

**Protection versus Flexibility: A critical analysis
of the new labour brokering provisions
introduced by the 2014 amendments to the
Labour Relations Act, 66 of 1995**

By

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Chapter 1

Introduction

The Labour Relations Act¹ marked a major change in South Africa's statutory industrial relations system.² Through the transition to political democracy the LRA has encapsulated the government's plan to democratise society and the labour relations system as a whole.³ The LRA's purpose is to change the law governing labour relations and consequently give effect to the rights enumerated in section 23 of The Constitution of the Republic of South Africa.⁴ Unfortunately the increase in casualisation and externalisation of employment has led to labour-broker workers and other non-standard employees being denied their constitutionally protected rights. Labour-broker workers fall under the tag of 'non-standard forms of work,' and as a result they often find themselves outside the ambit of the protections provided for by the Constitution and the LRA.⁵ This patent defect in the legislation has led to the abuse of these workers that has consequently left us at a juncture where the amendments became an urgently required change.

The paper will focus primarily on Labour Law with a particular emphasis being placed on the amendments to the LRA that deal with labour-broker employees. In order to fulfil this endeavour, the perceived purpose of labour law will be looked at to inform a discussion of what the amendments should be aiming to achieve. Further reference will also be made to fundamental International Labour conventions in order to enlighten the analysis.

¹ 66 of 1995 (Hereinafter the LRA)

² Du Toit D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B and Steenkamp A (2015) *Labour Relations Law: A Comprehensive Guide* LexisNexis page 6.

³ Du Toit et al *Labour Relations Law* 6.

⁴ The Constitution of the Republic of South Africa, 1996 hereafter (the Constitution).

⁵ 66 of 1995

The pertinent research question can therefore be expressed as follows; to what extent will the 2014 amendments to the LRA alleviate the challenges associated with vulnerable labour broker workers.

The Phenomenon of Non-standard employment

To begin the discussion this paper will seek to unpack the phenomenon of non-standard work. This is integral in order to better understand the context and challenges faced by vulnerable workers who are entangled in complex labour broking relationships. Non-standard employment can be categorised in two broad processes, namely casualization and externalisation.⁶ The former is considered as a doctored version of traditional employment, while the latter involves workers providing goods and services to the client in terms of a commercial contract, often, but not always, involving a satellite enterprise or intermediary.⁷ Labour broker workers are often employed and their services utilised through the use of the controversially infamous tripartite commercial contract. The growth of non-standard employment has been spurred by the need to have greater temporal and numerical flexibility to cope with varying demands brought about by global market uncertainty, and further to reduce human resource management responsibilities and costs.⁸ These costs generally pertain to the risks and difficulties associated with termination of employment.⁹ This shift towards non-standard employment allows the employer to change the status of the individual employee by restructuring the employment relationship with the help of the commercial contractual arrangement.¹⁰ As a result of the cloaked design of the commercial contract, the employer is then able to avoid labour laws and the labour broker employee is deprived of his/her labour rights.¹¹

⁶ Le Roux R “The World of Work: Forms of engagement in South Africa” (2009) *Institute of Development and Labour Law* 1 at 13.

⁷ Le Roux (2009) *Institute of Development and Labour Law* at 13

⁸ Ibid.

⁹ Ibid.

¹⁰ Le Roux (2009) *Institute of Development and Labour Law* at 27.

¹¹ Theron J “Prisoners of a Paradigm: Labour broking, the new services and non-standard employment” (2012) *Acta Juridica* 58 at 62.

The increase in non-standard forms of employment is an international phenomenon that has been fuelled by globalisation.¹² The rapid expansion and contraction of industries and the need to modify their product to match changing demands has significantly influenced the move towards non-standard forms of employment.¹³ The use of labour brokers now forms a large part of the changing nature of work which comprises of a shift away from full-time employment for an indefinite period while being under the control of an employer at such employer's premises.¹⁴ These changes have posed numerous problems for the regulation of labour in South Africa. This is especially with regard to the provision of employment security and the realisation of rights to fair labour practices.

The drive towards non-standard employment and externalisation is used by employers to transform and delegate work formerly done by permanent employees, to temporary workers who are engaged in a tripartite relationship between the worker, the client and the labour broker.¹⁵ The relationship is dictated by a commercial contract, and while the client benefits from having utilised the workers, that client is still able to avoid accountability from labour legislation on the basis that the client is not the actual employer as provided for in the LRA.

Consequently this practice has become a contentious form of employment and trade unions have gone as far as to call for a ban on labour broking and its operations.¹⁶ The continued expansion of the labour broking arena has resulted in a disjuncture between the law regulating temporary employment, and the reality that these relationships create.¹⁷ Thus far, the law has failed to adequately cater for the needs of the vulnerable workers in this new employment structure. The amendments have thus come about at a crucial juncture.

¹² Tshoose C and Tsewedi B "A Critique of the protection afforded to Non-standard workers in a temporary employment services context in South Africa" (2014) 18 *Law Democracy and Development* 334 at 334.

¹³ Tshoose and Tsewedi (2014) *Law democracy and Development* 335.

¹⁴ Tshoose and Tsewedi (2014) *Law democracy and Development* 335.

¹⁵ Gericke E "Temporary Employment Services: Closing a loophole in section 198 of the Labour Relations Act 66 of 1995" (2010) 31 *Obiter* 92 at 94.

¹⁶ Theron (2012) *Acta Juridica* 58.

¹⁷ *Ibid.*

Challenges faced by the Labour broking Industry

The labour broking industry has evidently been a highly contentious area of the South African labour market. As a result, the Congress of South African Trade Unions has led the calls for a ban on the labour broking industry.¹⁸ Unions allege that the abuse labour broker workers have to endure at the instance of the commercial contract can be likened to slavery as they are forced to contract without the protection of their full spectrum of labour rights.¹⁹ Despite the consistent calls for a ban on the industry, the government has preferably gone for the route of greater policing and regulation.

It should be noted that research indicates that the shift from formal employment to non-standard forms of employment is on the increase.²⁰ The majority of workers who leave the formal employment sector often re-enter the employment sector through one of the non-standard forms of employment.²¹ This has led to instability within the labour market and consequently this impacts negatively on employment growth and on the reduction of unemployment and poverty. The compounding issues result in greater economic and social insecurity.²²

The problems have been perpetuated through a number of key assumptions underpinning labour regulation that over time have been proved to not always represent the labour broking and non-standard relationship. The first of these assumptions is that the workplace is where the workers actually work and that their employer controls the workplace.²³ Workers' rights, such as the right to join a trade union are compromised, while at the same time trade unions rights to bargain and negotiate on behalf of the workers are diminished. As legislation is based on this eroded concept of the where the workplace is, non-standard workers are effectively excluded from enjoying the rights provided for by the LRA.

¹⁸ S Harvey "Labour Brokers and Workers' Rights: Can they co-exist in South Africa" (2011) 128 *SALJ* 100 at 100.

¹⁹ Harvey (2011) *SALJ* 100.

²⁰ Dicks R "The Growing informalisation of work: Challenges for labour – recent developments to improve the rights of atypical works" (2007) *Law Democracy and Development* 39 at 39.

²¹ Dicks (2007) *Law Development and Democracy* 39.

²² *Ibid.*

²³ Theron J "The shift to services and triangular employment" (2008) *Industrial Law Journal* 58 at 61.

The second key assumption revolves around the notion that employment is a binary relationship between the employer and the employee.²⁴ It has always been assumed that there is a clear distinction between employment and self-service, and that those employees in self-service are able to fend for themselves.²⁵ This distinction has been pronounced in the legal distinction between employees and independent contractors. However in the new triangular employment structures that characterise non-standard employment, the interests of the client are paramount.²⁶ This problem cannot be alleviated through collective bargaining because as briefly set out above the formulation of the triangular relationship means that non-standard employees are more than often excluded from joining trade unions.

The tripartite commercial contract therefore becomes the instrument of abuse upon which the labour broker and the client can do as they please with the workers. The formulation of section 198 further allows for the abuse and ensures that when a worker is unfairly dismissed at the instance of the client, such worker is often absent any means to legal recourse.²⁷ When the worker does attempt to take action, the client often points to section 198 that deems the labour broker and not the client to be the employer. In turn the labour broker points out that the dismissal took place at the instance the client and further that client has a contractual right to end the contract and therefore the broker cannot be held accountable. All in all the result is that no actionable dismissal will have taken place. Resultantly, the worker is left unemployed and with an industry ready to repeatedly take advantage of this legislative loophole.

The third assumption relates to employment relationship as always being indefinite.²⁸ The labour broker worker is almost always utilised for short-term posts, in order to satisfy short-term needs or allow for flexibility. Resultantly their relationships are also characterised by a lack of employment security. Employment security is an integral part of employment rights, and without it none of the other rights can be realised.²⁹

²⁴ Theron (2008) *Industrial Law Journal* at 61.

²⁵ Theron (2008) *Industrial Law Journal* at 62.

²⁶ Theron (2008) *Industrial Law Journal* at 62

²⁷ Botes A “Answers to the questions? A Critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to Labour Brokers” (2014) 26 *South African Mercantile Law Journal* 110 at 112.

²⁸ Theron (2008) *Industrial Law Journal* 62.

²⁹ *Ibid.*

Lastly, is the incorrect assumption with regards to the centrality of industry based bargaining in the South African labour system.³⁰ Part of this mistaken belief was that different industries in the economy could be demarcated according to the nature of the business conducted at the workplace taken as a whole and without state intervention.³¹ However, despite this incorrect assumption, engaging in collective bargaining has constantly been a difficult if not almost impossible endeavour for labour broker workers. The workers, being detached from the workplace of the client and continuously on the move, often find it difficult to join trade unions and have access to the accompanying collective bargaining power.³² The contemporary workplace relating to non-standard employment has been structured in a way that ensures that the client is the dominant economic entity, who determines the parameters on which employment is provided and also controls the actual workplace.³³

Outline of the 2014 Amendments to the LRA with a specific emphasis on section 198A

The amendments aim to respond to increased informalisation and to ensure that vulnerable non-standard employees receive sufficient protection and decent conditions of work.³⁴ In doing so, the amendments endeavour to ensure that the amended sections give effect to fundamental Constitutional rights that include fair labour practices, the right to equality and protection from unfair discrimination, and also the right to bargain collectively. The central question of the research is to analyse and determine the competence of the amendments in attempting to alleviate the problems associated with the contemporary workplace and labour broker workers.

³⁰ Ibid.

³¹ Ibid.

³² Theron (2008) *Industrial Law Journal* 62.

³³ Theron (2008) *Industrial Law Journal* 67.

³⁴ Labour Relations Amendment Bill of 2012 at 24.

Section 198A, is the main thrust behind the drive to afford greater protection for labour broker workers. The section endeavours to extend protection to employees earning under the earnings threshold as provided for in section 6(3) of the BCEA.³⁵

The criterion to determine what constitutes a temporary service is set out in section 198A(1).³⁶ In the cases where it is determined that the employee is rendering a temporary service, the temporary employment service remains as the employer of the worker. However under section 198A(3)(b), if the employee's work falls outside the influence of the definition of temporary services, then that employee will be deemed to be the employee of the client. Subsection 198A(4) is added to prevent the employer from circumventing section 198A(3)(b), and any attempt at avoiding its operation will be considered as a dismissal.³⁷

Where a labour broker employee is deemed to be the employee of a client in terms of section 198A(3)(b) further benefits are extended in that the employee must be employed on terms not less favourable than those of the clients permanent employees.³⁸ However, grounds to justify differentiation are provided for in section 198D. Section 198A and its revised provisions attempt to come together to mitigate the effects that have resulted from the shift away from the traditional employment relationship.

Supplementing the above-mentioned sections, is section 21 and 22 of the amendments. They are integral as they cater for trade unions, and aim to eradicate the problems faced with regards to non-standard workers exercising their collective bargaining rights. This endeavour is undertaken in a number of ways. When determining representativeness, a Commissioner is now allowed to consider the composition of the workplace, taking into account the extent to which there are non-standard workers in the employ of the client.³⁹ More importantly, trade unions are now allowed to exercise organisational rights for labour broker employees either at

³⁵ Tshoose and Tsweledi (2014) *Law democracy and Development* 341.

³⁶ Tshoose and Tsweledi (2014) *Law democracy and Development* 341

³⁷ Botes (2014) *South African Mercantile Law Journal* 130.

³⁸ *Ibid.*

³⁹ Botes (2014) *South African Mercantile Law Journal* 115.

the workplace of the labour broker or at the workplace of the client.⁴⁰ Before the amendments, the execution of labour broker employees' collective rights was significantly hindered and trade unions found it near impossible to gain access to employees who did not perform their services at the office of their employer. Further the employees were constantly on the move and would frequently change workplaces.⁴¹ Trade unions have consequently been unable to reach labour broker employees and represent their interests. All in all, section 21 aims to ensure that labour broker employees are considered as part of the workforce for the purposes of ascertaining trade unions' representativeness, and resultantly will be able to have access to trade unions and the power that comes with being part of the collective unit.

Why this Research is necessary

Prior to the amendments, despite various sections of the 1995 LRA existing to regulate non-standard work, it is safe to say, and especially in light of the change to the traditional employment relationship towards the more complex construction, South African labour legislation was on the whole deficient in its regulation of these emerging relationships.⁴² The relevant sections of the LRA dealing with the triangular employment relationship simply did not address all the obstacles faced by employees.⁴³ The LRA only provided umbrella provisions and as time passed it became clear that there was more to the triangular relationship that needed to be catered for by effecting statutory changes to prevent exploitation and infringement of labour rights.⁴⁴

South Africa has a duty to fulfil its international law obligations. This includes fundamental International Labour Organisation⁴⁵ conventions. As was set out in the court in *National Education Health and Allied Workers Union v University of Cape*

⁴⁰ Ibid.

⁴¹ Botes (2014) *South African Mercantile Law Journal* 116.

⁴² Botes (2014) *South African Mercantile Law Journal* 112.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Hereafter the 'ILO'.

Town and Others,⁴⁶ fundamental conventions have been identified by the ILO Governing Body and these conventions are said to be integral to the rights of human beings at work, irrespective of development of individual member states. Included among the fundamental conventions, is the Right to Organize and Collective Bargaining Convention.⁴⁷ As has been mentioned above, a lack of access to collective bargaining is just one of the major concerns that have plagued the labour broking industry. Further, employment in South Africa also needs to be characterized with dignity as well as being underpinned by decent work and fair labour practices.

There is a general perception within labour law that there is a need to reconceptualise and reconfigure the boundaries of labour law. This has come about for a number of reasons, chief among them being the change in the world of work and the way in which employment is now being undertaken. Unfortunately, labour broker workers have drawn the short straw in the labour market and their employment has generally punctuated by a lack of employment security among other things. As was stated by the Constitutional court, employment security is part and parcel of the right to fair labour practices.⁴⁸

In an effort to plug the holes that represent intolerable derogations from fundamentally guaranteed rights, it becomes integral that we research and analyse this area of the labour market in order to better evaluate the efficacy of the changes. The importance of protecting vulnerable workers and providing for decent work is encapsulated

“on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in the community and economic growth that expands opportunities for productive jobs and employment”⁴⁹

⁴⁶ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) para 34.

⁴⁷ *National Education Health and Allied Workers Union v University of Cape Town and Others* supra at para 34.

⁴⁸ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) para 42.

⁴⁹ South African Decent Work Country Programme 2010-2014

http://www.ilo.org/jobspact/resources/WCMS_145432/lang--en/index.htm (accessed 14 January 2016).

Chapter 2

The History and Development of Labour Relations in South Africa

The historical development of South African labour law closely mirrors the socio-political history of South African Society.⁵⁰ It is integral to start by understanding the history of labour relations in South Africa in order to fully comprehend the current period, its problems, and why certain issues are in existence. The way in which the labour sector has responded to problems throughout its history, as a result of changes in society and its convictions, is also central to understanding why certain problems have been addressed in a specific manner or not been addressed at all. Globally the problem surrounding labour brokers and their workers has long been in existence, and it could be said that South Africa has been relatively sluggish in attempting to remedy this area of the law.

The First Era of Developments

Labour legislation in South Africa has gone through a number of significant modifications over the decades in order to respond to changes in society and the way employment is viewed and undertaken. The first era of comprehensive labour

⁵⁰ Basson AC, Christianson MA, Dekker A, Garbers C, Le Roux PAK, Mischke and Strydom EML *Essential Labour Law* 5ed (2009) 4.

legislation consisted of the racially exclusive Industrial Conciliation Act.⁵¹ The system only catered for white workers and was exclusive of pass bearing African and Indian workers. The establishment of industrial councils was used as a spur to promote voluntary collective bargaining between employers' organisations and trade unions.⁵² The emphasis on voluntary collective bargaining is still an enduring legacy from the early development of South African labour legislation.⁵³ Unfortunately, another enduring legacy is the racially grounded system that laid the basis for a dual system of industrial relations.⁵⁴ The exclusion of African workers served to establish a joint monopoly of employers and white workers at the expense of black African workers. Subsequently labour market policy largely remained subject to this political and ideological vision for over half a century.⁵⁵

The exclusion of African workers meant that they could be employed on inferior terms to their fellow white workers.⁵⁶ The statutory regulation did not afford African workers the same protections as those workers who fell under its purview, and these workers were often left open to abuse from employers who did not have to conform to basic conditions of employment or collective agreements. The exclusive definition of an 'employee' with its marginalization of black workers can be likened to the problems that faced labour broker employees prior to the 2015 amendments. The fact that labour broker employees would fall into a grey area of labour legislation meant that have been excluded from their section 23 rights to fair labour practices as well as the rights to bargain collectively⁵⁷ as guaranteed by the Constitution.⁵⁸

The marginalisation of African workers resulted in a dual system of industrial relations. This situation can draw further parallels to the issues that have faced labour-broker employees prior to the 2014 amendments, where uncertainty ruled the arena and the workers were subject to labour rights violations without proper means to

⁵¹ 11 of 1924.

⁵² Du Toit et al *Labour Relations Law* 8.

⁵³ Du Toit et al *Labour Relations Law* 8

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Every worker is afforded the right to form and join a trade union, as well as to participate in trade union activities. As labour broker employees are not considered to be employees of the client or part of the client's workplace, they cannot be organized by the recognized trade unions at those workplaces, and are therefore often unrepresented.

⁵⁸ The Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

redress. These violations have involved the abuse of the labour broking commercial contract in order to deny the workers the full spectrum of their constitutional section 23 rights. Labour law and the labour broking landscape has been one filled with uncertainty and the courts⁵⁹ have had to weigh in on multiple occasions in order to bring about protection for various vulnerable groups of workers. Section 23 of the Constitution uses the word worker as opposed to employee. Consequently, and as was decided in *South African National Defence Union v Minister of Defence and Others*,⁶⁰ the word worker extends beyond those who enter into a common law contract of employment. Protections are thereby afforded to those who may fall foul of the traditional employee definition, but instead come under the larger ambit of that of a worker. The remedies and protections provided, as well as the specific violations, will be fully detailed and analysed later on in the paper.

The segregated system was largely successful and this was also as a result of the repressive political dispensation at the time.⁶¹ However, growing challenges brought about by the segregated industrial relations system coupled with the growth of African nationalism and political opposition signalled the start of the end of the segregated structure. The industrial system and the apartheid regime started to face new challenges from the excluded majority that formed the working class⁶² and the segregated system soon became untenable. In 1977 the government appointed the Wiehahn Commission (the Commission) to look into labour legislation and propose the necessary reforms necessary to bring labour back under control.⁶³ In 1979 the Commission recommended a number of reforms.⁶⁴

The Commission suggested that African workers be allowed to join registered trade unions and be involved and represented on industrial councils and conciliation boards.⁶⁵ Perhaps the most important reform introduced as a result of the

⁵⁹ *NAPE v INTCS Corporate Solutions* (2010) 31 ILJ 2120 (LC), *Kylie v Commission for Conciliation, Mediation and Arbitration and Others* 2010 (10) BCLR 1029 (LAC), *Discovery Health v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1480 (LC).

⁶⁰ 2007 (5) SA 400 (CC).

⁶¹ Du Toit et al *Labour Relations Law* 12.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

Commission was the establishment of an Industrial Court.⁶⁶ This court was given a wide discretion to measure the conduct of employers and employees against the widely defined concept of the unfair labour practice.⁶⁷ The court rose to the task and started to transform South African labour law in innovative ways guided by principles of fairness as opposed to the strict application of common law rules.⁶⁸ Central to this innovative approach was the courts recognition that although the employer or trade union may have acted lawfully, in that they complied with common law or contractual obligations, such conduct could nevertheless be regarded as unfair.⁶⁹ This innovative use of the law can be likened to recent Labour Court judgments where our courts have had to come to the aid of unprotected labour broker workers, and other vulnerable workers in order to provide a purposive interpretation that mirrors the goals set out in the Constitution and labour legislation.⁷⁰ This purposive approach has involved dissecting the true nature of the relationships outside of the commercial contract and offering protections to these vulnerable workers that are in line with the general purpose⁷¹ of labour law.

The creation of an advisory statutory board was equally integral and its job was to continually survey and analyse the labour market and evaluate the effectiveness of labour legislation.⁷² The government accepted most of the proposals in an effort to try and bring the militant African worker unions under control. The amendments came into action over the course of four years and in this process the legislation changed to be called the Labour Relations Act.⁷³ However, although the new unions were now allowed to register, a few unions initially declined this option for fear of being co-opted.⁷⁴ In 1981 the ban on mixed unions was finally repealed. New unions were

⁶⁶ Basson et al *Essential Labour Law* 6.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Basson et al *Essential Labour Law* 6.

⁷⁰ *NAPE v INTCS Corporate Solutions* (2010) 31 ILJ 2120 (LC), *Dyokhwe v De Kock NO and Others* (2012) 33 ILJ 2401 (LC).

⁷¹ The Traditional dictum as to the purpose of labour law as enunciated by Otto Kahn-Freund is said to be to equalise the imbalance of power between the employer and the employee, and to protect the weaker party, that party being the employee. These ideas will be expanded upon later in the thesis.

⁷² Du Toit et al *Labour Relations Law* 12.

⁷³ Ibid.

⁷⁴ Ibid.

faced with pressure from different sectors and started to register, however, the unions continued to reject industrial council participation.⁷⁵

The rapid growth of the new unions was important in many respects; however, this swift growth had both positive and negative effects. It spurred on the push towards centralised collective bargaining as the main source of bargaining in South African industrial relations. The increased size of the unions allowed them to compete and wield considerable power against the established trade unions, employers' organisations and in the council negotiations.⁷⁶ On the other hand, these changes led to a relationship between management and labour that could at best be described as troubled and fractitious. In light of this prickly relationship, by the time the new Labour Relations Act⁷⁷ came into action the focus of its changes revolved around addressing the prevalent historical tensions as well as providing an improved framework for centralised collective bargaining.⁷⁸ Some argue that this focus was slightly misguided.⁷⁹ At the time the labour market was undergoing fundamental changes characterized by a steady increase in casualization and externalisation of employment.⁸⁰ The rapid emergence of non-standard work suggests that this may have been the perfect time to tackle issues concerning labour broking, especially considering the extensive drafting process of the new Labour Relations Act.⁸¹ However, there seems to have been no discussion on issues central to new forms of work, such as the definition of an employee and the definition of the workplace.⁸²

The Context and Constraints directing the Development of Labour Relations in South Africa

⁷⁵ Du Toit et al *Labour Relations Law* 12.

⁷⁶ Du Toit et al *Labour Relations Law* 13.

⁷⁷ 66 of 1995.

⁷⁸ Godfrey S and Bamu P "The state of centralized bargaining and possible future trends" Le Roux R and Rycroft A (2012) *Acta Juridica* 219-220.

⁷⁹ Godfrey and Bamu (2012) *Acta Juridica* 220.

⁸⁰ Ibid.

⁸¹ Labour Relations Act 66 of 1995.

⁸² Godfrey and Bamu (2012) *Acta Juridica* 220.

The focus on catering for a stronger collective bargaining was compounded by the racial tensions that surrounded the time period around the drafting of the Act.⁸³ The Apartheid system of racial segregation that had been enforced in South Africa since 1948 had officially only just come to an end in 1994. Race relations were tense and there was an increased focus on integration and conciliation. Legislation was needed to appease the unions and avoid further labour unrest and violence. It was also important for labour to be functional in order to aid South Africa's economic surge after years of global exclusion.

The speed at which the government tackled the re-writing of the country's labour law was influenced by a multiplicity of factors.⁸⁴ The promptness can be explained by the role of organised labour in the struggle against apartheid and in the ANC's electoral success.⁸⁵ The Congress of South African Trade Unions⁸⁶ in particular looked to the ANC in order to fulfil its long standing demands with regard to labour dispensation, for example on issues relating to centralised bargaining.⁸⁷ These expectations were fortified and consolidated by the ANC's pre-election commitment, expressed in its Reconstruction and Development Programme (RDP), to allow for workers to attain the fruits of their struggle.⁸⁸ In light of this urgent revision, it is therefore not surprising that the issues surrounding labour brokers were overlooked.

The economic crisis facing South Africa and its new government lent impetus to the need for new labour legislation, as well as influencing its content. South Africa was a new player on the International stage after years of exclusion. Cohesive and undisrupted labour was integral to the planned recovery.

The Current Focus and the Difficulties that need to be Addressed

As has been illustrated from the outline of the history of labour relations in South Africa, certain periods have been characterised by certain issues and the demand for

⁸³ Labour Relations Act 66 of 1995.

⁸⁴ Du Toit et al *Labour Relations Law* 16.

⁸⁵ Du Toit et al *Labour Relations Law* 16.

⁸⁶ From hereon COSATU.

⁸⁷ Du Toit et al *Labour Relations Law* 17.

⁸⁸ Ibid.

those problems to be addressed. The difficulties surrounding casualisation of employment, and particularly labour broking were not addressed when they first came to the fore. Unsurprisingly, the 2014 amendments focus on remedying the situation regarding externalisation and casualization of employment.⁸⁹ There has been a concerted effort to correct the omissions of the original Act regarding non-standard workers.⁹⁰ However, it has been suggested that this focus has been done at the expense of addressing the state of centralised collective bargaining, which has recently been plagued by weakened trade union organisation as well as growing casualization and externalisation of employment.⁹¹ It has further been suggested that this has had the consequence of ignoring the mechanisms and levers of collective bargaining that could be used to assist in the regulation non-standard workers. Collective bargaining is an important mechanism by which workers can bargain with the employer and address important issues affecting them. The collective force of the workers gives them the clout to be able to make the employer accede to their demands. Generally, non-standard workers have had very little access to trade unions and collective mechanisms; constantly they have suffered considerably with regard to having issues being expressed and resolved. This idea and its fixes will be dealt with later in this paper when the amendments and their effectiveness are discussed.

The Constitution of the Republic of South Africa, 1996 (the Constitution)

The new labour dispensation has been punctuated by the advent of the Constitution with an entrenched Bill of Rights that has had a profound effect on all areas of the law.⁹² For the purposes of labour law, in the Bill of Rights, section 23 is of fundamental importance. The primary rights contained within impact directly on labour law, and since the Constitution came into force, the legal system and the courts

⁸⁹ Godfrey and Bamu (2012) *Acta Juridica* 220.

⁹⁰ *Ibid.*

⁹¹ Godfrey and Bamu (2012) *Acta Juridica* 220.

⁹² Grogan J *Workplace Law* 11ed (2014) 6.

have had to consider the Constitution's impact and application.⁹³ Section 39 provides that the Constitution is the supreme law of the land and the courts are required, when interpreting legislation and the common law, to promote the purport and objects of the Bill of Rights. Consequently the Bill of Rights has been interpreted and applied, and had a profound impact on the way legislation is understood. The Constitution also represents an integral mechanism for private persons to challenge legislation and the actions of the state because it sanctions both the horizontal and vertical application of rights.⁹⁴

Although, the Constitution provides for these rights, there is an imperative need for our legislation to mirror this protection. This is due in part to the principle of subsidiarity as pronounced upon by the courts.⁹⁵ Section 23 of the Constitution expressly provides that legislation may be enacted to regulate labour relations in South Africa. The application of the principle of subsidiarity speaks as to whether a litigant may bypass the LRA and rely directly on the rights in section 23 of the Constitution. In *NAPTOSA and Others v Minister of Education, Western Cape, and Others*,⁹⁶ the Cape High Court held that a litigant cannot bypass the LRA and directly rely on the Constitution without challenging the constitutionality of the LRA that provisions for that right. Further, in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*,⁹⁷ it was noted that if the *NAPTOSA* approach were not to be followed, the result might well be the creation of dual systems of jurisprudence under the Constitution and under legislation.⁹⁸

This is important because it dictates that where the legislation is deficient, and does not effectively amplify that which is provisioned for in the Constitution, such legislation needs to be amended. Such deficiencies in the LRA were exactly the case in point with regard to the protection of labour broker workers and other non-standard employees.

⁹³ Basson et al *Essential Labour Law* 10.

⁹⁴ Grogan *Workplace Law* 6.

⁹⁵ *NAPTOSA and Others v Minister of Education Western, Western Cape Government and Others* 2001 (2) SA 112 (C), *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC), *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400.

⁹⁶ 2001 (2) SA 112 (C).

⁹⁷ 2006 (2) 311 (CC).

⁹⁸ *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 para 51.

The Effect of The Constitution on Labour Law in South Africa

The LRA and the Basic Conditions of Employment Act⁹⁹ were propagated as the national legislation designed to give effect to the right to fair labour practices referred to in section 23 subsection (1).¹⁰⁰ The Employment Equity Act¹⁰¹ is there to supplement both Acts and it deals specifically with discrimination in the workplace and employment equity.

Section 23 of the Constitution protects a number of pivotal constitutional rights such as “everyone’s” right to fair labour practices, the right to freedom of association (i.e. the right to belong to or to participate in a trade union) as well as the right to organise and the right to bargain collectively.¹⁰² Although the LRA was promulgated to protect “everyone’s” labour rights, section 198, has resulted in labour-broker workers being denied the right to exercise their labour protections. Section 198 dictates that in the event that a person’s services are procured to a client by a temporary employment service, the temporary employment service becomes that person’s employer. Through various mechanisms and contractual arrangements, these workers are often find themselves outside the ambit of the LRA protections relating to fair labour practices and the right to procedural and substantively fair dismissals. Essentially, section 198 has become a vehicle for the abuse of labour broker workers. These mechanisms and arrangements that facilitate such abuses will be elaborated upon below.

The Constitution’s applicability to labour law is not only confined to section 23. Other sections also play an integral role in supplementing section 23. For example, section 9 of the Constitution provides for equality and freedom from discrimination.¹⁰³ This section provides the framework for any discussions on employment equity, discrimination and affirmative action.¹⁰⁴ The interpretive guides in section 8 of the Constitution provide that the Bill of Rights applies to all law and

⁹⁹ 75 of 1997 (hereafter the BCEA).

¹⁰⁰ Grogan J *Workplace Law* 5.

¹⁰¹ 55 of 1998 (hereafter the EEA).

¹⁰² Basson et al *Essential Labour Law* 11.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

binds all areas of government. Further, section 8 states that, when applying any law or legislation, the courts must apply the law in a way that gives effect to the Bill of Rights, or where necessary, develop that law or legislation in line with the Bill of Rights. Section 39 of the Constitution then goes on to say that when interpreting the Bill of Rights, a court or tribunal must promote the values that underlie an open and democratic society, must consider international law and may consider foreign law. These interpretive provisions have often come to the aid of labour broker employees. The courts have often relied on a purposive approach that gives effect to the labour rights in the Constitution in order to grant vulnerable workers some relief.¹⁰⁵

The entrenchment of labour rights in the Constitution has led to the development of constitutional jurisprudence by the courts that have had far reaching effects on the way the contract of employment and the employment relationships are viewed.¹⁰⁶ *NUMSA and Others v Bader Bop (Pty) Ltd and Another*¹⁰⁷ is illustrative of the omnipotent influence of the Constitution. In *NUMSA* it was held that where there is no clear indication that the legislature intended a statute to limit a right, and if that statute is capable of an interpretation in a manner that does not limit fundamental rights, then that interpretation should be preferred. The right to fair labour practices is a fundamental right.¹⁰⁸ There is no clear indication in section 198 that suggests the legislature intends to limit the right to fair labour practices. It is therefore submitted that an interpretation that protects the right to fair labour practices is always preferable, and this would resultantly be in line with the reasoning followed in the *Discovery Health v CCMA*¹⁰⁹ case.

Further, it should be noted that section 23(1) provides that ‘everyone has the right to fair labour practices.’ The term ‘everyone’, which follows the wording of section 7(1) of the Constitution, provides that the Bill of Rights enshrines the right ‘of all people

¹⁰⁵ *Dyokhwe v De Kock NO and Others* (2012) ILJ 2401 (LC).

¹⁰⁶ *Grogan Workplace Law* 6.

¹⁰⁷ (2003) 24 ILJ 305 (CC) hereafter (NUMSA).

¹⁰⁸ *Discovery Health v Commission of Conciliation, Mediation and Arbitration and Others*, 2008 29 ILJ 1480 (LC) para 29.

¹⁰⁹ *Discovery Health v Commission of Conciliation, Mediation and Arbitration and Others*, 2008 29 ILJ 1480 (LC) para 29. Here it was noted that the right to fair labour practices is a fundamental right. Consequently, as The Immigration Act 13 of 2002 does not expressly provision for the limitation of the right to fair labour practices, a person cannot be denied such rights on the basis that they contracted for illegal work as set out in section 38 of the Immigration Act.

in the country.’ Consequently this is supportive of a broad interpretation of the rights protected in section 23.¹¹⁰ As noted in *Khosa v Minister of Social Development*¹¹¹ the word everyone is a term of general import and unrestricted meaning. It means what it conveys.¹¹² It is therefore accepted that the right to fair labour practices vests in ‘everyone’, despite the validity of their employment contract,¹¹³ and in some circumstances, despite their line of work being illegal and against public policy.¹¹⁴ Consequently, labour broker employees are always entitled to their necessary protection.

Labour Broking in South Africa

The existence of labour brokers in South Africa has long been a serious issue of contention. The debate on their existence ranges from a total ban on the industry, to regulation and greater policing by legislation.¹¹⁵ The long running debate over the place of labour brokers in the South African labour market took a vital step in 2010 when the government published drafted proposed amendments to labour legislation.¹¹⁶ Zwelinzima Vavi, the General Secretary of COSATU, forecast the ‘mother of all battles’ over the issue.¹¹⁷ In support of a ban, trade unions submit that labour broking is akin to slavery, and that labour broker employees are contracted without the full benefit of the protection of the law.

Labour broking relationships are given legal force by the provisions of section 198 of the LRA.¹¹⁸ In South Africa, labour brokers are also referred to as temporary employment services. The LRA envisages the labour broking relationship to be a

¹¹⁰ *Kylie v Commission of Conciliation, Mediation and Arbitration* (2010) (10) BCLR 1029 (LAC).

¹¹¹ 2004 (6) SA 505 (CC) para 111.

¹¹² *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 111.

¹¹³ *Discovery Health v Commission of Conciliation, Mediation and Arbitration and Others*, 2008 29 ILJ 1480 (LC).

¹¹⁴ *Kylie v Commission of Conciliation, Mediation and Arbitration* (2010) (10) BCLR 1029 (LAC) para 22.

¹¹⁵ Mahomed I “Labour Brokers – Real Remedies” (2010) *Without Prejudice: Labour Law* 48.

¹¹⁶ Harvey, S “Labour Brokers and Workers’ Rights: Can they co-exist in South Africa” (2011) 128 SALJ 100 at 100.

¹¹⁷ Harvey (2011) SALJ 100.

¹¹⁸ Labour Relations Act 66 of 1995.

tripartite relationship between the labour broker, the employee and the client of the labour broker.¹¹⁹ The labour broker procures the services of a worker, for reward, for the benefit of the client. Prior to the amendments, in terms of section 198(2), when these relationships were brought about, the labour broker, and not the client, was always deemed to be the employer. Section 198 provides that, ‘for the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person’s employer.’ Consequently the labour broker was always deemed to be the employer, except in instances that fell under section 198(4) of the LRA. In these instances, the client and the labour broker could be jointly and severally liable if the labour broker contravened specific conditions.

For various reasons that will be set out below, section 198 is a highly contentious provision. There have been consistent calls by labour activists for a ban on the labour broking industry. However, economists have warned that a complete ban would impact negatively on the economy.¹²⁰ In support of this argument, they cite statistics showing a growth in employment and they also contend that this means that the industry creates jobs.¹²¹ Larger broking companies argue that the law before the amendments was adequate and that it only needed better enforcement in order to be effective. Further the larger broking companies argue that it is only the smaller so called ‘bakkie brigade’ that gives a bad name to the industry as a whole.¹²² Those defending labour broking insist the industry is essential to the economy and banning them will eliminate an essential function aiding South Africa’s economic growth.¹²³

Arguments supporting Labour Broking

The economic argument in favour of labour broking reads as follows. Essentially, it is argued that in the era of growing global unemployment, a trend that South Africa has

¹¹⁹ Mahomed (2010) *Without Prejudice* 48.

¹²⁰ Harvey (2011) *SALJ* 100.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

not escaped, the banning of labour brokers would have a disastrous effect.¹²⁴ The labour broking industry does not only cover unskilled workers but covers a whole range of professionals that are all regulated under the same legislation.¹²⁵ Skilled labourers are essential to the infrastructure projects being rolled out across the country, especially in the electricity, roads, rail, telecommunications, engineering and information technology sectors.¹²⁶ The skilled workers utilised on such projects tend to move on when the start-up phase is complete and the project enters into the operational or maintenance phase. Businesses cannot be expected to thrive in an increasingly competitive market if they are forced to retain these workers on a permanent basis.¹²⁷

Further, it is reasoned that it would be difficult for businesses to provision and hire extra staff for peak periods, if those businesses are expected to endure the cost of retrenchments at the end of those periods or in a downturn. Financial markets make provision for cyclical growth in every industry, and it follows that the organisations should be able to staff accordingly.¹²⁸ In fluctuating economic conditions, labour broking services help companies and employers, through flexible employment, to face global pressures and deal with changing demand and supply trends.¹²⁹ The labour broking industry is often the faster at creating jobs during periods of economic recovery and this plays a vital role in developing basic skills, reducing unemployment and providing for the transition to permanent employment.¹³⁰ As alluded to above, labour broker advocates argue that labour legislation prior to the amendments “more than adequately addressed the use of labour brokers; what was needed was effective enforcement of those laws.”¹³¹

The economic argument continues further, stating that, “far from disregarding the rights of workers, the TES industry has played, and continues to play, a positive role

¹²⁴ Burmeister S “Banning Labour Brokers could damage the Economy” (2009) *Civil Engineering* 40 at 40.

¹²⁵ Burmeister (2009) *Civil Engineering* 40.

¹²⁶ Burmeister (2009) *Civil Engineering* 40.

¹²⁷ Burmeister (2009) *Civil Engineering* 40.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

in the driving of South Africa's economy".¹³² The European Union in collaboration with the confederation of trade unions across Europe has legitimised the labour broking industry across 28 countries as they recognise their importance in job creation and driving the economy.¹³³ The regulatory framework with regard to worker benefits over these 28 countries was also strengthened at the same time.¹³⁴

Supporters of the labour broking movement put forward that the decision to either ban or further regulate the labour broking industry is ill advised and would have dire consequences for the South African economy. This is according to the Confederation of Associations in the Private Employment Sector (CAPES)¹³⁵ an industry association representing the interests of temporary employment services.¹³⁶ It is forwarded that the proposals to change the labour broking system are being based on "unrepresentative sector interviews that take anecdotal evidence as the basis upon which national labour and employment policy is to be decided."¹³⁷ It is alleged that there are misconceptions about the labour broking industry in South Africa, and in order to substantiate this argument statistics and facts are produced. These statistics come from the industry association CAPES and other statutory bodies such as the Services and Statistics SA (SETA).

According to these statistics, since 2000, labour brokers have introduced around 3.5 million temporary, part-time and contract employees into the South African labour force.¹³⁸ Approximately 2 million of these employees were first time job seekers, 92% were black and 85% were aged 18 to 35.¹³⁹ Further, more than 32% of these employees secured traditional, permanent jobs within 12 months and 47% did so within three years.¹⁴⁰ According to the Services (SETA), labour brokers contributed R415 million to the National Skills Fund in 2008/2009 alone.¹⁴¹ For the year 2008, Statistics SA also show that atypical employees represent between 13.1% and 52.2%

¹³² Ibid.

¹³³ Burmeister (2009) *Civil Engineering* 40.

¹³⁴ Ibid.

¹³⁵ Hereafter CAPES.

¹³⁶ Botha J "Unions War against Labour Brokers Lacks Research" (2009) 25 *Management Today* 27.

¹³⁷ Botha (2009) *Management Today* 27.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Botha (2009) *Management Today* 28.

¹⁴¹ Ibid.

of the total sector employment in South Africa with the highest number of these atypical workers being found in construction (59.2%), wholesale and retail trade (42.8%) and transport and communications (39.7%).¹⁴² Although, labour broking relationships have been subject to increasing abuse, the facts would suggest that labour brokers do in fact play an integral role in the South African economy. This is with particular reference to labour brokers being a formal channel for introducing unskilled, unemployed workers into the world of work.¹⁴³

In response to criticisms that the tripartite relationship brought about by labour broking gives rise to specific problems and abuses, broking advocates argue that this stance is highly selective and does not consider that organisations have a valid basis for entering into these agreements which are increasingly common in South Africa and around the world.¹⁴⁴ For example, by cross-utilising temporary workers between multiple organisations and sectors, it is said that agencies provide their work force with a degree of continuity in employment that a single employer, subject to various internal as well as sectoral cycles could not provide.¹⁴⁵ Through the provision of recruitment, training, payroll, leave administration and other services, labour broking agencies allow companies to focus on their core competencies and outsource time-consuming non-core functions to specialised third party service providers. There can be no doubt that labour broking does in fact have multiple beneficiary functions in the labour market especially with regard to provisioning for flexibility and allowing for ease of business functionality. However, in my mind, these benefits cannot outweigh and allow for a derogation of the right to fair labour practices afforded to all workers. The limitation of this particular group of worker's legal protections, who are usually the most vulnerable, cannot be substituted or justified solely on the basis of increased labour flexibility.

It is said that the private employment industry represents a R26 billion-revenue industry. Statistics suggest that law abiding agencies, and on average, 78.8% of total revenue was paid directly to their agency workers in cash and benefits; a further 3.3%

¹⁴² Ibid.

¹⁴³ Botha (2009) *Management Today* 28.

¹⁴⁴ Botha (2009) *Management Today* 28.

¹⁴⁵ Botha (2009) *Management Today* 29.

was received indirectly by workers in non-cash forms such as classroom and on the job training; a further 6.1% was used to offset recruitment, screening, assessment, verification and other inherent costs; a further 7.3% was used to offset costs incurred in the management and administration of payrolls, benefits, leave, training, performance and recognition – and just 3.8% to 4.5% was retained by employment agencies as a return on their investments in recruitment tools, countrywide branch and office infrastructures, pay-roll and other systems and technology.¹⁴⁶ Proponents who support the broking movement do not deny that there are some agencies that engage in nefarious employment practices, however they suggest that these agencies are the small unregulated brokers, and a clear distinction should consequently be drawn between the legitimate compliant transparent and audited businesses and the disingenuous operators.¹⁴⁷

Labour broking agencies evidently perform an essential function in the market. They specialize in the recruitment and deployment of dynamic work forces, and these work forces allow for flexibility that adapts to the economy's seasonal, cyclical and other market variables.¹⁴⁸ However, the abuses perpetrated by non-compliant brokers illustrate the gaps in the system that need to be plugged in order to pull the industry in line with constitutional protections afforded to workers. It is submitted that the exploitation of workers does not warrant the call for an outright ban on the industry, however, contrary to those who argued that regulation was adequate prior to the amendments; such abuses illustrate that the need for urgent changes to the regulatory framework has not been overstated.

The proponents of the 'economic' argument, who believe the regulation prior to the amendments was sufficient, fail to see that the legislative position was untenable with the Constitution.¹⁴⁹ It should be said that although these economic advocates do not support the derogation of workers' rights through the labour broking relationship, "Job flexibility should not be achieved through compromising on the rights and

¹⁴⁶ Botha (2009) *Management Today* 27.

¹⁴⁷ Botha (2009) *Management Today* 27.

¹⁴⁸ Botha (2009) *Management Today* 29.

¹⁴⁹ Harvey (2011) *SALJ* 100.

working conditions of the workers.”¹⁵⁰ Some of their statements do in fact suggest that they are oblivious to the obvious abuses occurring in the labour broking industry.

The Challenges facing the Labour Broking Industry in South Africa

As shown above, the indignities of the past abuses suffered at the hands of the tripartite labour broking relationship have led to many negative reactions towards the industry. The protest march in March 2012 organised by COSATU, one of South Africa’s leading labour federations, is a prime example of the negative reactions and has been illustrative of the growing unease towards the industry in South Africa.¹⁵¹

Globally, labour legislation is put in place with one of its purposes being to protect workers. In South Africa, two key protections are provided for in section 23 of the Constitution, namely the right to fair labour practices which the Constitutional Court¹⁵² has held further encompasses the right to employment security,¹⁵³ and secondly the right to collectively bargain with employers to improve terms and conditions of employment. These rights are integral in ensuring workers can exercise their collective power in order to attain better working conditions and employment security.

The rights to employment security and specifically the right not to be unfairly dismissed are provisioned for in the LRA. Section 185 of the LRA stipulates that every employee has the right not to be unfairly dismissed. In terms of collective bargaining, section 4 and 5 of the LRA protect all workers’ rights to form and join trade unions, and this right is linked to the right of freedom of association. The overall

¹⁵⁰ Ibid.

¹⁵¹ Botes A “The History of Labour Hire in Namibia: A lesson for South Africa” (2013) *PER/PELJ* 506 at 506.

¹⁵² *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC).

¹⁵³ *National Education Health and Allied Workers Union v University of Cape Town and Others* supra para 42; Harvey *SALJ* “Labour Brokers and Workers’ Rights” 103.

collective bargaining scheme under the LRA is based on voluntarism and an employer does not have a duty to bargain with the unions.¹⁵⁴ However, bargaining is encouraged and promoted through the provision of organisational rights which allow certain rights to representative unions which then allows them to have more influence in the workplace and increase their ability to bargain.

The inadequacy of the LRA, especially section 198, has resulted primarily from the assumptions it was premised upon. There was a complete disjuncture between the law and reality. These assumptions included that, the workplace is the place of business of the employer, employment is a binary relationship, employment is indefinite, and lastly that central industry bargaining still reigns supreme and different industries are demarcated according to the nature of the business undertaking conducted at the workplace.¹⁵⁵

In many ways the provisions of section 198 of the LRA, undermined these rights and often left workers at the mercy of unscrupulous employers. The formulation of section 198 of the LRA aids in this task as does the nature of the relationship between the broker, the worker and the client. The labour broker employs a worker, who is then provided to the client for a fee. The worker then works for the client, at the client's premises, under the client's supervision and is paid by the broker until the contract comes to an end or the client decides that the services of that worker are no longer necessary. Despite the worker seemingly looking like he or she is in the employ of the client, the LRA¹⁵⁶ stipulates that the labour broker, and not the client, is the employer of that worker. This arrangement creates a number of issues. First and foremost it results in a disconnect between the true employer and the worker, and secondly it also results in a disconnect between the worker and the workplace.¹⁵⁷

This disconnect essentially results in the worker being unable to enjoy the protections offered under the fair labour practice jurisdiction, nor is that worker afforded his or

¹⁵⁴ *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 para 55; Godfrey and Bamu (2012) *Acta Juridica* 221.

¹⁵⁵ Theron (2012) *Acta Juridica* 60-3.

¹⁵⁶ Section 198(2) of the Labour Relations Act.

¹⁵⁷ Harvey (2011) *SALJ* 100; Theron (2012) *Acta Juridica* 60. R Le Roux, "Employment: A Dodo or simply living dangerously" (2013) *ILJ* 30 at 37.

her collective bargaining rights.¹⁵⁸ This is because fair labour practice and collective bargaining rights attach to the workplace.¹⁵⁹ Section 198 of the LRA and its endorsement of the fiction that the broker is the employer has resulted in a number of challenges and rights violations that have plagued the industry and therefore attracted calls for drastic measures to be taken.

Some of the most common challenges faced by labour broker workers surrounded the legislative fiction as created by section 198. Workers who were employed by labour brokers were often treated differently and differentiated from employees of the client in that they were paid much less, could seldom bargain collectively, and in many instances they could be easily replaced and had very little recourse to remedies.¹⁶⁰ In reality, labour broker employees were never afforded the full spectrum of their labour protections and enforcement of these rights was a tedious and often unsuccessful escapade.¹⁶¹ This denial of rights also included those protections contained in the Basic Conditions of Employment Act¹⁶², the rights to fair dismissal and labour practices, and finally the rights contained the Employment Equity Act.¹⁶³

The labour broker was deemed to be the employer of the workers and therefore did not have the right to grant trade union organisational rights at the client's workplace.¹⁶⁴ Only the true employer is entitled to grant organisational rights at its workplace. Further, because broker employees often from workplace to workplace on a regular basis, and are not always in the employ of a specific client for long periods, trade unions found it hard to recruit and organise these workers and as a result, this denied the workers their right to bargain and utilize their collective power.

¹⁵⁸ Le Roux R "The World of Work: Forms of engagement in South Africa" (2009) *Institute of Development and Labour Law* 1 at 23.

¹⁵⁹ Harvey (2011) *SALJ* 100; Theron (2012) *Acta Juridica* 62.

¹⁶⁰ Botes (2013) *PER/PELJ* 525.

¹⁶¹ Theron (2012) *Acta Juridica* 65.

¹⁶² 75 of 1997 (hereafter BCEA)

¹⁶³ 55 of 1998 (hereafter EEA).

¹⁶⁴ Botes (2013) *PER/PELJ* 525.

Labour broker workers also had to deal with the uncertainty that is brought about by a lack of job security. This is done through a commercial contract upon which the relationship between the broker and the client is based. Essentially this type of contract gives the client the right to request the labour broker to remove the temporary worker from his service on short notice.¹⁶⁵ In turn the labour broker would add a clause in the employment contract of the worker stating that should the client make such a request, the labour broker is compelled to comply, and the employment contract will terminate automatically.¹⁶⁶ A clear example of the abuses perpetrated through automatic termination clauses was demonstrated in the case of *Sindane v Prestige Cleaning Services*.¹⁶⁷ In this instance, Prestige Cleaning Services employed Mr Sindane in terms of a ‘fixed term eventuality contract’. In terms of this agreement the period of employment between the parties was for a definite period of employment terminating on the termination of the contract that existed between the client (to whom the cleaning services were provided) and Prestige Cleaning Services.¹⁶⁸ The Client subsequently cancelled the cleaning contract, and Mr Sindane’s employment contract was consequently cancelled. In response to the application brought for unfair dismissal, the court held that no dismissal had taken place as Mr Sindane’s termination was clearly linked to a particular period and the eventuality that arose and gave rise to the termination is contemplated as being applicable to fixed term contracts.¹⁶⁹

This state of affairs has resulted in labour broker worker’s employment being characterised by uncertainty. The client is entitled to terminate the commercial contract with the broker at short notice, which, in turn would result in the broker worker losing his or her job. The worker would also be without a remedy. In such circumstances, an unfair dismissal claim could not be lodged against the client for whom the worker provided services as section 198 of the LRA deems the labour broker to be the employer. The worker would also fail in an unfair dismissal claim against the broker, as they had acted as per the contract, and the broker would argue

¹⁶⁵ Botes (2013) PER/PELJ 526.

¹⁶⁶ Botes (2013) PER/PELJ 526.

¹⁶⁷ (2010) 31 ILJ 733 (LC).

¹⁶⁸ (2010) 31 ILJ 733 (LC) para 4.

¹⁶⁹ (2010) 31 ILJ 733 (LC) para 17.

that the termination was out of their control as the work that had been contracted for was no longer available.

Summarily put, the contractual triangular relationship makes it difficult to sue the real employer and claim procedural and substantive unfairness when dismissed. The client is the one who manages the employee and gives the instructions, yet that employee has no recourse against an unfair dismissal by that client. The situation ultimately denies the employee their section 23 constitutional rights to fair labour practices as well as denial of that employee's collective bargaining rights and those advantages that are associated with collective action. Section 213, of the LRA also added to this legislative quagmire by defining the workplace as the place of the business of the employer. This resultantly made it almost impossible to for trade unions to organise labour broker workers.

This contractual loophole was highly controversial and posed a number of problems that were debated in the courts. In *April and Workforce Group Holdings t/a The Workforce Group*¹⁷⁰ the employee's claim failed on the interpretation of the contract and the triangular relationships it created. It was held¹⁷¹ that, as the employee's contract terminated due to an act of the client who was not the employer, no dismissal had taken place. Although this interpretation subsisted for a while, and almost always to the detriment of the employee, the courts soon stepped in to attempt to give an interpretation which accorded with the purpose of the LRA and which would give sufficient protection to vulnerable workers.¹⁷²

In the *NAPE v INTCS Corporate Solutions*¹⁷³ case the courts intervened to stem the abuses that characterised the triangular employment contract. The facts of the case resembled many other scenarios typical of the labour broking relationship. As per the usual labour broking arrangement, two contracts characterised the employment relationship to which the employee was subject. The first being, the labour broker contract with the employee by which employment could be terminated on fair grounds. Then, secondly, the broker and client contract, where the client had the right

¹⁷⁰ (2005) 26 ILJ 2224 (CCMA).

¹⁷¹ *April and Workforce Group Holdings t/a The Workforce Group* (2005) 26 ILJ 2224 (CCMA).

¹⁷² *NAPE v INTCS Corporate Solutions* (2010) 31 ILJ 2120 (LC).

¹⁷³ *NAPE v INTCS Corporate Solutions* (2010) 31 ILJ 2120 (LC).

to request the placement to end at any given moment. When the client did in fact exercise this right, the labour broker had no choice but to retrench the employee. The employee would then proceed to refer an unfair dismissal claim. Like all cases, the broker argued that the client was acting lawfully under the terms of the contract when it wished to remove the employee from the premises. The broker thereby claimed it was powerless to stop the process.

The court started by referring to the fact that ‘everyone’ and not just employees have the right to fair labour practices as guaranteed by the Constitution.¹⁷⁴ Even though the person was not considered to be an employee of the client, the client has a legal duty to do nothing that will undermine a person’s right to fair labour practices, unless the limitation is justified by national legislation.¹⁷⁵ On the courts reading of section 198 of the LRA, nothing in the section provided that a client or broker could limit such right.¹⁷⁶ Accordingly, the court held that any clause in a contract that allows the client to undermine the rights of a person not to be unfairly dismissed is against public policy.¹⁷⁷ The court continued to ascribe a duty on labour brokers to ensure that their clients do not insist on carrying out behaviour that is clearly in violation of ones labour rights.¹⁷⁸ The court rejected the argument that labour brokers are powerless to resist the demands of their clients.¹⁷⁹ In reaching this conclusion, the court said that the labour broker is entitled to approach a court to compel the client not to insist on the removal of an employee where no fair grounds exist.¹⁸⁰ Similarly if a court were to reinstate an employee into the employment of the broker, the broker may enforce such an order against the client.¹⁸¹ The court found it was necessary to send a clear message to labour brokers no to simply accede to the whims of their clients when such demands conflict with their employee’s rights to job security and those demands are unfair. The court also reiterated that public policy demands that notions of fairness, justice and reasonableness are upheld.¹⁸²

¹⁷⁴ *NAPE v INTCS Corporate Solutions* supra at para 63.

¹⁷⁵ *NAPE v INTCS Corporate Solutions* supra at para 63.

¹⁷⁶ *NAPE v INTCS Corporate Solutions* supra at para 64.

¹⁷⁷ *NAPE v INTCS Corporate Solutions* supra at para 70.

¹⁷⁸ *NAPE v INTCS Corporate Solutions* supra at para 77-79.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *NAPE v INTCS Corporate Solutions* supra at para 78.

¹⁸² Mahomed (2010) *Without Prejudice* 49.

The decision was an encouraging one, and also reminds us that our Constitution is there to protect the most vulnerable in our society.¹⁸³ The court clearly elevated the rights of fair labour practices, and security of employment in order to purposefully interpret and resultantly protect vulnerable labour broker employees. This decision was welcomed and showed the courts willingness to look past the facade created by the contracts and bring about constitutionally guaranteed protections. However, it could be argued that this decision fails to take commercial realities into consideration. A labour broker is seldom likely to want to take its client to court over a dismissal dispute, or interdict its client from relying on a provision of the contract to get rid of an employee.¹⁸⁴ The broker would certainly lose credibility amongst its clients, as it will be seen to not be reliable in catering for their needs, namely flexible employment relationships that come without the legal headaches that follow traditional employment. I would therefore argue that it is far from prudent to burden the courts with the interpretive responsibility of making sense of labour provisions and contracts that deny integral rights. Instead proper regulation would better remedy the situation and in the process avoid the increased legal disputes.¹⁸⁵

The peculiarities of the labour broking relationship illustrate that an employment relationship is not always binary. The broking relationship is characterised by two contracts, the one concluded between the broker and the client, and the other between the broker and the employee. Further, with labour broker employees, and also as a result of the deeming provision in section 198(2), the workplace where they conduct their work is not the place of business of their employer. Until the boom of non-standard employment, the workplace was always the place that the employees of the employer actually worked, and the employer concerned was the person in control of that actual workplace.¹⁸⁶ The LRA definition of the workplace is the place where the employees of the employer work. Unfortunately labour broker employment does not correspond with this reality or with the LRA definition.¹⁸⁷ As illustrated above, labour broker employees job security has often been non-existent and their employment can in no way be described as indefinite. Their continued employment has always been at

¹⁸³ Ibid.

¹⁸⁴ Mahomed (2010) *Without Prejudice* 50.

¹⁸⁶ Theron J (2012) *Acta Juridica* 60.

¹⁸⁷ Ibid.

the whims of the client, when the client terminates the agreement and no other work is available, they are often dismissed on the basis of operational requirements. Central industry bargaining is also not an option because, not only has there been a decline in this form of collective bargaining, but labour broker employees rarely get to join trade unions because of the organisational difficulties.

Calls for a ban on the Labour Broking Industry in South Africa

It is submitted that the calls for an outright ban on the industry are indeed drastic and further they can be argued to be unconstitutional. Lessons in this regard can be taken from the Namibian Supreme Court case of *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*¹⁸⁸ where it was held that an absolute prohibition was unjustified because of the right to free trade, the need for flexibility for which labour brokers cater and the importance of freedom of contract.¹⁸⁹ Apart from this judgment, South African labour law can also take note of other lessons from Namibia, with particular emphasis on the risks involved where there is a lack of regulation of labour brokers.

In an attempt to stem the abuses brought about by labour broking, the Namibian government decided to ban the labour broking industry in 2007. This ban was brought about through the provisions of section 128 of the Namibian Labour Act.¹⁹⁰ As it has done in South Africa, the labour broking industry touched a sensitive nerve in various societies in Namibia.¹⁹¹ However, although the industry was associated with the exploitation of workers, there were still a few objections to the complete ban on

¹⁸⁸ (2011) 32 ILJ 205 (Nms).

¹⁸⁹ Mahomed (2010) *Without Prejudice* 50.

¹⁹⁰ Namibian Labour Act 11 of 2007.

¹⁹¹ Botes (2013) *PER/PELJ* 516.

labour broking.¹⁹² These objections eventually triumphed in the Namibian Supreme Court.¹⁹³ Africa Personnel Services in the matter argued that the ban on labour broking infringed their right to carry on a trade or business of their choice as protected by section 21(1)(j) of the Constitution of the Republic of Namibia.¹⁹⁴

In summary, the court came to the conclusion that the ban on labour hire was not necessary in order to achieve the purpose of ensuring fair labour practices to all workers. The court found that the ban on labour hire contained in section 128¹⁹⁵ was so broad that it essentially banned all types of atypical employment.¹⁹⁶ This was found to be disproportionate and unreasonable, especially in light of the fact that the International Labour Organisation¹⁹⁷ allows for labour broking and merely requires proper regulation.¹⁹⁸ Further, it was held that the function of ensuring fair labour practices could be achieved through proper regulation, and on this reasoning the ban was considered to be disproportionate and unnecessary.¹⁹⁹ In line with this rationale, the limitation could therefore not be upheld and fell foul of the ambit of section 21(2).²⁰⁰

A number of lessons can be taken from the Namibian Supreme Court judgment especially with regards to the constitutionality of a ban on the industry. In terms of section 22 of the South African Constitution, every citizen has the right to choose their trade, occupation or profession freely and the law is permitted to regulate any trade and its state of affairs. Consequently, in terms of section 22, labour brokers and their employees are free to partake in any legal occupation or trade. However, this right must be balanced with the rights in section 23 of the Constitution. Section 23 provides that ‘everyone’ has the right to fair labour practices. In light of this right to fair labour practices not being realized due to the abuse of the tripartite broking relationship, regulation by the law of an occupation or trade, as provisioned for by

¹⁹² Ibid.

¹⁹³ *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 (Nms).

¹⁹⁴ The Constitution of the Republic of Namibia, 1990; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 ILJ 205 (Nms).

¹⁹⁵ Namibian Labour Act 11 of 2007.

¹⁹⁶ Botes (2013) PER/PELJ 520.

¹⁹⁷ Hereafter the ILO.

¹⁹⁸ Botes (2013) PER/PELJ 520.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

section 22 would best serve the purpose of respecting and achieving both rights. Most importantly, this can be done without unnecessarily derogating from one right or the other. It is submitted that an overall ban on the labour broking industry would fail to meet the threshold set out in the section 36 limitations clause of the Constitution. This failure would be on the basis that the limitation is far-reaching in that it bans the whole trade whereas there are less restrictive means that exist that can ensure the fulfillment of both rights. The new framework needs to be able to adequately police the industry and protect workers, whilst still retaining the freedom of one to conduct any legal trade and the beneficial aspects like flexibility that labour broking provides. These aspects will be fully canvassed in chapter 4 when the amendments are comprehensively evaluated.

Chapter 3

The Purpose of Labour Law

A significant issue to consider when assessing labour laws, or in fact any laws in general, is what function are those laws expected to serve. “A premise or basis of any legal dispensation is the purpose or the function of such laws.”²⁰¹ A look to the purpose of labour law helps us understand what results are sought when labour laws are promulgated and when we debate issues central to labour matters. A question also arises as to whether the purpose of labour law has changed over time, and whether this has been reflected in the changes to our own labour laws and the LRA. If legislation is unable to achieve its perceived function or purpose then that legislation has to be revised.²⁰² Discussions surrounding the purpose of labour law have always been punctuated by the traditionally articulated dictum by Otto Kahn-Freund

This dictum as forwarded by Otto Kahn-Freund comes across in the following quotation:

²⁰¹ Vettori MS *The Functions of Labour Law* (University of Pretoria) (2005) at 21.

²⁰² Vettori (2005) *University of Pretoria* 21.

“ 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 operations it is a condition of subordination, however much the submission and subordination may be concealed in 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 in the employment relationship”²⁰³

This power imbalance allows the employer to dictate the rules and who must comply with such rules. It is said that the primary purpose of labour law has been to regulate this power imbalance, support employees, and restrain the power of employers and their management against that of organised labour. Essentially labour law has sought to maintain a balance of power and afford protection to the employee, who traditionally has been seen as the weaker entity.

These sentiments are echoed in case law, most notably in the Labour Appeal court decision of *National Entitled Worker’s Union v Commissioner for Conciliation and Arbitration*.²⁰⁴ The case involved a constitutional challenge to specific provisions of the Labour Relations Act and the Employment Equity Act in that they did not provide for remedies for an employer in instances where an employee resigns without notice. It was argued by the employer that the employee’s actions violated the employer’s right to fair labour practices. In short, the case was based on the contention that the failure of the Labour Relations Act and the Employment Equity Act to provide a remedy for employer’s who suffered unfair labour practices was unconstitutional.

In dispensing with the application, the judge made note of the fact that legislation is enacted if a need for such legislation has arisen.²⁰⁵ Under the common law the employer’s position was strong as against an employee.²⁰⁶ Under the common law regime, if an employee was dismissed lawfully, which essentially involved being

²⁰³ Benjamin P “Labour Law beyond employment” (2012) *Acta Juridica: Reinventing Labour Law* 21 at 21.

²⁰⁴ *National Entitled Workers Union v Commissioner for Conciliation Mediation and Arbitration and Others* [2007] ZALAC 3.

²⁰⁵ Ibid

²⁰⁶ Ibid

given proper notice of the termination of his or her contract or if the employee was paid notice pay in lieu of notice, the employee had no remedy in law even if the reason to terminate had been unfair.²⁰⁷ The courts could also not provide any remedy to the situation. Unfair labour practice jurisdiction was introduced partly to provide employees with greater protection as the need had clearly arisen through the unequal employment relationships that characterised labour law.²⁰⁸

The court found that in general the position of employers is different from that of employees.²⁰⁹ Employers are sufficiently powerful when compared to individual workers²¹⁰ and employees are generally extremely vulnerable to an exercise of such power. Employers enjoy greater social and economic power and labour legislation has been necessary to intervene and provide greater protection to vulnerable employees and regulate the power imbalance.

Prior to the amendments, the provisions of the LRA dealing with labour brokers and their employees has given little protection to the workers in those relationships and has resultantly failed to give effect to the traditional purpose of labour law as set out by Otto Kahn-Freund. The situation has been left to the labour courts to rectify and give an interpretation to the legislative provisions that accorded some sort of protection to labour broker employees, and in doing so would align with the purpose of labour law.²¹¹ Adopting a purposive interpretation of the provisions, in order to afford the requisite protection, has provided some limited protection.²¹²

The LRA sets out a number of policy objectives that it seeks to achieve through the application of its provisions. These principal aims and objectives can be seen to be relatively ambitious.²¹³ Among its objectives, section 1 states that the LRA seeks to advance economic development, social justice, labour peace and the democratisation of the workplace. Further, the LRA is expected to give effect to the rights contained in

²⁰⁷ Ibid.

²⁰⁸ *National Entitled Workers Union v Commissioner for Conciliation Mediation and Arbitration and Others* [2007] ZALAC 3.

²⁰⁹ *National Entitled Workers Union v Commissioner for Conciliation Mediation and Arbitration and Others* [2007] ZALAC 3.

²¹⁰ Ibid

²¹¹ *NAPE v INTCS Corporate Solutions* (2010) 31 ILJ 2120 (LC).

²¹² *Djokwe v De Kock NO and Others* (2012) 33 ILJ 2401 (LC).

²¹³ Vettori (2005) *University of Pretoria* 21.

section 23 of the Constitution, as well as fulfilling the obligations incurred by South Africa as a member of the International Labour Organisation. Promotion of orderly collective bargaining also stands chief among these obligations. The challenges associated with labour broker workers has ensured that the LRA is dismally failing at accomplishing the majority of its objects in this regard.

A Brief Discussion on The function of Labour Law

Labour law canvasses and regulates a large and integral part of society. It thereby wields immense potential to affect multiple aspects of everyday life, including the potential to fulfil socio-economic objectives. Labour law is difficult to define and there is no comprehensive all-encompassing definition.²¹⁴ Generally put, labour law is the totality of rules that regulates legal relationships between employers and employees, “the latter rendering services under the authority of the former,” at the individual as well as the collective level.²¹⁵

Employment is a central aspect of everyday life. It is inextricably linked to a person’s ability to source an income and maintain their own welfare as well as that of their dependents. Employment affords economic power that in turn affects an individual’s ability to dictate the direction and trajectory of their life. This economic power is coupled with other rights and privileges associated with employment, such as insurance, medical aid and employee retirement schemes, amongst other things. Attaining full employment can be said to be one of the principle aims in a person’s lifetime, and resultantly allows a person, depending on the quality of the post, to somewhat evade the poverty and poor living conditions that generally characterise the lives of those who remain unemployed.

Further, employment is socially esteemed, this probably being a result of its ability to command a certain lifestyle. Society attaches feelings of self worth to ones employment status, and certain jobs are revered above others. However, and most

²¹⁴ Vettori (2005) *University of Pretoria* 22.

²¹⁵ *Ibid.*

importantly, unemployment and underemployment lies at the core of poverty.²¹⁶ For the poor employment is often the only asset they can use to improve their well-being, hence the creation of productive employment is essential in achieving poverty reduction and sustainable economic and social development.²¹⁷ As a consequence of its socio-economic importance, employment and its accompanying labour laws, has the ability to influence and affect a significant aspect of the populace it controls. Labour laws and policies have the capability to create employment, ensure employment security, as well as protect vital socio-economic rights, and in so doing greatly improve the lives of those within its sphere. The World Summit for Social Development has put the goal of full and productive employment at the forefront of the United Nations agenda and they have recognized that productive employment will be the most effective means of promoting social integration²¹⁸ and reducing poverty.²¹⁹ In turn, governments committed to promoting full employment and making it a priority to their economic and social policies.²²⁰

Further, at the 2005 World Summit, countries committed to making the goals of full and productive employment as well as decent work a central objective of national policies. Labour broker workers are part of an increasing reliance on non-standard work, as opposed to that of full-time employment. Further, labour broker workers are often the most vulnerable and come from the poorer parts of our society. Policies that are tailored to protect the rights of these workers and their ability to sustain a livelihood are central to improving the lives of the poor. The purpose that underlies our labour laws and their promulgation is consequently of immeasurable significance.

Predominant approaches to the Purpose and Function of Labour Law

²¹⁶ Poverty Social Policy and Development Division <http://undesadspd.org/Poverty/PovertyandEmployment.aspx> (Accessed, 29 October 2015).

²¹⁷ Poverty Social Policy and Development Division <http://undesadspd.org/Poverty/PovertyandEmployment.aspx> (Accessed, 29 October 2015).

²¹⁸ Social and racial integration remains a central objective that came into being with the introduction of the Constitution of the Republic of South Africa, 1996.

²¹⁹ Employment, Social Policy and Development Division <http://undesadspd.org/Employment.aspx> (Accessed, 29 October 2015).

²²⁰ Employment, Social Policy and Development Division <http://undesadspd.org/Employment.aspx> (Accessed, 29 October 2015).

Creighton and Stewart²²¹ are of the view that there are two main approaches to the purpose and function of labour law.²²² The first being the ‘protective view’ and the second being the ‘market view’.²²³

The protective view focuses on the idea that there is an imbalance of power between the employer and the employee. The employer, being the stronger party, is able to dictate the majority of the terms of employment and the employee is therefore left at the mercy of this discretion. As a result of this imbalance, the employee has very little bargaining power and the function of the law is to protect the employee and assist and regulate this imbalance so that equity and fairness rules the arena.²²⁴ A look at South African labour legislation would suggest that this view dominates the thinking behind its approach.²²⁵ This approach, based on pluralism, is said to be the labour law system behind all liberal democracies.²²⁶ The pluralist approach revolves around regulating the inherent conflict that lies at the heart of organisations comprising of employees and employers who harbour conflicting interests.²²⁷

Section 23 of the Constitution caters for both employers and employees rights to freedom of association and to bargain collectively in order to facilitate the resolution of these conflicts. The resolution of the conflict is beneficial to both parties in order to avoid the destruction of the organisation. Both employers and employees have an interest in the management of the conflict and continued survival of the organisation.²²⁸ The pluralist system centres on balancing these two powers, and where this cannot be achieved it usually leads to industrial action by either party.²²⁹ A situation leading to collective action is always disruptive and can affect large sectors and resultantly follow on to damage the welfare of the county’s economy. Labour law, according to the protective view attempts to protect employees by creating a system that facilitates meaningful collective bargaining.²³⁰

²²¹ Creighton B and Stewart A *Labour Law: An Introduction* 3ed (2002) The Federation Press.

²²² Vettori (2005) *University of Pretoria* 24.

²²³ Ibid.

²²⁴ Vettori (2005) *University of Pretoria* 24.

²²⁵ Vettori (2005) *University of Pretoria* 24.

²²⁶ Vettori (2005) *University of Pretoria* 25.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Vettori (2005) *University of Pretoria* 26.

The market approach proposes that market forces are preferable to the government intervention in order to achieve economic growth and success.²³¹ This approach results in reduced intervention from government with regard to setting minimum labour standards and basic conditions for employment. According to the market approach, state intervention in the form of protection for the employee results in an artificial distortion of the market forces which in turn results in economic inefficiencies and a loss of prosperity.²³² The principal premise of the approach is that the operation of the market is more favourable to the attainment of the efficient allocation of resources.²³³ Labour laws are meant to refrain from interfering with market forces, and rather work together with them.²³⁴ The restricted intervention therefore leads to a stronger economy that at the same time will cater to the interests of both employers and employees.

The basic premise of the protective approach, namely protection of the employee, mirrors the traditional proposition to the purpose of labour law as formulated by Otto Kahn-Freund. This is particularly apparent when the latter part of his dictum is examined. The relevant segment reads as follows;

“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 in the employment relationship”²³⁵

The principal purpose of labour law is to maintain the equilibrium between employers and workers by ensuring an effective operation of a voluntary collective bargaining system.²³⁶ Beyond that labour law is also seen as concerned with the protection of social rights.²³⁷ As mentioned above, South African labour legislation generally corresponds with this approach. The protection of workers’ rights and fair labour practices is comprehensively provided for in chapter eight of the LRA. South African

²³¹ Ibid.

²³² Vettori (2005) *University of Pretoria* 26.

²³³ Vettori (2005) *University of Pretoria* 27.

²³⁴ Ibid.

²³⁵ Benjamin (2012) *Acta Juridica: Reinventing Labour Law* 21.

²³⁶ Davies P and Freedland M *Kahn-Freund’s Labour and the Law* (1983) 3ed 2.

²³⁷ Davies and Freedland *Kahn-Freund’s Labour Law* 2.

labour law is also committed to the facilitation of voluntary collective bargaining. This means that there is no judicially imposed duty to bargain. This is fundamentally linked to the right to freedom of association as guaranteed in the Constitution. Further, the voluntary nature is fostered through the provision of organisational rights, collective bargaining aids, and other mechanisms provided for in chapter three of the LRA. Prior to the amendments, it can be stated that the LRA provisions dealing with labour brokers explicitly failed to guarantee the protection of the workers or facilitate orderly and voluntary collective bargaining. This was as a result of trade unions often being unable to access labour broker employees as their place of occupation was constantly changing, and also because they were not considered to be employees of the client and therefore could not be organised under a trade union that was recognised by the client.

The question remains as to whether Otto Kahn-Freund's sentiments regarding the purpose of and function of labour law still hold their relevance. If his sentiments are still relevant, can they be paired together with other ancillary purposes in order to derive greater benefits from the application of labour laws, especially with regard to marginalised workers such as labour broker employees? Further if his sentiments are regarded to be out-dated, what should the new purpose entail and where should its priorities lie?

In my opinion, Kahn-Freund's notions on the function of labour law still hold ample relevance. In this regard a few parallels can be drawn to the challenges facing labour broking in South Africa, and the calls for enhanced regulation. As outlined above, the challenges facing labour broker employees illustrate the consequences of a poorly regulated relationship between a bearer of power and one who is not a bearer of power. The labour broker employee is at the heart of this submission, and subordinates his or herself to the broker's terms and conditions. For the most part, the employee is at the mercy of the broker's ability to secure employment. Where no employment is found, the employee then becomes a victim of the 'legal figment' that is the commercial contract of employment. The arrangement attempts to give the impression of freedom of contract, but instead allows for that employee to be dismissed without any recourse to the labour protections he or she is supposedly

guaranteed. Consequently labour law continues, and rightly so, to have and need to impose the obligation to protect vulnerable workers who find themselves at the wrong end of the power imbalance. This, however, is not to say that other functions cannot simultaneously coexist.

Although the traditional purpose has always been to equalise the bargaining power between employers and their employees, it should be mentioned that this traditional purpose has been met with more contemporary ideas of what objectives labour law may be used to achieve. Labour law and its purposes should not be confined to one arena and it could benefit from multiplicity of commitments that can come together to bring about employment opportunities, job security and business flexibility whilst still regulating the power imbalance. These commitments could include enhancing workers employability, enhancing access to the labour market for new entrants, as well as assisting workers during transitional phases in their working lives.²³⁸

Allowing for a multiplicity of commitments would allow for greater flexibility and also cater for situations that do not ascribe to the traditional conceptions of the employer and employee relationship. An example of mistaken conceptions can be seen in the assumption that the employee is always the weaker bargaining entity as this is not always the case, for example with highly skilled workers who are often able to dictate their own terms.²³⁹ The usefulness and flexibility of resolutions could be used to confront the ever changing nature of the labour arena, as is evident in the labour broking arena. The flexibility could also lend itself to resolving different challenges that may arise throughout labour law. “The attempt to identify a single defining goal loses sight of the differing purposes of different types of labour law.”²⁴⁰

Labour law can be used to support policies such as social security, training and education, labour placement and mobility, job creation and immigration law.²⁴¹ A regulatory approach to labour law can also achieve social policy goals by using mechanisms and strategies that ensure that workers in fact receive the intended

²³⁸ Benjamin (2012) *Acta Juridica: Reinventing Labour Law* 21.

²³⁹ Benjamin (2012) *Acta Juridica: Reinventing Labour Law* 23.

²⁴⁰ Benjamin (2012) *Acta Juridica: Reinventing Labour Law* 24.

²⁴¹ Benjamin (2012) *Acta Juridica: Reinventing Labour Law* 25.

benefits of their labour rights.²⁴² In relation to labour broker employees, this will entail that they receive their constitutional guarantees, and they do not suffer abuses as a result of the tripartite relationship and its ability to circumvent labour laws.

A large portion of the analysis of the amendments will focus on whether or not the new provisions adequately cater for the protection of labour broker employees. However, it should be noted that the analysis will also look as to whether the amendments fulfil other commitments and this is especially in light of the above paragraphs taking note of the advantages that maybe be derived from a multiplicity of directives.

The Impact of International Labour Conventions on Debates surrounding Labour Broking

As stated above, the LRA is expected to give effect to the rights contained in section 23 of the Constitution, as well as fulfilling the obligations incurred by South Africa as a member of the International Labour Organisation. With regard to the regulation of labour brokers, the ILO has adopted the Private Employment Agencies Convention,²⁴³ which seeks to balance flexibility and the protection of labour broker workers. The convention takes note of the importance of flexibility in the functioning of labour markets. However, it also emphasises the importance of protecting workers against abuses as well as the need to guarantee the rights to freedom of association and collective bargaining.²⁴⁴ Social dialogue is also highlighted as being necessary to guarantee a functional labour relations system.²⁴⁵

As the convention recognises the important role labour brokers often play in the labour market, it therefore allows for the operation of labour broker agencies while at

²⁴² Benjamin (2012) *Acta Juridica: Reinventing Labour Law* 26.

²⁴³ Private Employment Agencies Convention, 1997 (No. 181).

²⁴⁴ Private Employment Agencies Convention, 1997 (No.181)

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326 (Accessed 9 January 2016).

²⁴⁵ Private Employment Agencies Convention, 1997 (No.181)

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326 (Accessed 9 January 2016).

the same time upholding important worker protections. In South Africa, as was stated in the previous chapter, the adequate protection of labour broker workers' rights to freedom of association which is in turn linked to collective bargaining, has always been an area of deficiency. Article 11 of the Convention²⁴⁶ specifically provides that national law and practices must adequately provide for freedom of association and collective bargaining for these workers, as well as ensuring that they are not paid below the minimum wage.

The International Labour Organisation's Decent Work Agenda also stands among South Africa's international obligations. Like those who advocate for labour law embracing a multiplicity of purposes, the ILO Decent Work Agenda also brings about a broader focus on how labour law is supposed to function.

As its name suggests, the Decent Work Agenda is aimed at promoting decent work for all. As work is central to people's well-being, it is important that such work is able to pave the way for broader social and economic advancement.²⁴⁷ In order to achieve these goals it is important that such work is decent. "Decent work sums up the aspirations of people in their working lives."²⁴⁸ Interpretation of what decent work is should be viewed through the prism of the ILO's four strategic objectives.²⁴⁹ These four objectives are, promoting jobs, guaranteeing rights at work, extending social protection as well as promoting social dialogue.²⁵⁰ Promoting jobs allows for job creation, more employment opportunities and therefore more people with the ability to sustain their livelihoods. Guaranteeing rights at work is integral for the recognition and respect for workers rights, especially disadvantaged and poor workers who need representation and laws that work with their interests.²⁵¹ Extending social protection ensures workers are permitted adequate family and rest time as well as adequate

²⁴⁶ Private Employment Agencies Convention, 1997 (No.181).

²⁴⁷ Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (29 December 2015).

²⁴⁸ Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (29 December 2015).

²⁴⁹ Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (29 December 2015).

²⁵⁰ Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (29 December 2015).

²⁵¹ Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (29 December 2015).

health care. And lastly the promotion of social dialogue is central to avoiding disputes, increasing worker participation and building cohesive organisations.²⁵²

“Decent work embraces all forms of productive activity and is not about universally applicable standards, Decent work envisages all workers, not only employees, on the same continuum, with those at the bottom suffering the most ‘decent work deficits’ and workers further up the continuum suffering fewer such deficits. The decency of work, or the lack thereof, depends on the realisation of four core values, namely, the opportunity to work, the right to freedom of association, social protection and voice.”²⁵³

How we will deliver on these values for those outside standard employment,²⁵⁴ for example labour brokers, is an important question that needs to be addressed. Promoting decent work is seen to be key in reducing poverty and achieving equitable, inclusive and sustainable development.

Ensuring decent work conditions and the fulfilment of social rights has been particularly challenging in the labour broking arena as was shown in the previous chapter. Labour brokers offer their clients short-term risk free employment that allows for business flexibility. Short-term employment has become an integral part of certain businesses, especially those who deal with seasonal surges in business. The short-term flexibility, which often allows for instant termination at the request of the client, also permits businesses the elasticity to be able to curb financial responsibilities of paying wages when the need arises. This therefore affords them the ability to survive and adapt to the ever-fluctuating global markets. Labour brokers are therefore seen as the perfect tonic to the increasingly volatile employment market. They allow businesses the flexibility to keep their costs as low as possible, and also alleviate the responsibility of complying with applicable labour laws. Especially with regard to non-standard and temporary workers, it can be said that the call for flexibility has trumped that of ensuring job security.

²⁵² Decent Work Agenda <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm> (29 December 2015).

²⁵³ Le Roux (2013) *ILJ* 37.

²⁵⁴ Le Roux (2013) *ILJ* 37.

Will an Integrated Function provide a solution to the Challenges faced?

The question needs to be asked as to whether a variety of functions can be merged together and peacefully coexist. Simply put, and with particular regard to labour broker workers, would it be possible to allow for business flexibility, whilst still protecting worker's employment security and ensuring the subsistence of decent work. In light of the argument above that labour laws can mesh together a multitude of functions in order to achieve more extensive goals, it is argued that the integration of labour flexibility and employment security could be particularly beneficial where adequately provided for.

In this regard, it should be noted that South Africa has developed its own brand of integration. South African policy makers have taken account of the fact that it is not the sole purpose of labour law to provide protection for workers.²⁵⁵ South Africa has adopted the concept of 'Regulated Flexibility' that provides for the selective application of legislative standards, depending on the remuneration earned by workers and the size of the employer's undertakings.²⁵⁶ Flexibility and the protection of workers' fundamental rights underpin this South African approach.²⁵⁷ It also recognises that lower earning employees are often in a more precarious position than those who earn higher salaries.²⁵⁸ Further, the policy also recognises that smaller undertakings should not be burdened with obligations that could potentially introduce rigidities and costs that would inhibit job creation.²⁵⁹

Although South Africa has developed a multifaceted system, the question still remains as to whether there are other approaches that could support or supplement our labour policy. When considering the proposition as to how labour law can benefit from a multiplicity of functions, it becomes important to consider how these functions can work in tandem in order to produce more desirable results. Employment security is closely aligned to the traditional 'protective view' as outlined in this chapter, where

²⁵⁵ Van Eck BPS "Regulated Flexibility and the Labour Relations Amendment Bill of 2012" (2013) 46 *De Jure* 600 at 604.

²⁵⁶ Van Eck (2013) *De Jure* 604.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

the employee is protected from the stronger bargaining power of the employer. On the other hand, business flexibility closely aligns with the ‘market view’ that advocates market forces as being preferable to the government intervention in order to achieve economic growth and success. Flexibility tends to be a metaphor for unfettered markets.²⁶⁰ Yet, it is said that there is no such thing as a completely unregulated market, as with labour markets, because they function effectively only because they are surrounded by a set of institutions that generate common rules, and most importantly reflect the interests of the participants.²⁶¹ In the present instance that would entail allowing for business needs, but also acknowledging worker’s rights to security.

The concepts are therefore at odds which each other, and seem to present a sort of oxymoron.²⁶² People are generally always suspicious when two elements of social and economic policy are presented as complementary, where they are almost always commonly seen to be linked in a trade-off manner.²⁶³ For many, increasing flexibility in the labour market is synonymous with decreasing job and employment security, because a relaxation just means a relaxation of the laws regulating the hiring and firing of workers.²⁶⁴ This relaxation generally comes in the form of offering more flexible forms of employment, such as fixed term jobs, labour broker agency jobs and other forms of atypical jobs that produce less security.²⁶⁵ The development of the many atypical forms of employment and the previously discussed labour broker triangular employment relationship points to proof of a trade-off between flexibility and security.²⁶⁶ This has consequently resulted in two labour market policies that have been constantly pitted against each other, and this has often led to a stalemate in policy reform.²⁶⁷ COSATU have understandably led the calls for employment security, while employers have argued the benefits of flexibility.²⁶⁸

²⁶⁰ Rodgers G “Labour Market Flexibility and Decent Work” (2007) *Economic and Social Affairs* 1 at 1.

²⁶¹ Rodgers (2007) *Economic and Social Affairs* 1.

²⁶² Auer P “Security in Labour Markets: Combining Flexibility with Security and Decent Work” *Economic and Labour Market Papers, International Labour Organisation* 1 at 1.

²⁶³ Auer (2007) *Economic and Labour Market Papers* 1.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Rodgers (2007) *Economic and Social Affairs* 1.

The concept of 'Flexicurity' proposes a third labour market view that could overcome the fundamentally opposed policies as described above.²⁶⁹ Within this conception, flexibility and security are not opposed, but instead are complementary of each other. Flexibility and security therefore come together and transform into a complementary process through social dialogue.²⁷⁰ Flexibility and security amalgamate and become mutually supportive in facing the challenge of globalisation.²⁷¹

The elements of flexibility, within the concept of flexicurity entail: external and internal numerical flexibility, functional flexibility, wage flexibility.²⁷² The security dimension involves: job security, employment security/employability security, income security and combination security.²⁷³ There is a shift within the security element, the shift being from traditional stable employment security and relationships in private firms and the public sector, towards security by employment policies and new social rights that protect individuals between jobs.²⁷⁴ Flexicurity involves a number of policy objectives. It involves instituting active labour market policies that help people to cope with rapid change, unemployment spells, reintegration and transitions to new jobs.²⁷⁵ Reliable and responsive lifelong learning involves a system that ensures continuous adaptability and employability for all workers.²⁷⁶ Modern social security systems provide adequate income support and facilitate labour market mobility.²⁷⁷ Modern social security also includes provisions that help people combine work with private and family responsibilities such as childcare. Lastly, supportive and productive social dialogue, as mutual trust and developed industrial relations is integral to ensuring that flexicurity policies are properly introduced.²⁷⁸

The demanding nature of the policies means that extensive financial government support is necessary especially when supporting workers who are out of the

²⁶⁹ Auer (2007) *Economic and Labour Market Papers 2*.

²⁷⁰ Auer (2007) *Economic and Labour Market Papers 2*.

²⁷¹ Ibid.

²⁷² Auer (2007) *Economic and Labour Market Papers 2*.

²⁷³ Ibid.

²⁷⁴ Auer (2007) *Economic and Labour Market Papers 3*.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

employment cycle as well as provisioning for additional social rights. Essentially, the employment security element in flexicurity derives from the government providing for extensive employment benefits and social security. In welfare states, such as Denmark, this is normally achieved through progressive taxation. Flexicurity essentially demands the relaxation of job protection in exchange for adequate social and unemployment benefits and active labour market policies. It results in workers being protected but their jobs not being afforded the same.

Although, this welfare state model may not be perfectly suited to the South African landscape, there are useful elements that can be gleaned from it in order to facilitate greater security and protection for labour broker workers. Further, it is highly unlikely that unions would allow for decreased job protection, especially when taking into account the levels of unemployment in South Africa, and the already stringent nature of the dismissal provisions in the LRA. However, lessons regarding the greater provision of social rights and employment protections could be taken on board as a way to aid not only labour broker workers who are between employment, but also all forms of non-standard workers. Additionally, facilitation of training and schemes to keep the worker's skills relevant could also assist in allowing labour broker workers to find employment.

“Temporary employment is on the rise and all indications are that, in the future, workers will migrate between temporary short-term employment. The only way in which stable access to social benefits will be assured is if the benefits are not channelled through the employer, but through a different platform that does not assume regularity of income that has been associated with waged employment.”²⁷⁹

Where the government is not able to do so, trade unions should consider being the conduit for providing these social rights when workers are bereft of employment. This would involve trade unions taking on workers who are not necessarily employed at the time, but are between employment. This will be the case in order to accommodate and facilitate their needs in between jobs.²⁸⁰

²⁷⁹ Le Roux (2013) *ILJ* 39.

²⁸⁰ Le Roux (2013) *ILJ* 39.

Discussions surrounding flexibility and security relate to the provision and application of the decent work agenda in that the agenda constitutes a framework for social policy that incorporates both flexibility and security amongst other elements.²⁸¹ Although each country has its own social goals, there are broad goals that are mutual and these include the importance of access to productive employment for all, security of work and income, respect for core rights in the work place; including dignity of work, freedom of association, the role of work in social integration and personal development, as well as the democratic process of social dialogue by which these goals are set and achieved.²⁸² These are all elements of the decent work agenda.²⁸³ Achieving decent work therefore calls for a concerted effort where policies promote employment promotion and protection, as well as security, income support, but also competitive and productive systems in which adaptability and innovation are key.²⁸⁴

South Africa can gain direction from both the Decent Work Agenda and flexicurity policy approaches adopted by the ILO and the EU.²⁸⁵ Both policies seek to balance flexibility with the protection of workers, as well as aspects like training, social security measures and the promotion of dialogue.²⁸⁶ The purpose of labour law needs to look beyond the “mere fortification of employee’s rights.”²⁸⁷ The purpose of labour law should also incorporate aspects that may discourage or encourage job creation and which also integrate skills development and social security protection into a refined encompassing labour market.²⁸⁸ Some encouragement can be taken from the fact that expenditure on social grants has increased in South, which is received by some 13 million individuals.²⁸⁹ The expenditure on welfare and social grants has increased from R30.1 billion in 2000 to 101.4 billion in 2009.²⁹⁰ This could certainly be argued to be a positive sign with regard to providing for those out of employment.

²⁸¹ Rodgers (2007) *Economic and Social Affairs* 7.

²⁸² Rodgers (2007) *Economic and Social Affairs* 7.

²⁸³ Ibid.

²⁸⁴ Rodgers (2007) *Economic and Social Affairs* 8.

²⁸⁵ Van Eck (2013) *De Jure* 611.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Van Eck (2013) *De Jure* 611.

²⁸⁹ Benjamin (2012) *Acta Juridica: Reinventing Labour Law* 35.

²⁹⁰ Ibid.

Labour brokers and other non-standard forms of work are there to provide flexibility. However flexibility and economic success is not the only part of the picture. Efforts to achieve decent work as well as flexible employment relationships are part of a bigger picture and should be considered when formulating functions and policies.²⁹¹ The bigger picture should involve creating a better and more stable society for all which accommodates the interests of all members in the society, and where decent work stands chief among those interests.

²⁹¹ Rodgers (2007) *Economic and Social Affairs* 8.

Chapter 4

Analysis of the 2014 Amendments to the LRA in the context of Labour Broking

Introduction

The relentless abuses perpetrated in the non-standard arena led to the introduction of the much-needed amendments that form the principal subject matter of this paper. The statutory ring fencing of labour broker arrangements contributed to an externalised labour market and the dehumanisation of contract workers to mere units of labour.²⁹² From an early stage it was clear to see that South African labour legislation was not nearly adequate enough to provide protection for employees in non-standard work relationships.²⁹³ Section 11 of the Private Employment Agencies Convention of 1997 places an obligation on member states of the ILO to take steps to implement policies that protect employees involved with labour broker agencies.²⁹⁴ The amendments seek to address specific problem areas associated with the abuse of labour broker workers.²⁹⁵

²⁹² Cohen T “The Effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships” (2014) 35 *ILJ* 2606 at 2616.

²⁹³ Botes A “A Comparative study on the Regulation of Labour Brokers in South Africa and Namibia in light of recent legislative developments” (2015) 132 *SALJ* 100 at 101.

²⁹⁴ Botes (2015) *SALJ* 104.

²⁹⁵ Cohen (2014) *ILJ* 2616.

The bulk of this analysis will focus on the provisions of the amendments that may be seen to be contentious. While the analysis canvasses the specific sections that have been brought about, comment will also be made as to whether these sections make provision for protective as well as flexibility measures. It is clear from the first reading and further from the reasoning behind the promulgation of the amendments, that their function is squarely set towards providing adequate protection and ensuring security and the realisation of fair labour practices for labour broker workers who fall below the BCEA threshold. However it is also apparent that the legislature has also sought to provide for genuine instances of temporary work, and in doing so has allowed some flexibility in this regard. After the discussion has touched on the subject matter referred to above, the analysis will look to discuss the various amendments, while at the same time pointing out the protective aspects of those sections, as well as those parts of the sections that allow for flexibility. A protective approach does have its merits especially on the back of the abuses witnessed in the labour broker arena, however, this paper will attempt to illustrate the advantages of a twofold approach where the LRA focuses on protection and flexibility in order to facilitate a better balanced approach. The case of *Assign Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*²⁹⁶ will also be looked at to inform the conversation on the section 198A(3)(b) deeming provision and the way forward as regards its correct interpretation.

A Critical Overview of Section 198A of the LRA

The modified section 198A sets out to regulate labour broker arrangements and stem the commodification of these workers while at the same time making the labour broker client more accountable in specific circumstances.²⁹⁷ Section 198(1) of the LRA defines a temporary employment service²⁹⁸ as any person who for reward procures or provides to a client other persons who perform work for the client and who are remunerated by the TES. Notably, section 198(2) of the LRA still stipulates that in genuine instances of temporary work, the TES remains the employer of the

²⁹⁶ [2015] 11 BLLR 1160 (LC).

²⁹⁷ Cohen (2014) *ILJ* 2616.

²⁹⁸ From hereon “TES”.

worker. The bulk of the amendments are thus to be found in section 198A of the LRA. Section 198A defines a 'temporary service' as work for a client by an employee for a period not exceeding three months; or as a substitute for an employee of the client who is temporarily absent; or in a category of work and for any period of time which has been determined to be a temporary service by a collective agreement concluded in a bargaining council, sectoral determination or a notice published by the Minister. Workers falling under the categories set out in section 198A(1) remain employees of the TES in terms of section 198(2). Although it should be noted that, as per section 198A(2), section 198A only applies to workers earning under the prescribed threshold in terms of section 6(3) of the BCEA. The earnings threshold as per the BCEA currently sits at R205,433.00 per annum.

In my mind the threshold postures various problems. The threshold might be seen to be arbitrary, as it could be argued that workers who fall outside the threshold are also seen to be vulnerable. The threshold can therefore be seen as a tenuous proxy. The threshold essentially assumes that vulnerability is linked to income, and those who fall outside it are not vulnerable. Further, the threshold can be used to deny workers the protection of section 198A. This can be achieved by ensuring that these workers remain outside the threshold. This is accomplished by ensuring that their wages safeguard that their earnings remain in excess of the threshold. When taking action against such abusive practices, it will be particularly difficult to prove that the employer is doing this purposefully to avoid the application of the protective provisions. Although one can see the reasons behind the application of a threshold, it is submitted that other workers above the threshold could also find themselves in precarious relationships as these relationships would still be governed by section 198(2) and they would consequently encounter the same problems as before the changes.

Much has been made of the protections provided for those workers falling below the threshold. However, some thought also needs to be given to those who fall above it and are still subject to the same legislative regime that led to calls for the amendments. Those falling just above the threshold might still be as vulnerable as those below it; however, they will have the misfortune of being on the wrong side of the threshold. Those workers who are above the threshold will still face the same

problems with regard to losing their jobs at the whims of the client and the commercial contract and not being able to take any action against such client or exercise their collective bargaining rights. Conversely, it could be suggested that courts that are faced with vulnerable workers who fall above the threshold will still be able to afford these workers adequate protection by ignoring the threshold and providing a purposive interpretation of the legislation and its goal to introduce protective measures for vulnerable labour broker workers.

The threshold does however illustrate that the legislature considered issues surrounding security as well as flexibility. This comes across in attempting to ensure that those businesses employing those who are above the threshold are not overly burdened by the application of the amendments, as their workers are presumably stronger bargaining position as opposed to those vulnerable workers below the earnings threshold. Further considerations of flexibility are similarly demonstrated through section 198A(1)(c) of the LRA and its allowances for circumstances where a categories of work and for any period of time can be determined to be a temporary service by a collective agreement concluded in a bargaining council, sectoral determination or a notice published by the Minister. This thereby allows for further genuine usages of temporary workers that do not fall squarely within the grounds of the first few requirements of section 198A(1)(a) and (b).

Workers falling below the threshold and whose work is not categorised as temporary are given the benefit of the deeming provision in section 198A(3)(b). The deeming provision under section 198A(3)(b) states that the client is deemed to be the employer of the worker, but only in instances where the worker is not seen to be performing temporary work in terms of section 198A(1). It goes further to note that such employees will, subject to 198B, be deemed to be in the indefinite employ of the client.

The amendments in 198(4A) continue the protective theme that characterises the majority of the changes. Section 198(4A) follows on from section 198(4) in that it provides for joint and several liability for the client and the labour broker. Section 198(4A) goes on to provide that if the client of the TES is jointly and severally liable

in terms of section 198(4), or is deemed to be the employer in terms of s 198A(3)(b) then the employee may institute proceedings against either the TES or the client, or both the client and the TES. The joint and several liability as set out in section 198A(3) is for the purposes of the LRA and extends to unfair dismissals and unfair labour practice disputes.²⁹⁹ As per section 198(4A)(c), any award made against the TES or the client in terms of section 198(4A) may be enforced against either party. Conforming with the protective drive is section 198(4B) that stipulates that a TES must provide an employee whose service is procured for the client with written particulars of employment that comply with section 29 of the BCEA, when such employee commences employment. Section 198(4C) provides that a TES may not employ a worker on any terms of conditions that are prohibited by any employment laws, sectoral determinations or collective agreements. The courts are also entrusted to maintain this protective scheme by ensuring in terms of section 198(4E) that they scrutinise every provision in the employment contracts between the TES and the client in order to determine whether the provision complies with section 198(4C). These protective measures in section 198(4)(A) are linked and reinforced by section 198A(4) and 198A(5). Section 198A(4) prohibits any terminations of the employees service at the instance of the TES or the client in order to avoid the application of section 198A(3)(b). Terminations in such instances will be regarded as dismissals. The section also comes to the aid of the often mistreated and under-paid³⁰⁰ labour broker workers by ensuring that where the client is deemed to be the employer in terms of section 198A(3)(b), then that client must treat the employee 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. On the whole not less favourable has been interpreted to mean that terms and conditions other than the fundamental terms of employment should not differ.³⁰¹ Principally, it requires that the fundamental terms offered to the employees are essentially the same.

²⁹⁹ Cohen (2014) *ILJ* 2616.

³⁰⁰ Tshoose and Tsweledi (2014) *Law Democracy and Development* 335.

³⁰¹ Inez Moosa

<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2014/employment/downloads/employment-alert-20-october-2014.pdf> (accessed 13 March 2016).

Section 198(4F) provides another significant protective provision. It provides that Labour Broking agencies, or TES's, are required to be registered in terms of any applicable legislation or regulations. The fact that the TES is not registered will not constitute a defence to any claim instituted in terms of section 198A. The Employment Services Act³⁰² (ESA) creates a framework for regulating labour broker agencies.³⁰³ In terms of this ESA, it will be a criminal act to operate without registration.³⁰⁴ These restrictions have been instituted in a bid to stem the tide of abuses perpetrated by the infamous 'bakkie brigade.'³⁰⁵

As noted in the preceding chapters the vulnerability of labour broker workers has also been amplified by the inability of such employees to effectively gain access to organisational rights.³⁰⁶ This has come about as a result of the tripartite working relationship, with the employees' workplace often being different to their place of work.³⁰⁷ Changes to sections 21 and 22 of the LRA attempt to remedy this situation by providing that a trade union may exercise organisational rights in respect of TES employees, either at the workplace of the TES or one or more clients of the TES. These changes have been brought about in an attempt to encourage trade unions to actively recruit and organise employees of labour brokers in such a manner that their needs and interests are adequately represented.³⁰⁸

Section 21(8)(b) of the LRA has been added and allows for a commissioner, when tasked with resolving a dispute over whether a trade union is representative within a particular workplace, to consider the composition of the workplace whilst taking into account the extent to which there are employees of labour broker agencies and other non-standard employees. This provision serves to promote trade unions' participation by making it easier to organise and show representativeness in a workplace. The organisation of labour broker employees is also promoted, as they are now considered as part of the workforce.³⁰⁹

³⁰² 4 Of 2014 (From hereon the ESA)

³⁰³ Cohen (2014) *ILJ* 2616; Employment Services Act 4 of 2014 section 13.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ Cohen (2014) *ILJ* 2619; Botes (2015) *SALJ* 116.

³⁰⁷ Theron (2012) *Acta Juridica* 60-3.

³⁰⁸ Cohen (2014) *ILJ* 2616.

³⁰⁹ Botes (2015) *SALJ* 116.

Section 21 seeks to remedy the problems surrounding the labour broker employees' workplace being different to where they actually work. This relief comes in the form of section 21(12) of the LRA. The section circumvents this obstacle by permitting trade unions to exercise organisational rights in respect of employees of a TES, at the workplace of either the TES or one or more clients of the TES. The section goes further and states that where the trade union exercises such rights in the workplace of the client of the TES, any reference in chapter 3 of the LRA to the employer's premises must be read as including the client's premises. This approach is justified especially when one looks at the control the client exercises over the employees at that client's work premises.³¹⁰ More importantly, these provisions are of immense importance for the collective bargaining rights of the labour broker employees. In theory, it can be said that the amendments might resolve the more serious problems of collective bargaining in the triangular employment relationship.³¹¹ It can also be said that this provision will do a lot to decrease trade unions' antagonism towards labour broker employees and encourage them to make greater efforts to recruit them.³¹² The right to collective bargaining has been noted by the ILO and the Constitutional Court as being fundamental to the rights of human beings at work.³¹³

The task of remedying the provision of this fundamental right is supplemented by sections 22(5)(a) and (b) of the LRA. These sections deal with the applicability of arbitration awards that are made binding on the employer. However, and more importantly, the sections provide for such awards, to be made binding additionally to the extent that it applies to the employees of the TES, or a client of the TES for whom an employee covered by the award is assigned to work. Further, the award will also be binding on any person other than the employer who controls access to the workplace to which the award applies, if that person has had the opportunity to participate in the arbitration proceedings. The provision allows a system where all the parties concerns are considered and upheld against the necessary and relevant parties.³¹⁴

³¹⁰ Botes (2015) *SALJ* 117.

³¹¹ *Ibid.*

³¹² Botes (2015) *SALJ* 109.

³¹³ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) at 18; *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 para 50.

³¹⁴ Botes (2015) *SALJ* 109.

The realisation of collective rights are integral not only to labour broker employees but to all workers being able to exercise their collective power, and consequently bargain for better conditions, and alleviate some of the problems associated with their employment. Trade unions can now easily include labour broker employees in their bargaining process through the enhanced procedures for the procurement of organisational rights.³¹⁵ As was suggested in the previous chapters of this paper, suggestions have been made that the government, in drafting the amendments, failed to consider measures related to the collective bargaining arena that could remedy the prevalent issues in the non-standard and labour broking arena.³¹⁶ Although it could be argued that more attention could have been paid to these suggestions, namely, by providing more means to strengthen the collective power of non-standard workers. Although it can be said that trade unions are at present in a steady decline, it must be stressed that they could be doing more to organise non-standard and temporary workers and attempt to stem the tide of their decline by increasing membership.³¹⁷ The law is not always in a position to remedy each and every glitch that may arise in the labour arena. At times it may require further efforts from the trade unions and their members to ensure fulfilment of their rights. This could also allow a platform for the government to make more of an effort to increase social rights and guarantee benefits that could protect and galvanise these workers. Further it is also submitted that on the face of it, the amendments seem to go far enough in remedying the appropriate collective bargaining complications. Whether this is in fact the case can only be seen over time and as the provisions are implemented.

The Interpretation of the section 198A(3)(b) Deeming Provision

Despite the bulk of the amendments being lauded for the necessary changes they have brought about, there is still some discomfort surrounding some of the sections and in particular section 198A(3)(b) of the LRA. As noted above, this section provides that

³¹⁵ Botes (2015) *SALJ* 118-119.

³¹⁶ See Discussion in Chapter 2, note 78.

³¹⁷ Le Roux (2013) *ILJ* 39.

when an employee is deemed to not be performing temporary services, then the client is deemed to be the employer of that employee. The employee is therefore deemed to be an indefinite employee of the client, subject however to the provisions of section 198B. Section 198B(3) allows for workers to be employed on fixed term contracts for longer than six months in specific instances which will therefore not attract the consequences of the section 198A(3)(b) deeming provision. The controversy surrounding the section develops when one considers the different interpretations that could be accorded through its application.

Despite the recent decision in *Assign Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration*,³¹⁸ there still exists a flurry of legal debate concerning the correct interpretation of the section. Interested parties are anxious for the courts to unravel the provision and the true meaning that was intended by the legislature.³¹⁹ However, it must be noted that these parties harbour a preferred position that would ultimately serve their best interests.

The main purpose of the deeming provision goes to the heart of the abuses perpetrated on labour broker employees. It seeks to limit the use of these employees where the work cannot be seen to be temporary. Thus the section ties in with the protective purpose of the amendments and consequently imparts hefty penalties by deeming the client to be the employer of the worker for the purposes of the LRA. The extent of the obligations brought about by section 198A(3)(b) make the interested parties all the more anxious to attain certainty on its application.

Ultimately, the term ‘deemed’ has caused the majority of the controversy, and the debate has surrounded the fact as to whether or not it means that the broker is no longer considered to be the employer.³²⁰ The broker party can be said to be in support of the position that the deeming provision results in dual-employment, and that the

³¹⁸ [2015] 11 BLLR 1160 (LC); Summarily put, in a dispute that was referred to Labour Court, the first respondent (the CCMA) had been asked to pronounce on the proper construction of statutory innovations governing the relationship between a labour broker, the workers they engage and the client with whom they are placed. Pivotal to the dispute over the nature of this relationship was section 198A(3)(B) known as the deeming provision. Briefly stated the terms of this provision state that the worker is deemed to be employee of the client three months after placement.

³¹⁹ Haralambous C “Tough Reality from a legal fiction? Employment Law” (2015) *Without Prejudice* 40 at 41.

³²⁰ Venter D “Who is the employer?” (2015) *Without Prejudice* 25 at 25.

broker still remains the co-employer.³²¹ Conversely, the trade unions have supported the view that the client becomes the sole employer,³²² and thereby takes on all the obligations that come with being ascribed as the employer of an employee on indefinite employment. When one considers the highly protective provisions of the LRA, the consequences of sole employment would have far-reaching consequences that either party would seek to avoid.³²³

It would seem almost obvious that in instances of uncertainty provisions and their effects should be interpreted in line with their intended purpose.³²⁴ This purpose, as has been noted above, is to protect broker employees from being exploited and employed for long periods, on inferior terms, in instances that do not constitute temporary employment. Simply put, the provisions are put in place to prevent the abuses characterised by employment by labour brokers.

Some suggest that a purposive approach would result in the provision being interpreted to allow for the dual employment approach as advocated by the broker party.³²⁵ This approach results in the client, together with the broker being the employers, with the client being the employer only for the purpose of the provisions of the LRA.³²⁶ It is further suggested, as per the rules of legal interpretation, that provisions should generally be interpreted by giving meaning to the plain and ordinary language used.³²⁷ In line with this rule, one would look to ascertain the meaning of the term that has been the point of all the controversy. The term ‘deem’ in the Oxford Dictionary is said to mean “to regard or to consider.”³²⁸ Therefore, it is argued in some sectors, that if the word is ascribed its plain and ordinary meaning, it could be strongly argued that the legislature intended the dual employment approach.³²⁹ This would allow for the employee to exercise the protective rights

³²¹ Haralambous (2015) *Without Prejudice* 40.

³²² Ibid.

³²³ Ibid.

³²⁴ Venter (2015) *Without Prejudice* 25.

³²⁵ Venter (2015) *Without Prejudice*; Tshoose and Tsweledi (2014) *Law Democracy and Development* 343.

³²⁶ Venter (2015) *Without Prejudice* 26.

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Venter (2015) *Without Prejudice* 26-27.

conferred by the LRA against the client, without terminating the employment contract between that employee and the labour broker.

In keeping with the legislature being clear and unambiguous in their choice of words, it is further argued in an article by Deidre Venter, that had the legislature intended to provide for sole employment, it would have been far clearer in doing so.³³⁰ It can be argued that the legislature should have had no problem expressly providing that in such instances as those that fall under section 198A(3)(b), the contract of employment will wholly transfer to the client, and the client will thereby solely employ such employee. Other sections surrounding the deeming provisions also lend their voice in support of a dual approach. Section 198A(3)(a) stipulates that the labour broker is contemplated as being the employer in instances of genuine temporary employment. This might illustrate that the protection of two employers is only intended to arise in the instance of vulnerable lower paid workers.³³¹ It may also be illustrative of the fact that where the legislature desires one party to be seen as the employer, it is often express and unambiguous in its intention. Section 198(4A) can also be said to support the dual employment stance, in that it affords the employee the right to institute proceedings or enforce compliance with the BCEA against the broker, the client, or both.³³² This provision is inserted since the deeming provision operates only for the purposes of the LRA, consequently the BCEA would therefore have not be enforceable against the client in its capacity as the deemed employer.³³³ This again points towards a legislative approach where the client is deemed to be an employer for the purposes of the LRA and for the purpose of the employee being able to exercise its LRA protections against the client.

However a further alternative and insightful view is offered by Paul Benjamin.³³⁴ Benjamin sees section 198A of the LRA as performing an important function, namely that of providing additional protections for lower paid temporary service workers.³³⁵ In Benjamin's opinion section 198A(3)(b) of the LRA is clearly brought about to

³³⁰ Venter (2015) *Without Prejudice* 27.

³³¹ Venter (2015) *Without Prejudice* 27.

³³² [2015] 11 BLLR 1160 (LC) para 15.

³³³ *Ibid.*

³³⁴ Benjamin P "Restructuring Triangular Employment: The Interpretation of section 198A of the Labour Relations Act" (2016) *ILJ* 28.

³³⁵ Benjamin (2016) *ILJ* 37.

replace section 198(2) of the LRA that deems the TES to be the employer.³³⁶ Because section 198A(3)(b) is put in place to operate where section 198(2) does not, it is therefore reasoned that there exists no situation where the two sections operate at the same time and dual employment is envisioned.³³⁷ Benjamin therefore submits that the correct approach is to have only one of the sections operating. Either the TES is the employer and that would come about in terms of section 198(2) of the LRA where the employee is seen to be performing genuine temporary work, or conversely, the client is deemed to be the sole employer in terms of the section 198A(3)(b) deeming provision. The question of dual employment is therefore not even supposed to be a relevant consideration.³³⁸

Benjamin therefore advocates for the sole employment approach. In his opinion, the amendments, and the section 198A(3)(b) deeming provisions main function was to act as a deterrent to clients using labour broker workers on a long term basis, as when coupled with section 198A(5) the sections provide that such client must treat the deemed worker no less favourably than the client's other employees performing the same or similar work.³³⁹ It therefore becomes more expensive for the client to pay workers the same as other employees and, in addition, pay the labour broker its fee for providing the worker.³⁴⁰

However, despite some support for the sole employment approach, the Labour Court in *Assign Services (Pty) Ltd v CCMA*³⁴¹ concluded in favour of the dual approach system. The conclusion came about as the court dealt with the issue as to whether the broker was concurrently vested with statutory rights and obligations as well as the powers and duties that are given to the employer in terms of the LRA.³⁴² Summarily put, did the deeming provision advocate dual employment? As briefly noted above, the broker party argued in support of the workers remaining employees of the broker as well as being deemed to be the employees of the client for the purposes of the

³³⁶ Benjamin (2016) *ILJ* 38.

³³⁷ *Ibid.*

³³⁸ Benjamin (2016) *ILJ* 38.

³³⁹ Benjamin (2016) *ILJ* 38.

³⁴⁰ *Ibid.*

³⁴¹ [2015] 11 BLLR 1160 (LC).

³⁴² Naidoo M "Employment Law Update; One employee serving two employers" (2015) *De Rebus* 45 at 47.

LRA. Therefore, the contract of employment between the broker and the employee would not fall away, and neither would the rights and duties created by such contract. In opposition, the trade union advocated the sole employment by the client for the purpose of the LRA. Because of the Constitutional right to freedom of trade, on this basis Benjamin notes that the legislature could not ban labour broking, however, the next best solution came about by promulgating section 198A(3)(b) in order to strongly discentivize labour broking and enforce the strict sanction of sole employment.³⁴³

In coming to its conclusion, the court noted that it saw no reason why the broker should be relieved of its statutory rights and obligations towards the employee on the basis that the client has acquired a parallel set of rights and obligations.³⁴⁴ The worker does not therefore sacrifice the rights gained on the basis of its employment relationship with the broker because of the fact that such worker has been placed with the client,³⁴⁵ or alternatively on the basis that the client has been deemed to be the employer by section 198A(3)(b). A lot of the focus in the proceedings was placed on the meaning of the term ‘deemed.’³⁴⁶ In the circumstances, the court leaned towards a construction of the word that fell in line with the general architecture and purpose of the new provisions.³⁴⁷ This architecture constructs better protection for the worker and further supports an upgrade of the joint and several liabilities between the broker and the client that resultantly support the dual-employment approach.

Nonetheless, this finding is not without controversy, and has done very little to stem the tide of arguments for and against the opposing views. The most influential of these opposing views being Paul Benjamin, who was predictably critical of the judgment and its findings.³⁴⁸ The judgment did however rightly point out that the provision is still set to give rise to considerable litigation in the future.³⁴⁹ A lot of the issues may arise when considering the practical application of the provision. One

³⁴³ Benjamin (2016) *ILJ* 40.

³⁴⁴ [2015] 11 BLLR 1160 (LC) para 12.

³⁴⁵ *Ibid.*

³⁴⁶ [2015] 11 BLLR 1160 (LC) para 14.

³⁴⁷ [2015] 11 BLLR 1160 (LC) para 15.

³⁴⁸ Benjamin (2016) *ILJ* 39.

³⁴⁹ [2015] 11 BLLR 1160 (LC) para16.

must consider the remedies that might be available to an employee who claims unfair dismissal against the client, especially where that employee is immediately placed with another client following the dismissal. In instances where an unfair dismissal is referred, what remedies is that employee entitled to?³⁵⁰ The employee would still be employed by the broker, although it would now be at a different client.³⁵¹ Reinstatement would be difficult, as the employee would have already been placed with a new client. If reinstatement were to be ordered, would this reinstatement resurrect the triangular relationship between the broker, the client and the employee?³⁵² Further, compensation would also be problematic, as that employee would not have lost any income due to the immediate re-placement with another client.³⁵³ In such instances, it is submitted that the remedies could maybe come in the form of punitive payment to the employee for the client's failure to follow and uphold that employee's fair labour practice rights. Issues also surround what would happen to temporary workers where a client is the employee for the purposes of the deeming provision in the context of a sale of business as a going concern.³⁵⁴ In such instances, as the client is an employer for the purpose of LRA rights and obligations, and because transfers of businesses are also under the ambit of the LRA, would the contract with the broker transfer to the new employer, and therefore entitle that broker to receive a fee for those deemed employees?³⁵⁵

A lot of the hypotheticals illustrate the issues that could surround the interpretation of the section 198A(3)(b) deeming provision. It is therefore submitted that the each case will resultantly have to be dealt with on a cases by case basis and only time will tell where the path of the provision will end. However, it could be argued that Paul Benjamin's sole employment approach averts the majority of these hypothetical issues and difficulties. In light of the differing views it seems highly unlikely that the recent Labour Court's ruling will bring an end to the debate.³⁵⁶ This is also as a result of the fact that the court did not have a proper factual issue set before it. Instead it had to consider a point of legal construction; speculation therefore became inevitable, as

³⁵⁰ Laubscher T and Mather N "No man can serve two masters" (2015) *Without Prejudice* 35 at 36.

³⁵¹ Laubscher and Mather (2015) *Without Prejudice* 36.

³⁵² Laubscher and Mather (2015) *Without Prejudice* 37.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

were the hypothetical scenarios that arose because of the abstract manner of the case framed before the court.³⁵⁷ It is therefore submitted that the necessary inclusion of a proper factual dispute will aid the courts in envisioning what type of protection the legislature sought in light of the specific circumstances before it.

A Brief Comment on the Possible Socio-economic Impact of the Increased Protections in Section 198A of the LRA

Although the amendments have been lauded in the majority of labour circles, there are still pockets of dissent that not only disagree with the increased protection brought about by these changes, but also with the general ‘over-protective’ stance adopted by the LRA. Even before the amendments were brought into operation, and at the very early stages of their development, the business sector was up in arms with claims that the changes would increase the cost of employment and resultantly lead to large-scale losses of jobs.³⁵⁸ In their infancy, the proposed amendments were criticised as they were predicted to hinder job creation and the growth of the economy by restricting flexible employment arrangements.³⁵⁹ Since they have come into effect, it can be said that similar criticisms are still being levelled at the changes.

Labour laws are intended to protect workers from unfair labour practices perpetrated by employers, as well as to counter and protect the worker from the imperfections in the global and national financial markets.³⁶⁰ However, by imposing strict labour restrictions, and increasing protections, labour flexibility is somewhat weakened and

³⁵⁷ [2015] 11 BLLR 1160 (LC) para 19; Laubscher and Mather (2015) *Without Prejudice* 37.

³⁵⁸ Lynley Donnelly <http://mg.co.za/article/2012-07-26-labour-law-changes-will-shed-jobs-in-south-africa> (Accessed 21 February 2016).

³⁵⁹ Lynley Donnelly <http://mg.co.za/article/2012-07-26-labour-law-changes-will-shed-jobs-in-south-africa> (Accessed 21 February 2016).

³⁶⁰ Stefano Scarpetta http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf (Accessed 22 February 2016).

businesses are not afforded unrestricted adaptability. Research therefore draws a strong correlation between stringent employment protection and a reduction of job creation.³⁶¹ Studies suggest that strict labour protection hinders the effectiveness of labour market flows, as well as harming productivity and growth.³⁶²

One of the purposes of the LRA is to provide the means for the Constitutional rights in section 23 of the Constitution to be realized and upheld. However, the LRA also has other objectives, and chief among them, is to advance economic development.³⁶³ With this in mind, and taking into consideration the effect that increased protection may have, it is also important to consider the effects the amendments may have on South Africa's economic objectives. Key to economic development is the injection of foreign investment.³⁶⁴ The amendments impose further restrictions on South Africa's supposedly already rigid employment arena, and it is argued by some that this will be a further deterrent to vital foreign investment.³⁶⁵

In this regard, the World Bank's 2013 Global Competitiveness report, which measures various competitive aspects of economies, is brought forward to sustain the argument that the amendments will act as a further deterrent to investors. In terms of this report, South Africa is ranked at the bottom of the scale in various categories.³⁶⁶ Countries are given a rating on a scale from 1-144. In terms of Labour market efficiency, which includes; cooperation in labour-employer relations, flexibility of wage determination, hiring and firing practices and redundancy costs, South Africa was given a rating of 113 out of 144.³⁶⁷ It has been argued that these poor ratings are as a result of South Africa's stringent labour laws and with the enactment of the amendments the situation could be exacerbated.³⁶⁸

³⁶¹ Stefano Scarpetta http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf (Accessed 22 February 2016)..

³⁶² Ibid.

³⁶³ Labour Relations Act 66 Of 1995.

³⁶⁴ Milo S "A deterrent to Foreign Investment and a cause of Unemployment" (2015) *Without Prejudice* 28 at 28.

³⁶⁵ Milo (2015) *Without Prejudice* 28.

³⁶⁶ Ibid.

³⁶⁷ Stefano Scarpetta http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf (Accessed 22 February 2016).

³⁶⁸ Milo (2015) *Without Prejudice* 28.

As the working world has changed over the years, increased labour market flexibility has become an important part of businesses being able to stay viable within the global market. Skills shortages, the increase in global competition and the improvement of technologies has resulted in a situation where flexible employment arrangements are often the economically favoured means of employment.³⁶⁹ In an effort to remain competitive, there has been a trend in business to outsource their non-core functions and to bring in specific skill sets for certain projects when and if they are needed.³⁷⁰ These employment relationships are often temporary and for fixed periods, or when the relevant project is completed. As noted throughout this paper, temporary and non-standard, and its accompanying business flexibility, has therefore become an integral part of the global economy.

Resultantly, it is argued by some that the amendments provide increased impediments to the provision of this necessary flexibility. Through increased regulation, it is said that the amendments make the non-standard arena an unattractive option.³⁷¹ Consequently, two large multinational companies have apparently taken their business out of South Africa, in their reasoning; they attribute the country's over protective labour laws that make it difficult for businesses to operate.³⁷² From this comes the correlation between strict employment laws and the creation of barriers to employment. The heavy burden hanging over large businesses in the form of South Africa's rigid labour laws means that large businesses are reluctant to hire more staff and expand.³⁷³

It should however be noted, and in contrast to the data above, that in terms of data compiled by the OECD in 2013, countries were ranked on a scale of 0-6 as to the strictness of their dismissal laws. In terms of this scale and in relation to individual dismissal, South Africa was ranked at 1.4 as compared to the OECD average, which is marked at 2.29.³⁷⁴ These numbers would suggest that South Africa and its labour laws are not overly constricting. In spite of this, it is submitted that there is a need for a

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Milo (2015) *Without Prejudice* 28.

³⁷² Ibid.

³⁷³ Milo (2015) *Without Prejudice* 29.

³⁷⁴ Stefano Scarpetta http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf (Accessed 22 February 2016)..

comprehensive package that includes both the protection of workers as well as business flexibility and adaptability.³⁷⁵ But more importantly, it should be noted that this flexibility should not become the vessel for which abuses are perpetrated and it should never come at the cost of providing constitutionally recognized worker protections.

Although it can be shown that stringent laws may have an adverse effect on job creation and the provision of flexibility, caution still needs to be undertaken when tackling this issue. While it may be true that strict labour laws form some sort of deterrent and allow for less flexibility, it is submitted that decent work and the protection of workers should be at the forefront of the LRA's function. Only once workers can be guaranteed fair and dignified employment, should methods that may alleviate the effects of over-protective labour laws be looked to. This is especially true for the labour broking arena where the abuse towards vulnerable lower paid workers has subsisted for an intolerable period. In the present, and because of the abusive system that the LRA and labour broking has recently come from, it is important first, to deal with allowing for decent work for all workers. It would be irrational to provision for flexibility while the vulnerable are still taken advantage of.

The history of the labour market, as set out in the previous chapters also needs to be a source of consideration. This is with particular regard to the long history of vulnerable and unrepresented workers being denied specific protections and representation. This should be considered in tandem with non-standard workers inability to access the collective bargaining arena. These workers can therefore be seen to be in desperate need of the LRA's protection. South Africa will not easily move from a situation where trade unions considered the abuses to be so excessive that they called for a ban for all labour broking, to the LRA relaxing protections in order to cater for business interests. It is submitted that, in the current labour climate, and with the parties surrounding the market still at odds over various issues, the provision of decent work and labour rights should remain at the forefront of our thinking.

³⁷⁵ Stefano Scarpetta http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf (Accessed 22 February 2016). .

Chapter 5

Conclusion

In light of what has been discussed above, and throughout this paper, it has been well established that the purpose and function of the amendments has been to provide non-standard workers with the patently lacking protection that they require. In this regard, it is submitted that on the face of it, it would seem that the amendments have gone far enough to achieve this function. However it should be noted that only time will tell, and the application of the provisions by our courts will better serve as a barometer as to the proficiency of the changes.

Although the provision of protection has been the main thrust of the changes, the legislature has not forgotten about the important role that non-standard work plays in providing for business flexibility. In order to allow and maintain the economic flexibility provided by labour brokers, the amendments do not ask that genuine temporary workers should be remunerated on the same scale as the client's permanent workers.³⁷⁶ By providing temporary employees with comparable wages after only three months, as per section 198A(5), it allows for client's to be more cost effective

³⁷⁶ Botes (2015) *SALJ* 116.

and allows the broking industry to retain the advantages they offer to businesses.³⁷⁷ Although there is no minimum wage, it has been suggested that there should be a provision that perhaps ensures that a suitable living wage is maintained, this might be achieved by way of a sectoral determination.³⁷⁸

Conversely, it could be argued that such a provision has become unnecessary. This comes in light of the amendments to sections 21 and 22 of the LRA that will supposedly make collective bargaining more accessible to non-standard workers. In line with this thinking, it could therefore be left to the trade unions and their use of bargaining through collective mechanisms to ensure that their members are adequately remunerated. This would be in line with South African labour law's emphasis on centralised voluntary bargaining.³⁷⁹ Further, it is submitted that legislation and its provisions should not always be looked at to provide answers for every single eventuality. It is impossible for the provisions of the LRA to provide for each and every nuance or peculiarity that may arise in the labour market. The provisions should instead be able to be flexible enough and contain flexible measures, mechanisms and platforms to be able to resolve unforeseen consequences. Thus, reliance should be placed on these mechanisms that have been brought about to cater for these sort of eventualities. These issues are well suited to be resolved through the use of the LRA's collective bargaining mechanisms. These submissions further fall in line with Rochelle Le Roux's sentiments that trade unions need to re-invent themselves and do more to protect their members, regardless of what type of employment those members might fall under.³⁸⁰

The amendments are definitely a welcome change. This is especially so for the vulnerable workers who fall under its ambit. Questions, however, do still need to be asked as to what abuses will and might still be eventuated on those who fall just outside the threshold. This is still an area of concern, and it would seem that they would still find themselves in the same precarious position as the one prior to the amendments.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ Du Toit et al *Labour Relations Law* 8; See chapter 2 note 53.

³⁸⁰ Le Roux (2013) *ILJ* 39.

On a more positive note, the amendments are to be lauded on a number of aspects that they introduce. First and foremost, they bring about the necessary protections needed for vulnerable labour broker workers.³⁸¹ This coming in the form of the alterations to how trade unions access these workers, and also the protections places in section 198A of the LRA. Secondly, the amendments also bring about general change and protection for all types of non-standard workers.³⁸² Thirdly, since employment is the primary mechanism through which benefits and growth is secured, as well the means by which decent and dignified work is attained.³⁸³ Lastly, although it may be to a lesser extent, the amendments do make allowances for flexibility and for non-standard work to retain the benefits it gives to the business arena

In response to the criticisms that the amendments provide an impediment to creation of jobs and economic growth, it can be submitted that one of the major functions of these amendments was to ensure decent work and the securing of basic rights. This is not to say that this is the only purpose that should be sought after. It is entirely possible to provision and balance out both the protective and the market view. The protective view would obviously entail the protection of workers, which the amendments clearly achieve. While the market view would focus on allowing for business flexibility, another issue that the amendments tackle head on it can be submitted, adequately provide. The balance of the two opposing approaches is therefore crucial as they both have considerable merits that aid the labour market in general.

In light of the difficult task of providing for impermeable security, while still considering issues of flexibility, the legislature should be commended for managing this difficult balancing act. Although there are genuine criticisms that can be levelled at the alterations, it can be said that for the most part, the amendments are consistent with international conventions regulating agency work, such as the ILO's Private Employment Agencies Convention³⁸⁴ as well as the European Union's Temporary Work Directive.³⁸⁵ Both of these instruments, like the amendments, seek to regulate

³⁸¹ Tshoose and Tsweledi (2014) *Law Democracy and Development* 346.

³⁸² Ibid.

³⁸³ Tshoose and Tsweledi (2014) *Law Democracy and Development* 346.

³⁸⁴ Private Employment Agencies Convention 1997 (no 181).

³⁸⁵ Cohen (2014) *ILJ* 2619.

the temporary employment industry whilst still retaining its scope for labour market flexibility.³⁸⁶ In the ILO's directive's preamble, recognition is made of the fact that the labour broker industry provides necessary flexibility, while at the same time making note of the need to prohibit and prevent the abuse of these types of temporary employment arrangements.³⁸⁷

Employers in South Africa have for a long time relied on the nuances of the non-standard arena in order to circumvent statutory obligations and justify differential treatment of these workers.³⁸⁸ As a result, these vulnerable workers have had to endure inferior work conditions that lack the security that is central to fair labour practices and decent work.³⁸⁹ Consequently the amendments were urgently needed to remedy this untenable state of affairs. It is because of this, that the introduction of protective measures is commended. It can be indisputably submitted that the context definitely warranted such an approach. This is not to say that this approach will always be the mandatory and necessary function. Just as was illustrated in the preceding chapters, context often, and rightly so, dictates what is required in the specific circumstances. For these reasons, it is submitted that the amendments, and their protection based slant, have not only come at an appropriate time, but have also done well considering the difficulty surrounding the situation, and the pressure to cater for the dual function of worker protection, as well as that of business flexibility. Consequently, once the abuses have receded, the time will come for further advances in providing flexibility and for this function to take the forefront and lead the LRA into a new era.

³⁸⁶ Ibid.

³⁸⁷ Private Employment Agencies Convention 1997 (no 181); Cohen (2014) *ILJ* 2619.

³⁸⁸ Cohen (2014) *ILJ* 2621.

³⁸⁹ Ibid.

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