace derived from a fair defeat.<sup>290</sup> The Constitutional Court's decision is one that a provided employee would rejoice to, but a lawyers bane. The decision appears to be what provided

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<sup>286</sup> *Assign* CC para [106]; s 1 of the 1997 BCEA.

<sup>287</sup> *Assign* CC para [106] – [107].

<sup>288</sup> *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) para [46].

<sup>289</sup> Dyokwe para [22].

<sup>290</sup> See Scalia J's words as quoted by Tsele M in Tsele M 2018 (2) *SALJ* 220.

employees might have desired, but it is bane in that it is not a decision a court guided by nothing but the law and the principles derived therefrom could have reached.

## **Chapter 5**

### **General conclusion**

#### **5.1 Introduction**

Employees employed by TES's have historically been exploited because they had difficulties in identifying their employer. This study clarified the employer's identity once the provisions of section 198A(3)(b) of the 1995 LRA have been triggered. The study was limited to a comprehensive analysis of that particular section, with other sections being perused only to the extent that they assisted in its analysis.

This chapter is limited to only the fundamental aspects of the foregone chapters and to conclude on the correct interpretation between the sole and the dual employer interpretation.

#### **5.2 Concluding remarks**

Despite having been in existence for a considerable time prior, the regulation of TES's only began upon the amendment of the 1956 LRA in 1983. In relation to TES's, the amendments were meant to address the failure by employers to carry out employer duties such as the provision of social security and job security to provided employees. The 1956 LRA's identification of the TES as the employer was an antithesis to the amendments' intended purpose because it identified TES's as employers despite employees spending the vast majority of their work-life with clients who did not have any statutory responsibilities. The overall limited regulation of TES's furthermore exacerbated the problematic circumstances.

The democratic transition of the 1990s meant a revolution in labour relations. A new Act, namely, the 1995 LRA, was promulgated. Section 198 of the 1995 LRA regulated, but still inadequately, employment through TES. Problems that predated the 1995 LRA, such as the identification of the TES as the employer and the unequal treatment between provided employees and those directly employed by clients persisted. Provided employees could be dismissed at the client's whim, and it was standard practice for employment contracts between TES's and employees to contain automatic termination clauses in

terms of which provided employees automatically lost their jobs when clients and TES's terminated their commercial agreements. To address such issues, among multiple others, the 1995 LRA was amended in 2014. The consequent insertion of section 198A(3)(b) of the 1995 LRA mandated that after three months of placement with a client, a provided employee is *deemed* to be employed by that client. Disappointingly, the wording of the section, while identifying the client as the employer, was not lucid enough to state the TES's position at that juncture.

The 2014 amendments commenced a fierce academic debate on whether once section 198A(3)(b) of the 1995 LRA is triggered, both the TES and the client become joint employers or whether the client becomes the sole employer. On the one hand, proponents of the sole employer interpretation argue that having the client as the sole employer once the section has been triggered curbs the exploitation inherent when the employee does not know with certainty who their employer is. The employment contract between the TES and the provided employee is transferred to the client and then amended where necessary to ensure that it puts provided employees on par with their directly employed colleagues. When this eventuality arises, it becomes pointless to have a dual employment relationship because by then provided employees would have been elevated to standard ones. However, the TES may remain in the picture beyond the initial three months only to remunerate the employee.

The fact that the TES lingers on beyond the triggering of section 198A(3)(b) of the 1995 LRA is as a result of the legislature's reluctance to impose a complete ban on them lest the decision is challenged for violating section 22 of the Constitution. If the TES continues in the relationship, it could find itself being held liable for the client's statutory violations. On the other hand, teleological interpretation leads the proponents of the dual employer interpretation to conclude that beyond the triggering of section 198A(3)(b) of the 1995 LRA, both the TES and the client remain as dual employers. The starting point for them is not whether a dual employer relationship commences and thereby may lead to the obfuscation of the employer's identity. For them what matters is what better protects the employees as envisaged by the legislature. The 2014 amendments show an Act intent on having both the TES and the client as joint employers beyond the triggering of the section. Section 198A(3)(a) of the 1995 LRA provides that the TES is the employer of the provided

employee in terms of 198(2) of the 1995 LRA while section 198A(4) of the 1995 LRA provides that the termination of the employee's employment by the TES for having exercised rights constitutes a dismissal.

The Constitutional Court's decision in *Assign Services CC* marked the tipping point in the debate regarding the employer's identity – or did it? The majority held that once section 198A(3)(b) of the 1995 LRA has been triggered, the client becomes the sole employer of the provided employee. The word "or" used to separate section 198A(3)(a) of the 1995 LRA from 198A(3)(b) of the 1995 LRA enjoins a choice. An employee falls within the ambit of section 198A(3)(a) of the 1995 LRA until section 198A(3)(b) of the 1995 LRA kicks in. The possible hindrance in the exercise of rights that may be caused by the dual employer interpretation also swayed the majority against it. The court pointed out that what might constitute an issue of mutual interest between one employer and the provided employees may not necessarily be so for the other employer. This predicament would then make it impossible for the employees to go on a protected strike. The former Chief Justice, Pius Langa,<sup>291</sup> once pointed out that a dissenting judgment keeps alive the views that otherwise have been declared to be wrong by the majority. Cachalia AJ's dissent is so compelling that one ponders whether the issue has been put to bed. In support of the dual employer interpretation, Cachalia AJ highlighted that by coercing an employee into an employment contract based on unknown terms, the sole employer interpretation violates at least the employees' constitutional right to choose an occupation and that to fair labour practices. The sole employer interpretation also undoes the existent alignment between the BCEA and the 1995 LRA. The dissenting judgment should be lauded for upholding the 1996 Constitution by identifying provided employees as employed by both TES's and their clients post the initial three months period. The two employers are capable of providing the intended additional protection that the 2014 amendments were meant to bring to provided employees. It provides security of employment and also enables provided employees to exercise all their rights in terms of the 1995 LRA.

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<sup>291</sup> Langa "The emperor's new clothes: Bram Fischer and the need for dissent" 2007 23 *SAJHR* 370.

### 5.3 Recommendation

Although this study supports the dual employer interpretation, it is nevertheless recommended that section 198A(3) of the 1995 LRA should be redrafted to ensure that it is lucid enough to enable those interpreting it to definitively ascertain whether the sole or dual employer interpretation is intended. The word "deemed" should be avoided, and the legislature should clearly state what the position of the TES is post the initial three months period.

Clarity is a fundamental aspect of the rule of law.<sup>292</sup> Despite the Constitutional Court's *Assign* judgment, clarity on how to interpret section 198A(3)(b) of the 1995 LRA in harmony with the other provisions of the 1995 LRA remains elusive.<sup>293</sup> It is not unheard of that the Constitutional Court changes its decisions. At times dissenting judgments have escaped the clutches of mere decent.<sup>294</sup> Cachalia AJ's dissent has proven that there is, at times, more than one correct answer to a legal question.<sup>295</sup> However, there is a need for one definitive answer to whether there commences a sole or dual employment relationship post the triggering of section 198A(3)(b) of the 1995 LRA. A legislative amendment can provide this answer.

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<sup>292</sup> Gauntlett "The sounds of silence?" 2011 2 *TSAR* 277.

<sup>293</sup> Grogan J (2018) 34.5 *EL*.

<sup>294</sup> The Constitutional Court in *Gcaba v Minister for Safety and Security and Others* (2010) 31 *ILJ* 296 (CC) confirmed the dissenting judgment in *Chirwa v Transnet Limited and Others* (2008) 29 *ILJ* 73 (CC) par [154] on the jurisdiction of the Labour Court and the High Court; Hoexta 2015 *Acta* 121 and 123 – 133; Langa "The emperor's new clothes: Bram Fischer and the need for dissent" 2007 23 *SAJHR* 369.

<sup>295</sup> Langa "The emperor's new clothes: Bram Fischer and the need for dissent" 2007 23 *SAJHR* 370.

## **Bibliography**

### *Literature*

Alleter and van Eck 2016 (2) *South African Mercantile Law Journal*

Alleter C and van Eck S "Employment agencies: Are South Africa's Recent Legislative amendments compliant with the International Labour Organisation's standards?" 2016 SA Merc LJ 286-310

Basson *et al*/ The Essential labour Law Handbook

Garbers C "The meaning of 'employee'" in Basson AC, Christianson MA, Garbers C, le Roux PAK and Strydom EML (eds) The Essential Labour Law Handbook (Labour Law Publications cc Cape Town 2017) 55- 80

Benjamin (2016) 37 *Industrial Law Journal*

Benjamin P "Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act" (2016) 37 ILJ 28-44

Benjamin "To ban or to regulate?"

Benjamin P "To regulate or to ban? Controversies over temporary employment agencies in South Arica and Namibia" in Malherbe K and Sloth-Nielsen (eds) Labour Law into the future: Essays in honour of D'Arcy du Toit (Juta Claremont 2012) 189-209

Bosch 2008 *ILJ*

Bosch C "Contract as a barrier to dismissal: the plight of the labour broker's employee" 2008 29 *ILJ* 813-840

Botha *Statutory interpretation: an introduction for students*

Botha C *Statutory interpretation: an introduction for students 5<sup>th</sup> ed* (Juta Cape Town 2017)

Botes 2015 *SALJ*

Botes "A comparative study on the regulation of labour brokers South Africa and Namibia in light of recent legislative developments" (2015) 1 *SALJ*100-121

Botes (2014) 26 *South African Mercantile Law Journal*

Botes A "Answer to the questions? A critical analysis to the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers" 2014 26 *SAMLJ* 110-137

Brassey and Cheadle 1983 *ILJ*

Brassey MSM and Cheadle H "Labour Relations Amendment Act 2 of 1983" (1983) 1983) 4 *ILJ* 34-37

Ciliwe 2016 LLM Dissertation

Ciliwe Y An evaluation of the amended Temporary Employment Service Provisions in the South African Labour Relations Act (LLM-dissertation University of Western Cape 2016)

Cassim *de Rebus* January 1984

Cassim NA "The Labour Relations Amendment Act 2 of 1983" *de Rebus* (January 1984) 27-31

Conradie 2016 22 *Fundamina*

Conradie M "THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES: A CONSIDERATION OF THE INFLUENCE AND CONTINUED IMPORTANCE OF THE HISTORICAL REGULATION OF (UN)FAIR LABOUR PRACTICES PRE-1977" 2016 22 *Fundamina* 163-204

Du Toit 2018 *SA Merc LJ*

Du Toit D "Should precarious work be the focus of labour law?" 2018 *ILJ* 39 2089 - 2106

Forere 2016 (3) *South African Mercantile Law Journal*

Forere MA "From exclusion to Labour Security: To what extent does section 198 of the Labour Relations Amendment Act of 2014 strike a balance between the employers and employees?" 2016 (3) *SA Merc LJ* 375 - 398

Frahm-Arp *Without Prejudice* November 2015

Frahm-Arp L "Fair or Lawful: which is paramount?" *Without Prejudice* (November 2015) 16 – 17

Gauntlett 2011 *TSAR*

Gauntlett JJ "The sounds of silence?" 2011 *TSAR* 226 - 233

Gerbers "The meaning of employee"

Gerbers C "The meaning of employee" in Basson AC, Christianson MA, Garbers C *et al The New essential Labour Law Handbook* 6<sup>th</sup> ed (Labour Law Publications CC Centurion 2017) 55-80

Gericke 2010 *Obiter*

Gericke "Temporary Employment Services: Closing a loophole in section 189 of the Labour Relations Act 66 of 1995" 2010 *Obiter* 92-105

Grogan (2018) 34.5 *EL*

Grogan J "Bashing the brokers: Does *Assign* spell the end of labour broking?" (2018) 34.5 *EL*

Grogan *Workplace Law*

Grogan J *Workplace Law* 12<sup>th</sup> ed (Juta Grahamstown 2017)

Harper, Mulligan and Horn *Without Prejudice* February 2018

Harper R, Mulligan T and Horn J "Where to for Labour Brokers?" *Without Prejudice* (February 2018) 18

Langa SAJHR 2007

Langa P "The emperor's new clothes: Braam Fischer and the need for dissent" *SAJHR* 362 - 372

le Roux 2009 *Contemporary Labour Law*

le Roux PAK "Labour brokers and non-standard forms of employment" 2009 19 (3) *Contemporary Labour Law* 21-30

Marumoagae 2017 *PER/PELJ*

Marumoagae C "Liability to Pay Retirement Benefits when Contributions were not paid to the Retirement Fund" *PER/PELJ* 2017 (20)

Nkhumise 2016 *LDDev*

Nkhumise RW "Dismissal of an employee at the instance of the client: Revisiting *Nape v INTCS Corporate Solutions (Pty) Ltd* in the context of the Labour Relations Amendment Act 6 of 2014" (2016) 20 *LDDev* 106-130

Ngcukaitobi 2012 *Acta Juridica*

Ngcukaitobi "Precedent, separation of powers and the Constitutional Court" 2012 (1) *Acta Juridica* 148 - 169

Theron 2005 *ILJ*

Theron J "Intermediary or employer: Labour Brokers and the Triangular Employment Relationship?" (2005) 26 *ILJ* 618-649

Theron 2012 *Acta Juradica*

Theron J "Prisoners of paradigm: labour broking, the 'new services' and non-standard employment" 2012 *Acta Juradica* 58-83

Tsele (2016) *CCR*

Tsele M "Coercing Virtue' in the Constitutional Court: Neutral Principles, Rationality and the *Nkandla* Problem" (2016) 8 *CCR* 193 - 220

Tshoose and Tsweledi 2014 *LDDev*

Tshoose C and Tsweledi B "A Critique of the of the protection afforded to non-standard workers in a temporary employment service context in South Africa" 2014 18 *LDDev* 334-346

Van Eck 2010 *PER/PELJ*

Van Eck BPS "Temporary employment services (labour brokers) in South Africa and Namibia" 2010 13 (2) *PER/PELJ* 106/204-126/201

van Niekerk *et al*/Law@work

van Niekerk *et al* Law@work (LexisNexis Durban 2017)

Van Staden and Van Eck 2018 *SA Merc LJ*

Van Staden M and Van Eck S "'Deemed' to be an employee: adopting the teleological interpretation of statutes (2018) 30 *SA Merc LJ* 416 – 433

Venter *Without Prejudice* November 2015

Venter D "Who is the employer?" *Without Prejudice* November 2015 26

## **Case law**

*AfriForum and Another v University of the Free State* [2017] ZACC 48

*Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (2) *BCLR* 165 (CC)

*AMCU and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3

*Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Ltd and Another* (CCT20/18) [2019] ZACC 45 (26 November 2019)

*April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* (2005) 26 *ILJ* 2224 (CCMA)

*Assign Services (Pty) Ltd v CCMA and Others* (2015) 36 *ILJ* 2853 (LC)

*Assign Services (Pty) Ltd v Krost Shelving and Racking (Pty) Ltd and Another* ECEL 1652-15

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

*Barkhuizen v Napier* CCT 72/05 [2007] ZACC 5

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15

*Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15

*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)

*Chirwa v Transnet Limited and Others* (2008) 29 *ILJ* 73

*City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19

*Dyokhwe v De Kok NO and Others* [2012] 10 *BLLR* 1012 (LC)

*Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11

*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)

*Gcaba v Minister for Safety and Security and Others* (2010) 31 *ILJ* 296

*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12

*LAD Brokers (Pty) Ltd v Mandla* (CA14/00) [2001] ZALAC 9 (29 June 2001)

*Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51

*Mahlamu v CCMA* [2011] 4 *BLLR* 381 (LC)

*Mankayi v AngloGold Ashanti Ltd* 2011 (5) *BCLR* 453 (CC)

*Minister of Home Affairs v Scalabrini Centre, Cape Town (735/12 & 360/13)* [2013] ZASCA 134 (27 September 2013)

*Nape v INTCS Corporate Solutions (Pty) Ltd* (JR 617/07) [2010] ZALC 33

*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA)

*National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (2) *BCLR* 154

*National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* (CCT14/02) [2002] ZACC 30

*National Union of Metalworkers of South Africa and Others v Abancedisi Labour Services* (857/12) [2013] ZASCA 143 (30 September 2013)

*National Union of Metalworkers of South Africa v Assign Services and Others* (2017) 38 ILJ 1978 (LAC)

*Sindane v Prestige Cleaning Services* 2009 BLLR 1249 (LC)

*South African Broadcasting Corporation v McKenzie (CA8/98)* [1998] ZALAC 13 (15 October 1998)

*South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* [2018] ZACC 44

*State Information and Technology Agency v CCMA* [2008] 7 BLLR 611 (LAC)

*United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21

*University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2016) 37 ILJ 2730 (CC)

*Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC)

## **Legislation**

*Constitution of the Republic of South Africa, 1996*

*Basic Conditions of Employment Act 75 of 1997*

*Compensation for Occupational Injuries and Diseases Act 130 of 1993*

*Constitution of the Republic of South Africa, Act 200 of 1993*

*Employment Equity Act 55 of 1998*

*Industrial Conciliation Act 11 of 1924*

*Industrial Conciliation Act 36 of 1937*

*Labour Relations Act 66 of 1996*

*Labour Relations Act 28 of 1956*

*Labour Relations Amendment Act 2 of 1983*

*Labour Relations Amendment Act 6 of 2014*

*Labour Relations Amendment Bill 16 of 2012*

Memorandum of Objects of the *Labour Relations Amendment Bill, 2012*

### ***Internet sources***

Harper R, Mulligan T and Horn J 2017 <https://www.chmlegal.co.za/where-to-for-labour-brokers/> accessed 22 April 2019

Sapa 2013 <https://www.fin24.com/Economy/Labour-brokers-are-parasites-Cosatu-20130620> accessed 29 June 2019

Matlapeng 2018 <http://www.sabcnews.com/sabcnews/cosatu-welcomes-concourts-ruling-on-labour-brokers/> accessed 20 November 2019

### **Additional Sources**

P Benjamin et al *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 and Employment Services Bill 2010* (2010)