

The Impact of Temporary Employment Services on Employees' Fundamental Rights and Fair Labour Practices: Assessing the Effectiveness of Section 198A of the *Labour Relations Act* 66 of 1995



Online ISSN
1727-3781

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Date Submitted

13 August 2024

Date Revised

13 October 2025

Date Accepted

13 October 2025

Date Published

31 October 2025

Editor

Prof Mitzi Wiese

Journal Editor

Prof Wian Erlank

How to cite this contribution

Mello P "The Impact of Temporary Employment Services on Employees' Fundamental Rights and Fair Labour Practices: Assessing the Effectiveness of Section 198A of the *Labour Relations Act* 66 of 1995" *PER / PELJ* 2025(28) - DOI <http://dx.doi.org/10.17159/1727-3781/2025/v28i0a19871>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2025/v28i0a19871>

Abstract

This article examines the regulatory landscape governing temporary employment services (TES) in South Africa, with a focus on job security and the protection of fundamental labour rights. Over the years, the regulation of TES has been problematic, especially with regard to exercising fundamental rights and the right to fair labour practices. Despite legal regulation, TES continue to raise concerns about employees' exploitation and job security. Using a doctrinal and qualitative research methodology, this article explores the vulnerability of TES employees and the complexities inherent in triangular employment relationships. It interrogates constitutional issues, employer accountability and fairness in labour practices in light of landmark decisions like *Nape* and *Assign Services*.

While there is a recognised need for labour broking relationships, the research underscores persistent concerns surrounding their impact on workers, particularly those earning below the earnings threshold. The article highlights the difficulties of preserving the fundamental rights of and fair labour practices for TES employees. The complexity of the TES relationship is illustrated by means of case law on unfair dismissals and unfair labour practice disputes. The article concludes by making recommendations to bolster the protection of TES employees and to reinforce equitable labour standards.

Keywords

Labour brokers; temporary employment services; triangular employment relationships; fair labour practices; fundamental rights; section 198A of *LRA*.

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1 Introduction

This article examines the regulation of temporary employment services (TES) in South Africa and asks whether employees in this form of non-standard work can exercise their fundamental labour rights. The problem is that the triangular relationship between TES, the client and employees often creates uncertainty about who the actual employer is, which can weaken the protection of employees' rights.

The *Labour Relations Act* 66 of 1995 (*LRA*) defines an "employee" as any person, excluding an independent contractor, who works for another in exchange for remuneration.¹ A TES is defined as any person who, for reward, provides employees to a client who performs work for the client but is remunerated by the TES. This creates a tripartite relationship: the TES contracts with the employees, and the TES contracts with the client, but no direct employment contract exists between employees and clients.²

Section 23(1) of the *Constitution* guarantees everyone the right to fair labour practices.³ In *Kyle v CCMA*⁴ the court confirmed that this right extends to all employees to ensure dignity, fairness and respect in the workplace. Importantly, the *Constitution* is the supreme law, meaning any law or conduct inconsistent with it is invalid.

Despite this protection, TES employees face challenges such as vulnerability to unfair labour practices, unfair dismissals, difficulty in exercising the right to freedom of association, and unequal treatment. This means that TES employees may not be able to exercise and perform their labour rights as contained in section 23 of the *Constitution*.⁵

The purpose of this article is to assess whether employees employed under TES are adequately exercising their fundamental rights and fair labour practices. It considers the legislative framework, constitutional principles and case law to evaluate the extent to which the *LRA* protects TES employees and to highlight the challenges that continue to arise in practice.

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¹ Section 213 of the *Labour Relations Act* 66 of 1996 (the *LRA*).

² Section 198A of the *LRA*.

³ Section 23 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

⁴ *Kylie v Commission for Conciliation Mediation and Arbitration* 2010 7 BLLR 705 (LAC) para 40.

⁵ Ntuli *Legal Framework for Employees* 50.

2 The role of international labour standards in temporary employment services

The protection of workers employed through TES has been a long-standing concern in labour law. The challenge arises because TES employees often fall outside the scope of traditional employment relationships, which makes it difficult for them to exercise their fundamental rights.⁶ This problem is particularly serious in South Africa, where labour brokers often deny TES employees access to collective bargaining and other essential protections.

The International Labour Organization (ILO) has adopted several conventions that provide a framework for safeguarding all workers, including those in non-standard employment. *Convention 87* of 1948 guarantees freedom of association and the right of workers, without distinction, to organise. *Convention 98* of 1949 further secures the right to collective bargaining, while *Conventions 100* (equal remuneration) and *111* (elimination of discrimination) address equality in the workplace.⁷ *Conventions 29* and *105* abolish forced labour, and *Conventions 138* and *182* prohibit child labour.⁸ Together these instruments establish a universal standard of protection that is not limited to permanent or direct employees but extends to all categories of workers, including those placed by TES. South Africa has ratified and adopted these conventions, which means it is bound to exercise and enforce the provisions of these conventions. These conventions support labour brokers' protection and call for equal treatment in the workplace.

Despite these protections and ratifications, TES employees in South Africa face unique challenges in realising their rights under the provisions of these conventions.⁹ Labour brokers, who act as intermediaries, often weaken employees' ability to organise and bargain collectively. This undermines the effectiveness of *Conventions 87* and *98*, which are central to ensuring fair labour practices.¹⁰ The difficulty lies in the triangular structure of TES, where the employment relationship is fragmented between the worker, the agency, and the client company. As a result, the worker's entitlement to ILO rights becomes limited in practice even though it is guaranteed in principle.¹¹

⁶ See COSATU Labour Brokers 2019 <http://www.cosatu.org.za/show.php>.

⁷ *Freedom of Association and Protection of the Right to Organise Convention 87* of 1948 and *Right to Organise and the Collective Bargaining Convention 98* of 1949.

⁸ *The Forced Labour Convention 29* of 1930 and the *Abolition of Forced Labour Convention 105* of 1957 (ratified by South Africa on 26 May 1994).

⁹ Nkhumise 2016 LDD 120-122.

¹⁰ *Freedom of Association and Protection of the Right to Organise Convention 87* of 1948 and *Right to Organise and the Collective Bargaining Convention 98* of 1949.

¹¹ *Freedom of Association and Protection of the Right to Organise Convention 87* of 1948 and *Right to Organise and the Collective Bargaining Convention 98* of 1949.

The *Private Employment Agencies Convention* 181 of 1997 directly addresses this issue by regulating agency work.¹² While it legitimises and protects the role of labour brokers to promote labour market flexibility, it also places clear obligations on them to respect workers' fundamental rights, including freedom of association and collective bargaining.¹³ In South Africa these international standards are upheld by section 23 of the *Constitution*, which enshrines the right to fair labour practices, and by the *LRA*.¹⁴ This legal framework highlights that TES employees are not excluded from ILO protections but rather should be equally entitled to exercise them within the triangular employment relationship.

3 The challenges faced by TES employees in a triangular relationship

TES employees often suffer from unstable working conditions where job security is limited, hours are irregular and there is a constant risk of termination.¹⁵ Such insecurity undermines the right to fair labour practices guaranteed by section 23 of the *Constitution*. The following are some challenges that are faced by TES employees, which violate their fundamental rights and their right to fair labour practices.

3.1 Legal ambiguity and lack of accountability

A point of weakness of TES is the uncertainty surrounding the identity of the employer. In terms of section 198(1) of the *LRA*, the TES is deemed to be the employer, even though the worker is supervised, integrated and controlled by the client.¹⁶ This "legal fiction" creates accountability gaps. Under section 198(2), the client cannot be held liable for unfair dismissal, unfair labour practices or unfair discrimination.¹⁷ As a result, TES workers are often left without an effective remedy when their rights are violated.¹⁸

3.2 Collective bargaining challenges

TES workers also face problems in exercising collective bargaining rights. In South Africa, trade unions typically organise within a defined workplace, usually the employer's premises.¹⁹ TES employees, however, work at client sites, often dispersed across multiple locations, making it difficult for unions to organise them as a collective. This undermines the right to organise and

¹² *Private Employment Agencies Convention* 181 of 1997.

¹³ *Private Employment Agencies Convention* 181 of 1997.

¹⁴ Section 23 of the *Constitution*.

¹⁵ Grogan 2021 *Yearbook of South African Law* 765-853.

¹⁶ Tshoose and Tsewedi 2014 *LDD* 340.

¹⁷ Section 198A of the *LRA*.

¹⁸ Grogan 2021 *Yearbook of South African Law* 765-853.

¹⁹ Ciliwe *Evaluation of the Amended Temporary Employment Services Provisions* 32-35.

bargain collectively protected by ILO *Conventions* 87 and 98 and weakens the bargaining power of one of the most vulnerable groups of workers in the labour market.²⁰

3.3 Discrimination and unfair treatment

The *Employment Equity Act* 55 of 1998 (*EEA*) prohibits unfair discrimination on grounds such as race, gender and pregnancy.²¹ However, in practice TES employees remain exposed to discriminatory practices within client workplaces. For example, a client may instruct a TES to recruit workers of a certain race or to exclude pregnant women, and the TES complies.²² Because accountability is not clearly shared between the broker and the client, workers are left without a clear remedy of redress. This contradicts both the *EEA* and international labour standards.²³

3.4 Enforcement gaps

Although South Africa has ratified key ILO conventions and enshrined labour rights in domestic law, the fragmented structure of TES employment makes enforcement difficult. Section 198A of the *LRA* provides some additional protection for vulnerable employees, but it does not fully resolve questions of liability or provide effective remedies for discrimination, exploitation or unfair dismissal.²⁴ This gap undermines the protective purpose of both domestic statutes and international standards such as the *Private Employment Agencies Convention* 181 of 1997,²⁵ which requires that agency workers' rights not be restricted.²⁶

The above challenges are evident in various cases, for example in *Sindane v Prestige Cleaning Services*, where Mr Sindane began working as a cleaner for Prestige Cleaning Services (Prestige) in June 2002. His employment was terminated in April 2007.²⁷ His dismissal was due to operational concerns. Prestige argued that there had been no dismissal because the terms of Mr Sindane's employment automatically ended when Prestige's client's cleaning contract was decreased. Since the client no longer required Mr Sindane's services, the contract between Prestige and the client was reduced.²⁸

²⁰ Ciliwe *Evaluation of the Amended Temporary Employment Services Provisions* 33-36.

²¹ Section 6 of the *Employment Equity Act* 55 of 1998 (the *EEA*).

²² Van Staden and Van Eck 2018 *SA Merc LJ* 419.

²³ Van Staden and Van Eck 2018 *SA Merc LJ* 419.

²⁴ Section 198A of the *LRA*.

²⁵ Nkhumise 2016 *LDD* 120-122.

²⁶ *Private Employment Agencies Convention* 181 of 1997.

²⁷ *Sindane v Prestige Cleaning Services* 2010 31 *ILJ* 733 (LC) paras 4-5.

²⁸ *Sindane v Prestige Cleaning Services* 2010 31 *ILJ* 733 (LC) paras 4-5.

Prestige brought up the issue with its client, but it was unsuccessful. Shortly after, Mr Sindane received a notice terminating his employment contract due to Prestige's client contract being reduced. His contract would expire at the end of April 2007, according to a letter dated 1 April 2007.²⁹ The court noted that employment contracts may be terminated in several ways that do not constitute "dismissals" as defined in the *LRA*. These include the expiration of a fixed-term contract after the passage of a specified time or on the occurrence of a specified event. In such cases the cause of the termination is not an act by the employer, unless the employer frustrates a reasonable expectation that the contract will be renewed.³⁰

In *Old Mutual Life Assurance Co SA Ltd v Gumbi*, the Supreme Court of Appeal held that the constitutional right to fair labour practices as guaranteed in section 23 had been embedded in the common law employment contract. This development means that an employee now enjoys a right to a pre-hearing dismissal hearing.³¹ Section 23(1) of the *Constitution* requires employers to always treat employees fairly. There is no collective bargaining process between TES employees and the employer. This serves as a crucial denial of a fundamental right, because meaningful associations are the foundation of humanity.³²

In *Affordable Medicines Trust v Minister of Health*, Ngcobo J observed that one's work is part of one's identity and constitutes one's dignity.³³ There is a relationship between work and the human personality. The Constitutional Court cited the *Barkhuizen v Napier* decision of the Constitutional Court, where the court concluded that public policy as defined by the *Constitution* would prohibit the implementation of a contractual provision if doing so would be unreasonable or unfair.³⁴ Therefore, public policy recognises the need for basic justice to be upheld between contracting parties while also supporting the freedom of contract. The court further held that the principles underlying our constitutional democracy, as articulated by the provisions of the Bill of Rights, must now be considered when determining what constitutes public policy and whether a clause in a contract contravenes it. Therefore, a clause that conflicts with the principles outlined in our *Constitution* is against public policy and is therefore unenforceable.³⁵

The court went one step further and ruled that everyone, not just employees, has a constitutional right to fair labour practices. Therefore, the client is still required to refrain from endangering an employee's right to fair labour

²⁹ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) paras 4-5.

³⁰ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) paras 7-9.

³¹ *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 5 SA 552 (SCA) paras 5-8.

³² Benjamin "Persistence of Unfree Labour" 118-142.

³³ *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 59.

³⁴ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC).

³⁵ *SAMA v McKenzie* 2010 3 SA 601 (SCA) paras 5-10.

practices, even though the TES employee may not be legally considered an employee of the client but rather of the labour broker.³⁶

These cases provide clear evidence that the triangular employment relationship undermines the human rights of TES employees. Many employees are subjected to unfair labour practices, discrimination and dismissals, often without adequate legal recourse.³⁷

In conclusion, the relationship highlights the tension between labour market flexibility and worker protection. While TES contracts enable businesses to adapt quickly, they do so at the expense of employees, who could face insecurity, unequal treatment, unclear accountability, weakened collective bargaining rights and persistent discrimination. South Africa's existing legal framework, including the *Constitution*, *LRA*, *Basic Conditions of Employment*, and *EEA*, incorporates ILO principles but falls short of closing these gaps. To uphold international labour standards and constitutional rights, stronger enforcement mechanisms and clearer joint liability between TES and client companies are essential. Without such reforms, TES employees will remain among the most vulnerable workers in the labour market, being excluded from the full protection of fair labour practices.

TES provide employees to outside clients, who then assign tasks to the employees and supervise their completion. Employees of the labour broker may find this to be a highly perplexing scenario because they are assigned to the client's workplace and have certain tasks to complete under the client's supervision³⁸ and they are a part of the client's organisation. Many labour broker employees believe that they work for the client and that the client is responsible for any unfair labour practices or dismissals they may have experienced. As a result of the above, it is challenging to identify the responsible persons involved in this relationship.³⁹

4 The unfair labour practices suffered by TES employees in collective bargaining and after the three months period

TES employees have recourse to the CCMA and to the Labour Court, particularly after the enactment of the 2014 *Labour Relations Amendment Act* 6 of 2014.⁴⁰ Section 198(3)(b) of the *LRA* states that TES employees are deemed after three months to be employees of the client, allowing them to pursue unfair dismissal and unfair labour practice claims against the client.⁴¹ Van Staden and Van Eck argue that TES employees may find it

³⁶ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC).

³⁷ Theron 2007 LDD 27, 29.

³⁸ Theron 2007 LDD 27, 29.

³⁹ See also *Walljee v Capacity Outsourcing* 2012 33 ILJ 1744 (LC) para 5.

⁴⁰ *Labour Relations Amendment Act* 6 of 2014.

⁴¹ Section 198A of the *LRA* 66 of 1995.

difficult to claim unfair dismissal or unfair labour practices if the contract has expired after three months. This highlights the fact that TES employees struggle to prove unfair labour practices, making it challenging to access legal forums and fundamental rights. In the authors' view, this puts TES employees in a difficult position, as both the TES and the client will be reluctant to attend to their disputes and grievances at the workplace.⁴²

This serves as evidence of the unequal treatment and failure to regulate the fundamental rights of TES employees in the triangular relationship, as they are not provided with enough protection and legal avenues and forums to exercise their rights as mandated by section 23 of the *Constitution*, as occurred in *SA Post Office Ltd v Mampuele*.⁴³

Terminating an employment contract because the customer has ended its business relationship with the labour broker does not, in and of itself, amount to dismissal. However, this has been occurring in practice as TES workers are deemed to be dismissed as well when the client terminates a commercial contract with the TES.⁴⁴ The effect of this is that if the termination does not constitute dismissal, a dispute about the unfair dismissal cannot be referred to the labour court, the worker in the TES is therefore left without remedy and is unable to exercise his or her fundamental rights, even though the situation is grossly unfair.⁴⁵

TES employees and their trade unions do not participate in any collective bargaining procedure regarding the commercial agreement between the client and the labour broker. The *LRA* recognises the right to collective bargaining for all employees, including TES employees.⁴⁶ Contrary to this, Basson agrees that although TES employees can join trade unions and engage in collective bargaining through their unions this is not enough to allow them freedom to access fair labour practices.⁴⁷ This author is of the view that practical challenges, such as the employment structure and the contract between the TES and the client, make it difficult for TES employees to assert access to their rights to collective bargaining. A practical example would be disputes relating to wage disparities, as well as the principle of equal pay for equal work. Fergus and Debbie argues that TES employees are often subjected to unequal pay when compared to the standard employees hired by the client in the organisation, even though they are performing the same services, which are of equal value to the workplace.⁴⁸

⁴² *Mahlamu v Commission for Conciliation, Mediation and Arbitration* 2011 4 BLLR 381 (LC) paras 5-9.

⁴³ *SA Post Office Ltd v Mampuele* 2010 31 ILJ 2051 (LAC) paras 23-26.

⁴⁴ Narain and Naidoo 2019 *IJEBMR* 68-74.

⁴⁵ Narain and Naidoo 2019 *IJEBMR* 68-74.

⁴⁶ Sections 4, 5 and 23 of the *LRA*.

⁴⁷ Basson and Garbers "Meaning of Employee" 110-113.

⁴⁸ Debbie and Fergus "Meaning of Employee and Employer" 87-92.

This infringes on their right to fair labour practices.⁴⁹ This unequal treatment entrenches a two-tier employment structure that compromises TES workers' access to fundamental labour protections.⁵⁰

5 The case of *Assign Services Pty (Ltd) v National Union of Metalworkers of South Africa*

On 26 July 2018 the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Labour Appeal Court (LAC).⁵¹ The case concerned the interpretation of section 198A(3)(b) of the *LRA* and whether this deeming provision resulted in a "sole employment" relationship between a placed worker and a client or a dual employment relationship between a TES, a placed worker and a client.⁵² The LAC set aside the order of the Labour Court and held that a placed worker who has worked for a period in excess of three months is no longer performing a temporary service and the client, as opposed to the TES, becomes the sole employer of the worker by virtue of section 198A(3)(b) of the *LRA*.⁵³

In 2015 *Assign Services*, a TES, placed 22 workers with Krost Shelving and Racking (Pty) Limited (Krost), a number of whom were members of the National Union of Metalworkers of South Africa (NUMSA).⁵⁴ The placed workers provided services to Krost for a period exceeding three months and on a full-time basis. *Assign Services'* view was that section 198A(3)(b) created a dual employer relationship, while NUMSA contended that a sole employer relationship resulted from the section.⁵⁵ The Commission for Conciliation, Mediation and Arbitration (CCMA) supported NUMSA's sole employer interpretation.⁵⁶ By confirming the client as the sole employer, the Constitutional Court advanced workers' right to fair labour practices.⁵⁷ The ruling protects TES employees from being trapped in insecure triangular relationships where no party accepts full responsibility for their rights.⁵⁸ Academic scholars such as Botes and Mcaciso argue that section 198 of the *LRA* aims to give effect to and promote the constitutional rights to freedom of association, fair labour practices and access to justice.⁵⁹ This study agrees with the arguments made by the scholars. Section 198 should

⁴⁹ Van Eck 2010 *PELJ* 109.

⁵⁰ Joubert *Review of the Protection of Fixed-term Contract Employees* 37-45.

⁵¹ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa* 2018 5 SA 323 (CC) (*hereafter Assign Services CC*) paras 2-6.

⁵² *Assign Services CC* paras 14-15.

⁵³ *Assign Services CC* paras 9-13.

⁵⁴ *Assign Services CC* paras 13-15.

⁵⁵ *Assign Services CC* paras 13-15.

⁵⁶ *Assign Services CC* paras 13-15.

⁵⁷ *Assign Services LC* paras 9-11.

⁵⁸ *Assign Services LC* paras 13-15.

⁵⁹ Botes 2014 *SA Merc LJ* 110-137. Also see Mcaciso *Constitutional Court Decision in Assign Services* 45-49.

be interpreted to give effect to section 23 of the *Constitution* and strengthen collective bargaining as well as trade union negotiations by clearly identifying the employer of TES employees. This assertion was also agreed to in *Assign Services*.

The judgment in *Assign Services* strengthens workers' ability to exercise their right to join trade unions and participate in collective bargaining. Under a sole employer model, employees negotiate directly with the client, who controls their working conditions.⁶⁰ This avoids the fragmentation of bargaining power that would occur if both TES and the client were regarded as employers. However, it is argued that clients may resist recognising unions representing TES workers, especially where no direct comparators exist within their workforce. This could still constrain effective bargaining strategies.⁶¹ The ruling enhances access to justice by clarifying who can be held accountable for violations of fair labour practices.⁶² Under the dual employer model, workers faced procedural uncertainty and potential delays in enforcing claims.⁶³ The sole employer model reduces these barriers, giving workers a clearer path to remedies under the *LRA*. While the judgment does not remove all vulnerabilities of TES employees, it aligns triangular employment with constitutional values. It ensures that workers are not deprived of security and bargaining rights simply because of the manner in which their work is organised.⁶⁴

The author agrees with the judgments in this case that the purpose of section 198 of the *LRA* is to identify the employer of a placed worker under the *LRA*. This is correct on the basis that the conventional tests of employment, both common law and statutory, are inadequate in the circumstances of triangular employment. Overall, this situation makes TES employees vulnerable, denying them the right to exercise their fundamental rights and fair labour practices at the workplace.

6 The judgment in *Nape v INTCS Corporate Solutions Pty Ltd*

The case of *Nape v INTCS Corporate Solutions (Pty) Ltd*⁶⁵ examined the interpretation of section 198 of the *LRA* in cases where employees were let go at a client's request in accordance with a labour broking agreement.⁶⁶ The ruling serves as an example of the difficulties that employees face when delivering services to a client under the conditions of these contracts and

⁶⁰ *Assign Services* LC paras 51-54.

⁶¹ *Assign Services* LC paras 51-54.

⁶² Burt 2018 *TaxTalk* 54-57.

⁶³ *Assign Services* LC paras 51-54.

⁶⁴ *Assign Services* LC paras 51-54.

⁶⁵ *Nape v INTCS Corporate Solutions (Pty) Ltd* 2010 31 ILJ 2120 (LC) (hereafter *Nape*).

⁶⁶ Section 198 of the *LRA*.

the necessity of the broker's right of recourse against the client in order to uphold the employees' fundamental rights and right to fair labour practices.⁶⁷

The dispute in *Nape* emerged from a dismissal following the misconduct of one Simon Nape (the applicant), who sent an abusive email to a single person at the client's location.⁶⁸ Invoking its contractual rights, the client, Nissan (Pty) Ltd, required the respondent, INTCS Corporate Solutions (Pty) Ltd, to remove Nape from the client's premises. As his employer, the respondent suspended him and, after a disciplinary investigation, decided that a final written warning, rather than termination, was the appropriate penalty. Nissan was not satisfied with Nape's agreement to accept a final written warning and denied him access to its facilities.⁶⁹

6.1 The court's decision in Nape

The Labour Court observed that section 23 of the *Constitution* could be interpreted broadly to cover clients in labour broking agreements because it was clearly stated that all parties involved in the labour market had a right to fair labour practices and the realisation of their fundamental rights. Stated differently, a client of TES is legally obliged to uphold the employees' fundamental right to fair labour practices under this clause.⁷⁰ The judgment in *Nape* had an impact on TES employees in that it primarily established that a client cannot indirectly force a labour broker to dismiss an employee in a manner that violates fair labour practices.

The court referred to *Sidumo v Rustenburg Platinum*,⁷¹ clarifying that the Constitutional Court emphasised fairness in disciplinary proceedings and that fair labour practices include substantive and procedural fairness in dismissal cases. Significantly, the Constitutional Court confirmed that the primary purpose of the right against unfair dismissal was to protect and ensure job security and uphold the principles of the *Constitution* to safeguard employees' fundamental rights.⁷² As a result, the court in *Nape* determined that the contractual restrictions imposed by the labour broker and its client would not be binding on courts when interpreting the statutory right against unfair dismissal in the context of labour broking arrangements,

⁶⁷ Section 198 of the *LRA*.

⁶⁸ *Nape* paras 10-12.

⁶⁹ *Nape* paras 12-13.

⁷⁰ *Nape* paras 47-48.

⁷¹ *Nape* paras 64-66. The Court cited the judgments in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 BCLR 158 (CC).

⁷² *Nape* paras 64-66; The Court cited the judgments in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 BCLR 158 (CC).

particularly in cases where the arrangements blatantly violated employees' human rights.⁷³

The *Nape* ruling aligns with the judicial principles on third-party dismissals.⁷⁴ The court emphasised once more that dismissal in response to a third party's demand was not always equitable. Therefore, the labour broker could not waive its legal or constitutional duty to treat employees equitably, just like any other employer.⁷⁵

It is evident that none of the scholarly and judicial opinions covered above addresses the contextual legitimacy of *LRA* section 198(4) as an unjustified limitation of the employee's right not to be unfairly dismissed. The discussion of section 198(4) suggests that it prohibits joint liability for dismissal disputes, but it should be framed with more care, as it primarily regulates liability rather than clearly preventing it.

7 Exploitative working conditions and inadequate responsibility in the TES relationship

Trade unions have consistently advocated for stronger labour protection to safeguard the fundamental rights of TES workers. Moreover, trade unions have called for stricter labour laws.⁷⁶ The denial of collective bargaining and the frequency of dismissals are two issues that the trade union movements have highlighted in their demands for policy changes that will reevaluate the legality of labour brokers who follow unfair employment practices.⁷⁷ Furthermore, labour unions assert that these employees frequently experience extended periods of job insecurity due to their ongoing vulnerability to both procedurally and substantively unfair dismissals, which affects their entitlement to fair labour practices and fundamental rights.⁷⁸

Employees in TES enjoy limited job security, particularly when performing "temporary employment services".⁷⁹ Concerns have also been raised about the exploitative nature of labour brokers, particularly regarding the inadequate pay they offer, which is often significantly less than that of permanent employees doing the same tasks, and their lack of training in health and safety protocols.⁸⁰ Employees at labour brokerage firms usually receive only the minimum benefits mandated by law, such as social security and workers' compensation, while being completely excluded from other

⁷³ *Nape* paras 52-53.

⁷⁴ *Nape* paras 56-58.

⁷⁵ *Nape* paras 74-77.

⁷⁶ Grogan "Parties to the Employment Relationship" 36-50.

⁷⁷ Joubert *Review of the Protection of Fixed-term Contract Employees* 37-45.

⁷⁸ Joubert *Review of the Protection of Fixed-term Contract Employees* 37-45.

⁷⁹ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights* 41.

⁸⁰ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights* 42-44.

broader social benefits like medical insurance or pension fund contributions.⁸¹

8 Conclusion and recommendations

This article has discussed the impact of TES employees and their effects on the fundamental rights of employees in a triangular relationship, especially in matters related to unfair dismissals and the right to fair labour practices. The decisions in *Nape* and *Assign Services*⁸² clearly illustrate the need for a comprehensive regulation that would enable labour brokers to play a positive and crucial role in the enforcement and protection of the employee's fundamental rights in labour broking arrangements. Most importantly, labour brokers and their clients should structure their employment policies and agreements in such a way as to conform to the human rights of employees and to promote fair labour practices.

This study recommends that section 198A(3) of the *LRA* should be redrafted to ensure it is sufficient for those interpreting it to definitively determine whether it is to be interpreted as referring to the sole or the dual employer. This provision should also specify a responsible person with whom TES employees could participate in collective bargaining. The structures and relationships are not yet clear enough to determine to whom these employees could assert their rights. The right to collective bargaining is a fundamental right and promotes freedom of association, as enshrined in the *Constitution*.

It is recommended that section 198A(3)(b) of the *LRA* make the client the employer for the purposes of the *LRA*, not only because the client does not form part of the contractual rights and obligations between TES and the employee but also to ensure that employees know who their employer is and can exercise their fundamental rights and fair labour practices against the correct employer.

Bibliography

Literature

Basson and Garbers "Meaning of Employee"

Basson AC and Garbers C "The Meaning of Employee" in Basson AC and Garbers C (eds) *The Essential Labour Law Handbook* (MACE Labour Law Publications Centurion 2024) 110-115

Benjamin "Persistence of Unfree Labour"

Benjamin P "The Persistence of Unfree Labour: The Rise of Temporary Employment Agencies in South Africa and Namibia" in Fudge J and Strauss

⁸¹ Mbwaalala *Can Labour Law Succeed in Reconciling the Rights* 42.

⁸² *Assign Services* CC paras 2-6.

K (eds) *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge New York 2013) 118-142

Botes 2014 *SA Merc LJ*

Botes A "Answers to the Questions? A Critical Analysis of the Amendments to the Labour Relations Act 66 of 1995 with Regard to Labour Brokers" 2014 *SA Merc LJ* 110-137

Burt 2018 *TaxTalk*

Burt K "The Assign Services Case: Its Effect for the 'Employer'" 2018 *TaxTalk* 54-57

Ciliwe *Evaluation of the Amended Temporary Employment Services Provisions*

Ciliwe Y *An Evaluation of the Amended Temporary Employment Services Provisions in the South African Labour Relations Act* (MPhil-dissertation University of the Western Cape 2016)

Debbie and Fergus "Meaning of Employee and Employer"

Debbie C and Fergus E "The Meaning of Employee and Employer" in Debbie C and Fergus E (eds) *Labour Law in South Africa: Context and Principles* (Oxford University Press Cape Town 2018) 87-92

Grogan 2021 *Yearbook of South African Law*

Grogan J "Labour and Employment Law" 2021 *Yearbook of South African Law* 765-853

Grogan "Parties to the Employment Relationship"

Grogan J "The Parties to an Employment Relationship" in Grogan J (ed) *Workplace Law* (Juta Cape Town 2020) 36-50

Joubert *Review of the Protection of Fixed-term Contract Employees*

Joubert M *A Review of the Protection of Fixed-term Contract Employees Within South African Labour Law: A Comparative Discussion* (LLM-dissertation University of the Western Cape 2021)

Mbwaalala *Can Labour Law Succeed in Reconciling the Rights*

Mbwaalala NR *Can Labour Law Succeed in Reconciling the Rights and Interests of Labour Broker Employees and Employers in South Africa and Namibia* (MPhil mini-thesis University of the Western Cape 2013)

Mcaciso *Constitutional Court Decision in Assign Services*

Mcaciso Z *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?* (LLM-dissertation University of Cape Town 2020)

Narain and Naidoo 2019 *IJEBMR*

Narain Z and Naidoo LD "An Exploratory Study into Anticipated Effects of the Interpretation of Section 198A(3)(b) of the Labour Relations Act on Businesses in Durban" 2019 *IJEBMR* 68-95

Nkhumise 2016 *LDD*

Nkhumise RW "Dismissal of an Employee at the Instance of a Client: Revisiting *Nape v INTCS Corporate Solutions (Pty) Ltd* in the Context of the Labour Relations Amendment Act 6 of 2014" 2016 *LDD* 106-130

Ntuli *Legal Framework for Employees*

Ntuli NX *The Legal Framework for Employees Engaged in Temporary Employment in South Africa* (LLM-dissertation University of Pretoria 2021)

Theron 2007 *LDD*

Theron J "Who's In and Who's Out: Labour Law and Those Excluded from Its Protection" 2007 *LDD* 25-38

Tshoose and Tsweledi 2014 *LDD*

Tshoose C and Tsweledi B "A Critique of the Protection Afforded to Non-standard Workers in a Temporary Employment Services Context in South Africa" 2014 *LDD* 334-346

Van Eck 2010 *PELJ*

Van Eck BPS "Temporary Employment Services (Labour Brokers) in South Africa and Namibia" 2010 *PELJ* 106-126

Van Staden and Van Eck 2018 *SA Merc LJ*

Van Staden M and Van Eck S "Deemed to Be an Employee: Adopting the Teleological Interpretation of Statutes" 2018 *SA Merc LJ* 416-433

Case law

Affordable Medicines Trust v Minister of Health 2006 3 SA 247 (CC)

Assign Services (Pty) Limited v National Union of Metalworkers of South Africa 2018 5 SA 323 (CC)

Assign Services (Pty) Ltd v CCMA 2015 11 BLLR 1160 (LC)

Barkhuizen v Napier 2007 7 BCLR 691 (CC)

Kylie v Commission for Conciliation Mediation and Arbitration 2010 7 BLLR 705 (LAC)

Mahlamu v Commission for Conciliation, Mediation and Arbitration 2011 4 BLLR 381 (LC)

Nape v INTCS Corporate Solutions (Pty) Ltd 2010 31 ILJ 2120 (LC)

Old Mutual Life Assurance Co SA Ltd v Gumbi 2007 5 SA 552 (SCA)

SA Post Office Ltd v Mampuele 2010 31 ILJ 2051 (LAC)

SAMA v McKenzie 2010 3 SA 601 (SCA)

Sidumo v Rustenburg Platinum Mines Ltd 2008 2 BCLR 158 (CC)

Sindane v Prestige Cleaning Services 2010 31 ILJ 733 (LC)

Walljee v Capacity Outsourcing 2012 33 ILJ 1744 (LC)

Legislation

Basic Conditions of Employment Act 75 of 1997

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 6 of 2014

International instruments

Abolition of Forced Labour Convention 105 of 1957

Discrimination (Employment and Occupation) Convention 111 of 1958

Equal Remuneration Convention 100 of 1951

Forced Labour Convention 29 of 1930

Freedom of Association and Protection of the Right to Organise Convention 87 of 1948

Minimum Age Convention 138 of 1973

Private Employment Agencies Convention 181 of 1997

Right to Organise and the Collective Bargaining Convention 98 of 1949

Worst Forms of Child Labour Convention 182 of 1999

Internet sources

COSATU Labour Brokers 2019 <http://www.cosatu.org.za/show.php>

COSATU Labour Brokers 2019 *Cosatu Concedes on Labour Brokers*
<http://www.cosatu.org.za/show.php> accessed 13 May 2025

List Of Abbreviations

CCMA	Commission for Conciliation, Mediation, and Arbitration
EEA	Employment Equity Act
IJEBMR	International Journal of Economics, Business and Management Research
ILO	International Labour Organization
LAC	Labour Appeal Court
LDD	Law, Democracy and Development
LRA	Labour Relations Act 66 of 1995
NUMSA	National Union of Metalworkers of South Africa
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
TES	temporary employment services