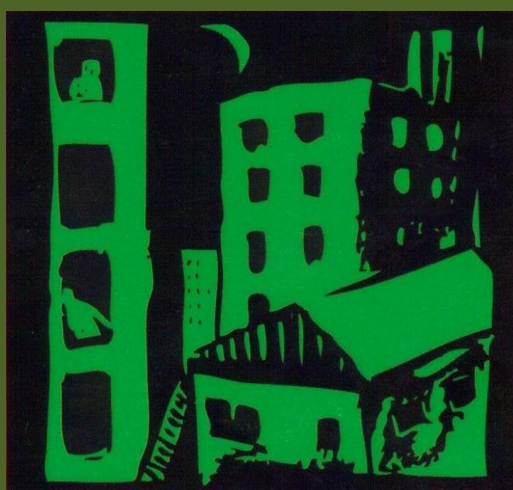


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Dismissal of an employee at the instance of a client: *Revisiting Nape v INTCS Corporate Solutions (Pty) Ltd* in the context of the Labour Relations Amendment Act 6 of 2014

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1 INTRODUCTION

The judgment in *Nape v INTCS Corporate Solutions (Pty) Ltd (Nape)*¹ concerned the proper interpretation of section 198 of the Labour Relations Act (LRA)² where employees have been dismissed at the instance of a client in terms of a labour broking agreement. The decision illustrates the problems encountered by employees providing services to a client in terms of these agreements and the need for the broker's right of recourse against its client in order to give effect to the employee's right to fair labour practices. The main thrust of this article focuses on the need to regulate the relationship between the employee,

¹ (2010) 31 *ILJ* 2120 (LC).

² Act 66 of 1995.

client and labour broker and the impact of the amendments introduced by the Labour Relations Amendment Act (Amendment Act)³ on the existing law on temporary employment services in terms of section 198 of the LRA. It is instructive to point out that the amendments introduce certain provisions in an attempt to cast the net wider in order to protect employees in labour broking arrangements. It is axiomatic that these amendments have introduced far-reaching changes into the law on and practices of temporary employment services. This article raises a number of issues which are likely to be the subject of continual interpretation by the Commission for Conciliation, Mediation and Arbitration (CCMA) and labour courts. It starts with an analysis of the judgment in *Nape* to illustrate the challenges faced by employees in temporary employment services in enforcing their rights, for example in disputes involving unfair dismissal against the client. It will then address the possible effects of the amendments with a view to illustrating that, although these amendments provide some improvements to the existing section 198 of the LRA, they have regrettably failed to address some uncertainties on the application and interpretation of this section, and have in turn compounded the problem by introducing additional uncertainties. It is not the aim of this article to deal in more detail with all the different aspects of the amendments, however, the article reflects on a few of the most important changes to section 198A of the LRA which affect the regulation of temporary employment services in South Africa. Finally, this article will argue that the regulation of temporary employment services without an effective remedy of the labour broker and/or its employee against the client does not adequately protect and promote the employees' right to fair labour practice.

2 THE REGULATION OF TEMPORARY EMPLOYMENT SERVICES UNDER SOUTH AFRICAN LABOUR LAW

Section 198 of the LRA and section 82 of the Basic Conditions of Employment Act (BCEA)⁴ specifically regulate the employment of persons whose services are procured for or provided to a client by a labour broker. Section 198(1) of the LRA defines a "temporary employment service" to mean "any person who, for reward procures for or provides to a client other persons who perform work for the client; and (b) who are remunerated by the temporary employment service".⁵ Section 198(2) of the LRA further provides that the labour broker is the employer of persons whose services have been procured or provided to a client. However, section 198(3) of the LRA expressly provides that a person who provides services to a client as an "independent contractor" is not an employee of the labour broker or of the client.⁶ Section 198 (4) of the LRA sets out the various contraventions for which the client and labour broker are jointly and severally liable to the employee of the labour broker. However, these contraventions do not include cases of unfair dismissal. Therefore in claims involving unfair dismissal the

³ Act 6 of 2014. The Labour Relations Amendment Act took effect on 10 January 2015.

⁴ Act 75 of 1997.

⁵ Section 82(1)-(3) of the BCEA also contain similar provisions.

⁶ See Grogan J *Workplace law* 9th ed (Cape Town: Juta & Co 2007) at 27-28 and Van Niekerk *et al Law @work* 3rd ed (Durban: LexisNexis 2015) at 69.

employee has a cause of action against the labour broker and not the client or both.⁷ The decision of Bado, AJ, in *Nape* is of great importance in the interpretation of the application of section 198 of the LRA for the following two reasons. First, it rigorously addresses the issue of dismissals in the context of employees involved in labour broking arrangements, and secondly, it also contains a detailed analysis of the relevant legal principles which could provide the employee with a right of recourse against the client in the context of temporary employment services.

3 THE SALIENT FACTS IN THE *NAPE*

The dispute in *Nape* arose in the context of dismissal after one Simon Nape (the applicant) misconducted himself by sending an e-mail containing offensive material at the client's premises to one individual. The client, Nissan (Pty) Ltd, invoked its contractual rights and demanded that Nape should be removed from the client's premises by the respondent (INTCS Corporate Solutions (Pty) Ltd), its labour broker. The respondent, as his employer, suspended him and, after a disciplinary enquiry, determined that the appropriate sanction was a final written warning rather than dismissal. Although Nape agreed to a final written warning, Nissan was not satisfied and refused him access to its premises. The labour broker proceeded to retrench him because there was no alternative employment with any of its clients.

The applicant then challenged the fairness of his dismissal based on operational requirements, in the Labour Court in terms of section 189 of the LRA. The respondent argued that the dismissal was fair because it complied with the contractual obligation between the client and the employer (labour broker) whereby termination could be effected on any ground acceptable under law. The termination was based on the fact that the labour broker had to pay the employee's salary without receiving any value from the client, since the client had acted within its contractual rights to terminate the payment.

4 THE DECISION IN THE *NAPE*

4.1 The respondent's reliance on section 189 of the LRA

The main issue to be determined by the court was whether the retrenchment of the applicant from the employment of the respondent, a labour broker, was unfair, and if so, what the appropriate remedy was under those circumstances? The respondent argued that the dismissal was fair because it was entitled to invoke section 189 of the LRA⁸ and there was nothing more it could do, because the client had acted within its contractual powers that the applicant be removed from its premises. It relied on the judgment in *Lebowa Platinum Mines Ltd v Hill (Lebowa Platinum Mines Ltd)*⁹ which is authority

⁷ Generally, see Van Niekerk *et al* (2015) at 68-72 for a detailed discussion of temporary employment services under South African labour law.

⁸ Section 189 of the LRA provides for the substantive and procedural requirements of a fair dismissal based on operational reasons of the employer (retrenchment).

⁹ [1998] 7 BLLR 666 (LAC).

concerning dismissal at the behest of third parties. Further, it submitted that there was nothing it could do in response to the client's demand, because the latter had superior bargaining power as a large client. In deciding on the fairness of the dismissal, the Labour Court had to determine whether a dismissal in those circumstances complied with the spirit and purport of the law of retrenchment under section 189 of the LRA.

On the question of the fairness of the dismissal, the Court noted that the respondent's argument rested on two pillars: in the first place, that the client was acting within the parameters of the service level agreement when deciding not to allow the applicant onto its premises, and secondly, that the respondent was powerless to prevent its client from enforcing its contractual right in terms of the agreement.¹⁰ In deciding on the legality of the contractual relationship, the Court referred to the judgment in *Barkhuisen v Napier (Barkhuisen)*¹¹ where the Constitutional Court confirmed that in determining whether a contractual clause is against public policy and/or reasonable, fair and just, one must consider the constitutional values and more specifically the Bill of Rights, which affords every employee the right to fair labour practices. Clearly, this right cannot be taken away from the employee by any agreement concluded by the parties. Therefore, any agreement to that effect will not only be invalid, but will also be unconstitutional. Bado AJ held that contractual clauses will be held to be *contra bonos mores* if they conflicted with public policy and were, therefore, invalid and unenforceable.¹²

According to the judge, public policy in this context was nothing more than an expression of the general sense of justice of the community.¹³ The Court further noted that, although public policy encourages freedom of contract, undoubtedly the notion of justice also accepts that the courts should interfere with contractual provisions, particularly where such provisions clearly undermine fundamental rights. Hence, the right not to be unfairly dismissed should be construed broadly to ensure protection of employees. Therefore the unfair dismissal provision would be pointless and afforded no adequate protection to employees, if courts were not allowed to interfere with contractual provisions between the labour broker and the client, particularly where such provisions clearly undermined the employee's right to fair labour practices.¹⁴

Bado AJ further referred, with approval, to the decision in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & Another*¹⁵ where the Court emphasised the need for the courts to be vigilant when contractual parties abused their rights. In this case, the Court warned that private parties could not be allowed to contract out of standards provided by the Constitution of the Republic of South Africa, 1996 (Constitution).¹⁶ The Court also referred to *Du Plessis & Others v De Klerk & Another*¹⁷ where Madala J pointed out that the Constitution sought to eradicate the past oppressive and undemocratic

¹⁰ *Nape* at para 47.

¹¹ 2007 (5) SA 323 (CC).

¹² *Nape* at paras 52-53.

¹³ *Nape* at paras 52-53.

¹⁴ *Nape* at para 54.

¹⁵ 2009 (3) SA 78 (C).

¹⁶ Act 108 of 1996.

¹⁷ 1996 (3) SA 850 (CC) at para 163.

practices at all structures and levels of society and also to redress past racial imbalances in South Africa.¹⁸ The Court in *Nape* further referred to *SA Post Office v Mampeule (Mampeule)*¹⁹ where it was reaffirmed that parties must not structure their contractual rights in a manner that would severely undermine the constitutional protection afforded to employees by schedule 8 to the LRA, for example, by including a clause in the contract of employment that provides for the termination of such contract on the occurrence of an event such, as misconduct or incapacity.²⁰

The Labour Court in *Nape* noted that it was clear from the wording of section 23 of the Constitution that all the stakeholders within the labour market had the right to fair labour practices; thus this section was capable of being interpreted widely to cover clients in labour broking agreements. Put differently, this section also imposes a legal duty on a client of a broker to respect the fundamental right of employees to fair labour practices.²¹

Bado AJ found that clearly the plain meaning of section 198 of the LRA did not sanction that the labour broker and its client could limit the employee's right not to be unfairly dismissed.²² Importantly, the court referred to the decision in *Sidumo & Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*²³ where the Constitutional Court affirmed that the right not to be unfairly dismissed existed primarily to promote and guarantee job security. Consequently, the Court in *Nape* held that when applying the statutory right not to be unfairly dismissed in the context of labour broking arrangements, the courts will not be bound by the contractual limitations created by the labour broker and its client, more so where such arrangements clearly undermine the constitutional rights of the employees.²⁴ The Court further drew an analogy in support of its reasoning that the client has a legal duty to respect the rights of employees of a labour broker by citing with approval the judgment in *Volvo (Southern Africa) (Pty) Ltd v Yssel*²⁵ in which the client was permitted to proceed with an action for breach of the fiduciary duty against the employee, although, in principle, it was generally accepted that the latter was employed by the labour broker. Consequently, the client has a corresponding duty not to structure its own employment policies in a manner which undermines the constitutionally entrenched rights of an employee to fair labour practice.²⁶ Therefore Bado AJ concluded that a contractual clause between the labour broker and client that permitted the latter to undermine the employee's right not to be unfairly dismissed would be against public policy and invalid. Therefore the employer

¹⁸ *Nape* at para 56.

¹⁹ (2009) 30 ILJ 664 (LC).

²⁰ *Nape* at para 57.

²¹ *Nape* at para 63.

²² *Nape* at para 57.

²³ [2007] 12 BLLR 1097 (CC).

²⁴ *Nape* case at paras 64-66. The Court cited the judgments in *TSI Holdings (Pty) Ltd & Others v NUMSA & Others* [2006] 7 BLLR 631 (LAC). Similarly, the Court found that the labour broker could not rely on the provisions of s 189 of the Act to disguise the true reason for dismissal (referred to the judgments in *CWIU & Others v Latex Surgical Products (Pty) Ltd* [2006] 2 BLLR 14 (LAC), *Perumal & Another v Tiger Brands* [2008] 1 BLLR 58 (LC) and *Oosthuizen v Telkom SA Ltd* [2007] 11 BLLR 1013 (LAC).

²⁵ 2009 (6) SA 531 (SCA).

²⁶ *Nape* at para 69.

should not be permitted to rely on that contractual clause to justify dismissal for operational reasons under section 189 of the LRA. Despite that finding, the Court noted that the employer can properly dismiss an employee for operational reasons where the client's demand for the removal of the employee was lawful and fair.²⁷

4.2 Does the labour broker have a right of recourse against the client?

The Court in *Nape* went further to discuss the import of section 198 of the LRA with regard to the possible action open to a labour broker against the client. The Court indicated that it was clear from the wording of section 198 that the employee of the labour broker had no right of recourse against the client in unfair dismissal claims. Despite that conclusion, the Court indicated that the labour broker still has a statutory duty to satisfy unfair dismissal claims of employees in the context of labour broking schemes as this was part of the compromise inherent to section 198 of the LRA. The court in *Nape* noted that in the present matter it was not called on to pronounce on the constitutional validity of section 198; hence it was not in a position to express any opinion on that issue.²⁸

The Court noted that whilst section 198 of the LRA made no specific reference to the right of recourse of the labour broker against the client, it did not follow that the former was indeed powerless to resist the client's attempts to enforce a contractual provision which was in conflict with the employee's right to fair labour practice. The Court relied on the judgments in *Barkhuysen* where it was held that in such cases the labour broker could approach either the Labour Court or High Court in an attempt to prevent the client from enforcing a contractual term which undermined the fundamental rights of employees. Hence, labour brokers should give consideration to the rights of employees when deciding to enforce such contractual rights which include and or relate to any form of dismissal or retrenchment under section 189 of the LRA.²⁹

In support of the contention on the need to recognise the labour broker's right of recourse against its client, the Court in *Nape* stressed that such right would promote and guarantee job security, especially in the context of dismissals for operational reasons under section 189 of the LRA where in most cases an employee may be dismissed for considerations other than those provided for in the LRA.³⁰ Bado AJ found that the client's insistence that that the applicant be removed was unlawful and in breach of his right to fair labour practices. The Court further found that the applicant did not commit an offence which justified dismissal. Hence, the client had no right to insist on the application of its own e-mail policies to the employee since such conduct contradicted the very structure of the labour broking relationship as the client was not the employee's employer. Therefore the client had no right to impose its internal policies on the employee particularly when they conflicted with the employee's right not to be unfairly dismissed.³¹

²⁷ *Nape* at paras 70-72.

²⁸ *Nape* at paras 74-75.

²⁹ *Nape* at paras 76-77.

³⁰ *Nape* at paras 82-83.

³¹ *Nape* at para 84.

The Court further held that the contractual provision between the labour broker and its client which allowed for the removal of the applicant from its premises was *prima facie* unlawful and against public policy, more so if it clearly undermined the employee's fundamental right not to be unfairly dismissed. Finally, the court stated that the labour broker should have resisted its client's attempts to rely on a contractual clause which undermined the employee's constitutional right to fair labour practice. Therefore it was unfair for the respondent not to enforce its right of recourse against the client before it could even consider any form of dismissal or retrenchment under section 189 of the LRA.³²

Clearly, the respondent's argument that it was entitled to invoke its contractual right under the labour broking agreement to terminate the employee's employment contract depended entirely on principles set out in the decision in *Lebowa Platinum Mines Ltd* which is authority for the proposition that an employer can dismiss an employee at the behest of a third party. In rejecting the above contention, the court in *Nape* accepted that the facts of these two cases were completely different.³³ First, the court pointed out that the circumstances of a demand for dismissal in the former case had sound legal foundations, since it involved a serious threat by a union to strike in support of the demand that the employer must remove an employee from its premises for making a derogatory racist comment. Secondly, the court further observed that the employer in *Lebowa Platinum Mines Ltd* was not involved in any manner in making such offensive racist remark. As far as *Nape* was concerned, the labour broker and its client voluntarily entered into a contractual relationship which had the potential of infringing the fundamental right of the employee to fair labour practice. Furthermore, the court opined that in *casu* there was no compelling evidence available which suggested that the client (Nissan) demanded that the applicant be dismissed other than that the respondent's contention that it was acting under its contractual right to remove the applicant from the client's premises.³⁴

Therefore, the removal of the employee from the client's premises resulted in the effective dismissal of the employee since the labour broker did not provide any alternatives to dismissal. Nevertheless, the Court in agreed that its conclusion was still consistent with the finding in *Lebowa Platinum Mines Ltd* where that Court also indicated that a mere demand for the dismissal of an employee by a third party on its own did not render the dismissal fair under such circumstances, unless such demand rested on sound legal foundations. The Court concluded that the demand for the dismissal of an employee would usually have such foundations if it did not infringe on the employee's constitutional right to fair labour practices.³⁵

In support of this conclusion, the Court in *Nape* further relied on the decision in *Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distribution (Mnguni)*.³⁶ In that case, the employer, a labour broker, rendered some distribution services at various

³² *Nape* at paras 85-86.

³³ *Nape* at para 87.

³⁴ *Nape* at para 87.

³⁵ *Nape* at para 87.

³⁶ (2002) 23 ILJ 492 (LC).

clients' premises. The dispute involved an employee of the labour broker who was accused of theft at one of its client's premises. The client demanded that the employee be immediately removed from its premises and the employer obliged by retrenching the employee as there were no other alternatives available. The court held that such dismissal was unfair because the employer did not take any reasonable steps to persuade the client to drop its request. The Court further found that there was nothing which suggested that the client would have terminated the labour broking contract if the labour broker resisted its client's demand that the employee be removed from its premises.³⁷ The Court in *Nape* further indicated that the right of recourse of the labour broker may also be extended to any other arbitrary conduct by the client which clearly undermined the constitutionally entrenched right of an employee to fair labour practices. Therefore in such cases the labour broker had to approach the Labour Court or High Court for appropriate relief.³⁸

However, the Court in *Nape* noted that under certain circumstances it could be a fair labour practice for a labour broker to dismiss its employee(s), especially if the client threatened to cancel the entire contracts if the labour broker failed to dismiss or remove the employee/s from the client's premises. The same concerns were raised by the Labour Court in *NUMSA obo Ngayi & 6 Others v Lapace Construction*.³⁹ The Court's finding on the labour broker's right of recourse against the client in this regard represents an important aspect of this judgment. Whilst the Court emphasised that the recognition of the right of recourse of the labour broker would undoubtedly alleviate the challenges associated with the remedy of reinstatement in the context of labour broking arrangements, it also acknowledged some serious procedural difficulties inherent in pursuing this right. However, the court suggested that the labour broker could still be expected to compel the client to drop its unlawful demand under these circumstances, for example, by issuing a third party notice if the facts and issue in dispute were the same. Alternatively, the employee could also join the labour broker and its client as respondents in the unfair dismissal dispute, especially where reinstatement was sought.⁴⁰

The Court seemingly went further to consider whether the labour broker and client were jointly and severally liable to the employee in unfair dismissal claims. The Court noted that section 198 of the LRA went no further than state that the labour broker was liable for all unfair dismissal claims to its employees. The Court referred to *LAD Labour Brokers (Pty) Ltd v Mandla (LAD Labour Brokers (Pty) Ltd)*⁴¹ where the Labour Appeal Court simply found that the labour broker was liable for all unfair dismissal claims under section 198 of the LRA, without even deciding on the legality of the client's demand. A similar approach was adopted by the Labour Court in *State Information Technology Agency (Pty) Ltd v CCMA & 7 Others*⁴² where the Court also

³⁷ The Court also referred to the decision of the Industrial Court in *Buthlezi & Others v Labour for Africa (Pty) Ltd* (1999) 12 ILJ 588 (IC).

³⁸ *Nape* at para 88.

³⁹ Unreported decision of Commissioner M Marcus MEGA 21381, cited in *Nape* paras 48 & 89.

⁴⁰ *Nape* at para 89.

⁴¹ [2001] 9 BLLR 993 (LAC).

⁴² [2008] 7 BLLR 611 (LAC).

found that the provisions of section 198 were not applicable since it was not in dispute that SITA was the true employer in that case.⁴³

The Court in *Nape* further found that the principles expounded in the judgment in *Sindane v Prestige Cleaning Services (Sindane)*⁴⁴ on dismissal under section 198 of the LRA could provide some valuable guidelines to the present case. *Sindane* involved a dispute in the context of the scaling-down exercise by one of the clients of the labour broker which resulted in the retrenchment of two employees. A single employee challenged the fairness of his dismissal for operational reasons under section 189 of the LRA. However, the respondent (labour broker) contended that his dismissal was fair because it was based on fair and genuine reasons of its client pursuant to the expiry of a fixed-term contract whose existence undeniably would determine whether the latter still required his services. Although the facts of this case can be contrasted with of *Nape*, the Court nonetheless cautioned that such approach could encourage parties to contract out of the provisions of the LRA in contravention of section 5(2) of the LRA because this would effectively prevent an employee from exercising the right against unfair dismissals under section 189 of the LRA.⁴⁵ After reviewing the principles derived from the above authorities, the Court accordingly found that the dismissal of the applicant in terms of section 189 of the LRA was substantively unfair, and the respondent was ordered to pay appropriate compensation together with costs.⁴⁶

5 THE DISMISSAL OF AN EMPLOYEE BY A CLIENT AND THE RECOGNITION OF THE RIGHT OF RECOURSE OF THE LABOUR BROKER AGAINST ITS CLIENT

The decision in *Nape* confirms the general principles developed by the courts when dealing with unfair dismissal disputes of employees in response to a demand by a third party. Once again the court stressed that dismissal in response to a demand by a third party was not necessarily fair. Therefore, like any other employer, the labour broker could not contract out of its statutory and constitutional obligations to treat employees fairly.⁴⁷ The principles developed by the courts in cases of dismissal at the instance of the third party provided some useful guidelines in determining the fairness of the dismissal of employees at the instance of the client in the context of labour broking arrangements.

The finding in *Nape* is consistent with the approach adopted in *Amalgamated Beverage Industries (Pty) Ltd v Jonker (Jonker)*⁴⁸ where the Court held that the mere fact that a third party insisted on the dismissal did not in itself render the dismissal of an employee to be fair. A proper investigation should have been conducted to consider all relevant factors before deciding to dismiss, including whether the employee was at fault, which was an important consideration to justify dismissal under those

⁴³ *Nape* at paras 90-91.

⁴⁴ [2009] 12 BLLR 1249 (LC).

⁴⁵ *Nape* at para 92.

⁴⁶ *Nape* at paras 111-113.

⁴⁷ Grogan (2007) at 218.

⁴⁸ (1993) 14 ILJ 1232 (LAC) at paras 1249I-1251C.

circumstances. The employer must also attempt as far as possible, to take all reasonable and positive steps to engage the third party, to consult and also persuade him or her not to persist with his or her demand. Nevertheless, the employer was still expected to balance the harm that it would suffer from the impending threat against the potential injustice or inconvenience that could be caused to the concerned employee.⁴⁹

The decision in *Lebowa Platinum Mines Ltd*,⁵⁰ affirmed the fundamental principle that the employer must follow an objective and holistic approach which takes into account a number of factors prior to dismissing an employee for incompatibility or incapacity. In particular, on the question of fairness of the dismissal, the demand made by the third party should be based on “good” and “sufficient” foundations which had to be backed by a “real” and “serious” threat, for instance, that the employees would embark on a strike action if the employee in question was not dismissed.⁵¹

The principles set out in *Lebowa Platinum Mines Ltd*⁵² were subsequently upheld in *Mnguni*,⁵³ by confirming the proposition that the question of fairness of the dismissal of an employee at the instance of the third party depended on the circumstances of each case, and summarised the guidelines for such cases as follows: the demand for the employee’s dismissal must have a “good and sufficient foundation”; the third party’s demand must be backed by a real and serious threat; dismissal must be the only option that is fair to both the employer and employee; the employer must take reasonable steps to dissuade the party making a demand from persisting with it; the employer must investigate and consider all alternatives to dismissal in consultation with the employee; and the employee must be made aware that the refusal to accept an alternative job will lead to his dismissal.⁵⁴

According to Grogan,⁵⁵ the above cases have demonstrated that the rigour with which these guidelines will be applied in any given case depended mostly on the circumstances that gave rise to the demand for the employee’s dismissal. Therefore a court, in assessing and evaluating the fairness of the dismissal, must adopt a flexible approach which primarily focuses on all relevant factors. The “real reason” for, and cause of the demand by the third party, whether the employer explored alternatives, and also the *bona fides* of the employer should be used as relevant factors to determine the fairness or otherwise of dismissal under these circumstances.⁵⁶

The principles applicable to dismissals at the instance of the third party have also provided some useful guidelines in cases involving the dismissals of employees of

⁴⁹ See also *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at para 544C-E and *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 ILJ 115 (LAC) at paras 124E-125H.

⁵⁰ *Lebowa Platinum Ltd* case (1998) at para 680E-G.

⁵¹ See, also *East Rand Proprietary Mines Ltd v UPUSA* (1996) 17 ILJ 1134 (LAC) at paras 1149E-1151A.

⁵² *Lebowa Platinum Ltd* at paras 671E-673C.

⁵³ *Mnguni* at para 393F-G.

⁵⁴ *Mnguni* at para 393F-G.

⁵⁵ Grogan (2007) at 218.

⁵⁶ See also, *Jonker* at para 1250A, *Lebowa Platinum Mines* at para 1122A-B, *Govender v Mondi Kraft (Richards Bay)* (1999) 20 ILJ 2881 (LAC) at paras 2887I-2888C and *Kroeger v Visual Marketing* (2003) 24 ILJ 1979 (LC) at para 1983A-C.

labour brokers whose clients were dissatisfied with their services (or presence) at the workplace. In *NUMSA obo Swanepoel & Others v Oxyon Services CC*,⁵⁷ the client complained to the labour broker about one of the employees. Thereafter, the client terminated the employee's services for incapacity. The arbitrator found that the dismissal was unfair and also emphasised that it was the labour broker's duty as an employer under these circumstances to persuade the client to act fairly.⁵⁸

Finally, in *Jabari v Telkom SA (Pty) Ltd*⁵⁹ the employee was dismissed for incompatibility following a disciplinary enquiry. The employee contended that his dismissal was automatically unfair as it was precipitated by his initiating of a grievance procedure against the management as well as his refusal to accept a voluntary retrenchment package. The Labour Court found that the employer failed to prove the employment relationship between the parties had irretrievably broken down to such an extent that it justified dismissal. The Court further found that dismissal of the employee amounted to victimisation for exercising his statutory rights which also amounted to an automatically unfair dismissal under section 187(1)(d) of the LRA.⁶⁰

It is clear from the principles developed in the cases described above that the emphasis is on the need for the labour broker to investigate the reasons behind the demand for dismissal and to consult on and consider alternatives to dismissal before taking the decision to dismiss the employee in question. The Court made an important finding on the need to recognise the labour broker's right of recourse against its client. Section 198 of the LRA is silent on this issue.⁶¹ The finding of the Court on this issue will ensure that protection is afforded to the employees of the labour broker against the client as well, that is, the employees of the labour broker can now directly assert their rights against the client. Therefore, in searching for a proper application and interpretation of whether section 198 of the LRA should be construed in such a way as to recognise such a right, due regard must be had to the contextual framework of the relevant legislative provisions concerned.

Importantly, section 3 of the LRA provides that any person applying the Act must interpret its provisions in compliance with the Constitution. The Constitutional Court has stated in *National Education, Health and Allied Workers Union v University of Cape Town & Others (UCT)*⁶² that this section is an express injunction to interpret the provisions of the LRA purposefully. According to the Constitutional Court, a purposive approach to interpretation considers a statutory provision broadly so as to give effect to the constitutional values and the underlying purpose of the statute. In order to interpret labour legislation in compliance with the Constitution, a commissioner, arbitrator or judge must interpret its provisions in a way that ensures the protection, promotion and fulfilment of constitutional rights, in particular the right to fair labour practices in

⁵⁷ (2004) 25 ILJ 1136 (BCA) at paras 1141J-1142A.

⁵⁸ See also, *Smith and Staffing Logistics* (2005) 26 ILJ 2097 (BCA) at para 2101C-E and *Glass v Liberty Group Ltd* [2007] 12 BALR 1172 (CCMA) at paras 1184E-1185B & 1186H-I.

⁵⁹ (2006) 27 ILJ 1854 (LC) at paras 1868J-1869I.

⁶⁰ Generally, see Basson AC et al *Essential Labour Law* 5th ed (Centurion: Labour Law Publications 2009) at 143-144.

⁶¹ *The Nape* at paras 74-75.

⁶² (2003) 24 ILJ 95 (CC) at para 41.

section 23 of the Constitution.⁶³ Therefore, in search of a proper interpretation, if more than one interpretation can be given to a legislative provision, the decision maker must choose the interpretation that best gives effect to the intention of the legislature, provided this does not unduly restrict the intention of the statute or infringe any constitutionally entrenched right to fair labour practices. The Constitutional Court in *UCT* has noted that employment security is a core value of the LRA and that this fact should be taken into account in determining whether a person is an employee and therefore entitled to protection against unfair dismissal.⁶⁴ Finally, section 39(2) of the Constitution also enjoins any court, tribunal or forum to interpret the language of any legislation in a manner that will promote the spirit, purport, and objects of the Bill of Rights consistent with the underlying constitutional values.⁶⁵

The Court in the *Nape* stressed that the right of recourse of the labour broker against its client extended further to any unlawful demand by the latter which undermined the employee's right to fair labour practices.⁶⁶ Therefore, in such cases the labour broker has the right to approach the Labour Court or High Court for appropriate relief. The Court also observed that recognition of the right of recourse against the client would promote and guarantee job security, especially in cases where employees sought reinstatement as a primary remedy against unfair dismissal.⁶⁷

6 THE LAW OF UNFAIR DISMISSALS IN THE CONTEXT OF LABOUR BROKING SCHEMES

The question of dismissals in the context of labour broking presents some serious theoretical and practical problems which precipitate abuse of employees engaged in triangular relationships. As noted above, section 198(2) of the LRA confirms that the labour broker is the employer of employees whose services are supplied to or procured for the client. It has been noted by commentators that this fiction does not reflect the true nature of this relationship. According to Bosch,⁶⁸ this proposition flies in the face of reality since employees are assigned to the client who exercises the supervisory role on how they discharge their duties but for the provisions of section 198(2) of the Act the client bears little statutory responsibility towards these employees.⁶⁹

⁶³ *UCT* at para 14 and *South African National Defence Union v Minister of Defence Force & Another* 1999 (6) BCLR 615 (CC) (*SANDU*) at paras 20-29.

⁶⁴ *UCT* at para 47.

⁶⁵ See *Pharmaceutical Manufacturers Association of SA & Others: In re Ex Parte President of Republic of South Africa & Others* 2000 (2) SA 674 (CC) at para 49 and *Carmichele v Minister of Safety and Security & Another* 2001 (10) BCLR 995 (CC) at paras 39-40.

⁶⁶ *Nape* at para 66.

⁶⁷ *Nape* at para 89.

⁶⁸ Bosch C "Contract as a barrier to 'dismissal': the plight of the labour broker's employee" (2008) 29 *ILJ* 813 at 819.

⁶⁹ Bosch (2008) at 814-815. See also section 198(2) of the LRA and section 82 of the BCEA. See also Le Roux PAK "Protecting the employees of temporary employment services: recent decisions" (2012) 22 (3) *Contemporary Labour Law* 21 at 21-27.

This approach was illustrated by the decision in *LAD Labour Brokers (Pty) Ltd* where the employee was confronted with the difficulty of identifying the employer in the triangular relationship. The Court had to decide whether the worker was an employee or independent contractor of the labour broker or the client. In deciding this question the Court suggested that the relationship was determinative by the dominant impression test as between the client and the labour broker. The Labour Court had an opportunity to finally clarify the scope and content of section 198(2) of the LRA in the decision in *Dyokhwe v De Kock NO & Others (Dyokhwe)*.⁷⁰ The dispute involved an employee of the labour broker (Mondi Packaging) who was advised to sign a contract of employment with the client (Adecco Recruitment Services). As the applicant was illiterate, he could not read and understand the content of the new employment contract. However, he was assured by the client that the change would not affect the existing terms and conditions of his employment. Thereafter, he continued working at the client in the same position for six years until his contract was unceremoniously terminated by the labour broker.

The employee referred an unfair dismissal dispute to the CCMA joining both the client and the labour broker as respondents. Relying on the provisions of section 198(2) of the LRA, the Commissioner found that the labour broker was the true employer at the time of dismissal. On review, the Labour Court set aside the findings of the Commissioner and held that the client was his true employer. Of importance, is that the Court indicated that the proper wording of section 198(4) of the LRA expressly provides that the labour broker must “procure” or “provide” workers for the client.⁷¹

It is worth noting that section 198(4) of the LRA provides that the client and labour broker are jointly and severally liable to the employee on matters enumerated therein, excluding unfair dismissal disputes.⁷² Hence, more often labour brokers and their clients utilise a variety of devices, for example automatic termination clauses to avoid possible liability in unfair dismissal claims. This approach was rejected by the Labour Appeal Court in *South African Post Office Limited v Mampeule (SAPO v Mampeule)*.⁷³ This dispute involved the dismissal of an employee, a chief executive officer and director of a company by its shareholders. His contract of employment incorporated a clause which stipulated, amongst others, that the employment contract would automatically terminate when he ceased to be a board member. Hence, the

⁷⁰ [2012] 10 BLLR 102 (LC).

⁷¹ *Dyokhwe* at paras 73-76.

⁷² Section 198(4) of the LRA provides that the client and labour broker are jointly and severally liable for contravention of collective agreements, the BCEA and determinations made in terms of the Wage Act. See Bosch (2008) at 815 and Benjamin P “To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia” in *Malherbe & Sloth-Nielsen* (eds) *Labour law into the future: essays in honour of D’Arcy du Toit* (Cape Town: Juta 2012) 189 at 200 and *Dyokhwe* at para 44. Further, see Botes A “Answers to questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers” (2014) 26 *South African Mercantile Law Journal* 110 at 119-123 for a critical analysis of the concept of joint and several liability of the client and labour broker under section 198(4) of the LRA.

⁷³ LAC case no: JA29/09 (4 June 2010).

employer argued that there was no dismissal for the purposes of the Act when he was eventually removed from the board by the shareholders. The Court rejected the argument of the employer and found that the automatic termination clause was void. Furthermore, the Court stressed that the employee's right not to be unfairly dismissed gave effect to the constitutional right to fair labour practices, and that it was one of the manifestations of that right.⁷⁴ However, the same court reached a different conclusion in *Sindane*. This matter involved an unfair dismissal following the termination of a fixed term contract by the employer as a result of a scaling down of the business of its client. On the facts the Court found that the termination of the contract under certain circumstances did not constitute dismissal for purposes of the LRA as in this case where the scaling down of the client's business was at issue.⁷⁵

Subsequently, in *Mahlamu v CCMA & Others (Mahlamu)*⁷⁶ the Labour Court held that automatic termination clauses were void for contravening the provisions of section 5 of the LRA which prohibited contracting-out of the provisions of the Act, including, in that case, the employee's right not to be unfairly dismissed.⁷⁷ Despite this conclusion, the Court clarified that such finding should not be construed to deem termination of a genuine fixed term contract a dismissal for the purposes of section 186(1) (b) of the LRA, where the parties had agreed to and anticipated such event, for example, on completion of a project. Put simply, that is, if the parties agreed that they will be engaged in terms of a fixed-term contract the end of the term being clearly defined by the occurrence of a specific event, without converting the right not to be unfairly dismissed to a conditional right.⁷⁸

Finally, most often labour brokers utilise "take back clauses" or "substitution clauses" in terms of which an employee is given employment for an indefinite or intermittent period. However, if the employee is not deployed he or she remains in the workforce without pay. Put differently, the employment relationship endures notwithstanding the periods of unemployment; hence the labour broker argues that there is no dismissal for the purposes of the LRA.⁷⁹ This approach was rejected by the SCA in *National Union of Metal Workers of South Africa and Others v Abancedisi Labour*

⁷⁴ *SAPO v Mampeule* at para 21.

⁷⁵ See Giles F "Labour broking: validity of 'fixed-term eventuality' employment contracts". Available at <http://gilesfiles.co.za/05-labour-court-judgments/labour-broking-validity-of-%E2%9C%9Cfixed-term-eventuality%E2%80%9D-employment-contracts> (accessed on 1 November 2014).

⁷⁶ (2011) 32 *ILJ* 1122 (LC).

⁷⁷ *Mahlamu* at paras 13-22.

⁷⁸ *Mahlamu* at para 23. Generally, see Le Roux (2012) at 25-27, Le Roux PAK "Automatic termination of employment: The Labour Courts express scepticism" (2010) 19 (11) *Contemporary Labour Law* 101 and Harvey S "Labour brokers and workers' rights: can they co-exist in South Africa?" (2011) *SALJ* 100 at 108-110. See also Lawrence I & Moodley J "Perils of automatic termination clauses in labour broking context", *The Mercury* 30 September 2013 at 3. Available at <http://www.polity.org.za/article/the-perils-of-automatic-termination-clauses-in-a-labour-broking-context-2011-10-13> (accessed 30 May 2015).

⁷⁹ See, Harvey (2011) at 110. Further, see Bosch (2008) at 834-839 for a discussion of the status of employees who remain on the books of the labour broker when their assignment with a client comes to an end without payment of their salaries.

Services (Abancedisi).⁸⁰ The dispute arose from the dismissal of employees of the labour broker who were denied access to the workplace following a two-hour strike action at the client's premises. Consequently, the striking employees were ordered to sign a code of conduct designed to regulate industrial action. Those employees who refused to sign the code were denied entry into the client's premises and eventually replaced with new employees. Subsequently, the excluded employees referred an alleged unfair dismissal dispute to the bargaining council. The employer argued that there was no dismissal, that is, the referral of unfair dismissal was premature since they still formed part of its workforce; which argument was upheld by the council, the Labour Court and also confirmed by the LAC. On appeal, the SCA found, amongst others, that the exclusion of the employees from the client's premises coupled with the illusory retention without pay constituted a serious breach of the employment contract which entitled the aggrieved parties to cancel it.⁸¹ On the facts, the SCA found that the attitude of the labour broker was consistent with the allegations of the employees that they were dismissed, for instance, the former did not take any steps to consider alternative employment or propose possible retrenchment procedures for the excluded employees.⁸² Accordingly, the dismissal was found to be substantively and procedurally unfair and the employer was ordered to pay compensation and costs.⁸³

Even if the dismissal of employees in the triangular relationship is found to be unfair, the employee will still be confronted with the difficulty of enforcing the remedy of re-instatement. As noted by Harvey,⁸⁴ the remedy of re-instatement is a "hollow remedy" in triangular relationships since the labour broker can provide neither the workplace nor income as both are derived from the client.⁸⁵ Clearly, none of the judicial and academic pronouncements discussed above dealt with the contextual constitutionality of section 198(4) of the LRA as an unjustified limitation of the employee's right not to be unfairly dismissed. The unjustifiable limitation lies in the fact that section 198(4) excludes joint and several liability of the client and the labour broker in dismissal disputes. It is proposed in this article that the question can be answered by considering the constitutional and legislative structure of section 198 of the LRA. Therefore, section 198(4) of the LRA must be interpreted in a manner that conforms to the fundamental right to fair labour practice.⁸⁶ As a starting point, section 39(2) of the Constitution enjoins courts to interpret the provisions of the LRA in a manner that seeks to promote the spirit, purpose of object of the Constitution. Furthermore, section 3 of the LRA enjoins any person applying the LRA to interpret its

⁸⁰ [2013] 12 BLLR 1185 (SCA).

⁸¹ *Abancedisi* at para 15.

⁸² *Abancedisi* at para 17.

⁸³ Section 186(1) (e) of the LRA. See Basson, Le Roux & Strydom (2009) at 91-95 for a detailed discussion of constructive dismissals under section 185 of the LRA. Generally, see Harvey (2011) at 108-113 for a detailed discussion of the difficulty of managing dismissals within the context of labour broking schemes.

⁸⁴ Harvey (2011) at 113 and Harvey S (2009) "*Labour brokers and workers' rights: can they co-exist in South Africa?*" (Unpublished LLM dissertation, University of Cape Town) at 22.

⁸⁵ Harvey (2009) at 31-32.

⁸⁶ See Benjamin (2012) at 200 and *Dyokhwe* at paras 42-43.

provisions in a manner that complies with the Constitution and public international law⁸⁷ and also gives effect to the primary objectives of the LRA.⁸⁸ Therefore, an important source of international law in interpreting section 198 of the LRA is the ILO Convention on Private Employment Agencies 181 of 1997 (CPEA)⁸⁹ which, amongst others, seeks to ensure that adequate measures are put in place to extend protection to employees engaged by temporary employment agencies.⁹⁰

In addition, the ILO Recommendation Concerning Employment Relationships 198 of 2006 (RCER) enjoins Member States to combat all forms of disguised employment that have the potential of depriving employees of their entitlements to statutory labour law protection.⁹¹ Importantly, the Recommendation enjoins a person when determining the employment relationship in the context of disguised employment to look at the true relationship, notwithstanding the description proffered by the parties.⁹² In *UCT*, the Constitutional Court emphasised that one of the core purposes of the LRA was to promote job security, especially the employee's right not to be unfairly dismissed under section 185 of the LRA.⁹³ In *Sidumo*, the Constitutional Court observed that section 185 refers to "right", that is, the right not to be unfairly dismissed is a hard-won and well-deserved right which is essential to give effect to the constitutional imperative for fair labour practice.⁹⁴ Hence, the social and historical significance of the labour rights embodied in the Constitution and protective legislation suggested that those rights should not be lightly limited.⁹⁵

⁸⁷ See also the decision in *SANDU* at para 25, *NUMSA v Bader Bop (Pty) Ltd & Another* (2003) 24 ILJ 305 (CC) at para 26 and *Equity Aviation (Pty) Ltd v SATAWU & Others* [2009] 10 BLLR 933 (LAC) (*Equity Aviation*) at para 26 where the Constitutional Court acknowledged that international conventions and treaties constituted important sources for the interpretation of the constitutional right to fair labour practices. See also the judgment in *Discovery Health Case v CCMA & Others* [2008] 7 BLLR 633 (LC) at para 28. Further, see sections 232 and section 233 of the Constitution which generally deal with the status and application of international law under South African law.

⁸⁸ Section 39(2) of the Constitution. Further, see Cohen T "Debunking the legal fiction-*Dyokhwe v De Kock No & Others*" (2012) 33 ILJ 2318 at 2319-2322.

⁸⁹ The CPEA was adopted in 1998 and came into force on 10 May 2000.

⁹⁰ See, Cohen (2012) at 2321. See also *Dyokhwe* at paras 32-34 for a brief discussion of the interpretative guidelines provided by the CPEA in the context of labour broking schemes under South African law.

⁹¹ The RCER was adopted on 15 June 2006. See also Cohen (2012) at 2321 and *Dyokhwe* at para 35.

⁹² Paragraph 9 of the RCER. See also Cohen (2012) at 2321 and *Dyokhwe* at paras 35-36 for a brief discussion of the Recommendation. See also *Dyokhwe* at para 36. Further, see *Dyokhwe* at paras 32-36 for a brief discussion of the role of international law as an interpretative guideline for section 198 of the LRA.

⁹³ *UCT* at para 42 and *Bosch* (2008) at 831.

⁹⁴ *Sidumo* at para 74. The same view was also expressed by the Labour Court in *FAWU & Others v Pet Products (Pty) Ltd* (2000) 21 ILJ 1100 (LC) at para 15 where the Court indicated that the rights entrenched in the Constitution were hard-earned and well-deserved rights. See also, Harvey (2011) at 103 where the author suggests that the legislative history and purpose of the LRA should be taken into account in interpreting the content of the constitutional right to fair labour practices, especially, the employee's right not to be unfairly dismissed.

⁹⁵ Harvey (2011) at 104-105.

This right not to be unfairly dismissed is also given effect by international law under the Convention on Termination of Employment at the Initiative of the Employer 158 of 1982 (CTEIE) which seeks to provide guidelines to promote job-security by ensuring that the employer does not dismiss at will.⁹⁶ Of importance, is that sections 188-189 of the LRA provide that the employment of an employee shall not be terminated unless there is a valid reason for such termination related to the conduct or capacity of the employee or based on operational reasons.⁹⁷ Therefore, section 198 should be interpreted in a manner that is consistent with the underlying imperatives of the Constitution and LRA to promote job security especially the employee's right not be unfairly dismissed. One of the purposes of the LRA is to "advance economic development, social justice, labour peace and the democratisation of the workplace".⁹⁸ This approach was adopted in the context of dismissals under labour broking schemes in *Dyokhwe*⁹⁹ to determine whether it would be against public policy to enforce a contractual clause between a client and a labour broker that undermined the employee's right not to be unfairly dismissed. The Court indicated that public policy is a factual issue which must be determined according to the merits of each case. Clearly, in the context of labour broking schemes, the unequal bargaining relationship of the parties is one of the most important factors which could justify the protection of employee's right against unfair dismissals.¹⁰⁰

Furthermore, the surrounding circumstances at the time of conclusion of the contract can also provide some valuable guidelines, for example, in *Dyokhwe*, the Court found, amongst others, that the employee was in a weakest and vulnerable bargaining position because he was illiterate and unable to read and understand the consequences of the contract when signing it.¹⁰¹ Therefore, the courts should adopt a purposive approach in interpreting section 198 of the LRA to promote the primary objectives of the LRA which include job security.¹⁰² Most academics agree that section 198(4) is capable of being interpreted purposively so as to extend the joint and several liability provision to clients in unfair dismissal disputes.¹⁰³ In addition, it is proposed in this article that a new section, section 186(1)(g), be inserted into the LRA that would define "unfair dismissal" to include any contractual arrangement between the client and labour broker which has the effect of contracting out of the statutory protection of the

⁹⁶ Article 4 of the CTEIE. See *Equity Aviation* at para 26.

⁹⁷ Sections 188-189 of the LRA. See, Bosch (2008) at 824-825 and *Equity Aviation* at paras 26-27.

⁹⁸ Section 1 of the LRA.

⁹⁹ *Dyokhwe* at paras 67-72.

¹⁰⁰ *Dyokhwe* at paras 67-72. See also Bosch (2008) at 819-820 & 826-829 and Cohen (2012) at 2325-2326.

¹⁰¹ *Dyokhwe* at para 72.

¹⁰² See, *UCT* at para 41 (see also the cases cited at footnote 47 of the judgment).

¹⁰³ See Tshoose C & Tsweledi B "A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa" (2014) 18 *Law, Democracy and Development* 334 at 345.

right not to be unfairly dismissed. This would also bring the situation in line with section 197 transfer dismissals.¹⁰⁴

7 THE IMPLICATIONS OF THE LEGISLATIVE AMENDMENTS FOR THE REGULATION OF TEMPORARY EMPLOYMENT SERVICES UNDER THE LRA

The Amendment Act has introduced some significant changes to section 198 which have far-reaching implications for the protection of employees engaged in labour broking schemes. Section 198 of the LRA still applies generally to employees of the labour broker, whilst section 198A extends protection to employees earning below the income threshold under the BCEA.¹⁰⁵ Therefore, the new section 198A of the LRA recognises only three categories of labour broking schemes, namely, (1) work of less than three months; (2) employees who substitute for a permanent employee of the client who is temporary absent; and (3) work which is temporarily in terms of a collective agreement or sectoral determination.¹⁰⁶ Consequently, any low-paid employee contracted in terms of a labour broking agreement which falls outside the above three schemes will be deemed to be the employee of the client.¹⁰⁷ The implications of this construction is that such low-paid employee will be entitled to proceed directly against the client, for example, in any dispute concerning unfair dismissal or unfair labour practice.¹⁰⁸

According to Van Niekerk et al,¹⁰⁹ the scope of section 198A (1) of the LRA poses some potential difficulties. First, it is not clear whether this subsection must be interpreted so as to mean that an employee automatically becomes the employee of the client or will just be deemed to be in that position for the purposes of the employer's statutory liability. It is suggested that the most plausible interpretation is that the employees should remain in the service of the labour broker; however, they will be deemed to be the employees of the client only for the purposes of enforcement of statutory rights against the client.¹¹⁰ It is submitted that if this was not the case, the legislature could have indicated expressly, for example, that the employment contracts

¹⁰⁴ Generally, see Basson (2009) at 177-187 for a detailed discussion of section 197 transfers.

¹⁰⁵ See, clause 44 of the Labour Relations Amendment Bill 2012. Available at https://jutralaw.co.za/media/filestore/2012/05b_16_-_2012_-_Labour_Relations_AB.pdf (accessed 30 May 2014), which introduced the new section 198A-D to the principal Act, entitled "The application of section 198A-D to employees earning below the income threshold". Section 6(3) of the BCEA provides that the Minister may determine this amount from time to time in the Government Gazette. Currently the amount has been capped at R205 435-30 with effect from 1 July 2014 (see GG 37795: GN 531 of 1 July 2014)). See also Rheeder J "The future of labour brokers in terms of the Labour Relations Amendment Act 2012". Available at <http://www.jrattorneys.co.za/south-african-labour-law-law-case-articles/legislations-and-labour-law-amendments.html> (accessed 17 June 2014).

¹⁰⁶ Section 198A (1) LRA. See also Van Niekerk *et al* (2015) at 70.

¹⁰⁷ Section 198(1) read with s 198A (3) of the LRA.

¹⁰⁸ See "Memorandum of objects, Labour Relations Amendment Bill, 2012" (Explanatory Memorandum). Available at <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposedamendmentbills/memoofobjectsra.pdf> (accessed 13 December 2014).

¹⁰⁹ Van Niekerk *et al* (2015) at 71.

¹¹⁰ Van Niekerk *et al* (2015) at 70.

as well as the rights and obligations of the labour broker's employees are automatically transferred to the client, for example, after three months.¹¹¹ Therefore, on a literal reading of sections 198A (1)-(2) of the LRA the labour broking agreement will be deemed to be for an indefinite period and the client will be deemed to be the employer.¹¹²

Furthermore, section 198A (3) of the LRA empowers the Minister to deem certain employees of the labour broker earning below the statutory income threshold to be employees of a client.¹¹³ First, section 198A (3)(a) of the LRA confirms that a labour broker's employees providing services to a client under "genuine labour broking agreements" remain employees of the labour broker. This conclusion can be inferred from paragraph (a) of the subsection which defines such employee with reference to the definition of "temporary employment services" as contemplated in terms of section 198A(1).¹¹⁴ Although the provisions of this paragraph are couched negatively, they simply recognise that employees of the labour broker providing services under a genuine labour broking agreement remain employees of the labour broker. Conversely, employees who no longer provide "temporary services" will be deemed to be permanent employees of the client, unless the provisions relating to fixed term contracts apply.¹¹⁵

Secondly, section 198A (3)(b) of the LRA provides that "*employees of the labour broker not performing temporary services to the client*" will be deemed to be employed indefinitely by the client, unless the provisions relating to fixed term employees do apply (added emphasis).¹¹⁶ The provisions of 198A (3)(b) of the LRA are confusing in many respects; however, it is submitted that there are two schools of thought regarding application of the provisions of this paragraph. First, it can be interpreted to mean that the employee becomes an employee of the client and ceases to be an employee of the labour broker.¹¹⁷ Secondly, it appears that the employee remains an employee of the labour broker but it is also deemed to be an employee of the client for the purposes of statutory liability under the LRA.¹¹⁸ It seems that the latter construction is inconsistent

¹¹¹ Van Niekerk *et al* (2015) at 70.

¹¹² Section 198A (3) (b) LRA. See also Van Niekerk *et al* (2015) at 71.

¹¹³ Section 198A(3) of the LRA provides: "For the purposes of this Act, an "employee"-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 not performing such temporary service of the client is- deemed to be the employee of that client and the client is deemed to be the employer; and subject to the provisions of section 198B, employed on an indefinite basis by the client."

¹¹⁴ Section 198A (3) (a) LRA.

¹¹⁵ Van Niekerk *et al* (2015) at 71. Generally, see the Explanatory Memorandum at 24-26 for a detailed discussion of fixed term contracts under the new 198B of the LRA.

¹¹⁶ Section 198(3) (b) LRA.

¹¹⁷ Comments on the Labour Relations Amendment Bill and Basic Conditions of Employment Amendment Bill. Furnished by Solidarity Trade Union (June 2012) at 10 (Solidarity Research Institute Commentary) at 10. Available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120731solidarity_0.pdf (accessed 20 June 2014).

¹¹⁸ Solidarity Research Institute at 10.

with the general nature of the labour broking relationship under section 198 of the LRA.¹¹⁹

However, it seems that the legislature reaffirms that the Minister may deem low-paid employees not performing temporary service for the client to be employees of the client and the latter is deemed to be their employer.¹²⁰ Furthermore, these employees will also be deemed to be permanent employees of the client, unless the client can prove that they have been engaged in terms of a “genuine fixed term contract” as contemplated by section 198B of the LRA.¹²¹ It is suggested that this paragraph is aimed at counteracting any attempt by the client to circumvent the operation of the provisions of section 198A, for example, by engaging casual employees or other non-standard employees.¹²²

The confusion whether there is a dual relationship or whether the client is the sole employer as created by the deeming provision in section 198A (3)(b) of the LRA came under scrutiny in two recent arbitration awards, *Mphirime v Value Logistics Ltd/ BDM Staffing (Pty) Ltd*¹²³ and *Assign Services (Pty) Ltd v Krost Shelving & Racking (Pty) Ltd (NUMSA)*¹²⁴ where the arbitrators found that the client is the sole employer of the labour broker’s employees earning below the statutory threshold after three months for the purposes of the LRA. More recently, the Labour Court in *Assign Services (Pty) Ltd v CCMA & Others (Assign Services (Pty) Ltd)*,¹²⁵ per Brassey AJ, reviewed and set aside the CCMA Commissioner’s award that the client became the sole employer of the labour broker’s employee after the placement of three months. The Court was called upon to decide whether the Commissioner had erred by finding that the deeming provision meant that the client of the labour broker became the sole employer of the labour broker’s employees earning below the income threshold after expiry of three months of their placement. The Court noted that the crisp question was whether the labour broker continues to be the employer even after the application of the deeming provision. The Court found that on a proper reading of section 198A (3) of the LRA, the client becomes the employer for the purposes of the operation of the LRA. Put differently, the client is not jointly and severally liable as employer for any other statutory obligations in respect the labour broker’s employee other than those generated under the LRA, for

¹¹⁹ Van Niekerk *et al* (2015) at 71.

¹²⁰ Section 198A (3) (b) (i) LRA.

¹²¹ Section 198A (3)(b)(ii) LRA.

¹²² Du Toit J “Amendments to labour legislation-temporary employees. Available at <http://www.labourguide.co.za/most-recent/898-amendments-to-labour-legislation-temporaryemployees> (accessed 20 June 2014). Further, see Botes (2014) at 132-134 for a discussion of possible interpretations which can be attached to 198(3)(b) of the LRA. For a critical discussion of the possible meanings to be attached to 198A (3)(b) of the LRA, see Grogan J “The new dispensation, Part 1: The amendments to the LRA” (2014) 30(3) *Employment Law* 4 and s 198A(3)(b)(i) of the LRA “The argument in favour of dual employment”. Available at [http://www.capes.org.za/cm4all/iproc.php/The%20Argument%20in%20favour%20of%20Dual%20Employment%20-LRA%20s198A\(3\)\(b\)\(i\).pdf?cdp=a](http://www.capes.org.za/cm4all/iproc.php/The%20Argument%20in%20favour%20of%20Dual%20Employment%20-LRA%20s198A(3)(b)(i).pdf?cdp=a) (accessed 30 May 2015) for a critical discussion of the possible meanings that could be attached to section 198A (3)(b) of the LRA.

¹²³ NBCRFLI FSRFBC34922 [24 June 2015].

¹²⁴ CCMA ECEL 1652-15 [26 June 2015].

¹²⁵ [2015] BLLR 1160 (LC).

example, the contractual rights between the labour broker and employee arising from the contract of employment.¹²⁶

After making that finding, the Court went further to consider whether the labour broker ceased to be the employer if the deeming provisions in section 198A were triggered. The Court found that the labour broker continued to be an employer of its employees notwithstanding the application of the deeming provision. The Court noted that there was nothing in principle or practice which suggested that the labour broker should be relieved of its statutory rights and obligations toward its employees; the client has merely acquired a parallel set of such rights and obligations by virtue of operation of the deeming provisions.¹²⁷ Therefore the labour broker was concurrently vested with rights and obligations generated by the LRA. The Court found that the deeming provision did not invalidate the contract of employment between the labour broker and its employees or even derogated from its terms.¹²⁸ Of importance was that the Court confirmed that the deeming provision was intended to only operate against the client for the purposes of the LRA.¹²⁹ Hence, the deeming provision was introduced specifically to operate for the purposes of the LRA, and thus it served to amplify or extend the pre-existing statutory protections afforded to employees against the labour broker (true employer). Therefore, the deeming provision under section 198A (3) of the LRA was created to serve as an augmentation instead of a substitution of the existing statutory protection of the labour broker's employees against its client.¹³⁰

The essence of the Labour Court finding was that the employment relationship between the labour broker and its employees remained intact; however, by virtue of the deeming provision the employees could now assert their rights arising from the LRA against the client (added emphasis). Therefore, the Court's approach on the interpretation of the deeming provision in section 198A (3) of the LRA clearly demonstrated judicial support for the dual employment approach. Consequently, the labour broker's employees were not automatically transferred to the client as sole employer after the application of the deeming provision.¹³¹ Despite that finding, the Labour Court warned that the extensive scope and exigibility of those proffered legislative protections introduced by the amendments will undoubtedly attract considerable litigation in future, unless the Labour Appeal Court finally clarifies this issue.¹³² The decision in *Assign Services (Pty) Ltd* was relied on by the arbitrator in *National Union of Mineworkers of South Africa obo Nkala & others v Durpo Workforce Solutions*¹³³ where it was found that for all the purposes of labour legislation, except for

¹²⁶ *Assign Services (Pty) Ltd* at paras 10-11 & 15.

¹²⁷ *Assign Services (Pty) Ltd* at para 12.

¹²⁸ *Assign Services (Pty) Ltd* at para 11.

¹²⁹ *Assign Services (Pty) Ltd* at para 11.

¹³⁰ *Assign Services (Pty) Ltd* at para 14.

See also Patel A "Judgment on the interpretation of the 'deeming provision': sole or dual?" Available at <http://www.labourguide.co.za/most-recent/2135-judgment-on-the-interpretation-of-sole-or-dual> (accessed 29 September 2015).

¹³² *Assign Services (Pty) Ltd* at paras 16 & 18.

¹³³ [2016] 3 BALR 229 (MEIBC).

the LRA, the temporary employment service remained the employer of the placed employees.¹³⁴

Regrettably, the legislature does not provide any guidelines as to who bears the onus of proof to establish whether a person is an employee of the client in the above circumstances. However, it is generally accepted that an employee bears the onus of proof, and in the event of doubt, the traditional legislative and judicial tests will always provide some useful guidelines to determine the employment relationship.¹³⁵ The amendments introduced by section 198A of the LRA address a variety of challenges encountered by employees in labour broking arrangements, for example, in *Nape* and the series of cases discussed above where the labour broker or employee did not have any right of recourse against the client to promote and protect the employee's right to fair labour practice.¹³⁶

Furthermore, the legislature also thwarts any attempt by a client to circumvent the application of the deeming provision, for example, by terminating the employment relationship after the expiry of three months. Any termination under those circumstances constitutes a dismissal for the purposes of the LRA.¹³⁷ In addition, section 200B has been inserted to provide some form of joint and several liability between the client and labour broker towards the labour broker's employee for breach of any statutory obligations in terms of labour laws. Importantly, section 200B of the LRA provides that "for the purposes of this Act or any other employment legislation the 'employer' includes one or more persons who is carrying business or on associated or related activity or business through an employer with intent or effect of defeating the purposes of the LRA or other employment laws".¹³⁸ Therefore the court will more readily be prepared to "pierce the corporate veil" and identify the true employer where the client and the labour broker act fraudulently to conceal the true nature of the employment relationship, for example, by attempting to hide behind a bogus corporate identity.¹³⁹

Equally, in an attempt to enforce equal treatment, section 198A (5) of the LRA provides that the client must treat employees deemed to be its employees under the Act on terms and conditions of employment that are, on the whole, not less favourable than of those existing employees of the client performing the same or similar work, unless

¹³⁴ Also Van Wyk J, Van Heerden A & Jacobs S "Contracts of temporary employment services employees". Available at <http://www.labourguide.co.za/most-recent/2256-contracts-of-temporary-employment-services-employees>, (accessed 15 June 2016).

¹³⁵ See Du Plessis JV & Fouché MA *A practical guide to labour law* 6th ed (Durban: LexisNexis 2006) at 10-12 and Basson *et al* (2009) at 24-32 for a detailed discussion of the legislative and judicial approaches to establish an employment relationship.

¹³⁶ See the current section 198 of the LRA.

¹³⁷ Section 198A (4) LRA. Consequently, an employee can, for example, institute an action for an alleged unfair dismissal against the client after expiry of three months.

¹³⁸ Sections 200B (1)-(2) LRA.

¹³⁹ See, for example, the decision in *Paper Printing Wood & Allied Workers Union v Lane (NO)* (1993) 14 ILJ 1366 (IC) and *Kruger v Jigsaw Holdings Limited & Others* (2006) 27 ILJ 1161 (LC). Generally, see Grogan (2007) at 26-28 for a detailed discussion of the term "employer" for the purposes of labour law.

justifiable reasons exist for different treatment.¹⁴⁰ Similarly, the legislature does not provide guidelines for the dispute resolution of different treatment; however, it is suggested that under these circumstances the employee can resign and allege “constructive dismissal” as envisaged by section 186(1)(e) of the LRA.¹⁴¹ Alternatively, an employee can tender their resignation by relying on the provisions of section 186(1)(f) of the LRA that the new employer (the client) has provided terms and conditions which are substantially less favourable than those provided by the earlier employer (labour broker) pursuant to transfer of business as a going concern under section 197 of the Act.¹⁴² Clearly, the provisions of section 198A of the LRA will not trigger section 197 of the Act which, amongst others, require that there must be a “transfer of business” from one employer to another as a going concern.¹⁴³

Another interesting question is whether section 198A (3)(b) renders the provisions of section 198(4) of the LRA, which provide for joint and several liability of the labour broker and client for matters enumerated under the latter section, superfluous.¹⁴⁴ It seems that the legislature contradicts itself on this issue. Clearly, the question of joint and several liability will not arise in cases of low-income employees since the client will be regarded as employer if any one of the circumstances envisaged in section 198A(1) read with section 198(4) of the LRA is present.¹⁴⁵ However, according to Botes,¹⁴⁶ the status of the client in terms of section 198(4) read with section 198(3)(b) of the LRA implies that the labour broker could still be held severally liable even though the client is deemed to be the employer under section 198A(3)(b) of the LRA. Put differently, the client’s employer status does not change the original position with regard to liabilities under section 198(4) of the LRA, that is, despite the deeming provision of section 198A(3)(b) of the LRA, the client still retains some employer status to a certain degree.¹⁴⁷ It seems that this latter construction is preferred by most academics since it is consistent with the very spirit and purposes of temporary employment services under the LRA.¹⁴⁸

¹⁴⁰ Section 198A (5) LRA.

¹⁴¹ Section 186(1) (e) LRA. See Botes (2014) at 134. Generally, see Basson et al (2009) at 91-95 for a detailed discussion of general principles developed by case law in the context of “constructive dismissals” under section 185(1)(e) LRA.

¹⁴² Section 186(1) (f) LRA. See also Basson Le Roux & Strydom (2009) at 95 for a brief discussion of “transfer dismissals” under section 186(1) (f) of the LRA.

¹⁴³ Sections 197 & 197A LRA. Further, see Basson, Le Roux & Strydom (2009) at 177-187, Du Plessis & Fouché (2006) at 283-284 and Grogan (2007) at 248-255 for an analysis of the principles developed by case law relating to transfer of employment contracts under section 197 of the LRA.

¹⁴⁴ Section 198(4) of the LRA provides for liability of the client and the labour broker for any contravention of the BCEA or collective agreement, *etc.* Compare the current section 198(4) with section 198A (3) (b) of the LRA.

¹⁴⁵ Compare section 198A (3) (b) with section 198(4) of the LRA.

¹⁴⁶ Botes (2014) at 32.

¹⁴⁷ Botes (2014) at 132. Generally, see Botes (2014) at 131-134 for the possible interpretations that can be attached to section 198A (3) (b) of the LRA on the scope of the deeming provision of the client as employer of the labour broker’s employees.

¹⁴⁸ See, for example, Botes (2014) at 128-134 and Van Niekerk *et al* (2015) at 70-71. Further, see Bosch C “The proposed 2012 amendments relating to non-standard employment: what will the new regime be?” (2013) 34 *ILJ* 1631.

Finally, it is regrettable that the legislature did not clearly address any possible right of recourse of the labour broker and/or the employee against the client if the latter refused to comply with its obligations in terms of section 198A of the LRA, discussed above.¹⁴⁹ Although the legislature has attempted to alleviate the plight of low-income employees of the labour broker, some very serious concerns which precipitated these amendments will still persist particularly in cases involving highly-paid employees engaged in labour broking schemes. It remains to be seen how the labour courts will interpret some of the problematic issues raised by the amendments under section 198A of the LRA.

8 CONCLUSION

The crux of the decision in *Nape* is that in order for the dismissal of the employee at the instance of the client (third party) to be fair, the employer must prove that the dismissal of the employee is for fair reasons which are consistent with constitutional principles and the objects of the LRA. Therefore, in applying and interpreting the right not to be unfairly dismissed in the context of employment services, a court will more readily not enforce any contractual provision which clearly undermines the employee's constitutional rights to fair labour practices.¹⁵⁰ This decision clearly illustrates the need for a comprehensive regulation in terms of which labour brokers would play a positive and crucial role in the enforcement and protection of the employee's fundamental rights in labour broking arrangements.

Most importantly, the principles expounded in *Nape* also serves as a stern warning to labour brokers and their clients that they should structure their employment policies and agreements in such a way as to conform to the fundamental right of employees to fair labour practices.¹⁵¹ Although the amendments discussed above attempted to extend protection to low-paid employees engaged in labour broking schemes, most of these provisions cause some serious problems of interpretation. For example, there are still some uncertainties as to the scope of application of the deeming provision in section 198A (3) of the LRA concerning who is the employer of a labour broker's employees earning income below the statutory threshold after the expiry of three months. Clearly, the interpretation of this section will cause some serious practical problems which would require some urgent legislative intervention. It is suggested that in the absence of clear legislative guidelines, the deeming provision and other related provisions in section 198A of the LRA should be interpreted in a manner which is consistent with the general structure of temporary employment services under section 198 of the LRA.

Regrettably, the legislature did not take the opportunity to clearly address the complexities created by the lack of an effective remedy for the labour broker and/or its

¹⁴⁹ See Botes (2014) at 133-134 for an analysis of the possible remedies that may be available to either the labour broker or the employee if the client does not comply with its obligations under section 198A of the LRA.

¹⁵⁰ *Nape* at paras 64-67.

¹⁵¹ See Alexander M "Labour brokers: where to now?" Available at [http://www.deneysreitz.co.za/index.php/news/labours where to now/](http://www.deneysreitz.co.za/index.php/news/labours%20where%20to%20now/) (accessed 12 February 2011).

employees against the client in temporary employment schemes. Even though the legislature's intention may have subsequently changed in that the client will now be deemed to be the employer for the purposes of statutory liability under certain circumstances, this situation is still speculative. Therefore in the absence of any statutory provision on this issue, it is believed that the decision in *Nape* on the need to recognise the labour broker's right of recourse is still instructive. In this case the Labour Court illustrated the practical challenges posed by labour broking arrangements on the enforcement of rights by the labour broker/and its employees vis-à-vis the client. Consequently, the question of the right of recourse of the labour broker/and its employees against the client should be left open for the courts to fashion such remedy through purposive interpretation of section 198 of the LRA, given the proffered employee protectionist aims underlying both the LRA and more recent legislative amendments.

Hopefully, in the absence of any clear legislative guidelines, the decision in *Nape* will undoubtedly still serve as authority for future interpretation of section 198 of the LRA which is consistent with the employees' protection against unfair dismissal in the context of temporary employment services. It is unfortunate that the employee in *Nape* requested monetary compensation. It remains to be seen what approach the courts will adopt where the relief granted is in the form of re-instatement in future.