

An analysis of the labour law amendments of 2014 pertaining to labour brokers: A comparative study

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It all starts here TM



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ABSTRACT

Tracing back in history, it emerges that atypical forms of work, of which labour broking is one, were not adequately regulated in the South African legislative framework. It has been in South Africa since the 1920s at least, but it was not covered in legislation until much later. The *Labour Relations Act* of 1956 did not refer to labour brokers at all and the subsequent amendments in 1983 only defined labour brokers and their offices, but it did not adequately provide for the proper regulation of labour broking relationships. This led to the emergence of legal reform in the South African legislative framework with regards to the regulation of labour brokers. The *Labour Relations Act* 66 of 1995 was the first statute that attempted to regulate labour brokers in section 198. However, the regulations could be described as highly inadequate due to a number of shortcomings. The mentioned section did not sufficiently cover aspects such as the liability of the authority figures (the TES and the client), the use of triangular employment relationships as disguised employment, the unequal treatment of temporary employees, lack of job security and the lack of bargaining power of temporary employees. The above *lacunae* led to the decision of Parliament to address labour brokers more prominently in the *Labour Relations Amendment Act* 6 of 2014. It is submitted that a measure of additional protection and legal certainty has since the amendments been afforded to temporary employees. Upon scrutiny it can be concluded that many aspects are now addressed, such as the definition of TES's, the liability of authority figures, the scope of temporary services, the status of the employer and its obligations and the organisational rights and treatment of temporary employees. However, it seems that not all problems are addressed such as the use of disguised employment and job security of temporary employees. As a member of the International Labour Organisation (ILO), South Africa has an obligation to ensure that its domestic legislation falls within the ILO labour standards. The ILO has its own instruments which regulate labour brokers, which South Africa as a signatory thereto has to comply with. It is submitted that South Africa complies with the ILO standards which regulate labour brokers to a certain extent. In this research a comparative study with the United Kingdom (UK) will be undertaken. It can be concluded that the UK has a number of mechanisms in place to ensure that labour brokers are effectively

regulated and that ensure that temporary employees are adequately protected. It is recommended that South Africa should adopt the UK model which offers temporary employees equal treatment and a minimum floor of rights as well as a complaint and inspectorate machinery to protect such employees. It is believed that the UK offers solutions for potential problem areas where the South African legislative framework falls short.

Key words: Labour brokers, temporary employees, Labour Relations Amendment Act, protection

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LIST OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Services
BCEA	Basic Conditions of Employment Act 75 of 1997
EAS	Employment Agency Standards Inspectorate
ELJ	Employment Law Journal
EU	European Union
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 6 of 2014
PWR	Pay and Work Rights Helpline
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
TES	Temporary Employment Services

Chapter 1 Introduction

1.1 Introduction

This research analyses the 2014 labour law amendments of the *Labour Relations Act* 66 of 1995 pertaining to the regulation of labour brokers in South Africa. This chapter briefly outlines what the researcher proposes to do in this study. This includes an introduction of the subject matter, a brief synopsis of labour broking in South Africa and the problem areas that are addressed in this research. This enables one to have a better understanding of this study and an exposition of the specific areas that this study focuses focus on in the later chapters.

1.2 Problem statement

The *Labour Relations Act* 66 of 1995 was the first piece of South African legislation that attempted to regulate labour brokers in section 198.¹ Notably, the *LRA* refers to labour brokers as temporary employment services (TES).² It defines temporary employment services as any person who for a reward supplies to a client workers who perform work for the client and are subsequently paid by the TES.³ For purposes of brevity the term labour broker will be used to refer to temporary employment services.

The temporary employment relationship is characterised as a triangular employment or commercial relationship between the labour broker, client and the employee.⁴ A commercial relationship is created through a commercial contract between the client and the labour broker, upon which an employment relationship is created through an employment contract between the labour broker and the employee.⁵ According to section 198(2) of the *LRA*, the labour broker is the employer.⁶ This is despite the fact that the employee performs his work within the client's organisation and under his supervision.⁷

¹ Hereinafter referred to as the *LRA*.

² Section 198(1)(a), (b) of the *LRA* of 1995.

³ S 198(1)(a), (b) of the *LRA* of 1995

⁴ Van Eck 2010 *PELJ* 108.

⁵ Van Eck 2010 *PELJ* 108.

⁶ S 198(2) of the *LRA* of 1995.

⁷ *Private Employment Agencies in South Africa Sector Working Paper (2013)* 291 ILO vii; *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*

However, the regulations in section 198 of the *LRA* could be described as highly inadequate as a number of shortcomings existed. Firstly, despite the fact that section 198(2) provided for who the statutory employer was, the employees remained uncertain about this since the party they reported to and who had control over them was not the party that the law recognised as their employer.⁸ Since the legislation also did not specify which duties each of the authority figures should answer for, employees were unclear as to whom they should cite in their claims.⁹ Secondly, the period of the placement of the employee was not limited, irrespective of the fact that such services were meant to be temporary in nature.¹⁰ This created the possibility of exploitation of the temporary employees, since clients of the labour brokers would keep the employees of the labour broker on a “permanent” temporary basis as they were technically not required to comply with employer duties such as dismissal procedures and equal pay for equal work. They could thus avoid employer obligations to some extent and cut expenses at the same time.

Another shortcoming was that the occurrence of disguised employment was not addressed by the *LRA*. The labour broker and client would characterise the temporary employee as an independent contractor on paper, treating him/her as a commodity and effectively excluding them from labour protection, but still reaping the benefits from what seems to still be an employment relationship in nature.¹¹ Further, temporary employees were not awarded protection regarding employment opportunities when applying for a position at the client.¹² This is because the agreement concluded between the labour broker and the client could exclude the employee from applying for posts at the client, limiting their permanent employment opportunities.¹³ It is noteworthy that usually temporary employees are paid less than permanent employees. This might be premised on the fact that these employees are mostly low-skilled. The South African legal system does not provide for minimum wages or any other employment benefits such as insurance and medical aid schemes for temporary employees of labour brokers.¹⁴ This means that

Employment Services Bill 2010, A Report prepared for the Department of Labour and the Presidency 33.

⁸ Van Niekerk *et al Law @ Work* 69.

⁹ Van Niekerk *et al Law @ Work* 69.

¹⁰ Van Niekerk *et al Law @ Work* 69.

¹¹ Van Niekerk *et al Law @ Work* 71.

¹² Van Niekerk *et al Law @ Work* 71.

¹³ Van Niekerk *et al Law @ Work* 71.

¹⁴ Botes 2014 *SA MERC LJ* 135.

temporary employees are subjected to any wages that either the labour broker or client might have stipulated and without employment benefits.¹⁵

Moreover, the provisions of section 198 did not address the exercise of organisational rights by trade unions to the benefit of temporary employees.¹⁶ The challenge was that temporary employees in essence had no permanent workplace where trade unions could represent them. Although the employees carried out their duties at the client's premises, the client was not their statutory employer and would he therefore probably not grant trade unions organisational rights to exercise on his premises to the benefit of these employees.¹⁷ The implication of this was that it left temporary employees vulnerable as they could not fully exercise their organisational rights or participate in the collective bargaining process on matters that affected them.¹⁸ Lastly, issues of liability of the labour broker or the client did not encompass the disputes regarding unfair dismissals and unfair labour practices.¹⁹ It was unclear who should be cited in dismissal disputes since the labour broker, generally liable as the employer, was the one with the authority to terminate the employee's contract of employment, but the client exercised most of the control and would mainly be the one to request a termination.

Due to a lack of protection of temporary employees and inadequate regulation as can be seen above, the need to regulate labour brokers more prominently in the *Labour Relations Amendment Act 6 Of 2014* was recognised.²⁰ The recently amended *LRA* now elaborates on labour brokers and includes additional provisions in various sections.²¹ It is recognised that through the amendments, a measure of additional protection and legal certainty is now afforded to temporary employees. This protection will be analysed in this study so as to determine whether temporary employees are now afforded *adequate* protection under the *LRA*. Impetus to this enquiry is whether the regulation of labour brokers in South Africa is adequate or should it be out-rightly banned as had been advocated by trade

¹⁵ Botes 2014 SA MERC LJ 135.

¹⁶ Botes 2014 SA MERC LJ 116.

¹⁷ Botes 2014 SA MERC LJ 117.

¹⁸ Botes 2014 SA MERC LJ 116.

¹⁹ Van Niekerk et al *Law @ Work* 68.

²⁰ *Labour Relations Amendment Act 6 of 2014*, hereinafter referred to as the amended *LRA* of 2014.

²¹ S198(A)(1), (2),(3) of the *LRA* of 1995.

unions such as Congress of South African Trade Unions (COSATU) and National Public Service Workers Union (NPSWU).²²

As a member of the International Labour Organisation (ILO), South Africa has an obligation to ensure that its domestic legislation complies with the ILO labour standards.²³ The ILO provides for labour brokers in various instruments to which South Africa is a signatory. This means that South Africa is obliged to follow said instruments. One of these instruments is the *Private Employment Agencies Convention* 181 of 1997, which regulates and gives cognisance to the existence of private employment agencies (labour brokers).²⁴ It will be examined to what extent South Africa complies with the ILO's standards on the matter of labour brokers within the current legislative framework.

A comparative study with the United Kingdom will furthermore be undertaken in this research to make possible suggestions for the potential problem areas in the South African legislative framework where policy reform might be needed.²⁵ Since the UK is a market driven economy, it is submitted that it is relevant for purposes of this study because it provides a successful model for those employers who require temporary and flexible forms of employment at their disposal.²⁶ The UK has adopted a number of mechanisms to ensure that labour brokers are effectively regulated and that temporary employees (agency workers) are adequately protected. The key UK legislative measures that regulate labour brokers include the *Gangmasters Act*, the *Conduct of Employment Regulations* and the *Agency Workers Regulations*.²⁷ In addition, the United Kingdom has a complaint and inspectorate mechanism to raise awareness and curtail failure to observe any labour broking procedures.²⁸ These include the Gangmasters Licensing Authority,

²² Botes 2014 SA MERC LJ 113.

²³ Van Niekerk *et al* Law @ Work 21.

²⁴ *Private Employment Agencies Convention* 181 of 1997.

²⁵ Although the UK's legislation was largely influenced by the European Union (EU) Directives, it should be noted that the UK is currently in the process of exiting the European Union as member.

²⁶ European Union Committee *Modernising European Union Labour Laws: has the UK anything to gain: Report with Evidence* 197; Collins 2016 <http://www.collinsdictionary.com>. A market driven economy is an economy that is controlled and guided by commercial considerations. It should be noted that the current UK legislation as it stands has been promulgated to comply with the directives of the European Union, since upon drafting them, the UK was still a member to the EU.

²⁷ *Gangmasters Act* of 2004; the *Conduct of Employment Regulations* of 2007 as amended; the *Agency Workers Regulations* (SI2010/93).

²⁸ *The Role and Activities of Employment Agencies IZA Research Report* No. 57 (2013).

the Employment Standards Inspectorate (EAS), the United Kingdom Advisory Conciliation and Arbitration Services (ACAS) and the Pay and Work Rights Helpline.²⁹

1.3 Framework

This research has five chapters:

Chapter 1 is a brief overview on what the researcher proposes to do in this study. This includes a concise summary on labour broking in South Africa and the specific problem areas that are addressed in this research.

Chapter 2 discusses international law and regional instruments regulating labour brokers. In this regard, particular reference is made to the ILO labour standards. As a member of the ILO, South Africa has an obligation to ensure that its domestic legislation falls within the ILO labour standards. Therefore, this chapter provides the background to the prescribed international regarding labour brokers from which it can later be deduced whether the ILO standards in particular are complied with in South Africa.³⁰

Chapter 3 discusses the historical development and the current legislative framework of labour brokers in South Africa. It traces back to the formation, introduction and the development of labour broking in the South African law. In this chapter the original shortcomings of the *LRA* regarding labour brokers are highlighted to show where reform was necessary in the first place.

Chapter 4 is a critical analysis of the amendments of labour brokers in South Africa. This chapter evaluates whether the regulation of labour broking and the original problems it posed has now been adequately addressed. Moreover, any new problems arising from the current legislative framework are also assessed.

²⁹ Gangmasters Licensing Authority 2016 *What we do* <http://www.gla.gov.uk>; *Employment Agency Standards (EAS) Inspectorate Annual Report 2010 – 2011*; Eichhorst *et al* *The Role and Activities of Employment Agencies 2013*; *Employment Relations Research Series 113 Survey of Pay & Work Rights Helpline callers (2010)*.

³⁰ South Africa is a member of the Southern African Development Community (SADC), but its regional instruments will not be referred to in this dissertation due to the limited coverage on the regulation of labour brokers.

Chapter 5 is a critical analysis and an evaluation of regulation of labour brokers in the United Kingdom. This will assist in evaluating lessons that can be learnt that can be adopted into the South African legislative framework where the amended legislation falls short.

Chapter 6 is based on the observations made throughout the research. Recommendations are made as to what measures can be taken to ensure adequate and proper regulation of labour brokers in South Africa so as to provide optimum protection to the employees concerned.

Chapter 2 Labour brokers under the International Labour Organisation

2.1 Introduction

This chapter provides background on and deals with international law and regional standards regulating labour brokers. In particular, reference is made to the labour standards of the International Labour Organisation (ILO). In terms of the *Constitution of the Republic of South Africa*, 1996 the courts must consider international law and may consider foreign law when interpreting any legislation.³¹ As a member of the ILO, South Africa has an obligation to ensure that its domestic legislation falls within the ILO labour standards and complies with the provisions of the instruments it ratified.³² It is hoped that after having assessed how the ILO regulates labour brokers, South Africa can learn lessons and if possible bridge gaps where its legislation falls short.

2.2 Brief background of the ILO

The ILO was established in 1919 emanating from the Treaty of Versailles.³³ The ILO was an independent affiliated agency of the League of Nations.³⁴ Consequently, all members of the League of Nations became members of the ILO.³⁵ The need for an international organisation that specifically addressed labour issues arose in the nineteenth century.³⁶ The demands for just and equal labour standards as well as improved working and living conditions for workers globally long before the outbreak of World War I were the driving forces of this movement.³⁷ After the Second World War, the United Nations then replaced the League of Nations.³⁸ Subsequently, the ILO became the United Nations' (UN) specialised agency.³⁹

³¹ S39(1)(b),(c), s232, s233 of the *Constitution of the Republic of South Africa*, 1996.

³² Department of International Relations and Cooperation Republic of South Africa 2004 <http://www.dfa.gov.za>; ILO 2016 <http://www.ilo.org>; Van Niekerk et al *Law @ Work* 21.

³³ Sengenberger *The International Labour Organisation: Goals, Functions and Political Impact* 9.

³⁴ Van Niekerk et al *Law @ Work* 21.

³⁵ Van Niekerk et al *Law @ Work* 21.

³⁶ ILO 2016 <http://www.ilo.org>.

³⁷ History 2016 <http://www.history.com>.

³⁸ Van Niekerk et al *Law @ Work* 21.

³⁹ Van Niekerk et al *Law @ Work* 21.

2.3 The role of the ILO and its international labour standards

The main goal of the ILO is to advocate for social justice and to advance internationally recognised human and labour rights within the labour market.⁴⁰ These international standards are to be achieved through the promotion of decent and productive work in conditions of freedom, equity, security and dignity.⁴¹ Similarly, the decent work agenda established by the ILO requires that member states should ensure that all employees are afforded basic labour rights.⁴² These include equality in the workplace, individual security, freedom of association and collective bargaining rights.⁴³ Therefore, the driving force behind the introduction of the concept of decent work was to advance the promotion of opportunities in order to secure decent and productive work for both men and women.⁴⁴ This goal is to be achieved under conditions of equality, human dignity, security and freedom.⁴⁵

The ILO labour standards are mainly provided in Conventions and Recommendations.⁴⁶ As soon as a member state ratifies a convention, it is subject to the ILO's supervisory system which ensures that the convention has been duly complied with.⁴⁷ Recommendations, on the other hand, augment and stipulate additional guidelines on how conventions should be applied.⁴⁸ These guidelines are to be applied in either policies, legislation or practices of a member state.⁴⁹ However, recommendations do not have a legally binding effect and they do not need to be linked to specific conventions.⁵⁰ The mere fact that a member state is a member of the ILO means it has an obligation to

⁴⁰ ILO 2016 <http://www.ilo.org>.

⁴¹ Sengenberger *The International Labour Organisation: Goals, Functions and Political Impact* 27.

⁴² Benjamin "Labour Market Regulation: International and South African Perspectives" 7.

⁴³ Benjamin "Labour Market Regulation: International and South African Perspectives" 17.

⁴⁴ ILO 2016 <http://www.ilo.org>.

⁴⁵ ILO 2016 <http://www.ilo.org>.

⁴⁶ Sengenberger *The International Labour Organisation: Goals, Functions and Political impact* 28. Conventions are international treaties that have a binding effect only after they have been included in a member state's legislative framework and may be ratified by member countries. Conventions set basic principles that are to be effected by those countries that would have ratified them. Ratification can be defined as a formal procedure whereby a state assents to the convention as a legally binding instrument.

⁴⁷ ILO 2016 <http://www.ilo.org>.

⁴⁸ ILO 2016 <http://www.ilo.org>.

⁴⁹ *International Labour Standards Department Handbook of Procedures relating to International Labour Conventions and Recommendations* 2.

⁵⁰ ILO 2016 <http://www.ilo.org>.

implement the ILO labour standards even if it has not ratified the ILO conventions in question.⁵¹ This is true in particular with regard to the four core rights.⁵²

2.4 The ILO standards with regards to the regulation of labour brokers

The ILO introduced standards regarding the regulation of labour brokers, or private employment agencies as the ILO refers to them.⁵³ After decades of development as from the 1940s, the ILO currently provides for the minimum standards of employees of labour brokers in the *Private Employment Agencies Convention* 181 of 1997 and the *Private Employment Agencies Recommendation* 188 of 1997.⁵⁴ The *Private Employment Agencies Convention* (No. 181) was designed to support flexibility and the persistence of labour brokers, but protect those workers that were part of this triangular employment relationship.⁵⁵ Not only does the Convention legitimise atypical forms of employment but it also establishes a minimum level of protection for temporary employees who are involved in such forms of employment.⁵⁶ Vosko⁵⁷ asserts that it is for this reason that the *Private Employment Agencies Convention* advances a novel normative model of employment which epitomises lower levels of social protection compared to those in standard employment relationships. Therefore, discussing the *Private Employment Agencies Convention* will assist in determining to what extent South Africa complies with the ILO's standards in regulating labour brokers within its current legislative framework in the later chapters. It should be noted, however, that South Africa has not yet ratified the *Private Employment Agencies Convention*.⁵⁸

⁵¹ Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* 1998; Member states are mandated to observe, promote, and to implement the core labour standards set by the ILO. This includes ensuring that the member state's national and domestic legislation falls within the ILO standards.

⁵² The four core rights include the right to freedom of association and collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination with regards to employment and occupation.

⁵³ Any reference to private employment agencies in the chapter pertaining to the ILO should be also read to mean labour brokers.

⁵⁴ The older instruments that regulated labour brokers include the *Unemployment Convention* No. 2 of 1919, the *Unemployment Recommendation* No.1 of 1919, the *Fee-Charging Employment Agencies Convention* No. 34 (1933) and the *Fee-Charging Employment Agencies Convention* No. 96 of 1949; *Private Employment Agencies Convention* No. 181 of 1997 (hereinafter referred to as the *Private Employment Agencies Convention*) and the *Private Employment Agencies Recommendation* No. 188 of 1997 (hereinafter, referred to as the *Private Employment Agencies Recommendation*).

⁵⁵ *Private Employment Agencies Convention*.

⁵⁶ Vosko 1997 *Comparative Labour Law and Policy Journal* 44.

⁵⁷ Vosko 1997 *Comparative Labour Law and Policy Journal* 45.

⁵⁸ ILO 2016 <http://www.ilo.org>.

2.5 The ILO Private Employment Agencies Convention No. 181 (1997) and the Private Employment Agencies Recommendation No. 188 (1997)

2.5.1 Regulation of labour broking under the Private Employment Agencies Convention

The *Private Employment Agencies Convention* acknowledges the role of labour brokers in a well-functioning labour market. In terms of the Convention, private employment agencies (labour brokers) are defined as any natural or legal person, services comprising of hiring employees to avail them to a third party, who may be a natural or legal person (user enterprise or client) who consigns and supervises the performance of the employees' tasks.⁵⁹ The main purpose of the *Private Employment Agencies Convention* in terms of article 2 thereof is to allow for the operation of private employment agencies and to provide protection of temporary employees within the framework of its provisions.⁶⁰

Regarding the working and living conditions of temporary employees, in most cases there is no adequate enforcement to safeguard employees through protection against abusive practices that they are subjected to either by the client or the private employment agency. Hence, the *Private Employment Agencies Convention* emphasises the need to protect employees under private employment agencies against any possible exploitation and abuse.⁶¹ Abuse and exploitation of employees can be in the form of deceiving employees as to the nature of the job which they are being employed for or with regards to the location of the placement in question or being exposed to appalling and hazardous living and working conditions.⁶² In the case of migrant and illiterate employees who rely on the assistance of employment agencies, they are taken advantage of due to their lack of education and language skills.⁶³ As a result; such employees are not furnished with accurate information which may cause them not to leave their employment.⁶⁴

Moreover, the preamble of the *Private Employment Agencies Convention* lists a number of conventions incorporated into it that reflect some of the basic rights that should be

⁵⁹ Article 1(b) of the *Private Employment Agencies Convention*.

⁶⁰ Article 2(3) of the *Private Employment Agencies Convention*.

⁶¹ Preamble of the *Private Employment Agencies Convention*.

⁶² United Nations Office on Drugs and Crime *The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons* 6.

⁶³ United Nations Office on Drugs and Crime *The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons* 6.

⁶⁴ United Nations Office on Drugs and Crime *The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons* 6.

awarded to temporary employees. These include provisions of the *Forced Labour Convention* No. 29 of 1930, the *Freedom of Association and the Protection of the Right to Organise Convention* No.87 of 1948, the *Right to Organise and Collective Bargaining Convention* No. 98 of 1949, the *Employment Promotion and Protection against Unemployment Convention* No. 176 of 1988 amongst others. With regard to collective bargaining, the *Private Employment Agencies Convention* ensures that employees are awarded the fundamental rights to freedom of association and collective bargaining.⁶⁵ Member states who ratified the convention are consequently obliged to take measures that safeguard employees' exercise of freedom of association and collective bargaining rights.

In addition, member states have a duty to prohibit all forms of discrimination against temporary employees provided for within their national laws and practices.⁶⁶ This provision is paramount as temporary employees are often treated differently from permanent employees. This is especially the case concerning wages and employment opportunities when applying for a position at the client; temporary employees are excluded from permanent posts in the contracts that they conclude with private employment agencies.⁶⁷ Budlender⁶⁸ asserts that the *Private Employment Agencies Convention* provides for affirmative action similar to provisions in section 9(2) of the *Constitution of the Republic of South Africa, 1996* in that there should be specially designated programs for the previously disadvantaged in the labour market. This is evidenced by article 5(2) which explicitly states that the Convention shall not be effected in a manner that prevents private employment agencies from employing target programs or specialised services to assist the most disadvantaged employees in their job seeking activities.⁶⁹ Therefore, private employment agencies are required to assist disadvantaged persons in the workplace. Assistance that can be rendered to such persons in the workplace include accessible facilities, training, specialised supervision and support.

⁶⁵ Article 4 of the *Private Employment Agencies Convention*.

⁶⁶ Article 5(1) of the *Private Employment Agencies Convention*.

⁶⁷ Van Niekerk et al *Law @ Work* 71.

⁶⁸ Budlender "Private Employment Agencies in South Africa Sector Working Paper No. 291" 8; s9 of the *Constitution of the Republic of South Africa, 1996*; Article 5(2) of the *Private Employment Agencies Convention*.

⁶⁹ Article 5(2) of the *Private Employment Agencies Convention*.

Furthermore, member states and user enterprises have to protect employees in line with national law and practice with regards to minimum wages, working time and other working conditions, statutory social security benefits, occupational safety and health, maternity protection and benefits, as well as parental protection and benefits amongst others.⁷⁰ The *Private Employment Agencies Convention* recommends that national policies should set thresholds for the minimum wage for temporary employees, establish the number of hours of work and the standard of working conditions that temporary employees should be exposed to.⁷¹ In addition, medical aid schemes and insurance policies are amongst the employment benefits that temporary employees should be awarded.

The Convention continues to require of member states to adopt special measures to protect migrant workers from abuse by private employment agencies.⁷² Such measures include implementing laws or regulations which stipulate penalties including prohibition of those private employment agencies which engage in fraudulent practices and abuses as discussed earlier.⁷³ The convention does bestow upon member states the power to determine whether private employment agencies should be regulated by either licensing or certification procedures to the exception that such regulation is already determined by national law and practice.⁷⁴ The purpose of licensing and certification procedures is to ensure that private employment agencies are operating lawfully. This also ensures that private employment agencies are adequately regulated to maintain acceptable employment standards for temporary employees.⁷⁵

It is submitted that regulation through a licensing system ensures that records of the private employment agencies which include information such as the type of services that private employment agencies offers its client, are readily available.⁷⁶ Such transparency curtails malpractices by private employment agencies and abuse of temporary employees by the agencies who carry out illegitimate dealings such as drug or human trafficking.⁷⁷

⁷⁰ Article 11 and 12 of the *Private Employment Agencies Convention*.

⁷¹ Article 11 and 12 of the *Private Employment Agencies Convention*.

⁷² Article 8 of the *Private Employment Agencies Convention*.

⁷³ Article 8 of the *Private Employment Agencies Convention*.

⁷⁴ Article 3(2) of the *Private Employment Agencies Convention*.

⁷⁵ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 14.

⁷⁶ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 13.

⁷⁷ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 14.

Hence, anyone can access the public registry to check the legitimacy of the private employment agency.⁷⁸ Further, member states are required to employ complaint and investigation mechanisms for alleged abuses and fraudulent practices concerning the activities of private employment agencies.⁷⁹ Another important prohibition has regard to the fact that private employment agencies are prohibited from charging their employees either directly or indirectly.⁸⁰ It is therefore intended that the recruitment and placement of already vulnerable and mostly low skilled employees are free of charge. This provision attempts to further curtail any possible exploitation of temporary employees.

Lastly, violations of any provisions provided in the *Private Employment Agencies Convention* can necessitate adequate remedies which include penalties where appropriate. It is submitted that in the event that the private employment agency fails to comply with the regulations, penal sanctions should be imposed. The sanctions, however, will be determined by the severity of the violation or misconduct.⁸¹ In cases where the violation is less severe, warnings will be issued to the private employment agency to rectify its actions.⁸² Severe violations committed by the private employment agency will warrant revocation or withdrawal of licenses, fines or imprisonment enforced through either an administrative tribunal or through a court of law.⁸³ Such incentives will ensure proper management and effective regulation of private employment agencies.

However, Vosko⁸⁴ argues that the *Private Employment Agencies Convention* is not clear on how certain duties and obligations should be assigned amongst the parties in the triangular relationship. Moreover, the *Private Employment Agencies Convention* does not provide the conditions that member states should consider when authorising agencies to

⁷⁸ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 15.

⁷⁹ Article 10 of the *Private Employment Agencies Convention*. This provision would allow employees to report any exploitative or fraudulent practices by the employment services. The relevant authorities will adequately detect, investigate and make follow-ups on alleged reports on the purported violations. Article 7 of the *Private Employment Agencies Convention*.

⁸⁰ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 36.

⁸¹ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 36.

⁸² International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 36.

⁸³ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 36.

⁸⁴ Vosko 1997 *Comparative Labour Law and Policy Journal* 43. The South African legal framework only provided for who the statutory employer was, but did not provide clarity as to who should be held liable for various types of claims. Clarity on this matter in legislation would assist the employee in instituting claims against the relevant authority. The *Private Employment Agencies Convention* could have been of considerable help to member states if it specified certain duties of each of the authority figures.

be classified as employers, nor does it address the job security of temporary employees employed by private employment agencies.⁸⁵ Another shortcoming of the *Private Employment Agencies Convention* is that it does not address the issue of equal treatment in working conditions of temporary employees to those of the user undertaking (client).⁸⁶ In addition, the *Private Employment Agencies Convention* does not clearly articulate as to the nature of agency work in that it should be temporary in nature.⁸⁷

It can be concluded that although the *Private Employment Agencies Convention* provides guidelines pertaining to a wide range of aspects on labour brokers and their employees, comprehensive guidance on the protection of many rights of the employees does not form part of its framework. As Vosko points out that the guidance of the Convention is limited. Crucial issues such as the duties and obligations of parties to the triangular relationship, job security of temporary employees, equal treatment regarding the working conditions of temporary employees are not adequately addressed in the Convention. It is therefore argued temporary employees still remain vulnerable in this regard. It is recommended that the Convention should provide elaborate guidance on these issues so as to ensure that temporary employees are adequately protected within the labour market.

2.5.2 Regulation of labour broking under the Private Employment Agencies Recommendation

Apart from the above Convention, the ILO also issued the *Private Employment Agencies Recommendation* No. 188 in 1997. This Recommendation supplements and is to be applied in conjunction with the *Private Employment Agencies Convention*.⁸⁸ In order to provide for the proper and effective regulation of labour brokers, the *Private Employment Agencies Recommendation* stipulates that national law and regulations of member states

⁸⁵ Benjamin "Law and practice of private employment agency work in South Africa Sector Working Paper No. 292" 7. The South African legislative framework does not award protection to temporary employees regarding permanent employment opportunities when applying for a position at the client (user undertaking). Comprehensive guidelines by the *Private Employment Agencies Convention* on the protection of temporary employees regarding temporary employment as a means to eventually attain permanent posts would assist South Africa in its policies which regulate labour brokers.

⁸⁶ Van Eck 2014 *International Journal of Comparative Labour Law* 55. The South African legislative framework has no adequate enforcement with regards to the working conditions of the employees especially if they are subjected to abusive practices by the client (user undertaking). For this reason, guidance from the *Private Employment Agencies Convention* regarding the standard working conditions for temporary employees would have assisted South Africa in its policy reform.

⁸⁷ Van Eck 2014 *International Journal of Comparative Labour Law* 55.

⁸⁸ Article 1 of the *Private Employment Agencies Recommendation*.

should be complemented with technical standards, guidelines, codes of ethics, self-regulatory mechanisms or other means consistent with national practice.⁸⁹ Such standards maintain business ethics and stimulate quality service delivery which enhances the legitimacy of the activities of the private employment agency.⁹⁰ Additionally, temporary employees are required to have at least concluded a written contract with the private employment agency which particularly specifies their employment terms and conditions.⁹¹ As a minimum requirement, it is imperative that these employees be informed of their conditions of employment before their placement comes to effect.⁹² This ensures that temporary employees are fully aware of the nature of their work, what duties they are required to fulfil and the obligations of the private employment agency towards them.

With regards to the protection of temporary employees, the *Private Employment Agencies Recommendation* requires that member states implement measures to avert and to eradicate unethical practices by private employment agencies as previously discussed.⁹³ In addition, private employment agencies are prohibited from either knowingly recruiting, employing or placing employees for jobs in a way in which they are exposed to unacceptable hazards or dangers and are subjected to abuse or any kind of discriminatory treatment.⁹⁴ Finally, through affirmative action programmes, private employment agencies are encouraged to help promote equity in the labour market.⁹⁵

It is asserted that the *Private Employment Agencies Recommendation* ensures that private employment agencies are conducted in a manner that protects temporary employees. It is submitted that the Recommendations protects employees from exploitative practices by requiring private employment agencies to follow certain standards so that it will be easier to monitor their activities. Moreover, by ensuring that temporary employees are aware of the nature of employment as well as the employment

⁸⁹ Article 2 of the *Private Employment Agencies Recommendation*.

⁹⁰ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 41.

⁹¹ Article 5 of the *Private Employment Agencies Recommendation*.

⁹² Article 5 of the *Private Employment Agencies Recommendation*.

⁹³ Article 4 of the *Private Employment Agencies Recommendation*. See par 2.5.1. Steps such as laws or regulations which provide for penalties and the prohibition of such unethical practices should be employed by member states.

⁹⁴ Article 8(a) of the *Private Employment Agencies Recommendation*.

⁹⁵ Article 10 of the *Private Employment Agencies Recommendation*.

terms and conditions, this means that employees will be less susceptible to exploitative practices and abuses by the private employment agencies. It also contended that affirmative action programmes will enable temporary employees to participate in the labour market. Consequently, temporary employees will no longer be marginalised in the workplace.

2.6 Conclusion

South Africa has to ensure that the regulation of labour brokers falls within the international labour standards set by the ILO. As indicated in the provisions of the *Private Employment Agencies Convention*, temporary employees should be protected from possible exploitation and abuse and all forms of discrimination in both working conditions and allocation of wages. Moreover, temporary employees should be granted the rights to freedom of association and collective bargaining. It is further recommended that the member states in regulating labour brokers should have proper guidelines codes of ethics and standards in place to ensure adequate protection of temporary employees. Member states are also given the option of adopting licensing and certification procedures to ensure proper and adequate regulation of labour brokers. However, the *Private Employment Agencies Convention* does not address issues of job security, dismissal or liability for unfair dismissals which would have assisted South Africa in the regulation of labour brokers. It can be deduced from the provisions of the instruments that temporary employees are worthy of protection like any other employees within the labour market. It is submitted that it is through these instruments that the ILO attempted to address the plight of temporary employees. Consequently, member states are required to ensure that these employees are adequately protected. In the later chapters it will be ascertained whether South Africa complies with the ILO standards to ensure adequate regulation of labour brokers within its legislative framework.

Chapter 3 The historical development of labour brokers in South Africa

3.1 Introduction

This chapter traces back to the establishment and the development of labour broking in the South African law. In addition, this chapter outlines and discusses the original shortcomings of the *Labour Relations Act* 66 of 1995 with regards to the regulation of labour brokers in South Africa.⁹⁶ Accordingly, this chapter serves as a backdrop to the current legislative framework of the *LRA* of 1995 regulating labour brokers that is discussed in a later chapter.⁹⁷ It is crucial to investigate the problems that existed with labour brokers previously to have a better understanding as to why policy reform was necessary in this regard. For purposes of brevity the statutory term "temporary employment services" (TES) will be used interchangeably with labour brokers.

3.2 Overview of the development of labour brokers in South Africa

Tracing back in history, atypical forms of work such as labour broking were not adequately regulated in the South African legislative framework.⁹⁸ It has been in South Africa since the 1920s at least, but it was not covered in legislation until much later.⁹⁹ Before its amendmend, the *Labour Relations Act* 28 of 1956 did not refer to labour brokers.¹⁰⁰ However, it was only through the amendments of 1983 that these definitions were introduced into it. In terms of the *LRA* of 1956, labour brokers were referred to as businesses which supply clients with workers to perform work for the client at a fee although such workers are remunerated by the broker.¹⁰¹ However, the *LRA* of 1956 as amended only defined labour brokers and their offices but it did not adequately provide for the proper regulation of labour-broking relationships.¹⁰²

⁹⁶ *LRA* of 1995.

⁹⁷ Refer to chapter 4.

⁹⁸ Botes 2015 *SALJ* 101. Other atypical forms of work include part-time work, casual work, seasonal work, fixed term employment homework, subcontract work and franchising (see Mhone 1998 *ILJ* 207); Le Roux *The World of Work: Forms of engagement in South Africa* 14,18; Theron 2003 *ILJ* 1250, 1252; Mills 2004 *ILJ* 1204.

⁹⁹ Botes 2014 *SA Merc LJ* 110.

¹⁰⁰ *Labour Relations Act* 28 of 1956 (hereinafter referred to as the *LRA* of 1956).

¹⁰¹ Section 1 of *LRA* of 1956.

¹⁰² S2(3) of *LRA* of 1956.

No regulation was provided in the *LRA* of 1956 regarding who the employer is between the labour broker and the client, as well the duties of the respective authority figures in the triangular employment relationship. Consequently, it was unclear as to who the employees should cite in their claims.¹⁰³ Moreover, no provisions were provided in the *LRA* in respect of minimum wages, employment benefits, organisational rights and the working and living conditions of temporary employees. Furthermore, no provision for issues of liability of either the labour broker or the client in respect of the disputes regarding unfair dismissals and unfair labour practices were addressed by the *LRA*. Consequently, due to the complete lack of proper regulation under the *LRA* of 1956, it is safe to assume that temporary employees were susceptible to exploitation and abuse either by the labour brokers or the client because they had little or no labour protection at all.¹⁰⁴

This subsequently led to the emergence of legal reform in the South African legislative framework with regards to the regulation of labour brokers.¹⁰⁵ Notably, section 23 of the *Constitution of the Republic of South Africa*, 1996 awards everyone the right to fair labour practices.¹⁰⁶ It is contended that the constitutional right to fair labour practices does not have a precise definition but its scope of coverage can be derived from practices that are set out from the development of the law.¹⁰⁷ It is therefore submitted that temporary employees are equally bestowed with this fundamental right since they are employed in the workplace.¹⁰⁸ In addition, as a member of the ILO and signatory to many of its instruments, South Africa has an obligation to ensure that its domestic legislation falls

¹⁰³ Van Niekerk *et al* *Law @ Work* 69.

¹⁰⁴ Mills 2004 *ILJ* 1216. A case study was once carried out in the hotel industry, particularly Southern Suns, to illustrate the abuses and exploitation that the workers in the cleaning industry faced. It was reported that the status of these workers was indeterminate in that they were considered to be independent contractors when in actual fact they were temporary employees. Moreover, if a worker did not get through a specific number of rooms per day, that employee was compelled to work overtime, with no pay to meet a minimum salary. If the employees had grievances regarding either wages or conditions of employment, they were often referred from one authority figure to the other in their own time. As a result, these employees seldom managed to have their grievances resolved.

¹⁰⁵ Section 39(1)(b), (c), s 232, s 233 of the *Constitution of the Republic of South Africa*, 1996.

¹⁰⁶ S23 of the *Constitution of the Republic of South Africa*, 1996.

¹⁰⁷ Van Niekerk *et al* *Law @ Work* 42. The right safeguards one from unfair labour practices relating to work security and employment opportunities as codified in the *LRA*; it guarantees one minimum standard set out in the *Basic Conditions of Employment Act* and lastly, the right is related to the adjudication of disputes of right and not disputes of interests. In *South African Defence Force and another v Minister of Defence and Others* (2003) 24 *ILJ* 1495 (T) (SANDU 1) para 48, it was held that the right to fair labour practices is an overarching right that encompasses other labour relations rights including collective bargaining rights and trade union rights.

¹⁰⁸ Gericke 2010 *Obiter* 95; S1 of the *LRA* of 1995.

within the ILO labour standards.¹⁰⁹ Therefore, it was through the inclusion of section 198 that the *LRA* of 1995 attempted to follow these standards and regulate labour brokers to some extent.¹¹⁰ Section 198 established a triangular employment relationship between the labour broker, client and the employee.¹¹¹ A brief exposition of the regulations of labour brokers before the 2014 amendments follows after which the shortcomings it possessed are outlined and assessed.

3.3 The regulation of labour brokers under the Labour Relations Act 66 of 1995

The notable difference from the *LRA* of 1956 is that the *LRA* of 1995 was the first attempt to truly regulate labour brokers.¹¹² Furthermore, the *LRA* of 1995 substituted the term “labour broking” with “temporary employment services” (TES).¹¹³ The concept of the employment arrangement was retained. Section 198 originally referred to a temporary employment service as a person who for reward caters to a client other persons who render services to the client but are subsequently remunerated by the temporary employment service.¹¹⁴ From this definition it can be deduced that a triangular employment relationship is established between the TES, the client and the temporary employee.¹¹⁵ In order to regulate this peculiar relationship, a commercial contract is firstly created between the TES and the client and a subsequent employment contract between the TES and the employee.¹¹⁶ A commercial contract is concluded between the TES and the client in which the labour broker consents to provide the client with workers at a fee

¹⁰⁹ Department of International Relations and Cooperation Republic of South Africa 2004 <http://www.dfa.gov.za>; ILO 2016 <http://www.ilo.org>; *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, A Report prepared for the Department of Labour and the Presidency* 13; Van Niekerk et al *Law @ Work* 21. It should be noted that it was only in 1994 that South Africa rejoined the ILO. This explains why its compliance with the ILO labour standards was not mentioned before the promulgation of the *LRA* of 1995. See para 2.5.1.

¹¹⁰ Benjamin 2010 *ILJ* 851; S198 of the *LRA* of 1995.

¹¹¹ S198 of the *LRA* of 1995.

¹¹² Botes 2015 *SALJ* 101.

¹¹³ Benjamin 2016 *ILJ* 30.

¹¹⁴ S198 of the *LRA* of 1995.

¹¹⁵ Theron 2005 *ILJ* 619, 620. Other forms of triangular relationships include franchising and homework. Franchising is when a franchisor licenses a franchisee to operate a business using the franchisor's trademark or brand, whereas the franchisee employs workers to assist the franchisor. Homework (or outwork), on the other hand, is brokered through an intermediary who has neither the capacity nor the intention to provide goods or services himself or herself; instead he or she contracts to acquire a workforce to perform the work.

¹¹⁶ Botes 2015 *SALJ* 103.

and specifies the period and the tasks that the employee is required to execute.¹¹⁷ It is argued that the commercial contract between the TES and the client in fact triggers the conclusion of an employment contract between the TES and the employee.¹¹⁸ This means that without the commercial contract there is no basis for an employment contract. If the client terminates its commercial contract with the TES, automatically the placement of the workers concerned also terminates.¹¹⁹

In addition, the *LRA* of 1995 creates a legal fiction whereby the TES is the employer of the temporary employee and the temporary employee is the employee of the TES.¹²⁰ It is argued that this arrangement is a legal fiction in that the employee performs work at the client's workplace and at his behest. Hence, one would assume that the client instead of the TES would be the employer since he is the one who exercises control and supervises the employee. Moreover, in most cases the employee is provided with tools of the trade by the client and forms part of the client's organisation.¹²¹ Theron¹²² argues that since the identities of both employer and employee are clear, perhaps a triangular employment relationship should not exist at all. It is argued that it is anomalous that the TES is regarded as the employer yet the client is the dominant party in the triangular employment relationship based on the fact that it determines the parameters of the relationship.¹²³ On the other hand, it can be argued that this provision was designed to provide clarity as to who the true employer is so as to avoid confusion that is created by having multiple authority figures.¹²⁴ Nonetheless, section 198(3) stipulates that an employee of a labour broker is not an independent contractor.¹²⁵ It is thus clear that these workers are by law considered employees, but this does not exclude the possibility that all the parties concerned may legitimately agree that such a worker would be an independent contractor. In these instances it has, however, to be ensured that the worker freely

¹¹⁷ Harvey 2011 SALJ 100, Theron 2003 ILJ 1254; Theron 2005 ILJ 628; *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: A Report prepared for the Department of Labour and the Presidency* 33.

¹¹⁸ Theron 2005 ILJ 629.

¹¹⁹ Theron 2005 ILJ 629; Cohen 2008 ILJ 873.

¹²⁰ Van Eck 2010 PELJ 109.

¹²¹ Theron 2005 ILJ 629.

¹²² Theron 2005 ILJ 619.

¹²³ Cohen 2008 ILJ 872.

¹²⁴ Botes 2015 SALJ 103.

¹²⁵ S198(3) of the *LRA* of 1995.

chooses this situation and that the relationship is then in actual fact conducted as one with an independent contractor.

Lastly, section 198 provided for the joint and several liability of the TES and the client regarding claims in relation to the employee's employment conditions.¹²⁶ Nevertheless, liability was limited to instances whereby the TES infringed the employee's employment conditions in a collective agreement concluded in a bargaining council, a binding arbitration award, the *Basic Conditions of Employment Act* and a sectoral determination made in terms of the *Wage Act*.¹²⁷ However, despite the attempt by the legislature to regulate labour brokers through section 198, the *LRA* of 1995 still fell short of adequately protecting temporary employees. Hence, there were a number of shortcomings in the aforementioned provisions that required policy reform. Due to the peculiarity and intricacy surrounding the triangular employment relationship, it was not sufficient for the legislature to regulate such a complex issue without taking into consideration the various practical implications it would have on the temporary employees. It is argued that the legislature did not adequately protect temporary employees because it attempted to regulate a practical situation by means of a legal fiction which resulted in problems as detailed regulation was absent. The problems presented by this feeble regulation are now discussed below in greater detail.

3.4 Shortcomings of section 198 of the Labour Relations Act 66 of 1995

There were a number of shortcomings in section 198 regarding the protection of temporary employees. These include the issue of liability of the authority figures (the TES and the client), the use of triangular employment relationships as disguised employment, the unequal treatment of temporary employees, the lack of job security and the lack of bargaining power of temporary employees. There was a lack of adequate regulation in the previous section 198 in these specific areas. The shortcomings are discussed below.

3.4.1 Who the true employer is between the labour broker and the client

In the triangular employment relationship, the labour broker and the client perform different functions. The labour broker provides employees to the client and performs other

¹²⁶ S198(4) of the *LRA* of 1995.

¹²⁷ S198(4) of the *LRA* of 1995.

administrative functions such as remunerating the employees and deducting tax from the employees' salaries,¹²⁸ whereas, the client prescribes the work to be done, determines the employees' salaries, working conditions and other terms of employment under which the work is done.¹²⁹ Although the labour broker is deemed the employer of the temporary employee, it can be deduced that the client exercises more control and supervision over the employee. Consequently, this creates confusion in that one would presume that the client would be the employer in this case.¹³⁰

As stated earlier, the *LRA* of 1995 stated that the client and the TES would be held jointly and severally liable provided the TES contravenes the employee's employment conditions.¹³¹ It can be inferred from this provision that the client's liability is a default liability, meaning that the client cannot be sued directly by the employee because it is not the statutory employer.¹³² Van Eck¹³³ correctly observes that the *LRA* clearly omitted shared responsibility of the TES and the client when it comes to actions of unfair dismissal and unfair labour practices that are committed by the client against the temporary employees. Hence, an employee is only permitted to institute a claim against the client provided it has acquired a judgement or order against the TES which it had refused to pay.¹³⁴ In the case of *April v Workforce Group Holdings (Pty) Ltd*¹³⁵ the court confirmed

¹²⁸ Van Eck 2010 *PELJ* 108.

¹²⁹ *Private Employment Agencies in South Africa Sector Working Paper (2013)* 291ILO vii; *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, A Report prepared for the Department of Labour and the Presidency* 33.

¹³⁰ S200A of the *LRA* and s83 of the *BCEA* provides a rebuttable presumption of employment when a person renders services to another person based on any one or more of the listed factors which include a) the manner in which the person works is subject to the control or direction of another person; (b) the person's hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person. Inherent from the exercise of control by the client over the temporary employee in the triangular employment relationship, it can be alluded that most of the factors present would conventionally make him the employer. However, due to the nature of the triangular employment relationship identifying the client as the employer creates confusion owing to the fact that there is no employment relationship between the client and the employee. In most cases the employee renders services in terms of most if not all of the listed factors to the client.

¹³¹ S198(4) of the *LRA* of 1995.

¹³² Benjamin 2010 *ILJ* 850.

¹³³ Van Eck 2010 *PELJ* 109.

¹³⁴ Benjamin 2010 *ILJ* 850.

¹³⁵ *April v Workforce Group Holdings (Pty) Ltd* [2005] 26 *ILJ* 2224 (CCMA) para 4-6; *NUMSA & Others v SA Five Engineering (Pty) Ltd & Others* [2007] 28 *ILJ* 1290 (LC) para 78.

that the client of a TES cannot be held responsible for any unfair conduct by the TES since the applicant was not an employee of the client. Therefore, the client will not be prosecuted for any violations in working conditions experienced by the temporary employees such as unequal treatment regarding wages or working conditions and unfair dismissals with no severance pay or notification.¹³⁶

Although the labour broker is the statutory employer and accrues all responsibility with regards to these acts, it is unfair that the labour broker is held liable for encroaching on the employee's rights and any unfair labour practices in that the client has in fact perpetrated the violation.¹³⁷ On the other hand, pursuing the labour broker first before proceeding to the client can be burdensome on temporary employees as they do not always have the resources to pursue all these avenues of redress such as instituting legal proceedings against both parties.¹³⁸ Evidently, clients can therefore use TESs in an attempt to evade their obligations as an employer and other disciplinary procedures that come with employing permanent employees.¹³⁹

Botes¹⁴⁰ argues that such an implication is harsh and impractical especially considering that the labour broker has little or no control over the circumstances of the employee's actual work on a daily basis or place of work. Clearly, there is a 'disconnect' between the labour broker and the temporary employee while he or she is placed at the client.¹⁴¹ Moreover, the termination of the commercial contract on which that work is based, and/or the treatment of the employee on the client's premises is beyond the reach of the labour broker.¹⁴² For this reason it is contended that it will be logical that the client be regarded as the employer based on the fact that he controls the activities of the temporary employee; under common law it would make sense to do so.¹⁴³ Gericke¹⁴⁴ correctly submitted that section 198 (as it previously stood) undercuts the rights of temporary

¹³⁶ *Pienaar v Tony Cooper & Associates* [1995] 16 ILJ 192 (IC); *Qwabe & others and Robertson's Foods & Another* (2007) 28 ILJ 1356 (CCMA).

¹³⁷ Botes 2015 SALJ 106.

¹³⁸ Shoba *Temporary Employment Services in Contemporary South Africa: A Critical Analysis* 21.

¹³⁹ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 39.

¹⁴⁰ Botes 2015 SALJ 106.

¹⁴¹ Benjamin 2010 ILJ 848.

¹⁴² Botes 2015 SALJ 106.

¹⁴³ Schoeman *An analysis of Temporary Employment Services and the new laws regulating them in South Africa* 15.

¹⁴⁴ Gericke 2010 *Obiter* 105.

employees as it maintains the fiction that the TES is an employer yet it only serves as the go-between, meaning an intermediary between the client and the employee. It is argued that the employees' rights are undermined in that they cannot institute claims against the party who will be actually responsible for either terminating their contract or treating them unfairly in the workplace.

For these reasons it is argued that it is unfair for the labour broker to be held accountable for unfair conduct under such circumstances irrespective of whether it is deemed to be the legal employer of the temporary employees in terms of statute.¹⁴⁵ Further, the temporary employee becomes uncertain as to whom he or she should cite when instituting claims for the infringement of his or her rights.¹⁴⁶ This is owed to the fact that the party whom the temporary employee should report to (the client) is not the party who would be held liable (the TES).¹⁴⁷ Le Roux¹⁴⁸ contends that in some cases it is difficult to hold the TES liable because often the TES is a small employer who either has little or no contact with its employees, has few assets, and has no permanent office. The case of *Dyokhwe v de Kock NO & Others*¹⁴⁹ is a clear illustration on the difficulties in identifying who the true employer in the triangular relationship is. In this case, Mr Dyokhwe (the temporary employee) had been working as a machine operator (Mondi, the client) when his contract was terminated. Mondi decided to re-route Dyokhwe's contract through Adecco (the TES). The TES then placed Dyokhwe with the original employer (now the client, Mondi). However, the client informed the TES that it no longer required the services of Dyokhwe due to its operational requirements. Subsequently, the employee instituted claims against the client and not the TES.

The court held that section 198 would not apply if the employment arrangement between the TES and the client had been a sham, *in fraudem legis* meaning that it was a fraudulent act that was committed by the employer with the intention to evade the law.¹⁵⁰ This is especially when employers transfer their existing employees to labour brokers for no justifiable reason other than to circumvent their statutory obligations towards them.¹⁵¹ In

¹⁴⁵ Botes 2015 SALJ 106.

¹⁴⁶ Botes 2015 SALJ 106.

¹⁴⁷ Le Roux 2012 *Contemporary Labour Law* 21.

¹⁴⁸ Le Roux 2012 *Contemporary Labour Law* 21.

¹⁴⁹ *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 (LC).

¹⁵⁰ *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 (LC) para 49.

¹⁵¹ Le Roux 2012 *Contemporary Labour Law* 24.

the case of *Dyokhwe* the court rejected the client's argument that the TES was the employer.¹⁵² Although Adecco supposedly provided services to Mondi, the court held that Mondi was true employer because Dyokhwe continued doing the same work for Mondi that he had done in the previous years.¹⁵³ The court held that there was no temporary employment relationship between Adecco and Dyokhwe and that Mondi had not terminated the applicant's employment.¹⁵⁴ It is therefore submitted that the situation of Dyokhwe exactly illustrates the fact that the courts recognise that due to its control, the client would in some instances be the common law employer and subsequently liable.

It is clear from the above that the original section 198 did not provide proper guidance pertaining to the issue of multiple authority figures.¹⁵⁵ This caused impractical results and legal uncertainty.

3.4.2 *Disguised employment*

Disguised employment occurs when the labour broker and client identify the temporary employee as an independent contractor on paper, refusing him his labour rights and protection, but at the same time still treating him like an employee and conducting the relationship as one of employment.¹⁵⁶ It was argued that the worker was an independent contractor because an employee only works until the client no longer needs him (say for the completion of a project) and that there is no statutory employment relationship between the client and the temporary employee. In terms of the *LRA* an employee is defined as any individual, to the exclusion of an independent contractor, who performs works for another person or for the State and who receives, or is entitled to receive, any remuneration.¹⁵⁷ This part of the definition supposes the formal employment relationship between an employee and employer, where one person performs work for another and that person remunerates them for such work provided. A temporary employee of a TES will naturally not fall within this part of the definition since he is not remunerated by the person for whom he provides work and the person he provides his labour to is not his employer. However, the definition continues to state that an employee is also defined as

¹⁵² *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 (LC) para 58.

¹⁵³ *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 (LC) para 54.

¹⁵⁴ *Dyokhwe v de Kock NO & Others* (2012) 33 ILJ 2401 (LC) para 58.

¹⁵⁵ Van Niekerk *et al* *Law @ Work* 69.

¹⁵⁶ Benjamin 2010 *ILJ* 846; NEDLAC 2007/*ILJ*.

¹⁵⁷ S213 of the *LRA* of 1995.

any other person who in any manner assists in carrying on or conducting the business of *an* employer.¹⁵⁸ This supposes that regardless of whether the person as a worker provides his labour to is *his* employer, he will be regarded as an employee just as long as he assists in carrying on or conducting the business of any employer. Needless to say this fact can further be confirmed by considering whether control is exercised over the manner in which the employee performs his work, whether working hours are prescribed, whether tools are provided, etcetera.¹⁵⁹

In a disguised employment relationship an employee would have performed its functions in terms of the definitions above, whereas the labour broker and the client would have managed the relationship as an employment relationship.¹⁶⁰ Both the labour broker and the client would have reaped benefits that emanate from the relationship which include exercising authority and control yet they evade their employer duties towards the purported independent contractor.¹⁶¹ The *ILO Employment Relationship Recommendation* of 2006 mandates member states to prevent the use of disguised employment relationships when they are used to evade employer obligations and to deprive employees of their protection.¹⁶² However, the *LRA* did not adequately afford the necessary labour protection to temporary employees in this regard.

The issue of disguised employment was addressed by the courts in the case of *Mandla v LAD Brokers*.¹⁶³ In this case, a temporary employee was alleged to be an independent contractor by the labour broker after he had claimed that he had been unfairly dismissed.¹⁶⁴ To ascertain whether the temporary employee was an independent contractor, the court had to apply the common law tests for an employment relationship.¹⁶⁵ The court confirmed that the relationship between the labour broker and

¹⁵⁸ S213 of the *LRA* of 1995.

¹⁵⁹ S200 of the *LRA* of 1995.

¹⁶⁰ Van Niekerk et al *Law @ Work* 71.

¹⁶¹ Van Niekerk et al *Law @ Work* 71.

¹⁶² S4(b) of the *ILO Employment Relationship Recommendation* of 2006; South Africa is a member state of the ILO and as such is obligated to comply with the ILO standards in its domestic legislation. This is especially if South Africa has ratified the ILO instruments in question.

¹⁶³ *Mandla v LAD Brokers* (Pty) Ltd (2000) 21 ILJ 1807 (LC).

¹⁶⁴ *Mandla v LAD Brokers* (Pty) Ltd (2000) 21 ILJ 1807 (LC) para 2. The common law tests include the control test which determines whether the employer exercises control over the employee; the organisation test which determines whether the employee formed an integral part of the organisation; the economic test which ascertains whether the employee is economically dependent on the employer and the dominant impression test which includes all the aforementioned tests.

¹⁶⁵ *Mandla v LAD Brokers* (Pty) Ltd (2000) 21 ILJ 1807 (LC) para 7-10.

the temporary employee should be determined in the light of the existing contract as a whole and the real nature of the relationship that is created between the parties.¹⁶⁶ Therefore, the conclusion of a contract and the parties' classification of their relationship are not conclusive or exclusive of the existence of an employment relationship.¹⁶⁷ It should therefore not matter what the form of the contract is or what the parties choose to call the relationship; the reality of the relationship is the determining factor. Botes¹⁶⁸ opines that this assists in corroborating whether there is an existing disguised employment relationship. After having applied the control and dominant tests to the set of facts, the court held that the respondent was under the supervision and control of the client which identified the relationship as an employment relationship.¹⁶⁹ Therefore, the court ruled that the applicant was the employee of the labour broker. The employee was awarded compensation because the court held that he had been unfairly dismissed.¹⁷⁰ However, despite the attempts to address disguised employment in case law, the *LRA* did not address this problem, which made temporary employees more vulnerable to exploitation. Tshoose and Tsweledi¹⁷¹ argue that the *LRA*'s failure to address the problem of disguised employment will not only lack clarity as to the nature of employment but it will further exacerbate mistrust between contracting parties involved in such relationships.

3.4.3 *Low wages, employment benefits and unfavourable working conditions*

The *LRA* of 1995 did not address the issue of low wages and employment benefits also not covered by its predecessors. Temporary employees are usually paid less than permanent employees due to the fact that most of them are low-skilled.¹⁷² These low wages are can furthermore be attributed to the fact that there are no set requirements in place that ensure that temporary employees receive similar wages to those of permanent employees of the client.¹⁷³ The TES system is mainly focused on providing temporary employees to the client at a lower competitive price than other TESs, consequently, this

¹⁶⁶ *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807 (LC) para 41.

¹⁶⁷ *Hydraulic Engineering Repair Services v Ntshona & Others* (2008) 29 ILJ 163 (LC) para 18.

¹⁶⁸ Botes 2015 SALJ 105.

¹⁶⁹ *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807 (LC) para 18.

¹⁷⁰ *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807 (LC) para 50.

¹⁷¹ Tshoose and Tsweledi 2014 *Law, Democracy and Development* 343.

¹⁷² Benjamin 2010 ILJ 865; Theron 2005 ILJ 629; Mhone 1998 ILJ 209; Bosch 2013 ILJ 1633; Fourie 2008 PELJ 145; Mills 2004 ILJ 1212; Smit and Fourie 2009 TSAR 518.

¹⁷³ Theron 2005 ILJ 626, 629; Bosch 2013 ILJ 1633.

is often at the expense of the employees.¹⁷⁴ The wages that temporary employees receive are dependent on the price of the service that the labour broker offers to its client.¹⁷⁵ This is so since the wages of temporary employees are paid from the fee that the client pays to the TES in terms of the commercial contract.¹⁷⁶ Another contributory factor to low wages is that temporary employees do not have access to training and/or benefits which means that they cannot improve their skills.¹⁷⁷ Lack of training is attributed to the confusion that exists amongst temporary employees as to which of the authority figures should provide such training.¹⁷⁸ Hence, it is uncertain as to whom this responsibility falls on.¹⁷⁹

Moreover, social protection that is afforded to temporary employees is inferior compared to that of permanent employees.¹⁸⁰ The *LRA* did not provide for employment benefits such as insurance, medical aid schemes and maternity leave benefits for temporary employees.¹⁸¹ This is attributed to the fact that coverage of such benefits is only extended to employees who are employed in the formal sector of the economy.¹⁸² This has further exacerbated the vulnerability of temporary employees.

Furthermore, the *LRA* of 1995 did not address the standard of working and living conditions that should be provided to temporary employees whilst on placement at the client. This means that employees are susceptible to being exposed to working and living conditions that are hazardous to their health and safety. Given that temporary employees do not receive medical or insurance cover after having been exposed to such dangers

¹⁷⁴ Shoba *Temporary Employment Services in Contemporary South Africa: A Critical Analysis* 14.

¹⁷⁵ Shoba *Temporary Employment Services in Contemporary South Africa: A Critical Analysis* 14; Bosch 2013 *ILJ* 1632.

¹⁷⁶ Bosch 2013 *ILJ* 1632.

¹⁷⁷ Botes 2015 *SALJ* 105.

¹⁷⁸ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 43.

¹⁷⁹ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 43.

¹⁸⁰ Tshoose and Tswedi *Law, Democracy and Development* 338.

¹⁸¹ Fourie 2008 *PELJ* 110; Mills 2004 *ILJ* 1216; Botes 2014 *SA MERC LJ* 135; *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, A Report prepared for the Department of Labour and the Presidency* 16.

¹⁸² Olivier 1998 *ILJ* 684; Smit and Mpedi *Law Democracy and Development* 1, 20. The notion "employee" in the context of social benefits is usually used to refer to "standard" formal sector workers. In this way, atypical workers are excluded. Moreover, social insurance benefits are awarded based on conditions which include contributions and a qualifying period. Due to the low level and irregularity of their income, most informal economy workers are unable to participate in and contribute to the schemes.

makes them even more vulnerable. It is submitted that South Africa did not comply with the *Private Employment Agencies Convention* which requires member states and user enterprises to protect employees in line with national law and practice with regards to minimum wages, working time, working conditions and employment benefits.¹⁸³

In addition, the LRA did not limit the period of the placement of temporary employees irrespective of the temporary nature of such employment.¹⁸⁴ These unfavourable working conditions created the possibility of temporary employees being exploited given that the client was not required to adhere to employer duties such as dismissal procedures and equal pay for equal work for extended periods of time. Employers could keep their whole temporary staff on a continuous basis.¹⁸⁵ This is especially since temporary employees were not deemed to be part of the client's labour force and were remunerated by the labour broker. This could clearly make temporary employees even more vulnerable to exploitation.

3.4.4 Lack of job security

3.4.4.1 The use of automatic termination clauses (resolutive clauses)

Among the shortcomings that were present in the previous *LRA* of 1995 was the issue of job security of temporary employees. It should be noted that the client could terminate the commercial contract with the labour broker on short notice, which had a bearing on the employment contract between the temporary employee and the labour broker.¹⁸⁶ Stemming from the fact that the labour broker is the employer, it would have the obligation to follow dismissal procedures when the client decided to end the contract at a whim.¹⁸⁷ The TES would then be liable for possible unfair dismissal.¹⁸⁸ To circumvent this duty, the labour broker would include a resolutive clause in the employment contract to avoid the responsibility of having failed to comply with fair dismissal procedures after having

¹⁸³ Article 11 and 12 of the *Private Employment Agencies Convention*. Refer to paragraph 2.5.1.

¹⁸⁴ Van Niekerk et al *Law @ Work* 69; Theron 2005 *ILJ* 645; Olivier 1998 *ILJ* 676; *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, A Report prepared for the Department of Labour and the Presidency* 16.

¹⁸⁵ Le Roux 2012 *Contemporary Labour Law* 25; Theron 2005 *ILJ* 647.

¹⁸⁶ Botes 2015 *SALJ* 105.

¹⁸⁷ Le Roux 2012 *Contemporary Labour Law* 25.

¹⁸⁸ Botes 2015 *SALJ* 105.

dismissed the employee.¹⁸⁹ An automatic termination clause (resolutive clause) states that an employment contract is automatically terminated when the client terminates the commercial contract entirely and/or removes the employee from its service before the period of placement has elapsed.¹⁹⁰ Henceforth, a contract of employment concluded between the labour broker and the temporary employee terminates either on dissolution of the commercial contract or when the client no longer needs the services of the employees.¹⁹¹ The client will simply inform the labour broker in writing that it no longer needs the services of the temporary employee.¹⁹² It should be noted that the client could no longer require the services of the temporary employee for any reason.¹⁹³

Another consequence was that an employee would be deprived of the right to challenge the fairness of his dismissal because the employment contract will be terminated by operation of law rather than by dismissal.¹⁹⁴ In addition, an employee will not be called in for either a disciplinary hearing or consultation, will not have to be accommodated before termination and will not be entitled to any severance benefits.¹⁹⁵ The labour broker will often submit that there has been no dismissal but that the contract has either been terminated automatically, or due to operational requirements or that the employee is still 'on the books' awaiting further assignment.¹⁹⁶ Either way the predicament that the temporary employee finds himself in vividly resembles a state of unemployment as they are at home with neither work nor income.¹⁹⁷ It was affirmed in both *Numsa obo Daki v Colven Associates Border CC*¹⁹⁸ and *Smith v Staffing Logistics*¹⁹⁹ that placing an employee under the guise of being on 'standby' or 'in the pool' after a client indicated it no longer wanted the employee on site still constituted a dismissal.

Like its predecessors, the *LRA* of 1995 did not adequately address the issues of liability of the labour broker or the client in relation to unfair dismissals and unfair labour

¹⁸⁹ Botes 2015 SALJ 105.

¹⁹⁰ Botes 2015 SALJ 105.

¹⁹¹ Jordan 2011 <https://www.sanlam.co.za>.

¹⁹² Jordan 2011 <https://www.sanlam.co.za>.

¹⁹³ Le Roux 2012 *Contemporary Labour Law* 25.

¹⁹⁴ Botes 2015 SALJ 105.

¹⁹⁵ Le Roux 2012 *Contemporary Labour Law* 25.

¹⁹⁶ Harvey 2009 SALJ 109.

¹⁹⁷ Harvey 2009 SALJ 110.

¹⁹⁸ *Numsa obo Daki v Colven Associates Border CC* [2006] 9 BALR 877 (MEIBC).

¹⁹⁹ *Smith v Staffing Logistics* [2005] 10 BALR 1078 (MEIBC).

practices.²⁰⁰ Therefore, automatic termination clauses made temporary employees more vulnerable since they could lose their jobs at the behest of the client without proper dismissal procedures being followed. Additionally, this also meant that temporary employees did not have either job security or an income. This is irrespective of the fact that the temporary employee in question had worked for a specific client even for a considerable period of time. However, there are a number of cases that have attempted to address the use of automatic termination clauses and to ascertain whether they did not impinge the rights of temporary employees.

In the case of *Sindane v Prestige Cleaning Services*,²⁰¹ the court confirmed that automatic termination clauses could be utilised by the client when it no longer needed the services of a temporary employee. However, the majority of case law concurred that the use of the resolutive clauses is against public policy as it strips the employee of his or her labour rights.²⁰² Similarly, in *SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*²⁰³ and in *SA Post Office Ltd v Mampeule*,²⁰⁴ the courts shared the same sentiments of the court in the *Mahlamu* case that resolutive clauses infringe section 5 of the *LRA* of 1995 in that employees cannot waive their statutory protection against unfair dismissal. This is premised on the fact that the *LRA* of 1995 was promulgated to protect the interests of the public.²⁰⁵ The court declared that such clauses are prohibited and deemed to be statutorily invalid in the recently amended *LRA* of 1995.²⁰⁶

Further, in *Nape v INTCS Corporate Solutions (Pty) Ltd*,²⁰⁷ it was held that the courts are not bound by contractual terms that infringe the fundamental rights of employees. The duty of the court is not to aggravate the injustices against employees that are exercised by

²⁰⁰ Van Niekerk *et al* *Law @ Work* 68; *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, A Report prepared for the Department of Labour and the Presidency* 33.

²⁰¹ *Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC) para 16.

²⁰² Botes 2015 SALJ 105.

²⁰³ *SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* [2015] 36 ILJ 1553 (LC) at 1923.

²⁰⁴ *SA Post Office Ltd v Mampeule* (2010) 10 BLLR 1052 (LAC) para 5.

²⁰⁵ *SA Post Office Ltd v Mampeule* (2010) 10 BLLR 1052 (LAC) para 21.

²⁰⁶ *SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* [2015] 36 ILJ 1553 (LC) at 1923.

²⁰⁷ *Nape v INTCS Corporate Solutions (Pty) Ltd* (JR 617/07) [2010] ZALC para 53 and 66.

private parties who possess greater bargaining power.²⁰⁸ The court also emphasised that the TES is not entirely defenceless against the requests of the client.²⁰⁹ The TES should contest any attempts by the client to exercise its bargaining power in a manner that undercuts the fundamental rights of employees or enforcing contractual clauses that are against public policy.²¹⁰ Therefore, in any event the TES should refer such matters to a court of law to compel the client not to persist in denying an employee employment where no fair grounds exist for such removal.²¹¹ In the case of *Mahlamu v CCMA & Others*²¹², the court rejected the use of automatic termination clauses in such a manner. The court argued that automatic clauses are a violation of section 5(2)(b) and 5(4) of the *LRA* which safeguards employees from infringements that hinder them from fully exercising their rights in terms of the Act.²¹³ The case of *Adecco Recruitment Services (Pty) Ltd v Moshela & Others*²¹⁴ affirmed that the use of automatic termination clauses could be utilised in relation to TES employment relationships.

In the recent case of *Pecton Outsourcing Solutions CC v Pillemer and Others*,²¹⁵ the court ruled that it was not permissible for a labour broker to notify its employees that the employment contract would be terminated solely because the client was terminating the commercial contract. The position stands despite the fact that the temporary employee's employment contract incorporated an automatic termination clause.²¹⁶ Further, the court maintained that automatic termination clauses are inconsistent with section 189 of the *LRA* of 1995 which deals with dismissal based on operational requirements, including the right to severance pay.²¹⁷ Therefore, automatic termination clauses should not be used as a means to evade labour legislation.²¹⁸ However, Van Niekerk J emphasised that these unacceptable situations should not be blurred with justifiable cases of automatic termination of a fixed-term contract, where both parties fully intended for the contract to

²⁰⁸ *Nape v INTCS Corporate Solutions (Pty) Ltd* (JR 617/07) [2010] ZALC para 67.

²⁰⁹ *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 854 para 77.

²¹⁰ *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 854 para 77.

²¹¹ *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) at 854 para 77.

²¹² *Mahlamu v CCMA & Others* (2011) 32 ILJ 1122 (LC) para 14-21.

²¹³ *Mahlamu v CCMA & Others* (2011) 32 ILJ 1122 (LC) para 22.

²¹⁴ *Adecco Recruitment Services (Pty) Ltd v Moshela & Others* (Unreported JR 3161/11 19 June 2012).

²¹⁵ *Pecton Outsourcing Solutions CC v Pillemer and Others* [2016] 2 BLLR 186 (LC) para 35.

²¹⁶ *Pecton Outsourcing Solutions CC v Pillemer and Others* [2016] 2 BLLR 186 (LC) para 45.

²¹⁷ *Pecton Outsourcing Solutions CC v Pillemer and Others* [2016] 2 BLLR 186 (LC) para 47.

²¹⁸ Siena Attorneys 2016 <http://disienaattorneys.co.za>.

only be a specific period, after which the contract would legitimately terminate by operation of law.²¹⁹

3.4.4.2 Lack of employment opportunities in permanent posts

Another hurdle regarding job security was attributed to the fact that temporary employees were not adequately protected by the *LRA* when applying for a position at the client.²²⁰ The agreement that was concluded between the labour broker and the client could exclude the employee from applying for posts at the client subsequently limiting their permanent employment opportunities.²²¹ Therefore, temporary employees did not enjoy the same employment opportunities that were awarded to permanent employees at the client. Hence, temporary employees were only limited to temporary jobs and could not secure permanent posts at the client.

3.4.5 Lack of bargaining power

Lastly, section 198 did not address the exercise of organisational rights by trade unions to the benefit of temporary employees.²²² The inadequacy was in that temporary employees had no permanent workplace where trade unions could represent them.²²³ Firstly, trade unions found it difficult to represent temporary employees due to their small numbers that are spread over a wide area.²²⁴ As a result, trade unions had difficulty reaching them. Another obstacle was that trade unions would also experience challenges in accumulating sufficient representivity of temporary employees within a particular workplace to enable them to acquire certain organisational rights.²²⁵

However, suppose the trade union already has organisational rights within that client's workplace or managed to accumulate sufficient representivity so as to attain certain organisational rights, it would still experience difficulties in finally exercising those rights to the benefit of the temporary employees.²²⁶ This is especially because the labour broker is the employee's statutory employer, which meant that the client was under no obligation

²¹⁹ *Mahlamu v CCMA & Others* (2011) 32 ILJ 1122 (LC) para 7.

²²⁰ Van Niekerk *et al* *Law @ Work* 71.

²²¹ Van Niekerk *et al* *Law @ Work* 71.

²²² Botes 2014 *SA MERC LJ* 116.

²²³ Botes 2015 *SALJ* 106; Fourie 2008 *PELJ* 111.

²²⁴ Botes 2015 *SALJ* 106.

²²⁵ S12 of the *LRA* of 1995; Mills 2004 *ILJ* 1225.

²²⁶ Mills 2004 *ILJ* 1224; Botes 2015 *SALJ* 106.

to bargain with the trade union to the benefit of the temporary employees since they were not considered part of the client's workforce.²²⁷ This is irrespective of the fact that the employees executed their duties at the client's premises.²²⁸ Harvey²²⁹ argues that the disconnect between the employee and TES, on the one hand, and work and workplace, on the other means that either the TES as the employer or the temporary employee cannot exercise the rights to fair labour practice and collective bargaining. In the event that the trade union exercised organisational rights on the client's premises and bargained with the client, only its permanent (actual) workforce would benefit in terms of a collective agreement reached as a result of such collective bargaining.²³⁰ Consequently, temporary employees cannot agitate for equal remuneration, better working conditions or any other matters that affect them if they cannot use mechanisms such as engaging in collective bargaining and subsequently enforcing their rights in binding collective agreements.²³¹

It is submitted that temporary employees additionally have fewer opportunities of establishing relationships in the workplace.²³² This is because they seldom work at clients for long periods as they are constantly moved around.²³³ Consequently, permanent employees find it difficult to identify with temporary employees, which in turn makes the creation of solidarity almost impossible.²³⁴ What is more, since temporary employees are always constantly moved around to one industry from another, it makes it difficult to unionise them.²³⁵ For instance, a temporary employee can be in the cleaning industry for a month and in the supply industry in the next.²³⁶ The specific challenge that arises is whether to affiliate the temporary employees to the union in the sector of the client where

²²⁷ Botes 2014 SA MERC LJ 117; *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, A Report prepared for the Department of Labour and the Presidency* 48.

²²⁸ Botes 2014 SA MERC LJ 117.

²²⁹ Harvey 2009 SALJ 100.

²³⁰ Botes 2014 SA MERC LJ 116.

²³¹ Gericke 2010 *Obiter* 105.

²³² Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 54.

²³³ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 54.

²³⁴ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 54.

²³⁵ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 55.

²³⁶ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 55.

they actually perform their duties or to affiliate to the unions of the TES.²³⁷ In *Workforce Group Holdings (Pty) Ltd and National Bargaining Council for the Road Freight Industry* it was held that temporary employees do not perform work for the TES but for the client.²³⁸ Thus, there is accordingly no joint association with a common purpose but rather each employee forms a separate association depending on the assignment to perform particular duties for a client.²³⁹ Nevertheless, the challenge is that it still remains unclear as to what to do about the temporary employees' union membership when they are moved to a new client in a different industry.²⁴⁰

3.5 Conclusion

Tracing back in history regarding the regulation of labour brokers in South Africa, one can argue that temporary employees were among the most marginalised and underclass groups in the labour market.²⁴¹ As evidenced in the observations above, the use of labour brokers became a means for clients to circumvent employer obligations, subsequently depriving vulnerable temporary employees of their labour rights.²⁴² In some instances, temporary employees fell victim to both the labour broker and the client who could utilise the triangular employment arrangement to disguise the employment relationship by identifying the temporary employee as an independent contractor on paper so as not to incur employer obligations. In addition to the plight of temporary employees there is the fact that they are mostly low-paid and low-skilled and are often exposed to unfavourable working and living conditions. The scope of coverage of employment benefits such as insurance, medical aid schemes and maternity leave benefits is seldom extended to temporary employees.²⁴³ In addition, job security of temporary employees is threatened

²³⁷ Grogan *Collective Labour Law* 93.

²³⁸ *Workforce Group Holdings (Pty) Ltd and National Bargaining Council for the Road Freight Industry* [2006] 27 ILJ 2743 (CCMA) para 5. In this case the applicant (TES) supplied employees to clients in a number of industries which also included some drivers to two clients involved in transporting goods. Despite the fact that the drivers only consisted of about 8 per cent of the TES's total operations, the TES registered with the respondent council. However, the TES sought deregistration because it was involved in the services sector and that it was also associated with its employees. This was not for purposes of road transportation, but to provide various services to clients. However, the CCMA rejected the applicant's argument.

²³⁹ *Workforce Group Holdings (Pty) Ltd and National Bargaining Council for the Road Freight Industry* [2006] 27 ILJ 2743 (CCMA) para 7.

²⁴⁰ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia?* 55.

²⁴¹ Theron 2005 *ILJ* 622; Mills 2004 *ILJ* 1212.

²⁴² Benjamin 2010 *ILJ* 846.

²⁴³ Fourie 2008 *PELJ* 110; Mills 2004 *ILJ* 1216; Botes 2014 *SA MERC LJ* 135; *Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions*

by the use of automatic termination clauses and their exclusion from employment opportunities when applying for permanent posts at the client. Lastly, the fact that trade unions had so much difficulty representing temporary employees meant that employees would mostly not be included in collective agreements, leaving them vulnerable.²⁴⁴ Due to a lack of protection of temporary employees and inadequate regulation in the previous *LRA* as can be seen above, there was a need to regulate labour brokers more effectively in the *Labour Relations Amendment Act 6 of 2014*.²⁴⁵

of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010, A Report prepared for the Department of Labour and the Presidency 16.

²⁴⁴ Botes 2014 SA MERC LJ 116.

²⁴⁵ *Labour Relations Amendment Act 6 of 2014*. Hereinafter referred to as the amended *LRA* of 2014.

Chapter 4 The current legislative framework of labour brokers in South Africa

4.1 Introduction

The previous chapter was a backdrop of the regulation of labour brokers before the current legislative framework of the *Labour Relations Act* 66 of 1995.²⁴⁶ The foregoing chapter highlighted the original shortcomings of the *LRA* of 1995 that inevitably necessitated legal reform as far as the protection of temporary employees and effective regulation of labour brokers were concerned. It should be noted that section 198 still retains some general provisions which include that the TES is the employer of the temporary employee who renders work to the client and that a TES and its client are jointly and severally liable for specified contraventions of employment laws.²⁴⁷ This chapter, however, critically analyses the current legislative framework in the light of its amendments governing labour brokers in South Africa. This chapter attempts to evaluate whether the original problems that were present in the previous *LRA* as highlighted in the preceding chapter have now been adequately addressed by the recent amendments, particularly those concerning the protection of temporary employees.²⁴⁸ In addition, this chapter investigates whether some of the original problems still remain and also whether new challenges are perhaps now posed by the amendments.

4.2 The current legislative framework regulating labour brokers

Although the recently amended provisions of section 198 provide more elaborate and additional provisions on the regulation of labour brokers in South Africa as will be seen below, some of the original provisions remained, but was a little tweaked to provide more clarity in general.²⁴⁹ The *Memorandum of Objects of the Labour Relations Amendment Bill* of 2012 outlined the intention and the primary objective of the comprehensive amendments to section 198 being to award greater protection to temporary employees of labour brokers.²⁵⁰ Therefore, the amendments were crafted to protect vulnerable, lower-paid temporary employees against exploitation and unfair labour practices and to restrict

²⁴⁶ *LRA* of 1995.

²⁴⁷ Tshoose and Tsweledi 2014 *Law, Democracy and Development* 341.

²⁴⁸ *LRA* of 1995.

²⁴⁹ Section 198(A)(1),(2),(3) of the *LRA* of 1995.

²⁵⁰ *Memorandum of Objects of the Labour Relation Amendment Bill* of 2012.

them to genuine and relevant temporary work.²⁵¹ It is a commendable and progressive step taken by the legislature to adopt a title that explicitly addresses the regulation of non-standard forms of employment.²⁵² It shows the legislature's intent towards providing adequate regulation of the informal sector in the labour market.

4.3 The amended LRA provisions regulating labour brokers

Through the aforementioned amendments a measure of additional protection and legal certainty is now afforded to temporary employees. These additional provisions include an articulate definition on what temporary services entails, the liability of the authority figures (the TES and the client), registration of TESs, collective bargaining vis-à-vis temporary employees and the treatment and legal certainty of such employees. For purposes of structure, this chapter first deals with how the wording of the original section 198 was changed, then how section 198(4) was expanded, following a discussion of section 198A which introduces some of the key additional protections for temporary employees who earn on or below the threshold prescribed in terms of section 6(3) of the *Basic Conditions of Employment Act*. Reference is also made to sections 21 and 22 of the amended LRA, as far as it pertains to the issues of collective bargaining and organisational rights relevant to temporary employees.

4.3.1 Changes to the original definition

In the previous LRA, section 198 originally referred to a temporary employment service as a person who for reward caters to a client other persons who renders *services* to the client but are subsequently remunerated by the temporary employment service.²⁵³ However, under the recently amended LRA the wording of original section 198 has been amended. The definition now substitutes the phrase 'renders services' with 'who performs work for the client' when describing the person who does the work for the client.²⁵⁴ The term 'renders services' implies that the employee is employed by the client, which in turn implies that an employment contract was concluded between the client and the temporary

²⁵¹ Tshoose and Tsweledi 2014 *Law, Democracy and Development* 341.

²⁵² The LRA of 1995 provides the section that deals with non-standard forms of employment under the title "Regulation of Non-Standard Employment and General Provisions" (heading of Chapter IX substituted by section 36 of LRAA 6 of 2014).

²⁵³ S198 of the LRA of 1995.

²⁵⁴ S198(a) of the LRA of 1995.

employee and therefore supposed an employment relationship.²⁵⁵ This is incorrect since an employment contract is concluded between the TES and the employee, where the statutory employment relationship subsequently resorts.²⁵⁶ In fact, the employee is merely placed with the client to perform temporary work.²⁵⁷ Botes²⁵⁸ argues that the new definition provides clarity by indicating that the client is not the employer but a person who simply enjoys the labour potential of the temporary employee. It can also be argued that the new definition affords temporary employees protection in that their function is clearer and is restricted to performing temporary work for the client, but is not in his service in the true sense of the word. Any ambiguity that the original definition exhibited is thus now removed.

4.3.2 *Liability of authority figures*

Regarding the liability of the TES and the client, the amended section 198 retained provisions from its predecessor. Previously, the *LRA* only provided for default liability on the part of the client.²⁵⁹ This meant that an employee could only institute a claim against the client provided it had acquired a judgement or order against the TES which it had refused to pay.²⁶⁰ However, at present the client of a TES is jointly and severally liable or is deemed to be the employer of an employee in terms of the *LRA* under certain circumstances as will be seen below.²⁶¹ A temporary employee may now institute proceedings against either the TES or the client or both the TES and the client.²⁶² Consequently, clients can no longer use TES's as a means to eschew its employer's obligations and other disciplinary procedures that come with employing permanent employees. Therefore, the client could now be held liable for any violations in working conditions experienced by the temporary employees which should include unfair dismissals with no severance pay or notification. It is argued that the TES and client ought to be held liable in matters of dismissal, based on their respective roles in terminating the

²⁵⁵ Botes *SA Merc LJ* 118.

²⁵⁶ Botes *SA Merc LJ* 118.

²⁵⁷ Botes *SA Merc LJ* 118.

²⁵⁸ Botes *SA Merc LJ* 118.

²⁵⁹ Benjamin 2010 *ILJ* 850.

²⁶⁰ Refer to paragraph 3.4.1. Also see Benjamin 2010 *ILJ* 850.

²⁶¹ S198(4A)(a) of the *LRA* of 1995.

²⁶² S198(4A)(a) of the *LRA* of 1995.

employee's contract of employment. An employee will be certain as to whom he or she can institute a claim against between the authority figures.

Moreover, if the TES terminates the employment contract either based on its own decision or the client's in order to circumvent any employer obligations incurred in terms of section 198A(3)(b) (to be discussed later) or because the employee exercised a right in terms of this Act, it constitutes a dismissal.²⁶³ One would be able to argue that the employee could cite both in light of the provisions in section 198(4A). Van Eck and Aletter²⁶⁴ argue that the employee can also institute a claim for unfair dismissal or unfair labour practice against the client directly. The application of section 198(4A) could thus be far-reaching. Although these amendments now bring clarity as to the responsibility of both authority figures, this may lead to the demise of flexibility and clients' resorting to labour broking. Such provisions now places more obligations on them, which limits the benefits associated with labour broking.²⁶⁵

4.3.3 Registration and terms and conditions of employment

Under the recent amendments, the TES is now required to be registered in order to conduct its business.²⁶⁶ This is to ensure that the TES is lawfully and adequately regulated. It is argued that it will be easier to ensure that the TES is maintaining acceptable employment standards for temporary employees.²⁶⁷ In this regard, the amended LRA complies with the *Private Employment Agencies Convention* No. 181 of 1997 which requires that private employment agencies should be regulated by either licensing or certification procedures provided that such regulation is already determined by national law and practice.²⁶⁸ It should be noted, however, that the requirement of registration is not relatively new given that it existed under the *LRA* of 1983, although it was discarded when the *LRA* of 1995 was adopted.²⁶⁹ In addition, failure to register

²⁶³ S198A(4) of the *LRA* of 1995.

²⁶⁴ Van Eck and Aletter 2016 *SA Merc LJ* 296.

²⁶⁵ Pienaar and Taylor 2013 *Employment Alert* 2.

²⁶⁶ S198(4F) of the *LRA* of 1995.

²⁶⁷ *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, A Report prepared for the Department of Labour and the Presidency* 41.

²⁶⁸ Article 3(2) of the *Private Employment Agencies Convention* No. 181 (1997) (hereinafter referred to as the *Private Employment Agencies Convention*). See para 2.5.1.

²⁶⁹ Bosch 2013 *ILJ* 1637.

cannot be used as a defence by the TES to any claim instituted by an employee in terms of the Act.²⁷⁰ However, it should be noted that the date of commencement of this legislative provision is yet to be pronounced.²⁷¹ It is submitted that there is a need for the legislature to effect registration on the part of the TES as soon as possible in order to distinguish those that are operating unlawfully from those that comply with the law. In addition to making this provision more effective, the *LRA* should clearly set out penalties for those TES's that fail to register. Botes²⁷² recommends that an additional provision could be added whereby the Registrar can withdraw the licence of the TES based on the number of repeat misconducts by the TES to ensure effective compliance.

Moreover, as soon as the employee commences with its employment, the TES has a duty to provide the employee with written particulars of employment that comply with section 29 of the *Basic Conditions of Employment Act*.²⁷³ This provides legal certainty to the employee as they will be aware of the contents of the employment contract. This requirement is in line with the provision of the *Private Employment Agencies Convention* which stipulates that temporary employees be informed of their terms and conditions of employment in their written contracts with the private employment agency before their placement comes into effect.²⁷⁴ A valuable addition to section 198 concerns the prohibition on the TES to employ an employee on terms and conditions of employment which are not permitted by the Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council which applies to the client to whom the employee works for.²⁷⁵ The *LRA* now also allows an employee to challenge the contents of his/her employment contract with the TES or the commercial contract between the TES and the client.²⁷⁶ The Labour Court or an arbitrator can then make an appropriate order or award after having determined whether the contracts comply with the provisions of the Act.²⁷⁷ This assists in preventing exploitation of the employee by either the TES or the client and bestowing upon the employee a level of control over his contract of employment and its contents. It would be an anomaly if the TES were to place employees

²⁷⁰ S198(4F) of the *LRA* of 1995.

²⁷¹ S198(4F) of the *LRA* of 1995.

²⁷² Botes *SA Merc LJ* 128.

²⁷³ S198(4B) of the *LRA* of 1995.

²⁷⁴ Article 5 of the *Private Employment Agencies Recommendation*.

²⁷⁵ S198(4C) of the *LRA* of 1995.

²⁷⁶ S198(4E) of the *LRA* of 1995; Bosch 2013 *ILJ* 1638.

²⁷⁷ S198(4E) of the *LRA* of 1995.

with various clients in different sectors where employees might end up with immeasurable different terms and conditions which do not necessarily comply with legislative prescriptions.²⁷⁸

4.3.4 *The scope of temporary services*

For the first time the *LRA* provides what temporary services truly entail by describing it and effectively limiting its scope. Temporary services are firstly referred to by the Act as work for a client by a temporary employee.²⁷⁹ Further, the *LRA* now provides a time- frame within which true temporary work can be conducted. In terms of the Act, temporary work should not exceed three months.²⁸⁰ Therefore, if it exceeds three months it ceases to be temporary services. By limiting the period to three months it provides protection to temporary employees from being ‘temporarily’ employed for an indefinite period during their placement at the client.²⁸¹

It is argued that if an employee maintains the temporary status whilst performing work that is no longer temporary in nature for an indefinite period of time, they are left vulnerable as they will not be awarded benefits that are given to permanent employees for the period that they would have worked. Section 198 now provides legal certainty by specifying a definite period of temporary work, meaning that after three months a temporary employee will be considered to be a permanent employee of the client. One can argue that the benefits of being regarded as a permanent employee are that such temporary employees will no longer be paid poorly (since the client, as the deemed employer, will now be liable for disparities in salaries, based on the principle of equal pay for equal work), will now have to be treated on the whole not less favourably than their permanent counterparts and will now have more job security. It is contended that the same terms and conditions that apply to permanent employees will now apply to these temporary employees; hence they will no longer be so vulnerable to unfavourable working conditions. In addition, temporary work is defined as services that a client can utilise to substitute one of its employees that is temporarily absent.²⁸² Similarly, this provides legal certainty as to when such services can be employed. Lastly, temporary work falls under

²⁷⁸ Bosch 2013 *ILJ* 1637.

²⁷⁹ S198(1)(a), 198A(1) of the *LRA* of 1995.

²⁸⁰ S198A(1)(a) of the *LRA* of 1995.

²⁸¹ Van Niekerk *et al Law @ Work* 69; Van Eck and Aletter 2016 *SA Merc LJ* 293.

²⁸² S198A(1)(b) of the *LRA* of 1995.

services that are subject to any category of work or any period of time by means of a collective agreement determined in a bargaining council, a sectoral determination or a notice issued by the Minister in accordance with the Act.²⁸³ Hence, this is the only instance that such placement is subject to any choice of work or any period of time. It can be argued that these changes circumvent exploitation of temporary employees in that any work that deviates from any temporary work in terms of the Act compels the client to discharge its employer obligations towards the employees.

4.3.5 *The status of the employer and its obligations*

As highlighted in the preceding chapter, one of the shortcomings presented by the previous *LRA* was the difficulty in identifying who the true employer was in the triangular relationship between the TES and the client. Although the TES is the statutory employer of the temporary employee, the client exercises more supervision and control over the employee and seems to be the true employer in terms of the common law. It is argued that section 198(A) introduces additional protection for temporary employees as to the status of the employer and the respective obligations of the TES and the client in this respect.²⁸⁴ Section 198A(3)(a) states that the temporary employee is the employee of the TES provided that he or she performs temporary work for a period of three months in terms of the Act.²⁸⁵ Contrarily, section 198A(3)(b)(i) states that if the employee does not perform temporary work for the client as contemplated in the Act, he or she is *deemed* to be the employee of that client.²⁸⁶ The benefit of this provision is that a temporary employee will be considered as a permanent employee of the client if his circumstances do not comply with section 198A(1) and will thus be entitled to the rights and benefits that are allocated to the client's permanent employees. Exploitation is hereby effectively skirted. The *LRA* however gives rise to a number of uncertainties as to the interpretation of the 'deeming' provision of section 198A(3).²⁸⁷ It is unclear what happens to the original commercial contract between the TES and the client in the event that the 'deeming' provision comes into play.²⁸⁸ Perhaps the client will pay the TES a fee for the period that it provided services before the three months had elapsed and the employee will

²⁸³ S198A(1)(c) of the *LRA* of 1995.

²⁸⁴ *Labour Relations Act Amendment Bill* of 2012.

²⁸⁵ S198A(3)(a) of the *LRA* of 1995.

²⁸⁶ S198A(3)(b)(i) of the *LRA* of 1995.

²⁸⁷ Aletter and Van Eck 2016 *SA Merc LJ* 294.

²⁸⁸ Harvey 2011 *SALJ* 100.

subsequently become the employee of the client. One can argue that the commercial contract between the TES and the client will then fall away naturally. Similarly, one could ask what the legislature's intention was as to what would happen with the employment contract between the TES and the temporary employee currently containing (or which is supposed to contain) the employment terms and conditions. It is not clear whether the employment contract lapses, requiring of the client to conclude a new contract with his 'newly' acquired employee or whether it is simply transferred to the client who will now have to amend the contract so to ensure that it does not contain terms and conditions less favourably than those of its existing employees. It is furthermore uncertain as to whether the client will be deemed the sole employer with all the employer's duties, given that there is no employment relationship between the client and the employee,²⁸⁹ whether the TES remains the true employer and merely shares employer duties with the client or whether they become joint employers of the employee.²⁹⁰ It is contended that these questions are crucial for purposes of clarity when determining who will carry liability for unfair dismissals and the power to dismiss the employee between the TES and the client. Evidently, the legislature had not foreseen that using the word 'deemed' would lead to such legal uncertainty.²⁹¹

There are various interpretations to section 198A(3). Firstly, it is submitted by Venter²⁹² that the original employment contract of the temporary employment service with the employee is terminated. Subsequently, a new contract between the client and the employee must be concluded.²⁹³ This would support the argument that the 'deeming' provision causes the client to now be the sole employer. However, practical implications of the client being regarded as the sole employer should be considered carefully. Botes²⁹⁴ opines that if the client is regarded as the sole employer it provides legal certainty as well as permanent job security since the employee will be granted equal treatment to what is given to permanent employees. This also falls within the requirements of section 198A(5) that stipulates that an employee deemed to be an employee of the client is to be treated on the whole not less favourably than a permanent employee of the client performing the

²⁸⁹ Aletter and Van Eck 2016 *SA Merc LJ* 294; Nkhumise 2016 *Law, Democracy and Development* 124.

²⁹⁰ Aletter and Van Eck 2016 *SA Merc LJ* 294.

²⁹¹ Aletter and Van Eck 2016 *SA Merc LJ* 294; Nkhumise 2016 *Law, Democracy and Development* 107.

²⁹² Venter 2015 *Without Prejudice* 25.

²⁹³ Venter 2015 *Without Prejudice* 25.

²⁹⁴ Botes 2015 *SALJ* 115.

same or similar work provided that there is a justifiable reason for different treatment.²⁹⁵ Needless to say this amendment is potentially very beneficial for the employee. On the other hand, the disadvantage is that in most instances the client only requires seasonal employees to perform a specific task for a certain period of time.²⁹⁶ The client will now be forced to permanently employ the employee and increase its labour force which will adversely strain its labour costs. Labour broking is usually intended for temporary employment purposes but was not always used as such. Employees could stay on for years on this temporary basis before the amendments came into effect. Labour broking is efficient for businesses because it is cost-effective regarding the various employment costs associated with employing permanent staff.²⁹⁷ One could argue that that being solely regarded as the employees of the client is a valid change for employees in that they will no longer be working for longer periods than intended and they will be adequately protected if this happens. At the same time it could have adverse effects on the labour market in that by becoming the sole employer, the client will be forced to observe employer duties, the relevant labour legislation and ensuring that the employee receives employee benefits that are awarded to permanent employees.²⁹⁸ Pienaar and Taylor²⁹⁹ argue that one of the reasons behind utilising TES's is to avoid an employer's administrative obligations and to reduce labour costs. Identifying the client as the sole employer with all its accompanying responsibilities negates the main objective of temporary employment which is to promote flexibility in the labour market.³⁰⁰ This further exacerbates unemployment in the labour market since clients will become reluctant to use TES's owing to these implications. Consequently, when the deeming provision comes into play the client will simply dismiss the employee without following the proper dismissal

²⁹⁵ S198A(5) of the LRA of 1995.

²⁹⁶ Botes 2015 SALJ 115.

²⁹⁷ Benjamin 2016 ILJ 31.

²⁹⁸ *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, A Report prepared for the Department of Labour and the Presidency* 6; Botes 2015 SALJ 115.

²⁹⁹ Pienaar and Taylor 2013 *Employment Alert* 2.

³⁰⁰ International Labour Organisation *Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment* (Geneva, 16–19 February 2015); *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, A Report prepared for the Department of Labour and the Presidency* 37; Botes 2015 SALJ 115; Mathekga *The political economy of labour market flexibility in South Africa* 25. Labour market flexibility is a process whereby enterprises can change various aspects of its work and workforce in order to meet the demands of the business. Such changes can be in the form of the size of the workforce, the content of jobs, and working time.

procedures which in turn would leave the employee vulnerable.³⁰¹ This gives rise to job insecurity for temporary employees.³⁰² Although the amendments provide that it will be considered as a dismissal, it still remains unclear as to which of the authority figures will be held liable for the dismissal.³⁰³ This means that an employee still remains uncertain as to which of the authority figures he or she should institute a claim against. In order to assist an employee in this regard, it is recommended that clarity should be given as to which of the authority figures will be held liable so that it will be easier to cite them in their dismissal claims. Doing this will also remove the potential burden of liability on the TES for the dismissal, in matters where it played little role in the termination of the contract.

As mentioned above, another possible interpretation is that there be an automatic transfer of contracts between the TES and the client, thereby automatically making the client the employer of the temporary employee.³⁰⁴ Contrarily, Van Eck,³⁰⁵ Aletter³⁰⁶ and Nkhumise³⁰⁷ argue that section 198A(3) does not indicate neither does it suggest that the client steps into the shoes of the TES.³⁰⁸ If this had been the case, Nkhumise³⁰⁹ opines that the legislature would have provided an express provision. However, by deeming the client the employer, this would presuppose that he has control over the employee's terms and conditions at work and to dismiss the employee, as an employer has the right to do. The only way he could obtain control and authority over the above would be by becoming the authoritative party to the employee's employment contract. The circumstances would then be similar to those of the transfer of a going concern whereby one employer merely substitutes the other.³¹⁰ Naturally, the client would just have to amend the employee's contract so as not to be on the whole less favourable than those of his permanent employees. It is contended that this should be done in consultation with the employer and be finalised by way of an agreement. Another possible interpretation is that both the TES and the client become joint employers of the employee thereby giving rise to a dual

³⁰¹ Botes 2015 SALJ 115.

³⁰² Botes 2015 SALJ 115.

³⁰³ S198A(4) of the LRA of 1995. Refer to paragraph 4.3.1.

³⁰⁴ Venter 2015 *Without Prejudice* 25.

³⁰⁵ Van Eck 2013 *De Jure* 606; Van Eck and Aletter 2016 *SA Merc LJ* 295.

³⁰⁶ Van Eck and Aletter 2016 *SA Merc LJ* 295.

³⁰⁷ Nkhumise 2016 *Law, Democracy and Development* 124.

³⁰⁸ Van Eck 2013 *De Jure* 606.

³⁰⁹ Nkhumise 2016 *Law, Democracy and Development* 124.

³¹⁰ S197 LRA of 1995.

employment relationship.³¹¹ This means that the employee has separate employment relationships with both the TES and the client each being the employer. Owing to this dual relationship, both the client and the TES will have to comply with an employer's obligations as set out in the *LRA*.³¹² It is not clear whether both the TES and the client will control and supervise the employer instead of the TES single-handedly.³¹³ This is a challenge for the employee as they would have to maintain different employment relationships with two employers. Particularly, it will be difficult for an employee to comply with different sets of requirements placed by both employers on them especially if they want the employee to discharge the same obligations towards them separately. It will be burdensome on the part of the employee and may give rise to a 'battle of power' between the TES and the client.

Tshoose and Tsweledi³¹⁴ argue that when interpreting section 198A, the intention of the legislature should be considered and a purposive interpretation of the legislative text should be adopted. As indicated earlier, the intention and the primary objective of the amendments of section 198A were to confer greater protection on temporary employees during their period of placement at the client.³¹⁵ In addition, section 3 of the *LRA* dictates that when interpreting any provisos within the Act, effect should be given to the Act's primary objects.³¹⁶ Section 198A(3) was designed to protect temporary employees in the event that they exceed the required three month period of temporary services and are employed for an indefinite period of time.³¹⁷ Botes³¹⁸ affirms this proposition and contends further that section 198A(3) was implemented to curb any potential exploitation of temporary employees by the client. This is especially true when the clients utilised TES's as a means by which to evade any restrictive labour legislation and some employer obligations.³¹⁹

Another plausible interpretation of section 198A(3) suggests that the client is the employer for the name's sake, hence, he can only exercise rights granted in terms of section 198

³¹¹ Davies and Vatalidis 2015 <http://www.werksmans.com>.

³¹² Davies and Vatalidis 2015 <http://www.werksmans.com>.

³¹³ Van Eck 2010 *PELJ* 108.

³¹⁴ Tshoose and Tsweledi 2014 *Law, Democracy & Development* 342.

³¹⁵ *Labour Relations Act Amendment Bill* of 2012.

³¹⁶ S3 of the *LRA* of 1995.

³¹⁷ Venter 2015 *Without Prejudice* 25.

³¹⁸ Botes 2015 *SALJ* 111.

³¹⁹ Botes 2015 *SALJ* 111.

of the *LRA* and be held liable for contraventions of the Act, but will still not be considered the true employer.³²⁰ Venter³²¹ supports this interpretation as it provides certainty to temporary employees as to whom they should institute their claims against in the event that they perform purported temporary work for an indefinite period. Based on this interpretation, it can be eluded that the client will only exercise certain rights and duties only for purposes of section 198 of the *LRA*.³²² Consequently, the TES will remain the actual employer of the temporary employee. Grogan³²³ supports this view because it undertakes its daily administrative functions that stem from the triangular relationship. For purposes of section 198A(3) the TES acts as a suspended employer whereas the client assumes certain rights and obligations as the employer for purposes of the Act.³²⁴ Evidently, the original contract of employment between the employee and TES will still subsist.

The recent matter of *Assign Services (Pty) Ltd v CCMA*³²⁵ and *Others* is the first decided case that dealt extensively with the true position of the client in terms of section 198A(3). In this case, Brassey J asserted that the use of the word '*deemed*' presupposes that 198A(3)(b) is intended to augment rather than to dissolve the existing employment relationship between the TES and the temporary employee.³²⁶ He applies the 'no servant can serve two masters' approach.³²⁷ It is argued that the TES should not be relieved of its obligations towards the temporary employee as the original employer.³²⁸ Brassey J further elucidated that the TES primarily concludes the employment contract and consequently becomes the source of control of the employee.³²⁹ One can argue that this contention is incorrect for the reason that although the TES is the statutory employer and has virtual control in terms of this fact, the client becomes the source of true control over the employee as it exercises more control and supervision over the employee than the TES itself.

³²⁰ Venter 2015 *Without Prejudice* 25.

³²¹ Venter 2015 *Without Prejudice* 26.

³²² S198 of *LRA* of 1995.

³²³ Grogan 2014 *ELJ* 2.

³²⁴ Grogan 2014 *ELJ* 2.

³²⁵ *Assign Services (Pty) Ltd v CCMA and Others* (JR1230/15) (2015) (hereinafter, referred to as the *Assign Services* case).

³²⁶ S198A(3)(b) of *LRA* of 1995; *Assign Services* case para 14.

³²⁷ *Assign Services* case para 17.

³²⁸ *Assign Services* case para 12.

³²⁹ *Assign Services* case para 17.

Moreover, it can be argued that Brassey's assertion that the client only acts as an agent or representative who sets the undertakings that the employee must perform at the behest of the TES³³⁰ is incorrect. In fact, flowing from the triangular employment relationship, a temporary employee works at the client's workplace and at his behest and not that of the TES. Brassey J added that in the event that the TES terminates the employment contract, the objects of the employment relationship will be unattainable.³³¹ Thus, the client will have to conclude a new contract if it is to presuppose the function of the employer.³³² It can be argued that this argument is also incorrect because without the commercial contract between the TES and the client there will be no basis for an employment contract, not the other way round. Therefore, if a client terminates its commercial contract with the TES, automatically the employment contract between the TES and the employee terminates.³³³ Nevertheless, the court based its findings on the above assertions and it was held that the Commissioner had erred in stating that the client was deemed to be the sole employer.³³⁴

Although Benjamin³³⁵ disputes Brassey J's findings, he makes a number of substantial arguments regarding the interpretation of section 198A(3). Benjamin³³⁶ opposes the proposition that the TES is an employer under common law because it is flawed and it leads to substantial misinterpretations of section 198. Benjamin³³⁷ argues that the conventional common law test of employment in terms of both statutory and common law does not apply to the triangular employment relationship. This is because section 198 identifies the TES as the employer regardless of its contractual status with the employee.³³⁸ Benjamin refutes Brassey J's conclusion that the relationship between the employee and the TES is an employment relationship.³³⁹ Benjamin³⁴⁰ submits that the rationale in the *Assign Services* case is contrary to binding Labour Appeal Court (LAC) authority in *LAD Brokers (Pty) Ltd v Mandla* in which it was held that in common law there

³³⁰ *Assign Services* case para 17.

³³¹ *Assign Services* case para 17.

³³² *Assign Services* case para 17.

³³³ Theron 2005 ILJ 629; Cohen 2008 ILJ 873.

³³⁴ *Assign Services* case.

³³⁵ Benjamin 2016 ILJ 28.

³³⁶ Benjamin 2016 ILJ 34.

³³⁷ Benjamin 2016 ILJ 34; Van Niekerk *et al* *Law @ Work* 61.

³³⁸ Benjamin 2016 ILJ 34.

³³⁹ Benjamin 2016 ILJ 34.

³⁴⁰ Benjamin 2016 ILJ 29; refer to footnote 83.

is no employment relationship between the TES and the employee it is placing at the client.³⁴¹ It is submitted that these arguments show the complexity surrounding the regulation of temporary employment service relationships even in light of the amendments (if not exacerbated by it).

Benjamin³⁴² also argues that the 'no man can serve two masters' biblical connotation that was referred to in the *Assign Services* case has no legal basis in common law and neither is it part of South African law to support its application.³⁴³ The implication of the 'two masters' rule argued by Brassey is that the source of control over an employee must always be singular so as to avoid irresolvable strife, which Benjamin³⁴⁴ strongly disagrees with. On the other hand, Benjamin³⁴⁵ agrees with Brassey J by recommending that a single employer should be identified as the sole employer of the temporary employee. Such an employer will exercise the rights and responsibilities regarding each aspect of the employment relationship to avoid legal uncertainty.³⁴⁶

In conclusion, Benjamin is of the opinion that although sections 198(2) and 198A(3)(b) are both 'deeming' provisions, both sections cannot be applied together.³⁴⁷ Accordingly, section 198A(3)(b) substitutes section 198(2) as the operative clause by establishing the identity of the employer of temporary employees for the purposes of the Act.³⁴⁸ Therefore, in the light of arguments discussed above, it is submitted that the most suitable interpretation is to regard the client as the employer only for the purposes of the *LRA* of 1995, and only when the circumstances do not comply with section 198A(1). It is argued that section 198A(3) of the *LRA* shows no indication that the legislature intended otherwise. This means that the client will only receive employer status and will be awarded certain employer obligations for purposes of section 198A(3). This also provides legal certainty taking into consideration the complications surrounding the triangular employment relationship.

³⁴¹ *Lad Brokers (Pty) Ltd v Mandla* 2002 (6) SA 43 (LAC); (2001) 22 ILJ 1813 (LAC).

³⁴² Benjamin 2016 ILJ 34.

³⁴³ Benjamin 2016 ILJ 34.

³⁴⁴ Benjamin 2016 ILJ 36.

³⁴⁵ Benjamin 2016 ILJ 36.

³⁴⁶ Benjamin 2016 ILJ 36.

³⁴⁷ Benjamin 2016 ILJ 38.

³⁴⁸ Benjamin 2016 ILJ 38.

4.3.6 Low wages, employment benefits and working conditions

As highlighted earlier in the previous chapter, the *LRA* of 1995 did not address wages and employment benefits with regard to temporary employees.³⁴⁹ Temporary employees are usually paid less than permanent employees due to the fact that most of them are low-skilled.³⁵⁰ No sectoral determination has been published as yet regarding a set minimum wage for temporary employees that would address their low wages within the first three months of their placement with the client. Nevertheless, it is predicted that the legislature will implement a sectoral determination that stipulates a national minimum wage that could also be to the advantage of temporary employees in the near future.

Moreover, the *LRA* of 1995 did not address the standard of working and living conditions of temporary employees whilst working at the client. This made employees vulnerable as they were prone to being exposed to unfavourable working and living conditions.³⁵¹ However, section 198A(5) now stipulates that an employee who is deemed to be an employee of the client in terms of section 198A(3) must be treated on the 'whole not less favourably' than permanent employees of the client doing similar work.³⁵² This implies that the client is compelled to afford temporary employees equal treatment regarding equal pay and other employment benefits such as insurance, medical aid and maternity leave benefits that are awarded to permanent employees.³⁵³ Moreover, the client will have to ensure that temporary employees are under safe working and living conditions. Bosch³⁵⁴ asserts that this provision was designed to eradicate the marginalisation of temporary employees as underclass employees. In this respect the amended *LRA* complies with the *Private Employment Agencies Convention* which requires member states to prohibit all forms of discrimination against temporary employees provided for within their national laws and practices.³⁵⁵

³⁴⁹ Refer to paragraph 3.4.3.

³⁵⁰ Benjamin 2010 *ILJ* 865; Theron 2005 *ILJ* 629; Mhone 1998 *ILJ* 209; Bosch 2013 *ILJ* 1633; Fourie 2008 *PELJ* 145; Mills 2004 *ILJ* 1212; Smit and Fourie 2009 *TSAR* 518.

³⁵¹ Refer to paragraph 3.4.3.

³⁵² S198A (5) of the *LRA* of 1995.

³⁵³ *Labour Relations Act Amendment Bill of 2012; 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, A Report prepared for the Department of Labour and the Presidency* 20.

³⁵⁴ Bosch 2013 *ILJ* 1639.

³⁵⁵ Article 5(1) of the *Private Employment Agencies Convention*. Refer to paragraph 2.5.1.

Nevertheless, it is uncertain as to what the term '*on the whole not less favourably*' entails and how much freedom is granted to clients to provide *some* level of different terms and conditions of employment. It is submitted that the term '*on the whole not less favourably*' should be interpreted in the context of section 197 which deals with transfers of business.³⁵⁶ In the context of section 197, the term has been interpreted to mean that the terms and conditions offered to the employee by the new employer remain the same as those of the previous employer although they do not need to be identical to those of the old employer.³⁵⁷ However, the client would have to prove that there is a justifiable reason for the differential treatment.³⁵⁸ When determining a justifiable reason factors such as seniority, experience, length of service, merit, the quality or quantity of work performed or any other criteria of a similar nature are to be considered.³⁵⁹ Nevertheless, it appears that the *LRA* does not extend this protection to temporary employees that work for the TES or the client who is not deemed to be the employer in terms of the Act. This in turn means that such employees remain vulnerable and susceptible to exploitation by the client within the first three months or before the 'deeming' provision would apply. It is recommended that the *LRA* should extend its scope of coverage to protect those employees who are not employees of the client before it is deemed to be the employer to ensure that all employees are adequately protected.

4.4 Organisational rights

As discussed above, trade unions previously had difficulty acquiring organisational rights and even exercising them due to the fact that temporary employees have no permanent workplace where they could represent them.³⁶⁰ This is because the temporary employees' employer's premises were not the workplace in which they actually performed services.³⁶¹ Since the client was not their employer, it did not have to bargain with trade unions at the behest of the temporary employees for these employees did not form part of his workforce.³⁶² However, the amended *LRA* now ensures temporary employees' right to be

³⁵⁶ Cliffe Dekker Hoffmeyr 2014 *Employment Alert* 3.

³⁵⁷ S197(3) of the *LRA* of 1995; Van Niekerk et al *Law @ Work* 357; Cliffe Dekker Hofmeyr 2014 *Employment Alert* 3; *BIFAWU obo Members v Zurich Insurance CO SA (J175/12)* [2014] ZALCJHB 18 (7 January 2014) para 18.1.

³⁵⁸ S198A(5) of the *LRA* of 1995.

³⁵⁹ S198D(2) of the *LRA* of 1995; Faasen 2016 *Civil Engineering Journal* 31.

³⁶⁰ Botes 2015 *SALJ* 106. See para 3.4.5.

³⁶¹ Botes 2015 *SALJ* 106; Fourie 2008 *PELJ* 111.

³⁶² Botes 2014 *SA MERC LJ* 117.

involved in collective bargaining and also ensures their inclusion in collective agreements. Particularly, section 21(12) allows trade unions to exercise organisational rights for the benefit of temporary employees.³⁶³ A broad interpretation would be that the trade union can either exercise these collective rights at the workplace of either the TES or one or more clients of the TES.³⁶⁴ In the event that the trade union exercises the rights at the client's premises, the Act has extended the scope of the term of the employer's premises to include the client's premises.³⁶⁵ The legislature intended to remedy the situation whereby temporary employees may only exercise their collective bargaining rights at the premises of the TES, which is not the premises where they are most vulnerable and which in most cases is far from where they actually conducted their work.³⁶⁶ The above issue is now largely resolved through section 21(12). Bosch³⁶⁷ asserts that the client will have an obligation to give access to small trade unions in its workplaces alongside other majority trade unions because that union will be sufficiently representative elsewhere. Bosch³⁶⁸ further argues that there is however need for the legislature to redraft section 21(12) as this broad interpretation is not readily ascertainable.

Due to their small numbers spread over a wide area, trade unions experienced difficulty in representing temporary employees before the amendments.³⁶⁹ Moreover, not all trade unions qualified for all organisational rights except those that were registered and were representative of the majority in the workplace.³⁷⁰ Hence, the majority registered trade unions which had the fifty plus one per cent of the employees in the workplace as members of the union could exercise such rights.³⁷¹ Contrarily, the *LRA* now confers organisational rights to registered trade unions that do not have the majority of employees in the workplace who are employed by an employer in a workplace.³⁷² Such trade unions can also exercise organisational rights provided that no other trade union that has been granted these rights in the workplace.³⁷³ Consequently, this means that trade unions that

³⁶³ S21(12) of the *LRA* of 1995.

³⁶⁴ S21(12) of the *LRA* of 1995; Bosch 2013 *ILJ* 1636.

³⁶⁵ S21(12) of the *LRA* of 1995; Bosch 2013 *ILJ* 1636.

³⁶⁶ *Memorandum of Objects Labour Relations Amendment Bill* of 2012.

³⁶⁷ Bosch 2013 *ILJ* 1636.

³⁶⁸ Bosch 2013 *ILJ* 1636.

³⁶⁹ Botes 2015 *SALJ* 106.

³⁷⁰ S11 of the *LRA* of 1995.

³⁷¹ Van Niekerk *et al Law @ Work* 377.

³⁷² S21(8A) of the *LRA* of 1995.

³⁷³ S21(8A) of the *LRA* of 1995.

wish to represent temporary employees in the workplace can now fully exercise organisational rights. It should be noted that another important addition to the LRA entails that temporary employees are now considered as part of the client's workforce when determining a trade union's representivity.³⁷⁴ Being part of the client's workforce would therefore bring about that they would benefit from collective agreements concluded as a result of collective bargaining.

In addition, arbitration awards in terms of the Act can now be made binding on temporary employees and the client to the extent that it applies to them.³⁷⁵ It is contended that the inclusion of temporary employees means that they are bound and protected under the terms of an arbitration award. It is submitted that the amendments provide greater protection for temporary employees in that they are now able to advance their plight in matters of mutual interest in the workplace. This includes matters concerning equal remuneration, favourable working conditions or any other matters that affect them.³⁷⁶ It is submitted that the amended *LRA* complies with the *Private Employment Agencies Convention* in this regard in that employees are adequately awarded their fundamental rights to freedom of association and collective bargaining.³⁷⁷

4.5 Issues not covered by the amendments

Although the *LRA* attempted to address the problems that were present before the amendments, it has not adequately addressed all of the challenges pertaining to the regulation of labour brokers. The issues that are not adequately addressed include the use of disguised employment and job security of temporary employees.

4.5.1 Disguised employment

Amongst the issues that have not been addressed is that of disguised employment. The *Labour Relations Amendment Bill* of 2010 attempted to redress the use of disguised employment by labour brokers and clients as a way to circumvent their obligations.³⁷⁸ Section 200B required that an employee be employed permanently unless the employer

³⁷⁴ S21(8)(b)(v) of the *LRA* of 1995.

³⁷⁵ S22(5)(a) of the *LRA* of 1995.

³⁷⁶ Gericke 2010 *Obiter* 105.

³⁷⁷ Article 4 of the *Private Employment Agencies Convention*.

³⁷⁸ S200B of the *Labour Relations Amendment Bill*, 2010.

could establish a justification for employment on a fixed term.³⁷⁹ This section was designed to prevent the use of fixed term contracts as a means to deprive temporary employees who are employed for an indefinite period.³⁸⁰ Section 200B was drafted to deter disguised employment arrangements and hold such persons jointly and severally liable for failing to comply with an employer's obligations under the LRA or any employment law.³⁸¹ This was a progressive step by the legislature to grant temporary employees greater protection from being exploited by both the TES and the client. However, this proposed section was not included in the subsequent Bill of 2012 and was therefore not included in the final *LRA*. As a result, employees still remain vulnerable particularly when the parties try to hide the true nature of the employment relationship.

4.5.2 Job security

The amendments do not address the issue of job security of temporary employees. This in particular refers to the use of automatic termination clauses by the TES to terminate its employment contract with the employee when the client no longer needs the employee's services.³⁸² However, it can be argued that although the amendments do not explicitly provide for the use of automatic termination clauses, temporary employees can turn to section 198A(4) of the *LRA* for protection.³⁸³ Section 198A(4) states that if the TES terminates the employment contract due to its own decision or the client's as a way to bypass any employer obligations in terms of the Act it constitutes a dismissal.³⁸⁴ Additionally, section 198(4C) permits an employee to challenge the contents of its employment contract, which contract might include an automatic termination clause.³⁸⁵ In this way the *LRA* to some extent affords protection to temporary employees against the unlawful use of automatic termination clauses by both the TES and the client. Contrarily, Botes³⁸⁶ argues that the *LRA* must provide an express provision that outrightly prohibits the use of illegitimate automatic termination clauses because the applicability of sections 198A(4) and 198(4C) may be rebutted. By including specific prohibitions on automatic termination clauses for illegitimate reasons will guarantee legal certainty and greater job

³⁷⁹ S200B of the *Labour Relations Amendment Bill*, 2010.

³⁸⁰ S200B of the *Labour Relations Amendment Bill*, 2010.

³⁸¹ S200B of the *Labour Relations Amendment Bill*, 2012.

³⁸² Jordan 2011 <https://www.sanlam.co.za>.

³⁸³ S198A(4) of the *LRA* of 1995.

³⁸⁴ S198A(4) of the *LRA* of 1995.

³⁸⁵ S198A(4C) of the *LRA* of 1995.

³⁸⁶ Botes 2014 *SA MERC LJ* 126.

security for temporary employees. Lastly, the recent amendments to the *LRA* do not address temporary employees' job security with regards to securing permanent posts at the client. This means that the labour broker and the client can still exclude the employee in their agreements from applying for posts at the client.³⁸⁷ As a consequence, the temporary employee still has limited permanent employment opportunities at securing permanent posts at the client and is only limited to temporary jobs.³⁸⁸ Henceforth, temporary employees are still deemed vulnerable in this regard.

4.6 Conclusion

To a certain extent the amendments to the *LRA* now provide adequate regulation of labour brokers and afford greater legal protection to temporary employees in terms of certain aspects. As Tshoose and Tsweledi³⁸⁹ correctly observed, the goal of alternative forms of employment such as labour broking should not only be restricted to creating employment, but rather to create employment of an acceptable quality. On some level the new provisions reach this goal. On the other hand, the current amendments have failed to address all the problems previously experienced and to clarify some ambiguities on the application and interpretation of some provisions as seen above.³⁹⁰ This subsequently has the effect of exacerbating the problem of ensuring adequate regulation of labour brokers and protection for the employees concerned.³⁹¹ One should, however, take care to not over-regulate the matter. This will have a considerable adverse impact on the economy, possibly leading to increased unemployment. It is submitted that the increased levels of protection afforded to temporary employees should be proportionally balanced with the rights and needs of employers who legitimately require seasonal employees for a specific reason or time period.³⁹² Perhaps the legislature will have to consider legal reform in this regard to accommodate the interests of all parties to the triangular relationship without encroaching on the interests of the TES, client or the temporary employee.

³⁸⁷ Van Niekerk et al *Law @ Work* 71.

³⁸⁸ Van Niekerk et al *Law @ Work* 71.

³⁸⁹ Tshoose and Tsweledi 2014 *Law, Democracy and Development* 346.

³⁹⁰ Nkhumise 2016 *Law, Democracy and Development* 107.

³⁹¹ Nkhumise 2016 *Law, Democracy and Development* 107.

³⁹² Lee 2015 *Lee Compliance* 2.

Chapter 5 The regulation of labour brokers in the United Kingdom

5.1 Introduction

The foregoing chapters dealt with the current South African legislative framework regulating labour brokers and how the legislature attempted to address the problems that were present before the amendments. However, this chapter will critically analyse and evaluate the regulation of labour brokers in the United Kingdom (UK). It should be noted that the United Kingdom does not provide all the solutions pertaining to the regulation of labour brokers as each legal system is prone to have its own challenges. It is hoped that after having assessed how labour brokers are regulated in the UK, South Africa can learn lessons and find solutions for potential problem areas where its legislative framework still falls short. This chapter first provides an exposition of labour broking regulations in the UK. This is followed by each of the problems as experienced in South Africa being discussed in light of how the UK attempts to address them in its own legislation. For purposes of brevity, the term *labour broking* is referred to as *agency work* in the UK and this term will therefore be used in this chapter to refer to labour broking. Similarly, the term 'agency' will be used to refer to the labour broker.

5.2 An exposition of labour broking regulations in the United Kingdom

The UK has a market-driven economy, accordingly, it has limited formal restrictions on regulations governing labour brokers.³⁹³ Consequently, labour brokers operate relatively freely in the UK.³⁹⁴ It is for this reason that the UK model is deemed to provide a successful model for those employers who require temporary resourcing and employees who want more flexible alternatives at their disposal.³⁹⁵ However, the UK has a number of mechanisms in place to ensure that labour brokers are effectively regulated and that temporary employees (agency workers) are adequately protected. The first piece of legislation that dealt with the regulation of agency work in the UK was the *Employment*

³⁹³ Eichhorst *et al* *The Role and Activities of Employment Agencies* 2013 12; Collins 2016 <http://www.collinsdictionary.com>. A market driven economy is an economy that is controlled and guided by commercial considerations.

³⁹⁴ Eichhorst *et al* *The Role and Activities of Employment Agencies* 2013 12.

³⁹⁵ European Union Committee *Modernising European Union Labour Laws: has the UK anything to gain: Report with Evidence* 197. It should be noted that the current UK legislation as it stands has been promulgated to comply with the directives of the European Union, since upon drafting them, the UK was still a member to the EU.

Agencies Act of 1973.³⁹⁶ In terms of this Act, businesses that were engaged in agency work were compelled to obtain a licence for their business which had to be made available to the public. This served as a confirmation that they were operating lawfully. However, the *Deregulation and Contracting Out Act* of 1994 removed the licensing requirement for employment agencies.³⁹⁷ Subsequently, other legislative measures which specifically dealt with labour brokers were promulgated. The key legislative measures include the *Gangmasters (Licensing) Act* of 2004, the *Conduct of Employment Agencies and Employment Business Regulations* of 2007 as amended and the *Agency Workers Regulations* (SI 2010/ 93).³⁹⁸

In addition, the UK has a complaint and inspectorate machinery to raise awareness and restrain parties that fail to observe any labour-broking procedures provided for in the legislation.³⁹⁹ These include the Gangmasters Licensing Authority, the Employment Standards Inspectorate (EAS), the United Kingdom Advisory Conciliation and Arbitration Services (ACAS) and the Pay and Work Rights Helpline. For purposes of this discussion each of the key legislative instruments and the complaint and inspectorate machinery will be discussed and assessed as to how the UK has attempted to regulate labour brokers. It is believed that this might assist in providing solutions for South Africa where it falls short in its legislation.

5.3 Key legislative measures that regulate labour brokers in the UK

As mentioned earlier, the key UK legislative measures that regulate labour brokers are the *Gangmasters Act*, the *Conduct of Employment Regulations* and the *Agency Workers Regulations*.⁴⁰⁰ Each of these legislative instruments will be discussed briefly to outline which areas each of them addresses.

³⁹⁶ *Employment Agencies Act* of 1973.

³⁹⁷ *Deregulation and Contracting Out Act* of 1994.

³⁹⁸ *Gangmasters (Licensing) Act* of 2004 (hereinafter referred to as the *Gangmasters Act*); the *Conduct of Employment Agencies and Employment Business Regulations* of 2007 as amended (hereinafter referred to as the *Conduct of Employment Regulations*); the *Agency Workers Regulations* (SI2010/93) (hereinafter referred to as the *Agency Workers Regulations*).

³⁹⁹ Eichhorst et al *The Role and Activities of Employment Agencies* 2013 57.

⁴⁰⁰ *Gangmasters Act*; the *Conduct of Employment Regulations*; the *Agency Workers Regulations*.

5.3.1 *The Gangmasters (Licensing) Act of 2004*

The *Gangmasters Act* was adopted after 23 undocumented Chinese migrant workers drowned in the Morecambe Bay sands in northwest England in 2004.⁴⁰¹ The Morecambe Bay incident conscientised the public to the exploitation that migrant workers in the UK agricultural and food processing sector were exposed to.⁴⁰² Inevitably, this led to the emergence of implementing mechanisms that would curtail agency workers from being exposed to such practices.

In the UK, gangmasters include labour contractors, intermediaries and agencies that supply seasonal employees for agricultural shellfish and horticultural industries.⁴⁰³ In terms of the *Gangmasters Act*, a person acts as a gangmaster if he supplies an employer with workers to perform work for another person.⁴⁰⁴ A person also acts as a gangmaster if he uses an employee to perform services provided by him to another person.⁴⁰⁵ Employees who are hired by these agencies are referred to as gangs.⁴⁰⁶ Such employees are usually employed for a short-term seasonal period to meet the demands of cheap flexible labour in the aforementioned industries.⁴⁰⁷

The *Gangmasters Act* sets down regulations and licensing procedures for agencies (including temporary employment agencies) in the agriculture, shellfish and food-packing sectors.⁴⁰⁸ The *Gangmasters (Licensing) Act* was designed to protect temporary employees from exploitative practices by gangmasters (labour brokers in this case).⁴⁰⁹ Such exploitative practices could entail being poorly paid, treated unfairly and being exposed to unsafe working and living conditions among others.⁴¹⁰ It is submitted that the Act protects employees from such exploitative practices by requiring gangmasters to

⁴⁰¹ Migrant Labour Migration Branch 2016 www.ilo.org; Fudge and Strauss *Temporary Work Agencies and Unfree Labour: Insecurity in the New World of Work* 164.

⁴⁰² Migrant Labour Migration Branch 2016 www.ilo.org.

⁴⁰³ Fudge and Strauss *Temporary Work Agencies and Unfree Labour: Insecurity in the New World of Work* 164.

⁴⁰⁴ S4(2), (4) of the *Gangmasters Act*.

⁴⁰⁵ S4(4) of the *Gangmasters Act*.

⁴⁰⁶ Fudge and Strauss *Temporary Work Agencies and Unfree Labour: Insecurity in the New World of Work* 164.

⁴⁰⁷ Fudge and Strauss *Temporary Work Agencies and Unfree Labour: Insecurity in the New World of Work* 164.

⁴⁰⁸ S3(1) of the *Gangmasters Act*.

⁴⁰⁹ *Explanatory Memorandum to the Gangmasters (Licensing Authority) Regulations* No. 448 of 2005.

⁴¹⁰ Fudge and Strauss *Temporary Work Agencies and Unfree Labour: Insecurity in the New World of Work* 164.

license their businesses so that it will be easier to monitor their activities especially regarding the protection of employees. Other pertinent features of the Act include the introduction of licensing requirements for gangmasters and the establishment of the Gangmasters Licensing Authority which generally oversees lawful operation of gangmasters.⁴¹¹ It is contended that the Act is an incentive by the legislature to safeguard the protection of temporary employees whilst also ensuring that gangmasters operate within the limits of the law.

5.3.2 The Conduct of Employment Agencies and Employment Business Regulations of 2007

In addition, the *Conduct of Employment Agencies and Employment Business Regulations* of 2007, sets out minimum standards and the duties of labour brokers (agencies), clients (hirers) and temporary employees (work seekers) which should be complied with.⁴¹² In terms of the Regulations, temporary employees are referred to as ‘work-seekers’. A work-seeker is defined as a person to whom an agency or employment business supplies or holds itself out as being capable of providing work-finding services.⁴¹³ The client on the other hand is referred to as a ‘hirer’.⁴¹⁴ A hirer is defined as a person (including an employment business) to whom an agency or employment business introduces or supplies a work-seeker.⁴¹⁵

The *Conduct of Employment Regulations* ensures that temporary employees are fairly protected by closely defining the duties of the labour brokers towards them.⁴¹⁶ The Regulations set out requirements that should be satisfied by all parties before services are provided to the client. These requirements entail that all parties should agree to the written terms of the business before the work-seeker performs work for the hirer.⁴¹⁷ The Regulations require that the contents of the agreement should include a specification as to the nature of employment that the work-seeker will be undertaking, remuneration that will be paid and the manner in which it will be paid to the work-seeker as well as other

⁴¹¹ *Gangmasters Act.*

⁴¹² *Conduct of Employment Regulations.*

⁴¹³ Regulation 1 of the *Conduct of Employment Regulations.*

⁴¹⁴ Regulation 1 of the *Conduct of Employment Regulations.*

⁴¹⁵ Regulation 1 of the *Conduct of Employment Regulations.*

⁴¹⁶ *Conduct of Employment Regulations.*

⁴¹⁷ Regulation 14, 17 of the *Conduct of Employment Regulations.*

general employment terms and conditions.⁴¹⁸ In terms of the Regulations, employment agencies are prohibited from charging a fee to a work-seeker for finding them employment, withholding the employee's salary even if the hirer has not paid its fee to the employment agency and preventing employees from terminating their employment with the agency or taking up employment elsewhere.⁴¹⁹ It is submitted that the Regulations protect employees by setting requirements as to what the contents of the contract including the specifications such as the nature of the job, to avoid employees from being treated unfairly and being paid low wages.

5.3.3 *The Agency Workers Regulations (SI 2010/ 93)*

Lastly, the *Agency Workers Regulations* is one of the fundamental international legislative measures which guarantee equal treatment to temporary employees in the UK labour market.⁴²⁰ A salient feature in the *Agency Workers Regulations* is the principle of equal treatment that should be accorded to temporary employees. In terms of the *Regulations*, temporary employees should not be treated less favourably than directly employed employees.⁴²¹ The principle of equal treatment comprises equal pay and working time rights as well as rights to access to facilities and amenities in the workplace.⁴²² A unique feature of the Regulations is the rights that are accorded to temporary employees depending on how long they have been working at the client. The *Regulations* demarcate the rights that temporary employees are entitled to from the first day of commencement of their assignment (day one rights) from those that can be realised progressively after a qualifying period of twelve weeks.⁴²³ It is submitted that the *Agency Workers Regulations* protect vulnerable temporary employees by ensuring that they are not treated less favourably than permanent employees and that they receive some level of protection notwithstanding how long they have worked at the client.

As shown above, the UK has attempted to regulate labour brokers and adequately protect vulnerable temporary employees through its various legislative measures and incentives.

⁴¹⁸ Regulation 16 of the *Conduct of Employment Regulations*.

⁴¹⁹ Regulations 5, 12 and 6 of the *Conduct of Employment Regulations*.

⁴²⁰ *Agency Workers Regulations*.

⁴²¹ Regulation 5 of the *Agency Workers Regulations*.

⁴²² Regulation 5, 12 of the *Agency Workers Regulations*.

⁴²³ Regulation 5, 7 of the *Agency Workers Regulations*.

However, the question that will be posed is how the UK has attempted to address similar issues to those experienced in South Africa.

5.4 How the UK addresses similar issues to those experienced in South Africa

Although the recently amended section 198 was implemented to regulate labour brokers in South Africa, as highlighted in the preceding chapter, the section has certainly not addressed all the problems to ensure adequate regulation of labour brokers. However, this chapter will further investigate how the UK has addressed various issues in their legal system, particularly those issues that posed or still pose problems in South African law. These issues include the scope of temporary services, the status of the employer and its obligations, liability of authority figures, registration of labour brokers, disguised employment, minimum wages and employment benefits as well as the working conditions, organisational rights and job security of temporary employees.

5.4.1 Liability of the authority figures

In the UK there are different factors which determine the liability of a client or the agency towards the temporary employee. Firstly, liability of the authority figures can be determined by the rights that a temporary employee accrues based on their qualifying period at the client.⁴²⁴ The client is liable for day one entitlements because the agency does not have a hand in delivering these entitlements based on the fact that it has no influence or role in providing access, for instance, to the client's canteen.⁴²⁵ The agency is liable for ensuring that rights such as pay and working conditions which come into force after the twelve-week qualifying period are guaranteed to agency workers.⁴²⁶ Secondly, both the agency and the client will be held liable for failing to provide basic working and employment conditions to temporary employees to the extent that each party is responsible for such failure.⁴²⁷ However, the client will be held solely liable if the agency can prove that it undertook reasonable steps to obtain relevant information from the client

⁴²⁴ BIS *Agency Workers Regulations Guidance May 2011* 46. A qualifying period varies depending on how long an agency worker has worked at the client's. A qualifying period can be either be from a day or after 12 weeks.

⁴²⁵ BIS *Agency Workers Regulations Guidance May 2011* 46; the *Agency Workers Regulations* outlined rights that are to be conferred by temporary employees from the first day of commencement of their assignment (day one rights) from those that can be attained gradually after a qualifying period of twelve weeks. These rights will be elaborated on further in this discussion under paragraph 5.4.5.

⁴²⁶ Eichhorst *et al The Role and Activities of Employment Agencies 2013* 58.

⁴²⁷ Regulation 1, 2 of the *Agency Workers Regulations*.

about its basic working and employment conditions and treated the temporary employee accordingly.⁴²⁸

Although the *Agency Workers Regulations* stipulate that if an agency worker is dismissed based on the reasons provided for in the *Regulations*, it shall be regarded as an unfair dismissal, but it does not specify as to which of the authority figures will be held liable.⁴²⁹ In instances where it is not clear whether the breach of the provisions in the *Agency Workers Regulations* should be attributed to either the agency or the client such as in matters of dismissal, a temporary employee can claim against both parties.⁴³⁰ This is to ensure that both authority figures are named from the outset or joined to a claim and will be liable to the extent that the Tribunal finds that they are responsible for the infringement.⁴³¹ Similarly, in South Africa, a temporary employee may now institute proceedings against either the TES or the client or both the TES and the client to the extent that the parties are liable.⁴³²

5.4.2 Registration of labour brokers

Although labour brokers are now required to be registered in order to conduct their business in South Africa, an inevitable shortcoming is that the date of commencement of this legislative provision is still to be pronounced.⁴³³ In this regard, South Africa can learn lessons from the UK which is more explicit about the registration of labour brokers.

To ensure that agencies operate lawfully and that they are adequately regulated, the UK legislative framework compels agencies to register their businesses. In terms of the *Gangmasters Act*, gangmasters are prohibited from operating without a licence.⁴³⁴ This legislative measure echoes that of the *Private Employment Agencies Convention* No. 181 of 1997 which requires that private employment agencies should be regulated by either licensing or certification procedures provided that such regulation is already determined

⁴²⁸ Regulations 14 (3) of the *Agency Workers Regulations*.

⁴²⁹ Regulations 17 of the *Agency Workers Regulations*.

⁴³⁰ BIS *Agency Workers Regulations Guidance May 2011* 46.

⁴³¹ BIS *Agency Workers Regulations Guidance May 2011* 46.

⁴³² S198(4A)(a) of the *LRA* of 1995.

⁴³³ S198(4F) of the *LRA* of 1995.

⁴³⁴ S6 of the *Gangmasters Act* .

by national law and practice.⁴³⁵ Such licensing procedures ensure that labour brokers operate lawfully and it will be easy to monitor whether the employment of temporary employees is compliant with acceptable employment standards.⁴³⁶

Regulation through a licensing system furthermore ensures that transparency of operation of labour brokers in that the type of services that they offer will be readily and publicly available.⁴³⁷ Consequently, temporary employees are protected from labour brokers who carry out illegitimate dealings such as drug or human trafficking.⁴³⁸ The user undertaking (client) can also check whether the workers who have been supplied to them are from a legitimate gangmaster.⁴³⁹ In addition, the user undertaking will also be informed if the gangmaster's licence is revoked to prevent dealings with illegal gangmasters.⁴⁴⁰

Furthermore, the UK provides penal sanctions as a form of deterrent measure for agencies who fail to adhere to the above and those who want to evade the registration requirements. In terms of the *Gangmasters Act*, operating without a licence constitutes a criminal offence which warrants imprisonment for a period not exceeding ten years or a fine set by statute.⁴⁴¹ Similarly, if a person utilises services of an unlicensed gangmaster it constitutes a criminal offence that warrants a heavy penalty such as imprisonment for at least six months or a fine.⁴⁴² These regulations echo the provisions of the *Private Employment Agencies Convention* which state that any violation of any provisions provided in the Convention will warrant adequate remedies such as penalties where deemed appropriate.⁴⁴³ Therefore, if a labour broker fails to comply with the regulations, penal sanctions should be imposed.⁴⁴⁴ It is submitted that the UK legislative steps are

⁴³⁵ Article 3(2) of the *Private Employment Agencies Convention* No. 181 (1997) (hereinafter referred to as the *Private Employment Agencies Convention*). Although the UK is a member of the ILO, the UK has not yet ratified the *Private Employment Agencies Convention*.

⁴³⁶ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and enforcement* 14.

⁴³⁷ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 13.

⁴³⁸ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 14.

⁴³⁹ Gangmasters Licensing Authority 2016 <http://www.gla.gov.uk>.

⁴⁴⁰ Gangmasters Licensing Authority 2016 <http://www.gla.gov.uk>.

⁴⁴¹ S12 of the *Gangmasters Act*.

⁴⁴² S12, S13 of the *Gangmasters Act*.

⁴⁴³ Article 14(3) of the *Private Employment Agencies Convention*.

⁴⁴⁴ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 36.

highly commendable in that they deter both the gangmaster and the one who uses their services from participating in illegal dealings. Moreover, they reflect some of the penal measures of the ILO which shows the UK's dedication to provide temporary employees a minimum floor of protection which South Africa can learn from.

In terms of the *Gangmasters Act* new applicants for a license and existing license holders will have to comply with certain licensing standards to be able to be granted a license or to retain a license.⁴⁴⁵ Firstly, a temporary employee should be provided with written terms of agreement between the license holder and the client, a requirement that South Africa has recently adopted in its labour legislation.⁴⁴⁶ This is in line with the *Private Employment Agencies Convention* that requires that temporary employees be informed of their terms and conditions of employment in their written contracts with the private employment agency before their placement comes into effect.⁴⁴⁷ In this way temporary employees will become fully aware of the nature of their work, what duties they are required to fulfil and the obligations of gangmasters as well as the user undertakings towards them. Secondly, the licence holder must operate his business in a fit and proper manner.⁴⁴⁸ It is submitted that operating a business in a fit and proper manner requires a licence holder to exercise a high standard of transparency and ethics so as not to bring his or her business into disrepute. Moreover, it also includes safeguarding the interests of the temporary employees.

Licensing standards ensure that temporary employees are fairly treated and that they receive the same pay, benefits and conditions that are accorded to permanent employees.⁴⁴⁹ The *Private Employment Agencies Recommendation* No. 188 of 1997 recommends member states to complement their national laws and regulations with standards in order to provide for the proper and effective regulation of labour brokers.⁴⁵⁰

⁴⁴⁵ Davies *Workplace Law: Handbook 2012: Health and Safety Premises and Environment* 345.

⁴⁴⁶ Davies *Workplace Law: Handbook 2012: Health and Safety Premises and Environment* 346; Section 198(4B) of the *LRA* of 1995 requires the TES to provide the employee with written particulars of employment that comply with section 29 of the *Basic Conditions of Employment Act*.

⁴⁴⁷ Article 5 of the *Private Employment Agencies Recommendation*.

⁴⁴⁸ S7 of the *Gangmasters Act*; Davies *Workplace Law: Handbook 2012: Health and Safety Premises and Environment* 346.

⁴⁴⁹ Gangmasters Licensing Authority 2016 <http://www.gla.gov.uk>.

⁴⁵⁰ Article 2 of the *Private Employment Agencies Recommendation* No. 188 of 1997. Hereinafter referred to as the *Private Employment Agencies Recommendation*.

Not only do these standards maintain the quality of service delivery of gangmaster activity but it also provides a minimum floor of protection for all temporary employees.⁴⁵¹

5.4.3 *The scope of temporary services in the UK*

As compared to South African law, the UK legislation does not clearly articulate what temporary services entail or the length of assignments.⁴⁵² Cabrelli⁴⁵³ submits that the length of an average temporary assignment is less than three months (twelve-week period). Prassl⁴⁵⁴, on the other hand, states that in most cases clients (end users) explicitly limit the length of an individual assignment to an eleven-week period in their contracts. Adam Smith and Williams⁴⁵⁵ contend that short-term temporary work is usually less than a period of one year. In the recent case of *Moran and others v Ideal Cleaning Services and Celanese Acetate*⁴⁵⁶ it was held that workers will only be accorded protection under the *Agency Workers Regulations* provided that they are supplied to work *temporarily* for the end user. Therefore, it can be deduced that a temporary employee will be deemed to have performed temporary work if the length of assignment is temporary in nature ranging from the three months to less than a year. It can be argued that since there is no official demarcation or a maximum period provided, there is nothing preventing such a contract to be even longer than a year as long as it can be classified as temporary. In this regard, it can be argued that South Africa protects temporary employees more against exploitation pertaining to the duration of temporary work than the UK.⁴⁵⁷

5.4.4 *The status of the employer and its obligations*

In South African law, it is unclear as to when the obligations, the true position of the employment relationship and the full status of the parties after the 'deeming' provision comes into play and what happens to the contracts.⁴⁵⁸ As highlighted in the foregoing chapter, it is uncertain as to whether the client will be the sole employer for the purposes

⁴⁵¹ International Labour Organisation *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* 41.

⁴⁵² Kubal *Social Legal Integration Polish Post-2004 EU Enlargement Migrants in the United Kingdom* 4.

⁴⁵³ Cabrelli *Employment Law in Context* 132; *Explanatory Memorandum to the Agency Workers Regulations*.

⁴⁵⁴ Prassl *The Concept of the Employer* 132.

⁴⁵⁵ Adam, Smith and Williams *Contemporary Employment Relations: A Critical Introduction* 53.

⁴⁵⁶ *Moran & Ors v Ideal Cleaning Services Ltd & Anor* UKEAT/0274/13/DM para 16.

⁴⁵⁷ Refer to paragraph 4.3.4.

⁴⁵⁸ S198A(3)(b)(i) of the LRA of 1995. Refer to paragraph 4.3.4.

of the Act or that the TES remains the true employer or that both parties become joint employers of the employee.⁴⁵⁹ In the UK, whether the status of the employer and its obligations should be attributed to agency or the client has sparked a contentious debate. Hardy and Butler⁴⁶⁰ refer to the situation as ‘complicated’ whereas Wynn and Leighton⁴⁶¹ label it as a ‘legal vacuum’ because it is not clear whether the status of the agency worker is that of an employee of the agency or the client. A contract of employment is concluded between the agency and a temporary employee because the agency is the one who supplies individuals to the client.⁴⁶² Consequently, no direct contract exists neither is there an employment relationship between the client and the employee.⁴⁶³

Based on the fact that the triangular employment relationship among the employee, client and the agency does not fall under the conventional employment relationship, the courts find it difficult to confer the requirement of mutual obligation and responsibility of an employer on the client.⁴⁶⁴ Therefore, whether the agency or the client is the employer is determined on a case by case analysis depending on the facts of the case and the mutuality of obligations as it is divided in the particular case between the parties and the temporary employee.⁴⁶⁵ However, the European Union Committee argues that the agency is not an employer of the agency because the temporary agency worker is engaged under a contract of service.⁴⁶⁶ This is because the temporary worker has no obligation to accept any particular assignment from the agency.⁴⁶⁷ It is argued that even if the employee had an obligation to accept an assignment from the agency, there will not be a contract of service between the parties because the agency does not exercise a sufficient degree of control over the employee.⁴⁶⁸ In addition, a temporary agency worker

⁴⁵⁹ Refer to paragraph 4.3.4.

⁴⁶⁰ Hardy and Butler *European Employment Law: A Comparative Guide* 317.

⁴⁶¹ Wynn and Leighton 2006 *ILJ* 303.

⁴⁶² Dougan and Currie *50 Years of the European Treaties: Looking Back and Thinking Forward* 295; s4 of the *Gangmasters Act*.

⁴⁶³ Dougan and Currie *50 Years of the European Treaties: Looking Back and Thinking Forward* 295; Wynn and Leighton 2006 *ILJ* 314.

⁴⁶⁴ Dougan and Currie *50 Years of the European Treaties: Looking Back and Thinking Forward* 295.

⁴⁶⁵ Ashtiany, Stein and Nathanson *Employment 2006: Law and Practice, Human Resources* 131.

⁴⁶⁶ European Union Committee *Modernising European Union Labour Laws: has the UK anything to gain: Report with Evidence* 197.

⁴⁶⁷ European Union Committee *Modernising European Union Labour Laws: has the UK anything to gain: Report with Evidence* 197; Hardy *Labour Law in Great Britain* 97; *James v Greenwich London Borough Council* [2008] *EWCA* para 17; *Carmichael v National Power, the Lord Chancellor* [2000] *IRLR* 43 para 15.

⁴⁶⁸ Hardy *Labour Law in Great Britain* 97; *Montgomery v Johnson Underwood Ltd* (2001) *IRLR* 269 para 18.

may work through several employment agencies at the same time which means that its relationship with the agency is not an exclusive one.⁴⁶⁹

Wynn and Leighton⁴⁷⁰ argue that the UK courts have attempted to bridge these lacunae by constructing an employment relationship between a temporary employee and the client. Although there is no express contractual relation between the client and temporary worker, it is argued that there is an implied contract between the parties which deems the client the employer.⁴⁷¹ In *Dacas v Brook Street Bureau (UK) Ltd and Wandsworth LBC*⁴⁷² it was held that an agency worker is an employee of the client, not of the agent. The Court of Appeal held that Brook Street (the labour broker) had no obligation to provide the applicant with work, whereas the applicant had no obligation to perform it.⁴⁷³ Moreover, the labour broker did not exercise any relevant day-to-day control over the employee's work.⁴⁷⁴ In fact, the client is the one who supervises and exercises the day-to-day control over the employee.⁴⁷⁵ Hence, the client is the employer.⁴⁷⁶ The court highlighted that the obligation that arose from the status of client as the employer was to remunerate the agency worker for the work that it would have performed and the benefit that the client would have derived from the employee.⁴⁷⁷ Based on these findings the court held that Mrs Dacas (the agency worker) was an employee of the Council (the client) and not of Brook Street (the agency).⁴⁷⁸

This was reaffirmed in the case of *Cable & Wireless plc v Muscat*⁴⁷⁹ where it was held that the agency worker (Mr Muscat) was held to be an employee of the client (C&W). The Court of Appeal confirmed the *Dacas* decision that an implied contract of employment can be found to exist between an agency worker and a client in appropriate circumstances.⁴⁸⁰ This is especially when there is a need to give business reality to the

⁴⁶⁹ European Union Committee *Modernising European Union Labour Laws: has the UK anything to gain: Report with Evidence* 197.

⁴⁷⁰ Wynn and Leighton 2006 *ILJ* 303.

⁴⁷¹ Collins, Ewing and McCoglan *Labour Law* 215.

⁴⁷² *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA para 79.

⁴⁷³ *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA para 53.

⁴⁷⁴ *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA para 53.

⁴⁷⁵ *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA para 64.

⁴⁷⁶ Thompsons Solicitors 2013 <http://www.thompsons.law.co.uk>.

⁴⁷⁷ *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA para 53, 69.

⁴⁷⁸ *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA para 79.

⁴⁷⁹ *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220 para 52.

⁴⁸⁰ *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220 para 39.

relationship and arrangements between the parties.⁴⁸¹ An implied contract exists when the client exercises a sufficient degree of control over the work that is performed by the agency worker,⁴⁸² whereas the agency worker carries out the work because of its obligation to do so.⁴⁸³ The case of *Secretary of State for Business Innovation & Skills v Studders & Ors*⁴⁸⁴ confirmed there is no employment relationship between an agency worker and the agency that supplies them to the end user (client). Therefore, it can be concluded that the client is the employer of the temporary employee.

It is argued that there is a tendency by the courts to identify the client as the employer of the agency worker. It can be concluded that the current position in the UK is that the client is the employer of the temporary employee because it exercises the day to day control and supervises their activities. It is submitted that it is logical to regard the client as the employee since it controls the activities of the temporary employee.⁴⁸⁵ In most cases, the agency will have little or no contact with the temporary employee.⁴⁸⁶ Identifying the client as the employer provides clarity as to who the employees should cite in their claim if any of their rights are infringed during the period of their placement. It is argued, however, that identifying the client as the employer negates the benefits that flexibility would have, since the client will be reluctant to use TES's as it will be forced to carry out its employer obligations towards the employee. Inevitably, this leads to an increase in unemployment for those individuals who seek temporary employment.

5.4.5 Minimum wages, employment benefits and working conditions

Compared to South Africa, the UK provides extensive coverage and protection to temporary employees with regards to minimum wages, employment benefits and working conditions. In terms of the *National Minimum Wage Act* of 1998, an agency worker is entitled to a minimum wage for all the time that he or she would have worked.⁴⁸⁷ In terms of the *Gangmasters Act*, the licence holder has an obligation to remunerate his

⁴⁸¹ Wothersworldwide 2006 www.withersworldwide.com.

⁴⁸² *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220 para 35.

⁴⁸³ *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220 para 35.

⁴⁸⁴ *Secretary of State for Business Innovation & Skills v Studders & Ors* UKEAT/0571/10/DM para 38.

⁴⁸⁵ Schoeman *An analysis of Temporary Employment Services and the new laws regulating them in South Africa* 15.

⁴⁸⁶ Le Roux 2012 *Contemporary Labour Law* 21.

⁴⁸⁷ S1 and S34 *National Minimum Wage* of 1998. In terms of the Act the national minimum wage will be a single hourly rate as prescribed by the Secretary of State may from time to time.

employees the extent of the national minimum wage and provide them with itemised pay slips thereof.⁴⁸⁸ Remunerating the national minimum wage curbs the problem of temporary employees being the lowest paid employees in the labour market which in turn protects them from exploitation by the labour brokers. Although the Minister of Labour may set minimum terms and conditions of employment including minimum wages in terms of *Basic Conditions of Employment Act*; there is currently no national minimum wage implemented in South Africa.⁴⁸⁹ Moreover, no specific minimum wage has been set yet for temporary employees in South Africa, although it is expected to be done in the near future.⁴⁹⁰ Following the UK's steps in ensuring that temporary workers are entitled to a minimum wage will assist South Africa in enabling temporary employees to at least afford the basic standard of living.

Moreover, the UK provides health and safety measures which are to be undertaken by the authority figures in order to protect temporary employees from unfavourable working and living conditions. To safeguard the health and safety of temporary employees the *Gangmasters Act* sets the licensing standards which require the licence holder to carry out risk assessments in the workplace to ensure that such working conditions are healthy and safe for the employees.⁴⁹¹ The licence holder must also ensure that employees live in living conditions that are of an adequate standard and that are properly licensed.⁴⁹² Similarly, the *Conduct of Employment Regulations* requires an agency to make reasonably practicable inquiries to ensure that the health and safety of temporary employees (work seeker) are not compromised during the course of the assignment at the client.⁴⁹³ To ensure that both new applicants and existing licence holders comply with the aforementioned licensing standards, the Gangmaster licensing officer will carry out inspections at random or on the basis of risk assessment of the gangmaster's

⁴⁸⁸ Davies *Workplace Law: Handbook 2012: Health and Safety premises and Environment* 346.

⁴⁸⁹ Mywage.co.za 2016 <http://www.mywage.co.za>.

⁴⁹⁰ Measured Ability Group Holdings (Pty) Ltd 2016 <http://www.measuredability.com>; Mywage.co.za 2016 *Minimum Wages in South Africa* <http://www.mywage.co.za>. Not all sectors of temporary employment have sectoral determinations which regulate their minimum wage. Moreover, there is no single sectoral determination that provides for a minimum wage for all temporary employees in South Africa. However contract and cleaning, civil engineering, domestic workers, private security sector, forestry sector, farm workers and hospitality sectors currently have sectorial determinations which stipulate their minimum wage.

⁴⁹¹ Davies *Workplace Law: Handbook 2012: Health and Safety premises and Environment* 346.

⁴⁹² Davies *Workplace Law: Handbook 2012: Health and Safety premises and Environment* 346.

⁴⁹³ Regulation 20(b) of the *Conduct of Employment Regulations*.

operations.⁴⁹⁴ In this way, the legislature is actively involved in ensuring that temporary employees are exposed to the right working and living conditions. However, South Africa might not have health and safety measures specifically in the context of the TES, but arising from his control over his workplace, the client has a general obligation to ensure a safe working environment to all on his premises.⁴⁹⁵ This includes employees, temporary workers, client and consultants amongst others. It is submitted that temporary employees are also afforded healthy and safety conditions in the workplace.

Furthermore, the UK offers a unique feature which are rights that temporary employees are entitled to depending on how long they have been working at the client's, a system that is not applicable in South Africa. It is submitted that the *Agency Workers Regulations* is more articulate than the *LRA* of 1995 as to what the prohibition of treating an employee less favourably entails.⁴⁹⁶ At any given point in time workers have some level of protection regardless of how long they have worked at the client. In particular, the *Agency Workers Regulations* delineate the rights that are to be accrued by temporary employees from the first day of commencement of their assignment (day one rights) from those that can be attained gradually after a qualifying period of twelve weeks.⁴⁹⁷ From the first day of an assignment, a temporary employee is not to be treated less favourably than a comparable employee with a permanent post at the client's.⁴⁹⁸

Day one rights include the right to be informed of any vacancies in the clients's organisation and to be given an opportunity that is awarded to permanent employees to find permanent employment with the client.⁴⁹⁹ Day one rights also include the right to have access to facilities such as canteens, child-care facilities, transport and gyms.⁵⁰⁰ The client will have to justify reasons for refusing temporary employees access to facilities

⁴⁹⁴ S15 and S16 of the *Gangmasters Act*.

⁴⁹⁵ S9 of the *Occupational Health and Safety Act* 85 of 1993. In terms of the Act an employer must operate his business as far as reasonably practicable so that persons other than those in his employment who might be directly affected by his activities are not exposed to hazards to their health or safety.

⁴⁹⁶ Section 198A(5) states that an employee who is deemed to be an employee of the client in in terms of section 198A(5) must be treated on the 'whole not less favourably' than permanent employees of the client doing similar work. As highlighted in the previous chapter it is unclear as to what the term 'on the whole not less favourably' entails and how much freedom is granted to clients to provide some level of different terms and conditions of employment. Refer to paragraph 4.3.6.

⁴⁹⁷ Regulation 5, 7 of the *Agency Workers Regulations*.

⁴⁹⁸ BIS *Agency Workers Regulations Guidance* May 2011 15.

⁴⁹⁹ Regulation 13 of the *Agency Workers Regulations*.

⁵⁰⁰ Regulation 13,12 of the *Agency Workers Regulations*.

other than costs alone.⁵⁰¹ It is submitted that practical and organisational considerations are possible factors that will be considered to determine whether the differentiation is justifiable.⁵⁰² In the event that there is an objective justification, the client can also consider other possible or feasible means of reasonably accommodating the employee, for instance, offering them certain access to facilities on a partial basis as an alternative as opposed to excluding them altogether.⁵⁰³ In this way, temporary employees are not marginalised or treated unfairly in the workplace.

After the twelve continuous calendar weeks, a temporary employee is entitled to the same basic conditions of employment.⁵⁰⁴ However, the *Regulations* will allow an employee to take breaks during the twelve week period provided that the break does not exceed 6 weeks.⁵⁰⁵ This was designed to accommodate and protect the employee from being jeopardised when they either fall sick, pregnant, during and after childbirth, when they are on maternity leave or in the event that they are injured.⁵⁰⁶ Nevertheless, a temporary employee can exercise twelve-day rights as if they had been directly employed by the client from the first day from when an assignment commences.⁵⁰⁷

Twelve-week rights include the right to remuneration such as any fee, bonus, commission, or holiday pay relating to the assignment.⁵⁰⁸ This also includes work time rights such as rest time, night time, annual leave that is above what is required by the law.⁵⁰⁹ It is recommended that South Africa should adopt a similar approach in ensuring that temporary employees are awarded some level of specific protection regardless of how long they would have worked for the client. This guarantees temporary employees a minimum floor of rights.

⁵⁰¹ Harbottle and Lewis *Summary of the Agency Workers Regulations* 2010 <https://www.harbottle.com> accessed 20 October 2016.

⁵⁰² BIS *Agency Workers Regulations Guidance May 2011* 16.

⁵⁰³ BIS *Agency Workers Regulations Guidance May 2011* 16.

⁵⁰⁴ Regulation 5, 7 of the *Agency Workers Regulations*.

⁵⁰⁵ Regulation 7(8) of the *Agency Workers Regulations*.

⁵⁰⁶ Regulation 7(8) of the *Agency Workers Regulations*; Howes 2011 *Comparative Labour Law and Policy Journal* 9.

⁵⁰⁷ Regulation 5, 7 of the *Agency Workers Regulations*.

⁵⁰⁸ Regulation 6 of the *Agency Workers Regulations*.

⁵⁰⁹ Regulation 6 of the *Agency Workers Regulations*.

5.4.6 Organisational rights

Fudge and Strauss⁵¹⁰ argue that the UK practically has no arrangements for collective bargaining especially for the regulation of temporary agency work. This may be attributed to the fact that there is a low density of union membership amongst temporary workers in the UK.⁵¹¹ Trade unions find it difficult to recruit and organise agency workers because they are most likely to leave the workplace in a short space of time after having completed their assignments.⁵¹² However, this is not to say that temporary employees do not have collective bargaining rights. Ronmmar⁵¹³ adds that sectoral collective bargaining is an unfamiliar phenomenon in the UK. This is attributed to the fact that the UK has recently been experiencing a decline in unionisation and collective bargaining.⁵¹⁴ Moreover, the UK's industrial relations are characterised by a traditional system of voluntarism between employers and trade unions.⁵¹⁵ Consequently, any collective bargaining around the use of temporary employment contracts will be established in accordance with the specific conditions and circumstances of the sector and/ or employing organisation.⁵¹⁶ There is no collective bargaining that regulates temporary agency work either at intersectorial, national level and sectorial level.⁵¹⁷ In few instances, collective bargaining is exercised at company level between the employer and the employees.⁵¹⁸ Therefore, compared with the UK, the South African legislative framework guarantees more protection to temporary employees regarding the exercise of collective bargaining rights in the workplace regarding matters that concern them.⁵¹⁹

5.4.7 Disguised employment

In the UK, none of the agency work regulations address the issue of disguised employment. The closest to addressing the issue of disguised employment is the *Agency*

⁵¹⁰ Fudge and Strauss *Temporary Work Agencies and Unfree Labour: Insecurity in the New World of Work* 53.

⁵¹¹ Stanworth and Druker 2000 *International Journal of Employment Studies* 17.

⁵¹² Stanworth and Druker 2000 *International Journal of Employment Studies* 17.

⁵¹³ Ronmmar *EU Industrial Relations v National Industrial Relations: Comparative and Interdisciplinary Perspectives* 71.

⁵¹⁴ European Union Committee *Modernising European Union Labour Laws: has the UK anything to gain: Report with Evidence* 180.

⁵¹⁵ Walden *IUS Labor* 2014 9.

⁵¹⁶ Walden *IUS Labor* 2014 9.

⁵¹⁷ Eurofound 2016 <http://www.eurofound.europa.eu>.

⁵¹⁸ Eurofound 2016 <http://www.eurofound.europa.eu> accessed.

⁵¹⁹ S21(12) of the *LRA* of 1995; Employees have collective bargaining rights. Moreover, trade unions no longer experience difficulty in exercise organisational rights for the benefit of temporary employees.

Workers Regulations which only provides anti-avoidance measures to encourage compliance with the authority figures.⁵²⁰ Dickson and Gormally⁵²¹ submit that these anti-avoidance measures are designed to prevent unscrupulous employers from structuring assignments to prevent an employee from qualifying for the twelve-week periods and to circumvent the regulations. In the event that the client attempts to circumvent the acquisition of these rights by the employee after twelve weeks, employees will be treated as having satisfied the twelve-week qualifying period provided that they are prevented from doing so through a relevant structure of assignments.⁵²²

The temporary employee can institute a claim at an industrial tribunal if he or she believes that he or she was prejudiced from asserting such rights as provided by the *Regulations*.⁵²³ However, the employee will have to prove that the structure of assignments is not in line with the *Regulations*.⁵²⁴ Howe⁵²⁵ argues that this may prove to be a fairly difficult task bearing in mind that the agency worker will need to provide sufficient evidence of the hirer's or agency's motive. Such actions will also be burdensome on a temporary employee as they may not have the means or avenues to pursue either or both of the authority figures.

5.4.8 Job security

In the UK, labour brokers are prohibited from preventing temporary employees from taking permanent jobs at the client's workplace.⁵²⁶ This addresses the issue of lack of job security of temporary employees failing to secure employment. However, in the case of *Coles v Ministry of Defence*⁵²⁷, the Employment Appeal tribunal held that there is nothing in the agency workers' legislation that prevents employers from choosing permanent staff over agency workers for job vacancies. The tribunal highlighted that the right to information is conferred on temporary employees to give them the same opportunity that is given to permanent employees to find permanent employment with the hirer. However,

⁵²⁰ Holland and Burnett *Employment Law* 26.

⁵²¹ Dickson and Gormally *Human Rights in the Northern Island: The CAJ Handbook* 522.

⁵²² Howes 2011 *Comparative Labour Law and Policy* 9.

⁵²³ Regulation 18 of the *Agency Workers Regulations*; Dickson and Gormally *Human Rights in the Northern Island: The CAJ Handbook* 522.

⁵²⁴ Dickson and Gormally *Human Rights in the Northern Island: The CAJ Handbook* 522.

⁵²⁵ Howes 2011 *Comparative Labour Law and Policy Journal* 9.

⁵²⁶ Regulation 6 of the *Conduct of Employment Regulations*.

⁵²⁷ *Coles v Ministry of Defence* UKEAT/0403/14.

the Tribunal was quick to point out that that was as far as the provisions went.⁵²⁸ To some extent, UK legislation does not provide a viable solution for job security of temporary employees. It should be noted that the UK prohibits the use of automatic termination clauses whereas South African courts reject them, such clauses are void.⁵²⁹ Therefore, the dismissal of a temporary employee on the basis of automatic termination clauses constitutes an unfair dismissal.⁵³⁰

5.4.9 Complaint and inspectorate machinery

Lastly, the United Kingdom has a complaint and inspectorate mechanism to raise awareness and curtail failure by agencies to observe any labour broking procedures, a feature that is not present in South African law.⁵³¹ One of the machineries that ensures proper regulation of gangmasters (labour brokers) is the establishment of a Gangmasters Licensing Authority by the *Gangmasters Act*.⁵³² The Gangmasters Licensing Authority is a non-departmental public body that issues licences and ensures lawful compliance of gangmaster activity through inspections.⁵³³ The Gangmasters Licensing Authority aims at preventing exploitation of vulnerable temporary employees, confronting unlicensed or criminal gangmaster activity and ensuring that licence holders operate within the law.⁵³⁴ It is submitted that this is a commendable legislative measure towards closely monitoring the regulation of labour brokers whilst affording temporary employees protection from exploitative practices.

Another piece of complaint and inspectorate machinery is the Employment Agency Standards Inspectorate (EAS) which works closely with trade associations to raise awareness on the rights and duties of temporary employees.⁵³⁵ The EAS achieves this by producing an annual report at the end of every year which is premised on the observations and assessments on the implementation of the temporary workers

⁵²⁸ *Coles v Ministry of Defence* UKEAT/0403/14.

⁵²⁹ *British Leyland (UK) Ltd v Ashraf* [1978] IRLR 930 (EAT); *Igbo v Johnson Matthey Chemicals Ltd* [1986] ICR 505.

⁵³⁰ *British Leyland (UK) Ltd v Ashraf* [1978] IRLR 930 (EAT); *Igbo v Johnson Matthey Chemicals Ltd* [1986] ICR 505.

⁵³¹ Eichhorst *et al* *The Role and Activities of Employment Agencies* 2013.

⁵³² S1 *Gangmasters Act*; Gangmasters Licensing Authority 2016 <http://www.gla.gov.uk>.

⁵³³ S1 *Gangmasters Act* of 2004; Gangmasters Licensing Authority 2016 <http://www.gla.gov.uk>.

⁵³⁴ Gangmasters Licensing Authority 2016 *What we do* <http://www.gla.gov.uk>.

⁵³⁵ *Employment Agency Standards (EAS) Inspectorate Annual Report 2010 – 2011*.

regulations in the United Kingdom.⁵³⁶ Such measures ensure that the activities of labour brokers are closely monitored on an annual basis and allow any improvements where the UK legislation falls short; a formidable step that should be adopted by South Africa.

Another body is the United Kingdom Advisory, Conciliation and Arbitration Services (ACAS) that offers advice and guidance to both labour brokers and temporary employees on their rights and duties.⁵³⁷ The Pay and Work Rights Helpline (PWR) not only conscientises the public on basic workplace rights but it also handles complaints from the public including temporary agency work-related issues.⁵³⁸ In this way, temporary employees are aware of their rights in the event that they are exploited. It is hoped that South Africa can readily learn lessons from the UK's adoption of complaint and inspectorate mechanisms to adequately protect the interests of temporary employees.

5.5 Conclusion

Although the UK does not necessarily provide all the solutions, South Africa can learn from the UK in some aspects where its legislation falls short on the regulation of labour brokers. It is submitted that the UK has attempted to provide a floor of rights for temporary employees by promulgating the *Gangmasters Act*, the *Conduct of Employment Agencies and Employment Business Regulations* and the *Agency Workers Regulations*.⁵³⁹ Wynn⁵⁴⁰ classifies the licensing model under the *Gangmasters Act* as one that exemplifies a stronger enforcement policy and a more rigorous compliance regime. It is submitted that the *Gangmasters Act* achieves this by enforcing licensing requirements and standards on gangmasters to monitor and protect employees from abuse and exploitative practices. The Act also establishes a Gangmasters Licensing Authority which monitors and ensures lawful operation of gangmasters.⁵⁴¹ To ensure compliance with the licensing requirements, the Act imposes penal sanctions on those gangmasters who fail to observe these requirements. It is therefore contended that the *Gangmasters Act* adequately protects temporary workers.

⁵³⁶ *Employment Agency Standards (EAS) Inspectorate Annual Report 2010 – 2011*.

⁵³⁷ *Eichhorst et al The Role and Activities of Employment Agencies 2013*.

⁵³⁸ *Employment Relations Research Series 113 Survey of Pay & Work Rights Helpline callers (2010)*.

⁵³⁹ *Gangmasters Act; the Conduct of Employment Regulations; the Agency Workers Regulations*.

⁵⁴⁰ Wynn 2009 ILJ 70.

⁵⁴¹ *Gangmasters Act*.

Through the *Conduct of Employment Regulations*, the UK attempted to protect temporary employees stipulating the duties of the labour brokers towards them.⁵⁴² It is submitted that by identifying the duties of the labour brokers it provides clarity and legal certainty as to what temporary employees should expect from them. Lastly, through the *Agency Workers Regulations*, temporary employees are guaranteed equal treatment similar to their permanent counterparts in the workplace.⁵⁴³ A unique feature of the Regulations is that temporary employees are entitled to certain rights depending on how long they have been working at the client's. It is submitted that temporary employees in the UK are adequately protected as the law accords them some form of protection from the first day of the assignment until after a period of twelve weeks. It is argued that the UK has attempted to ensure that temporary employees are not marginalised or treated as the underclass in the workplace.

Another incentive that the UK has adopted is a complaint and inspectorate machinery to ensure that temporary employees are adequately protected.⁵⁴⁴ These include the Gangmasters Licensing Authority which ensures that licensed gangmasters operate within the law; the Employment Standards Inspectorate (EAS) which is designed to raise awareness on the rights and duties of temporary employees; the United Kingdom Advisory Conciliation and Arbitration Services (ACAS) which offers advice and guidance to both labour brokers and temporary employees on their rights and duties and the Pay and Work Rights Helpline which handles complaints from the public including temporary agency work-related issues. In this way, temporary employees in the UK are constantly made aware of their rights and they are given the platform to issue complaints in the event that they are being treated unfairly

It is submitted that the UK is a model that South Africa can learn from. South Africa can adopt mechanisms that have been implemented by the UK to ensure that labour brokers are closely monitored. In this way, South Africa will be able to guarantee temporary employees a minimum floor of rights and ensure that they are adequately protected.

⁵⁴² *Conduct of Employment Regulations*.

⁵⁴³ *Agency Workers Regulations*.

⁵⁴⁴ Eichhorst et al *The Role and Activities of Employment Agencies* 2013 57.

Chapter 6 Recommendations and conclusion

6.1 Introduction

This chapter provides recommendations that may assist the South African legislative framework where legislation falls short. The chapter concludes by highlighting the important issues that have been identified in all the previous chapters. Finally, an evaluation is made as to whether employees who are employed through labour brokers are now adequately protected by the 2014 amendments.

6.2 Conclusion

This study, as indicated in chapter one, analyses the 2014 labour law amendments of the *Labour Relations Act* of 65 of 1995 pertaining to the regulation of labour brokers in South Africa. Chapter one identified the problem areas that were present before the 2014 amendments were promulgated. It was identified that temporary employees are amongst the most vulnerable groups in the labour market as they are susceptible to exploitation by either labour brokers, the client or both the regulation of labour brokers in South Africa. Chapter two discussed international standards regulating labour brokers namely the ILO which provides regulations regarding agency work. As a signatory and member of the ILO, South Africa has an obligation to ensure that its domestic legislation falls within the ILO labour standards.⁵⁴⁵ The *Private Employment Agencies Convention* 181 of 1997 was identified as the key instrument which regulates and gives cognisance to the existence of private employment agencies (labour brokers).⁵⁴⁶ To a certain extent, South Africa complies with the ILO standards pertaining to the regulation of labour brokers and the protection of temporary employees. The 2014 amendments strengthen the collective bargaining rights of temporary employees and they require that such employees be treated equally '*on the whole not less favourably*' than permanent employees meaning that they should not be unfairly discriminated.⁵⁴⁷ Moreover, temporary employees are now furnished with written contracts of employment which stipulate their employment terms and conditions.⁵⁴⁸ In this regard, it is argued that through the amendments, a measure of

⁵⁴⁵ Department of International Relations and Cooperation Republic of South Africa 2004 <http://www.dfa.gov.za>; ILO 2016 <http://www.ilo.org>; Van Niekerk *et al Law @ Work* 21.

⁵⁴⁶ *Private Employment Agencies Convention*.

⁵⁴⁷ Refer to paragraph 4.4 and 4.3.6.

⁵⁴⁸ Refer to paragraph 4.3.3.

additional protection and legal certainty is now afforded to temporary employees. Chapter three discusses the regulation of labour brokers in South Africa and the problems that existed before the 2014 labour law amendments. It was identified that there was a lack of protection of temporary employees and inadequate regulation which necessitated the need to regulate labour brokers more prominently in the 2014 amendments. Chapter four discussed the current legislative framework regulating labour brokers in South Africa. It was concluded that some of the original problems that were present before the amendments still exist and that the amendments also pose their own challenges. Chapter five critically analysed the regulation of labour brokers in the UK which was investigated to provide lessons and possible solutions for South Africa where its legislative framework falls short. It was concluded that South Africa can learn some lessons from the UK regarding its complaint and inspectorate mechanisms, licensing standards, minimum wages, equal treatment and job security of temporary employees.

In conclusion, it is clear that South Africa now accords temporary employees an additional measure of protection and legal certainty that was lacking before the amendments. Nevertheless, section 198 of LRA needs to be streamlined in certain areas to ensure that temporary employees are adequately protected. However, the legislature should be wary of over regulation of labour brokers as this might scare off clients as they might become more reluctant to use such arrangements. It is argued that banning TES's is not a viable option as this will result in job losses and increased employment which would be detrimental to South Africa's economy.⁵⁴⁹

6.3 Recommendations

It is recommended that:

- a) *Clarity be given as to which of the authority figures will be liable for dismissals and whether a dismissal under section 198(4A) is an unfair or automatically unfair dismissal*

⁵⁴⁹ *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, A Report prepared for the Department of Labour and the Presidency 3.*

It is recommended that the *LRA* should be clear as to which of the authority figures will be held liable in the event that the TES terminates the employment contract either based on its own decision or the client's. This provides legal certainty in that temporary employees will be certain as to whom they should cite in their claims. Moreover, the *LRA* should be clear as to whether dismissals under section 198A(4) should be regarded as unfair dismissals or automatically unfair dismissals to provide legal certainty for all parties that are involved in the triangular employment relationship.⁵⁵⁰

b) The commencement date of the legislative provision pertaining to registration of temporary employment services should be effected

Although TES's are now required to be registered in order to conduct their businesses, the date of commencement of this legislative provision is yet to be pronounced.⁵⁵¹ It is recommended that there is need for the legislature to effect registration on the part of the TES in order to distinguish those who are operating unlawfully from those who comply with the law.⁵⁵² It is submitted that South Africa can learn lessons from the UK which is more elaborate on the registration of labour brokers. South Africa could also adopt the UK model by setting penal sanctions as a form of deterrent for labour brokers who fail to adhere to the registration requirements and those who want to evade such requirements.⁵⁵³ Moreover, South Africa can adopt the UK model which attaches criminal sanctions to those labour brokers that do not comply with the registration requirements and those clients who utilise the services with unlicensed labour brokers.⁵⁵⁴ This will keep both parties in constant check before they decide to operate in the business. Lastly, South Africa should adopt the UK's establishment of a regulating body which monitors and ensures lawful operation of labour brokers. This ensures that TES's are closely monitored and it safeguards temporary employees from unfair treatment and ensures that they

⁵⁵⁰ S198A(4) of the *LRA* of 1995.

⁵⁵¹ S198(4F) of the *LRA* of 1995.

⁵⁵² *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, A Report prepared for the Department of Labour and the Presidency* 41. Refer to paragraph 4.3.3.

⁵⁵³ Refer to paragraph 5.4.2.

⁵⁵⁴ Refer to paragraph 5.4.2.

receive the same pay, benefits and conditions that are afforded to permanent employees.⁵⁵⁵

c) Clarity should be given as to the meaning of the ‘deeming’ provision regarding the status of the client as the employer

As highlighted in the earlier chapters, the interpretation of the ‘deeming’ provision gives rise to a number of uncertainties.⁵⁵⁶ It is recommended that the *LRA* should be clear as to what happens to the original commercial contract between the TES and the client and the employment contract between the TES and the employee when the client is ‘deemed’ to be the employer.⁵⁵⁷ It is recommended that the legislature should provide clarity as to whether the TES remains the true employer and merely shares employer duties with the client, the client becomes the sole employer or that they become joint employers of the employee.⁵⁵⁸ It is recommended that the client should be regarded as the employer only for the purposes of the *LRA* of 1995, and only when the circumstances do not comply with section 198A(1). It is argued that Van Eck,⁵⁵⁹ Aletter⁵⁶⁰ and Nkhumise’s⁵⁶¹ assertions that section 198A(3) does not indicate neither does it suggest that the client steps into the shoes of the TES are correct.⁵⁶² It is contended that section 198A(3) of the *LRA* shows no indication that the legislature intended otherwise.⁵⁶³ It is argued that Venter⁵⁶⁴ and Grogan’s⁵⁶⁵ assertions that the client is the employer for the name’s sake and will not considered the true employer should be considered as the most viable interpretation. Therefore, the client will only receive employer status and will be awarded certain employer obligations for purposes of section 198A(3).⁵⁶⁶ This also provides legal certainty taking into consideration the complications surrounding the triangular employment relationship. This will provide clarity when determining who will be liable for unfair dismissals and the power to dismiss the employee between the TES and the client.

⁵⁵⁵ Gangmasters Licensing Authority 2016 <http://www.gla.gov.uk>.

⁵⁵⁶ Refer to paragraph 4.3.5.

⁵⁵⁷ Harvey 2011 *SALJ* 100.

⁵⁵⁸ Aletter and Van Eck 2016 *SA Merc LJ* 294.

⁵⁵⁹ Van Eck 2013 *De Jure* 606; Van Eck and Aletter 2016 *SA Merc LJ* 295.

⁵⁶⁰ Van Eck and Aletter 2016 *SA Merc LJ* 295.

⁵⁶¹ Nkhumise 2016 *Law, Democracy and Development* 124.

⁵⁶² Van Eck 2013 *De Jure* 606.

⁵⁶³ Refer to paragraph 4.3.5.

⁵⁶⁴ Venter 2015 *Without Prejudice* 25.

⁵⁶⁵ Grogan 2014 *ELJ* 2.

⁵⁶⁶ Refer to paragraph 4.3.5.

- d) *The legislature should set a sectoral determination which stipulates the national minimum wage to the benefit of temporary employees*

It is recommended that a sectoral determination which sets the minimum wage for temporary employees should be published. South Africa can learn lessons from the UK which has a national minimum wage for agency workers for all the time that they would have worked for the client.⁵⁶⁷ It is submitted that establishing a national minimum wage provides legal certainty and in turn curbs the problem of temporary employees being the lowest-paid employees in the labour market. It will be easier to identify those unscrupulous employers who exploit vulnerable employees by paying them meagre incomes that fall below the minimum wage.

- e) *Clarity should be given to the meaning of the term 'on the whole not less favourably'*

It is uncertain as to what the term '*on the whole not less favourably*' entails and how much freedom is granted to clients to provide *some* level of different terms and conditions of employment.⁵⁶⁸ It is argued that it is not enough to infer that the term '*on the whole not less favourably*' should be interpreted in the context of section 197 which deals with transfers of business.⁵⁶⁹ For purposes of clarity and legal certainty, it is recommended that the section 198 of the *LRA* must provide an express provision that clearly elaborates on what the term '*on the whole not less favourably*' entails and the scope of its application regarding terms and conditions of employment of temporary employees. It is also recommended that the *LRA* should extend its scope of coverage to protect those employees who are not employees of the client before it is deemed to be the employer. In this regard, South Africa could adopt the UK approach which provides temporary employees some level of protection despite how long they have worked at the client.⁵⁷⁰ South Africa could also introduce day one rights whereby temporary employees are entitled to from the first day of commencement of their assignment and rights that can be realised progressively after three months.⁵⁷¹ This protects vulnerable temporary employees by ensuring that they are not treated less favourably than permanent

⁵⁶⁷ Refer to paragraph 5.4.5.

⁵⁶⁸ Refer to paragraph 4.3.6.

⁵⁶⁹ Cliffe Dekker Hofmeyr 2014 *Employment Alert* 3.

⁵⁷⁰ Refer to paragraph 5.4.5.

⁵⁷¹ Refer to paragraph 5.4.5.

employees and that they receive some level of protection notwithstanding how long they have worked at the client.

f) Disguised employment should be prohibited in terms of the LRA

As mentioned earlier in the previous chapters, the *Labour Relations Amendment Bill* attempted to redress the use of disguised employment by labour brokers and clients as a way to circumvent their obligations.⁵⁷² However, the provision was not included in the final *LRA*. It is recommended that the *LRA* must provide an express provision that out rightly prohibits the occurrence of disguised employment to protect temporary employees from exploitation by both labour brokers and clients. It is suggested that the *LRA* could then prohibit such parties from ever engaging in triangular employment relationships. This will serve as a deterrent to those labour brokers and client that exercise such despicable practices.

g) Measures should be adopted to ensure job security of temporary employees

It is recommended that the *LRA* should provide an express provision that out-rightly prohibits the use of illegitimate automatic termination clauses.⁵⁷³ Although the UK legislation does not provide a viable solution regarding job security to a certain extent, South Africa can adopt the UK's approach which prohibits labour brokers from preventing temporary employees from taking permanent jobs at the client's workplace.⁵⁷⁴ It submitted that this will alleviate the issue of lack of job security of temporary employees of failing to secure employment. However, there is need for policy reform as far as job security of temporary employees is concerned.

h) Complaint and inspectorate be adopted

South Africa can learn lessons from the UK which has a complaint and inspectorate mechanism which is designed to raise awareness on the rights and duties of temporary employees.⁵⁷⁵ It is recommended that South Africa should also adopt complaint and

⁵⁷² S200B of the *Labour Relations Amendment Bill*, 2012.

⁵⁷³ Botes 2014 SA MERC LJ 126.

⁵⁷⁴ Refer to paragraph 5.4.8; Regulation 6 of the *Conduct of Employment Regulations* of 2003.

⁵⁷⁵ Refer to paragraph 5.5.

inspectorate mechanisms. In this way, temporary employees will fully become aware of their rights and they will be able to issue complaints in the event that they are exploited.

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