

Interpreting the 2015 amendments to the Labour Relations Act 66 of 1995 in light of the underlying purpose of South Africa's labour laws.

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Dedication

**This dissertation is dedicated to the Almighty God and my late mother Tendai Musvota.
Thank you God for everything andThanks Mom.**

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Table of Contents

Chapter 1	7
1. Title	7
1.2 Reasons for choosing the topic.....	7
1.3 Outline of the dissertation	9
1.31 Historical development on the purpose of labour law	9
1.32 Is the Labour Relations Act doing enough to make sure that the purpose of labour law is realised?.....	9
1.33 How best can these Amendments be interpreted to ensure that they afford the much needed protection?.....	9
CHAPTER 2	11
2. What Is the Purpose of labour law?.....	11
2.1 Protective View of Labour Law	12
2.2 Market View	12
2.3 Otto Kahn-Freund’s View.....	13
2.4 Paul Benjamin’s View.....	15
2.5 International perspective	17
2.6 The importance of different socio-economic eras on the purpose of labour law.....	19
2.7 Fordism Era.....	19
2.8 A critical analysis of what might have led Otto Khan-Freund to adopt the protective view	20
2.9 Protective View as subject to the Market View.....	21
2.10 The proposed approach when establishing the purpose of labour law	22
2.11 A brief discussion of the South African Labour Market.....	23
2.12 Effects of the Constitution on Labour legislation.....	25
2.13 Courts’ approach to the purpose of labour law in South Africa	26
2.13.1 Kyle v Commission for Conciliation Mediation and Arbitration and Others.....	26
2.13.2 Discovery Health v Commission for Conciliation, Mediation and Arbitration & Others... ..	29
2.13.3 Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.....	31
2.14 Otto Kahn-Freund’s view on the role played by the courts in labour law	32
2.15 Courts’ approach to the purpose of labour law in other jurisdictions	33
2.16 Conclusion	35
CHAPTER 3	37
3. Does the LRA align with this purpose?.....	37
3.1 Brief History of South African labour law	37
3.2 Non-standard workers.....	43
3.3 Temporary Employment Services	44

3.31 Resistance against TESS	44
3.32 Problems associated with TESS (Pre-Amendments)	45
3.4 An analysis of whether or not the LRA amendments managed to respond to the above mentioned problems.....	49
3.5 Conclusion	57
Chapter 4	58
4. Proposed Manner in which the Amendments should be interpreted	58
4.1 Literal v Purposive Approach.....	59
4.2 Purposive Approach	60
4.3 Influence of the Constitution on the interpretation of labour law.....	63
4.4 Application of section 3 (b) of the LRA	68
4.5 How the problematic provisions of the LRA amendments should be interpreted.....	68
4.6 Conclusion	72
Chapter 5	74

Chapter 1

1. Title

Interpreting the 2015 amendments to the Labour Relations Act 66 of 1995 in light of the underlying purpose of South Africa's labour laws.

1.2 Reasons for choosing the topic

“The relationship between an employer and isolated employee or worker is typically a relationship between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission; in its operation it is a condition of subordination, however much submission and subordination may be concealed by that indispensable figment of legal mind known as the contract of employment”.¹

The above quote represents what was and still is regarded by many as the purpose of labour law. It is from this understanding that it has become accepted that the purpose of labour law is to maintain a balance of power between the employer and the employee. The Constitutional Court in the case of *Sidumo & Another v Rustenburg Platinum Mines Ltd & others*², described the above quote as the ‘famous dictum’ by Otto Kahn-Freund.³ This dictum has traditionally articulated the purpose of labour law; however, the new world of work is presenting many challenges to this conception of labour law.

It seems, however, that our courts have on many occasions upheld the notion that the purpose of labour law is to protect vulnerable workers, thus achieving equality in the employer worker relationship. In the case of *National Entitled Worker's Union v CCMA*⁴, the court stated that the protection against unfair contracts of employment is based on the fact that employers enjoy greater social and economic power than that individuals workers have.⁵ The court further stated that this is the reason why legislation not only in South Africa but also in many countries in the world makes provision for the protection of employees against unfair or unjustified dismissal but provides no protection for employers against unfair resignations or termination of contracts of employment against workers.⁶ In its conclusion the court

¹ Davis P and Freedland M Kahn-Freund's Labour and the Law (1983: 12).

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd* supra at para 72.

⁴ *National Entitled Worker's Union v CCMA* (2007) 28 ILJ 1223 (LAC).

⁵ *National Entitled Worker's Union v CCMA* supra at para 21.

⁶ Ibid.

mentioned that if the legislation sought by NEWU was to be enacted the employee position would be weakened further and such legislation would be a step backward in the field of labour relations and employment law in our country.⁷ This case clearly illustrates how our courts have embraced this traditional purpose of labour law.

However, a question arises as to whether such judgments should be interpreted to mean that protection of employees to the exclusion of all other is the sole purpose of labour law. The question is whether Freund's dictum still has relevance today, or whether labour law ought to be searching for a new purpose? This is where the other theory on labour law comes into play namely the market view, which is based on the principle that market forces are preferable to government intervention in the attainment of economic growth and spirit.⁸

Thus, the aim this dissertation is to establish what the purpose of labour law is and thereafter determine whether or not the Labour Relations Act 66 of 1995 (LRA) is doing enough to make sure that such purpose is realised. It is important to note that this paper is only limited to the purpose of labour law and the application of the LRA as far as non-standard workers (particularly temporary employment services) are concerned. If the purpose of labour law is established it will be easier for the legislator to focus the developments of the LRA in line with the desired purpose. Furthermore, an understanding of the purpose of labour law, makes the job of the courts much easier when it comes to the interpretation of such provisions. In doing so the non-standard workers will be protected from some of the difficulties which they are currently facing in the workplace.

In most circumstances non-standard workers are left alone to grapple with all the difficulties in the workplace without any protection. What is the purpose of labour law if such vulnerable workers are unable to get protection from the law? The answers to these problems are not of mere academic importance, the plights that non-standard workers face affects South Africa negatively as it always leads to illegal strikes and in most circumstances abuse of such workers.

While the question of this dissertation is only limited to the Labour Relations Act to the exclusion of other Acts, it is important to note that this part of enquiry is the one that has compelled the recent amendments in the Labour Relations Act. Therefore, it the one in most

⁷ *National Entitled Worker's Union v CCMA* supra at para 22.

⁸ Creighton WB and Stewart A *Labour Law: An Introduction* (2000:2-3).

need of explication. The other Acts, however, will only be discussed in so far as they relate to specific provisions of the Labour Relations Act which shall later be analysed in this paper.

1.3 Outline of the dissertation

1.31 Historical development on the purpose of labour law

This paper will first examine the origin and development of the purpose of labour law. The point of departure will be the famous dictum by Otto Kahn-Freund which has traditionally articulated the purpose of labour law. The paper will analyse the market view, and how the ever changing world of work has affected the traditionally accepted purpose of labour law. South African cases which assisted in shedding some light into the purpose of labour law shall be analysed in detail. Furthermore, foreign case law such as UK and Australian case law will be briefly discussed for the purpose of bringing some clarity and guidelines. This comparative analysis will assist in determining how the courts in other jurisdictions have dealt with the question of the purpose of labour law. The possibility might be that there is no single purpose of labour law, but rather the purpose is broad and encompasses many aspects, however, this is what this section will try to enquire.

1.32 Is the Labour Relations Act doing enough to make sure that the purpose of labour law is realised?

Having established the purpose of labour law, the third part of this dissertation will focus on the analysis of the recently introduced amendments to the LRA (those which apply only to temporary employment services). It has been said that much of these amendments are aimed at protecting non-standard employees or vulnerable workers.⁹ However, in reality some parts of the amendments are couched in terms which brings a lot of confusion on how they should be interpreted.¹⁰ The amendments also provide for exclusionary provisions which are very controversial.¹¹ This raises so many questions as to whether by excluding other parties, is the LRA doing enough to realise the purpose of labour law? This paper will also try and establish what might have been the rationale behind these exclusions.

1.33 How best can these Amendments be interpreted to ensure that they afford the much needed protection?

Putting aside these exclusions, are the provisions in the LRA doing enough to protect these vulnerable workers and how best should these provisions be interpreted so as to ensure that the purpose of labour law is well-maintained at all times. All these questions will be

⁹ Labour Relations Act, s 198.

¹⁰ See discussion in Chapter 3 and 4.

¹¹ See discussion in Chapter 3 and 4.

discussed with the reference to the purpose of labour law. The conclusion of this discussion will have important implications for how future developments of the LRA must proceed and on how the provisions in the LRA must be interpreted to ensure that vulnerable workers are protected by the law.

The last Chapter will summarise the whole discussion of this dissertation and give recommendations on how the current problems faced by the non-standard workers can be alleviated through proper interpretation of the LRA.

CHAPTER 2

2. What Is the Purpose of labour law?

Introduction

One of the most controversial questions in labour law is to determine what the ultimate objectives of labour laws are? Different views and theories have been advanced in an attempt to resolve this somewhat easy but very difficult question. It remains very vital to answer the above posed question because understanding what the function or purpose of labour law is shapes the manner in which labour legislation is to be developed. Labour law responds to a number of challenges such as the preservation of institutions of collective bargaining, protection of rights conferred by section 23 of the Constitution and ensuring that the obligations incurred by South Africa as a member state of the International Labour Organisations (ILO) are given effect to.¹² On the other hand, it is important to note that misinterpretation of what the purpose of labour law is has dire consequences as it always leads to the enactment of legislation which is less than effective in achieving its goals.

Labour laws are one of the most far-reaching, crucial aspects of a democracy. Their enshrinement in law, and the mere fact of their existence acts as an often reliable safeguard to employment exploitations. It provides an outlet for employee grievances, should there be justifiable reasons for such grievances.

This part of the dissertation will endeavour to establish the purpose of labour law. The point of departure will be to distinguish between the two schools of thought on the purpose of labour law namely the protective view and the market view. This will be followed by an analysis of whether we should follow the market view or protective view. This paper argues that we should follow the market view because it allows flexibility and brings about equality in the employment relationship. However, this does not mean that our labour law should not have a protective element to it. It only means that labour law will only have such a protective function if the market forces¹³ so require.

¹² Labour Relations Act, s 1.

¹³ Market forces for the purposes of this dissertation refers to the needs in the labour markets i.e if the labour market establishes that there is growth of vulnerable workers then labour law must be developed to advance protection to such employees, however, if the labour market does not call for such protection then the law should not focus on such overprotection where it is not needed because such conduct usually leads to externalisation, casualization and economic inefficiencies.

2.1 Protective View of Labour Law

‘What is labour law for?’ is a question with a past.¹⁴ It is therefore essential to begin by briefly delineating its history. The traditional ‘idea’ of labour law is a combination of subject matter and purpose. The starting point of the founders of the discipline of labour law in the first part of the twentieth century was the inequality of the supplier and purchaser of labour power.¹⁵ Labour law was seen as the law of subordinate or dependent labour. The Marxist socialist tradition also recognised the imbalance between the owners of capital and their workers.¹⁶ Hepple argues that labour law was seen as providing institutions and process, mainly collective, which created a fair balance between employers and workers.¹⁷ He further argues that the focus was on subordinated workers within the employment relationship and not the wider aspects of labour market.¹⁸ Therefore, labour law during this time was serving a social rather than an economic function.

The primary role of labour law has been viewed traditionally as addressing the unequal bargaining power between employers and employees. This has been referred to by some academics as the Protective View of labour law.¹⁹ Accordingly, this view assumes that there is always an unequal relationship between the employer and the employee which inevitably affects the bargaining power of the employee. Therefore, according to the protective view the purpose of labour law is to ensure a balance or equality of bargaining power in this inherently unequal relationship.²⁰ In other words, the protective view suggests that the purpose of labour law should always be to protect vulnerable workers who are inferior to their employers in the work place.

2.2 Market View

It is important to note that the protective view is not the only school of thought there is when it comes to the function of labour law. There are two philosophies concerning the purpose or function of labour namely the protective view and the market view.²¹ It is, therefore, necessary at this point to briefly discuss the market view. The market view is based upon the

¹⁴ Davidov G and Langille J *The Idea of Labour Law* (2011: 1).

¹⁵ Hepple B (2003: 181) ‘Four Approaches to the Modernisation of Individual Employment Rights’ in Miagi M and Blainpain R ‘*Changing Industrial Relations and modernisation of labour law.*’

¹⁶ Ibid.

¹⁷ Ibid

¹⁸ Ibid.

¹⁹ Creighton WB and Stewart A op cit (n8) 2-3.

²⁰ Creighton WB and Stewart A op cit (n8) 3.

²¹ Ibid

principle that market forces are preferable to government intervention in the attainment of economic growth and prosperity.²² In other words, the supporters of the market view argue that market forces are better placed with regard to the attainment of economic growth and prosperity. Therefore, unwarranted state intervention in the employment relationship should be avoided at all costs. This view began to gain support in the early 1970's and has been associated with the likes of Thatcher and Reagan.²³ Creighton and Stewart argue that the purpose of labour law should not be to interfere with market forces but rather to work with them in order to ensure the well-being of the economy, thus, the well-being of employers and employees.²⁴ They further state that state intervention, for example in the form of overprotection for the employee, results in an artificial distortion of the market forces which in turn inevitably results in economic inefficiencies and loss of prosperity.²⁵

2.3 Otto Kahn-Freund's View

As indicated above different theories and views have been advanced over the years to try and resolve this question of the purpose of labour law. The most cited view is that of Professor Otto Kahn-Freund. His dictum is often regarded as the point of departure when one is dealing with the protective function of labour law. In this regard he states the following:

‘The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the ‘contract of employment’. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship’²⁶

Khan Freund is often regarded as the father of the protective view of labour law. Although he adhered to this protective function of labour law he was not blind to the fact that the law

²² Creighton WB and Stewart A op cit (n8) 6.

²³ Vettori MS *The Function of Labour Law* LLM (University of Pretoria) (2005) 26.

²⁴ Ibid.

²⁵ Creighton WB and Stewart A op cit (n8) 6.

²⁶ Kahn-Freund O *Labour and the Law* (1972:8).

played a secondary function when it comes to the protection of employees. He thus goes on to state the following:

“Where labour is weak and its strength or weakness depends largely on factors outside the control of the law—Acts of Parliament, however well-intentioned and well designed, can do something, but cannot do much to modify the power relation between labour and management. The law has important functions in labour relations but they are secondary if compared with the impact of the labour market (supply and demand) and, which is relevant here, with the spontaneous creation of a social power on the workers' side to balance that of management. Even the most efficient inspectors can do but little if the workers dare not complain to them about infringements of the legislation they are seeking to enforce.”²⁷

He further strengthens his argument by giving an example of the Truck Act²⁸ in which he argues that the Act only began to be effectively enforced when membership in trade unions gave the workers the strength to insist on the maintenance of legal standards.²⁹

On the other hand, Professor Vettori in her analysis of Khan-Freund's view reached a rather interesting and controversial conclusion. She argues that Khan-Freund actually supported the market view as the function of labour law.³⁰ She further argues that Khan-Freund believed that the major force behind the strength of the unions was the market not the law.³¹ She based her argument on the quotation from Khan-Freund's work in which he stated that that the function of labour law is to “regulate, to support and to restrain the power of management and the power of organised labour.”³² In her understanding this simply means that the function of labour law is not to protect the employee, but rather it is a “technique for the regulation of social power”³³ This view is cemented by the discussion we had above in which Khan-Freund argued that law plays a secondary function when it comes to the protection of employees.

²⁷ Davies P and Freedland M *op cit* (n1) 19.

²⁸The Truck Act 1940 (3 & 4 Geo 6 c 38).

²⁹ Davies P and Freedland M *op cit* (n1) 19.

³⁰ See Vettori MS *op cit* (n23) 45.

³¹ Vettori *op cit* (n23) 46.

³² *Ibid.*

³³ *Ibid.*

Having this knowledge that law plays a secondary role Khan-Freund placed immense emphasis on voluntarism and the mechanism of collective bargaining as a means of attaining equality.³⁴ This explains why there is a need to have strong trade unions because without them, labour law alone cannot achieve this equality between the parties. It is important to note that Khan-Freund was looking at collective bargaining within a specific historical context³⁵. However, with the current decline in trade union density the question arises as to whether legal regulation in and of itself, in the form of labour laws, can exclusively serve to protect workers particularly with the prevalence of weaker collective bargaining structures?

2.4 Paul Benjamin's View

Benjamin accepts that the traditional justifications for the purpose of labour law have focused on its role in remedying the imbalance of power within the employment relationship.³⁶ He, however, argues that recent scholarship focuses on the broad range of regulatory functions that labour law can play in the labour market which includes enhancing the employability of individual employees, enhancing access into the labour market by new entrants, and assisting working people during transitional phases in their working lives.³⁷

He argues that the challenges³⁸ facing labour law requires us to move and look beyond employment.³⁹ To this end, he gives an example of employees who are dismissed or who have resigned and they fall outside the scope of employees until they are rehired again.⁴⁰ The problem here lies in the fact that in the current labour market workers change their jobs and status more frequently than in the past. According to Benjamin, this raises the challenge of how labour law should provide security during the many periods of transition that workers are likely to experience in their working lives.⁴¹

³⁴ Davies P and Freedland M op cit (n1) 2.

³⁵ See the discussion of the Fordism era and Paul Benjamin's view below.

³⁶ Benjamin P (2012:21) 'Labour law beyond employment' in Rycroft AJ and Le Roux R *'Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges'*.

³⁷ Ibid.

³⁸ See Benjamin P op cit (n36) 22- 24, where he talks about the challenges currently facing labour law.

³⁹ Benjamin P op cit (n36) 25.

⁴⁰ Benjamin P op cit (n36) 32.

⁴¹ Ibid.

He goes on to say that the contemporary labour law should favour the broader notion of labour market security which underpins concepts such as ‘flexicurity’ in terms of which a range of social protections are provided to workers through public unemployment and re-training programmes.⁴² To cement his argument Benjamin refers to the report by the Commission of Inquiry into a Comprehensive Social Security System (Taylor Committee), which recommended that the notion of social protection has to be more comprehensive in order to minimise the negative effects of unemployment on social cohesion.⁴³ Its recommendations include the extension of social insurance in circumstances where it is administratively feasible, as well as social grants and indirect social protection through the facilitation of favourable labour market transitions.⁴⁴ It has been argued that this approach identifies the major life course transitions as those between education and employment; (unpaid) caring and employment; unemployment and employment; retirement and employment; and precarious and permanent employment.⁴⁵

There is no doubt that these approaches involve a wider concept of security than conventional labour legislation which has focused primarily on providing employment security for workers in the formal economy. Benjamin feels that this shift of focus ensures greater protection of a broad range of workers, a more encompassing form of protection both in formal and informal sectors. It still remains unanswered, however, if this will serve to address the main challenge of protecting vulnerable workers who live and work in a globalised world.

It is important to note that Benjamin does not deny the need to protect vulnerable workers as proposed by Khan-Freund, he however argues that the protective function as defined by Khan-Freund is not the only or sole purpose of labour law. He observes that much has changed since Khan-Freund’s statement was published, which has resulted in the creation of new forms of work and the rise of powerful and skilful employees who are able to demand employment on desired terms and to find another job if the employer does not comply.⁴⁶ That all employees are not in a position of inequality, so he argues, is not an argument against the need for labour law.⁴⁷ According to Benjamin, it simply raises the question of whether all

⁴² Ibid.

⁴³ Benjamin P op cit (n36) 32 -33.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Benjamin P op cit (n36) 22-23.

⁴⁷ Benjamin P op cit (n36) 23.

employees require the protection of all labour laws, and whether some categories of employees have sufficient bargaining power to do without all or some of its help.⁴⁸

Although Benjamin does not specifically states that he is a proponent of the market view, an analysis of his work clearly indicates that he does not support the fact that the protective function is the sole purpose of labour law. Benjamin states that the main object of labour law is not always the pursuit of equality. To this end he gives reference to the South African history which he says provides an even more unambiguous example that the purpose of labour law is not always the pursuit of equality (particularly during the 1950s when the purpose of labour law was political marginalisation and profitable exploitation).⁴⁹ Taking into account the two theories on the purpose of labour law as discussed above it seems logical to conclude that Paul Benjamin falls on the side of the markets view.

2.5 International perspective

It is also important to understand what the purpose of labour law is from an international perspective. Such an understanding is very important because section 233 of the Constitution provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”⁵⁰ Therefore, an understanding of the purpose of labour law at global level is an essential tool in assisting the courts in their interpretation of labour law legislation in South Africa.

The fundamental goal of the ILO is the achievement of decent and productive work for both women and men in conditions of freedom, equity, security and human dignity.⁵¹ Its four strategic objectives are to promote rights at work, encourage decent employment opportunities, enhance social protection and enhancing dialogue in handling work-related issues.⁵²

⁴⁸ Ibid.

⁴⁹ Benjamin P op cit (n36) 23.

⁵⁰The Constitution of the Republic of South Africa, s 233.

⁵¹ International Labour Organisation ‘The ILO at a glance’ available at <http://www.ilo.org/public/english/download/glance.pdf> (accessed June 2015).

⁵² Ibid.

As mentioned above, social protection is one of the four strategic objectives of the Decent Work Agenda that define the core work of the ILO.⁵³ The concept of decent work is based on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in community, and economic growth that expands opportunities for productive jobs and employment.⁵⁴

According to the ILO, "Decent Work" involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.⁵⁵ It aims to promote decent work for all because work is central to people's well-being. Since its creation in 1919, ILO has actively promoted policies and provided its Member States with tools and assistance aimed at improving and expanding the coverage of social protection to all groups in society and to improving working conditions and safety at work.⁵⁶

The ILO has set three objectives reflecting three major dimensions of social protection namely: (i) extending the coverage and effectiveness of social security schemes (ii) promoting labour protection, which comprises decent conditions of work, including wages, working time and occupational safety and health, essential components of decent work and (iii) working through dedicated programmes and activities to protect such vulnerable groups as migrant workers and their families; and workers in the informal economy.⁵⁷ From the above it is clear that international standards set by the ILO to a certain extent promote the protective function of labour law.

The above is a clear indication that our international law requires that national legislation must protect vulnerable employees and South Africa has an obligation as a member of the

⁵³ International Labour Organisation 'Social Protection' available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm> (accessed June 2015).

⁵⁴ International Labour Organisation 'Decent Work Agenda' available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> (accessed June 2015).

⁵⁵ International Labour Organisation 'Decent Work Agenda' available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm> (accessed June 2015).

⁵⁶ Ibid.

⁵⁷ Ibid.

ILO to give effect to that. Furthermore, South Africa has a constitutional mandate to ensure that an interpretation which is consistent with international law is followed rather than the one which is not.⁵⁸ This complements the approach which our courts have been following as shall be indicated in the judgements to be discussed later in this chapter.

Reverting back to the protective view, since reference is often given to Kahn-Freund's famous dictum when one is dealing with the protective function of labour law, it seems to me necessary to understand the circumstances under which Kahn-Freund wrote this famous dictum. I believe that such an understanding will not only be instrumental in grasping why he wrote that statement but it will also be of great significance in helping our courts to understand when and where the dictum should be applied. On that note, an understanding of the circumstances under which the statement was written will allow us to determine whether there has been any changes in the nature of employment relationship from the time the statement was written up to now, and if there are any such changes those changes must indeed be taken into account when trying to establish the purpose of labour law.

2.6 The importance of different socio-economic eras on the purpose of labour law

Vettori argues that insight into the different socio-economic eras of mankind demonstrates that the character of work alters the organisation of society.⁵⁹ She further argues that such organisation of society will determine what labour laws (if any) will result.⁶⁰ It is, therefore, necessary in the present dissertation to establish and understand the socio-economic conditions which prevailed during Kahn-Freund's time.

2.7 Fordism Era

It is clear that his statement was written during the Fordism era which span from approximately 1950 to 1980.⁶¹ The term 'Fordism' is used to describe both an epoch and a form of production that dominated that epoch.⁶² During the early twentieth century, a series

⁵⁸ The Constitution of the Republic of South Africa, s 233.

⁵⁹ Vettori MS op cit (n23) 27.

⁶⁰ Ibid.

⁶¹ Jessop B (1992: 43-47) 'Fordism and post-Fordism: a critical reformulation', in Scott AL and Storper MJ Pathways to Regionalism and Industrial Development.

⁶² Farnham D Employee Relations in Context (2000: 133).

of innovation in manufacturing led to large scale mass production of commodities, using highly specialised machinery, extensive division of labour and assembly line process. Labour was highly fragmented generally semi-skilled or unskilled, and located primarily in factories.⁶³ Taylor argued that Fordism was also associated with scientific management.⁶⁴ He stated “where employers adopt a scientific approach to production, they could maximise productivity, output and efficiency and this entailed separation of planning, organising and controlling from activities of executing and producing. It was, therefore, the job of the management to plan production scientifically, including work process and the job of workers to carry out the work assigned to them.”⁶⁵ This resulted in the rise of an ‘expert’ managerial group demanding managerial privileges and the right to manage within the workplace.⁶⁶

It is important to note that in the Fordism model, workers did not have the essential tools they had in the preceding handicraft system of production, namely their skill, their wisdom, their knowledge and their experience. Prior to Fordism, workers had been able to control the production cycle and the technology. One of the main reasons why Fordism became popular was that employers decided to react against such a situation. Unions controlled the labour force through the closed shop system: to hire new workers, one had to go through the unions. The de-qualifying inherent in the Fordism approach meant a change in the workers’ bargaining power: they lost their skills and with the introduction of Fordism they lost their bargaining power.⁶⁷

2.8 A critical analysis of what might have led Otto Kahn-Freund to adopt the protective view

Looking at the circumstances under which the dictum was written, Kahn-Freund was, therefore, justified in reaching a conclusion that the purpose of labour law should be to protect vulnerable workers. This is so because the Fordism era had the effect of weakening the workers’ bargaining power. As a result, there was need to protect these workers from the incipient powerful employer.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Farnham D op cit (n62) 134.

⁶⁷ Brown DL and Swanson LE *Challenges for Rural America in the Twenty-First Century* (2010:157).

However, in determining which approach we should follow between the protective view and the market view we should ask ourselves the question whether or not Kahn-Freund had the market view in mind when he wrote this statement. Indeed, the market view does not deny the significance or need for the protection of employees. However, the need for such protection of employees must arise as a result of the market forces. As mentioned above the Fordism era required the protection of employees due to the fact that they had lost their bargaining powers, thus, becoming more and more inferior to their employers. Therefore, one can logically argue that Kahn-Freund's statement was influenced by the prevailing circumstances in the labour market at that time. Although his statement is the foundation of the protective view, this approach was as a result of the market forces, thus, it was informed by the market view. He was, therefore, justified at that time to have argued that the protective function was the main object of labour law.

This view is shared by Benjamin who argues that Khan-Freund's statement was a product of his time and place, taking into account the prevailing circumstances at the time in question.⁶⁸ Vettori strengthens this view even further when she argues that Khan-Freund actually supported the market view of the function of labour law because he believed that the major forces behind the strength of trade unions was the market (i.e. high employment rate) and not the law.⁶⁹ She further argues that although he may have adhered to the protective approach as the function of labour law, he was very aware of the limitations of the law.⁷⁰ Vettori went on to state that in the heyday of Fordism, with high rates of employment and trade tariffs protecting employers from competition, a protective approach could have been viable from an economic perspective.⁷¹ However, once the forces of the market alter the situation the argument that overprotection may result in economic inefficiencies come to the fore.

2.9 Protective View as subject to the Market View

It makes logical sense to understand the need for the protective function of labour law as subject to the market view. Should our courts enforce this protective function in circumstances where the market forces do not require such protection, this will inevitably

⁶⁸ Benjamin P op cit (n36) 23.

⁶⁹ Vettori MS op cit (n23) 46.

⁷⁰ Ibid.

⁷¹ Ibid.

lead to externalisation, as employers will try by all means to escape the hand of the law. Therefore, before our courts apply this protective function of labour law, it seems logical that they should first ask themselves questions as to whether such protection is required in the given circumstance, thus avoiding the overprotection of workers which may result in economic inefficiencies. Accordingly, the purpose of labour law should be to have both a social and economic function by taking into account interests of employees, as well as of employers in response to the needs of the market forces. However, it is important to note that this approach in itself does not do away with the human rights based approach to labour law which is informed by the Bill of Rights. What it does is that it balances both the interests of employers and employees by ensuring that both the economic and social factors affecting these parties are taken into account.

2.10 The proposed approach when establishing the purpose of labour law

When one is called upon to establish the purpose of labour law in South Africa, it also goes without saying that such a person should enquire as to whether the market forces require protection of employees before he or she reaches a conclusion that the protective view is sole purpose of labour law in South Africa. This kind of enquiry will bring about the much needed equality in the employment relationship without sacrificing the interests of the employer. It is important to note that ignoring interests of employers in the labour laws leads to the non-effectiveness of this legal-field. This is so because it leads to casualisation and externalisation (in the form of subcontracting and outsourcing) which are drivers of informality. All our labour laws should have an element of fairness, and such fairness require us to balance the interests of both the employer and the employee.

It is important to note that there has been a number of changes in the employment relationship ever since Kahn-Freund wrote his famous dictum. The labour market has in recent years seen the emergence of powerful workers with certain skills which allow them to bargain on equal footing with their employers. Thus, the time when all employees were regarded as inferior to their employers is well behind us. Although the Fordism era is behind us, that in itself does not give us a license to give a blind eye to any circumstances which might require the need for protecting employees. It is very much possible that the new world of work might have its own problems which requires the protection of employees. Therefore,

it is suggested that the test should at all times be whether or not the market forces require the protective function to come into play.

From the above argument, it is clear that the purpose of labour law is broad and the legislation should be shaped in accordance to the prevailing circumstances in the labour market. Therefore, I argue that the market view forms the bases of the purpose of labour law and the application of the protective function should be subject to the market view. Thus, for all purposes the protective function should only be considered if the market forces requires us to do so. Some academics have also shown their support for the market view. For instance Davies shares the same view when he states the following:

“The true function of labour law can be described as the preservation of the social and economic structures prevailing in society at any given moment by the confinement and containment of the basic conflict of interests inherent in the relationship between employer and employee.”⁷²

This clearly illustrates his support for the market view, because he cements the same point that the laws should be informed by the market forces.

2.11 A brief discussion of the South African Labour Market

As mentioned above, before we accept the protective function as part of the purpose of labour law it is significant that we understand our labour market. This is a process which requires one to enquire as to whether there is any such need for the protective function of labour law in the labour market at any given circumstance. It inevitably means that one has to have a thorough knowledge of the market. The knowledge of labour market information will enhance understanding of the operations of the market and therefore inform the direction in which the labour legislation should be shaped. It is not possible to articulate the purpose of labour law without regard to a specific context of time and place.

⁷² Davis DM (2002:160) ‘*Death of Labour Lawyer?*’ in Conaghan J, Fischl MR and Klare K ‘*Labour Law in an Era of Globalization*’.

The contemporary labour market has a number of employment relations which are distinct from the full-time employment relationship. These include temporary service employees, part time employees and employees on fixed term contracts⁷³. This group of workers is often referred to as non-standard workers. These workers are often paid for results rather than time and their vulnerability is linked in many instances to the absence of an employment relationship or the existence of a flimsy one.⁷⁴ It must be noted that most of these workers are unskilled or work in sectors with limited trade union organisation and limited coverage by collective bargaining, leaving them vulnerable to exploitation.⁷⁵

Much blame is placed on the effects of apartheid which has left many black men and women without the necessary skills which are required for one to have some kind of bargaining power in an employment relationship. On the other hand, there has been an influx of immigrants from the neighbouring countries such as Zimbabwe, Malawi, Mozambique, Somalia and other African countries. There is no official figure with regard to the number of immigrants working as non-standard workers. However, research indicates that the foreign immigrants have a higher probability of being employed in precarious activities.⁷⁶ One explanation which is often advanced for the exploitation of foreign migrants is their willingness to accept more precarious conditions, and sometimes use such precarious jobs as a stepping stone to the formal labour market.⁷⁷

There has been, without doubt, the growth of non-standard workers in South Africa. The Quarterly Labour Force Survey (QLFS), 1st Quarter 2015 indicates that the number of employees with a contract of a permanent nature decreased while the number of contracts with limited duration increased.⁷⁸ It further shows that there has been an increase in the number of non-standard workers in the past four successive quarters.⁷⁹

⁷³ Fourie ES 'Non-Standard Workers: The South African Context, International Law and Regulation by the European' (2008) 11 PER/PELJ 1.

⁷⁴ Ibid.

⁷⁵ Fourie ES op cit (n73) 2.

⁷⁶ Budlender D and Fauvelle-Aymar C 'Migration and employment in South Africa: Statistical and econometric analyses of internal and international migrants in Statistics South Africa's labour market data' (2014) African Centre for Migration and society: University of Witwatersrand 5.

⁷⁷ Budlender D and Fauvelle-Aymar C op cit (n76) 6.

⁷⁸ Statistics South Africa P0211 'Quarterly Labour Force Survey: Quarter 1, 2015' available at <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2015.pdf> (accessed June 2015).

⁷⁹ Ibid.

On the other hand, the rise of multinational companies and the emergence of giant firms with a worldwide business perspective has also caused a lot of challenges for trade unions in their bid to bargain on behalf of employees. It has been accepted that of great importance to any corporation is the relationship between management, its employees and their trade union representative and thus it is not astonishing that the internalisation of management through multinational corporations has had important consequences for industrial relations and trade unions strategies in general.⁸⁰ To a certain extent this has left a lot of employees, including non-standard workers in vulnerable positions.

Having such an understanding of our labour market in mind, we should now ask ourselves if the prevailing forces in our labour market require us to adopt the protective function as part of the purpose of labour law. It ranges from highly unlikely to non-existent that one will argue that the market forces in South Africa do not require us to adopt the protective function of labour law. The labour surveys as indicated above shows an increase in the number of non-standard employees, thus the legislation is for all purposes required to protect such employees. It can, therefore, be concluded that as it stands the markets forces in South Africa requires us to adopt the protective function as part of the purpose of labour law and the labour legislation must also focus its attention on addressing such problems. Thus, in South Africa the protective function of labour law should be regarded as one of the functions of labour law, although not the sole purpose of labour law.

2.12 Effects of the Constitution on Labour legislation.

The introduction of the interim Constitution in 1994 had a profound effect on the labour legislation in South Africa. The Constitution required all pieces of legislation to be in line with it. This in itself meant that some changes were to be introduced to the labour legislation in South Africa, particularly the LRA. Furthermore, the Interim Constitution protected the rights of all people, including the workers' right to freedom association at the workplace.⁸¹ Section 27 of the Interim Constitution provided that everyone has the right to fair labour practise, and this included the right of employees to join and form trade unions.⁸²

⁸⁰ Blake D *The Multinational Corporation* (1972:35).

⁸¹ Interim Constitution of the Republic of South Africa, s 27.

⁸² Ibid.

It is important to note that the final Constitution also provides similar protection as the interim Constitution, and it also brought with it the Bill of Rights which is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The Bill of Rights also encompasses the right to fair labour practice which is very essential for the purposes of labour law.⁸³ The Constitution places an obligation on state to respect, protect, promote and fulfil in the Bill of Rights.⁸⁴ It is as a result of this Constitution that the LRA came into force. It is important to note that the existence of the Constitution also influences the manner in which judges have interpreted and still interpret some provisions of the Labour Relations Act.

2.13 Courts' approach to the purpose of labour law in South Africa

In South Africa the protective function of labour law seem to have been accepted by our courts in a number of cases as shall be illustrated in the cases to follow.

2.13.1 *Kylie v Commission for Conciliation Mediation and Arbitration and Others*

In the case of *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (Kylie).⁸⁵ The appellant was a sex worker who was employed in a massage parlour. She alleged that she was unfairly dismissed from her employment and referred her dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration. Before the arbitration commenced, the Commissioner held that the Commission did not have jurisdiction to arbitrate on an unfair dismissal in a case of this nature.⁸⁶ The appellant sought judicial review of this ruling in front of the South African Labour Court.

Labour Court

The Labour Court (LC) held that because sex work was illegal, the appellant's employment contract was void and thus unenforceable.⁸⁷ The Court held that a sex worker was not entitled to protection against unfair dismissal within the meaning of section 185(a) of the LRA

⁸³The Constitution of the Republic of South Africa, s 23.

⁸⁴ The Constitution of the Republic of South Africa, s 8.

⁸⁵ *Kylie v Commission for Conciliation Mediation and Arbitration* [2008] 9 BLLR 870 (LC).

⁸⁶ *Kylie v Commission for Conciliation Mediation and Arbitration* supra at para 1.

⁸⁷ *Kylie v Commission for Conciliation Mediation and Arbitration* supra at para 32.

because to provide such protection would be contrary to the common law principle, *ex turpi causa* that a court ought not to sanction or encourage illegal activities.⁸⁸

The Court held that although section 23 of the Constitution of South Africa provides that “everyone has the right to fair labour practices,” it did not protect a person engaged in illegal employment.⁸⁹ The court also held that if a court will not enforce a sex worker’s contractual right to fair procedure before dismissal on the grounds that the contract is void, it is difficult to conclude that the enforcement of a statutory right to a fair pre-dismissal procedure should not be treated the same way.⁹⁰ The learned judge further argued that if a court will not recognise a sex worker’s claim for damages for a material breach of his contract of employment with a brothel, why should a court or arbitrator recognise his claim for compensation for unfair dismissal grounded on that breach.⁹¹

Interestingly the learned judge made certain remarks in his judgement which cannot go unmentioned. He stated that the relationship between the Applicant and the Third Respondent is an employment one. But for the statutory prohibition, it would be an enforceable contract.⁹² The reasoning which one can draw from this statement is that in certain circumstances the courts are inclined to protect workers but are hindered by legislation, which clearly illustrates how the courts are always willing to give effect to the protective function of labour law.

The appellant lodged an appeal against this ruling to the Labour Appeal Court.

Labour Appeal Court

The Labour Appeal Court (LAC) came to a rather interesting conclusion which indicates how our courts have adopted the protective function of labour law. The LAC stated the following:

“as sex workers cannot be stripped of their right to be treated with dignity by their clients, it follows that, in their relationships namely with their employers the same protection should hold. Once it is recognised that there must be treated with dignity not only with their clients

⁸⁸ Ibid.

⁸⁹ *Kylie v Commission for Conciliation Mediation and Arbitration* supra at para 72.

⁹⁰ *Kylie v Commission for Conciliation Mediation and Arbitration* supra at para 91.

⁹¹ Ibid.

⁹² *Kylie v Commission for Conciliation Mediation and Arbitration* supra at para 56.

but their employers, section 23 of the Constitution, which, at its core, protects those in employment relationship, should find application.”⁹³

The court did not give a blind eye to the fact that this was a case of an illegal contract which is also against public policy.

The court noted that it would be against public policy to reinstate such ‘employees’ in their employ even if they were to show that such dismissal was unfair.⁹⁴ However, according to the learned judge;

“public policy does not constitute an absolute prohibition, to at least, some protection provided under the Labour Relations Act, a protection which can reduce their vulnerability, exploitation and erosion of their dignity. Monetary compensation for procedurally unfair dismissal has been treated as a *solatium* for the loss of her right to fair procedure. This kind of compensation is therefore independent of the loss of illegal employment in this case and would therefore appear to be applicable in appropriate case where the services rendered by an employee are classified as illegal.”⁹⁵

Although this judgement has been criticised by many academics, it is in my view a classical example of how far the courts will go in trying to give effect to the protective function of labour law. This crystal case of *Kylie* has successfully laid a foundation that all persons in an employment relationship, inclusive of those in the informal sector, should also have access to labour protective legislation. It offers a precedent that all those in employment relationship should be covered by labour law and enjoy all the benefits, including the protective function of labour law thereof. Some writers argue that this judgment has expanded the boundaries of labour law, such that our legislative authorities, courts and competent tribunals are now better positioned to devise creative responses towards extending labour protective legislation to those in desperate need.⁹⁶

⁹³ *Kylie v Commission for Conciliation Mediation and Arbitration* [2010] 7 BLLR 705 (LAC) at para 26.

⁹⁴ *Kylie v Commission for Conciliation Mediation and Arbitration* supra at para 52.

⁹⁵ See *Kylie v Commission for Conciliation Mediation and Arbitration* supra at para 52 – 53.

⁹⁶ See Rapatsa MJ and Matloga NS ‘Who Is (Should) Be Covered By Labour Law? Lessons from *Kyle v CCMA*’ (2014) 3 Journal of Business Management & Social Sciences Research (JBM&SSR) 112.

2.13.2 Discovery Health v Commission for Conciliation, Mediation and Arbitration & Others

In another case which was decided prior to the *Kyle* judgement, our courts also delivered another controversial judgment in the case of *Discovery Health v Commission for Conciliation, Mediation and Arbitration & others*.⁹⁷ In this particular case the LC was called upon to deal with a situation where the employer had employed Mr German Lanzetta, an Argentinean national, who was in South Africa on a temporary residence permit. Mr Lanzetta's employment with Discovery Health Ltd was terminated summarily on the 14th of January 2006 when the employer realized that he did not have a valid work permit.⁹⁸ Mr Lanzetta then referred an unfair dismissal claim to the CCMA which ruled that he was an employee in terms of the LRA.⁹⁹ The Commissioner agreed with Bosch's view that the concept of an employment relationship was an appropriate vehicle to extend the protections of the LRA to what Bosch terms 'unauthorised workers'. Accordingly, the commissioner concluded as follows:

“While it seems to me to be obvious that an employer cannot be required to continue the employment of an illegal foreigner or a foreigner whose specific work permit does not permit the employer to employ him that does not mean that the protections afforded to employees by the Act cannot apply to such foreigners prior to decisions being made in this regard.”¹⁰⁰

On this basis, the Commissioner ruled that the CCMA had jurisdiction to determine whether the Applicant had unfairly dismissed Lanzetta, and found further that Lanzetta had established the existence of a dismissal.¹⁰¹ This is a case in which one from the outset would have expected the court to dismiss the case because the complaint was an illegal immigrant trying to seek protection from the labour law legislation.

The LC on review, however, took a rather interesting stance and interpreted the word ‘employee’ broadly so as to include illegal immigrant workers within the confines of the protective net of LRA. The LC found that the contract of employment concluded by Discovery Health and Lanzetta was not invalid, despite the fact that Lanzetta did not have a valid work permit to work for Discovery Health.¹⁰² For this reason, Lanzetta was an

⁹⁷ *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration* [2008] 7 BLLR 633 (LC).

⁹⁸ *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration* supra at para 1-3.

⁹⁹ *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration* supra at para 4.

¹⁰⁰ *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration* supra at para 13.

¹⁰¹ *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration* supra at para 14.

¹⁰² *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration* supra at para 54.

‘employee’ as defined in s 213 of the LRA and entitled to refer the dispute concerning his unfair dismissal to the Commission for Conciliation, Mediation and Arbitration Court.¹⁰³ Furthermore the court stated that even if the contract concluded between Discovery Health and Lanzetta was invalid only because Discovery Health was not permitted to employ him under s 38(1) of the Immigration Act, Lanzetta was nonetheless an employee as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment.¹⁰⁴

These two cases of *Kylie* and *Discovery Health* have specifically been hand-picked because they dealt with situations where one from the outset would have expected the courts to dismiss the cases. Indeed, one would have anticipated that the court would not hear these cases on the bases that either the work being done is illegal, or the work concerned although not illegal by nature is alleged to be illegally performed. But what could have led these two courts to reach such conclusions? The most probable answer to this question is that the courts gave purposive interpretation to the provisions of both the Constitution and the LRA.¹⁰⁵ This purposive interpretation by our courts presupposes that the purpose of labour legislation is to protect vulnerable workers and it also serves as an indication that our judicial system has accepted this protective function as part of the purpose of labour law in South Africa. It is also crystal clear from the outcome of these cases that the courts interpreted the word ‘employee’ broadly so as to protect these vulnerable workers. By doing so the court managed to include these vulnerable workers within the protective net of the LRA, thus, giving effect to the protective function of labour law.

To cement the above argument, one can rely on the *Kylie* judgement. The court in this case referred to *National Education Health & Allied Workers Union v University of Cape Town (NEHAWU)*¹⁰⁶, in which the court held that the LRA was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated upon principles of social justice, equality and fairness.¹⁰⁷ In the *Kylie* decision it was argued that:

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ See the discussion on purposive interpretation in Chapter 4.

¹⁰⁶ see *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* 2003 (2) BCLR, the main issue in this case was whether upon the transfer of a business as a going concern, in the context of section 197, workers are automatically transferred to the new owner of the business as part of the transaction

¹⁰⁷ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* supra at para 33-40.

“If the purpose of the Labour Relations Act was to achieve these noble goals, then courts have to be at their most vigilant to safeguard those employees who are particularly vulnerable to exploitation in that they are inherently economically and socially weaker than their employers. This consideration applied with even greater force in the case of sex workers who are especially vulnerable class exposed to exploitation and abuse by a range of people with whom they interact, including their employers and clients.”¹⁰⁸

2.13.3 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*

Furthermore, the court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹⁰⁹ held that

“In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a core value of the Constitution which has been given effect to by the Labour Relations Act. This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterises employment in modern developing economies. The relationship between employer and an isolated employee and the main object of labour law is set out in the now famous dictum of Otto Kahn-Freund”.¹¹⁰

The court further stated that the LRA seek to redress the power imbalance between employees and employers. The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations.¹¹¹ This is another example among many other cases in our jurisdiction which shows that our courts have accepted the protective function as part of the purpose of labour law.

On the other hand, it is important to note that there has been an increase in the number of illegal immigrants from neighbouring countries such as Zimbabwe, Malawi and Mozambique into the South Africa labour markets.¹¹² This has led to large-scale evasion of laws around minimum wages and basic working conditions. Therefore, the move by the courts to give

¹⁰⁸ *Kylie v Commission for Conciliation Mediation and Arbitration* [2010] 7 BLLR 705 (LAC) at para 41.

¹⁰⁹ The case dealt with an unfair dismissal claim by Mr Sidumo who was employed by Rustenburg Platinum Mines. r Sidumo was employed to patrol the Mine’s high security facility where precious metals are separated from lower grade concentrate. He was dismissed for failing to apply established search procedures.

¹¹⁰ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 12 BLLR 1097 (CC) at para 72.

¹¹¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 12 BLLR 1097 (CC) at para 74.

¹¹² South African Immigrants available at <https://africacheck.org/reports/how-many-zimbabweans-live-in-south-africa-the-numbers-are-unreliable/> (accessed June 2015).

effect to the protective function of labour law should be celebrated rather than criticised. If labour rights are not afforded to illegal immigrants, more employers will prefer to employ an illegal immigrant for lower wages, longer working hours and the option of dismissal whenever the employer so desires. Therefore, it is clear from the three cases discussed above that our courts have embraced the protective function as part of the purpose of labour law in South Africa.

It is also important to note that whereas the *Kylie* case dealt with an informal sector job and this dissertation is focused on non-standard workers, both sectors have some important similarities because they are constituted with the most vulnerable workers in the workplace. Informal sector encompasses all jobs which are not recognized as normal income sources, and on which taxes are not paid.¹¹³ The term is sometimes used to refer to only illegal activity, such as an individual who earns wages but does not claim them on his or her income taxes, or a cruel situation where people are forced to work without pay.¹¹⁴ On the other hand, non-standard workers includes part time employees, employees on fixed term contracts and employees of temporary employment services. However, both sectors are characterised with the absence of job security, little or no legal protection, and lack of entitlement to fringe benefits. Since both categories consist of vulnerable workers there seem to be no logical reason why this judgment should not be applied *mutatis mutandis* in a case of a non-standard worker.

Nevertheless, it is important at this juncture to briefly visit other jurisdictions to try and establish how the courts have dealt with this question of the purpose of labour law. The purpose of this comparative analysis is to thoroughly report any similarities or differences in the manner in which these courts have dealt with this matter.

2.14 Otto Kahn-Freund's view on the role played by the courts in labour law

Kahn-Freund argues that in the formulation of the rules which regulate the relations between employers and workers the common law has played a minor role, thus, the courts had their share, but only a small share in their evolution.¹¹⁵ He further argues that;

¹¹³ Business Dictionary available at <http://www.businessdictionary.com/definition/informal-sector.html> (accessed June 2015).

¹¹⁴ Ibid.

¹¹⁵ Davies P and Freedland M op cit (n1) 29.

“...this is so because case law operates ex post; it does establish rules, but not before something has gone wrong. The normal function of a court is to lock the stable door after the first horse has bolted so as to keep the other horses in; normally it is only a statute that can protect the first horse. However, the courts have played (and continue to play) a most important role in interpreting statutes.”¹¹⁶

2.15 Courts’ approach to the purpose of labour law in other jurisdictions

It is scarcely surprising that in first world countries such as Britain so much of the regulation of the relationship between employer and worker took place outside the law and that what was regulated was biased in favour of employers of relatively high trust employees.¹¹⁷ Traditionally, it was accepted in British employment relations that, as far as terms and conditions of employment (the substantive issues) are concerned, the law may set a general framework but the details would be determined either by employers alone or after negotiation with trade unions.¹¹⁸ Indeed, in 1954, one academic lawyer was able to make the following comment: “There is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of (industrial) relations than in Great Britain and in which the law and legal profession have less to do with labour relations.”¹¹⁹

There has been, however, an indication of the change of attitude of the court since in the early 1970s. An example, is the celebrated judgement of *Williams v Compair Maxam*.¹²⁰ In this particular case Compair Maxam Ltd was losing business. Departmental managers picked teams of core staff who could be retained to keep the business viable. They chose on personal preference for what they thought would be good for the company, but the union was not consulted.¹²¹ Other employees were dismissed for redundancy and given money beyond statutory minima. Five workers claimed that their dismissal was unfair. The Tribunal dismissed the claims, saying that the managers’ preferences were a reasonable way of doing the job.¹²² This was appealed on grounds of perversity.

¹¹⁶ Ibid.

¹¹⁷ Rideout R ‘Lack of principles in labour law’ CPL Oxford Journals 431.

¹¹⁸ Ibid.

¹¹⁹ See Kahn-Freund O (1954:42), ‘Legal Framework’, in Flanders A and Clegg H ‘*The System of Industrial Relations in Great Britain*’.

¹²⁰ *Williams v Compair Maxam Ltd* [1982] ICR.

¹²¹ *Williams v Compair Maxam Ltd* [1982] ICR 156.

¹²² *Williams v Compair Maxam Ltd* supra.

In the appeal court Browne-Wilkinson J held the following;

“...there was an error of law by reaching a conclusion so perverse on the facts. The dismissal selection was unfair, the correct approach is to consider whether an industrial tribunal, properly directed in law and properly appreciating what is currently regarded as fair industrial practice, could have reached the decision reached by the majority of this tribunal. We have reached the conclusion that it could not.”¹²³

The implication of this judgment is that it has specifically led to effective judicial action against management devices aimed at nullifying employee protection. It is arguably one of the first cases which saw the British Courts moving towards the protective view of labour law. Furthermore, this judgement indicates how the courts interpreted the law with the view of protecting vulnerable employees, thus giving effect to the protective function of labour law.

In Australia, interestingly, the courts adopted this protective function of labour law way back before Professor Otto Kahn-Freund's time. In Australian labour law, the so-called *Harvester*¹²⁴ case from 1907 is perhaps the most iconic court decision in the history of the field. Many Australian writers patriotic to their legal system boast that the Harvest case was the forerunner to Kahn Freund's later and more internationally recognised articulation of the protective purpose of labour law.¹²⁵ In this particular case, the second President of the Australian Court of Conciliation and Arbitration, Justice H.B. Higgins observed that the provisions for fair and reasonable remuneration in the relevant legislation ‘must be meant to secure to employees something which they cannot get by the ordinary system of individual bargaining with employers’, which Higgins referred to as “the higgling of the market” for labour’. Instead, fair and reasonable remuneration must have as its starting point ‘the cost of living as a civilised being’.¹²⁶ John Howe argues that the *Harvester* case is famous for setting

¹²³ Ibid.

¹²⁴ *Ex Parte HV McKay (Harvester Case)* (1907) 2 Commonwealth Arbitration Reports 1. The case is known as the *Harvester* case because HV McKay was the owner of the Sunshine Harvester Works in Melbourne, Australia, a manufacturer of combine harvesters and other agricultural machinery.

¹²⁵ Howe J ‘The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work’ (2010) Centre for Employment and Labour Relations Law, The University of Melbourne 4.

¹²⁶ *Ex Parte HV McKay* (1907) 2 Commonwealth Arbitration Reports 1.

a precedent that legal minimum wages in Australia were to be a 'living wage', and confirming that the underlying purpose of Australian labour law is the protection of employees.¹²⁷

The above mentioned judgements clearly illustrate that judges in these different jurisdictions have played a major role in giving effect to the protective function of labour law. In South Africa, for instance, the courts have been at the fore front of preserving and interpreting legislation so as to give effect to the protective function of labour law. In many circumstances the courts have given purposive interpretation to the labour law legislation with the view that the purpose of labour law is to protect workers who are in a weaker position than their employers. Looking at the South African cases discussed above there is no doubt that the protective function of labour is regarded as part of the purpose of labour law in South Africa.

2.16 Conclusion

Taking into account the arguments presented in this chapter it can be concluded that the protective function should form part of the purpose of labour law in South Africa, however, it is not entirely true to say that the protective function is the sole purpose of labour law in South Africa. There must be some kind of equality between the employer and the worker. This means that the courts in their interpretation of labour law should strike a balance between the interests of both the employer and the worker. In other words, it means that the courts should not emphasise on one party's rights if such conduct can lead to inequality. Without doubt, the stance adopted by our courts which is to give effect to the protective function of labour law, has its advantages. However, it also has its own disadvantages if applied blindly because too much emphasises on purposive interpretation may lead to uncertainty as to the meaning of legislative provisions, which is bad for business. Furthermore, it seems this kind of interpretation has in many circumstances forced the courts to give a blind eye to other important aspects such as the costs of business, which in several situations end up causing 'externalisation'¹²⁸. While this dissertation shall only deal with the protective function of labour law, it is important to keep in mind that the purpose of labour

¹²⁷ Howe J op cit (n82) 5.

¹²⁸"Externalization" is described as the process of economic restructuring in terms of which employment is regulated by a commercial contract rather than by a contract of employment (Benjamin IJ1579).

law is broad, thus the protective function is part of the purpose although not the sole purpose of labour law.

CHAPTER 3

3. Does the LRA align with this purpose?

Introductory remark

In the previous chapter we established that the purpose of labour law should be to have both a social and economic function by taking into account interests of employees, as well as of employers in response to the needs of the market forces. Furthermore, it was argued that our courts should not apply the protective function of labour law in circumstances where such protection is not required by the market forces. After researching the prevailing circumstances in the South African labour market we established that the protective function should form part of the purpose of labour law in South Africa. It is, therefore, necessary in this chapter to determine whether the 1995 LRA align with this purpose, and if so, how so? It has been argued that the crisis of labour law is not the result of any change in our goals, but rather a mismatch between some labour laws and these goals, created by changing realities.¹²⁹ Thus, undoubtedly there is a need to re-match labour law with its purpose.

The process of determining whether or not the LRA align with the purpose of labour law requires one to briefly discuss the historical events that led to the enactment of the current LRA. The purpose of this historical discussion is to illustrate how legislation was always promulgated to react and concede to the socio-economic forces of the different times in history. In other words, these historical events will try and illustrate that our labour law legislation was and will always be enacted as a result of the social and economic changes, thus giving effect to the market view.

3.1 Brief History of South African labour law

The early developmental stages of South African labour relations were characterised by gross racial disparities, with the system being designed exclusively for the protection of the interests of white workers from the encroaching threat of cheaper and often better skilled black labour.¹³⁰ Many historians agree that the rise of formal labour relations in South Africa was as a result of the discovery of gold and consequent growth of the mining industry. Due to

¹²⁹ Davidov G and Langille J op cit (n14) 179.

¹³⁰ Venter R *Labour Relations in South Africa* (2003:38).

the fact that the working class in South Africa was divided on racial lines, the then government was adamant to protect white workers on the basis on their skin. As a result, in 1911 the government introduced the Mines and Works Act¹³¹ which ensured that skilled and semi-skilled work was reserved for white workers only. ¹³²Furthermore, it ensured that the white workers were paid more than black workers for doing the same work. Certificates of competency were now required before workers were allowed to perform certain tasks, and these certificates were not issued to black miners.¹³³

Although the 1911 Act protected skilled positions to white workers, the unskilled labour was substituted by black workers simply because it was cheaper.¹³⁴ The position was made worse by the crash in gold price in 1921 which forced mines to take far-reaching measures to reduce costs. A large number of white workers were laid off and where possible substituted for cheaper black workers.¹³⁵ This led to one of the most violent strike in South Africa's history known as the Rand Rebellion or the Red Revolt.¹³⁶ The strike was at large organised by white communists, and it included about twenty thousand workers who came out against mining capital.¹³⁷

As expected the government responded to this occurrence with an Act of parliament, namely the Industrial Coalition Act of 1924.¹³⁸ The Act managed to bring about the much needed formal conciliation mechanism, but nonetheless still retaining the extensive and rigorous pre-strike requirements.¹³⁹ However, the most far-reaching consequence of the Act was that black workers were formally excluded from the definition of an employee.¹⁴⁰ This inevitably means that black workers were disqualified from union membership and the conciliatory process.¹⁴¹

In 1947 there was an attempt by the United Party to include black workers in the South African labour legislation. They did so through the tabling of the Industrial Conciliation

¹³¹ Mines and Works Act 12 of 1911.

¹³² Venter R op cit (n130) 36.

¹³³ Ibid.

¹³⁴ Venter R op cit (n130) 37.

¹³⁵ Venter R op cit (n130) 37.

¹³⁶ Ibid.

¹³⁷ Venter R op cit (n130) 38.

¹³⁸ Industrial Coalition Act 11 of 1924.

¹³⁹ Venter R op cit (n130) 39.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

(Natives) Bill which sought to give black workers in the manufacturing industry similar recognition to that of white workers.¹⁴² However, this was not achieved because the National Party came to power in 1948, and with them they brought the apartheid policy which intensified racial divisions in industrial relations.¹⁴³

The period of 1950 to 1970 (known as the Nationalist era) is regarded as one of the darkest period of South African history.¹⁴⁴ A number of Acts were passed during this period which sought to regulate as to where and the conditions under which the blacks were permitted to sell their labour. It was, therefore, unblemished that the political system was linked to employment relations system.¹⁴⁵ Some of the prominent Acts which were promulgated at this time are namely the Industrial Conciliation Act of 1956¹⁴⁶, Native Consolidation Act¹⁴⁷, Native Act of 1952¹⁴⁸ and the Wage Act.¹⁴⁹ The effect is that this legislation gave rise to a dual system of employment relations and integrated the principle of segregation in labour situation.¹⁵⁰ This created a considerable amount of problems, which led to unrest, stay away actions, boycotts, riots and defiant campaigns. This unrest continued up until 1960 and it culminated to the Sharpeville massacre and the banning of the African National Congress and the Pan African Congress.

The 1970s was another decade filled with violent protest action. One of the biggest strikes of the decade took place in Durban in 1973. This strike involved sixty-one thousand black workers from the textile and engineering industry.¹⁵¹ As a result of these demonstrations and the pressure from the international community the government was forced to take action so as to avoid the continuation of this situation. It was clear that there was need for the then South African government to move towards what one would call 'the deracialisation of the South African labour relations'. Against this backdrop of the social-political hurly-burlies of the 1970s the government appointed the Wiehahn Commission to inquire into labour legislation.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Venter R (n130) 40.

¹⁴⁶ Industrial Conciliation Act 28 of 1956.

¹⁴⁷ Native Consolidation Act 25 of 1945.

¹⁴⁸ Native Act 67 of 1952.

¹⁴⁹ Wage Act 5 of 1957.

¹⁵⁰ Bekker H The effect of labour legislation on entrepreneurship and job creation *Magister Commercii* (University of Johannesburg) (2002) 45.

¹⁵¹ Venter R (n130) 41.

The Commission was instructed to investigate the inadequacies of the existing labour legislative structures and propose possible remedies.¹⁵² The Commission proposed:

- The amendment of the Industrial Conciliation Act to now include black workers within the definition of employee and thus include them in the collective bargaining framework;
- The creation of an industrial court for specialised labour disputes to replace the industrial tribunal;
- The formation of the national manpower Commission to advise the department of labour, and
- The encouragement of training in the private sector through tax incentives and concessions.¹⁵³

Without doubt the most important advice from the Commission was to include black workers in the definition of an employee because this inevitably meant that they would be granted freedom of association and black unions would be allowed to be registered.¹⁵⁴ In response to this advice the Industrial Conciliation Amendment Act 94 of 1979 was passed. The Act included in its definition of an employee, only those who were entitled to legal residence within the boundaries of the Republic.¹⁵⁵ The unavoidable consequence of this was that migrant workers were excluded from the definition of an employee.

Regardless of its limitations, the Industrial Conciliation Amendment Act was celebrated because it was the first Act to include blacks in the labour law legislation. However, in its application the Act did little in bringing about change in the workplace and this led to further amendments. In 1981 there was both name change and amendments, thus, the Labour Relations Act was born. The Labour Relations Act brought the much needed changes such as repelling all 1979 exclusions, which meant affording all workers the protection of the law.¹⁵⁶ Furthermore, the Black Labour Regulation Act was repealed and for the first time in South African history the Labour Relations Act became applicable to all employees regardless of

¹⁵² Venter R (n130) 41.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Venter R (n130) 42.

¹⁵⁶ Ibid.

race.¹⁵⁷ As a result, black workers started enjoying relative equality with their white counterparts at the workplace.

Due to the recognition of trade unions, disgruntled black people started using these trade union movements as a mechanism to voice their discontent. This led to the formation of the Congress of South African Trade Union (COSATU) in 1985, which worked closely with African National Congress.¹⁵⁸ As a result of excessive pressure internally and internationally there was a need for a negotiated settlement in South African politics. The Convention for Democratic South Africa (CODESA) was the forum in which all the parties were invited to negotiate a peaceful transition to South Africa's first democratically elected government.¹⁵⁹ Although COSATU was excluded from CODESA, the ANC and SACP, its partners within the alliance had to make sure that COSATU's interests were secured.¹⁶⁰

As a result of these negotiations, the Interim Constitution was passed into law. Fair and equitable labour relations were now formally recognised as fundamental rights.¹⁶¹ The Interim Constitution created the Bill of Rights which protected the rights of all people, including the workers' right to freedom association at the workplace.¹⁶² These workers' rights were also consolidated in the final Constitution in terms of section 23 which guarantees everyone the right to fair labour practise.¹⁶³ It was clear that due to the changes which had been brought about by the Interim Constitution there was need to change the Labour Relations Act and put it in line with the Constitution. Therefore, it is as a result of this background that the LRA 66 of 1995 came into being.

As mentioned above, the main purposes of the above historical discussion is to show that the purpose of labour law has always been to respond and concede to socio-economic and political changes, thus giving effect to the market view. This point is supported by Vettori who argues that every piece of South African legislation was enacted in order to confine and institutionalize conflict between employer and employee so that the economic system could

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Venter R (n130) 43.

¹⁶⁰ Ibid.

¹⁶¹ Venter R op cit (n130) 40.

¹⁶² The Interim Constitution of the Republic of South Africa.

¹⁶³ The Constitution of the Republic of South Africa, s 23.

be preserved.¹⁶⁴ She further argues that the government promulgated legislation in response to socio-economic and political pressures, and demands in order to preserve the status quo.¹⁶⁵ This view is also supported by Benjamin who argues that the purpose of labour law in South Africa has not always been to achieve equality.¹⁶⁶ He supports his argument by giving reference to the South African history particularly during the 1950s when the purpose of labour law was political marginalisation and profitable exploitation.¹⁶⁷

Some years after the enactment of the LRA the South African labour market is now faced with another challenge namely, the proliferation of non-standard workers. The question arises as to what has been the impetus of the change. Some of the reasons which can be advanced are the rise of cost of doing business and companies trying to cut costs, thus leading to externalisation and casualisation. Externalisation has been defined as a process of economic restructuring, in terms of which employment regulated by a contract of employment is being displaced by employment that is regulated by a commercial contract.¹⁶⁸

This externalisation can occur in one of two ways, firstly it occurs when someone is engaged as a contractor rather than an employee, and labour legislation is by definition excluded, either because the individual is self-employed, or because he or she is regarded as a so-called independent contractor.¹⁶⁹ Secondly externalisation occurs where workers are employed by an intermediary to work for someone else, usually that person is termed a client, and where the terms of employment are in effect determined by that client.¹⁷⁰ The result is a so-called triangular employment relationship. Externalisation can be achieved through outsourcing and sub-contracting, and a triangular employment relationship is created, but they are not the only means.¹⁷¹ Increasingly externalisation is achieved through labour broking, or the utilisation of a temporary employment service and franchising.¹⁷²

¹⁶⁴ Vettori MS op cit (n23) 48.

¹⁶⁵ Ibid.

¹⁶⁶ Benjamin P op cit (n36) 23.

¹⁶⁷ Ibid.

¹⁶⁸ Synthesis Report Changing nature of work and 'atypical' forms of employment in South Africa at para 2.4

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Synthesis Report Changing nature of work and 'atypical' forms of employment in South Africa at para 2.4

¹⁷² Ibid.

On the other hand, casualisation refers to the process whereby standard employment is being displaced by employment that is temporary or part-time (or both).¹⁷³ Temporary work ranges from those working a few days a week or month (commonly referred to as ‘casual’ workers) to those employed for a fixed-term. A fixed-term contract may be for an exact period of days or weeks or months or years. It may also be for the period required to complete a task.¹⁷⁴

The rise of non-standard workers has led to a number of cases being brought before the courts in which the non-standard workers were seeking protection from the courts. With no comprehensive protection in the LRA, approaching the courts seem to have been the most probable solution to these workers. After lengthy negotiations through the National Economic Development & Labour Council (NEDLAC), representatives of state, business and labour, new amendments to the LRA were promulgated. These amendments are now all in full force and effect. The amendments to the LRA are considered far-reaching, particularly as they affect the status of “non-standard employees”, namely those employed via labour brokers, fixed termers and part-timers. These changes and their likely impact will be explored in detail at a later stage in this chapter. The amendments came into operation on 4 January 2015. One can logically argue that that these amendments were introduced as a response to the changes in the labour market which require more protection for non-standard workers. However, in order to establish whether or not these amendments have managed to fulfil this protective function of labour law it is important to first delineate the problems posed by these workers.

3.2 Non-standard workers

The changes in the labour market resulted in the emergence of new forms of employment relations which are different from the regular protected full time employment. Included among these new forms of employment are temporary employees, part-time employees, employees supplied by employment agencies and workers engaged in a range of contracting relationships.¹⁷⁵ These workers are often referred to as non-standard workers or atypical employees.¹⁷⁶ Due to the fact that most of these employees are unskilled and work in sectors with little or no access to trade unions, they are particularly vulnerable to exploitation.¹⁷⁷

¹⁷³ Synthesis Report op cit n(149) at para 2.3

¹⁷⁴ Ibid

¹⁷⁵ Fourie ES op cit (n73) 110.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

Most of them have little or no access to collective bargaining which allows employers to give them employment contracts on less favourable terms than other employees.

Whereas they are different types of employment relationships which fall within the confines of non-standard workers, this dissertation shall only deal with the employees supplied by employment agencies. As per the LRA these employees are now referred to as employees of the temporary employment service (TES)¹⁷⁸, formerly known as labour brokers. The LRA defines the TES as any person who for reward procures for or provides to a client other persons who perform work for the client but are remunerated by the TES.¹⁷⁹

3.3 Temporary Employment Services

Labour brokering is a form of outsourcing practiced in South Africa in which companies contract temporary employment services to provide them with casual labour. The TESs supply workers to third party clients who assign such workers their duties and supervise the execution of their work. The TES usually enters into an employment contract with the worker, and is responsible for the payment of the salary of the worker concerned who has been placed with a client.¹⁸⁰ On the other hand, the TES also enters into a commercial agreement with the client, which governs the business relations between the client and the temporary employment services.

The contract of employment is in most circumstances made subject to this commercial agreement. One of the common conditions to be found in this contract of employment is that the agreement continues for as long as the client requires the services of the employee. It is important to note that there is no contractual relationship between the worker and the client. However, since there are three parties involved in any labour broking deal it creates what is known as a 'triangular relationship' which generates a number of difficulties as shall be discussed later in this chapter.

3.31 Resistance against TESs

¹⁷⁸ The Labour Relations Act, s 198 (1).

¹⁷⁹ Ibid.

¹⁸⁰ The Labour Relations Act, section 198 (2).

The issue of temporary employment services has faced a lot of resistance, especially from trade unions. COSATU, for instance, launched a campaign in 1999 in a bid to push for the banning of temporary employment services.¹⁸¹ They advanced a number of good reasons for their proposal for the banning of labour broking. They argued that temporary employment services act as go-betweens in the employment relationship, taking a fee from the party who should be the employer, for doing nothing.¹⁸² In this way, so they argued, the real employer dodges employment responsibilities and the law, the temporary employment services gets rich through being a trader in labour, and the worker is exploited worse than ever.¹⁸³ Despite the massive strike on the 7th of March 2012 by COSATU demanding the banning of temporary employment services, the African National Congress (ANC) continued to resist the pressure.¹⁸⁴ Instead, they tried to regulate the TES, this is so because labour broking is a source of employment and the banning of TESs as requested by COSATU would have left the government with a lot of unemployed people. Therefore, despite the resistance from COSATU the temporary employment services remain legal in South Africa. However, they cause a lot problems which has left a number of employees in more vulnerable positions.

3.32 Problems associated with TESs (Pre-Amendments)

It is vital to first establish the problems which are posed by TESs before we try and answer the question whether the LRA and its new amendments align with the protective function of labour law. One of the difficulties which the triangular relationship presents relates to the question of who should be regarded as the employer of the worker. The identity of the employer is very essential because it allows the worker to know who to sue in the event of a breach of contract or any other conduct which might entitle the employee to sue the employer. The LRA through section 198 (2) tried to bring some certainty as to the identity of the employer within this triangular relationship. This section provides that a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person's employer.¹⁸⁵ This is so regardless of the fact that the employee renders his services to the client. Even in circumstances where the client meets some of the

¹⁸¹ COSATO Today 'Labour brokers' available at <http://www.cosatu.org.za/show.php?ID=6359> accessed (July 2015).

¹⁸² COSATO Today 'Labour brokers' available at <http://www.cosatu.org.za/show.php?ID=6359> accessed (July 2015).

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Labour Relations Act, s 198 (2)

presumptions of an employer set out in s 200A of the LRA such as the providing of tools of the trade and the employee forming part of the client's organisation¹⁸⁶, the client strangely escapes the application of this provision. It has been argued that the proposition that the TES is the employer of the person whose services have been so acquired is so tenuous that it is difficult to conceive of it being established without legislative or judicial intervention.¹⁸⁷

Furthermore, le Roux argues that the fact that the TES is regarded as the employer does not reflect reality and that, in many cases, the real employment relationship exists between the client and the person assigned to the client by the TES.¹⁸⁸ This is so because the worker usually works at the client's premises, often performing the same duties as the client's employees and working under the supervision of the client's supervisory staff.¹⁸⁹ She argues that in theory it would not matter who is regarded as the employer as long as the worker has an employer against whom he could exercise his rights.¹⁹⁰ This indicates that the identity of the employer is very essential, especially in circumstances where the worker wants to exercise his or her rights against such employer, thus the confusion surrounding who should be regarded as an employer creates problems for these workers.

Since the employment contract between the TES and the worker is often subject to the existence of the commercial agreement between the TES and the client, upon the termination of the commercial agreement the contract of employment also terminates. Bosch points out that in this triangular relationship the commercial contract between the client and the TES determines the price at which labour will be supplied and also indirectly determines the wages that can be paid to the employees.¹⁹¹ Furthermore, he states that in circumstances where the client no longer wants or needs the employees that have been supplied to it, it need simply inform the TES and they be removed.¹⁹² This view is also supported by le Roux who states that it is not unusual for the commercial agreement between the client and the TES to

¹⁸⁶ Labour Relations Act, s 200A.

¹⁸⁷ Theron J (2012: 68) 'Prisoners of paradigm: Labour broking, the 'new service' and non-standard employment' in Le Roux R and Rycroft A *'Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges.'*

¹⁸⁸ Le Roux PAK 'Protecting the employees of temporary employment services: Recent decisions' (2012) *Contemporary Labour Law Journal (CLLJ)* 21.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Bosch C. 'The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?' (2013) 34 *ILJ* 1632.

¹⁹² Ibid.

provide that the client has the right to inform the TES that it no longer needs to make use of a worker assigned to it or, for various reasons, no longer wants to make use of the services of a particular worker.¹⁹³ The inevitable result in this circumstance is that the TES might find itself stuck with a worker that is a surplus to its requirements, or with a worker that, because of allegations of poor work performance made by the client, it no longer wishes to employ.¹⁹⁴ Le Roux argues that although dismissals in both these circumstances may be justified on the basis of misconduct, operational requirements or incapacity, the TES may not be willing to go through the time consuming process of an operational requirement dismissal or be unable to prove misconduct or incapacity because the client is not prepared to assist.¹⁹⁵ As a result, TESs often insert provisions in their standard contracts of employment which provide that the contract will terminate automatically in certain circumstances, usually when the client indicates that it no longer needs or wants to utilise the services of a worker, or when the contract between the client and the TES expires.¹⁹⁶

Unfortunately in some instances our courts have failed to come to the rescue of the employees in this circumstance because they have accepted that such a conduct cannot amount to a dismissal.¹⁹⁷ This was confirmed in the case of *Sindane v Prestige Cleaning Services*¹⁹⁸(Sindane), in which the Labour Court stated that the termination of a commercial agreement between a TES and a client that resulted in the coming to an end of a worker's contract did not constitute dismissal.¹⁹⁹ If the approach in *Sindane* is to be followed it means an employee is not be able to approach the CCMA to claim for unfair dismissal. Furthermore, it will also mean that the employee will be left without any remedy and the continuance of his or her employment will be at the mercy of the client, which client will not be liable for any unfair dismissal claim should the commercial agreement terminate.

The effect of this decision is such that the employee will have no remedy in law and the courts might be unwilling intervene even in circumstances where the termination of the

¹⁹³ Le Roux PAK 'Protecting the employees of temporary employment services:Recent decisions'(2012) Contemporary Labour Law Journal (CLLJ) 25.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Note* There are some cases which have adopted a more acceptable approach in protecting TES employees, see *NAPE v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 853 (LC) and *NUMSA v Abancedisi Labour Services* [2013] ZASCA.

¹⁹⁸ *Sindane v Prestige Cleaning Services* 2009 BLLR 1249 (LC).

¹⁹⁹ *Sindane v Prestige Cleaning Services* 2009 BLLR 1249 (LC).

commercial agreement is grossly unfair to the employee. The insertion of the automatic termination clause in a standard employment contracts and its consequences thereof brings about the question as to whether labour legislation is doing enough to protect vulnerable workers and whether this should be accepted in an open and democratic society like our own.

Although section 198 (4) of the LRA provides that in certain circumstances the TES and client shall be jointly and severally liable.²⁰⁰ It does not include the unfair dismissal claims within the ambit of this joint liability. There is no doubt that the stance adopted by the legislature in this regard exacerbates the position of these employees.

The LRA defines the workplace as the place or places where the employee of the employer works.²⁰¹ Theron points out that the fact that the workplace of the TES is regarded as the workplace of the person whose services have been procured for the client presents a number of problems.²⁰² He argues that this problem cannot be resolved by joint and several liability. This is so because the workplace is regarded as the foundation on which workers are able to exercise their organisational rights and bargain collectively.²⁰³ However, due to the fact that certain persons are regarded as employees of the TES they will not have access to these rights because the place at which they work is not regarded as their workplace.

Another important aspect to note is that due to the existence of the triangular relationship the client is always in better position in the bargaining process. This is so because the employees of the TES are not able to negotiate their wages on equal footing because they don't have access to the client who is the dominant party in the negotiation process. The wages that these employees receive depends on the negotiations between the TES and the client which they are not part to. Furthermore, it is highly likely that the employees of the TES will receive less favourable conditions compared to the employees of the client doing the same work. As a result of the increasing number of the TESs the client has a variety of choice, and should one TES request more money the client can easily look for another TES to render the same

²⁰⁰ Section 198 (4) Of the LRA, it provides that The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment; (b) a binding arbitration award that regulates terms and conditions of employment; (c) the Basic Conditions of Employment Act; or (d) a sectoral determination made in terms of the Basic Conditions of Employment Act.

²⁰¹ Labour Relations Act, s 213.

²⁰² Theron J op cit (n131) 68.

²⁰³ Ibid.

services at a much lesser value.²⁰⁴ This ends up causing many TES to accept certain commercial agreements knowingly that the packages of their employees will not be up to standard.

Furthermore, Theron criticised the fact that the LRA accepted that labour broking constituted a service, known as ‘temporary employment service’, without in any way circumscribing the period for which workers may be temporarily employed.²⁰⁵ This absence of limitation on the period the worker may be temporarily employed, so he argued, allowed the clients to create different tiers of employees doing the same job. It allowed the clients to facilitate the introduction of wage differentials between the different tiers. He compared this situation to the situation which prevailed in South Africa before the 1970s, the only difference being that the privilege back then was based on racial terms.²⁰⁶

3.4 An analysis of whether or not the LRA amendments managed to respond to the above mentioned problems.

Now that we have established the problems associated with TESs, it becomes necessary to address the question as to whether the LRA and its new amendments responded well to these problems, thus affording protection to these vulnerable workers and aligning itself with the purpose of labour law. One most important things which can be noticed from the outset is that section 198 of the LRA still exists, of course with some changes, however, the question is whether those changes are enough to advance this much needed protection. During the public consultation of these amendments it was stated that the reasons for these amendments are to respond to the growth of non-standard forms of employment in South Africa, in particular, labour broking, to ensure that labour legislation is in line with developments in labour law; to enhance the effectiveness of labour market institutions and to fulfil our obligations as a member state of the International Labour Organization (ILO).²⁰⁷ This is in line with purpose of labour law which we have established in Chapter 2.

²⁰⁴van Eck BPS Temporary Employment Services (Labour Brokers) in South Africa and Namibia PER / PELJ 2010(13)6.

²⁰⁵Theron J op cit (n131) 69.

²⁰⁶Theron J op cit (n131) 73.

²⁰⁷ Explanatory Memorandum of the 2014 LRA Amendments.

We have established above that one of the problems which the triangular relation presents is the question regarding the identity of the employer. Section 198 (2) of the LRA still provides that the TES is regarded as the employer of the person whose services have been procured for or provided to the client.²⁰⁸ However, the amendments tried to resolve this problem by inserting section 198A (3)(b)(i) into the LRA. Section 198A (3) (b) (i) of the LRA provides that if an employee is not performing temporary services for the client then the client is deemed to be the employer of the worker in question. One might ask, how then do we determine whether the services are temporary or not? This question is answered by s 198A (1) of the LRA which provides that ‘temporary service’ means work for a client by an employee: (a) for a period not exceeding three months (b) as a substitute for an employee of the client who is temporarily absent and (c) in a category of work and for any period of time which is determined to be a temporary service by a collective bargaining council, a sectoral determination or notice published by the Minister, in accordance with the provisions of subsection (6) to (8).²⁰⁹

In a nutshell, if one reads section 198A (1) together with section 198A (3) of the LRA it simply provides that after 3 months of service, the TES employees who are earning below the threshold are deemed to be client’s employees (currently the threshold is R 205 433 per annum). What is clear from these provisions is that before the three months elapse the TES is regarded as the employer of the worker. However, although this provision was meant to solve the problem regarding the identity of the employer it seems it is causing even more confusion regarding the identity of the employer. This is so because of the use of the word ‘deemed’ in section 198A (3) (b) of the LRA brings some difficulty. The difficulty lies in what the legislature intended when saying that a TES employee is deemed to be the employee of a client. Does the employee transfer from the TES to the client, with the client becoming the sole employer of the person, or does the provision create a dual employment relationship - with both the client and labour broker being the employers?

In a recent CCMA decision in the matter between *Assign Service (Pty) Ltd v Krost Services and Racking (Pty) Ltd and another* (ECEL1652-15)²¹⁰, the commissioner was called upon to determine the correct interpretation of s 198A (3) (b) of the LRA (the deeming provision).

²⁰⁸ Labour Relations Act, s 198 (2).

²⁰⁹ Labour Relations Act, s 198 A (1).

²¹⁰ ECEL1652-15 - *Assign Service (Pty) Ltd v Krost Services v Racking (Pty) Ltd* and another 2015.

The Commissioner held that section 3 (a) of the LRA requires that any person applying the Act must interpret its provisions to give effect to its primary objectives.²¹¹ To establish the purpose of the amendments the commissioner had to visit the explanatory memorandum of the 2014 LRA amendments. After analysing the explanatory memorandum the commissioner reached a conclusion that the purpose of the amendments is to ensure that greater protection is provided to the vulnerable class of employees identified by s 198A of the LRA.²¹² As a result it was clear that the correct interpretation of section 198A (3) (b) is the one that provides greater protection to these workers. Accordingly, the commissioner held the following:

“In my opinion the deeming provisions in section 198A (3) (b) of the LRA should be interpreted akin to how the law deals with the concept of adoption. In the case of adoption a legal fiction is also created, in that, for purposes the law, the adoptive parent is regarded as the parent of the child. In this regard the best interest of the child is considered to be in the scenario where the adoptive parent is afforded full rights in terms of guardianship and/ all obligations in terms of parenting and upbringing of the adopted child. The law does not regard a biological parent and adoptive parent as dual parents, as doing so would lead to uncertainty and confusion. Equally in the case at hand there are a number of problems that would arise in the dual employment interpretation, for example, who would be responsible for the disciplining of the placed workers and whose disciplinary code would be applicable, that of the TES or that of the client? Furthermore how would reinstatement occur if there is dual employment? Clearly this would lead to greater uncertainty and confusion to vulnerable employees the Act is seeking to afford greater protection too.”²¹³

Clearly, the above mentioned award indicates that the ‘deeming provision’ must be interpreted to mean that after three months the client will be the sole employer of the employee in question. This kind of interpretation tries to remove the confusion as to the identity of the employer at any given point in time. The award is likely to be taken on review to the Labour Court, thus it still remains to be seen if the LC will have the same view as that adopted by the commissioner. However, assuming that the interpretation adopted by the commissioner is the correct one, it means much of the confusion surrounding the identity of

²¹¹ *ECCEL1652-15 - Assign Service (Pty) Ltd v Krost Services v Racking (Pty) Ltd* supra at para 5.1.

²¹² *ECCEL1652-15 - Assign Service (Pty) Ltd v Krost Services v Racking (Pty) Ltd* supra at para 5.4 – 5.8.

²¹³ *ECCEL1652-15 - Assign Service (Pty) Ltd v Krost Services v Racking (Pty) Ltd* supra at para 5.12- 5.13.

the employer will be eradicated. Simply put, during the first three months the TES will be regarded as the employer and after three months (provided the job in question is not temporary in nature) the client will be regarded as the employer. This position brings less confusion and makes it easier for employees to exercise their rights against the employer.

In an earlier award, in the matter between *Refilwe Esau Mphirime and Value Logistics Ltd/ BDM Staffing (Pty) Ltd*²¹⁴ the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) was also faced with the question of how section 198A (3) (b) of the LRA should be interpreted. The NBCRFLI found in favour of a sole employment relationship and held that if an employee provides services to the client of a TES in a manner which falls outside the scope of the definition of temporary services, and earns below the threshold, that employee will be deemed to be the employee of the client.²¹⁵ In other words, the employment relationship between the TES and the employee would cease to exist. In this decision it was stated that the legislator awarded the duties and obligations in terms of the LRA to the TES only while the employee provides a temporary service as defined in section 198A(1).²¹⁶ Once the employee no longer performs a temporary service, the client is deemed to be the employer and duty-bearer for purposes of the LRA.²¹⁷ The Commissioner further stated the following:

“In the light of the purpose of the amendments which is to address more effectively certain problems and abusive practices associated with a TES, the interpretation of the Act in this way effectively stops the abusive practices. When considered objectively the abusive practices are a direct result of the triangular relationship in which the client is exempted from all the responsibility in terms of the LRA. It therefore follows that should the amendments be interpreted to mean joint and several liability for the purposes of the LRA, the abusive practices would not be addressed. Awarding the client the duties and obligations as employer for purposes of the LRA also ensures that the Constitutional rights of the employees as well as their rights in terms of the LRA are protected and enforced”²¹⁸

²¹⁴ FSRFBC34922 – *Refilwe Esau Mphirime v Value Logistic Ltd/BMD Staffing (Pty) Ltd* 2015.

²¹⁵ FSRFBC34922 – *Refilwe Esau Mphirime v Value Logistic Ltd/BMD Staffing (Pty) Ltd* supra at 40.

²¹⁶ FSRFBC34922 – *Refilwe Esau Mphirime v Value Logistic Ltd/BMD Staffing (Pty) Ltd* supra at

²¹⁷ Ibid.

²¹⁸ FSRFBC34922 – *Refilwe Esau Mphirime v Value Logistic Ltd/BMD Staffing (Pty) Ltd* supra at para 36 – 38.

The findings of both the CCMA and NCRFLI are not uncontroversial and it is inevitable that the LC will, in due course, be called upon to review these findings. It is important to also note that whereas these findings do not create a legal precedent they do, however, have some kind of persuasive force and they also indicate that there are problems with this deeming provision which the courts need to settle sooner or later. This is a matter of great importance as far as the protection of these vulnerable employees is concerned. The identity of the employer also clarifies the 'employee' status which prevents situations arising where employees are deprived of their rights such as, freedom of association and collective bargaining.

Moving on, what seems to be clear, however, is that when the client is deemed to be the employer, the employee would have any such rights which he or she would have had against the TES. Previously the client would only be liable for some aspects such as collective agreements²¹⁹ and not dismissal, but the amendments seem to go a step further and they include dismissals.

On the other hand, section 198A (2) of the LRA brings about some kind of difficulty. It provides that these provisions do not apply to employees earning in excess of the threshold prescribed by the Minister.²²⁰ Is the threshold a right way of determining whether an employee is vulnerable or not? Furthermore, what happens to those employees who are slightly above the threshold? It will be interesting to see how the courts will deal with this provision if its constitutional validity is challenged. This section allows the TES and client to treat certain employees differently, only because they earn above the threshold. It also means these employees will continue with the struggle of identifying their employer since the deeming provisions of section 198A (3) (b) of the LRA do not apply to them.

Furthermore, it means these employees will not have any remedy in law should the commercial agreement be terminated and if the *Sindane* judgment is anything to go by it also means that the termination of the commercial agreement will not be regarded as dismissal.²²¹

²¹⁹ Labour Relations Act, s 198 (4).

²²⁰ Labour relations Act, s 198A (2).

²²¹ Note* this does not mean that our courts in all circumstances will not assist the employee, this is so because there are certain decisions which have adopted a generous approach towards TES employees, e.g. NAPE v INTCS Corporate Solutions (Pty) Ltd [2010] 8 BLLR 853 (LC) and NUMSA v Abancedisi Labour Services [2013] ZASCA.

All TES employees require some kind of protection from our law and it is hard to accept that the more money one earns the less protection such a person requires. If these provisions were introduced to protect vulnerable employees as a class of workers it seems likely that the court will render it unconstitutional because it infringes one's right to equality and the right to fair labour practice as provided by our constitution.²²² It remains to be seen how the court will deal with such a matter.

It is possible that the client or TESs might perpetuate a hoax so as to avoid the operation of s 198A (3) (b). However, the legislator was well aware of this possibility and it took steps to safeguard the job security of these workers. Section 198A (4) of the LRA provides that the termination by the temporary employment services of an employee's service with a client for the purpose of avoiding the operation of subsection (3) (b) or because the employee exercised a right in terms of this Act is a dismissal.²²³ This section introduces a new form of dismissal, and it can be accepted that the second part of the provision which talks about the employee being dismissed because of exercising a right in terms of the LRA, is an automatically unfair dismissal.²²⁴ This section is of great significance because it brings about an action of dismissal which was not there before the amendments came into force, thus to a certain extent strengthening the position of these workers.

Upon the reading of section 198A (4) of the LRA, it seems logical that the provision places an onus on either TES or the client, depending on whose instance the contract was terminated, to prove that the dismissal was fair. Depending on the circumstances of each case this can be a very useful tool for the protection of employees. This is so because in circumstances where a hoax has been devised for the sole purpose of avoiding the operation of subsection (3) (b) it can be extremely difficult for the TES or the client to prove that the dismissal was fair.

On the other hand, it is possible that the TESs might give contracts which are less than three months so as to avoid the application of the deeming provision. This situation is not provided for in the Act, but the problem here lies in the fact that the court will only be able to establish the existence of this hoax after a certain period of time has passed. This is so because the

²²² The constitution of the Republic of South Africa, s 9 and s 23.

²²³ The Labour relations Act, section 198A (4).

²²⁴ Read Labour Relations Act section 198A (4) together with section 187 (1) and section 5 (2) (b).

court in this circumstance will only be able to find the TES liable if it can establish a trend which shows that the TES was continuously offering, for example, two months contracts so as to avoid the operation of section 198A(3)(b) of the LRA. Although it is possible for the court to establish this trend after a while, the negative side of this is that the first group of employees who will have been subjected to this hoax will not receive the necessary protection, because at that time the court will not be in a position to establish the trend.

As discussed earlier in this chapter, the TES employees do not participate in the negotiations of the commercial agreement between the TES and the client, thus many at times these workers are given contracts with less favourable conditions than their peers doing the same job. The amendments came to the rescue of these employees and it provides that once an employee is deemed to be the employee of the client then such employee must be treated on the whole not less favourably than an employee of the client performing the same or similar work.²²⁵ However, there is an exception to this provision and this exception is that the deemed employee can be treated differently if there is a justifiable reason for such different treatment.²²⁶ This provision is a total shift from the previous position where there were no safeguards to ensure that TES employees are not treated less favourably. Although the TES employees do not participate in the commercial agreement, the legislator inserted this provision to ensure that their interests are taken into account in the negotiation of the commercial agreement which they are not part to, thus strengthening the position of these vulnerable workers.

It is important to note that section 198A (5) of the LRA does not require precisely that the same benefits and conditions be given but substantially similar benefits and conditions, and deviations from conditions that apply to other employees would need to be justifiable. But what reasons can be regarded as justifiable so as to allow the differential treatment of these employees? In terms of S 198D (2) broad criteria are identified that an employer can put forward to prove

‘justifiable reasons’ including:

- seniority,
- experience or length of service,

²²⁵ Labour Relations Act, s 198A (5).

²²⁶ Ibid.

- merit,
- quality or quantity of work performed, and / or
- any other justifiable reason.²²⁷

It is submitted that these criteria should be strictly interpreted, and may need to stand the test of objective scrutiny, in the face of litigation. This objective criteria is there to ensure that the provisions of section 198A (5) of the LRA are not used maliciously at the expense of workers' rights.

On a more positive note, section 198A (1) of the LRA managed to resolve the problem which was raised by Theron with regard to the omission by the legislator to circumscribe the period for which workers may be temporarily employed. The Act now clearly provides that three months is the period for which workers may be temporarily employed. This means that employers are no longer able to create different tiers of employees doing the same job.

There is, however, another problem which these amendments present. For instance, the amendments do not apply to small employers who have either less than 10 employees, or less than 50 if the employer has been in business for less than 2 years.²²⁸ Allowing the smaller employers to escape the provisions of the Act indirectly means that the legislator was unwilling to protect the vulnerable workers exploited by these employers. The assumption that only big employers are the exploiters is unfounded in law. It is also important to note that there is a constitutional challenge as to why the other employees are protected while others are not. It remains to be seen if this provision will pass muster the equality provision of the Constitution.

This paper is not blind to the fact that there is a rationale behind the exclusion of these smaller employers which is aimed at encouraging economic development by not burdening smaller employers with legislative provisions which they might not be able to meet.

However, the question still remains as to what should be given more weight, on the one hand the policy of the government, and on the other hand the rights of these vulnerable workers to be treated equally and the right to fair labour practice which are both entrenched in the Constitution. Although some of the rights are not absolute, any limitation of such rights must

²²⁷ Labour Relations Act, s 198D (2).

²²⁸ Labour Relations Act, s 198B.

be in compliance with section 36 of the Constitution, thus it still remains to be seen if this provision will pass muster its constitutional challenge.

3.5 Conclusion

In conclusion, it can be accepted that the amendments have taken us a step further in addressing some of the problems which TES employees are facing. Comparing their position before and after the amendments, there is no doubt that the position of these employees have indeed been strengthened as a result of these amendments. However, the amendments also have quite a number of loopholes as discussed above which have been left unresolved. These loopholes includes issues such as the threshold, the exclusion of smaller employers and the issue of the workplace of the employee. There are difficulties in understanding the rationale behind the limitation of their rights by the legislature in this regard. With regard to smaller employers one might argue that the reason behind their exclusions is to allow their business to grow. Although allowing small businesses to grow is good for the economy, it is unacceptable to sacrifice vulnerable workers solely for the purposes of growing the economy because such conduct will not pass muster the provisions of the constitution. It is important to note that the question of whether these amendments will work solely depends on how the courts will interpret them. It remains to be seen how the court is going to interpret these provisions and whether some of the provisions will stand the constitutionality test. However, as mentioned above the amendments have indeed managed to take us a step further than we were before.

Chapter 4

4. Proposed Manner in which the Amendments should be interpreted

Introductory remark

In the previous Chapter we analysed the new amendments to LRA in order to establish as to whether or not they align with the protective function of labour law. It was established that there are some positive aspects which can be taken from these amendments and there are also loopholes which make them ineffective to a certain extent. Furthermore, it was also established that the answer to the question as to whether or not these amendments will work solely depends on the manner in which the courts are going to interpret these provisions. The question arises as to how these provisions should be interpreted so as to ensure that they give effect to their intended purpose?²²⁹ The answer to this question is very important because it ensures that the intended purpose of these provisions is given effect to, thus the provisions will not only exist on paper.

The process of establishing how these provisions should be interpreted requires one to briefly discuss how the interpretation of statutes works in South Africa. This involves the discussion of different theories of interpretation which have been accepted in our law. Courts have over the years used these theories as guidelines in their interpretation of statutes, thus this chapter shall also look at how the courts have dealt with some of these theories of interpretation. The coming of the Constitution changed a number of aspects including the interpretation of statutes, therefore, the effects of the constitution in this regard shall be discussed in detail.

²²⁹ The intended purpose of the amendments can be found in the explanatory memorandum (memorandum of objects) of the 2014 LRA Amendments. It provides that the amendments to the LRA can be grouped in the following theme- (a) responses to the increased informalisation of labour to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work; (b) adjustments to the law to ensure compliance with South Africa's obligations in terms of international labour standards; (c) ensuring that labour legislation gives effect to fundamental Constitutional rights including the right to fair labour practices, to engage in collective bargaining and right to equality and protection from discrimination (d) enhancing the effectiveness of the primary labour market institutions such as the Labour Court, the CCMA, the Essential Services Committee and the labour inspectorate; and (e) rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of these two statutes in the past decade.

Statutory interpretation deals with the body of rules and principles used to construct and justify the meaning of legislative provisions to be applied in practical situations.²³⁰ Only two main approaches shall be discussed in this dissertation namely the literal approach and purposive approach. It is argued that the difference between these two main approaches to statutory interpretation in South Africa can largely be reduced to the respective views on the relationship between the text and the context of legislation.²³¹ The literal approach focuses on the text of the provision and the purposive approach focuses on the text in context.

4.1 Literal v Purposive Approach

The literal approach recognises the importance of the role of language of the legislative text, thus the interpreter is required to concentrate primarily on the literal meaning of the provision to be interpreted.²³² The primary rule here is that if the meaning of the word is clear, it should be given effect and be equated to the legislator's intention. However, if the plain meaning of the word is ambiguous, vague or misleading or if a strict interpretation will lead to an absurd result then the courts can deviate from the literal meaning to avoid such absurdity.²³³ This process is known in our law as the golden rule. The court will then have to consider other aspects such as the long title of the statute, headings, chapters and sections to find the intention of the legislature.

As expected there are a number of criticisms which have been raised against the literal approach. It has been argued that the view that legislative text can be clear and unambiguous must be questioned.²³⁴ This is so because there are only a few texts which are so clear that only one interpretation is possible. It is also important to note that the literal approach leaves little or no room for judicial law making, thus turning courts into mechanical interpreters.²³⁵

²³⁰ Botha CJ Statutory Interpretation: An Introduction for Students (2005:1)

²³¹ Ibid

²³² Driver S Interpretation of Statutes (2007:5)

²³³ See *Becke v Smith* (1836) 2 M&W 195 per Justice Parke which states:

'It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further.'

²³⁴ South African Law Commission Discussion Paper 112 (Project 25) 'Statutory Revision: Review of the Interpretation Act 33 of 1957' (2006) at para 2.67.2

²³⁵ Ibid.

This view creates the impression that once the legislature has spoken, the courts cease to have any law-making function.²³⁶ Furthermore, the textual approach is inherently subjective, since the court will deviate from the plain meaning of the text only if it is unclear or ambiguous. Consequently the intention of the legislature is ultimately dependent on the court's decision on the clarity of the particular legislative text. It is regrettable, however, that some courts seem to continue following the literal approach despite its weaknesses.

4.2 Purposive Approach

Taking into account all the above mentioned criticisms it will be naive that the courts should simply rely on the literal meaning of the words. Davidov is of the view that there is no law without interpretation.²³⁷ He states that very often judges need to decide on the meaning of legal provisions or even just single words in a particular context.²³⁸ Furthermore, he states that sometimes the legislature intentionally leaves a broad room for judicial discretion. To this end he gives an example of the provision which provides that labour laws apply only to 'employees' but the legislature refrains from defining the term.²³⁹ He argues that disputes about whether one is an employee or an independent contractor are very common, and the lack of any definition in the law means that courts were entrusted with the task of developing tests and applying them, to give meaning to this term.²⁴⁰

This process of interpretation where words are to be understood in their context is known as the purposive approach. The purposive approach provides that the purpose or object of legislation is the prevailing factor in interpretation.²⁴¹ According to this approach the courts will have to take external factors such as the social and political factors into account, in order to establish the purpose of legislation.²⁴² It tries to strike a balance between the grammatical and overall contextual meaning, thus the interpretation process cannot be complete until the object and scope of the legislation are taken into account.²⁴³

²³⁶ Ibid.

²³⁷ Davidov G *Articulating Labour Law's Goals: Why and How* (2012:5).

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Davidov G op cit (n237) 6.

²⁴² Ibid.

²⁴³ Davidov G op cit (n237) 5.

This view has been supported by our courts in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*²⁴⁴ in which the court was called upon to determine the meaning of a certain proviso to the regulation 1(xxi)(h) of the regulations governing the Natal Joint Municipal Pension Fund.²⁴⁵ It was held that interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.²⁴⁶

The learned judge further stated that whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.²⁴⁷ Where more than one meaning is possible each possibility must be weighed in the light of all these factors.²⁴⁸ The court made it clear that the process is an objective one not subjective. Accordingly the court held the following:

‘A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document’²⁴⁹

²⁴⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

²⁴⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra 18.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

The view adopted in *Endumeni Municipality* case was recently followed in *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures*²⁵⁰ in which the court referred and followed the approach adopted in *Endumeni Municipality* case regarding the interpretation of statutes.²⁵¹

Davidov argues that no matter how important text and legislators' intent may be, they are not sufficient for the task of judicial interpretation as they must be supplemented by purpose.²⁵² He further argues that this view is formulated in the work of Hart and Sacks as follows:

“In interpreting a statute a court should: (1) Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then (2) Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either – (a) a meaning they will not bear, or (b) a meaning which would violate any established policy or clear statement.”²⁵³

It seems logical that laws should be interpreted in light of what they seek to achieve and our courts seem to have accepted this approach as well. In *Mgijima v Eastern Cape Appropriate Technology Unit*²⁵⁴, the learned judge made certain remarks with regard to the LRA and the purposive interpretation. He referred to the provisions of section 3 of the LRA which provides that any person applying the Act must interpret its provisions to give effect to its primary objects. The court referred to Du Toit who argues that the interpretation clause in the LRA explicitly sanctions a purposive approach to the interpretation of the Act.²⁵⁵ The court held the following:

“The purposive approach is not unfamiliar to our labour law jurisprudence. The Industrial Court and Labour Appeal Court employed it liberally in their construction of the Labour Relations Act, particularly when giving content to the unfair labour practice concept.”²⁵⁶

²⁵⁰ *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures* CC (44/2014) [2015] ZASCA 62.

²⁵¹ *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures* supra at para 11 – 12.

²⁵² Davidov G op cit (n162) 6.

²⁵³ Henry M. Hart Jr. and Albert M. Sacks (1958:1200) *The Legal Process: Basic Problems in the Making and Application of Law*.

²⁵⁴ *Mgijima v Eastern Cape Appropriate Technology Unit* 2000 (2) SA.

²⁵⁵ *Mgijima v Eastern Cape Appropriate Technology Unit* supra 291.

²⁵⁶ *Ibid*.

If the interpretation clause in the LRA explicitly sanctions a purposive approach to the interpretation of the Act, it also means that the amendments to the LRA which we discussed in the previous Chapter should be interpreted in this light. We have discussed previously that an understanding of the purpose of labour law is essential because it helps the legislature in their job of developing labour laws. On the other hand, this understanding of the purpose of labour law is also crucial at the level of the court where judicial officers will have to interpret such laws.

The purpose of the amendments is to advance protection to non-standard workers because of their vulnerability. The explanatory memorandum of the 2014 LRA amendments provides that section 198 of the LRA has been amended in order to address more effectively certain problems and abusive practices associated with temporary employment service or what is commonly known as labour brokers.²⁵⁷ It further states that the main thrust of the amendments is to restrict the employment of more vulnerable, low paid workers by a TES to situations of genuine and relevant temporary work and to introduce various further measures to protect workers employed in this way.²⁵⁸

Having read the explanatory memorandum it is clear that the main reason behind the amendment of section 198 of the LRA is to ensure that the vulnerable workers mentioned in this section are protected at all times. This inevitably means that a proper interpretation of these provisions is the one which advances such protection. Accordingly, judicial officers when interpreting any of these provisions must opt for an interpretation which advances the necessary protection to these vulnerable workers rather one which does not. This approach is in line with section 3 (a) of the LRA which provides that any person applying the LRA must interpret its provisions to give effect to its primary objects.

4.3 Influence of the Constitution on the interpretation of labour law

However it is important to note that the new Constitution brought with it some changes in the manner in which legislation is to be interpreted. This means that the Constitution has profound effect with regard to the manner in which the amendments to the LRA are to be

²⁵⁷ Explanatory Memorandum of the 2014 Labour Relations Act Amendments.

²⁵⁸ Explanatory Memorandum of the 2014 Labour Relations Act Amendments.

interpreted. The Constitution of the Republic of South Africa is the supreme law of the land.²⁵⁹ To understand how the Constitution has changed the manner in which legislation is to be interpreted one needs to read section 2 of the Constitution together with section 7, s 8 (1) and (2) and s 237 of the Constitution.²⁶⁰

It is important to note that the Constitution itself has certain sections which are known as interpretation provisions. Section 39 (2) of the Constitution provides that when interpreting any legislation or and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.²⁶¹ The Constitution does not expressly prescribe a contextual and purposive approach to statutory interpretation, however, the requirements provided in section 39 (2) of the Constitution are peremptory in nature. The section requires the courts to review the aim and purpose of legislation in the light of the Bill of Rights, thus, plain meanings and so-called clear, unambiguous texts are no longer sufficient.

In *Fourie and Another v Minister of Home Affairs and Others*²⁶² Cameron JA clearly illustrated that this provision is not discretionary and once the court is called upon to develop the common law doing so is not a choice, and the courts are under a general obligation to develop it appropriately.²⁶³ He remarked that development of the common law entails a simultaneously creative and declaratory function in which the Court perfects a process of incremental legal development that the Constitution has already ordained.²⁶⁴ Once the Court concludes that the Bill of Rights requires that the common law be developed, it is not

²⁵⁹ The Constitution of the Republic of South Africa, s 2.

²⁶⁰ See section 7 of the Constitution which provides that the Bill of Rights is the cornerstone of the South African democracy, and that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. On the other hand, s 8 (1) and (2) provide that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state, and that the Bill of Rights applies to both natural and juristic persons. Furthermore, s 237 stipulates that all constitutional obligations must be performed diligently and without delay. If one reads all these provisions together, one dominant principle which comes to fore is that the Constitution is supreme and everything and everyone is subject to it. This means that all law and conduct, rules, procedure and interpretation theories are influenced and qualified by the Constitution. Thus the Constitution is the ultimate yardstick against which everything (including the amendments to the LRA) is viewed and reviewed.

²⁶¹ The Constitution of the Republic of South Africa, 39 (2).

²⁶² *Minister of Home Affairs and Another v Fourie and Another* 2006 (3) BCLR 355 (CC).

²⁶³ *Minister of Home Affairs and Another v Fourie* supra at para 13.

²⁶⁴ *Minister of Home Affairs and Another v Fourie* supra at para 14.

engaging in a legislative process or in fulfilling that function, nor does the Court intrude on the legislative domain.²⁶⁵

This is a clear indication that any piece of legislation must be interpreted in light of the Bill of Rights. The Bill of Rights encompasses a lot of rights including the right to fair labour practice which is contained in section 23 of the Constitution. This means that when the labour legislation is being interpreted it must give effect to this right to fair labour practices. Our courts have dealt with a number of cases in which they were required to interpret section 23 of the Constitution and one thing that one would notice is that the courts have interpreted section 23 purposively. In interpreting section 23 of the Constitution one has to keep in mind section 39 (1) of the Constitution which provides that when interpreting the Bill of Rights a court, tribunal or forum must consider international law.²⁶⁶ The importance of international law when interpreting legislation is also evident in section 233 of the Constitution which provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.²⁶⁷

It is important to note that section 233 of the Constitution is a peremptory provision because the legislature used the word ‘must’, thus the courts do not have any discretion in this regard. This provision is strengthened by section 3 (c) of the LRA which provides that any person applying this Act must interpret its provisions in compliance with the public international law and the obligations of the Republic.²⁶⁸ Section 233 of the Constitution should also be read together with section 1 (c) of the LRA which provides that one of the purpose of the Act is to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation. It is clear that if these three provisions are read together they all entail that international standards which have been discussed in Chapter 2 of this dissertation should be taken into account whenever the amendments are being interpreted. These international standards as we have seen advocate for the protection of vulnerable employees, thus the courts in applying these provisions must seek for an interpretation which advances protection to these employees rather than the one which does not.

²⁶⁵ *Minister of Home Affairs and Another v Fourie* supra at para at 25.

²⁶⁶ The Constitution of the Republic of South Africa, s 39 (1).

²⁶⁷ The Constitution of the Republic of South Africa, s 233.

²⁶⁸ Labour Relations Act, s 3 (b).

In *National Union of Metal Workers of South Africa and Others v Bader Bop*²⁶⁹ the court had an opportunity to consider whether a minority trade union has a right to strike in order to secure organisational rights, and to do so the court had to interpret certain provisions of the LRA.²⁷⁰ The court acknowledged that in interpreting section 23 of the Constitution in line with section 39 (1) of the Constitution an important source of international law will be the conventions and recommendations of ILO.²⁷¹ As a result, the court relied heavily on two ILO Conventions namely Convention 87 on Freedom of Association and Protection of the Right to Organise and Convention 98 on the Right to Organise and Collective Bargaining.²⁷²

The Court went on to refer specifically to the supervisory structures established by the ILO, and emphasised the importance of the jurisprudence developed by the ILO's Committee of Experts and the Committee on Freedom of Association.²⁷³ Traversing the above mentioned ILO Conventions and the views of ILO Committee of Experts and the Freedom of Association Committee, the court accepted the view that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members and to seek to challenge majority unions from time to time.²⁷⁴ It is against this backdrop that the court accepted that a generous interpretation should be given to the LRA, one that does not infringe upon the rights to freedom of association, the right to strike and to participate in collective bargaining.²⁷⁵

In *NEHAWU v UCT*²⁷⁶ the court had to determine, among other things, the proper meaning of section 197 of LRA. The court had to determine whether in terms of section 197 of the LRA, upon transfer of a business as a going concern, the workers are transferred automatically with the business without a prior agreement to that effect between the transferor and transferee employer.²⁷⁷ The court first looked at the LRA and stated that its purpose is to advance

²⁶⁹ *National Union of Metal Workers of South Africa and Others v Bader Bop* 2003 (3) SA 513 (CC).

²⁷⁰ *National Union of Metal Workers of South Africa and Others v Bader Bop* supra at para 15.

²⁷¹ *National Union of Metal Workers of South Africa and Others v Bader Bop* supra at para 28.

²⁷² *National Union of Metal Workers of South Africa and Others v Bader Bop* supra at para 29.

²⁷³ *National Union of Metal Workers of South Africa and Others v Bader Bop* supra at para 29 – 34.

²⁷⁴ *National Union of Metal Workers of South Africa and Others v Bader Bop* supra at para 31.

²⁷⁵ *National Union of Metal Workers of South Africa and Others v Bader Bop* supra at para 46.

²⁷⁶ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* BCLR 2003 (3) SA 1 (CC).

²⁷⁷ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* supra at para 1.

economic development, social justice, labour peace and the democratisation of the workplace.²⁷⁸ It was argued that this is to be achieved by fulfilling its primary objects which includes giving effect to section 23 of the Constitution. The court also noted that the LRA lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations.²⁷⁹ As a result the court held that the LRA must be purposively construed in order to give effect to the Constitution.²⁸⁰ With regard to the interpretation of section 197 of the LRA, the court held the following:

‘The proper approach to the construction of section 197 is to construe the section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA to promote economic development, social justice and labour peace. The purpose of protecting workers against loss of employment must be met in substance as well as in form. And, as pointed out earlier, it also serves to facilitate the transfer of businesses. The section is found in a chapter that deals with unfair dismissal. Construed against this background, the section makes provision for an exception to the principle that a contract of employment may not be transferred without the consent of the workers.’²⁸¹

The above cases, amongst others²⁸², illustrate three important points namely the shift to purposive interpretation, the importance of international law in guiding decisions of courts and tribunals and the roles the courts can play in giving effect to the purpose of labour law and constitutional rights. It is also clear that the Constitution accepts the purposive approach as long the purpose of legislation in question is constitutional, meaning that the purpose in question must not unfairly infringe upon one's constitutional right. However, it is important to note that this reasoning should not be considered to mean that the legislature is precluded from exercising its right to limit the rights if it can do so in a justifiable way for an important

²⁷⁸ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* supra at para 41.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* supra at para 62.

²⁸² See *South African National Defence Union v Minister of Defence and Others* SA 400; 2007 (8) BCLR 863 (CC) in which the court relied heavily on the ILO Conventions in their interpretation of the regulations in question and *Schutte and Others v Powerplus Performance (Pty) Ltd and Another* 2003 (3) SA 1 (CC), *South African National Security Employers Association v TGWU & Others* (1) 1998 (4) BLLR 364 (LAC), *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) (in the last three cases the court followed the purposive approach in construing the LRA).

governmental purpose. It has, however, been argued that where the legislature enacts legislation in effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose.²⁸³ This is so because the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights.

4.4 Application of section 3 (b) of the LRA

As mentioned above section 3 (b) of the LRA provides that the provisions of the LRA must be interpreted in compliance with the Constitution. Therefore, it's inevitable that a proper interpretation and application of the LRA will raise a constitutional issue. Pheto argues that to give effect to the requirement of section 3(b) of the LRA, the person interpreting the Act has first to determine whether or not the provision in question constitutes, *prima facie*, a violation of any one or more of the provisions of the Bill of Rights.²⁸⁴ For example, the right to equality, privacy, freedom of expression et cetera. He further argues that in determining, whether or not any one or more of these rights are violated, the interpreter will have to determine the ambit of the right in question, and the directions of how the rights contained in the Bill of rights are to be interpreted should guide him.²⁸⁵

4.5 How the problematic provisions of the LRA amendments should be interpreted

In this previous chapter we looked at some of the problematic provisions introduced by the new amendments to the LRA. It is now necessary to determine the likely outcome if these provisions are interpreted in line with the interpretation approach proposed in this chapter (which is interpretation in compliance with the Constitution). Taking for instance the provision in the amendments which stipulates that the provisions do not apply to employees who earn above the threshold.²⁸⁶ Should the court give this provision an interpretation in compliance with the Constitution and section 3 (b) of the LRA, it is difficult to understand how this provision will pass muster the equality provision²⁸⁷, especially in circumstances

²⁸³ Woolman S *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013: 206).

²⁸⁴ Pheto T *Interpreting the Labour Relations Act in line with the Constitution* LLM (North-West University) (2005) 18.

²⁸⁵ Pheto T *op cit* (n284) 18-19.

²⁸⁶ See Labour Relations Act, s 198A (2).

²⁸⁷ The Constitution of the Republic of South Africa, s 9.

where the complainant in question is slightly above the threshold. The situation can be worse in circumstance where the employee can prove that he or she is also vulnerable like any other employee covered by the Act. It has been established that one of the main reasons behind the introduction of these amendments is to ensure that vulnerable employees are afforded more protection. Therefore, if an employee who earns slightly above the threshold can prove that he or she is vulnerable the courts must be willing to provide a leeway in that circumstance. This is so because the ultimate test should be whether or not the employee in question is vulnerable or not. This interpretation ensures the protection, promotion and fulfilment of the employee's constitutional rights. It is also important to note that this interpretation is in line with section 39 (2) of the Constitution which requires that every interpretation of a piece of legislation must promote the spirit, purport and object of the Bill of Rights.

This reasoning should not be considered to mean that the court should infringe the doctrine of separation of powers and its duty to pay deference to legislative intent. Besides its duty to pay deference to legislative intent, the court also has a duty to protect the most vulnerable of the society (which includes vulnerable workers). Therefore, in such circumstance the court will have to weigh the competing interests, on the one hand the policy of the government and on the other hand the right to equality of a vulnerable employee. It has already been established that our courts will give effect to the limitation of rights by the legislature if such limitation has been done in a justifiable way for an important governmental purpose.²⁸⁸ The question which the courts will have answer here is whether such limitation is justifiable in a case where an employee can prove his or her vulnerability. This paper suggests that a proper interpretation of section 198A (2) of the LRA should allow the court to give a leeway in circumstances where an employee earning slightly above the threshold can prove his or her vulnerability.

Perhaps the most controversial of all is the deeming provision in section 198A (3) (b) of the LRA.²⁸⁹ The question is whether this provision should be interpreted as to mean that after the three months both the client and the TES will be regarded as employers of the worker (dual employment) or whether only the client alone will be regarded as the employer. This matter

²⁸⁸ *National Union of Metal Workers of South Africa and Others v Bader Bop* supra at 47.

²⁸⁹ Section 198A of the LRA provides that for the purposes of this Act, an employee not performing temporary service for the client is deemed to be the employee of that client and the client is deemed to be the employer and subject to the provisions of section 198B of the LRA, employed on an indefinite basis by the client.

has already been dealt with in the CCMA as we have discussed in the previous chapter. The reasoning of the Commissioner is that the proper interpretation of this provision is the one that advances more protection to the vulnerable employee.²⁹⁰ This approach is in line with the approach which has been established in this chapter. Thus, the proper interpretation requires one to look at the benefits of having the 'dual employment' and on the other hand to look at the benefits of having the client as the sole employer. The 'dual employment' has its benefits but it brings about some confusion. For instance if both the client and the TES are regarded as employers which union should the employee join, the one at the client's workplace or both and as mentioned in the CCMA award there is also a question of who will be responsible for disciplining the placed workers and under whose disciplinary code²⁹¹. Furthermore, it also brings about the question of how the reinstatement of these employees will work in a 'dual employment'.

It seems likely that the dual employment will cause more confusion which can result in more violation of these employees' rights. On the other hand, if the client is regarded as the sole employer the employee will be able to benefit from the collective bargaining at the workplace of the client, he or she will be treated more or less the same with other employees of the client, the client will not have confusion with regard to the identity of the employer when it comes to exercising his or her rights against such employer. It seems that interpreting section 198A (3) (b) of the LRA as requiring the client to be the sole employer affords more protection to the employee, thus this paper suggests that such interpretation should be followed.

Another example is section 198A (5) of the LRA which provides that an employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment. Section 198D of the LRA lists some of the reasons which can be regarded as justifiable, however, s 198D (d) provides that it can be any other criteria of a similar nature. This provision is open to manipulation by clients who will try by all means to escape the application of section 198A (5). To ensure that such manipulation does not take place the courts must interpret this provision in line with the

²⁹⁰ *ECEL1652-15 - Assign Service (Pty) Ltd v Krost Services v Racking (Pty) Ltd* supra at para 5.1.

²⁹¹ *ECEL1652-15 - Assign Service (Pty) Ltd v Krost Services v Racking (Pty) Ltd* supra at para 5.13.

approach which we have established in this chapter. This entails that the court will have to first determine the purpose of the provision in question and try to give effect to such purpose in compliance with the Constitution and international law. If the court follows this approach, it means section 198 D (d) of the LRA will be interpreted strictly so as to minimise the grounds which can fall under this provision. In other words, the grounds which should fall within the confines of section 198D (d) of the LRA should be strictly limited. This approach ensures that the purpose of the provision which is to protect vulnerable employees is given effect to, it protects employees' constitutional rights and it is also in line with international law standards.

The other controversial aspect of the amendments is that they do not apply to smaller employers. There are of-course economic reasons which have been advanced by the government for such limitation of rights. Upon reading the explanatory memorandum to the 2014 LRA amendments it is clear that the amendments seek to achieve a balance that considers the commercial sustainability of businesses such as promoting the economic development of smaller employers by not burdening them with certain legislative provisions which are likely not going to meet. At the same time the amendments also seek to protect vulnerable workers. As we have discussed before, the court has an obligation to pay deference to legislative intent. However, one cannot give a blind eye to the fact that this duty in certain circumstances conflicts with the court's duty to protect the most vulnerable of the society.

Let's take for instance A and B who are both employed by the same TES, A is placed on a client who is not regarded as a smaller employer while B is placed on a client who is regarded as a smaller employer. Both A and B do the same or similar job earning the same salary. After three months the first client will be deemed to be the employer of 'A', which means A will begin to enjoy the fruits provided by the amendments, should A be dismissed unfairly in this regard he has the *locus standi* to bring an unfair dismissal action against the client.

However, the position of B is unjustifiably different because after three months B is unable to benefit from the provisions of the amendments. Should he be dismissed after these three months he continues to struggle with the issue of the identity of his employer because the deeming provisions of section 198A (3) (b) of the LRA do not apply to him. Although it seems likely that the courts will try to give effect to the purpose of the legislature (which is to

help small business grow) when interpreting this provision. I argue that such interpretation is at odds with the interpretation which is in compliance with the Constitution and international law. Furthermore, it will be at odds with the application of section 3 (b) of the LRA as suggested by Pheto, which requires the court when interpreting the Act to first determine whether or not the provision in question constitutes, prima facie, a violation of any one or more of the provisions of the Bill of Rights by determining the ambit of the right in question.²⁹²

This paper is not suggesting that the economic reasons behind the exclusion of smaller employers are not important, it is however, questioning whether in the balancing of rights the right of the legislature to limit a right for a governmental purpose should be given more weight at the expense of vulnerable employees. It questions the supposed idea that the infringement of the constitutional rights of these vulnerable employees is a small price to pay for the protection of the government policy. Such an interpretation will be at odds with the interpretation which we have established in this chapter. This so because the law will be treating A favourably and B will have to suffer because he was placed at a client who is regarded as a smaller employer, something which is beyond his control. If the courts can afford A with a remedy, surely denying B the same right can at the very least present our judicial system as one which condone favouritism.

4.6 Conclusion

In conclusion if one reads section 3 of the LRA with section 2, 8, 39 (2), and s 233 of the Constitution it clearly indicates that the purposive approach is the one that is favoured by the Constitution. This is established upon the reading of s 3 (a) of the LRA. However, section 39 (2) provides that such purposive approach must be in line with the spirit, purport and object of the Bill of Rights. Furthermore, these provisions also require the courts to opt for an interpretation which is consistent with the International labour standards rather than the one which is not.²⁹³ The amendments contain some controversial provisions as discussed in this chapter and previous chapter, however, whether or not these amendments will manage to provide the much needed protection solely depends on the manner in which the courts will

²⁹² Pheto T op cit (n284) 18-19.

²⁹³ The Constitution of the republic of South Africa, s 233.

interpret such provisions. It is submitted that courts should follow the interpretation which is in compliance with the Constitution and international law. International law advocates for the protection of vulnerable workers, and the Constitution on the other hand ensures that the constitutional rights are protected and only limited in a justifiable manner. This kind of interpretation will ensure that the purpose of the legislature is met and in circumstance where such purpose is in conflict with the Constitution it also ensures that this is rectified.²⁹⁴ Therefore, it is suggested that when a dispute with regard to these provisions is brought before the courts, the courts should rather opt for the approach established in this chapter as opposed to the literal approach.

²⁹⁴ The rectification can be done by rendering a certain provision of the Act unconstitutional and give the Parliament time to rectify such provision.

Chapter 5

Conclusion and Recommendations

The purpose of labour law is subject to two different theories namely the protective view and the market view.²⁹⁵ Traditionally it was accepted that the purpose of labour law should be to protect vulnerable workers due to the inherent equality in the employment relationship.

However, due the emergence of more powerful employees and the ever changing world of work, the market view is becoming more prominent.²⁹⁶ It is suggested in this paper that we should follow the market view because it affords the much needed flexibility by balancing the interests of both the employer and employee. Furthermore, the market view does not deny that the protection of workers is important, it however, ensures that the law does not over protect these employees. This is so because such conduct usually results in casualisation, externalisation and economic inefficiencies. As a result, it is submitted that the purpose of labour should be to have both a social and economic function by taking into account interests of both employees, as well as employers in response to the needs of the market forces.

The South African labour law history presents a good example of how labour law has always responded to the social and economic changes in the society at different times in history.²⁹⁷ Some years after the introduction of the LRA the South African labour market is now faced with another challenge namely, the proliferation of non-standard workers particularly those involved in temporary employment services. The legislature recently responded to this problem by introducing the new amendments to the LRA, in which it tried to afford more protection to these vulnerable workers while at the same time ensuring the commercial sustainability of businesses, particularly smaller businesses. However, certain provisions in the amendments are problematic because they cause a lot problems in their interpretation.²⁹⁸ The problems in question relate to the meaning of the deeming provision in section 198A (3) (b) of the LRA, the exclusion of smaller employers and the use of threshold to determine the vulnerability of workers (just to mention a few).

²⁹⁵ Creighton WB and Stewart A op cit (n8) 2-3.

²⁹⁶ See discussion in Chapter 2.

²⁹⁷ See discussion in Chapter 3.

²⁹⁸ See discussion in Chapter 4.

The question whether or not these provisions are going to work, solely depends on how the courts are going to interpret these provisions. It is submitted that the courts should adopt the purposive interpretation. However, this purposive interpretation must be in compliance with the Constitution and international law. This kind of interpretation ensures the protection, promotion and fulfilment of constitutional rights of these vulnerable workers. It also ensures that South Africa fulfils its obligation as a member of the ILO and in cases where the purpose of the legislature is in conflict with the Constitution it ensures that such conflict is rectified. This is done through the Constitutional Court confirming that a particular provision is unconstitutional and affording the Parliament time to rectify the problem. Furthermore, this interpretation is in compliance with section 3 of the LRA which provides how the Act should be interpreted. Accordingly, it submitted that to ensure that these amendments afford the much needed protection to the vulnerable workers the courts should adopt the interpretation discussed in this dissertation, which is an interpretation in compliance with our Constitution and international law.

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