Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?

By

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I hereby declare that I have read and understood the regulations governing the submission of LLM in Labour Law dissertations, including those relating to the length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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DECLARATION

I, Zola Mcaciso, hereby declare that the work on which this dissertation is based, is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

This paper is on the impact of the Labour Relations Amendment Act 6 of 2014 (**LRAA**)[1] on the Temporary Employment Services (**TES**) in South Africa. The TES practice involves a triangular relationship where the TES places workers/employees with a client to provide labour for the benefit of the client. Over the years, there has been an outcry from organised labour for the ban of the TES practice on the basis that it encouraged the exploitation of workers and undermined job security. Other issues associated with the practice were low wages and inferior conditions of service of the placed workers compared to employees employed by the client doing same or similar work.

Initially, the TES practice was regulated in a limited way by the Labour Relations Act of 1956[2] as well as the Labour Relations Act 66 of 1995 (**LRA**).[3] The LRA initially only regulated the TES practice in so far as it recognised that the TES is the employer of placed workers and it created provisions for joint and several liability for the client and the TES under certain limited circumstances.[4] Despite these attempts to regulate the practice, organised labour felt it was still not good enough as the same problems continued to persist, as a result they continued to challenge the constitutionality of this practice and called for it to be completely banned.[5] In response, the legislature introduced the Labour Relations Amendment Act No 6 of 2014 (**LRAA)** in an effort to close the loopholes identified. Section 198A(3)(*b*) (the deeming provision) introduced by the LRAA stipulates that after a period of three months of placement of workers by a TES with a client, the client is deemed the employer of those workers.

It is the interpretation of this deeming provision that has sparked a legal debate in South Africa, resulting in two views on how the deeming provision should be

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[1] Hereinafter referred to as the LRAA.
[2] Hereinafter referred to as the LRA of 1956.
[3] Hereinafter referred to as the LRA.
[4] Section 198(4) of the LRA.
[5] COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCAWU; AND SATAWU "Submissions on Labour Brokering to the Parliament Portfolio Committee 26 August 2009" available at https://www.politicsweb.co.za/documents/labour-broking-a-form-of-slavery--cosatu-et-al.(last accessed 25 August 2019).

interpreted. The first view is the ‘dual employment’ interpretation which suggests that after the three months placement has lapsed, both the TES and the client become employers of the placed workers. The second view is the ‘sole employment’ interpretation and it proposes that after the three months has lapsed, the client becomes the sole employer of the placed employees.

This legal debate was eventually settled by the Constitutional Court (**CC**) in 2018 in the A*ssign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 (**Assign Services**). The majority view in the CC ruled that the sole employment interpretation is the correct interpretation to be ascribed to the deeming provision, whilst the minority view favoured the dual employment interpretation.

This dissertation will critically analyse the legal jurisprudence involved in this debate as well as the implications of the CC decision on the operations of the TES practice in South Africa.

ABREVIATIONS

BCEA	-	Basic Conditions of Employment Act.
CCMA	-	Commission for Conciliation, Mediation and Arbitration.
CC	-	Constitutional Court.
COSATU	-	Confederation of South African Trade Unions.
CWAO	-	Casual Workers Advice Office.
ILJ	-	Industrial Law Journal
ILO	-	International Labour Organisation
LRA	-	Labour Relations Act.
LC	-	Labour Court.
LRAA	-	Labour Relations Amendments Act.
LAC	-	Labour Appeal Court.
NACTU	-	National Council of Trade Unions.
NEDLAC	-	National Economic Development Labour Council.
SLA	-	Service Level Agreement.
SLAJ	-	South African Law Journal.
TES	-	Temporary Employment Services.

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CHAPTER 1 - INTRODUCTION

1.1 *Introduction*

Labour brokering, also known as temporary employment services is a practice which involves three parties in an employment arrangement (the words Labour Broker and TES will be used interchangeably henceforth). In this practice the TES recruits and places workers with a company (client) to perform labour in favour of the client. [6] In exchange for providing these workers, the TES receives a fee from the client.[7] Accordingly, this practice creates a triangular relationship.

In this triangular relationship, a relationship between the TES and its client is formed, and this relationship is generally regulated by a service level agreement (**SLA**).[8] Another relationship is between the TES and the placed workers. A third relationship exists between the placed workers and the client. In this triangular arrangement, our law has for several years only recognised the relationship between the TES and the placed workers, as well as the relationship between the TES and its client. The third relationship between the client and the placed workers was not recognised, nor was it regulated, even though the existence of such a relationship was clear in the parties' interactions with each other.[9]

Given the lack of a recognition in the relationship between the client and the placed workers, this created a loophole in the legal system for clients and TESs to

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[6] Benjamin 2016 *ILJ* 30.
[7] Section 198(1) of the LRA.
[8] Theron 2005 *ILJ* 628; *Regulatory Impact Assessment of Selected Provisions of the Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010: A Report prepared for the Department of Labour and the Presidency* 33.
[9] Tshoose and Tsweledi 2014 *Law, Democracy and Development* 343.

treat the placed workers unfairly and to subject them to unfair working conditions.[10] For example, workers placed with the client would receive wages that were significantly less than those received by employees of the client doing same or similar work.

The challenges associated with this practice as demonstrated above caused resistance from employee organisations, particularly from the Confederation of South African Trade Unions (**COSATU**) and the National Council of Trade Unions (**NACTU**) who called for the total and complete ban of this practice in South African law.[11] COSATU highlighted that this practice is akin to the system of labour under the period of slavery as it perpetuates the exploitation of the vulnerable work force, but on a broader scale, the exploitation of black people in South Africa as the vulnerable and powerless class.[12]

In response to this call, the legislature introduced the LRAA which contained mechanisms intended to provide adequate protection to the vulnerable employees involved in the TES practice.[13] The most significant mechanism introduced by the LRAA was under section 198A(3)*(b).* This provision is what is now known as the deeming provision.[14]

In terms of the LRAA, temporary service is defined *inter alia* as employment that is less than three months. Section 198A(3)(*b*) reads that for purposes of the LRA, an employee not performing such temporary services for the client is - (i) deemed to

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[10] Van Eck BPS "*Temporary employment services (labour brokers) in South Africa and Namibia*." (2010) 13(2) *PER* 107.
[11]Labour Brokering: Public hearing continued. available at https://pmg.org.za/committee-meeting/10707/. (Last accessed 03 October 2019)
[12] http://www.cosatu.org.za/show.php?ID=10371, (Last accessed 28 November 2018).
[13] Labour Relations Amendment Act 6 of 2014.
[14] Section 198A (3) (a)-(b) of the LRA.

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.

In a nutshell, the deeming provision therefore provides that workers placed with a client under the TES practice will be deemed to be the employees of the client if placed with a client for a period exceeding three months. It is the interpretation of this deeming provision that has sparked one of the most interesting legal debates in South Africa. The question at the heart of this legal debate is the following –

> ' *if the client becomes the employer of the placed workers after the three months placement period has lapsed, does this mean the TES falls away from the triangular arrangement or do both the client and the TES become dual employers of the placed workers post the deeming*?

The first case to attempt to give meaning to the deeming provision is *Assign Services.*[15] This case was first referred to the Commission for Conciliation, Mediation and Arbitration (**CCMA**) by the National Union of Metal Workers of South Africa (**NUMSA**) on behalf of its members who were procured by a TES to a client for purposes of providing labour to that client.[16] After three months of their placement, NUMSA contended that, because of the deeming provision in the LRAA, the placed workers had now become the employees of the client and the client had become their employer.

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[15] *Assign Services (Pty) Ltd v Krost Shelving and Racking (Pty) Ltd and National Union of Metal Workers of South Africa* (*NUMSA)* (2015) ECEL 1652-15 (Unreported).
[16] Ibid.

The TES disputed this interpretation and submitted that the correct interpretation to be ascribed to the deeming provision is that, after the three months period the client and the TES both become the employers of the placed workers and that a dual employment relationship is formed. At the CCMA the commissioner, Abdool Carrim Osman, agreed with NUMSA's interpretation and concluded that after the deeming provision is triggered, the client became the sole employer of the placed workers. This interpretation is often referred to as the 'sole employment' interpretation.

The TES challenged this decision at the Labour Court (**LC**) by way of a review application maintaining its view that the proper interpretation to be ascribed to the deeming provision is that of dual employment, with both the TES and the client becoming joint employers.[17] The LC found in favour of the TES' interpretation and concluded that the deeming provision created dual employment, with both the TES and the client becoming employers of the workers. This interpretation is often referred to as the 'dual employment' interpretation.[18]

Aggrieved by this outcome, NUMSA took the matter on appeal to the Labour Appeal Court (**LAC**). The LAC found in favour of NUMSA and confirmed the interpretation ascribed by the CCMA to the deeming provision.[19] The labour broker took this matter to the CC. The CC as the court of final instance concluded that the sole employment interpretation is what is intended by the deeming provision and consequently confirmed the initial decision of the CCMA as well as the decision of

[17] *Assign Services (Pty) Ltd v CCMA and others* [2015] ZALCJHB 283.
[18] Ibid.
[19] *NUMSA v Assign Services and Others* (JA96/15) [2017] ZALAC 44.

the LAC.[20] Accordingly, the law as it currently stands favours the sole employment interpretation.

Having regard to the above, this dissertation will provide the historic overview of the TES practice in South Africa and demonstrate the legislature's attempts to regulate the practice over the years. This dissertation will critically examine how our courts have interpreted the deeming provision as well as highlight the dangers which will confront the TES practice as a consequence of the CC's interpretation of the deeming provision.

1.2 ***Research Question***

Considering the above, this dissertation will set out the history of the labour brokering practice in South Africa. It will explore and demonstrate the historic shortcomings of this practice which motivated the need for its regulation. This dissertation will further explore the shortcomings that persisted irrespective of the legislature's attempts to regulate the practice under the LRA of 1956 as well as the LRA and how these shortcomings has been subsequently addressed through the LRAA.

Ultimately, this dissertation seeks to address the following questions:

> *What are the implications of the Constitution Court's judgment in Assigned Services for the labour brokering practice in South Africa? Did this judgement unintendedly put an end to the labour brokering practice in South Africa, and ultimately fulfilled the wishes of COSATU*?

[20] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22.

1.3 ***Research Methodology***

The research methodology used in this dissertation is desktop research. A lot of reference will be made to the LRA of 1956, the LRA and the LRAA as well as its explanatory memorandum.[21] A critical analysis will be conducted to explore whether these statutes properly regulated the labour brokering practice in South Africa and whether such regulations provide adequate protection to the employees involved in this practice.

In doing this analysis, I will refer to relevant case law that dealt with the interpretation and application of the LRA legislation in labour brokering practice. These cases will serve to demonstrate that the protection previously afforded to employees involved in this practice were not adequate and left loopholes for TESs and their clients to exploit the workers. To back my arguments up, I will be relying on various journal articles and research papers which addresses the issues associated with the labour brokering practice in South Africa.

In concluding this dissertation, I will place reliance on the latest jurisprudence which has brought some clarity on the principles regulating this practice in South Africa, particularly on the debate of who becomes the employer in labour brokering arrangements once the deeming provision is triggered. I will critically analyse the Assign Services jurisprudence and opine whether the decision arrived at by the CC was the most appropriate decision.[22]

1.4 ***Chapter Outline***

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[21] LRA.
[22] *Assign Services (Pty) Ltd v NUMSA* supra (n20).

This dissertation has five chapters –

Chapter 1

The first chapter has set out a brief overview of the topic, particularly the issues sought to be addressed. This chapter has also set out the applicable research question as well as the research methodology that will be used in the completion of this dissertation.

Chapter 2

This chapter will set out the history of this practice in South Africa prior to the introduction of the LRA of 1956 and thereafter. This chapter will detail the shortcomings of this practice prior to its most recent regulation and demonstrate the flaws associated with the LRA's attempts to regulate this practice prior to the introduction of the LRAA.

I will also, with reference to recent case law, draw a distinction between outsourcing service providers as well as the labour brokering practice. The two concepts are often misunderstood to mean the same thing though they are fundamentally different in practice. I will draw the distinction between the two concepts and clarify that the deeming provisions under the LRAA as well as the CC's decision in the *Assigned Services* judgment does not affect the outsourcing practice but only seeks to regulate the labour brokering practice in South Africa.

This chapter will also briefly discuss the mechanisms introduced by the LRAA in its efforts to provide adequate protection to the vulnerable workers involved in this

practice as well as the issue pertaining to the debate as to the proper interpretation to be ascribed to the deeming provision under the LRAA.

Chapter 3

When the LRAA was introduced in 2015, a debate ensued as to how certain provisions should be interpreted, particularly the deeming provision under section 189A (3). The first and only dispute that assisted us in dealing with this debate was the dispute in Assigned Services.[23] This dispute has since been settled at the CC. This chapter will be analysing the different interpretations ascribed to the deeming provision under the LRAA by the CCMA as well as the LC in the *Assigned Services* judgment. This chapter will basically be a critical analysis of the decisions reached by these two respective judicial forums.

The CCMA and the LC both ascribed different interpretations to the deeming provision, giving birth to what has become well known as the ‘sole employment’ and the ‘dual employment’ interpretations. In this chapter I will be discussing these two concepts in detail and highlighting the challenges and advantages associated with each.

Chapter 4

Chapter 4 will continue in the same fashion as chapter 3 and will compare and contrast the LAC's and the CC's interpretation of the deeming provision. This chapter will also highlight some of the controversial issues flowing from the CC's interpretation of the deeming provision which may have a negative impact on the future of the TES practice in South Africa.

[23] *Assign Services v Krost* supra (n15).

I will also be providing my own opinion on the findings of the CC, particularly the interpretation of the deeming provision in the LRAA. I will argue whether this interpretation affords better and adequate protection to the employees whilst also sustaining the practice of labour brokering in South Africa.

Chapter 5

This will be the last chapter of this dissertation and will highlight what the current state of law is in respect of the regulation of the operations of labour brokering in South Africa.

This chapter will also highlight the practical implications of the position in our law in respect of the operations of TES and give a view of whether, considering the majority and minority views expressed by the CC in the *Assign Services* jurisprudence, this practice is currently sustainable and as attractive as it used to be to clients.

I will opine on the future of this practice in South Africa considering the CC's decision and its impact on the practice.

CHAPTER 2 - THE HISTORY OF THE TES PRACTICE IN SOUTH AFRICA AND ITS INSUFFICIENT REGULATION.

2.1 *The History of the TES Practice in South Africa*

The TES practice has been a part of the South African labour framework for many years dating as far back as the early 1920's, even though often without any form of legal regulation.[24] The TES practice involves the procuring of workers by one company, known as the labour broker, to another company in exchange for a fee.

The TES practice first received minimal regulation in South Africa in the 1950's under the LRA of 1956, and to some extent, continued to be regulated in terms of similar principles under the LRA.[25] Even though the LRA of 1956 touched on the issue of labour brokers, it did not provide proper and adequate regulation of the practice.[26] For example, the LRA of 1956 did not stipulate who the employer was in this triangular arrangement involving the agency, the placed workers as well as the client, it only made reference to labour brokers and their offices.[27]

The LRA of 1956's silence on who the employer was in the triangular arrangement gave rise to threat of job security to the placed workers involved in this practice who would often not know who their true employer was when they wanted to enforce their rights as employees.[28] The LRA was also silent on the regulation of other pertinent issues pertaining to terms and conditions of employment of the

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[24] Botes 2014 *SA Merc LJ* 110.
[25] LRA of 1956, see also LRA.
[26] Botes 2015 *SALJ* 101. Other atypical forms of work include part-time work, casual work, seasonal work, fixed term employment homework, subcontract work and franchising (see Mhone 1998 *ILJ* 207); Le Roux "*The World of Work: Forms of engagement in South Africa"* 14,18.
[27] Section 2(3) of the LRA of 1956.
[28] Botes A 'Answers to the questions? A critical analysis of the Amendments to the Labour Relations Act 66 of 1995 with regard to TESs' (2014) 26 SA *MERC LJ* 110

placed workers, such as; working hours, how issues of discipline would be regulated, who would bear liability for the placed workers for claims of unfair dismissal and/or unfair labour practices, and no provisions were made for how the placed workers could collectively bargain with either the agency or the client.[29] This silence on fundamental employment issues gave room for many companies to use these gaps in our law to subject workers engaged in labour brokering practices to unfair treatment, often leaving the placed workers confused as to who to bring a claim against in cases of unfair treatment.[30]

It was only when the LRA of 1956 was amended in the 1980's through the Labour Relations Amendment Act 2 of 1983[31] that the TES practice was granted legal recognition by means of a statutory definition. It was also for the first time through the LRAA of 1983 that the TES was recognised as an employer of the placed workers.[32]

The LRAA of 1983 defined labour brokers as agencies and in section 1(3) defined the labour broker practice as follows – "*an agency is any person, who for reward procures services of workers, to perform work for a client and for which services such persons are remunerated by the agent.*"[33] In the LRA and in defining labour brokering practice, the term '*agency*' was excluded and

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[29] Theron 2008 *ILJ* 1.
[30] Van Niekerk *et al Law @ Work* 69. See also Mills 2004 *ILJ* 1216. A case study was once carried out in the hotel industry, particularly Southern Suns, to illustrate the abuses and exploitation that the workers in the cleaning industry faced. It was reported that the status of these workers was indeterminate in that they were considered to be independent contractors when in actual fact they were temporary employees. Moreover, if a worker did not get through a specific number of rooms per day, that employee was compelled to work overtime, with no pay to meet a minimum salary. If the employees had grievances regarding either wages or conditions of employment, they were often referred from one authority figure to the other in their own time. As a result, these employees seldom managed to have their grievances resolved.
[31] Hereinafter referred to as the LRAA of 1983.
[32] Section 1(3)(a) of the LRAA of 1983.
[33] Section 1 of the LRAA of 1983.

substituted with the term *'Temporary Employment Services*'. Interestingly, the LRA retained a similar definition of labour brokering as its predecessor.[34] Section 198(1) of the LRA defines the TES practice as follows –

> '… *any person who, for reward, procures for or provides to a client other person (a) who render services to, or perform work for, the client; (b) and who are remunerated by the temporary employment service.'*

It is evident from the definition of the labour brokering practice that the LRA adopted a similar approach to the practice of labour brokering as its predecessor. Nothing much changed from the definition of the LRAA of 1983 as well as the definition under the LRA.

2.2 ***The triangular relationship***

An analysis of the LRA's definition of TES demonstrates that, a TES is a company that enters into an agreement, often referred to as a service level agreement (**SLA**), with another company which becomes the TES's client, with the understanding that the TES will provide the client with worker/s to perform work for the client at the client's premises.[35] In return the client will pay the TES a fee. The TES remunerates the workers placed with the client for their provision of labour to the client.[36] Evident from this practice is that a triangular relationship is created between the TES, the placed workers and the client.[37] The triangular relationship

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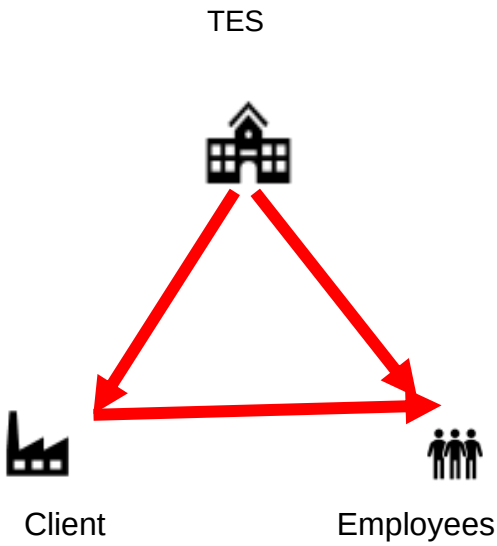
[34] Benjamin 2016 *ILJ* 30.
[35] E Gericke 'Temporary Employment Services: Closing a loophole in Section 198 of the Labour Relations Act 66 of 1995' 99.
[36] BPS Van Eck 'Temporary Employment Services (Labour Brokers) in South Africa and Namibia' (2010) *PER/PELJ* (13) 2 108.
[37] Theron 2005 *ILJ* 619, 620. Other forms of triangular relationships include franchising and homework. Franchising is when a franchisor licenses a franchisee to operate a business using the franchisor's trademark or brand, whereas the franchisee employs workers to assist the franchisor.

exists to split the functions and responsibilities of the TES and the client for a fee payable by the client to the TES.



The TES provides the workers to the client and the workers provide labour to the client, normally on the client's premises and in accordance with the client's instructions.[38] The functions and responsibilities of the TES are generally related to remuneration and human resource management of the placed workers and nothing more.[39]

The TES is rarely involved in the actual work provided by the placed workers to the client. The TES plays an intermediary role and assumes some of the ancillary

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Homework (or outwork), on the other hand, is brokered through an intermediary who has neither the capacity nor the intention to provide goods or services himself or herself; instead he or she contracts to acquire a workforce to perform the work. See also Van Eck BPS *"Temporary employment services (Labour Brokers) in South Africa and Namibia*" (2010) 13(2) *PER* 107 pg.108.

[38] Botes A. 'Answers to questions: A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers.' (2014) 26 *SAMERC LJ* 110 pg. 114.

[39] Craig Bosch 'The Proposed 2012 Amendments Relating to Non-Standard employment: What will the new regime be?' (2013) 34 *ILJ* 1631.

responsibilities such as discipline that would be typically handled by an employer however the TES has no influence on the working conditions of the placed workers as their labour is provided at the client's premises in accordance with the client's instructions and terms.[40] The functions and responsibilities of the client are related to day-to-day management, work allocation and performance evaluation of the placed workers.[41]

The client is also responsible for the working conditions of the placed workers since they are placed at the client's business premises.[42] The client usually has the power to discontinue the placed workers' services.[43] The TES practice is very similar and is often misconstrued to be the same as that of outsourcing/service providers. The conflation of the two concepts has often created a lot of confusion and misunderstanding in society considering the LRAA and the CC's judgment in *Assigned Services*.

2.3 ***The distinction between Outsourcing and TES practice***

The dissimilarities between TES and outsourcing in South Africa has left many confused as to the application of the deeming provisions and the constitutional court's judgment in *Assigned Services*.[44] The confusion is so because the words 'outsourcing' and 'labour brokering' are often used interchangeably even though

[40]E Gericke op cit (n35).
[41]Ibid.
[42] J Theron 'The shift to services and triangular employment: Implications for labour market reform' (2008) 29 *ILJ* 1-21
[43] E Gericke op cit (n35).
[44]Deloitte 'Labour Brokering v Outsourcing' available at - https://www2.deloitte.com/content/dam/Deloitte/za/Documents/process-and-operations/ZA_Labour%20broking%20and%20outsourcing%20-%20FP.pdf.(Last accessed October 2019).

they do not mean the same thing, nor have the same application and consequences in law.[45]

Many people have wondered whether the deeming provisions of the LRA are applicable to employees of service providers in outsourcing arrangements. Labour brokering and outsourcing are two different concepts. Service providers are companies/organisations that are procured by a client for purposes of rendering a service to their client. They operate as independent contractors who are contracted by a client to render a service.[46]

One of the leading authorities dealing with the distinction between independent contractors and labour brokers is the 2019 LC decision in *CHEP South Africa (Pty) Ltd v Shardlow N.O and others*.[47] In this case, Contracta-Force Corporate Solutions (Pty) Limited (**C-Force**) entered into an SLA with CHEP South Africa (Pty) Ltd (**CHEP**) in terms of which C-Force would render pallet conditioning services at the premises of CHEP in exchange for an agreed fee per pallet repaired. C-Force employed 201 employees for purposes of rendering these services to CHEP.[48]

In 2015 the 201 employees employed by C-Force referred a dispute to the CCMA in terms of which they sought to enforce rights under section 198A(3) and (5) of the LRA, .i.e. that after three months of rendering services to CHEP, they were deemed employees of CHEP and should not be treated less favourably than employees of CHEP doing the same or similar work as them.[49] In response to this

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[45] Ibid

[46] Ibid.

[47] *CHEP South Africa (Pty) Ltd v Shardlow N.O and others* [2019] JOL 40990 (LC).

[48] Ibid, para 1

[49] Ibid, para 2.

challenge, CHEP argued that its relationship with C-Force is not regulated by section 198A of the LRA as it is not that of TES and client, but that of independent contractor. In a pre-arbitration minute, the legal issue before the CCMA was crisply identified as follows - '*Whether C-Force is a TES as defined in the LRA, and whether C-Force for reward provided to CHEP, the services of the 21 employees*.'[50]

The employees on the other hand argued that C-Force is a TES as contemplated by section 198 of the LRA. In considering the issue, the CCMA concluded that the relationship between CHEP and C-Force is determined by the actual relationship between them as opposed to the contractual one. The CCMA concluded that factually, the 201 employees were employed by C-Force acting as a TES as described in section 198(1)(*a*) and (*b*), consequently CHEP was bound by the provisions of section 198A(3) and (5) of the LRA.[51]

Dissatisfied with the CCMA's decision, CHEP took the matter on review at the LC. The LC was required to interpret the definition of a TES as it appeared in the LRA in order to determine whether C-Force fell within the contemplation of section 198 of the LRA. In relation to the definition of TES under section 198(1) and (2) of the LRA, the LC had to determine the following - (a) whether C-Force provided CHEP with '*other services'*; (b) these persons '*performed work for CHEP'*; and (c) these persons were remunerated by C-Force.[52]

The LC held that the requirement of providing persons to '*perform work for'* a client means that these persons become part of the client's organisation to pursue the

[50] Ibid, para 4.
[51] Ibid, para 12.
[52] Ibid, para 22-24.

client's purpose or business. These persons will not be involved or associated in a common purpose with the TES in the conduct of the TES's business. For a person providing or procuring employees to be a TES, this element must be present. The persons procured should not contribute to the running of the TES's business, their contribution to the TES business is only as far as they are a commodity.[53] The LC concluded that C-Force cannot be regarded as a TES if it did not provide or procure the 201 employees for reward to CHEP. Having considered the terms of the SLA between CHEP and C-Force, it became apparent that C-Force was rewarded a fee for every pallet repaired and not for a fee for the labour provided by the 201 employees.

The court noted that in the triangular nature of the relationship between a TES, a client and placed workers, the TES normally provides human resources related services such as remunerating the placed workers, whereas the client conducts the day to day management of the placed employees and determine their working conditions. The TES merely plays an administrative function and is a third party that merely delivers the employees to the client.[54] The court found that these elements were not present in the relationship between CHEP, C Force and the 201 employees. There was no evidence that CHEP had any control over the 201 employees or that the employees were not contributing to the business of C-Force. It was also apparent that CHEP was not paying a fee to C-Force for the labour procured by the 201 employees, but a fee per item repaired by C-Force using the

[53] Ibid, para 30-31. See also *Assign Services v NUMSA*, supra (20) para 73.
[54] Ibid, para 37.

201 employees.[55] Accordingly, the LC reviewed and set aside the decision of the CCMA as incorrect and unreasonable.[56]

It appears from the *CHEP South Africa (Pty) Ltd v Shardlow N.O and others* decision that the point of departure of whether a person is a TES or an independent contractor lies in the definition of TES in the LRA as well as a consideration of the nature of the triangular relationship between the TES, client and placed workers.[57] For a person to be a TES, they must procure or provide persons to another in exchange for a fee for the labour of the persons procured. The persons so procured must be integrated in the client's organisation and not in that of the TES. They must work for the client and not the TES. The value they add to a TES's business should be that of a commodity as opposed to that of an employee rendering services to the business of the TES.[58] It appears from the CHEP decision that in the absence of these factors, a TES relationship is unlikely to exist and thus section 198 of the LRA will not find application.

Unlike TES, outsourcing service providers offer services that the client would most likely be unable to perform themselves or would not be able to perform effectively due to a lack of skills and/or equipment. As these functions require specific skill sets and equipment, those hired by outsourcing service providers cannot be easily replaced.[59] The service provider/outsourcing practice is largely popular in cleaning and security services. Most companies/organisations usually outsource these services because of the skill and equipment usually required for the proper rendering of these services. In outsourcing arrangements, the employees are

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[55] Ibid, para 40-43.
[56] Ibid, para 50-51.
[57] Ibid, para 22.
[58] See also Assign Services v NUMSA, supra (n20), para 73.
[59] Deloitte op cit. (n44).

contributing to the business of the independent contractor and are not merely commodities.

In this dissertation the focus is on the labour brokering practice and not the practice of outsourcing of services/independent contractors. The understanding of the distinction between the two concepts is thus fundamentally important for purposes of this dissertation.

2.4 *A Fictional Practical Example of the TES practice – Demonstrating TES Shortfalls*

As stipulated in the preceding paragraphs, the introduction of the TES practice created a very complex triangular relationship which brings a third party to the normal traditional employment relationship which only included an employer and an employee. It is evident from the preceding paragraphs that the complexities of the triangular nature of the relationship presented our legislature with difficulties in ensuring adequate regulation of the practice in South Africa, even in the LRA of the South African Constitutional dispensation.[60]

Below I demonstrate, by way of a practical fictional example and with reference to case law some of the shortcomings of the TES practice under the LRA prior to the introduction of the LRAA.

Example

Star Services (Pty) Ltd ("**Star Services**") enters into a service level agreement with MTN. In terms of the Agreement, Star Services will procure MTN with 20 call centre agents to assist MTN at its call centre in Claremont.[61] In return, MTN shall

[60] LRA.
[61] This is a hypothetical situation of the operation of the TES practice.

pay Star Services R200 000 a month for a period of five years. MTN already has 30 permanently employed call centre agents who each earn R10 000 per month plus commission. Star Services however remunerates the 20 placed call centre agents R5000 a month and they are not entitled to any commission. Three years into the Agreement, MTN advises Star Services that it is going through financial challenges and will only be needing 10 call centre agents for a fee of R100 000 a month. Star Services and MTN amend their agreement to reflect these changes. MTN advises Star Services of the 10 agents they would like to retain for the duration of the SLA. Star Services advises the other 10 agents that they will no longer be needed at the MTN call centre and Star Services will look to place them with one of their other clients who may need call centre agents. Seven months later, the 10 agents have not been placed by Star Services and have been unemployed since leaving MTN.

This fictional scenario in nutshell describes how the triangular relationship in the TES practice operates. Star Services is the TES, MTN is the client and the 20 call centre agents are the placed workers to provide labour to MTN as the client of the TES. Notably in this scenario, Star Services is responsible for remunerating these placed employees and is remunerating them at a significantly lower rate than the call centre agents employed by MTN doing the same work. The placed call centre agents are also not entitled to receive any commission for the labour provided. Furthermore, when MTN no longer wanted the other 10 call centre agents, it simply informed Star Services and they were removed. There was no protection afforded to them as far as job security with MTN or Star Services is concerned.[62]

[62] Harvey S '*Labour brokers and workers' rights: Can they co-exis?'* (2011) *SALJ* 100 p.110; see also *April v Workforce Group Holdings (Pty) ltd t/a The Workforce Group* 2005 *ILJ* 2224 (CCMA) para 11.

The above demonstrates some of the fundamental challenges that the introduction of the TES practice brought to the labour market in South Africa.[63] Even though it was regulated by the LRA prior to the introduction of the LRAA, the regulations did not provide adequate protection to the placed workers involved in this triangular relationship. At times, the workers would find themselves uncertain as to who their true employer is between the TES and its client. These workers would be subjected to exploitation for cheap labour, and received lower wages compared to the client's employees performing the same or similar work.[64] The placed workers were also excluded from joining trade unions and participating in collective bargaining with the client.[65] The right to participate in collective bargaining is a constitutional right afforded to everyone which these placed workers were deprived in the labour brokering practice.[66] These are some of the misnomers that led to the call for the LRA to be amended to afford adequate protection to these employees who were considered vulnerable and susceptible to exploitation.

In the above practical example, the 10 placed workers that were effectively dismissed by MTN cannot bring a claim against MTN because MTN is not their employer.[67] This principle was confirmed in the CCMA case of *April v Workforce*

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[63] *Nape v ITNCS* 2010 31 ILJ 2120 (LC) 74 Act 75 of 1997- In this case the client requested that the employee be removed from the client's premises after the TES employee had forwarded an offensive email to another employee using one of Nissans' (the client's) computer. The labour broker removed the employee from the client's premises and did not find alternative employment for the employee. The employee thereafter filed an application for unfair dismissal against the labour broker. The labour broker argued that it did not dismiss the employee and that it was only following its client's instructions. The court held that it was not up to the labour broker to argue that it was powerless and had to comply with the demands of the client. The court held that the labour broker had several options where the client demanded that the employee be removed without good reason.

[64] Benjamin P, et al "*Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill 2010, Basic Conditions of Employment Amendment Bill 2010, Employment Equity Amendment Bill 2010 and Employment Services Bill 2010. A Report prepared for the Department of Labour and the Presidency*" (2010) pg. 17-19.

[65] Botes A "The history of labour hire in Namibia: a Lesson to South Africa." (2013) 16(2) *PER* 506 pg.525.

[66] The right is provided for in s18 of the Constitution and s4 of the LRA.

[67] *Mandla v LAD Brokers (Pty) Ltd* 2000 BLLR 1047 (LC); see also *Vilane v SITA (Pty) Ltd* 2008 BALR 486 (CCMA).

Group Holdings (Pty) Ltd where it was held that a client of a TES cannot be held liable for any unfair conduct by the client towards the workers since it is (client) is not the employer of the placed workers but the TES is.[68] Therefore, an employee involved in the TES practice cannot bring a claim of unfair dismissal or of unfair labour practice against the client but can only bring such claims against the TES as the employer. This is so because the LRA stipulates that in labour brokering arrangements, the TES is the employer of the employees, nowhere does it refer to the client being an employer.[69]

The LRA only makes provisions for the TES and the client to be joint and severally liable under specified and limited circumstances, *i.e.* when there is a breach of a collective agreement or binding arbitration award regulating terms and conditions of employment etc.[70] There is no legal right provided to the placed workers to directly bring a claim against the client for breach of employment conditions, unfair labour practices or unfair dismissals.[71] Notably, the LRA did not make provisions for the client to be held liable for unfair labour practices perpetrated by the client to the placed workers. Even the provisions of joint and several liability provided a protection to the client in that, only when the TES is found in breach and an order or ruling is issued against it (TES) can it be enforced against the client. For some reason, the LRA elected not to impose joint liability to the client and the TES in cases of unfair labour practices and unfair dismissals.

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[68] *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 *ILJ* 2224 (CCMA). See also *National Union of Metalworkers of SA v SA Five Engineering (Pty) Ltd* 2007 *ILJ* 1290 (LC).
[69] Benjamin 2010 *ILJ* 850.
[70] See section 198(4) (a)-(c) of the LRA.
[71] *Pienaar v Tony Cooper & Associates* [1995] 16 ILJ 192 (IC); see also *Qwabe & others and Robertson's Foods & Another* (2007) 28 ILJ 1356 (CCMA).

From a practical consideration, it does not make sense for the client to bear no responsibility or liability whatsoever when it comes to these issues since the placed workers generally operated on the client's premises, under the supervision and direction of the client, worked according to the demands of the clients and often worked together with permanent employees of the client doing the same work but earning significantly less than them.[72] The TES is often not involved in the daily operations of the workers, with its only involvement being remunerating the workers on their pay day and exercising discipline over them on the instruction of the client.

The lack of recognition of any joint liability for unfair dismissals and unfair labour practices between the TES and its client towards the placed workers is one of the main causes that created loopholes for the client and the TES to be able to exploit the placed workers. This is one of the issues that the introduction of the LRAA sought to address.

2.5 ***The TES and the client should have been considered joint employers by the LRA from inception.***

If we consider substance over form, it is evident that the client should have been considered as one of the employers in the triangular relationship from inception. Although a statutory employment relationship was recognised by the LRA between the placed workers and the TES, it cannot be denied that the interaction of the placed workers and the client indicated the existence of an employment

[72] Botes 2015 *SALJ* 106.

relationship between them. The client in this tripartite relationship exercise control over these employees daily and they form part of the client's organisation.[73]

It would have been more prudent in my view for the legislature to have considered both the TES and the client to be the joint employers of the placed workers from the beginning of the triangular relationship. The fact that the client is not considered an employer or is held jointly liable for unfair dismissals and unfair labour practices for at least three months in the triangular relationship, is in my view at odds with spirit and purpose of the LRA considering that the interaction and the factual relationship between the client and the placed workers is indicative of the existence of an employment relationship from inception. The failure to hold both the client and TES accountable for unfair dismissals and labour practices as employers created a loophole for organisations to exploit the vulnerable workers.

In my view there is no rationale for the LRA to have come to this controversial election. The ILO Employment Relationship Recommendations of 2006 mandates member states, of which South Africa is one of them, to prevent the disguise of employment relationships when they are used to evade employer obligations and to deprive employees of their protection.[74] It is evident in this regard that the LRA was never amended to heed to this call. The LRA should have at least, considered the client the true employer of the placed workers by virtue of the factual reality in the interaction between the client and the placed workers.

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[73] S 200A of the LRA establishes a presumption to the effect that a person who works under the supervision and control of another person is provided with tools of the trade and forms part of the other person's organisation is an employee of that person. This is also in accordance with common-law tests developed by the courts. See in this regard *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) and *South African Broadcasting Corporation v McKenzie* 1999 ILJ 585 (LAC).

[74] Department of International Relations and Cooperation Republic of South Africa 2004 http://www.dfa.gov.za; (Last accessed 05 September 2019) ILO 2016 http://www.ilo.org (Last accessed 05 September 2019).

Considering both the TES and the client as employers would have, from inception, avoided any loopholes for exploitations in the TES practice. In cases of unfair treatment by either the TES or the client, the placed employee/s would have an election to bring a claim against any of the two, who would in turn be held liable jointly for the wrong doing irrespective of who between the two of them had perpetrated the unfair treatment against the employee/s concerned. The client and the TES would have equal rights and responsibilities towards the employees. Under those circumstances it would be up to the TES and the client on how they choose to regulate issues of joint and several liability between them in their SLA in respect of the placed employees.

2.6 ***The introduction of the LRAA***

The shortcomings of the LRA gave rise to a call to introduce new amendments to the legislation that would address these shortcomings. It was only towards the end of 2010 that the Minister of Labour at the time proposed amendments to the LRA with the intention of submitting such proposals for a debate at the National Economic Development Labour Council (**NEDLAC**).[75] NEDLAC is an almost unique statutory body enabling labour, business and other constituencies of civil society to participate directly in the formulation of policy and law before it is presented to Parliament.[76] After robust debates on the proposed bill at NEDLAC, it was finally submitted to Cabinet in March 2012 and was later approved for submission to parliament.[77]

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[75]Botes A. 'The history of labour hire in Namibia: a lesson to South Africa.' (2013) 16(1) *PER* 505 pages 528.
[76]www.ldd.org.za/by-type/...2.../196-negotiating-the-future-labours-role-in-nedlac.html.(Last accessed 11 May 2019).
[77] Van Eck BPS op cit (n10).

The bill received strong opposition from businesses across the whole country, this was because businesses believed the proposed amendments would bring too much restriction to the labour brokering practice.[78] The Bill was approved and signed by the President into law on 18 August 2014 and is now known as the LRAA.[79] The LRAA came in operation with effect from 1 January 2015 and introduced the intended amendments. These amendments now form part of the LRA. Some of these amendments (particularly in section 198A) introduced several protections for employees employed through TES. This is because the LRA previously, as demonstrated above, afforded very little protection to employees involved in the triangular relationship.

As a result of the inadequate protection, many employers used the gap in the law to exploit these vulnerable employees. As part of this practice, employees would be placed at a client's premises for many years and when the SLA between the TES and the client terminates, the employees would often be left with no protection for job security and no remedies to assist them in cases of unfair dismissals.[80] The issue of job security was one of the aims that sought to be achieved by the LRAA, as well as protecting these employees from low wages and inferior conditions of employment.

From the start, the practice of TES in South Africa was controversial and was actively opposed by many, particularly employee unions and federations who saw it as a practice that was akin to slavery. Since the beginning of this practice, the COSATU and NACTU has always been oppositional to it and actively contested

[78] Botes A. 'Answers to questions: A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers.' (2014) 26 *SAMERC LJ* 110 pg. 114.
[79] Government Gazette No 37921.
[80] Van Eck BPS op cit (nt 10),111.

for the complete legislative ban of this practice in South Africa.[81] COSATU and NACTU argued that the TES practice continued to perpetuate the systematic oppression of black people as vulnerable employees under the apartheid regime.[82] They argued that under the old regime workers had no rights in the workplace, with legislation and practices such as the Industrial Conciliation Act of 1924 excluding African workers from the legal definition of an “employee” and the practices of migrant labour systems, pass laws and Bantustans which sought to control black labour in the South African society.[83]

The LRA and other labour legislation were enacted to represent the country's formal commitment and foundations for reversing the apartheid labour market regime, in line with obligations arising from then new Constitutional democratic dispensation. They argue that the TES practice goes against this commitment and should be banned completely and entirely. COSATU commented extensively to the proposed Bill leading up to the conclusion of the LRAA when it was published in the Government Gazette for public comment and they made various submission to Parliament calling for the complete ban of the TES practice. However, notwithstanding the strong opposition, as indicated above, the Bill was approved into law and became operative on 1 January 2015.

One of the significant changes brought by the amendments was the introduction of section 198A which brought additional protection to employees involved in the triangular relationship. Section 198 of the LRA regulates temporary employment services in general. Subsection 2 of this provision provides that –

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[81] Craven 2009 www.cosatu.org.za. (Last accessed 20 December 2018)
[82] Ibid.
[83] Ibid.

> *"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 198(2) therefore does not require an employment contract to exist between the TES and the placed workers. Once the employees are procured to provide services to a client of the TES, the employees automatically become employees of the TES. It is therefore considered to be a statutory employment relationship *i.e.* an employment relationship that exists by operation of law.[84] Section 198(3) expressly provides that independent contractors are excluded from the application of section 198. In other words, independent contractors cannot be classed as employees of a TES. This points to the importance of understanding of the distinction between TES and outsourcing as illustrated in the preceding paragraphs.

Section 198(4) and 198(4A) of the LRA deal with joint and several liability of the TES and client *vis-a-viz* the TES employees. The TES and the client will be jointly and severally liable in limited circumstances, *i.e.* if the TES contravenes – a collective agreement concluded in a bargaining council that regulates terms and conditions of employment; binding arbitration award; the BCEA; or a sectoral determination under the BCEA. In these circumstances, the TES employee may institute proceedings against either the TES or the client or both. Notably, there is no joint liability in disputes of unfair dismissals and unfair labour practices.

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[84] P Benjamin 'Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010, Employment Services Bill 2010'. 31.

At this stage, it is necessary to consider section 198A of the LRA as it creates several additional protections for TES employees. It is the interpretation of this section that has sparked an intense debate in the South Africa labour jurisprudence. It is important to note, at the outset, that the provisions of section 198A only apply to employees earning below the BCEA earnings threshold (currently set at R205 433.30 per annum), i.e. lower-paid employees.[85] These employees are often considered to be vulnerable employees involved in precarious employment and therefore deserving of additional protections.[86]

Section 198A introduces additional protection for these lower-paid employees. This provision essentially provides that a TES employee, earning below the threshold and who is not engaged in 'temporary services' will be '*deemed*' to be the employee of the client for purposes of the LRA only. A TES employee will only be engaged in 'temporary services' in the following circumstances –

> (a) if the period of service does not exceed three months; (b) the work is performed as a 'substitute for an employee who is temporarily absent'; or (c) the work falls into a category or is conducted over a period deemed to be a temporary service a bargaining council agreement or sectoral determination.[87]

The introduced additional protection is intended to ensure that temporary employees are not subjected to exploitation and discrimination by being subjected to less favourable conditions of employment than employees of the client. There is

[85] Botes A 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments' (2015*) SALJ* 100 pg.110.
[86] Section 198A (2) of LRAA.
[87] Section 198A (1) (a)-(c) of the LRA.

a proven history in South Africa for companies who used employees involved in the TES practice as a form of cheap labour.[88] These additional protections introduced by the LRAA seek to introduce a substantial amount of regulation of this practice with the aim of limiting the potential exploitation of the placed workers.

Section 198A(3)(*b*)(i) provides that for purposes of the LRA, after the three-month of being placed with the client, the TES employee performing temporary services is "*deemed to be the employee of that client and the client is deemed to be the employer.*"[89] The TES employees will become employed by the client on an indefinite basis.[90] The only exception to this is if it can be shown that the TES employee was employed on a fixed-term contract (that meets the requirements of section 198B). Since coming into operation, section 198A(3)(*b*) has become widely known as "the deeming provision". The deeming provision gave rise to many questions regarding its interpretation. With the most controversial question being –

> *'Once the deeming provision is triggered, does it give rise to a dual employment relationship where the TES employees are deemed to be employed by both the TES and the client? Or does it create a sole employment relationship between the employees and the client?"*

2.7 ***Conclusion***

The following two chapters will be focusing on the discussions and analysis of the case law that dealt with the interpretation of the deeming provisions. This interpretation sparked a very interesting debate in South African labour law,

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[88] Benjamin 2010 *ILJ* 865; Theron 2005 *ILJ* 629; Mhone 1998 *ILJ* 209; Bosch 2013 *ILJ* 1633; Fourie 2008 *PELJ* 145; Mills 2004 *ILJ* 1212; Smit and Fourie 2009 *TSAR* 518.
[89] LRA.
[90] Section 198A(3)(b)(ii) of the LRA.

particularly in relation to the nature of the triangular relationship considering the deeming provisions. Two schools of thoughts emerged from the judicial scrutiny of the deeming provisions, with one school taking the view that upon the application of the deeming provisions a dual employment relationship is formed with both the TES and the client becoming joint employers of the placed workers with equal rights and obligations towards the employees. This interpretation argued that the deeming provisions created a statutory employment relationship between the client and the employees which came into operation by operation of law.

The other school of thought favoured the interpretation that once the deeming provision is triggered, the client becomes the sole employer of the placed workers and the TES falls away as it no longer serves a purpose in the triangular relationship. However, the relationship between the TES and the client is retained with only the employees being taken over by the client from the TES.[91] In chapter three, we explore in detail the meaning of the dual and sole employment interpretation as demonstrated in case law.

[91] *Assign Services (Pty) Ltd v CCMA* supra (n17), para 11.

CHAPTER 3 - THE DUAL AND SOLE EMPLOYMENT INTERPRETATION

3.1 *Introduction*

The interpretation of the deeming provision first received judicial scrutiny at the CCMA less than five months from the commencement date of the LRAA.[92] In this case, *Assign Services (Pty) Limited* (**Assign**) was the TES as defined in section 198(1) of the LRA whilst Krost Shelving was the client with whom workers were placed to provide temporary service for its benefit.[93]

In this case the CCMA was tasked with providing clarify as to the meaning to be conferred to the deeming provision considering the parties' contestation that the deeming provision has two possible interpretations.

3.2 *The Factual background to the Assign Services judgement*

Prior to the coming into operation of the LRAA, Assign had placed 22 workers with its client, Krost Shelving and Racking (Pty) Ltd (**Krost**), for the purposes of providing labour to Krost, a company that is involved in the business of offering storage solutions to its clients. Krost had in addition to the 22 placed workers, about 130 other employees who were employed by it.[94] The 130 employees were managed and paid by Krost for their services and were therefore, for all intents and purposes Krost's employees. The 22 workers were placed by Assign to provide additional labour to Krost and Assign received a fee from Krost in exchange for the labour provided by the 22 placed workers. The 22 placed

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[92] *Assign Services v Krost* supra (n15), para 1.1.
[93] In this section, "*temporary employment services" means any person who, for reward, procures for or provides to a client other person - (a) who perform work for the client; and (b) who are remunerated by the temporary employment service.*"
[94] *Assign Services v Krost* supra (n15), para 2.2 and 2.3.

workers were members of the National Union of Metal Workers of South Africa (**NUMSA**) at the time of placement.[95]

The dispute arose when NUMSA alleged that as of 1 April 2015, the placed workers had been placed with Krost for a period in excess of three months and had therefore became employees of Krost as a client of Assign in light of section 198A(3)*(b*) of the LRAA.[96] NUMSA argued that because by 1 April 2015 the operation of the deeming provision had been triggered, Assign had fallen out of the triangle relationship and only Krost remained as the sole employer of the 22 placed workers. It was common cause between the parties that the 22 workers were placed with Krost to provide labour on a full-time basis and that their placement occurred prior to 1 January 2015, the commencement date of the deeming provisions.[97]

In light of this allegation, Assign referred this dispute to the CCMA in terms of section 198D(1) of the LRA,[98] which allows the CCMA to determine disputes about the interpretation or application of section 198A of the LRAA. Assign's arguments was that the deeming provision must be interpreted to mean that after the three month's placement period has been triggered, in this case since 1 April 2015, both Assign and Krost became dual employers of the 22 placed workers, with Assign being the employer for all intents and purposes whilst Krost was deemed to also be an employer for purposes of the LRA only.[99] This, Assign referred to as the dual employment position/interpretation. NUMSA opposed this referral and

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[95] Ibid, para 2.3.
[96] Ibid, para 3.3.
[97] Ibid, para 2.3.
[98] "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."
[99] *Assign Services v Krost* supra (n15), para 3.2.

maintained its argument that the deeming provision should be interpreted to mean that the client, in this case Krost, became the sole employer of the 22 placed workers with effect from 1 April 2015. This they referred to as the sole employment position/interpretation.[100]

This matter was before the CCMA as a stated case wherein both parties agreed on issues that were common cause and those that were in dispute as well as the issue that the CCMA had to determine, namely being the interpretation to be conferred to the deeming provision.[101] Krost as the client, was joined and cited as an interested party in the proceedings but did not oppose the proceeding, instead Krost waived its rights to participate and filed a notice that it will abide by the decision of the CCMA.[102]

This meant that should the CCMA find in favour of Assign, Krost would be deemed an employer of the 22 workers for purposes of the LRA only. This meant that the employment relationship between Assign and the placed workers would remain intact for all intense and purposes and that Krost would be considered an employer only in so far as the employment rights and responsibility flowing from the LRA are concerned. For example, the placed workers would be entitled to bring unfair dismissals and unfair labour practice disputes against Krost as their LRA employer without the need to join Assign in the dispute. Even where the commercial agreement between Assign and Krost terminate, Krost would remain an employer of the placed workers.

[100] Ibid, para 3.3.
[101] Ibid, para 2.1 and 3.1.
[102] Ibid, para 1.3.

Furthermore, Krost would be obliged to provide the placed workers with terms and conditions of employment, that are no less favourable to those enjoyed by comparable indefinite employees employed by it. On the other hand, should NUMSA succeed, Krost would accept that it had become the sole employer of the 22 workers with effect from 1 April 2019.

3.3 ***Assign's legal submissions at the CCMA – Dual Employment Interpretation***

The arguments commenced with both parties relying on their understanding of the ordinary meaning of the word "deemed" in section 198A(3)(*b*) of the LRA. Assign as the Applicant and favouring the dual employment position argued with reference to case law that the expression "deemed" has no technical or uniform connotation and that its meaning and effect must be ascertained from the context in which it is used and its ordinary common construction. In support of this approach, Assign referred to the authority of *R v Haffejee*[103] to argue that in interpreting the expression "deemed", the aim, scope and objectives of the LRA must be considered in order to determine the sense of section 198A(3)(*b*).

In summary, Assign submitted that the word "deemed" lacked a uniform meaning and in order to understand its meaning and effect, one must consider the context in which the word is used in the LRA as well as the purpose of section 198 and 198A of the LRA.[104] Assign argued that from an overall contextual perspective, there was nothing in section 198 or 198A that supported the sole employment position. This is so because nowhere did the two provisions reflect a decision by the legislature to ban the use of TES practice, whether because of the deeming

[103] *R v Haffejee and Another* 1945 AD 345.
[104] Ibid, para 4.1.

provision or otherwise.[105] The two provisions should be read holistically and not in isolation.

Furthermore, Assign submitted that although it is clear from the deeming provision that it was the only employer of the placed workers for the first three months of placement,[106] however when the deeming provision were triggered on 1 April 2015 it did not serve to terminate the commercial agreement between Assign and Krost, nor did it serve to terminate the contractual employment relationship between Assign and the placed workers.[107] Assign argued that when the deeming provisions are triggered, they in effect create greater protection for the placed workers by making both Assign and Krost dual employers, with Krost being deemed an employer for purposes of the LRA only. Assign submitted that, in terms of this dual employment position, the placed workers are entitled in terms of section198(4A) (the joint and several liability provision)[108] to institute proceedings against either Assign or Krost, or both and that they may enforce any order or award made against Assign or Krost, against either of them.[109]

3.4 ***NUMSA's legal submission at the CCMA – Sole Employment Interpretation***

[105] Ibid, para 4.4.
[106] Section 198(2) of the LRA provides that 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'*.
[107] *Assign Services v Krost* supra (note 15),para 4.4.
[108] If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(*b*)- (*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.
[109] Ibid, para 5.4.

In opposition to Assign's legal submissions, NUMSA argued, also with reference to case law,[110] that the word "deemed" is often used in legislation in a very loose sense and therefore could easily be substituted with the word "is". NUMSA argued that, effectively that the word "deemed" as used in section 198A(3)(*b*)(i) created a legal fiction that once the deeming provision is triggered, the client (in this case Krost), is the sole employer of the placed workers.[111] In other words, NUMSA argued, the word "deemed" as used under section 198A of the LRA carried the same meaning as the word "is". Therefore, section 198A(3)(*b*)(i) created a legal fiction that the client is the employer of the placed workers after the three months of placement.[112] NUMSA submitted that the reference made by Assign to section 198(4A) does not create any new liabilities for any of the parties concerned, in that the provision merely provides an opportunity for an employee to institute proceedings against a party that is liable and that this provision applied to all workers placed with a client, including those who have been placed shorter than the three months contemplated by the deeming provision.[113]

NUMSA further argued that although the deeming provision does not expressly state that the client becomes the employer, the wording of section 198A(3)(*b*)(ii), when it reads " *subject to the provisions of section 198B, employed on an indefinite basis by the client*" supports the sole employment interpretation.[114] NUMSA also submitted that in relation to the pay parity provision created in terms

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[110] *S v Rosenthall* 1980 (1) SA 65 A; and *R v County Council of Norfolk* 65 (1891) QB division.
[111] Ibid, para 4.2.
[112] *Assign Services v Krost* supra (note 15), para 4.2.
[113] Ibid, para 4.7.
[114] For the purposes of this Act, an employee- (a) 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 (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.

of section 198A(5),[115] the legislature actually intends to create better employment conditions for the placed workers than those enjoyed by them under the TES and therefore a simple transfer of employment in terms of section 197 of the LRA would not suffice.[116] NUMSA continued to argue that a dual employment interpretation will cause confusion, uncertainty and prejudice to vulnerable employees because more often employees involved in the TES practice get confused as to whether they are employed by the TES or the client. It was further argued that the amendments were introduced to provide clarity to these employees on who their true employer is.[117] The sole employment interpretation will therefore provide clarity and certainty to these employees, as opposed to the dual employment interpretation that will leave them as confused as before.

NUMSA further submitted that the dual employment interpretation is nothing but an artificial construction which gives rise to immense scope for abuse, this is so because the placed workers are with the client often for an indefinite basis, but the TES is regarded as the employer merely because it pays the salaries. This construction does not make sense having regard to the objectives of the LRAA, which is to eliminate abuse and ensure job security.[118]

3.5 *The CCMA's interpretation of the deeming provision – Sole Employment Interpretation*

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[115] 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.

[116] Assign Services v Krost supra (note 15), para 4.8. see also section 198A (5) of the LRA "*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*".

[117] Ibid, para 5.11.

[118] Ibid, para 5.11. see also Benjamin, *To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia ', in Malherbe and Sloth-Nielsen (eds), Labour Law into the Future: Essays in Honour of D'Arcy du Toit (Juta 2012)* pages 189-209.

In considering both parties submissions, the Commissioner held that, when interpreting any provision of the LRA, one is obliged to have regard to the primary objective of the Act as a whole.[119] An interpretation that gives effect to the primary objectives of the LRA must therefore be preferred.[120] In order to achieve this task, the Commissioner had regard to the Explanatory Memorandum of the LRAA in order to ascertain its objectives. In light of this, the Commissioner noted that the amendments to section 198 are intended to address certain challenges with the labour brokering practice and to prevent abusive practices associated with this practice.[121] The Commissioner pertinently highlighted that the main aim of the amendments is to restrict the employment of more vulnerable, lower paid workers by TES to situations of genuine and relevant temporary work and to introduce protective measures to workers involved in this practice.[122]

The Commissioner further noted that in terms of the Explanatory Memorandum, section 198A was introduced to afford protection to the most vulnerable employees who earn below the threshold prescribed by the BCEA, and provides that such employees are employees of the TES for purposes of the LRA only if they are employed to perform genuine temporary work.[123] If the employees are not performing temporary work, they are deemed for purposes of the LRA to be employees of the client and not the TES. In concluding his findings, the Commissioner opined that the deeming provisions should be interpreted similarly to the law applicable to adoption of children. In adoption cases, the Commissioner noted, the adoptive parent acquires full parental rights to the child whilst the

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[119] Bid, para 5.2.
[120] *Assign Services v Krost* supra (n15), para 5. See also *Chirwa v Transnet* 2008 (4) SA 367 (CC).
[121] Ibid, para 5.4, 5.5.
[122] Ibid, para 5.4
[123] Ibid, para 5.6.

biological parents are completely removed from the picture.[124] There is no dual parental relationship recognised by the law. The Commissioner noted that this is deemed to be in the best interest of the child as it leaves less confusion to the child as to who its parents are.[125]

Equally in the interpretation of the deeming provision, the dual employment interpretation creates several problems as uncertainties would remain present. For example, it is not clear which employer would maintain the right to discipline and whose disciplinary code the placed employees would be bound by, and which employer would be bound in cases of reinstatement.[126]

The Commissioner dismissed Assign's argument that section 198(4A) does not apply joint and several liability in terms of section 198(3)(*b*)(i) but only in terms of section 198(4)[127] and that this seek to create dual employment. The Commissioner found that the fact that an employee has an election on who to institute proceedings against in the enforcement of awards does not, in its plain reading, support the dual employment interpretation.[128]

He concluded that, the legislature did not intend to completely ban the operation of the TES practice, but only sought to restrict and regulate the industry by affording better protection to the vulnerable employees involved in this practice. The TES are not banned because the commercial relationship between the client and the

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[124] Ibid, para 5.12.
[125] *Assign Services v Krost* supra (n15), para 5.12.
[126] Ibid, para 5.13.
[127] The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its *employee*s, contravenes - (a) a *collective agreement* concluded in a *bargaining council* that regulates terms and conditions of employment; (b) a binding arbitration award that regulates terms and conditions of employment; (c) the *Basic Conditions of Employment Act*; or (d) a sectoral determination made in terms of the Basic Conditions of Employment Act.
[128] *Assign v Krost* supra (n15), para 5.16.

TES can continue, the only thing that changes is that the placed workers become solely the employees of the client for the purpose of the LRA after the three months period has lapsed.[129] This is so because placement that is longer than three months is no longer regarded by the LRA as temporary service. And if they are not employed to perform temporary services, they are deemed for purposes of the LRA to be employees of the client and not that of the TES.

The Commissioner consequently ruled that the sole employment interpretation is the one that is supported by the primary objectives of the LRAA as evident in the Explanatory Memorandum. Consequently, after the three months period and with effect from 1 April 2015, the placed workers were deemed employees of Krost on an indefinite basis for purposes of the LRA and Krost became the sole employer.[130]

Interestingly, in his award the Commissioner made no pronouncement on what terms and conditions the placed workers would be employed by the client after the deeming provision has been triggered. The Commissioner's finding meant that the TES was, as a consequence of the sole employment interpretation, no longer considered an employer of the placed workers after the lapsing of the three months period and was released from any employer obligations it owed to the placed workers.

The Commissioner was satisfied that the sole employment interpretation is the one that provided greater protection to the vulnerable class of employees as contemplated in section 198A(3)(*b*) of the LRA.

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[129] Ibid, para 5.17.
[130] Ibid, para 5.21.

3.6 *The Labour Court's interpretation of the Deeming Provision – Dual Employment Interpretation*

Dissatisfied with the CCMA ruling, Assign took this matter to the LC to be reviewed in terms of section 145 of the LRA[131] on the grounds that the Commissioner had committed a material error of law and a gross irregularity which resulted in an unreasonable award. In considering the facts to this dispute, Brassey AJ noted that NUMSA had conceded in its heads of arguments that, although Krost is deemed the employer after the three months period for purposes of the LRA, the contractual relationship between the placed workers and Assign remained in force and accepted under cross examination that there is nothing in the LRAA which suggested that the placed workers are deprived of rights and obligations arising from their employment contract with Assign after the triggering of the deeming provision.[132]

This was considered in light of Assign's submissions that once the deeming provision is triggered, Krost became invested with rights and obligations that, by operation of the LRA, attach to an employer and, since Assign has in no sense been deprived of its status as employer, the two relationships now operated in parallel.[133] Assign submitted that the contracts of employment between it and the placed workers, even after the three months period, remained in force and nothing invalidates it, therefore it must be accepted by the Court that the placement of the

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[131] Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4 or section 17**,** 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.

[132] *Assign Services v CCMA* supra (n17), para 3

[133] Ibid, para 4.

placed workers with Krost has no bearing on the employment relationship between it and the workers and that the employment relationship continues with all the rights and obligations flowing from it from the time it was entered into.[134]

Having considered the above submissions, Brassey AJ rejected the argument that the deeming provision create a sole employment relationship. He found that there was nothing in the LRA which suggested that the contractual relationship between the TES and the workers came to an end upon the coming into effect of the deeming provision, in fact NUMSA had conceded to this.[135] The LC found that the deeming provision served to augment the contract between the TES and its employees and added the client as the party against whom the employees could claim their rights in terms of the LRA. Accordingly, it was not a substitution of the TES as the old employer, with the client as the new employer.[136]

The LC held that there is no reason in principle and in practice why the TES should be relieved of its statutory rights and obligations towards the placed workers because the client has acquired a parallel set of such rights and obligations, there was no reason why a TES should sacrifice its rights and obligations towards the placed workers simply on account of the fact that the workers have found placement with the client.[137] Brassey AJ found that after the three months period, two employment relationship exist with the client being added in the equation as an additional employer. The two employment relationships therefore co-existed at the same time in parallel lines.

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[134] Ibid, para 5.
[135] Ibid, para 11 and 14.
[136] Ibid, para 14.
[137] Ibid, para 12.

Furthermore, it was also found by the LC that it is the contractual relationship between the TES and the workers that gave the TES control over the employees. The fact that the workers rendered their labour according to the instruction of the client does not necessarily mean that the client is the one in control of the employees because the law recognises, as the Bible does that *'No man can serve two masters.*'[138] The source of the control still vests with the TES as the contractual employer of the workers and should the TES terminate this relationship with the workers, the source of the power of control is gone and the objects of the employment relationship become impossible to achieve.[139] Unless the client concludes a new contract with the workers, its relationship must come to an end by operation of supervening impossibility. The LC as per Brassey AJ concluded therefore that after the deeming provision was triggered, Krost did not become the sole employer, instead both Assign and Krost became employers of the employees with the two respective employment relationships being discernible and operating in tandem.

Pursuant to these two findings, it is evident that the LC favoured the dual employment interpretation whilst the CCMA favoured the sole employment interpretation. These two-interpretation created further confusion and uncertainties and sparked further robust debates as to the proper interpretation to be assigned to the deeming provision. The LC decision was not the end of this legal debate as the matter was referred to the LAC and subsequently to the CC as will be discussed in chapter 4 below.

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[138] Ibid, para 17.
[139] Ibid, para 17.

From a reading of the CCMA award, it is readily apparent that the main thrust for the CCMA's favouring of the sole employment interpretation was based on the Commissioner's view that the dual employment interpretation would bring confusion to the placed workers as they would still be unaware as to who their true employer was if the dual employment interpretation is preferred.

However, it can be argued that an interpretation that favours dual employment would bring no confusion to the placed workers at all. This is so because this interpretation would entitle the placed worker to bring a claim against either the client or the TES or both jointly. Any purported confusion which may be occasioned to the placed workers by this interpretation would be immaterial and nonprejudicial to them as it broadens the scope of their ability to bring claims against their employer/s.

3.7 ***Conclusion***

Having considered the LC and the CCMA’s interpretation to the deeming provision, what becomes apparent from the CCMA's ruling is that, considerations were not given to the impact of the decision to the practical operation of the TES practice and its sustenance, instead the Commissioner placed a strong reliance on the possibility that the dual employment interpretation would bring confusion to the placed workers.

The Commissioner’s finding that the sole employment interpretation does not ban the operation of the TES practice because the commercial agreement between the TES and the client is not nullified after the deeming provision is triggered, is in my view unsustainable and irrational. This is so because, the mere existence of the commercial relationship between the TES and the client is for the TES to retain

status as an employer and to receive a fee in exchange for the labour performed by the placed workers. The benefit to the client is the receipt of the labour without the obligations and liability of a sole employer. If the client becomes the sole employer after the three months and take full sole responsibility for all the placed workers, logic dictates that the purpose for which the commercial agreement was concluded between the client and the TES sees to exist and naturally, the agreement would also be terminated by them as it no longer serves its main purpose. Although the TES may continue to remunerate the placed workers post the deeming and perform other human resources functions, the benefit of this to the client is not significant and is likely to impact the fee payable by the client as these are functions that the client is in most cases able to do itself.

It is evident that the LC duly considered these challenges prior to concluding that the dual employment interpretation should be favoured. There is no reason why the TES should be released of its obligations as an employer after the three months, in fact nothing in the LRAA as well as its Explanatory Memorandum suggest that the relationship between the TES and the placed workers must terminate as soon as the deeming provision is triggered. The logical conclusion therefore should be that the relationship between the TES and the placed workers survive even after the deeming provision has been triggered.

Unfortunately, the decision of the LC as per Brassey AJ, of the interpretation of the deeming provision only constituted our legal position for a limited period of time until it was overturned by the LAC which too favoured the sole employment interpretation. In the next chapter we discuss how the LAC and the CC dealt with the interpretation of the deeming provision as well as what the current position in our law is in this regard. Does our law currently favour the dual or sole

employment relationship? This question is explored in detail in the following chapter.

CHAPTER 4 - THE LABOUR APPEAL AND CONSTITUTIONAL COURTS' FINDINGS ON THE INTERPETATION OF THE DEEMING PROVISION.

4.1 *The Labour Appeal Court's interpretation of the deeming provision- Sole Employment Interpretation*

Assign's celebration of the LC's finding on the interpretation of the deeming provision was short lived as NUMSA immediately took the matter on appeal to the LAC. The LAC was also tasked to decide on the proper interpretation of the deeming provision and the effect thereof. Since this was an appeal, it required the LAC to determine whether the dual employment interpretation as ascribed by Brassey J in the LC was the correct interpretation in law.

As did the commissioner at the CCMA, the LAC in tackling this legal conundrum, started off by laying down the basic legal principles applicable in interpretations of statutes in South African law.[140] The LAC per Tlaletsi DJP, referred to and placed guidance on section 39(2) of the Constitution[141] as well as section 3 of the LRA[142] to emphasise that the purposive interpretation that aims to promote the spirit and objectives of the Bill of Rights must be applied when interpreting legislation in South Africa.[143] Further to this, the LAC expressed that as per section 1 of the

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[140] *NUMSA v Assign Services* supra (n19), para 28- 31.

[141] "When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[142] Any person applying this Act must interpret its provisions- (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of the Republic.

[143] *NUMSA v Assign Services supra (n19)*, para 31. See also *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

LRA,[144] the purpose of the LRA is *inter alia* to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the LRA.[145]

After having laid down the fundamental principles applicable in interpretation of statutes, the LAC, with reliance to section 198(1) of the LRA noted that the LRAA has given a specific special meaning to ' temporary services', which is to mean work for a client by an employee for a period not exceeding three months, or as a substitute for an employee of the client who is temporarily absent; or an employee who falls into a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8) of the LRA.[146] After having identified this special meaning, the LAC found that section 189A(1) places an emphasis on the type of services as defined as opposed to the person rendering those services. In other words, the focus is on the specific definition of 'temporary services' as ascribed by the LRA as opposed to who is rendering those temporary services.[147]

In unpacking this issue further, the LAC found that if a TES places a worker to provide labour to a client in contravention of section 189A(1), in other words for

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[144] The purpose of this Act is to advance economic development, social justice, labour peace and the 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 27 of the Constitution; (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; (ii) collective bargaining at sectoral level; (iii)employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.
[145] *NUMSA v Assign Services supra (n17)*, para 35.
[146] Ibid, para 31.
[147] Ibid, para 36.

longer than three months or not as a substitute for an employee of the client who is temporary absent etc; such placed worker is no longer performing temporary work as defined, and if they are not performing temporary work they will be deemed an employee of the client for an indefinite period subject to sec 198B[148]

[148] (1) - For the purpose of this section, a 'fixed term contract' means *a contract of employment that terminates on- (a) the occurrence of a specified event; (b) the completion of a specified task or project; or (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).*
(2) - This section does not apply to- (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act; (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless- (i) the employer conducts more than one business; or (ii) the business was formed by the division or dissolution for any reason of an existing business; and (c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.
(3) - 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.
(4) - Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee- (a) is replacing another employee who is temporarily absent from work; (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; (d) is employed to work exclusively on a specific project that has a limited or defined duration; (e) is a non-citizen who has been granted a work permit for a defined period; (f) is employed to perform seasonal work; (g) is employed for the purpose of an official public works scheme or similar public job creation scheme; (h) is employed in a position which is funded by an external source for a limited period; or (i) has reached the normal or agreed retirement age applicable in the employer's business.
(5) - Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.
(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.
(8) - (a) An employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment. (b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.
(9) - As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.
(10) - (a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act. (b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.
(11) - An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the employee employment or procures employment for the

and the client will be deemed their employer[149] but for the purpose of the LRA only. The LAC in following the purposive interpretation of statute approach, found that the purpose of the LRAA was to limit the TES practice to situations of genuine temporary services. In other words, temporary services were limited only to the extent as defined in the LRAA and anything above that would trigger the application of the deeming provision which has the effect of making the placed workers, employees of the client and *vice versa*. In supporting this contention, the LAC also placed strong reliance on the Explanatory Memorandum[150] accompanying the LRAA as tabled in Parliament in 2012. The Explanatory Memorandum provided *inter alia* that the main thrust of the amendments is to restrict the employment of more vulnerable, lower- paid workers by a TES to situations of genuine and relevant "temporary work", and to introduce various further measures to protect workers employed in this way.[151]

The LAC concluded that there was nothing in the Explanatory Memorandum that supported the contention that the dual employment interpretation was intended by the legislature. The sole employment interpretation was the one that was consonant with the main thrust of the Explanatory Memorandum.[152] Furthermore, the court found that nothing in the LRAA itself favoured the dual employment interpretation and that the protection against unfair dismissal and unfair discrimination in the context of s198A should not be interpreted to support this interpretation, but should rather be seen as a measure to ensure that placed workers, once deemed employees of the client are not treated differently from the

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employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

[149] *NUMSA v Assign Services supra (n17)*.
[150] *Labour Relations Amendment Bill*, 2012.
[151] *NUMSA v Assign Services*, supra (n17), para 38.
[152] Ibid, para 40.

employees employed directly by the client.[153] The purpose of these protections in the context of s198A is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client.

The LAC further held that, this protection afforded to the placed workers takes into consideration the fact that the client is a statutory employer and the relationship between them is not one that is a product of negotiation but one that arises by operation of law.[154] The effect of this, held the LAC, is that the placed workers become the employees of the client by operation of law for an indefinite period on the same terms and conditions of employment as employees directly employed by the client doing the same or similar work.[155]

The LAC correctly observed that there is nothing in the LRAA that suggests that the contracts of employment of the placed workers are transferred to the client after three months or that the client steps into the shoes of the TES similar to section 197 of the LRA.[156] This would no doubt have supported, perhaps

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[153] Ibid.
[154] Ibid, para 40.
[155] Ibid, 40.
[156] In this section and in section 197A - (a) 'business' includes the whole or a part of any business, trade, undertaking or service; and (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
(2) - If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -
(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer; (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and (d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.
(3) - (a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer. (b) Paragraph (a) does not apply to employees if any of their conditions of employment are determined by a collective agreement.
(4) - Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied.53a

conclusively, that the sole employer interpretation was the intended interpretation.[157] The LAC however found that similarly, nothing in the LRAA stipulated that after the three months period the TES and the client become joint employers or that the client is added to the relationship to augment it, thus supporting the dual employment interpretation. It is only the purpose of the LRAA, as supported by the Explanatory Memorandum that indicates that the sole employment interpretation is what was intended by the legislature.[158]

(5) - (a) For the purposes of this subsection, the collective agreements and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the employees to be transferred, immediately before the date of transfer. (b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by - (i) any arbitration award made in terms of this Act, the common law or any other law; (ii) any collective agreement binding in terms of section 23; and (iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.
(6) - (a) An agreement contemplated in subsection (2) must be in writing and concluded between - (i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and (ii) the appropriate person or body referred to in section 189(1), on the other. (b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.
(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).
(7) - The old employer must - (a) agree with the new employer to a valuation as at the date of transfer of - (i) the leave pay accrued to the transferred employees of the old employer; (ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer's operational requirements; and (iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer; (b) conclude a written agreement that specifies - (i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and (ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment; (c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and (d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).
(8) - For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any employee who becomes entitled to receive a payment contemplated in subsection (7)(a) as a result of the employee's dismissal for a reason relating to the employer's operational requirements or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.
(9) - The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.
(10) - This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

[157] *NUMSA v Assign Services* (n17), para 43.
[158] Ibid, para 43.

The LAC concluded that in its view, the sole employment interpretation does not have the effect of banning the operation of the TES but only goes as far as ensuring that the use of TES is restricted to genuine temporary services as defined by the LRAA.[159] The TES's rights and obligations towards the placed workers seizes to exist as soon as the deeming provision is triggered and the TES falls out and the triangular relationship collapses. The LAC was of the view that it would make no sense to retain the TES in this triangular relationship for an indefinite period where the client has assumed all the rights and obligations of an employer towards the placed workers.[160] It concluded that, if the TES would be retained in the equation after the deeming provision kicks in, it would only be an employer in theory and would be adding no value to the relationship. The TES would be an unwarranted middleman that serves no purpose to the relationship.[161]

The LAC therefore concluded by upholding the CCMA's interpretation of the deeming provision that the sole employment interpretation is that which was intended by the legislature. Accordingly, the LAC concluded in favour of NUMSA and held that the LC misdirected itself when it concluded that dual employment is the correct interpretation and thereby setting aside the CCMA award on the grounds that it was both unreasonable and incorrect conclusion.[162] The dual employment interpretation was not supported by the Explanatory Memorandum which records the intention of the LRAA.

4.2 *The Constitutional Court's (Majority) judgement on the Interpretation of the deeming Provision – Sole Employment Interpretation*

[159] Ibid, para 42.
[160] Ibid, para 43.
[161] Ibid, para 60.
[162] Ibid, para 47.

Dissatisfied with the LAC's finding, Assign referred the matter to the CC for final determination.[163] The CC had to effectively determine what the legislature's intentions were when it introduced the amendments in the LRAA. Did the legislature intend that sole employment be created as found by the CCMA and the LAC? Or is the dual employment interpretation as concluded by Brassey AJ in the LC what was intended? Whatever the answer, the CC as court of last instance was tasked with this important consideration which had vast implications within the South African labour market, particularly on the operation of TES as a practice in South Africa.

It is evident from the history of this litigation that the answer to this consideration was not an easy one to arrive at as evident in how it has evoked two closely contested schools of thoughts in South African labour jurisprudence. It proved to be no different amongst the judges of the CC who delivered two contradicting judgments in this matter comprising of the majority judgement which constitutes the current legal position, and the dissenting minority judgment which carries persuasive value. The majority judgment was delivered by Dlodlo AJ[164] whilst Cachalia AJ delivered the minority judgment.[165]

Rightfully, in addressing this legal challenge, Dlodlo AJ representing the majority view of the CC paused to note that the interpretation of the deeming provision has profound implication for the TES practice in South Africa, particularly on the TES's ability to operate post the triggering of the deeming provision. Dlodlo AJ noted that Assign may be right in its assertion that the sole employment interpretation is

[163] *Assign Services (Pty) Limited v NUMSA* supra (20).
[164] Ibid, para 1 to 85.
[165] Ibid, para 86 to 109.

tantamount to a ban of the labour brokering practice in South Africa.[166] The CC acknowledged that the labour brokering practice contribute significantly to employment opportunities in South Africa and that the underlying issue for determination in this case had serious implications for the country's labour market and the continued role of the labour brokering practice in South Africa. [167]

The court noted that this issue had also significant implications for the rights of all the parties involved in the triangular relationship, *viz* the client of the labour broker as well as the thousands of employees currently involved in this practice. Having noted these challenges, the majority per Dlodlo AJ proceeded to cite the trite legal principles applicable in the interpretation of legislation in the same way the CCMA and the LC did in dealing with this matter.[168] This thesis has extensively dealt with the applicable principles in the interpretation of legislation in the previous chapters and the extent to which they are referred to herein again, is only for purposes of completion.

With reference to case law, the CC stated that in interpreting legislation, and in this case section 198A of the LRA, it had to consider its textual, contextual as well as its purposive meaning. The CC noted that the purpose of section 198A had to be considered within the meaning of the right to fair labour practice as entrenched within the constitution and the purpose of the LRA as a whole as set out in section 1 of the LRA.[169]

4.2.1 ***The Constitutional Court's view on the interpretation of the textual context of the deeming provision***

[166] Ibid, para 38.
[167] Ibid, para 38.
[168] Ibid para 41 to 43.
[169] Ibid, para 54.

In considering the textual meaning of the deeming provision, the CC found that the deeming provision clearly distinguished between those employees employed by a TES to perform temporary work as well as those deemed to be employed by the TES's client not performing temporary work. It was held that to interpret the deeming provision to mean that the client becomes one of the employers would be to strain the language used.[170] It was contended by the CC that this was not the intention of the legislature and if it were, the legislature could have easily provided that the client also becomes the employer after the deeming provision is triggered.[171]

The CC further rejected any argument that a placed worker could be regarded as an employee of a TES in terms of section 213 of the LRA.[172] The court held that the usual TES employment relationship is not covered by section 213 because if it were, there would be no need for section 189(2) of the LRA which creates a statutory employment relationship between a TES and placed workers.[173] The court concluded, as persuaded by arguments from the Casual Workers Advice Office ("**CWAO**"),who were *amicus curiae*[174] in the matter, that a placement of an employee with a TES does not create an employment relationship.[175] In other words, the fact that a worker is placed by a TES with client does not necessarily

[170] Ibid, para 54.
[171] Ibid, para 54.
[172] "employee " means – (a) any person, excluding an independent contractor, who works for another person or for the State 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, and "employed" and "employment" have meanings corresponding to that of " employee";
[173] Ibid, para 55.
[174] *Amicus curiae* is a well-established concept in law. Translated literally from Latin, the term means 'friend of the court. See G Williams 'The *amicus curiae* and intervention in the High Court of Australia: A comparative analysis' (2000).
[175] Ibid, para 60 – 61.

mean that a relationship of employment is created between the placed worker and the TES, this is not covered by section 213 of the LRA.

After having reached this conclusion, the CC was quickly confronted with the difficulties occasioned by the effect of section 198(4)[176] and (4A)[177] of the LRA. These provisions create joint and several liability for the TES and the client for the period while a placed worker is employed with a TES. This period, according to the CC, is the period prior to the triggering of the deeming provision and for the period thereafter if the contractual relationship between the TES and the client persist post the deeming. Once the placed worker is deemed an employee of the client after the three-month period, the TES is no longer joint and severally liable if the commercial contract between it and the client also comes to an end.[178] The TES is liable jointly and severally if, after the deeming, the commercial relationship between it and the client continues and the TES continues to remunerate the placed employees.[179]

Assign however held a different view, it argued that the textual context of section 198(4A) supports the dual employment interpretation because this provision facilitates the enforcement of the placed workers' employment rights against both

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[176] "The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes- (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment; (b) a binding arbitration award that regulates terms and conditions of employment; (c) the Basic Conditions of Employment Act; or (d) a determination made in terms of the Wage Act.

[177] If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b)- (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.

[178] *Assign Services v NUMSA* supra (n20), para 64.

[179] Ibid, para 64.

the TES and the client.[180] In other words, the joint and several liability binds both in their capacity as employers of the placed workers post the deeming. A preference of the sole employment interpretation would go against this provision as it will only recognise one employer, the client, whilst also creating mechanisms to allow the placed workers to enforce obligations against the TES as a non-employer.[181]

According to Assign, the joint and several liability between a TES and a client in respect of the placed workers continue even if their commercial relationship is terminated, this is so because the deeming did not serve to terminate the employment relationship between the TES and the placed workers. There was nothing in the LRAA that suggested that the deeming ends the relationship between the TES and employees placed by it with the client.

In response to Assigns argument, the CC pointed out that the joint and several liability provisions did not seek to suggest dual and joint employment, but only sought to create a substantive and statutory form of joint and several liability in circumstances where the TES carries principal liability as employer in terms of the LRA. This provision did not seek to create dual employment and therefore does not hamper the sole employment interpretation.[182] The court pressed that the joint and several liability provisions do not purport to determine who an employer may be from time to time. It merely provides an avenue for placed employees to bring claims against the TES after the deeming for as long as the contract between the TES and the client survives the triggering of the deeming provision.[183]

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[180] Ibid, para 59.
[181] Ibid, para 59.
[182] Ibid, para 61.
[183] Ibid, para 61.

The CC concluded that section 198(4A) provides the placed workers with more protection as it enables them to bring claims directly against the TES notwithstanding it not being their employer post the deeming.[184] The CC motivated that this provision may have been introduced to address the shortcomings of the LRA prior to the 2014 amendments whereby the placed workers were barred from directly bringing claims against the client as a non-employer and had to first bring a claim against the TES as their employer and thereafter enforce the award/court order against the client.

The CC held that, in terms of section 198(4A) the liability of the TES exists only in circumstances where there is still a contract between it and the client, i.e. if the TES continue to remunerate the placed workers post the deeming.[185] The court accordingly rejected Assign's argument that the textual reading of the provision supports their contention of dual employment interpretation. In other words, if the commercial contract between the TES and the client is terminated by them post the deeming, this had the effect of breaking the tie between the TES and the placed worker thus collapsing the triangular relationship and leaving only the client as the sole employer of the placed workers.

4.2.2 *The Constitutional Court's views on the purposive interpretation of the deeming provision*

Having reached this conclusion, the CC proceeded to provide a comprehensive explanation of what it considers the purposive interpretation of the deeming provision. In doing this, the court considered the purpose in terms of which the 2014 amendments were introduced into the LRA. It noted that the purpose of the

[184] Ibid, para 63.
[185] Ibid, para 61.

amendments is two-fold. The first is to afford better protection to the vulnerable workforce earning below the BCEA threshold involved in the labour brokering practice. The second is to restrict temporary services to true temporary service, that is for a period not exceeding 3 months.[186]

The CC noted that the aim of the amendments is not to ban the operation of the TES practice, but to properly regulate it. In order to get a proper understanding of the purpose of the amendments, it had to rely on the Explanatory Memorandum of 2012 accompanying the Bill.[187] The CC also noted that the Explanatory Memorandum confirms that the main thrust of the amendments *viz* section 198 and 198A, are to restrict the employment of more vulnerable, lower paid workers by labour brokers to situations of genuine and relevant temporary work and to introduce measures to provide additional protection to workers employed by labour brokers.[188] The court held that the restriction of TES employment to only genuine temporary work affords the clarity and precision needed by the LRA to realise the constitutional rights to fair labour practice. It concluded that the purpose of section 198A is to close the gap in accountability between the client and the placed workers.[189]

Assign further argued, as they had done at the LC, that nowhere in the amendments does it suggest that the employment relationship between the TES and the placed employee is terminated once the deeming provision is triggered. Assign contended that the common law employment relationship between the TES and the placed workers continue even after section 198A(3)(*b*) no longer deem the

[186] Ibid, para 66.
[187] Ibid, para 75.
[188] Ibid, para 76.
[189] Ibid, para 70.

TES an employer.[190] Assign further argued that the effect of the sole employment interpretation is that it forces employees to be automatically dismissed by the TES and transferred to the client without their consent.[191] This, it was argued, has the effect that the placed workers could potentially be exposed to employment on less favourable terms and conditions of employment by the client in circumstances where the TES was providing more favourable employment conditions.[192] Assign further submitted that the dual employment interpretation gives the workers two employers against whom they can claim against, this provides greater protection to the workers than the sole employment interpretation currently favoured.[193]

The CC once again rejected this argument stating that from a practical consideration, the relationship between the TES and the placed workers is not one of employment. The TES's role in the triangular relationship is only related to human resources function which entails remuneration and discipline of the placed workers.[194] From a substantive perspective, it is the client that is the employer. Further to this, the deeming provision do not create a transfer of employment, but rather a change in the statutory attribution of responsibility as employer in the triangular relationship. The CC contended that there is no prejudice to the workers created by this because the employees continue to perform the work, they were performing prior the deeming in the same position.[195]

Lastly, the CC held that a dual employment interpretation will be prejudicial to the placed workers, this is so because the labour brokering practice was based on a

[190] Ibid, para 71.
[191] Ibid, para 75.
[192] Ibid, para 72.
[193] Ibid, para 78.
[194] Ibid, para 79.
[195] Ibid, para 76.

practice that served to obfuscate and protect the client from the obligations that flow to an employer in an employment relationship.[196] The purpose of the amendments was to prevent this and retaining the TES in the triangular relationship post the deeming may have the effect of frustrating the purpose of the amendments. The sole employment interpretation affords better protection to placed workers because it gives them certainty and security of employment and therefore better protects the rights of placed workers.[197]

The majority view of the CC per Ddlodlo AJ concluded that the absence of certainty threatens employees' ability to exercise their LRA rights and that uncertainty for employees may give rise to various challenges; such as not knowing which employer disciplinary code to comply with, confusions as to which employer dismissed an employee in cases of dismissals, confusions in cases of industrial action etc.[198] It is for these reasons that the CC concluded that the sole employment interpretation is the correct one as it is supported by both the language and context of the provision. This interpretation represented the majority view of the CC, thus setting the legal position on this issue in South African labour law.

4.3 *The Constitutional Court's Minority Judgment on the interpretation of the deeming provision- Dual Employment Interpretation*

However, Cachalia AJ, after having had the benefit of first reading the majority judgment as discussed above, held a different view as to what the intentions of the legislature was when it introduced the deeming provision. Cachalia AJ held the

[196] Ibid.
[197] Ibid, para 81 - 82.
[198] Ibid, para 81.

view that the dual employment interpretation is one that was intended by the legislature and is one that makes sense considering the purpose of the amendments.[199] The acting judge found that an interpretation that gives the vulnerable employees two employers is one that affords them better protection and this is in line with the purpose of section 198A(3)(*b*) which is to provide better protection to vulnerable lower paid employees, who continue working for a client beyond the three months.

According to Cachalia AJ, the deeming provision merely recognise the client as a second employer post the deeming and not as a replacement of the TES. If the object was to make the client the sole employer post the deeming, section 198A(3)(*b*)(i), instead of being drafted as a deeming provision, could have been drafted to specify that after the three months period, a placed employee cease to be employed by the TES and is deemed to be an employee of the client.[200] Therefore, the choice of wording adopted by the legislature is consistent with the argument that the dual employment was intended. Further to this, the purposive interpretation of the deeming provision also does not support the sole employment interpretation.[201] This was also admitted by the majority decision when it considered the joint and several liability provisions. These provisions render the client and TES jointly and severally liable for certain contraventions in respect of the placed workers. The vulnerable employee continues to enjoy this protection under the dual employment interpretation.

Furthermore, section 198(4A) and section 198A were introduced by the amendments at the same time and they both refer to the deeming provision. They

[199] Ibid, para 86.
[200] Ibid, para 92.
[201] Ibid, para 93.

expressly stipulate that if a client is deemed to be the employer of an employee in terms of the deeming provision, certain employer duties may be enforced against either or both the TES and the client.[202] The employees are entitled to bring a claim against either of the two employers, they have a choice. An award obtained against the other is enforceable against the other.[203] However, same cannot be said for the sole employment interpretation as these vulnerable workers lose this protection after the three months if the commercial contract between the TES and the client is not maintained. In other words, for them to enjoy this protection, they are at the mercy of the TES and the client. This is plainly at odds with the purpose of giving placed employees additional protection.

Cachalia AJ held that, considering the above, it is evident that the dual employment interpretation gives the employees added protection by allowing them to enforce their employment rights against two employers. This is the meaning of the joint and several liability provision, a different interpretation of these provisions would not make sense.[204] Cachalia AJ further held that, the majority decision's finding that section 198(4) creates a substantive and statutory form of joint and several liability different from joint or dual employment is incorrect and does not make sense. This is so because the provision expressly stipulate that the TES and the client are jointly and severally liable in the whole.[205]

Furthermore, section 198(4A) also creates substantive rights for the vulnerable employees in that it recognises that both the TES and the client assume joint obligation towards the employees as employers. There can be no other reason for

[202] Ibid, para 95.
[203] Ibid, para 98.
[204] Ibid, para 96.
[205] Ibid, para 98.

imposing liability upon both, and once this section is understood in this way, there is no room for attempting to explain away the difficulty posed by its language, as the majority judgement does, as merely conferring a practical solution to placed employees being barred from instituting proceedings if they proceed against the incorrect party.[206] On the sole employment interpretation, liability is imposed upon the TES without it having any obligations as an employer towards the employees. As this cannot be, it must thus follow that section 198(4A) supports the dual employment interpretation.[207]

4.3.1 ***The problems associated with the CC's majority view on the interpretation of the deeming provision***

Cachalia AJ also noted that the majority view's decision to prefer the sole employment interpretation creates various consequences. For example, the placed workers cease to be employees of the TES for purpose of the LRA post the deeming. This is so even though nowhere in the LRA or the LRAA is it stipulated that the deeming provision ends the relationship between the TES and the placed workers.[208] He noted that the contract of employment between the TES and the worker is supposed to remain post the deeming, though without the additional benefits of the LRA. Cachalia AJ further noted that in terms of the sole employment interpretation, the worker is also transferred to the client without their consent and without their accrued employment rights being transferred to the client as a new employer.[209] There is also no employment contract being entered between the client and the workers. The only protection to the employees is that

[206] Ibid, para 99.
[207] See note 92.
[208] Ibid, para 100.
[209] Ibid, para 100.

they are deemed indefinitely employed and are not treated less favourably than employees of the client doing the same or similar work.[210]

Cachalia AJ also noted that the above raises various questions, for example, on what terms will the workers be employed if the client has no employees doing same or similar work? And if they were employed on better terms by the TES compared to employees of the client doing similar work, will they be downgraded to those inferior terms? These possible consequences are obviously averse to the purpose of the LRAA which is to provide additional protection to vulnerable workers involved in the labour brokering practice.

The minority judgement noted that, instead of providing additional protection, the sole employment interpretation places these workers in even weaker positions in certain instances. The sole employment interpretation is therefore clearly wrong considering the purpose of the LRAA. It is evident that the LRAA has no transitional provisions that serve to transfer the workers to the client post the deeming. It is thus evident that the legislature intended for both employment relationships to continue in tandem.

The minority judgment also noted that a further consideration is the fact that the BCEA and the LRA had been aligned to speak to each other when the LRAA was introduced. Both these statutes define an employee and a temporary employment service in the same terms.[211] These statutes are aligned to reflect that the TES is the employer of the employees placed with the client.[212] The dual employment

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[210] Ibid, para 101.

[211] BCEA - “employee” means - (a) any person, excluding an independent contractor, who works for another person or for the State 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. See also section 213 of the LRA.

[212] Section 82 (1) of BCEA- "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

interpretation is consistent with this alignment whereas the sole employment interpretation disturbs it.[213] Therefore, the acting judge concluded that having considered the purpose, language and context of the deeming provision, and having considered the alignment with the BCEA, there is no room for ambiguity, the dual employment interpretation is the only interpretation that can reasonably be ascribed to the deeming provision.

The Acting Judge held that in his view the deeming provision creates a statutory employment relationship between the placed workers and the client in addition to the already existing employment relationship between the employee and the TES and not in substitution thereof.[214] He concluded that if it were up to him, he would have upheld the appeal.

temporary employment service, and the temporary employment service is that person's employer." See also section 198(2) of the LRA.

[213] *Assign Services v NUMSA* supra (n20), para 107.

[214] Ibid, para 109.

CHAPTER 5 – CONCLUSION

5.1. *Introduction*

Temporary Employment Services as a practice has been a part of the South African labour framework for many years, though not adequately regulated.[215] The lack of adequate regulation caused an outcry from organised labour after the Constitutional dispensation, challenging the constitutionality of this practice, comparing it to modern day slavery.[216] Union federations argued that this practice was a sham that served to exploit workers for the benefit of employers and thus called for the complete ban of this practice.[217]

The legislature, instead of completely banning the operation of the TES practice, introduced the LRAA, the purpose of which was to protect the vulnerable employees involved in this practice.[218] One of the controversial mechanisms introduced by the amendments was the deeming provision which deemed the client an employer after a period of three months has lapsed with an employee placed with it by a TES.[219] The CC has interpreted this provision to mean that after the three months period has lapsed, the client becomes the sole employer and the TES falls away from the relationship.[220]

The CC's interpretation of the deeming provision has been controversial as it has detrimental implications to the sustenance of the TES practice in South Africa.

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[215] LRA of 1956.
[216] http://www.cosatu.org.za/show.php?ID=10371 (Last accessed 28 November 2018).
[217] COSATU, FAWU, NEHAWU, NUM, NUMSA, SACCAWU; AND SATAWU "Submissions on Labour Brokering to the Parliament Portfolio Committee 26 August 2009", page 2.
[218] *Assign Services v Krost* supra (n15), para 5.17
[219] Section 198A(3)(b)(i) of the LRA.
[220] *Assign Services v NUMSA* supra (n20).

Consequently, the strict restriction of the operation of the TES practice also generally has detrimental implications on the economy.

5.2 *The implications of the Constitutional Court's decision on the triangular relationship*

The TES practice creates a triangular relationship between the parties involved. The one relationship is between the TES and the employees it places with the client. The TES is a statutory employer of the placed employees prior to the deeming provision being triggered.[221] Another relationship is the one between the TES and the client which is normally regulated by a SLA.[222] The SLA generally stipulates the terms and conditions in terms of which the TES will provide employees to the client to render temporary services in favour of the client in exchange for a fee payable by the client to the TES.[223] Another relationship that exists is the one between the client and the employees placed with it by the TES.[224]

The CC has concluded that the deeming provision should be interpreted to favour the sole employment interpretation, that is after the three months of placement, the client becomes alone the employer of the placed workers.[225] The CC has taken it a step further to say that the triggering of the deeming provision automatically excludes the TES from the equation thus causing the triangular relationship to collapse.[226] The CC was of the view that it would be pointless to retain the TES in the equation if the client has taken over all the rights and responsibilities of an

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[221] Section 198(2) of the LRA.
[222] Van Eck BPS *"Temporary employment services (Labour Brokers) in South Africa and Namibia*" (2010) 13(2) *PER* 107 pg.108.
[223] Ibid.
[224] Ibid.
[225] *Assign Services v NUMSA* supra (n20), para 61.
[226] Ibid, para 63.

employer in respect of the placed workers.[227] Therefore, once the deeming provision is triggered and the client takes over the responsibilities as an employer of the placed workers, the TES will no longer be considered as an employer of the placed workers even for purposes of the LRA.

The CC has held that, since nothing in the LRAA suggests that the triggering of the deeming provision ends the SLA between the TES and the client, if the TES and the client elects to retain the SLA post the deeming and that the TES continue remunerating the placed workers, this is the only manner in which the TES may still have some liability towards the placed workers.[228] The CC is of the view that the joint and several liability provision under the LRA survives post the deeming provision for as long as the SLA between the TES and the client remains in operation. In this instance, the TES is jointly and severally liable towards the placed employees as a non-employer. The CC was at pains to stress that the joint and several liability provisions is not to be interpreted to support the dual employment interpretation.[229]

The CC's decision is also that the placed employees must be placed on the same terms and conditions as employee of the client doing similar work, with the same employment benefits, the same prospects of internal growth and the same job security that follows and that their employment is indefinite.[230] However, the placed employee's benefits and length of service with the TES are not transferred to the client. The implication is that the employment relationship between the placed worker and the client starts on a clean slate. The implication of the CC's

[227] Ibid, para 79.
[228] Ibid, para, para 61.
[229] Ibid, para 58 – 61.
[230] Ibid, para 69.

decision on the triangular relationship therefore is that it automatically terminates the employment relationship contemplated by section 198(2) between the TES and the placed workers because after a period exceeding three months, the placed workers are no longer rendering a temporary service.

5.3 ***Should the Dual Employment Interpretation have been preferred?***

As Brassey J, in my view, correctly found, the deeming provision serves to augment the relationship by bringing in an additional employer for purposes of the LRA as oppose to replacing one employer for another.[231] This interpretation in my view provides a broader protection for job security for the placed workers as they now have an additional employer to bring a claim against in cases of unfair treatment.

By adding the client as an employer to the relationship, the deeming provision added additional protection to the placed workers. To my mind, this is in line with the purpose of the amendments as evident in the Explanatory Memorandum. That is to provide additional protection to the vulnerable employees. One would think that an interpretation that widens the scope of employment is one that brings better protection to the placed worker's jobs as opposed to an interpretation that forces an unwilling employer to be the sole employer of the placed workers.

Since the client is effectively forced by this interpretation to be an employer, there is a risk that after the deeming provision has been triggered, the placed workers could face retrenchment. Furthermore, if retrenched, the employees would not be entitled to any severance packages since they would have no continued service for more than a year as required in terms of section 41(2) of the BCEA in order to

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[231] *Assign Services v CCMA* supra (n17), para 12.

qualify for severance package in cases of dismissals for operational requirements.[232]

5.4 *Does the Constitutional Court's decision constitute a ban of the TES practice in South Africa?*

What is apparent from the decision of the CC is that the provisions of section 198A (1) and the deeming provision have been interpreted in a manner that has extremely restricted the use of temporary employment services in South Africa. The CC has said that, because section 198A(1) *inter alia* restricts the definition of 'temporary employment services' to services that are no longer than three months, any services procured beyond three months is not genuine temporary employment, and this is the reason why the client becomes the sole employer after the three months.[233] Temporary employment services have now been strictly restricted to services under three months.

Given the fact that the deeming provision have not been interpreted to bring to an end the SLA between the TES and its client, the only conceivable practical benefit to be enjoyed by clients from this arrangement is if they continue to use the TES for the administrative aspect of the relationship. Although the client takes over all the employer obligations under the LRA, it can delegate all the administrative aspects of the employment relationship to be conducted by the TES. The TES can continue paying the placed workers' salaries, managing their leave, performing the disciplinary functions etc, and in return the TES will continue to receive a fee. Because of the TES no longer being considered to have any employment

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[232] An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35.
[233] *Assign Services v NUMSA* supra (n20), para 66.

obligations and liability towards the placed employees, the fee received from the client is likely to be significantly low. Furthermore, if the SLA is still intact post the deeming provision, the TES and the client will remain jointly and severally liable under the joint and several liability provision.[234]

Considering the above, it is apparent that the CC's preference of the deeming provision has not banned the operation of the TES practice in the strict sense. The implication of the CC's decision is that it has restricted the use of labour brokering only to what it considers 'genuine temporary employment services'. However, from a practical consideration, it is difficult to consider how the TES practice will survive considering the limited and restricted manner in which it is now expected to operate.

The CC's decision and interpretation of the deeming provision has stripped the TES practice of almost all the benefits to the TES and the client that was normally associated with the practice. The client now assumes sole responsibility and liability towards the employees in respect of employee rights flowing from the LRA. Because of this, the client will no longer see a reason to pay the TES a lucrative fee even if it elects to continue utilising the TES post the deeming provision. This is so because the TES will only be performing administrative responsibilities towards the placed employees without any risks as to liabilities save for section 198(4) of the LRA.

Considering the above, my view is that it can be considered that the CC's decision has banned the use of TES in South Africa, though not completely. This is so because the TES practice is no longer conducted as it used to, and it no longer

[234] Section 198(4) the LRA.

serves the purpose for which the practice was intended. In fact, Dlodlo AJ representing the majority decision admitted that the preference of the sole employment interpretation may be tantamount to ban of the operation of the TES practice in South Africa[235]. I respectfully agree with Dlodlo AJ's sentiments in this regard.

[235] *Assign Services v NUMSA* supra (n20*)*, para 38.

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