Non-standard employment in South Africa: How have we adapted in the past five years post amendments related to non-standard employment?

by

Alma Martha Mitchell

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CHAPTER 1

1.1 INTRODUCTION

It has been five years since the enactment of the Labour Relations Amendment Act.[1]

This dissertation focuses on non-standard employment in South Africa. For years, various organisations and trade unions have protested the use of temporary employment service (TES) agencies (also called labour brokers) who, as suppliers of non-standard employment solutions, appeared to be exploiting the vulnerable members of society.

The Labour Relations Act 66 of 1995 (LRA)[2] provided minimal protection for non-standard employees in their various forms. After the 1994 democratic elections, labour legislation has seen major changes. The 1995, 2002 and recent 2014 amendments to the LRA had a direct impact on non-standard employment relationships.[3] More changes are contemplated with regard to the LRA. However, the changes under review do not relate to this thesis.

The LRA was amended in 2014[4] with the intention of correcting the social evils brought about by non-standard employment which occurred under the radar of current legislation. The amendments to section 198 and the insertion of sections 198A-D in the LRA came about to provide better protection for employees engaged in exploitative non-standard relationships, reinforcing the aim of the LRA to provide job security and the right to not be unfairly dismissed.

Apart from underpaying these vulnerable employees and depriving them of benefits that would generally be offered to their permanent counterparts, there is a gross injustice against non-standard employees in terms of them being viewed as easily disposable commodities. These employees are dismissed without giving thought to the proper and fair process outlined within the LRA. The National Minimum Wage Act[5] was recently introduced and, based on its provisions, may impact the salaries offered to non-standard employees.

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[1] Labour Relations Amendment Act 6 of 2014.
[2] Labour Relations Act 66 of 1995.
[3] S Godfrey, D Du Toit, and M Jacobs, "The New Labour Bills: An Overview and Analysis." *Industrial Law Journal* 39 (2018): 2161.
[4] Labour Relations Amendment Act 6 of 2014.
[5] National Minimum Wage Act 9 of 2018.

This dissertation examines the impact that the labour laws and their recent amendments have on the practices within these non-standard employment relationships, and how the rights of the parties to the relationship are protected. Acknowledging the need for flexible working solutions, it identifies the problems associated with non-standard employment and examines whether the amendments, as a conduit regulating the employment relationship between the parties to the relationship, offer better protection for vulnerable employees.

1.2 RESEARCH QUESTION

Non-standard employment in South Africa: How have we adapted in the past five years post the amendments related to non-standard employment?

1.3 STATEMENT OF THE PROBLEM

What is termed as standard employment is based on a long-term and secure employment relationship.[6] Terms and conditions are governed; protection is provided against unfair dismissal and unfair discrimination; downscaling of jobs are regulated; health and safety at work are monitored; employees are free to associate or disassociate with trade unions and to engage in collective bargaining through various means; and insurance is provided against unemployment and the effects of occupational diseases and injuries. [7]

Scholars cite the key reasons for the increase in non-standard employment as the need for greater flexibility to easily cope with various demands, the need to reduce labour costs and the management of the workforce. [8]

According to statistics in the *Quarterly Labour Force Survey 2019*, the informal employment sector showed the largest increase in employment growth in the second quarter of 2019 compared to first quarter statistics. These were mainly in the trade, transport, manufacturing and construction industries.[9] This reaffirms that there is a slow decline in standard employment. While the world of work is changing, standard employment is still the benchmark against which other forms of work are compared. Standard employment typically refers to full-time employment where the employee has

[6] R Le Roux, "*The World of Work: Forms of Engagement in South Africa*." Monograph Series 02/2009. Institute of Development and Labour Law, University of Cape Town, 2009, 12.
[7] Ibid.
[8] Ibid., 13.
[9] Statistics South Africa. "Quarterly Labour Force Survey." Quarter 2 (2019), 1.

only one employer, the work is generally performed at a single workplace subject to the control of the employer, and it is characterised by the existence of a contract of employment.[10]

Changes in the world of work has brought about a different type of "employee" and "working environment" which may differ from the above "norm" in terms of how "employees" and their "working environment" have always been viewed. Because of this method of benchmarking, non-standard employees are usually not exposed to many of the basic conditions of service and benefits that are provided to the "standard" employees of an employer. In most areas, if not all, their basic rights are violated and they remain unprotected in terms of job security and fair labour practices.

Non-standard employment takes on many forms. Among these are temporary employees, fixed-term employees and part-time employees. The temporary employment service (TES) agency may be a supplier of any of these forms of non-standard employment at any given time. However, some of these forms of employment can also exist within an employer's own staffing model. Theron stated that non-standard employment is not an exact concept, nor is its definition agreed upon by social sciences from which the term is borrowed.[11] The only reference, according to Theron, that is made to this concept prior to the amendments was in Chapter 9 of the LRA, which contains the provision regarding TES suppliers.[12]

Although a flexible workforce may be an important consideration given the changing needs of the world of work and business, the reduction of both labour cost and labour presents moral challenges.[13] With ever-increasing unemployment rates, workers tend to be content with the employment offers they receive, as the alternative constitutes being unemployed in a country where few jobs are available to them. In order to address this dilemma, the legislature has attempted to balance the flexible labour needs of employers and the moral dilemma within which we find ourselves. It is in this context that existing forms of non-standard employment are reviewed, in addition to the changing legislation and the extent to which the vulnerable and exploited members of the labour force find protection within labour legislation. Said employees are susceptible to less favourable terms of employment than the client's "standard" employees doing the same work. In

[10] Jan Theron, "Employment is Not What it Used to Be." *Industrial Law Journal* 12 (2003): 1249.
[11] Jan Theron, "*Non-standard employment and labour legislation: The outline of a strategy*." Monograph 1/2014. Institute of Development and Labour Law, University of Cape Town, 2014.
[12] Labour Relations Act 1998, Section 198.
[13] Le Roux, "The World of Work," 13.

many instances, little to no trade union representation is found with these employees depending on labour laws and standards for their protection. Fourie is of the view that non-standard employees have, in theory, the protection of current legislation, but the enforcement of their rights is complicated by their circumstances.[14]

This thesis will analyse four reported cases that have tested the protection afforded to non-standard employees within the ambit of labour legislation in terms of their rights and duties by parties to the employment relationship. These cases will give us an indication of whether flexibility in business can still be possible within the amended framework to which employers are now subjected.

1.4 AREA OF RESEARCH

This thesis will review four reported judgements that have dealt with non-standard forms of employment. It will highlight how the courts have viewed these cases to determine whether flexible employment solutions are still feasible, without compromising the employees' basic rights.

The thesis will mainly focus on the LRA[15] as amended, highlighting the significant impact of said amendments on non-standard forms of employment. Reference will also be made to the Basic Conditions of Employment Act (BCEA)[16] and the National Minimum Wage Act, which may impact on the non-standard relationship.

The four reported judgements are:

1. *Assist Bakery 115 CC v Ngwenya N.O. and Others* [17]

Two employees of Assist Bakery 115 CC (Assist) approached the Commission for Conciliation, Mediation and Arbitration (CCMA) in respect of being deemed employees of Pick n Pay in terms of section 198A of the LRA.[18] The arbitrator made a decision in favour of the employees, citing the relevance of section 200B. Assist and Pick n Pay applied to the Labour Court (LC) to have the CCMA award set aside. The LC reviewed the award, highlighting errors in interpretation made by the arbitrator.

[14] ES Fourie, "Non-standard workers: The South African context, International Law and regulation by European Union." *Potchefstroom Electronic Law Journal* 11, no. 4 (2008): 110-152.
[15] Labour Relations Amendment Act 6 of 2014.
[16] Basic Conditions of Employment Act 20 of 2013.
[17] *Assist Bakery 115 CC v Ngwenya N.O. and Others (JR668/16, JR649/16) [2017] ZALCJHB 481 (27 October 2017)*
[18] Labour Relations Amendment Act 6 of 2014.

2. *Enforce Security Group v Mwelase and Others*[19]

Enforce was given notice of termination of the commercial contract and Enforce invoked the automatic termination clause in the employee's contract of employment. Does this mean that the contracting parties have contracted out the protection against unfair dismissal by relying on the automatic termination clause?

3. *Piet Wes Civils CC and Another v Association of Mineworkers and Construction (AMCU) and Others*[20]

The appellants argued that the employees were not dismissed due to operational requirements however employed on a limited contract that had expired. Referring to section 198B, contracts were found to be unlimited in duration.

4. *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*[21]

The case interprets the "deeming provision" in section 198 of the LRA and explores whether the deeming provision created a "sole employer" or "dual employer" relationship.

1.5 CHAPTER OUTLAY

The thesis will consist of the following chapters:

- Chapter 1 introduces the research question.
- Chapter 2 focuses on legislative history pertaining to non-standard employment.
- Chapter 3 reviews four cases prior to the recent amendments with regard to the protection of non-standard employees.
- Chapter 4 draws conclusions in response to the research question.

[19] *Enforce Security Group v Mwelase and Others (DA24/15) [2017] ZALAC.*
[20] *Piet Wes Civils CC and Another v Association of Mineworkers and Construction (AMCU) and Others [2018] ZALAC 18 (10 March 2018).*
[21] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others [2018] ZACC 22.*

CHAPTER 2

2.1 INTRODUCTION

The purpose of this chapter is to focus on legislative history and to highlight how labour legislation has evolved over time, with particular reference to the sections dealing with non-standard employment. Until recently, the manner in which the workforce has been constituted in order to keep up with the changing needs of business did not receive adequate attention by legislators. This chapter will specifically focus on the Labour Relations Act (LRA)[22] and to a lesser extent on the Basic Conditions of Employment Act (BCEA)[23] and the National Minimum Wage Act.[24]

2.2 LEGISLATIVE HISTORY

Everyone has the right to fair labour practices.[25] The purpose of labour legislation is to give effect to the constitutional provision of Section 23 (1). The Constitution establishes fundamental rights and has a profound effect on all spheres of the law. As a result of the Constitution, all citizens of South Africa can challenge legislation as well as actions by the state and/or employers that may infringe on the rights entrenched therein.[26]

As legislation is derived to give effect to the Constitution, the legislation in question, which is perceived to not give effect to a fundamental right, must be challenged as unconstitutional.[27] The Constitutional Court cannot be approached directly in order to claim rights derived from it. An example of such a challenge can be found in *SANDU v The Minister of Defence* where employees of the Defence Force were precluded from joining a union. In this case, the Constitutional Court held that the enlisted soldiers who serve on the National Defence Force are in relationships similar to a working relationship and still have the right to be treated fairly as per section 23 of our Constitution. Although they may not strike, soldiers can still challenge their contracts of employment in the common law courts.[28] Benjamin suggested that the law should be extended to protect all who perform work for another in a relationship where their livelihood is dependent on the

[22] Labour Relations Amendment Act 6 of 2014.
[23] Basic Conditions Amendment Act 20 of 2013.
[24] National Minimum Wage Act 9 of 2018.
[25] Constitution of the Republic of South Africa 1996, s 23.
[26] Ibid.
[27] Constitutional Law of South Africa, Commentary, 7.
[28] Le Roux, "The World of Work," 46-47.

income without there being a common law contract of employment.[29] The Constitutional Court supports this stance in the *SANDU v The Minister of Defence* judgment, stating that the interpretation of rights should be generous and should accord to individuals the full protection of these rights.[30]

Non-standard employment is not a new phenomenon as section 198 of the LRA[31] already makes provision for the procurement of temporary labour through a temporary service provider (TES). Unlike the suggestion in the heading of the provision, the service was not always temporary, but often continued for extended periods. Regardless of the placement with the client, the employee in this triangular relationship is considered to be in the employment of the TES when, in actuality, one would assume that the client is the employer. Section 198(2) of the LRA stated that, as long as the workers had been procured and were remunerated by the TES, they remained under the employ of said service provider.[32] There was no time limit on such "temporary" agreements at this point.

Bosch is of the view that this type of externalised relationship does not make sense and may even be regarded as fake. The employees are supplied to clients by the TES, to render services to these clients at their premises under their command and, in most instances, under their supervision. The clients pay the TES for its staffing services and the TES, in turn, pays the employees' salaries. This being said, such employees are often under the impression that they, in fact, work for the client. This triangular relationship is not unusual as its existence brought about legislation that attempted to regulate this arrangement. The arrangement in question was generally accepted. Through these types of agreements, a TES permitted clients to make use of employees' services indefinitely under the guise of temporary assignments – this without clients assuming any responsibility for the employees they use and manage on a daily basis. When these clients no longer need these employees, the TES is merely informed to remove them. In instances where the TES is unable to reassign them to other projects or services, their services are terminated. In the past, there were no mutual or several liabilities in terms of

[29] Paul Benjamin, "An Accident of History: Who is (and Who Should Be) an Employee under South African Labour Law." *Industrial Law Journal* 25 (2004): 787-804.
[30] *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) par 28.
[31] Labour Relations Act 66 of 1995.
[32] Labour Relations Amendment Act 12 of 2002.

unfair dismissals, which made such deals lucrative for clients when contracting with TES suppliers.[33]

2.3 THE LABOUR RELATIONS ACT (LRA)

The LRA of 1956[34] expressly stated that an employee was someone employed by or working for an employer, or someone assisting the employer in carrying out his business. However, section 3 of the act referred to the distinction made in terms of workers who are supplied by a labour broker to render services to a client and who will be deemed as the employees of the labour broker and the labour broker as the employer. Section 3(b) confirmed that the workers of the labour broker will fall under the ambit of the industry, trade or occupation in which the client operates. Section 3(d) and (e) inferred liability on the labour broker for all acts or omissions occurring in the service of the client by the employee of the labour broker as long as these are not related to criminal acts. The liability is squarely on the labour broker even if such acts occurred in the interest of the client. Even the premises where the employee performs the service to the client is regarded as the workplace of the labour broker as the employer.[35]

Theron stated that the LRA of 1995, like any other law, was a product of its time. During this period, most employers both provided work and controlled the places where their workers were expected to work. As a result of this particular employment relationship, rights and duties were afforded based on who was termed an “employee”. There has since been a shift in this relationship and, consequently, the same norms that were valid at the time are no longer valid today.[36] Between 1995 and 2004, unemployment increased drastically. It was mostly the unskilled and uneducated that suffered under this job crisis. The figures showed that most of the jobs created from 1994 onwards were in the informal employment economy.[37]

According to Le Roux and Rycroft, the employment relationship has always been one of the most regulated of contracts. This regulation has extended to other labour legislation and mostly echoes the priorities and policies of the government at the time. The LRA[38]

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[33] Graig Bosch, “The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?” *Industrial Law Journal* 34 (2013): 1631-1644.
[34] Labour Relations Act 28 of 1956.
[35] Labour Relations Act 28 of 1956, section 3(c).
[36] Theron, “Non-standard employment and labour legislation,” Monograph 1/2014.
[37] J Theron, S Godfrey, and M Visser, “*Globalization, the impact of trade, liberalization and labour law: The case of South Africa*.” International Institute for Labour Studies, Discussion Paper Series, No. 178 (2007). ISBN 978-92- 9014-834-0.
[38] Labour Relations Act 66 of 1995.

was perceived as a fresh start in a democratic South Africa – an act derived from and connected to the Bill of Rights which, for the first time, defined a range of labour-related rights in terms of section 198 of the LRA.[39]

The LRA[40] was assented in November 1996. The act was primarily concerned with legislation governing collective relationships, built on the premise of traditional, or standard, employment relationships. An employee, as defined in the LRA, could be understood as a person who is economically dependent on the person they provide a service to or work for in exchange for remuneration or reward. This work or service arrangement could be expressed orally or in writing.[41]

Management tended to focus on their core business and made use of a flexible employment model through labour brokers. The growth of non-standard work in all its forms has contributed to the increased inequality in South Africa.[42] The insertion of section 200A of the LRA dealing with the presumption of who is an employee was mainly to make a distinction between employee and independent contractor; still mainly focused on the standard employment relationship as a comparator. The failure of the legislature to deal with the increased exploitation of non-standard employees has not been dealt with in the 2002 amendments.

Section 200A(3)[43] provides that any party may approach the Commission for Conciliation, Mediation and Arbitration (CCMA) for an advisory award to advise on whether a party to the arrangements are employees, provided that the earnings of said individuals fall below the threshold set by the Minister in the BCEA.[44] However, since section 198 still maintained that the employee provided by the TES is the employee of the TES,[45] and with no inclusion of any other forms of non-standard employment, the rationale for the determination made in terms of section 200A(3) brought about no relief to TES employees.

[39] R Le Roux, and A Rycroft, "Civil Society and International Criminal Justice in Africa: Challenges and Opportunities." *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*" (first published as *Acta Juridica* 2012 no. 1 (2012): VII-VIII).
[40] Labour Relations Act 66 of 1995.
[41] Code of Good Practice, Published under GN 1774 in *GG* 29445 of 1 December 2006
[42] Theron, Godfrey and Visser, "Globalization, the impact of trade, liberalization and labour law."
[43] Section 200A , inserted by the Labour Relations Act 66 of 1995.
[44] Section 6 (3) of the Basic Conditions of Employment Act.
[45] (2) 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.

Section 213 of the LRA refers to an employee as follows: a person who works for another person or the state; a person who receives or is entitled to receive payment in lieu of such work or services rendered, excluding an independent contractor; a person who contributes or assists, in any form or fashion, in the conducting of an employer's business; and a person who, through the related words of "employed" or "employment" can be shown to be an "employee".

In *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* the commissioner at the CCMA held that no single test is conclusive or particularly preferred by the courts in determining who is an employee. The court held that it is obvious from the judgements of the LAC that in terms of fundamental law, the existence of the real relationship cannot be condensed to single basic test but that consideration of all the details surrounding and setting of the relationship should be considered, especially where the true nature is camouflaged by some contractual arrangement.[46] The court therefore finds that the drivers were not employees of Uber SA upon reviewing all the facts at their disposal.[47]

The Code of Good Practice (the Code) introduces a new comprehensive test called the "reality of the relationship" test, although this is not expressly clarified as such. Therefore, irrespective of the nature of the contract on face value, in order to make a determination on who is an employee, consideration must be given to the real relationship between the parties. Item 52 states that in order to make this distinction the dominant impression must be gained from considering all the factors gauged from realities of the parties' relationship.[48] Once the dominant impression indicates that a person establishes an employment relationship, the duty shifts to the employer party to prove the contrary.

The LRA has come a long way since 1956 where all liabilities befell the labour broker. The client was unscathed by any labour-related acts or omissions in terms of the employees and the labour broker, unless the act or omission was criminal in nature. Realising that the 1956 provisions exposed the already vulnerable employees to further exploitation, the 1995 amendments, inserting section 198(4), attempted to extend the protection in terms of several and mutual liability to both client and TES in terms of the BCEA and Bargaining

[46] *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others (C449/17) [2018] ZALCCT*, para 78.
[47] Ibid., para 98.
[48] Ibid., para 57.

Council agreements. Although the protection was extended to arbitration awards related to terms and conditions of employment, it was not extended to any other protections under the LRA provisions.

Over the years, there were further amendments to the LRA. The most significant was in the Labour Relations Amendment Act 6 of 2014. In essence, these amendments came about to provide job security for and to protect the vulnerable members of society. For this reason these amended provisions only apply to those who earn below the earnings threshold as stipulated by the Minister of Labour in terms of section 6 of the BCEA. These amendments include the following:

Section 198(4)(d) includes reference to a sectoral determination made in terms of the Basic Conditions of Employment Act.

Section 198(4) was amended by the insertion of the following sections:

(4A) Both sections 198(4) and 198A(3)(b) hold the client and TES mutually and severally liable in terms of acts or omissions in the employment relationship. Therefore, subsection (a) provides for employees to refer a dispute against the TES or the client or both. (b) Any compliance order in terms of the BCEA may be instituted against both the TES and client as if they are the employer or both at the same time; (c) any award or order against the TES may be enforced on the employer or vice versa.

(4B) Written details need to be provided to an employee of the TES. This requirement needs to be adhered to within three months of the existence of this provision for existing employees.

(4C) states that TES employees' conditions of service may not contain any provisions that are not allowed by the BCEA and bargaining council or sectoral determination.

(4D) The employees' conditions must reflect any legal requirements, collective agreement or sectoral determination that is applicable to the client.

(4E) states that any anticipated disputes from 4D may be made by the Labour Court or an arbitrator, and it may make an appropriate order or award.

Section 198A of the LRA provides that a person assigned to a client by a temporary employment service (TES) for a period of more than three months is deemed to be the employee of the client for the purposes of the LRA. Previously, this section had no

timeframe attached to it and “temporary” remained undefined by the LRA. Thus, employees “deemed” to be the employees of the client related to those who have exceeded the temporary period of three months. The client and the TES will therefore be mutually and severally liable for the employees.

Section 198B of the LRA relates to employees working on a limited duration contracts. Although section 198A(1)(a) provides that an employee that works for the client longer than three months may be regarded as the employee, section 198B appointments are excluded from this provision in terms of section 198A(b)(ii), based on certain conditions. That being said, this section provides for periods exceeding three months where the temporary task/project may be justified in terms of section 198B(3). Subsection 6 requires the fixed-term agreement to be in writing, clearly stating the end date of the definite contract. Section 198B(4) of the LRA describes examples of what may be deemed as justifiable reasons for employing temporary services that may exceed three months. The same justification is required where temporary contracts are extended or continuously rolled over. This provision does not apply to employees earning above the threshold, employers with less than 10 employees or employers that employ less than 50 employees whose business has been in operation for less than two years, unless the employer has more than one business or the business was formed due to restructuring.

Section 198B(8)(a) of the LRA requires employees on limited duration contracts being employed for more than three months to not be treated less favourably than permanent employees doing the same or similar work, unless such different treatment can be justified. In this context, “not less favourably” means that they can apply for work when positions are available, in the same way as a permanent employee in terms of subsection 9.

Section 198B(10) of the LRA provides that employees may become entitled to severance pay should the justified temporary contract in terms of which they have been employed come to an end after 24 months. Where an employee is offered reasonable alternative employment instead of being terminated, and the employee refuses, the employee in terms of subsection 11 will not be entitled to severance benefits. A fixed-term contract which disregards the provisions in subsection 3, such a contract will be deemed an unlimited contract according to Subsection 5.

Section 198C refers to employees that do part-time work. These employees work reduced hours in relation to the hours worked by full-time employees. However, this section does not apply to employees who work reduced hours due to an agreement reached in terms of operational requirements. This refers to employees who work fewer hours than a comparable full-time employee. In other words, a full-time employee is an employee who is paid in full in reference to the time that the employee works and is identifiable as a full-time employee in terms of the employer's practice.[49]

On the whole, part-time employees should not be treated less favourably than comparable full-time employees. Here, a full-time employee means an employee who works with the same employer at the same or another business of the employer performing the same or similar function, unless the differential treatment can be justified. Provision should be made for part-time employees to have access to training and skills development similar to full-time employees. This section excludes employees who earn in excess of the BCEA threshold, employers employing less than 10 employees and employers who employ less than 50 employees who has been in business for less than two years unless the employer has other businesses or the business was formed due to restructuring. Also excluded are employees working less than 24 hours a month, and employees in the first three months of employment.

Section 198D provides guidelines in respect of what parties can do if there is a difference in interpretation or application of sections 198A to 198C. When a dispute arises in relation to the interpretation or application of sections 198A to 198C, section 198D(1) provides that the parties can refer the matter to the CCMA or Bargaining Council with jurisdiction for conciliation and where conciliation fails, to arbitration. Subsection 3 provides that disputes, other than those that relate to dismissals in terms of subsection 198A(4), may be referred in writing to the relevant legislative body within six months after the occurrence of the dispute. If the dispute remains unresolved after conciliation, the parties have 90 days in terms of subsection 5 in which they may refer the dispute to arbitration.[50]

Where reference is made in terms of the amended sections 198A(5), 198B(8) and 198C(3)(a) regarding justifiable reasons for different treatment, consideration is given to years of service, merit that may include performance-related increases or privileges, and incentives in terms of quality or quantity of work performed or any similar criteria that are

[49] Lee's Compliance, Labour compliance series as per LRAA 2014.
[50] Ibid.

not discriminatory in nature and prohibited by section 6(1) of the Employment Equity Act, (55 of 1998).[51]

Prior to the amendments of the LRA that came into force in 2014, Bosch stated that the law was attempting to find the balance of interest in terms of allowing employers flexibility while ensuring that employees were not deprived of any rights to which they might be entitled.[52]

Theron stated that the more recent alterations to the LRA recognise, for the first time, the need to protect employees in non-standard employment.[53] These LRA amendments[54] should be read in conjunction with other labour legislation amendments adopted by parliament around the same time in order to understand the holistic impact on the rights and duties of employees in non-standard forms of employment.[55] Although these are examples of non-standard employment forms, they do not constitute the entirety of non-standard employment. The section 198 amendments stated specific rights under specific conditions and hold parties to the relationship accountable for their role and/or contribution to the rights and working conditions of non-standard employees, including unfair dismissals.

Recent amendments to the LRA that have significance to this thesis are highlighted below.

Section 198(4)(*d*) has been amended to include any sectoral determination made in terms of the BCEA. Replacing the reference to "the Wage Act" with the wording "sectoral determination made in terms of the Basic Conditions of Employment Act" illustrates the widening of the net in terms of inclusivity and the protection of non-standard employees. The inclusion of subsection 4A[56] clarifies the implication of mutual and several liabilities. Where the employee is temporary and the temporary employment service is at fault, the client may be held liable; likewise, where the employee is no longer temporary and deemed to be the employee of the client, both the TES and the client may be held liable in terms of the other's failure.

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[51] Lee's Compliance, Labour compliance series as per LRAA 2014.
[52] Bosch, "The Proposed 2012 Amendments Relating to Non-standard Employment," 1631.
[53] Theron, "Non-standard employment and labour legislation: The outline of a strategy," Monograph 1/2014.
[54] Labour Relations Amendment Act 6 of 2014, commencement date 1 March 2015.
[55] The amendments to the BCEA (20 of 2013) were assented to on 9 December 2013. The amendments to the EEA (47 of 2013) were assented to 1 August 2014. The Employment Services Act (4 of 2014) was assented to on 3 April 2014.
[56] (a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;(b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and (c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.

The inclusion of section 198(4B)*(a*) obligates a TES to furnish its employees with written particulars in terms of section 29 of the BCEA related to the terms of employment. This section makes no distinction between deemed employees or temporary employees other than the fact that it applies to employees earning below the BCEA threshold. In *Rumbles* v *Kwabat Marketing*,[57] Van Niekerk AJ said, "*it should be recalled, though, that a contract of employment may be in writing or oral, and its terms may be express or tacit. There are no formalities required for the formation of a contract of employment. Section 29 of the Basic Conditions of Employment Act 75 of 1997 requires 'written particulars of employment' to be given to an employee – it does not require a written contract*." Section 198B(6) has been one of the significant amendments in the LRA regarding non-standard employment that requires the fixed-term contract to be in writing, clearly stating the nature of the limited duration contract. This provision is different from merely stating written particulars such as working hours as in the case of section 29 of the BCEA but will be dealt with when discussing section 198B. The difference is that in terms of section 29 of the BCEA the written particulars can be stated on a payslip, whereas in section 198B(6) it clearly states that a written contract stating the reasons for appointment in terms of subsection 3(a) or (b) of 198B, placing contractual obligations on the parties.

Section 198A[58] provides that a person assigned to a client by a temporary employment service (TES) for a period of more than three months, and who earns less than the threshold amount set in section 6(3) of the BCEA[59], is deemed to be the employee of the client for the purposes of the LRA. Consequently, the TES employer and the client whom the TES employee provides work to, will be held jointly and severally liable, in the case of any breach by the TES or the client in terms of breech of agreements, sectoral determinations and/or employment laws.[60]

Where an employee is deemed to be the employee of the client, the employee should be treated in the whole not less favourably than the employees of the client performing the same or similar work.[61] "In the whole" suggests that conditions of service applicable to permanent employees work out more or less the same as those applicable to deemed employees. Or does this entail that, since there is no justification for the temporary placement of the deemed employee, they may have to be absorbed "wholly" into the

[57] *Rumbles* v *Kwabat Marketing (D1055/2001) [2003] ZALC 57* (21 May 2003), para 17.
[58] Labour Relations Amendment Act 6 of 2014, section 198A(1)(b).
[59] Ibid., section 198A(2).
[60] Quick guide to new LRA sections 198A, B, C and D, v12.
[61] Labour Relations Act, Section 198A(5).

business of the employer and treated the same as the permanent employee; or should the deemed employee be treated similarly as long as the gross benefit equates to that of a permanent employee? This is difficult to establish as there is no guideline to determine this. Consequently, employers and TES suppliers make decisions based on their own interpretation of section 198A(5). Some employers try to work around the deeming provision in order to not make employees be deemed or to avoid appointing them permanently. They get creative and in many instances terminate employees before they roll over the three-month limit, irrespective if the role they are fulfilling gets filled by another temporary solution. Should it be found that an employee's service is terminated to avoid the deeming provision of section (3)(b)[62] or where employees exercise their right in terms of the LRA, it will be regarded as a dismissal.

Section 198B of the LRA stipulates provisions regarding limited duration contracts and is applicable to employees earning below the BCEA section 6(3) threshold. Fixed-term contracts can be temporary in terms section 198A(1)(a) or may surpass the limited period of three months. That being said, this section makes provision for fixed-term requirements that exceed three months, given that the temporary tasks/projects are justified.[63] The fixed-term agreement must be in writing, clearly stating the reason for the project/task and the end date of the definite contract. In an earlier statement reference was made to section 29 of the BCEA being applicable to non-standard employees, but that it does not constitute a contract. As stated by Van Niekerk AJ in *Rumbles* v *Kwabat Marketing,* part (b) of section 213 of the LRA[64] without the existence of a contract remains a contentious issue and therefore oral contracts should not be allowed.[65] The inclusion of sections 198(4B)(a)[66] 198B(6) removes this point of contention as it necessitates the issuing of written particulars of employment and written contracts of employment to non-standard employees. The contract should clearly state the duration of employment and the rationale for the contract being fixed term. Section 198B(4) describes examples of what may be deemed as justifiable reasons for employing temporary employees for a period longer than three months, although the list is not exhaustive. The same justification is required where

[62] (b) not performing such temporary service for the client is—(i) deemed to be the employee of that client and the client is deemed to be the employer; and (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.
[63] Labour Relations Act 6 of 2014, section 198B(3).
[64] (b) any other person who in any manner assists in carrying on or conducting the business of an employer…"
[65] Rumbles *v* Kwabat Marketing (D1055/2001) [2003] ZALC 57 (21 May 2003), para 17.
[66] A temporary employment service must provide an employee whose service is procured for or provided to a client with written particulars of employment that comply with section 29 of the Basic Conditions of Employment Act, when the employee commences employment.

such fixed-term contracts are extended or continuously rolled over. Where no such justification can be provided and the fixed-term contract is found to be contrary to subsection 3[67] the contract is deemed to be for an unlimited period.[68] For this reason, where applicable in any proceedings, it is imperative that the employer be able to justify limiting the period of a contract of employment, and be able to prove that the written terms were agreed with the employee.[69]

Where employees are employed on limited duration contracts exceeding three months, they should be treated no less favourably than permanent employees[70] unless the different treatment can be justified. In addition, where vacancies are available fixed-term employees have the same right as permanent employees to apply for vacancies.[71] It is difficult to interpret "no less favourably" without guidance from the legislator. Section 198B(8) omits the words "in the whole" as stated in section 198(5).[72] Does this mean it should be applied in a "like-for-like" scenario, since the fixed-term employee should be treated no less favourably than a permanent employee performing the same or similar work, unless the different treatment can be justified? If so, it is not always possible to apply "no less favourable" terms in a like-for-like scenario. For example, in many instances retirement or provident fund rules do not allow fixed-term staff to join such funds. Would this justify as valid deviation from no less favourable treatment? Would it be acceptable for employers to ensure that the employee receives the monetary equivalent to purchase a retirement annuity? Would this be a mandatory requirement for employees to purchase the annuity, or would it boil down to ensuring that on a cost-to-company equivalent the fixed-term employee is not worse off? The intention of the legislator in section 198B(8) is as unclear as in section 198(5).

In cases where fixed-term assignments or projects exceed 24 months, section 198B(10) of the LRA provides that employees may be entitled to severance pay unless the employee unreasonably declines alternative work. This section is reflective of the intention of section 198 amendments to ensure job security and fair treatment. In many instances employees are weary to embark on limited duration contracts as they know these contracts will be

[67] An employer may employ an employee on a fixed term contract or successive fixed-term contracts for longer than three months of employment only if— (a) the nature of the work for which the employee is employed is of a limited or definite duration; or (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.
[68] Section 198B(5).
[69] Section 198B(7).
[70] Section 198B(8).
[71] Section 198B(9).
[72] Cliffe Dekker Hofmeyr. "What does 'on the whole not less favourable' mean?" *Employment Alert,* 20 October, 2014.

coming to an end. However, sweetening the end with a retrenchment benefit makes it more lucrative for the employee. It also helps to ensure that consistent treatment in terms of the law regarding termination of employment is extended to fixed-term contracts in some form.[73]

Section 198C refers to employees that do part-time work. These employees work reduced hours in relation to what the employer would deem to be full-time hours. However, this does not include employees who are working temporary reduced hours as a result of operational requirements.[74] In many cases, these employees are employed by the client on the same basis as full-time permanent employees. The provisions of section 198C exclude employees earning above the BCEA threshold, employees working less than 24 hours a month for an employer, and the first three months of an employee's tenure with an employer. Employers that employ less than 10 employees or that have less than 50 employees given that they have not been in operation for longer than two years or have been formed as a result of a split or change in the business are also excluded from the provision of this section.[75]

In relation to working hours, part-time employees should not be treated in the whole less favourably than full-time employees. Part-time employees should have the same access to development opportunities and training as their full-time counterparts. This applies immediately with no exceptions when the employee starts with the employer.[76] In terms of other provisions of section 198C, those will be applicable three months after the inception of the amendments for employees employed before the amendments took effect, and this includes access to apply for vacancies in the same way as full-time employees.[77] In order to do a comparative with a full-time counterpart, subsection 6 advises that regard must be given to full-time employees working at the same workplace or, if this is not possible, regard must be given to full-time employees working for the same employer at another workplace.[78]

For many years, section 198 has been interpreted and justified in terms of its limited provisions, leaving non-standard employees open to exploitation. Having learnt these costly lessons, the legislator has included section 198D in the amendments to guide us

[73] Labour Relations Act 6 of 2014, section 198B(10).
[74] Labour Relations Amendment Act 6 of 2014, section 198C(1).
[75] Ibid.
[76] Ibid., section 198C(3)(a), (b).
[77] Ibid., section 198C(4)(5).
[78] Ibid., section 198C(6).

and give us recourse in terms of matters arising out of the interpretation of the sections 198A-C. Should a dispute arise in terms of the interpretation and application of the provisions of section 198, it may be referred to the CCMA or a Bargaining Council for Conciliation, or where that fails, arbitration. These disputes may be referred in writing to the relevant statutory body within six weeks from the date of the acts or omissions, excluding referrals related to dismissals[79] in terms of section 198A(4).[80]

For the purpose of the LRA and other labour legislation, the newly inserted section 200B(1)[81] provides that an "employer" includes one or more persons who assist a business or related business activity through an employer for the purpose of avoiding the provisions of this act or any other labour legislation, be it intentional or not. Where more than one person are identified to be the employer of an employee, all will be held accountable in terms of acts or omissions in terms of this act or any other labour legislation.[82] Any person who wilfully distorts the true nature of the relationship in order to obtain benefits they otherwise would not have been privy to, and later tries to claim the status of an employee rather than an independent contractor, will not be tolerated by the courts.[83] TES agreements are used by clients to distance themselves from accountability. Section 200B(1) clarifies that even though the TES may seem on face value to be the employer, the client being party to this arrangement and whose business is the recipient of gains of such an arrangement by using non-standard employees, will all be held accountable as employers when it is found that their actions have indirectly or directly deprived employees of their rights in terms of the LRA or any other law.

The court must not be bound to what the parties term their relationship to be, but must determine the true nature of such a relationship.[84] In the case of *Gerber* v *Denel (Pty) Ltd* the court had to make a decision on whether Gerber, the respondent in this instance, was an employee of the appellant when her service was terminated.[85] The court came to the realisation that, when it is called upon to determine whether a party is an employee or not, it needs to establish the true and real situation. The court found that it could not only focus on the information provided by the parties to the agreement or what it considered the

[79] Pertaining to dismissals relating to the circumvention of the deeming provision.
[80] Labour Relations Amendment Act 6 of 2014, section 198D(3).
[81] Labour Relations Amendment Act 6 of 2014.
[82] Ibid., section 200B(2).
[83] *Gerber v Denel (Pty) Ltd (2005) 26 ILJ 1256 (LAC)*: If the appellant approaches the Labour Court with no proof that she has corrected this with the SA Revenue Services, it may well be that she will be approaching the court with dirty hands and her claim may need to be approached with due regard to such principle.
[84] SA Broadcasting Corporation v McKenzie 1999 20 ILJ 585 (LAC) at par 10.
[85] *Gerber v Denel (Pty) Ltd 2005 9 BLLR 849 (LAC)*.

nature of their relationship to be. It is the court's duty to make an objective determination of the true nature of such a relationship. Therefore, matters outside of the parties' agreement need to be taken into account to make a determination; not allowing such evidence could lead to making a ruling on form rather than substance.[86]

Bosch is of the view that section 200B, despite not expressly dealing with externalisation apart from labour broking, may be interpreted to apply to other forms of externalisation.[87] In many instances, clients hide behind TES suppliers, outsourcing or other commercial agreements that distort the true nature of the relationship. These agreements are normally staffed with all forms non-standard employees, which in many cases make it difficult to actually pinpoint who their employer or financial dependency is. These arrangements rob non-standard employees of rights and benefits due to them. Section 200B(1) clarifies that anyone who assists a business with the intention to circumvent the law or infringe on the rights of employees by entering into various agreements to do so, will be regarded as employers and held accountable for their contribution to the farce and will not be able to escape accountability due to tedious arguments about who the actual employer is.[88]

2.4 THE BASIC CONDITIONS OF EMPLOYMENT ACT

The BCEA[89] replaced the BCEA of 1983 and the Wage Act 1957. According to Godfrey, the new BCEA acknowledged the concept of "regulated flexibility".[90]

The Green Paper,[91] which accompanied the introduction of the new BCEA, explained the model of "regulated flexibility": It would extend protection of minimum standards with the requirements of labour market flexibility to employees who otherwise would have none. The BCEA[92] set minimum standards of employment for all employees with the exception of a few.[93] The Minister may introduce minimum conditions through sectoral determination in a sector or area.[94] The Minister may not publish sectoral determination in areas bound by a collective agreement by a bargaining council or statutory council, or where a sectoral

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[86] *Gerber v Denel (Pty) Ltd (2005) 26 ILJ 1256 (LAC) ILJ*, 1257.
[87] Bosch, "The Proposed 2012 Amendments Relating to Non-standard Employment," 1643-1644.
[88] *Masoga v Pick n Pay Retailers (Pty) Ltd (JA14/2018) [2019] ZALAC 59*
[89] Basic Conditions of Employment Act 75 of 1997 (BCEA).
[90] Shane Godfrey, "The Basic Conditions of Employment Act Amendments: Enabling Redistribution?" *Industrial Law Journal* 35 (2014): 2587-2606. The BCEA was introduced at NEDLAC by the Department of Labour in early 1996 as the Green Paper: Policy Proposals for a New Employment Standards Statute.
[91] Ibid., 2588.
[92] Basic Conditions of Employment Act 75 of 1997.
[93] Exceptions are the act applies to all employees and employers except members of the National Defence Force, National Intelligence Agency, South African Secret Service and unpaid volunteers working for an organisation with a charitable purpose.
[94] Section 51.

determination has already been in place for less than 12 months.[95] Sectoral determination is used in sectors where there is little to no collective bargaining. A number of sectoral determinations have been implemented successfully to provide protection for non-standard workers. The sectoral determination for retail has introduced an option of benefits similar to those of standard employees. However, the feasibility of these determinations is dependent on the enforcement thereof. The BCEA[96] adopted a cordial approach rather than a punitive approach, in that it allows for a voluntary approach through the inspectorate of the Department of Labour, and if this is not satisfactory, compulsory compliance to enforce compliance.[97]

Section 83 of the BCEA deals with the deeming of who is an employee, referring to full-time or part-time employment, as alluded to in this act or other labour legislation applicable to employees. Section 83A was introduced in the 2002 amendments to the BCEA[98] and, as in section 200A of the LRA, provides that workers may be presumed to be employees where one or more of the listed factors are present, unless the contrary is proven by the employer.[99] This section does not apply to employees earning in excess of the threshold stated by the Minister.[100] Any party to the relationship can approach the CCMA for an advisory award to determine whether the person who earns equal to the threshold or below is an employee.[101]

Le Roux stated that, while the new BCEA[102] is influential in validating the contract of employment as a unifying concept, this association is also responsible for the loss of worker rights.[103] In the words of Theron et al.: "… [this] exposes the fallacy of supposing that because labour legislation acknowledges no distinction between workers in standard and non-standard employment, workers in non-standard employment enjoy the same rights. In truth, both the growth of non-standard work, and the particular form it has taken in South Africa, is exacerbating inequality."[104] Because of the emphasis on and importance attached to the contract of employment, the absence of such a contract between client and non-standard employee exposes non-standard staff to unfair

[95] Section 55(7).
[96] Basic Conditions of Employment Act 11 of 2002.
[97] Fourie, "Non-standard workers," 124.
[98] Basic Conditions of Employment Act 11 of 2002.
[99] Basic Conditions of Employment Act 11 of 2002.
[100] Ibid., section 83A(2).
[101] Ibid., section 83A(3).
[102] Basic Conditions of Employment Act, No 11 of 2002.
[103] Le Roux, "The World of Work," 15.
[104] Theron, Godfrey, and Visser, "*Globalization, the Impact of Trade Liberalization, and Labour Law,"* 9.

treatment. Likewise, where a contract exists that contains an agreement between the parties of a certain nature or form, it may misconstrue the true nature of the relationship, for example where someone works as an independent contractor.

Godfrey is of the opinion that the BCEA receives limited attention from labour lawyers as it does not generate much case law, even though he views the BCEA as probably the most important of the labour laws as far as the labour market is concerned.[105] His reason for this is because of the direct minimum standards it establishes and the wages and working conditions that are set through the instruments it empowers (i.e. sectoral and ministerial determinations).

A significant amendment to BCEA section 55[106] has been included so that the Minister can prohibit or regulate sub-contracting in addition to contract work through a sectoral determination. Further amendment to this section is the inclusion of a minimum "increase" in wages in addition to a minimum rate.[107] The amendment to section 55(4)(b) can have far-reaching effects on businesses.[108] Sectoral determination used to set the minimum wage that employees in a certain sector must be paid. However, some employees may earn more due to tenure, i.e. more than the minimum wage. This means that the wages received by employees who already earn more than the prescribed minimum would also have to be increased by the amount prescribed by the Minister. An additional clause 55(8) provides that the Minister may, subject to subsection 7, publish a sectoral determination that applies to all employers and employees who are not covered by any other sectoral determination. Thus, section 55(4)(g)[109] indicates that the legislator is aware of other forms of externalised employment that need to be regulated. This will allow the Minister to regulate minimum wages and employment conditions for employees who do not fall under any specific sector already covered by a determination. As stated above, the success of these sectoral determinations is dependent on the enforcement thereof. The amendments to the BCEA has set the scene for the National Minimum Wage Act 9 of 2018 (NMWA) that came into effect on 1 January 2019, to be of consequence to non-standard employees.

[105] Godfrey, "The Basic Conditions of Employment Act Amendments," 2587.
[106] Subsection (4)(g).
[107] Section 55(4)(b).
[108] Basic Conditions of Employment Act, No 11 of 2002.
[109] A sectoral determination may in respect of the sector and area concerned — prohibit or regulate task-based work, piecework, home work and contract work.

The institution of the national minimum wage (NMW) introduced a minimum wage of R20 per hour to which all contracts of employment, collective agreements and sectoral determinations have to comply with as a mandatory minimum.[110] The question that arose was how this new act will operate within the existing legislation. The National Minimum Wage Commission (NMWC) will take over the functions of the Employment Conditions Commission (ECC) that has been presiding on the Sectoral Determinations (SDs). Sectoral determinations are arrived at by following procedures established by the BCEA, and provide for variations of stipulations in the BCEA and application for exemption of such stipulations. The 2013 amendments to section 55(8) of the BCEA granted new power to the minister to publish sectoral determinations that span across sectors that are not covered by bargaining council agreements, statutory agreements or sectoral determinations. No major amendments will be required in terms of the BCEA and its existing provisions regarding remuneration, review and content of sectoral determination as well as exemptions and enforcements.[111]

In terms of section 55 of the BCEA, the minister can prescribe minimum standards including minimum wages to all types of work. An example of such prescription is in the domestic work sectoral determination where independent contractors perform domestic work.[112]

It is interesting to see that in terms of the definitions, an employer is a person who is required to pay another person for work performed by that person. A worker is defined as a person who works for another and receives or is entitled to receive payment for work done, either in money or in kind.[113] No worker should earn less than the minimum wage stated in the NMWA.[114] There is no contracting out of the provisions of the NMWA, and those employers who act contrary to the framework will be exposing themselves to unfair labour practice claims.[115] Section 4(6) of the NMWA is clear that no waiver of the provisions will be allowed and that the NMWA takes precedence over any contract or law, collective agreement or sectoral determination that states contrary provisions. However,

[110] A Godfrey, and M Jacobs, "The national minimum wage: How best to align it with the existing labour regulatory framework." *Industrial Law Journal* 39 (2018), 1.
[111] Ibid., 5.
[112] Ibid., 13.
[113] National Minimum Wage Act 9 of 2018, Definitions.
[114] National Minimum Wage Act 9 of 2018, section 4(4).
[115] Ibid., section 4(8).

employers may apply for exemption, which may be granted for a maximum of 12 months, should it satisfy the criteria of the exemption committee.[116]

The application of the NMWA cuts across all industries in the private and public sectors, ensuring that all who employ workers adhere to the minimum standards prescribed. All businesses are bound to pay the minimum wage and respective impact on benefits. However, the only manner in which they can escape this consequence is by exemption granted by the exemption committee. The NMWA's exceptions apply to any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind.[117] Based on this fact, it would seem that everyone, including non-standard employees, will benefit from the provisions of the NMWA. The only question is how this will be monitored and enforced. Non-standard employees are rarely reflecting on client records in order to make an appropriate assessment. This may pose an issue, unless an employee refers a matter of unfair labour practice to the CCMA.

In my view, what makes it interesting is the use of the term *worker* rather than *employee* in this act, alluding to the fact that the legislator wanted to ensure that no confusion existed about who is entitled to the minimum wage. The argument about who is an employee has been used to cop out of provisions of legislation for so long. The employer, who is defined in this act as the person who is required to pay the worker, will be the one that the worker will refer the unfair labour practice against, should the employer fail to adhere to the provisions of the NMWA.

[116] Ibid., section 15.
[117] Godfrey and Jacobs, "The national minimum wage", 5.

CHAPTER 3

3.1 INTRODUCTION

This chapter will review four reported judgments. These cases will depict how the law, in terms of non-standard employment, is being interpreted and applied, and to what extent legislation protects the vulnerable.

3.1 *Assist Bakery 115 CC v Ngwenya N.O. and Others (JR668/16, JR649/16) [2017] ZALCJHB 481 (27 October 2017)*

Assist Bakery 115 CC (Assist Bakery) and Pick n Pay Retailers (Pty) Ltd (Pick n Pay) entered into three agreements around 1 August 2014. Of relevance to this thesis is the Manufacturing and Supply Agreement with Pick n Pay and Assist Bakery 115 CC as parties to this agreement.[118] Moeleso and Masoga were employees employed on this empowerment contract for a period of 12 months, due to the empowerment contract being of a limited duration of five years. The employees' contract duration was from 1 March 2015 till 1 March 2016, performing the function of bakery assistants (pickers).[119]

The two employees referred a dispute in terms of section 198A to the CCMA on 19 November 2015. The dispute cited Pick n Pay as the employer who controls access to the work premises and Assist Bakery as a TES; hence they requested to be deemed permanent employees of Pick n Pay who they viewed as the client.[120] Conciliation on 9 December 2015 was unsuccessful. On the same day, the employees completed documentation for arbitration in terms of section 198B and D, as categorised by the commissioner during conciliation. The outcome requested by the employees was to have Pick n Pay deemed as their employer on an indefinite contract and to enjoy the same remuneration and benefits as those employed as reach stackers and forklift drivers employed by Pick n Pay.[121]

Arbitration was set for 17 February 2016. What was clear in the commissioner's award that the dispute to be decided on was whether Pick n Pay was the true employer of the employees and, if so, to determine whether the employees were entitled to conditions

[118] *Assist Bakery 115 CC v Ngwenya N.O. and Others (JR668/16, JR649/16) [2017] ZALCJHB 481 (27 October 2017)*, para 4.
[119] Ibid., para 5.
[120] Ibid., para 6.
[121] Ibid., para 7.

under section 198A(5).[122] The commissioner issued his award after hearing evidence and arguments. According to the commissioner, *he found that both Pick n Pay and Assist Bakery* were joint or co-employees of Lethabo Masoga and Lebohang Moeleso in terms of section 200B.[123] As a result of this summation, the commissioner awarded that Pick n Pay and Assist Bakery furnish the applicants with no less favourable terms and conditions than employees who were permanently employed by Pick n Pay and who were performing the same or similar work, effective from 1 March 2015.[124]

As a result of the rationale of the award, Pick n Pay and Assist Bakery approached the Labour Court (LC) separately for a review of the arbitration award. As both Pick n Pay and Assis Bakery's applications revolved around the same dispute, their applications were combined.[125] The two arguments on which the applications were based were firstly that the commissioner did not understand and correctly identify the dispute he needed to arbitrate and, secondly, due to the omission and misinterpretation of certain evidence the commissioner came to a conclusion that no reasonable person would reach. Hence, his deductions were wrong in law and fact, and thus reviewable.[126]

Labour Court evaluation of the dispute

It is important for the true nature of the dispute to be established, firstly, to ensure that the decision maker has jurisdiction to hear and to conclude the matter and, secondly, to ensure that the correct dispute referred by the parties are being addressed.[127] This case dealt with the review and the rationale for the review of the arbitration award. However, the focus for this thesis is on the interpretation and application of sections 198A, 198B and 198C.

The arbitration documents stated the dispute to be in terms of section 198B and D. In the section relating to what the employees would like in terms of a decision by the commissioner, they stated that they wish to be appointed permanently by Pick n Pay and

[122] An employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.
[123] (1) For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law. (2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law.
[124] *Assist Bakery 115 CC v Ngwenya N.O. and Others (JR668/16, JR649/16) [2017] ZALCJHB 481 (27 October 2017*), para 2.
[125] Ibid., para 8-9.
[126] Ibid., para 10.
[127] Ibid., para 11.

to be remunerated by means of a salary and benefits, the same as the permanent staff of Pick n Pay operating reach trucks and forklifts. The LC surmised that the commissioner, during conciliation, must have become aware that the dispute was related to section 198B, which relates to fixed-term contracts and not to that of temporary employment services. The commissioner also rightfully indicated that the dispute related to the interpretation and application of section 198D and therefore should be referred to the CCMA.[128]

Employers may appoint employees on fixed-term contracts or successive fixed-term contracts for longer than three months if the reason to do so is justified or if the nature of the work is of a limited timeframe in terms of section 198B(3). Section 198B(5) provides that any limited-duration contract entered into contrary to subsection 3 will be deemed to be of an unlimited nature. Section 198D(1) provides for disputes in terms of the interpretation of sections 198A, 198B and 198C to be referred to the CCMA. The true nature based on the facts at hand relates to a dispute in terms of the application and interpretation of section 198B.[129]

It would seem that around 29 January 2016 the employees were offered permanent employment by Assist Bakery. At the time, the employees were under the impression that Pick n Pay was their true employer and not Assist Bakery. It has never been in dispute from initiating the referral to the CCMA that the fixed-term agreement was between the employees and Assist Bakery; the contract by this time having exceeded the three-month period in terms of section 198B(3).[130]

The question therefore is whether the commissioner dealt with the case in terms of section 198B during arbitration. In his award the commissioner stated that in terms of the referral he needs to establish whether Pick n Pay is the employer, and if so whether the employees are entitled to the terms and conditions provided in section 198. The court was of the view that the commissioner had in mind section 198B(5) to be applicable when referring to section 198 in his award, with the contract exceeding three months and therefore deemed to be of an indefinite nature. Subsection 3(b) provides for such employees not performing temporary work to be deemed employees of the client, subject to the provisions of section 198B if employed for an undefined period. In order for the

[128] *Assist Bakery 115 CC v Ngwenya N.O. and Others (JR668/16, JR649/16) [2017] ZALCJHB 481 (27 October 2017*). para 12-13.
[129] Ibid., para 14-15.
[130] An employer may employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months of employment only if—(a) the nature of the work for which the employee is employed is of a limited or definite duration; or(b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

employees to be treated on the whole not less favourably than the employees of the client in terms of section 198A(5), the employees first had to be deemed employees of the client in terms of section 198A(3)(b). Therefore, the question was asked whether they performed a temporary service or not to the client; if they did they were employees of Assist Bakery; if they did not they were employees of Pick n Pay. If the employees rendered this service for longer than three months, they would be deemed to be on an unlimited period contract if the requirements of section 198B(3)(a) and (b) had not been present.[131]

The matter to be arbitrated before the commissioner was in terms of section 198B and D, with the outcome sought to be appointed permanently by Pick n Pay and to be paid the same and enjoy the same benefits as reach truck and fork lift operators employed by Pick n Pay. The commissioner decided to focus on the commercial agreement between Pick n Pay and Assist Bakery, and in his view an employment relationship existed between Pick n Pay and the employees.[132] The commissioner continued to draw questionable inference regarding the matter before him, in terms of section 200B which contributed to the award being reviewable (but which is not relevant to this thesis).[133]

It was apparent that the commissioner incorrectly applied the law and his award, making the judge inclined to review and set aside the commissioner's award. Under normal circumstances, the court would revert the case to the CCMA. However, as previously stated, Assist Bakery already made amends to correct the contravention in terms of section 198B(5) before arbitration took place. For this reason, the judge found that there was no longer a relevant dispute in terms of section 198B.[134]

Section 198A deals with the application of section 198 to employees earning below the threshold. Section 198 deals with TES providing labour. However, there was no service that was provided to Pick n Pay by Assist Bakery as a temporary employment service provider. The employees were in fact employed by Assist Bakery and therein lay the error; their contracts with Assist Bakery were being challenged in terms of section 198B(5) for not being of a temporary nature. The contracts of the employees were of an unlimited nature and not of a fixed-term nature as it originally started out. It seems that Assist Bakery realised the error of their ways as the work performed by the employees could not be justified in terms of section 198B(3) and they offered the employees permanent

[131] *Assist Bakery 115 CC v Ngwenya N.O. and Others (JR668/16, JR649/16) [2017] ZALCJHB 481 (27 October 2017),* para 17-20.
[132] Ibid., para 28.
[133] Ibid., para 29.
[134] Ibid., para 44-46.

contracts. What is significant of this judgement is that only work which is truly temporary in nature i.e work required for three months or less, or where the period exceed three months but it is a temporary relieve of a person who will be returning to work on a future date, will be deemed as temporary. The temporary nature of the commercial contract entered into by the parties does not serve as rationale or justification to appoint their staff on a temporary basis. If the contract last more than three months, the staff earning below the threshold should be appointed on an indefinite contract.

3.2 Enforce Security Group v Mwelase and Others

This case relates to the inclusion of an automatic termination clause that indicates the expiry of the employment contract once the commercial contract between the employer and client comes to an end. The question here is whether the parties to the fixed-term employment contract have contracted out of the protection to not be unfairly dismissed.

Enforce Security Group (Enforce) was a private security service provider to various clients. Boardwalk Inkwazi Shopping Centre (Boardwalk) was one of the clients to whom Enforce provided security personnel. Enforce contracted and placed employees at the premises of Boardwalk. The terms of the contract with the employees stated that the duration of said contract would be aligned with the duration of the contract between Enforce and Boardwalk, which would constitute a fixed-term contract. The fixed-term contract included an automatic termination clause linked to the contract between Enforce and Boardwalk. Boardwalk gave Enforce notice to terminate the contract on approximately 30 September 2011, citing the end date to be 30 October 2011. The employees were offered alternative employment by the client, which they refused on the grounds that they were entitled to retrenchment packages in terms of section 189 of the Labour Relations Act (LRA). Enforce refused to pay retrenchment packages.[135]

The terminated employees then referred an unfair dismissal case to the CCMA. The CCMA dismissed their claim based on the fact that no dismissal took place as the contract naturally came to an end as stipulated in the contract of employment. The employees brought a review application before the Labour Court (LC), who found that the employees' termination constituted dismissal in terms of the LRA and that they have been substantively and procedurally unfairly dismissed. This finding by the LC was based on the

[135] *Enforce Security Group v Mwelase and Others (DA24/15) [2017] ZALAC* 9.

fact that there was a duty on the employer to follow a retrenchment process and that the alternatives offered to affected employees were not reasonable. The court made an order to the appellant to pay severance packages and compensation, and the commissioner's award was set aside.[136]

Subsequently, Enforce appealed against the LC judgement. The Labour Appeal Court (LAC) gave consideration to the following factors to reach a verdict:

Has a dismissal taken place or not?

Section 186(1) of the LRA defines dismissal as an act by the employer that has the consequence of severing the employment relationship.[137] It was argued on behalf of Enforce that it had no control over the severing of the relationship and that this occurred as a result of Boardwalk's termination of the contract. In this sense, a dismissal did not occur. However, the contract had merely run its course; this had been orchestrated by the client Boardwalk giving notice to Enforce to end the contract. Section 5 of the LRA lends protection to applicants or prospective employees to not be bullied into contracting out of their rights in order to find employment. The automatic termination clause was directly linked to the duration of the service contract with Boardwalk; therefore, it did not infringe on the rights or attempt to circumvent the rights of employees to be fairly terminated.[138]

Tlaletsi DJP is of the view that automatic termination clauses are not always invalid and that, in making this determination, a court must consider whether such clauses were intended to bypass fair dismissal obligations imposed on an employer by legislation. The judge provided a list of factors that would be considered in each case to validate the intention of the termination clause on each case's merit. The following consideration factors were listed: the exact wording of the automatic termination clause and the framework of the entire arrangement; how the client requirement correlates with the fixed-term justification; whether the client has autonomy to be selective regarding who provides services under the agreement; whether the client or the employer applies the clause to prejudice a specific employee by either; and whether the event has an economic and commercial rationale.[139]

[136] *Enforce Security Group v Mwelase and Others (DA24/15) [2017] ZALAC* 9. para 1-2.
[137] Ibid., para 21.
[138] Ibid., para 12.
[139] Ibid., para 41.

Courts have become sceptical of the use of automatic termination clauses as employers have abused this mechanism to the detriment of their employees, especially those on fixed-term contracts. Legislation has been amended to protect the job security of especially non-standard employees against such abusive practices. It is imperative to distinguish between dismissals and terminations in terms of the fulfilment of a condition of an automatic termination clause. Some factors referred to above has reference, and it is important to ensure that employees' rights are not infringed upon and that their job security is not threatened.[140]

The Labour Appeal Court held that the appellant was not responsible for the dismissal of the employees or the termination of their employment contracts, and that no dismissal as defined in the LRA had occurred. Instead, it was the contract between Enforce and its client that had been terminated. In addition, the Appeal Court reiterated that an employee will retain the right to challenge a termination as an unfair dismissal in terms of section 186(1)(b) if he or she had a reasonable expectation of renewal, or if the employer failed or refused to renew a fixed-term contract and the employee expected the employer to renew the fixed-term contract.[141]

The economic rationale for fixed-term contracts is to give flexibility to employers. Even prior to the 2013 amendments to the LRA, section 186(1)(b) protected employees from being unfairly terminated if they had a reasonable expectation of such fixed-term contracts to be renewed. The question begs whether this expectation has been managed in the case of Enforce. In my view, the termination clause that relates directly to the dependence of a continued commercial relationship between Enforce and Boardwalk manages this expectation. Even if the commercial contract would have been renewed a few times, the fact that Boardwalk decided to sever the relationship with Enforce brought an end to the economic rationale and thus the reason why the employees were employed. None of Enforce's employees could reasonably expect to continue with the employment relationship since there was no reason for them rendering services to a client that no longer required it. The LC advised the alternatives offered by the client were unreasonable. However, no information regarding the alternatives was provided.

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[140] In *Nogcantsi v Mnquma Local Municipality and Others (PA07/15) [2016] ZALAC 54; (2017) 38 ILJ 595 (LAC); [2017] 4 BLLR 358 (LAC) (22 November 2016)*, the termination clause was evoked subject to the results of a vetting process which was relevant to the role he was recruited for. The employee agreed to the vetting; results returned negatively and employee was terminated as a result of the negative vetting.

[141] *Enforce Security Group v Mwelase and Others (DA24/15) [2017] ZALAC 9*, para 42.

It is important to remember that there is no contracting out of any rights inferred in legislation, whether such contract was entered into before the existence of the relevant legislation or not. The termination clause itself does not give effect to the termination of the employment contract. A contract that directly or indirectly limits the application of section 4 or 5 of the LRA is invalid unless such contractual provision is allowed by the LRA.[142] Although the employees of Enforce can still challenge their dismissal in terms of section 186(1)(b) and the employees can establish that there were indeed a dismissal in terms of this section, the onus shifts to Enforce to justify the fairness of the dismissal. According to Tlaletsi DJP, this will severely nullify the whole rationale behind concluding fixed-term contracts for valid reasons.[143]

The contracts came to an end in 2011 before the 2013 LRA amendments. The 2013 amendments in terms of section 198(B)(10) now lends further protection to fixed-term employees earning below the BCEA threshold, and whose contracts are expiring, to be entitled to severance pay as prescribed by BCEA section 41(2), should the term of the fixed-term contract exceed 24 months. Should an employee unreasonably refuse an alternative position when the contract expires, he will not be entitled to a severance package.

Should this case have presented itself post the 2013 LRA amendments, the outcome would probably have been different. As in the Assist Bakery case,[144] the duration of the work performed by the employees was not of a temporary nature; irrespective of whether the commercial contract with the client was of a limited duration. Enforce would not have been able to justify the temporary nature of the employees' contracts and they would have been deemed to be indefinite contracts. Enforce would not have been able to disregard the obligation on them to follow the process in terms of section 189A. The reason for the operational requirement may have been the same but the process to be followed to be in line with section 189A of the LRA was not.

[142] Ibid.
[143] *Enforce Security Group v Mwelase and Others (DA24/15) [2017] ZALAC 9*, para 42.
[144] *Nogcantsi v Mnquma Local Municipality and Others (PA07/15) [2016] ZALAC 54; (2017) 38 ILJ 595 (LAC); [2017] 4 BLLR 358 (LAC) (22 November 2016)*.

3.3 *Piet Wes Civils CC and Another v Association of Mineworkers and Construction (AMCU) and Others [2018] ZALAC 18 (10 March 2018)*

Piet Wes

It is an accepted practice that business requires some flexibility in terms of labour requirements; job creation is given a boost when projects or piece work is required albeit these need to occur within the correct framework without undue prejudice to any of the parties. Section189B of the LRA[145] deals with fixed-term contracts of employment and the framework in which fixed-term contracts should operate.

Piet Wes Civils Service CC (Piet Wes) provided multiple services to Exxaro Coal (Pty) Ltd, trading as Grootegeluk Mine (Exxaro), and entered into contracts (10 November 2003, 2 September 2013, 17 June 2014 and 30 September 2014) for each of these services which included the distribution of magnetite, the movement of coal, an internal delivery service and cleaning services. Piet Wes employed his own staff to render these services to Exxaro and entered into employment contracts, pertaining to each service category, with staff members. Only some of these employees had written contracts while others were concluded verbally. There was a dispute regarding the defined nature of the contracts since the written contracts did not contain an express end date and the remainder of the staff had verbal contracts.

In August 2016, Exxaro gave one month's notice to cancel one of its contracts with Piet Wes. This cancellation affected 43 of Piet Wes's employees, and Piet Wes in turn gave notice to the affected employees. There was some dispute regarding the exact dates of termination of employment between Piet Wes and the Association of Mineworkers Construction Union (AMCU) to which the employees belonged. On receiving their termination notices, the employees referred a matter of unfair dismissal dispute to the CCMA.

Section 189A(13) provides employees with a remedy to approach the Labour Court (LC) to set the employer back on track when there is genuine procedural unfairness that goes to the heart of the process. In the meantime, an urgent application was made to the LC in terms of section 189A(13) to force Piet Wes to re-employee the employees in order to follow a fair process.

[145] Labour Relations Amendment Act 12 of 2014.

Section 198B(10)(a) provides that employees be paid severance packages in line with section 35 of the BCEA, provided that they earn below the threshold and that the fixed-term contracts that they were employed on were for a period of 24 months or more, should this contract come to an end. Piet Wes was of the view that he was in breach of this provision and offered to pay the employees one week for each completed year of service; this while the urgent application was being made by AMCU.

Section 198B(6) determines that an offer of employment on a fixed-term basis or renewal thereof must be in writing and justify why it is of a limited duration, should this period exceed three months. Section 198B(7) requires that an employer must prove in any proceedings that limiting the employment term was justified and why the contract was fixed term. As a result of these provisions, the non-existence of some contracts and inability of the existing ones that do not reflect the justification or defined nature of the contract, the employees believed that they were in fact employed on indefinite contracts, which led them to the LC in terms of section 189A(13)(c), forcing Piet Wes to follow a fair process in terms of retrenchment.

Waterkloof

Waterkloof supplied cleaning services to Exxaro, employing 104 employees to perform this service. Likewise, as in the Piet Wes scenario, not all employees had written contracts; some had oral contracts. The written contract itself contained no end date. On 11 November 2016 Exxaro gave Waterkloof notice of severing the contract. In turn, Waterkloof gave notice to their affected staff. As some of them were embarking on strike action at the time, this notice of termination was sent to the AMCU lawyers. Waterkloof made it clear that since they viewed the contracts as limited-duration contracts, there would be no process in terms of section 189A of the LRA.[146] Waterkloof advised that in terms of the amended LRA they will follow the provisions of section 198B(10) and will pay those affected employees in excess of 24 months' service, one week for every one year completed service as severance pay.

An urgent application was made by the employees to the LC opposing that their contracts were indefinite and not of limited duration as stated by Waterkloof. Therefore, section 189A should be complied with.

[146] (6) An offer to employ an *employee* on a fixed-term contract or to renew or extend a fixed-term contract, must—
(a) be in writing; and *(b)* state the reasons contemplated in subsection (3)*(a)* or *(b)*.
(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

The cases of Piet Wes and Waterkloof were consolidated before the LC as an urgent application in terms of section 189A(13) of the LRA.

The employees argued that their contracts were of an indefinite nature and that they had been dismissed for operational requirements. They also said that a process in terms of section 189A, which deals with large-scale retrenchments, should be followed and that no consultations were held. They wanted the court to reinstate them in terms of section 189A(13) so that a proper consultative process could be followed.

Steenkamp J stated that the onus is on the employer to provide proof of the fixed term of the contract, and that the terms to the contract were agreed.[147] Section 198B(4)(d) states that a contract must expressly show that the employee is exclusively employed on a specific project for a defined period. Although some clause in the contract made reference to such, it was not clear and therefore in contravention of section 198B(3).[148] Nowhere in both employers' cases was the nature of the work, or the term that such work would take, defined in the contract. However, the contract was linked to work supplied by the client.[149] Section 198B(1) requires a specific event, or end of a project with a specific date, to justify the defined nature. An open-ended event that may or may not occur is not sufficient. The purpose of section 198B is to provide security in employment so as to not have rolling contracts become a shortcut, but to provide flexibility where fixed-term contracts can be justified.[150]

Exxaro simply terminated its contracts with the two employers on notice; no indication is provided in any of the documents that a specific project had come to an end. The employers have not demonstrated a justifiable reason for fixed-term contracts in that regard. A "justifiable reason" contemplated by subsection (4)(d) would have been, for example, where Exxaro had contracted the respondents to clean up a specific mine, or to do so within a specified time. This is not such an example.[151]

Steenkamp J stated in the judgement that, on the facts of the case, the contract was not intended to be for a fixed duration, or to end on the happening of a specified event or the

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[147] *AMCU and Others v Piet Wes Civils CC and Another (J2834/16, J2845/16) [2017] ZALCJHB 7 (13 January 2017)*, para 13.

[148] An employer may employ an *employee* on a fixed-term contract or successive fixed-term contracts for longer than three months of *employment* only if— *(a)* the nature of the work for which the e*mployee* is employed is of a limited or definite duration; or *(b)* the employer can demonstrate any other justifiable reason for fixing the term of the contract.

[149] *AMCU and Others v Piet Wes Civils CC and Another (J2834/16, J2845/16) [2017] ZALCJHB 7 (13 January 2017)*, para 15.

[150] Ibid., para 19.

[151] *AMCU and Others v Piet Wes Civils CC and Another (J2834/16, J2845/16) [2017] ZALCJHB 7 (13 January 2017)*, para 16.

completion of a specified task or project, as contemplated by section 198B(1). Placing the possibility of a 'specified event' on the cancellation of the Exxaro contract would, in Steenkamp's view, go beyond the intention of the legislature. To make workers' employment dependent upon the whims of a third party that can simply terminate the contract between it and the employer on notice does not fit that purpose. The employers have not discharged the onus of justifying the reason to employ the workers on a fixed-term contract, as contemplated by section 198B(3)(b). The employment contracts must be deemed to be of an indefinite duration as contemplated by section 198B(5).[152]

Therefore, Steenkamp J found that the contract of employment did not automatically cease when Exxaro terminated its contracts with the employers Piet Wes and Waterkloof.[153] There may have been justifiable reasons for Piet Wes Civils and Waterkloof to terminate the services of the employees once the client terminated their contracts. However, that can only be established after an appropriate consultation process through a meaningful joint consensus-seeking process in terms of section 189 and 189A. As an appropriate process was not followed, the employers must be compelled to do so; the employees must be reinstated until the employers have followed a fair procedure as contemplated in section 189A(13)(c).[154] The order was made with no specific order with regard to timelines.[155]

Appeal against the Labour Court judgement

Piet Wes and Waterkloof appealed against the judgement of the LC as they held that the employees' contracts of employment ran their course when the contracts between their employer and the client were terminated; therefore the contract was limited in nature. The employers provided proof of the contract with Exxaro coming to an end and argued that there was no intention to circumvent the law. They argued that a valid reason existed for the existence of the fixed-term contracts in terms of section 198B(3)(b), albeit clumsily worded in the contract of employment. The employers felt that the employees were aware that their contracts were aligned with the duration of a specific task or event, as contemplated in section 198B(1). Hence, their argument was that the employees were not dismissed and therefore the relieve envisaged in terms of section 189A(13) to be reinstated was not applicable. The applicants wanted the appeal to be upheld with cost;

[152] Ibid, para 19.
[153] *AMCU and Others v Piet Wes Civils CC and Another (J2834/16, J2845/16) [2017] ZALCJHB 7 (13 January 2017)*, para 20.
[154] Ibid., 30.
[155] Ibid., 31.

they also wanted the LC order be set aside and to be replaced by an order dismissing the consolidated applications in terms of section 189A(13).[156]

The respondents opposed the appeal by stating that the rationale for their contracts being of a fixed-term nature is not justifiable in terms of section 198B(3) and as a result is deemed to be indefinite contracts in terms of section 198B(5). They argued that it was clear that the applicant was attempting to circumvent the law by relying on an automatic termination clause that is not valid and therefore not enforceable. The respondents held that since there is no justifiable reason for the fixed-term contracts, the LC rightfully ordered reinstatement of the employees. Accordingly, it was submitted that the appeal be dismissed with cost.[157]

In *Enforce Security Group v Fikile and Others (Enforce)*,[158] this court had regard to fixed-term employment contracts, which were concluded prior to section 198B becoming operational from 1 January 2015. Even prior to the existence of this section, the court recognised that fixed-term contract termination should not be dealt with lightly and purely on face value. The court made sure that a specific event and date were stated unambiguously in the contract that would bring about the end of the employment relationship. It was stated clearly and concisely, and in writing, ensuring the employees' expectations were appropriately managed. In the current matter, section 198B finds application that specifically states what is expected and regarded as fair within the context of the law, other than in the Enforce case.[159]

The argument brought forth by the applicant in terms of the specific event was not compelling. It referred to an event in the future that may or may not occur; the reference made is in respect of the operation of the business rather than a task or project. Hence, it is but a future possibility and does not define any specific occurrence or time lapse.[160]

Section 198B(1) is clear. A fixed-term contract, or renewal, or extension to that contract, must be in writing; and is required to state clearly that it is to terminate on the occurrence of a specified event, on the completion of a specified task or project or a fixed date, in terms of section 198B(3). The rationale behind the contract having to be in writing is for the compelling reason that it seeks to prevent any later dispute arising in terms of the

[156] *Piet Wes Civils CC and Another v AMCU and Others [2018] 12 BLLR 1164 (LAC); (2019) 40 ILJ 130 (LAC)*, para 20.
[157] Ibid., para 21.
[158] *Enforce Security Group v Mwelase and Others (DA24/15) [2017] ZALAC 9*.
[159] *Piet Wes Civils CC and Another v AMCU and Others [2018] 12 BLLR 1164 (LAC); (2019) 40 ILJ 130 (LAC)*, para 22.
[160] Ibid., para 25.

interpretation of the contract. The appellants, by their own admission, confirmed that no written employment contract was entered into with a number of employees employed by both Piet Wes and Waterkloof, with such contracts having been agreed verbally with those employees. There was no proof that the employees were furnished with a written offer of employment, as required by section 198B(6). The provisions of section 198B have not been complied with in respect of those employees with whom no written contracts had been concluded. In the absence of such contracts as proof to the contrary, those employees were employed for an unlimited duration.[161]

As all of the employment contracts entered into were indefinite, as contemplated by section 198B(5), these contracts could only be terminated on notice by the appellants without abiding by the fair dismissal procedures set out in the LRA. Savage AJA found the respondents were therefore entitled to approach the Labour Court to seek relief, as set out in section 189A(13). It was stated by the Constitutional Court, in *Steenkamp v Edcon Ltd,*[162] that section 189A(13) grants "*special protection for the rights of employees … to protect the integrity of the procedural requirements of dismissals governed by section 189A*".[163]

Savage AJA found that the LC was correct in stating the applicants may find justifiable reason to terminate the contracts, but this would only be established through a proper consultative process in terms of sections 189 and 189A. The LAC found that the LC was justified in granting the relief sought in terms of section 189A(13) and ordering the reinstatement of the respondents to follow a proper process in terms of section 189 of the LRA.

As stated by both the LC and LAC, the purpose of section 198B is to ensure job security. A fair process and a justifiable rationale go to the heart of the employment relationship. Fixed-term contracts as a non-standard form of employment has been used as a scape goat by many clients and employers to not take responsibility for treating employees fairly within the context of the law. There may be a true reason why the employment contract needs to end. However, proper care in terms of following a fair process with due regard to the welfare and impact on the employee should be given, as alternatives and re-

[161] *Piet Wes Civils CC and Another v AMCU and Others [2018] 12 BLLR 1164 (LAC); (2019) 40 ILJ 130 (LAC)*, para 23.
[162] S Van Eck, and T Kujinga, "Large-scale operation requirements dismissals: How effective are the remedies? A discussion of *Steenkamp & Others v Edcon Ltd." Industrial Law Journal 37 (2018): 76-88; 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC)* paras 161-164.
[163] *Piet Wes Civils CC and Another v AMCU and Others [2018] 12 BLLR 1164 (LAC); (2019) 40 ILJ 130 (LAC)*, para 27.

deployment may be options to review rather than settling for dismissal without applying one's mind. The days of using fixed-term contracts inappropriately are numbered. Fixed-term contracts have their place and rationale by providing flexibility to business, but only if they are used in the correct context, with justifiable reasons (unambiguously presented) and clearly stating the duration required. An employee entering into such a contract should at a glance understand exactly what the terms of the agreement are, without any expectations or misunderstanding.

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

Since the enactment of the 2014 amendments to the LRA,[164] the interpretation of section 198 has created widespread confusion and has become a subject of many debates. For the first time clarity was provided on the meaning of the word "temporary",[165] defined as a period not exceeding three months. However, the contentious issue was around the interpretation of the deeming provision where the period of placement exceeded three months (no longer temporary) and the employee is deemed to be the employee of the client.[166] Much to TES suppliers' chagrin, they saw the deeming provision as a nail in their proverbial coffin as they felt that their days were numbered in terms of providing temporary employees to clients. The provisions apply to employees earning below the threshold,[167] which forms the greater portion of employees provided to clients, with many of these temporary assignments lasting longer than three months.

The insertion of section 198D(1)[168] in the amended act provided guidance on what one can do when there is a misunderstanding or confusion in the interpretation of sections 198A-C of this act.

Soon after the provisions came into force, Assign Services, a temporary employment service, placed employees with the client Krost for a period exceeding three months. The employees therefore fell within the scope of section 198A(b)(3), deemed to be the employees of the client. Seeking clarity on what the deeming provision entails, the parties referred the matter to the CCMA in terms of section 198D(1) for interpretation.

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[164] Labour Relations Amendment Act 12 of 2014.
[165] Ibid., section 198A(1).
[166] Ibid., section 198A(3)(b)(1).
[167] Ibid., section 198A(2).
[168] (1) Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.

The insertion of section 4D[169] in section 198 states that employees doing work for a client will fall under the scope of the bargaining council in which the client is engaged. Section 147(2) provides that where a commissioner finds that the parties to a referral fall under the scope of a bargaining council, the commissioner may refer the matter to the bargaining council for resolution or appoint a commissioner to hear the matter. At the beginning, the commissioner realised that the parties fell under the jurisdiction of the Metal and Engineering Industries Bargaining Council (MEIBC). Assign Services, as the TES, and NUMSA on behalf of the employees, agreed to the CCMA assuming jurisdiction to hear the matter. Krost, the client, did not attend and undertook to abide by the decision of the commissioner. Their respective arguments led as follows at arbitration:[170]

The council for Assign Services argued that the deeming provision implied that the employees placed by the TES remained the employees of the TES, but for the purpose of the LRA is deemed employees of the client after three months. The council stated that the language of sections 198 and 198A does not imply a ban on labour brokering, and therefore legislation did not intend to terminate the commercial relationship between the TES and the client. The dual employment position offers greater protection for employees in terms of joint and several liability stated in section 198(4A).[171]

The second respondent's argument centred on the sole employer principle. NUMSA held that it was the intention of the legislator for the client only to become the employer of the placed employees. NUMSA contended that this is true for employees who exceeded the three-month mark, as well as for all employees placed by the TES. Hence, in this respect, section 198A(3)(b) creates a legal fiction. NUMSA is of the opinion that section 198(4A) creates no new liabilities for the parties to the relationship and not just for those who are deemed to be employees; it merely institutes proceedings against the party that has erred. NUMSA asserted that its "sole employer" argument is supported by section 198A(3)(b)(ii), stating "subject to the provision of section 198B, employed on an indefinite basis by the client".[172]

The commissioner, in making a decision, was led by the primary purpose of the amendments, which is to provide protection to employees in terms of exploitative practices by temporary employment services. The commissioner found that the deeming provision

[169] The issue of whether an employee of a temporary employment service is covered by a bargaining council agreement or sectoral determination must be determined by reference to the sector and area in which the client is engaged.
[170] *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another (2015) 36 ILJ 2408 (CCMA)*, 2409.
[171] Ibid.
[172] Ibid., 2409-2410.

should be regarded in the same perspective as that of adoption. The law maintains that the adoptive parents are the parents of the adoptive child for all purposes, and that the biological parent is not perceived as a co-parent. The commissioner stated that this will only create misunderstanding and uncertainty in the same way it would in a dual employment scenario. Section 198(4A), which provides for joint and several liability, had no influence on the interpretation of section 198A(3)(b) and did not create a dual employer relationship. The commissioner held that the deeming provision afforded additional protection to employees earning below the threshold, and as long as the commercial contract existed between the TES and the client, the client becomes the only employer of the employees after the three-month period. Based on this view, Krost will become the sole employer of the employees earning below the threshold after three months have lapsed, for an indefinite period for the purposes of the LRA.[173]

As expected, Assign Services applied to the Labour Court to review the commissioner's decision as this decision by the commissioner has far-reaching consequences for all temporary employment service providers. This may also make employers hesitant to use temporary labour where they may have a genuine temporary need. As advised in Chapter 2, section 198A(4) regard the termination of a temporary employee service as a way to avoid the deeming provision as a dismissal, whether it is intentional or not. The commissioner's decision gives no regard to genuine temporary requirements, and if this is approach is adopted, many clients may face unfair dismissal cases against them in future. The only opposition against the application was received from NUMSA.

According to NUMSA's complaint, the tribunal has committed a serious error of law and therefore requested the commissioner's decision on review. The court considered both NUMSA and Assign Services' arguments to be misleading, based on the following: NUMSA's argument was based on "sole employment", even though the union conceded that the contract of employment remains in force between the employee and the TES. The court found that there was nothing that deprived the employees from the rights and obligations derived from the contract since the contractual relationship remained in force. Assign Services' stance was that of "dual employment", implying that there is a relationship with the TES and a relationship with the client. The court held that this was not what Assign Services argued as it argued that once an employee has been placed, the client had a dual responsibility in terms of rights and obligations together with the TES.

[173] *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another (2015) 36 ILJ 2408 (CCMA),* 2410.

Both Assign Services and NUMSA were in agreement that the contract between the TES and the employee remained in force even after the three months had lapsed.[174]

The court further considered the language of section 198 and confirmed without a doubt that the TES remained the employer of the employees in common law. The TES and the client have a shared liability in terms of the BCEA,[175] and for the period after the three months the shared liability in terms of the LRA[176] for employees earning below the threshold. The only question still remaining was whether the TES remained the employer after the three-month period. As previously stated, the court could find no argument in law that suggests that the employment relationship between the TES and employee ceased to exist. The triangular relationship becomes one of shared liability. The court was of the opinion that the word “deemed” used in the LRA refers to an extension of the contract between the TES and the employee rather than replacement of said contract. Therefore, the court was satisfied that the correct interpretation of section 198A(3) was used as that of a dual interpretation for the purposes of the LRA.[177]

Reviewing the award, the court found that the commissioner had committed a serious error of law by coming to the conclusion that Krost, the client, was the sole employer of the employees after three months. The court further found that the intention of section 198D was to empower arbitrators to determine disputes arising from the interpretation of the amended section 198 but not to actually hear the matter and interpret the section through arbitration.

The court was content that the commissioner's error of law fell within the framework of legitimate review, and it duly reviewed and set aside the arbitration award. The court advised that it would have been prudent to include the employees in the proceedings as the award was centred on their interest.[178]

NUMSA appealed to the Labour Appeal Court (LAC) to have the conclusion of the Labour Court set aside. The LAC noted that the appeal related to the interpretation of section 198A(3)(b) and the principles pertaining to the interpretation of the legislation. The court acknowledged the significance of the section 198A(1), giving true meaning to the term

[174] *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2015) 36 ILJ 2853 (LC)*, 2854.
[175] Basic Conditions of Employment Act 75 of 1997.
[176] Section 198A(4).
[177] *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2015) 36 ILJ 2853 (LC)*, 2854.
[178] Ibid,, 2855.

"temporary service". The court duly noted that the term related to service and not to an employee or the person on the receiving end of such service. Therefore, the court deduced that a placed worker who renders a service that is not temporary for the purpose of section 198A for a period exceeding three months, and who does not earn above the threshold of the BCEA[179] and does not fall within the temporary category in terms of section 198(1)(c), is not the employee of the TES. This was the view of the court that, even though the employee was placed by the TES, if the service performed was not temporary as provisioned by section 198A(1), the employee is regarded as the employee of the client and the client the employer of the employee for the purposes of the LRA in terms of section 198A(3)(b). Employees earning below the BCEA threshold will be deemed to be employees of the client and should therefore be treated on the whole not less favourably as employees employed permanently by the employer in the same or similar roles; employees earning above the BCEA threshold are excluded from this provision. Therefore, subject to section 198B, an employee in a situation such as this will be employed by the client for an indefinite period.[180]

The court held similar to the CCMA that the main purpose of the section 198 amendments is to protect vulnerable employees against continued exploitation as a result of fictitious temporary work. The court is of the view that the sole employer principle does not ban a TES but ensures that work is provided in a temporary capacity for temporary purposes only. Once the temporary period lapses, the employee is deemed to be the employee of the client. The TES will remain responsible for the statutory obligations while the employee is temporary until the deeming provision kicks in and the obligation shifts to the client. There is no provision in the law for the client to become a joint employer as there is no provision for the contract to transfer from the TES to the client as in terms of a section 197 transfer. Therefore, the court held that the purpose of the deeming provision is not to transfer the contract but to transfer the statutory employment relationship to the client after the expiry of three months. Keeping in mind that the legislation has at its heart the protection of vulnerable employees, the temporary nature of the relationship needed to be kept just that, temporary. For this reason it would make no sense to keep the TES as part of the employment relationship where no temporary rationale exists. As a result of this, the

[179] Section 6(3) of the Basic Conditions of Employment Act 75 of 1997.
[180] *National Union of Metalworkers of SA v Assign Services & others (2017) 38 ILJ 1978 (LAC)*, 1979-1980

court resolved that the plain language of section 198A(3)(b) of the LRA, read in context, obviously supports the sole employer interpretation and accordingly upheld the appeal.[181]

The message from the LAC is unmistakably that as soon as the deeming provision kicks in, the client becomes the sole employer, with the TES no longer featuring in any form in the employment relationship, especially not that of employer. The court based this on the purpose of the LRA amendments. As a result of this judgement, the existence of the TES hangs in the balance, although the court stated otherwise in terms of the first three months. That being said, the TES referred an appeal to the Constitutional Court.

Assign Services applied for leave to appeal the decision of the Labour Court, citing that the Labour Court did not take into consideration the context of the word "deem" within its legislative context. Assign Services held that this would have far-reaching consequences for the whole of South Africa as it felt the LAC decision just about banned the TES by excluding other necessary considerations. Assign Services argued that as the TES was still operational until up to three months, section 198(2)[182] was not amended with the insertion of section 198A.[183] Better protection is provided by joint and several liability in terms of sections 198(4) and 198(4A) than it could be by the sole employer interpretation. In respect of the contract of employment, Assign Services felt that this was left unregulated by the LRA and that the employee is transferred to the client without its consent and forced into an employment relationship without it having any input therein. Therefore, Assign Services maintained its stance on the dual employment relationship.[184]

NUMSA suggested that sections 198 and 198A created two separate deeming provisions that cannot operate at the same time.[185] It argued that these provisions do not intend to ban TES suppliers but rather to regulate them in terms of vulnerable employees. Where employees earning in excess of the BCEA threshold are placed by the TES, they can continue unrestricted. The deeming provision only has an impact on the contract between the TES and the placed employee but not on the commercial contract between the TES and the client. The TES may still in certain instances do administration in respect of the

[181] *National Union of Metalworkers of SA v Assign Services & others (2017) 38 ILJ 1978 (LAC)*, 1980-1981.
[182] 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.
[183] An employee not earning above the BCEA threshold, working for a period not exceeding three months in a substitute position and not otherwise deemed as temporary by legislative framework.
[184] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae) (2018) 39 ILJ 1911 (CC),* 1919.
[185] Ibid., 1919-1920.

placed employee, but not in the context of employer. NUMSA did not agree with the view of Assign Services on the TES and employee relationship. Once the statutory obligations move from the TES to the client, so do the terms and conditions. NUMSA was of the view that it can only be in favour of better terms and conditions for the placed employee.[186]

The Casual Workers Advice Office (CWAO) was allowed as a friend of the court to make informed submissions as a result of first-hand exposure to the experience of non-standard employees. CWAO stated some complications that may arise from the dual employer interpretation and that may prejudice employees placed by the TES. These complications included **no job security** due to frequent role changes and fluctuation in income; **no claims for pay disputes** in terms of demanding a better salary can be made by placed employees to the client; **no fair dismissal procedure**, as the placed employees always have the shadow of retrenchment hanging over them if the TES has no placement for them; **no easy access to dispute resolution** as the placed employees will have to take the TES directly to the LC; and the **vulnerability of placed employees** in terms of enforcing their rights contained in the LRA, as they are easily disposable.[187] CWAO supported the interpretation of NUMSA that the two deeming provisions of sections 198(2) and 198A(3)(b) cannot operate at the same time, and that section 198A(3)(b) in essence "reversed" the effect of section 198(2).[188]

The Constitutional Court (CC) therefore had to determine the correct interpretation of section 198A(3)(b)(i) of the Labour Relations Act (LRA).[189] The court took cognisance of the far-reaching implications of the deeming provision once the three months had lapsed as hundreds of thousands of employees are placed by TES suppliers on a daily basis. Therefore, the argument related to the interpretation of the application of said section may have a serious impact on the South African labour market and future role of TES suppliers. This section of the act states that an employee who has been procured by a temporary employment service (TES), and is placed with a client for longer than three months and earns below the Basic Conditions of Employment threshold, is deemed to be the employee of the client.[190] The matter before the court was whether the employee

[186] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae) (2018) 39 ILJ 1911 (CC),* 1919.
[187] Ibid.
[188] Ibid., 1920.
[189] Labour Relations Act 66 of 1995.
[190] Section 198 A(3)(b) of the Labour Relations Act.

continued in a dual employment relationship, having both the TES and the client as an employer, or continued with one employer being the client.[191]

The purpose of the LRA is set out in section 1 of the Act.[192] For this reason the provisions of the LRA must always be read in context to fair labour practices, section 198A in particular. The provisions of the LRA must be clear for employers and employees to engage in meaningful labour relations. However, on face value, section 198A(3)(b) lacks this clarity. Section 198(2) is clear that once an employee has been procured and has been placed by a TES and renders service to a client, it is the employee of the TES and the TES the employer of the employee. There is no reference to contracts, with this relationship manifesting automatically.[193]

Section 198A(3)(b) states that the employee not performing a temporary service in respect of section 198A(1) "is deemed" to be the employee of the client for the purpose LRA. Such a deemed employee will be regarded as working for an undefined period and enjoy the same rights and obligations as a permanent in terms of the LRA.

Section 198(2) states that where a placed employee performs a temporary service, the employee "is" the employee of the TES. The court held that none of the statements is lesser than the other although both are in fact "deeming provisions". With varying interpretations of section 198A(3)(b), the court must find its actual meaning read in context and in the light of the constitutional purpose.[194] This court has reiterated that where a statute is being reasonably read in a manner that is not opposing the Constitution, that is the interpretation that is specified.[195]

The court held that there is a clear distinction between those who are performing a "temporary" service and those who are not performing a temporary service. Where employees are not performing a temporary service, they are deemed to be the employees

[191] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae) (2018) 39 ILJ 1911 (CC),* 1920.
[192] The purpose of this Act is to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objects of this Act, which are — *(a)* to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;*(b)* to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation; *(c)* to provide a framework within which employees and their trade unions, employers and employers' organisations can — (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and *(d)* to promote —(i) orderly collective bargaining; … (iv) the effective resolution of labour disputes.
[193] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae) (2018) 39 ILJ 1911 (CC),* 1922.
[194] Ibid., 1923.
[195] Ibid., 1936.

of the client. Section 198A(3)(a)[196] refers to employees deemed to be the employees of the TES where they perform temporary services for less than three months for reasons set out in section 198(2). What follows directly from this section is section 198A(3)(b), separated by an "or", which implies that it is either section 198A(3)(a) taking effect or section 198A(3)(b) that deems the employee temporary or not. The determination of who will be deemed the employer is based on this classification. Those employees whose placements cannot be justified as temporary will be deemed to be the employees of the client, employed on an indefinite basis. Employees earning below the threshold that triggers the deeming provision should be treated not less favourably than permanent employees, unless such different treatment can be justified.[197]

The court viewed Assign Services' interpretation as absurd, as the TES was of the view that the placed employee was the employee of the TES under section 213.[198] As stated by CWAO, being part of the TES records and being paid by the TES does not make you an employee.[199] The court held that the TES employee did not fit the description of an employee as per section 213; if it did, there would have been no reason for the legislator to deem an employment relationship within the context of section 198(2). The court argued that the dual and several liabilities are only in force when the TES and the client share the relationship during the first three months. After the deeming provision kicks in, the client can be directly sued in the CCMA or Labour Court.[200] As long as the commercial contract exists between the TES and the client, the employee may still claim against the TES. CWAO was of the view that section 198(4A) provides protection to placed employees that may have instituted proceedings against the wrong party.[201] For this reason, an order or award against the one may be enforced on the other.

Through the addition of sections 198A and D, the legislator clarified the distinction of what would be termed as temporary. The intention was clear that this distinction determined how the classified employees should be treated and their rights protected. The rationale for the section 198A amendment is clear; it acknowledges the business need for flexibility

[196] performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or…
[197] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae) (2018) 39 ILJ 1911 (CC),* 1924.
[198] '*(a)* any person, excluding an independent contractor, who works for another person … and who receives, or is entitled to receive, any remuneration; and *(b)* any other person who in any manner assists in carrying on or conducting the business of an employer'.
[199] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae) (2018) 39 ILJ 1911 (CC),* 1925.
[200] Ibid., 1926-1927.
[201] Ibid., 1926.

while clarifying the gap in accountability between the TES and the client towards the employee.[202]

The court found it difficult to consent to Assign Services' argument with regard to the sole employee principle which forces the employee into a new relationship. In many instances, the TES only operates as a payroll facility and has very little to do with the function the employee performs at the behest of the client. There is no change in the working environment of these employees as they still perform work at the same workplace for the same client in the same role. There is no violation of their rights or any prejudice against such employees.[203]

With regard to greater protection afforded to placed employees, the court held that one of the greatest challenges to these employees is the ability to apply their rights contained in the LRA. CWAO referred to the many reasons hindering placed workers to exercise this right, including which set of terms and conditions to adhere to.[204]

In a majority decision,[205] the CC stated that the language used by the legislature in section 198A(3)*(b)* of the LRA is plain and, when used in context, supports the sole employer interpretation. This interpretation is in line with the purpose of the latest amendment in terms of non-standard employees, the primary objective of the LRA being protection of job security and the right to fair labour practices.[206]

[202] *Assign Services (Pty) Ltd v National Union of Metalworkers of SA & others (Casual Workers Advice Office as Amicus Curiae) (2018) 39 ILJ 1911 (CC),* 1927.
[203] Ibid., 1929.
[204] Ibid., 1930.
[205] Ibid. para 86-108, A minority judgement holds the view the dual employer interpretation is the only one that could be inferred. As stated it provides greater protection in terms of mutually and several liability to the employee; unilaterally changing the employee's terms and conditions to a new employer does not makes sense and the employee being exposed to one employer's business being liquidated.
[206] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others [2018] ZACC 22*, para 84.

CHAPTER 4

4.1 CONCLUSION

Historically, legislators had focused on balancing the imbalance of power in the employment relationship – hence the slow turn of events of focusing on how and to what extent the working environment has changed.[207] Benjamin stated that not only is it important for the labour relationship to be regulated, but that it is always based on context. Even if the purpose of legislation is agreed upon, it is interpreted in terms of the background circumstances as well as the monitoring of compliance.[208]

In Chapter 1, I have alluded to the fact that the interpretation of the labour relationship is always contextualised against the "normal" or "standard" employment relationship. Reference has always been made to the employment contract that exists between employer and employee, and that provides the framework for the relationship. Should no contract exist, the nature of the relationship comes into question. Therefore, the absence of such a contract creates the perception that no or limited accountability exists for a person making use of another's services directly or indirectly. Thus, labour brokers were born as intermediaries for the provision of all types of flexible, non-standard employment solutions, where the client assumed no responsibility for such employees within the context of employment law. In fact, the LRA 28 of 1956 supported this practice.

A few major concerns have been identified that threaten the job security of job seekers and those employed in non-standard employment. With the existence of temporary employment services, job seekers would work for a pittance on any varying form of contract in order to just have some sort of income, compared to the salaries and benefits provided to standard and permanent employees. However, these non-standard forms of employment did not just exist within TES placements as fixed-term and part-time employment may also form part of an employer's own hybrid employment model. Therefore, when reading section 198A-D of the LRA, it should be read in reference to all non-standard forms of employment irrespective of the supplier.

Apart from the fixed-term and part-time employees mentioned in the amendments, other forms of externalisation also exist. Externalisation cannot be exactly defined, but it

[207] Le Roux and Rycroft, "Labour law beyond employment," 21.
[208] Ibid., 26.

basically comprises of delivering services and goods in terms of a commercial contract that involves the provision of services or goods in terms of a commercial contract instead of an employment relationship. This effectively distances the user of the services from being associated in an employment context with the provider without the accountability linked to such an employment relationship.[209] In broad terms, these externalised arrangements manifest in two ways: firstly, an intermediary provides services or goods via a commercial contract to the core business, employing the employees himself and running his business away from that of the core business, and, secondly, camouflaging the relationship as that of an independent service provider and client by means of a commercial contract. An example of such an intermediary is Homework, where the work is performed at the person's home. There is usually some form of economic dependence on the provider of work in order for this home-based business to be sustained. Manufacturers who have a contract with retailers to deliver clothing would give the work to other smaller home-based manufacturers to produce the clothing. In some instances, these homeworkers work long hours as their income depend on the amount they produce; they generally work hand in hand with the staff they employ to assist.[210]

Operating as independent contractors is another form of externalisation. Section 213 of the LRA specifically excludes independent contractors from the description of employee – with a truly independent contractor being someone who has a specific business that is not dependent on one client only to make ends meet. In Chapter 2 above, reference is made to section 213 of the LRA where an employee is defined as one who renders a service and is remunerated by another. To further clarify this, section 200A assists in identifying the employee through a dominant impression test. It thus would seem that in the case of *Gerber v Denel (Pty) Ltd,* the court would consider other evidence surrounding the relationship and not just what the parties had portrayed. Even in the absence of an employment contract, as was the case with some of the employees of Piet Wes and Waterkloof, the court found that, based on substance, they were employees on an indefinite basis as the relationship implied it to be. Thus, it seems that there is an avenue for staff of independent contractors who start off that way for some or other reason, to contest their relationship. However, these employees must ensure that their hands are clean when they do so.

[209] Le Roux, "The World of Work", 17.
[210] Ibid., 18.

According to Benjamin, the last decade has seen a noteworthy expansion in the number of people who may be defined as “employees” by legislation. This came about as a result of the legislative incorporation of the presumption of employment. This was in response to enterprises that drive workers out of the scope of labour regulation by using externalised non-standard work. Benjamin is of the view that this reaction has been particularly effective in the use of self-employment to disguise an employment relationship. As a result of this ruse being highlighted, employers have shifted their tactics resulting in a growth of triangular employment and fixed-term contracts.[211] This diversion was short lived with the enactment of the LRA amendments[212] in which section 198B highlights the rights and duties in terms of fixed-term contracts.

In Chapter 2, under the heading *The Labour Relations Act* (section 2.3), it was mentioned that in the 2002 amendments, the legislator failed to address the exploitative labour practices created by the flexible arrangements offered by TES suppliers. However, to what extent has this oversight been corrected to date? The “temporary” in TES has finally been defined in the 2014 amendments. Any employee (earning below the BCEA threshold) supplied by a TES or not working at the client for a period longer than three months, which does not comply with the fixed-term rationale in section 198B, is deemed to be the employee of the client. This interpretation has been finally put to bed in the majority CC judgement of NUMSA v Assign Services. Once deemed, these employees will have to be incorporated in the fold of the client business and be treated on the whole not less favourably than the permanent employees in the same or similar role. Where a project or assignment cannot be justified as fixed-term based on a logical rationale, that role will be deemed as permanent. The deeming does not depend on the person appointed in the role. Instead, justification is vested in the commercial sense or duration of a project or assignment, as in the Piet Wes and Waterkloof case. After the 2014 amendments, an automatic termination clause will not be accepted as justifiable as in the Enforce case, where no regard was given to tenure or alternatives. The force behind the amendments was based on job security, and for all intents and purposes all avenues to retain staff will be taken, and if not, they will be compensated in terms of the BCEA should their tenure exceed 24 months. The non-standard employment terminations have also received attention, and where justification is absent, it is deemed as a dismissal. When looking at

[211] Le Roux and Rycroft, “Labour law beyond employment,” 31.
[212] Labour Relations Amendment Act 6 of 2014.

the amendments much emphasis is still placed on who is an employee before employment rights can be inferred.

In 2012, Benjamin stated in an article, *"The definition of an employee has therefore served as the gatekeeper between the 'formal' and the 'informalised' within formal sector employment".*[213] It is still very much the same after the 2014 amendments. The deeming provision triggers "employee" status, which then turns the lever to rights and obligations within the employment relationship. It still plays no role in addressing exploitative practices within the informal sector, a sector that is populated mostly by vulnerable, unskilled workers.

In some way, one can argue that the deeming provision can be applied to any of these externalised relationships. Once the dominant impression has been obtained, and the employer is unable to rebut the presumption, the employee may be deemed as an employee of the client. Once deemed, the Minister in terms of section 55 of the BCEA can extend sectoral determinations in terms of subsection 8, or prohibit or extend such determination in terms of subsection 4(g). This is not that easy in an unregulated informal sector.

With the extension of the National Minimum Wage Act to employees who may not be part of a certain sector or industry, protection may be found under these provisions in terms of minimum standards of employment and wages. An example of such a determination is the inclusion of independent contractors working as domestic workers in the sectoral determination 7 for Domestic Workers. Needless to say, enforcing their employment rights is a cumbersome and expensive exercise already for employees in the formal sector. This is even more challenging for those in the informal sector who may not have access to resources. Added to this, as mentioned in Chapter 2, is the challenge to monitor and regulate these provisions in the informal sector.

For now, we are required to devise social and economic structures that ensure basic security and employment while remaining agile to rapidly changing conditions in a highly competitive global market.[214]

[213] Le Roux and Rycroft, "Labour law beyond employment," 31.
[214] Clarence Tshoose, and Benjamin Tsweledi, "A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa." *Law, Democracy & Development*, 18 (2014): 346.

This thesis set out to explore how we have adapted post the enactment of the amendments. My answer would be that although the recent amendments address the dilemma of a large portion of society that are being exploited by way of low-paying jobs and the absence of benefits, we may have just scraped the surface of addressing the issues that are glaringly obvious. Much is still required in terms of monitoring and enforcing these provisions.

BIBLIOGRAPHY

Jurisprudence

AMCU and Others v Piet Wes Civils CC and Another (J2834/16, J2845/16) [2017] ZALCJHB 7 (13 January 2017)

Assign Services (Pty) Ltd v CCMA and Others (JR1230/15) [2015] ZALCJHB 298 (8 September 2015)

Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd & Another (2015) 36 ILJ 2408 (CCMA**)**

Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others (CCT194/17) [2018] ZACC 22; [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC) (26 July 2018)

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

Enforce Security Group v Mwelase and Others (DA24/15) [2017] ZALAC

Gerber v Denel (Pty) Ltd (J2175/98) [2002] ZALC 131 (15 March)

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

NUMSA v Assign Services and Others (JA96/15) [2017] ZALAC 44; (2017) 38 ILJ 1978 (LAC); [2017] 10 BLLR 1008 (LAC) (10 July 2017)

Piet Wes Civils CC and Another v AMCU and Others [2018] 12 BLLR 1164 (LAC); (2019) 40 ILJ 130 (LAC)

Piet Wes Civils CC and Another v Association of Mineworkers and Construction (AMCU) and Others [2018] ZALAC 18 (10 March 2018)

Rumbles *v* Kwabat Marketing (D1055/2001) [2003] ZALC 57 (21 May 2003)

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

South African National Defence Union v Minister of Defence 1999 4 SA 469 (CC)

Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others (C449/17) [2018] ZALCCT

Quick guide to new LRA sections 198A, B, C and D, v12

Statutes

Constitution of the Republic of South Africa, No. 108 of 1996

Labour Relations Act, No. 28 of 1956

Labour Relations Act, No. 66 of 1995

Labour Relations Act, No. 127 of 1998

Labour Relations Act, No. 12 of 2002

Labour Relations Amendment Act, No. 6 of 2014

Basic Conditions of Employment Act, No. 75 of 1997

Basic Conditions of Employment Act, No. 11 of 2002

Basic Conditions of Employment Act, No. 20 of 2013

National Minimum Wage Act, No. 9 of 2018

Journals and articles

Benjamin, Paul. “An Accident of History: Who is (and Who Should Be) an Employee under South African Labour Law.” *Industrial Law Journal* 25 (2004): 787-804.

Bosch, Craig. “The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?” *Industrial Law Journal* 34 (2013): 1631-1644.

Cliffe Dekker Hofmeyr. “What does ‘on the whole not less favourable’ mean?” *Employment Alert,* 20 October, 2014.

Constitutional Law of South Africa. Commentary, Part II: The Bill of Rights, Substantive Provisions, Labour Relations, OS 07-06.

Fourie, E. S. “Non-standard workers: The South African context, International Law and regulation by European Union.” *Potchefstroom Electronic Law Journal* 11, no. 4 (2008): 110-152.

Godfrey, Shane. “The Basic Conditions of Employment Act Amendments: Enabling Redistribution?” *Industrial Law Journal* 35 (2014): 2587-2606.

Godfrey, S., Du Toit, D., and Jacobs, M. “The New Labour Bills: An Overview and Analysis.” *Industrial Law Journal* 39 (2018): 2161-2189.

Godfrey, S and Jacobs, M. “The national minimum wage: How best to align it with the existing labour regulatory framework.” *Industrial Law Journal* 39 (2018).

Le Roux, R. “*The World of Work: Forms of Engagement in South Africa*.” Monograph Series 02/2009. Institute of Development and Labour Law, University of Cape Town, 2009.

Lee’s Compliance, Labour compliance series as per LRAA 2014. Chapter IX of Act 66 of 1995.

Le Roux, R., and Rycroft, A. “Civil Society and International Criminal Justice in Africa: Challenges and Opportunities.” *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*” (first published as Acta Juridica 2012 no. 1 (2012): VII-VIII).

Le Roux, R and Rycroft, A. “Labour law beyond employment.” *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges*” (first published as Acta Juridica 2012 no. 1 (2012)).

Statistics South Africa (SSA). “Quarterly Labour Force Survey.” Quarter 2 (2019). http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2019.pdf

Theron, Jan. “Employment is Not What it Used to Be.” *Industrial Law Journal* 12 (2003): 1247-1282.

Theron, Jan. “*Non-standard employment and labour legislation: The outline of a strategy*.” Monograph 1/2014. Institute of Development and Labour Law, University of Cape Town, 2014.

Theron, J., Godfrey, S., and Visser, M. "*Globalization, the impact of trade, liberalization and labour law: The case of South Africa*." International Institute for Labour Studies, Discussion Paper Series, No. 178 (2007). ISBN 978-92- 9014-834-0.

Tshoose, Clarence, and Tsweledi, Benjamin. "A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa." *Law, Democracy & Development*, 18 (2014). http://dx.doi.org/10.4314/ldd.v18i1.17

Van Eck, S, and Kujinga, T. "Large-scale operation requirements dismissals: How effective are the remedies? A discussion of Steenkamp & Others v Edcon Ltd." *Industrial Law Journal* 37 (2018): 76-88.

Abbreviations

AJ	Acting Justice
AJA	Acting Justice of Appeal
AMCU	Association of Mineworkers and Construction Union
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
CC	Constitutional Court
CWAO	Casual Workers Advice Office
DJP	Depute Judge President
ECC	Employment Conditions Commission
J	Judge
LAC	Labour Appeal Court
LRA	Labour Relations Act
LC	Labour Court
par	paragraph(s)
p	page
ch	chapter
MEIBC	Metal and Engineering Industries Bargaining Council
NMW	National minimum wage
NMWA	National Minimum Wage Act
NMWC	National Minimum Wage Commission
NUMSA	National Union of Metalworkers of South Africa
NUPSAW	National Union of Public Service and Allied Workers
SD	Sectoral Determination
TES	Temporary Employment Service