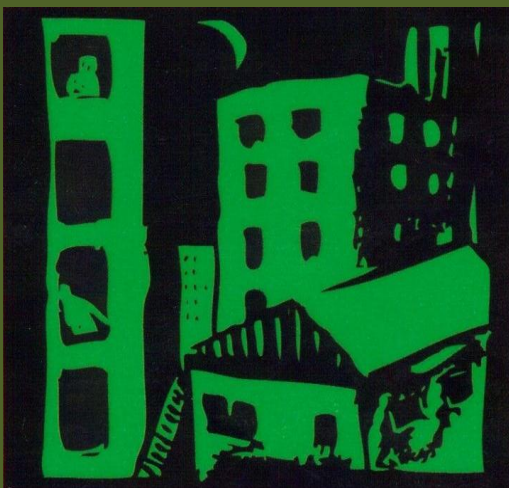


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# A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa

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## 1 INTRODUCTION

“He is the servant of one or the other, but not the servant of one and the other”.<sup>1</sup>

The increase in temporary employment services is an international phenomenon, indicative of the needs of a rapidly changing global village,<sup>2</sup>

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<sup>1</sup> *Laugher v Pointer* (1826) 5 B & C 547 at para 558, 208.

<sup>2</sup> Kalleberg A “Nonstandard employment relations: Part-time, temporary and contract work” (2000) 26 *Annual Review of Sociology* 341.

where industries expand and contract at increasing speed and modify their product offerings to match prevailing global demand. The use of labour brokers therefore forms part of a wider development, namely, the changing nature of work<sup>3</sup> and, in particular, the shift away from what was historically considered the standard form of employment, namely, full-time employment of an indefinite duration, under the control of the employer and mostly at the employer's workplace.<sup>4</sup>

These changes in employment relationship have raised concerns relating to the dynamics of labour broking in South Africa.<sup>5</sup> The use of labour brokers has had far-reaching implications for employees. This had led, amongst other things, to reduction of benefits, job insecurity,<sup>6</sup> unfair treatment and inadequate benefits, and other conditions of service.<sup>7</sup> The International Labour Organisation (ILO) has adopted the concept of "decent work"<sup>8</sup> which is captured in four objectives, namely, employment

<sup>3</sup> Theron J "Employment is not what it used to be" (2003) 24 *ILJ* 1247; See also "Employment intermediation for unskilled and low-skilled work seekers: Addressing inequality and economic marginalisation" (2008) at 5-14. Available at [www.tips.org.za](http://www.tips.org.za) (accessed 10 November 2013). Evans and Gibb assert that work is a key ingredient of social recognition, self-esteem, personal identity and participation in society. They argue that over long periods in the past, work has meant a stable, full-time job. Work was, to a large extent, related to the standard employment model under which a worker had one employer, worked full year and full-time without a pre-determined end date, mostly on the employer's premises, and was entitled to benefits either directly provided by the employer or through the social security system. Governments, through policies aimed at increasing deregulation of labour markets, have played their part in transforming the employment relationship and thus contributing to the emergence of precarious work over the past decades. Evans J & Gibb E "Moving from precarious employment to decent work" Global Union Research Network, Discussion Paper No.13 (2009) at 4. Available at <http://www.gurn.info/en/discussion-papers/no13-dec09-moving-from-precarious-employment-to-decent-work> (accessed 10 November 2013); See also Bendix S *Industrial relations in South Africa* (5<sup>th</sup> edn, Cape Town, Juta 2010); Thompson C "The changing nature of employment" (2003) 24 *Industrial Law Journal (SA)* 1793.

<sup>4</sup> Lund F "Social protection, citizenship and the employment relationship" Institute for Poverty, Land and Agrarian Studies (PLAAS), (University of the Western Cape, 2009) Working Paper No. 9, at 4-10. Available at <http://www.plaas.org.za/sites/default/files/publications-pdf/WP9.pdf> (accessed 10 November 2013).

<sup>5</sup> Casualisation and externalisation have therefore left many a worker outside the scope of protection offered by labour legislation.

<sup>6</sup> Greenberg S "Status report on Land and Agricultural Policy in South Africa" Institute for Poverty, Land and Agrarian Studies (PLAAS), University of the Western Cape, Research Report 40 (2010) at 16-18. Available at <http://www.plaas.org.za/plaas-publication/rr-40> <http://www.plaas.org.za/plaas-publication/rr-40> (accessed 10 November 2013).

<sup>7</sup> Van Eck B "Temporary employment services (labour brokers) in South Africa and Namibia" (2010) 13 (2) *Potchefstroom Electronic Journal (PER)* 111.

<sup>8</sup> "Decent work" has been described as a reformulation of longstanding ILO goals and an attempt to integrate these elements in a coherent whole to articulate a development agenda for the world of work. Decent work summarises the different dimensions of work, which include employment and its quality, rights at work, representation and voice, gender equality, social protection, the contribution of work to production and income of the individual as well as social integration and self-fulfilment. The goal of decent work should be to reflect the priorities of individual societies rather than a particular standard or target to be attained. See ILO "Decent work in a global economy: A research strategy" (Geneva: International Institute for Labour Studies 2006) at 2. Available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms\\_192590.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms_192590.pdf) (accessed 10 November 2013); Ghai D "Decent work: Concept and indicators" (2003) 142 *International Labour Review* 113 at 122-124.

opportunities, workers' rights, social protection and representation.<sup>9</sup> The concept of decent work could be used to provide impetus to the improvement of the precarious position of non-standard employees.<sup>10</sup>

The purposes of this article are threefold. First, it defines the notion of labour broking. Secondly, it examines the dynamics of and recent trends in labour broking in South Africa and its concomitant legal protection. Thirdly, the article looks at the legal reforms on regulating the labour broking industry.

## 2 WHO IS A LABOUR BROKER?

"Labour broking" is one of several terms describing work arrangements which do not fall under the traditional definition of employment. Other arrangements of this kind include casual workers, sub-contractors and daily labourers. "Atypical", "non-standard", or "marginal" are terms used to describe employees engaged, for instance, in part-time work, contract work, precarious work,<sup>11</sup> self-employment, or temporary, fixed-term, seasonal, casual, or piece-rate work, or to employees supplied by employment agencies, home employees and those employed in the informal economy.<sup>12</sup> These terms are used throughout the world but, because of variations in national law and practice, there are no internationally agreed definitions of these terms.

In South Africa, a labour broker or temporary employment service (TES) is "any person who, for reward, procures for or provides to a client other persons – (a) who renders services to, or perform work for, the client; and (b) who are remunerated by the temporary employment service".<sup>13</sup> In terms of the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA),<sup>14</sup> the TES, rather than the client, is the employer, unless the person procured is an independent contractor.

Research on national law and practice regarding the use of contract labour reveals consistent elements which must be present for a work arrangement to be a contract labour situation.<sup>15</sup> First, there should be a contractual arrangement under which a worker undertakes work for a person or organisation other than under a recognised

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<sup>9</sup> International Labour Conference Report XI "Decent work and the informal economy" 90<sup>th</sup> Session (2002) at 5-15. Available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf> (accessed 10 November 2013); See also ILO "Decent work" Report of the Director-General, 87<sup>th</sup> Session of the International Labour Conference (Geneva: International Labour Office 1999) at 4. Available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> (accessed 10 November 2013).

<sup>10</sup> Smit N & Fourie E "Perspectives on extending protection to atypical workers, including employees in the informal economy, in developing countries" (2009) 3 *Tydskrif vir die Suid-Afrikaanse Reg* 516.

<sup>11</sup> Ghai (2003).

<sup>12</sup> Fourie E "Non-standard workers: The South African context, international law and regulation by the European Union" (2008) 11 *PER* 110-111.

<sup>13</sup> Section 198(1) of the Labour Relations Act 66 of 1995 and s 82 of the Basic Conditions of Employment Act 75 of 1997.

<sup>14</sup> S 198 of the LRA, and s 1 of the BCEA.

<sup>15</sup> Forde C & Mackenzie R "Getting the mix right? The use of labour contract alternatives in UK construction" (2007) 36 *Personnel Review* 553-556.

contract of employment.<sup>16</sup> In other words, there is an agreement to perform work but the worker is not employed by the person for whom he or she performs the work.<sup>17</sup> Secondly, the Labour Appeal Court in *State Information Technology Agency (SITA) Pty Ltd v CCMA & others*,<sup>18</sup> with regard to the nature of the contract with a labour broker, when the client is the employer, held: “...when a court determines the question of an employment relationship, it must work with three primary criteria:

1. An employer’s right to supervision and control;
2. Whether the employee forms an integral part of the organisation with the employer; and
3. The extent to which the employee was economically dependent upon the employer.”

The ILO defines labour brokers as private employment agencies.<sup>19</sup> The generic understanding of a labour broker is that of a person or entity that employs employees but places them at the service of a third party who is the actual employer. Put differently, a labour broker connects the employee to the actual employer but remains an intermediary and continues to profit from the employment relationship which ensues between the worker and the actual employer.

A key characteristic of the relationship is the absence of a direct employment relationship between the labour broker and the employees concerned, although they are paid by the labour broker. By using a labour broker the actual employer can avoid responsibilities, such as providing employees with benefits, and avoid administrative tasks, such as deducting unemployment contributions.<sup>20</sup> Harvey notes that the broker, and not the client, is the employer, it is the broker that is the duty-bearer in relation to the employee’s employment rights.<sup>21</sup> He argues that the employee cannot exercise those rights against the client, even though it is the client who has control over the work and the workplace. Accordingly, a disconnect exists between the broker-employer and the

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<sup>16</sup> The Code of Good Practice: Who is an Employee issued in 2006 by NEDLAC in terms of the LRA, sets out guidelines for determining whether persons are employees. Section 56 provides: “[w]hether or not an individual supplied to a client by a temporary employment service is an employee of the client or an independent contractor must be determined by reference to the actual working relationship between the worker and the ‘client’ for whom the worker provides services or works. The relationship between the worker and the temporary employment service is relevant to the extent that it may give some indication of the relationship between the worker and the client. The relationship between the worker and the client must be assessed in the light of the normal criteria used to determine the existence of an employment relationship. Therefore, for example, it would be appropriate to examine factors such as the extent to which the client issues instructions to the worker or any other relevant factor. The presumption of employment is applicable to cases involving persons engaged by temporary employment services, if the employees earn less than the prescribed earnings threshold.”

<sup>17</sup> Bendix S *Industrial relations in South Africa* 4<sup>th</sup> ed (Cape Town: Juta 2001) at 128.

<sup>18</sup> (2008) 29 ILJ 607 (LAC) per Davis JA, Tlaletsi and Leeuw JJA concurring, at para 12.

<sup>19</sup> Convention on Private Employment Agencies 1997.

<sup>20</sup> McGregor M *et al Labour law rules* (Cape Town: Siber Ink 2012) at 24 – 25. For a detailed discussion of temporary employment services see Le Roux P “Labour brokers and non-standard forms of employment” 3 (2009) 19 *Contemporary Labour Law* 21-30; Le Roux PAK “Labour brokers and their employees” (2010) 19 (7) *Contemporary Labour Law* at 61-70.

<sup>21</sup> Harvey S “Labour brokers and workers’ rights: Can they co-exist in South Africa” (2011) 128 (1) *South African Law Journal* 100.

worker, on the one hand, and the client with its workplace, on the other, that prevents the worker from accessing key constitutional rights.

Another situation may arise whereby the labour broker contracts directly with individual employees or groups of individual employees to perform certain work for a fee and not for a wage. At one extreme, payment for work completed may take the form of piecework, where income is determined on a piece rate based on the number of completed units. In other instances, employees may request this form of commercial contract as it may lower their tax threshold. Here again there is no formal employment relationship between the parties concerned. Typically, these employees only service one client or user company, and the relationship is characterised as one of dependency rather than independence. Thus, while the form of the relationship may be one of independence and autonomy, as would be reflected in a commercial contract, in practice the relationship is characterised by the dependency of the worker on the labour broker, which is more indicative of an employment contract.

### 3 THE DYNAMICS OF LABOUR BROKING IN SOUTH AFRICA

One of the key aims of the post-apartheid labour legislation was to improve employment standards and extend coverage to vulnerable and marginalised workers.<sup>22</sup> Indeed, some observers have gone so far as to argue that the new labour legislation was generally 'labour friendly', it improved employment conditions for many workers, improved and codified organisational rights, extended protection to some workers previously excluded, and addressed discrimination and inequality in the labour market.<sup>23</sup> Nevertheless, the same cannot be said with regard to the atypical employees employed by labour brokers.

Atypical employees are very often vulnerable workers, earning a basic minimum wage and, suffering exploitation, and many casual workers are entitled to only partial protection.<sup>24</sup> In addition, the social protection afforded to employees in non-standard employment is significantly inferior compared to protection for employees in standard

<sup>22</sup> Clarke M "Ten years of labour market reform in South Africa: Real gains for workers" (2004) 38 (3) *Canadian Journal of African Studies* at 558; Barchiesi F "Wage labor, precarious employment, and social inclusion in the making of South Africa's post-apartheid transition" (2008) 51 (2) *African Studies Review* 119.

<sup>23</sup> Von Broembsen M "People want to work, yet most have to labour: Towards decent work in South African supply chains" (2012) 16 *Law, Democracy & Development* 1.

<sup>24</sup> Clarke (2004). Budget Vote Speech by the former Minister of Labour, Membathisi Mdladlana (MP), Parliament, Cape Town, 13 April 2010. Labour rights violations in the agriculture sector in South Africa are on the rise due to the use of unregulated labour contractors. Casualisation of farm employees causes a three-tier relationship with the farm worker, labour contractor and farmer as key players, but this relationship is not covered within the legal framework. Only a two-tier relationship is covered, and usually the farmer and labour contractor abide by the legal regulations, leaving the farm worker legally exposed. Farm employees without written contracts have no standard employee advantages. The most vulnerable are therefore pushed further into defenselessness, causing widespread concern over the use of unregulated labour contractors. See Van der Burg A *Going for broke: A case study of labour brokerage on fruit farms in Grabouw* (Stellenbosch: Centre for Rural Legal Studies 2008).

employment,<sup>25</sup> owing to the insecure nature of the employment and the lack of the social security arrangements associated with employment, such as, medical schemes and retirement provisions.<sup>26</sup> Commentators argue that, as a result of work restructuring against the backdrop of globalisation, the post-apartheid South African labour market can be divided into three zones<sup>27</sup> which they respectively call “core”, “non-core” and “periphery”. The “core zone” includes full-time employees in the formal sector; the “non-core zone”, which lies just outside of the “core zone”, includes outsourced, temporary, part-time and domestic workers; while employees in the informal sector and the unemployed are in the “periphery zone” which is at the outer edge.<sup>28</sup>

The increase in non-standard employment is understood in this schema as an expansion of the “non-core” zone (and shrinkage of the “core zone”) and marginalisation of employment (a shift of employment from “core zone” to “non-core” and from “non-core” to “periphery”). From this schema, what is depicted as problematic is the difference in terms of workers’ rights and protection, depending on the zone in which they are located. While employees in the “core zone” enjoy stable employment and relatively high wages, the jobs of “non-core” employees are generally unstable and low-waged and, although their rights as employees have improved on paper through labour law reforms, they seldom enjoy practical protection of their rights.

The increase in “non-core” employees is, in turn, a threat to the working conditions of “core” employees.<sup>29</sup> In such an understanding, the goal to be sought is an expansion of the protection and rights enjoyed by “core” employees to “non-core” and “periphery” employees and a reduction in the difference in levels of protection between the zones, rather than a deregulation of the labour market and a further erosion of the “core zone”.<sup>30</sup>

The use of labour brokers is regarded by many as a mechanism for exploitation and an obstacle to the goal of the creation of decent jobs.<sup>31</sup> It has eroded decent work and replaced the more secure traditional employment contract with an arrangement that involves a lower rate of pay with no benefits, no income security, remuneration based exclusively on a “completion of tasks basis” and fixed-term contracts.<sup>32</sup>

<sup>25</sup> Cohen T & Moodley L “Achieving decent work in South Africa” (2012) 15 (2) *PER* 320.

<sup>26</sup> Omomowo K “Atypical work and social protection in post-apartheid South Africa: Preliminary thoughts about social policy imperative” at 8 – 12. Available at [www.erd.eui.eu/media/2010](http://www.erd.eui.eu/media/2010) (accessed 10 November 2013).

<sup>27</sup> Karl V & Webster E “Wage restructuring and the crisis of social reproduction: A southern perspective” in Webster E & Von Holdt K (eds) *Beyond the apartheid workplace: Studies in transition* (Pietermaritzburg: University of KwaZulu-Natal Press 2005).

<sup>28</sup> Karl & Webster (2005).

<sup>29</sup> Karl & Webster (2005).

<sup>30</sup> Kumiko M “The changing nature of employment and the reform of labour and social security legislation in post-apartheid South Africa” (2008) at 4-10. Available at <https://ir.ide.go.jp> (accessed 10 November 2013).

<sup>31</sup> Le Roux (2009) at 21-22.

<sup>32</sup> Le Roux (2009); Department of Social Development Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present Protecting the Future. Draft

This position is further exacerbated by the on-going or indefinite nature of such arrangements, while the contracts are represented as temporary; hence the phenomenon of the worker referred to as a “permanent temp”. This enables employers to retain experienced workers on a long-term basis without enabling them to gain the full protection of their rights.

#### 4 THE LAW ON LABOUR BROKERS IN SOUTH AFRICA

The objective of labour law is commonly understood as being grounded in securing justice for employees in their working lives. We begin with the assumption that the employment or work relationship is an unequal one.<sup>33</sup> It is a relationship in which the employer has much greater power than the employees, and thus employees are disadvantaged in their capacity to extract a fair bargain for their labour. Labour law is seen as a corrective to this disparity. Kahn-Freund has argued:

The main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.<sup>34</sup>

The reality of the labour market in South Africa is characterised by extensive use of contingent work. In this case “contingent” means contingent on the immediate needs of an employer. As a result employees find themselves trapped in a precarious employment relationship.<sup>35</sup>

For the purposes of enforcing the rights of employees employed by labour brokers, the LRA holds both the labour broker and the client jointly and severally liable for any contravention of a collective bargaining agreement,<sup>36</sup> an arbitration award, the BCEA,<sup>37</sup>

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Consolidated Report (2002). Available at [www.welfare.gov.za/documents/2002/May/pdf](http://www.welfare.gov.za/documents/2002/May/pdf) (accessed 10 November 2013).

<sup>33</sup> Bendix (2001).

<sup>34</sup> Kahn-Freund O *Labour and the law* (3rd edn, London, Stevens & Sons Ltd, 1983) 18; For further reading in this regard see Hepple B (ed) *The making of labour law in Europe* (London: Mansell Publishing 1986); Dukes R “Constitutionalizing employment relations: Sinzheimer, Kahn-Freund, and the role of labour law” (2008) 35 *Journal of Law and Society* 341; Davies A *Perspectives on labour law* (Cambridge: Cambridge University Press 2004).

<sup>35</sup> Van Der Burg (2008).

<sup>36</sup> Ncube M *The labour market and decent work agenda in Southern Africa: Evidence and challenges* Department of Economics, University of Fort Hare and Human Sciences Research Council, ILO Sub-Regional Office for Southern Africa, Harare, Zimbabwe (2008) at 1-13. Available at [http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis\\_ababa/---sro\\_harare/documents/publication/wcms\\_228798.pdf](http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro_harare/documents/publication/wcms_228798.pdf) (accessed 10 November 2013).

<sup>37</sup> S 198(4). It has to be noted that s 198(4) was introduced as an attempt on the part of the legislature to ensure protection of employees engaged in a TES employment relationship. However, this arrangement gives limited protection to employees. The Labour Court and the CCMA do not even have jurisdiction to enforce the joint and several liability of the client (not being an employer for the purposes of the applicable legislation). The consequences of the provisions of section 198(4) in their existing form is that only the labour broker is responsible for any liability arising from infringements of the employee's right not to be unfairly dismissed or not to be subjected to unfair labour practices. Moreover, for the purposes of the sections regulating organisational rights and collective bargaining, only the labour broker is considered to be the employer. For further reading, see Benjamin P “Decent work and non-standard employees: options for legislative reform in South Africa”, prepared for the



and a wage determination. The BCEA mimics the provisions of section 198 of the LRA, the sole addition being that the labour broker and the client are also liable for failure to comply with a sectoral determination.<sup>38</sup> It is submitted that the new developments introduced by the Labour Relations Amendment Act 6 of 2014, will bring the needed protection to atypical employees in South Africa. In terms of the amendments to the LRA, protection is afforded to three categories of non-standard employees, namely, employees placed by a TES, employees engaged on fixed-term contracts, and part-time employees. Sections 198A, 198B and 198C extend protection to employees earning under the earnings threshold as provided for in section 6(3) of the BCEA.<sup>39</sup> The majority of these protections are only extended to employees after they have been in employment for six months.

Section 198 continues to apply to all employees. It retains the general provisions that a TES is the employer of persons whom it employs and pays to work for a client, and that a TES and its client are jointly and severally liable for specified contraventions of employment laws. The main aim of the amendments is to restrict the employment of vulnerable, lower-paid workers by a TES to situations of genuine and relevant “temporary work”, and to introduce other measures to protect workers employed by a TES. The amendments to the LRA seek to clarify provisions relating to a TES by providing for the following:

- a. An employee bringing a claim for which a TES and client are jointly and severally liable may institute proceedings against either the TES or the client or both and may enforce any order or award made against the TES or client against either of them;
- b. A labour inspector acting in terms of the BCEA may secure and enforce compliance against the TES or the client, as if it were the employer, or both;
- c. A TES may not employ an employee on terms and conditions of employment which are not permitted by the LRA, any employment law, sectoral determination or collective agreement concluded in a bargaining council that is applicable to a client for whom the employee works;
- d. The Labour Court or an arbitrator may now rule on whether a contract between a TES and a client complies with the Act, and make an appropriate award;
- e. A TES must be registered to conduct business, but the fact that it is not registered is no defence to any claim instituted in terms of section 198A; and
- f. A TES must provide an employee it assigns to a client with written particulars of employment that comply with section 29 of the BCEA, when the employee commences employment.

Section 198A further addresses the problem of “permanent temps” by providing that labour broker employees will be subject to a maximum period of three months placement with a client, after which those employees will be deemed to be permanent employees of the labour broker’s client. However, such additional protections are limited to non-standard employees earning below an annual threshold published pursuant to the BCEA. There are important exclusions in section 198A which need to be

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Department of Labour at NEDLAC in 2009. Available at [http://www.sabinetlaw.co.za/labour/articles/discussion-documents-proposed-new-labour-legislation-parliamentary-select-committee-\(accessed 10 November 2013\)](http://www.sabinetlaw.co.za/labour/articles/discussion-documents-proposed-new-labour-legislation-parliamentary-select-committee-(accessed%2010%20November%202013)).

<sup>38</sup> S 82 of the BCEA.

<sup>39</sup> The Minister of Labour, Mildred Oliphant, acting in accordance with s 6(3) of the BCEA, increased the annual earnings threshold to R205 433.30 from the previous figure of R193 805.00 on 1 July 2014 (see *GG* No 36620 of 1 July 2013).



noted. For that reason it is important to provide this section in detail before discussing its interpretation and exclusions. For the purpose of employees earning below threshold section 198A reads as follows:

- (1) In this section, a “temporary service” means work for a client by an employee-
  - (a) for a period not exceeding three months;
  - (b) as a substitute for an employee of the client who is temporarily absent; or
  - (c) in 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).
- (2) This section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.
- (3) For the purposes of this Act, an employee -
  - (a) performing a temporary service for the client is the employee of the temporary employment services in terms of section 198 (2); and
  - (b) not performing such temporary service for the client is deemed to be the employee of that client and the client is deemed to be the employer; and
- (4) The termination by the temporary employment services of an employee’s service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3) (b) or because the employee exercised a right in terms of this Act, is a dismissal.
- (5) 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.
- (6) The Minister must by notice in the Government Gazette invite representations from the public on which categories of work should be deemed to be temporary service by notice issued by the Minister in terms of subsection (1) (c).
- (7) The Minister must consult with NEDLAC before publishing a notice or a provision in a sectoral determination contemplated in subsection (1) (c).
- (8) If there is conflict between a collective agreement concluded in a bargaining council, a sectoral determination or a notice by the Minister contemplated in subsection (1) (c) -
  - (a) the collective agreement takes precedence over a sectoral determination or notice; and
  - (b) the notice takes precedence over the sectoral determination.

In light of the above, it becomes clear that section 198A can be interpreted in two ways. First, in terms of s198A (3) (b), the employee becomes an employee of the client and ceases to be an employee of the TES. Secondly, the employee remains an employee of the TES but is also deemed to be an employee of the client.

The dilemma of interpreting this section stems from the fact that the explanation found in the Memorandum of Objectives and a proper application of the principles of

interpretation of statutes leads to different results.<sup>40</sup> In our submission, a purposive interpretation shows that section 198A should be interpreted to give effect to the notion that the employee remains an employee of the TES but is also deemed to be an employee of the client, is a correct one.

#### 4.1 Joint and several liability in cases involving dismissals

The liability of the labour broker for dismissal of an employee is based on the notion of joint and several liability. The concept of joint and several liability does not extend to unfair dismissal cases. The worker has an employment relationship with the labour broker, who is the legal but nominal employer, and an uncertain work relationship that is not of an employment nature nor of a commercial nature with the real employer, who is the dominant entity in this arrangement.<sup>41</sup> The identity of the real employer is therefore hidden in such a way that the worker has almost no legal grounds to enforce any of the labour rights guaranteed by the Constitution and the labour laws.<sup>42</sup>

The case of *LAD Brokers (Pty) Limited v Robert Mandla*<sup>43</sup> illustrates this predicament. In this case a United Kingdom based company with no ties to South Africa sought the services of two employees to work on an off-shore drilling platform located off Cape Town. The company employed the employees through a labour broker, who facilitated the employment and the payment of the salaries and then rendered monthly invoices to the company including its fee. The employees entered into contracts with the labour broker entitled "Independent Contractor - Contracting Agreement." The employees worked on the drilling rig under the control of the UK company until such time as the company gave notice to the employees, terminating the agreement.

One of the employees then instituted an action against the labour broker. At the Labour Court and Labour Appeal Court, the broker tried to argue that the employee was an independent contractor. The Court found that the broker was the employer and that the employee was not an independent contractor. In establishing who the employer was, the Court found the UK company to have been the employer but that section 198 of the LRA placed an obligation on the broker who paid the remuneration to be held as liable as the employer. The case highlighted the situation of two alternative employers both denying liability, indicating the lack of clarity which exists within the current labour framework and which, unless corrected, will continue to cause mistrust between contracting parties involved in such relationships.

In this connection the more recent judgment of the Labour Court in *Simon Nape v INTCS Corporate Solutions (Pty) Ltd* (Nape) is also worth noting.<sup>44</sup> The judgment was concerned with the right of the labour broker to rely on section 189 of the LRA to justify

<sup>40</sup> *Board of Executors Ltd v McCafferty* (1997) 7 BLLR 835 (LAC).

<sup>41</sup> Grogan J *Workplace law* (10<sup>th</sup> ed Cape Town: Juta 2009) at 24-25.

<sup>42</sup> This is so despite the fact that, as pointed out above, s 198(4) of the LRA states that the labour broker and the client are jointly and severally liable for any contravention of a collective bargaining arrangement.

<sup>43</sup> 2002(6) SA 43 (LAC).

<sup>44</sup> *Simon Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 ILJ 2120 (LC).

the termination of the employment relationship for operational reasons after the client insisted that the employee be removed from its premises.<sup>45</sup> In this case Nape committed an act of misconduct (he sent an email containing offensive material from the client's premises) and the client, Nissan (Pty) Ltd, invoking its contractual rights, demanded that the labour broker remove Nape from its premises.<sup>46</sup> He was suspended and, after a disciplinary hearing, a final written warning was given. He agreed to the written warning, but Nissan was not satisfied and refused to allow him access to its premises. The labour broker was obliged, in terms of its contractual relationship with Nissan, to accede to Nissan's demands, and then invoked the provisions of section 189 of the LRA. After a consultation, Nape was retrenched by the labour broker on the basis that it did not have employment for him. The labour broker contended that it acted lawfully in terms of its contractual arrangement with Nissan.

The Labour Court held that, even though labour broking arrangements are legally permissible, this does not allow the labour broker and its client to agree to a term entitling the client to arbitrarily require the removal of an employee from the latter's premises. A provision to this effect, it was held, "was unlawful and against public policy as it took no account of the right of the employee not to be unfairly dismissed".<sup>47</sup> The Court held further that the labour broker was not powerless. It could resist the client's unlawful demand by undertaking the following:

- The labour broker is entitled to approach a court of law to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed;
- The labour broker is also entitled to resist any attempt by the client to enforce a contractual provision which is against public policy;
- If a court were to reinstate an employee into the employ of the labour broker, the labour broker may enforce such an order against the client to give effect to the employee's rights to fair labour practices;
- The labour broker could in such a case approach either the High Court or the Labour Court for appropriate relief.<sup>48</sup>

It is evident from the above case that the Court recognises and acknowledges the lawful existence of labour brokers. The case also served to clarify several important points regarding the position of labour broker employees dismissed at the instance of a client. However, the judgment did not and could not give the employee the right to proceed directly against the client of the labour broker in a dispute of this nature, because for that to happen the constitutionality of section 198 of the LRA, which denies that right to an employee in unfair dismissal cases, would have to be attacked.

Similarly, labour brokers may not contract with employees for the automatic termination of their employment contracts on expiry of the contract between the labour

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<sup>45</sup> For detailed discussion of the *Nape* case see Le Roux P "Temporary employment services" (2010) 19(11) *Contemporary Labour Law* 105.

<sup>46</sup> *Nape* case at para 2.2.

<sup>47</sup> At para 85. Emphasis added.

<sup>48</sup> *Nape* at para 79.

broker and the client,<sup>49</sup> In *SA Post Office Limited v Mampeule*,<sup>50</sup> the Labour Appeal Court endorsed the view that parties may not contract out of the dismissal requirements of the LRA, and that in such cases the employer must prove that the termination clause was fairly triggered. To ensure that all loopholes are covered and labour brokers' clients are held accountable for their involvement in employment relationships, it appears that the joint liability of labour brokers and their clients for unfair dismissal in circumstances where the client is involved may be an option to be explored in South Africa.

#### **4.2 The impact of the Employment Services Act 4 of 2014 on non-standard workers**

Parliament has enacted the Employment Services Act (ESA). The stated purposes in section 2(1) of the Act are to promote the employment of citizens, to improve access to the labour market for work seekers, to provide opportunities for new entrants to the labour market to gain work experience, to improve employment prospects for persons with disabilities, to improve employment prospects of work seekers and employees facing retrenchment, to facilitate access by work seekers to training, and to promote employment growth and workplace productivity. To these ends it provides for

- public employment services;
- the registration and regulation of private employment agencies;
- the establishment of schemes to promote the employment of young jobseekers and other vulnerable persons;
- schemes to assist employees in enterprises in distress to retain employment;
- the regulation of the employment of foreign nationals; and
- the establishment of the Employment Services Board, Productivity South Africa and Protected Employment Enterprises.

Public employment services (PES), which must provide work to South African citizens free of charge (in contrast to private employment agencies or TESs, which both must be licensed and could charge employers a fee for providing similar services). The PES will:

- match work-seekers with available work opportunities;
- facilitate the placement of work seekers with employers;
- advise workers on access to social security benefits;
- assist vulnerable work-seekers (i.e. disabled, retrenched and seasonal workers, employees facing retrenchment, young people, new entrants into the labour market and members of rural communities);

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<sup>49</sup> *Mahlamu v CCMA and others* (2011) 4 BLLR 381 (LC).

<sup>50</sup> (2009) 30 ILJ 664 (LC).

- facilitate the exchange of information among employers and work-seekers with employers having to register existing or new vacancies; and
- see to career counselling and assessment of work-seekers to determine suitability.

The Act also reiterates that an employer may not employ a foreign national prior to such person obtaining a work permit issued in terms of the Immigration Act.<sup>51</sup> Procedures for employers to follow if they have to employ a foreign worker are outlined and non-compliance with the latter or abusing foreign qualifying workers are penalised. If an employee works without a permit, however, he/she will be protected by the LRA and will be able to enforce the contract of employment against the employer.

## 6 CONCLUSION

It is submitted that the amendments to the LRA are to be welcomed in three respects. First, the amendments to the LRA have brought the needed protection with regard to regulating temporary employment services in South Africa. Secondly, these amendments by their nature seek to extend legal protection to non-standard workers. Thirdly, since employment is the primary channel through which the benefits of growth can be widely shared, securing decent work for employees engaged in labour broking represents an important challenge on the road to achievement of the Millennium Development Goals.<sup>52</sup> The goal is not just the creation of jobs, but the creation of jobs of acceptable quality.

The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adapting to rapidly changing circumstances in a highly competitive global market.<sup>53</sup> The recent developments address the realities faced by a large portion of the workforce who are vulnerable, and engaged in low-paying contracts with limited access to workplace entitlements, whether in the form of medical aid, pensions or services, such as training. The proposed amendments to the LRA and other legislative reforms discussed in this article will go a long way to addressing the plight of workers engaged in TESSs.

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<sup>51</sup> See Immigration Amendment Act 19 of 2004.

<sup>52</sup> "Policy brief: Millennium Development Goal 1, Accelerating progress on decent work for all: Building on a foundation of human rights." (New York, June 2010). The first of the Millennium Development Goals (MDG 1) is to eradicate extreme poverty and hunger. There are three targets currently associated with MDG 1: (a) To halve the proportion of people with an income below USD 1 a day between 1990 and 2015; (b) To achieve full and productive employment and decent work for all, including women and young people; (c) To halve the proportion of people who suffer from hunger between 1990 and 2015. For further reading on Millennium Development Goals, see Chitiga-Mabugu M & Tsoanamatsie N "The relevance and possibility of attaining the Millennium Development Goals by 2015 in South Africa" Policy brief, Human Sciences Research Council (July 2013). Available at [http://www.hsrc.ac.za/uploads/pageContent/4187/01PB\\_MDG.pdf](http://www.hsrc.ac.za/uploads/pageContent/4187/01PB_MDG.pdf) (accessed 10 November 2013).

<sup>53</sup> Somavia J "Decent work for all in a global economy: An ILO perspective." Submission by Director - General, International Labour Office, to the Third WTO Ministerial Conference in Seattle 30 November - 3 December 1999. Available at <http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/seattle.htm> (accessed 10 November 2013).