# DEVELOPMENTS IN IDENTIFYING THE TRUE EMPLOYER OF THE EMPLOYEE IN THE CONTEXT OF LABOUR BROKERS


## ABSTRACT

The paper considers the practice of labour brokering in South Africa and Namibia which has undergone considerable changes in recent years and discusses how these jurisdictions has responded to these changes. In doing so it explains how the practice is statutorily regulated in the jurisdictions under consideration. In the South African context, section 198 and 198A(3)(b)(i) of the Labour Relations Act, 66 of 1995 is of particular importance and has been the subject of recent court decisions and academic debate in as far as the effect of the section on identifying the true employer in the context section 198A(3)(b)(i) is concerned. Thereafter, the paper discusses the current position in South Africa and concludes with some recommendations.


## INTRODUCTION

Since the 1990s, businesses in South Africa opted to introduce, rather controversially, a triangular employment relationship into the labour market. This triangular relationship is classically made up of the labour broker, the client and the worker. Very often it would be the labour broker that would enter into a contract with the worker.[1] The labour broker would then enter into a contract with the client. The worker is then made available to the client, yet traditionally there was no contractual relationship between the client and the worker. This untenable situation meant that workers in this triangular relationship were considered vulnerable. For example, pension funds and medical aid were some of the benefits that workers in this triangular relationship were traditionally unable to access. For this reason, temporary employment services (commonly referred to as TES) have undergone substantial changes in recent years. The use of labour brokers has for a long time been a contentious issue in the South African labour market with some calling

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[1] This would include the managing the payroll, tax and other deductions from the worker's salary.

for a complete ban on the practice while others, for improved regulation. The South African legislature opted for the latter.

The paper also considers how temporary employment services are regulated in Namibia. In this regard, the concept of 'labour hire' will be explored as a comparator to South Africa. It is noted that in 2007 labour hire in Namibia was banned, yet in 2009, the practice was re-instated without concomitant legislation. A 'change in the tide' occurred in 2012 with the introduction of amendments to labour laws, regulating labour hire in Namibia. As with the current situation in South Africa, the amendments in Namibia seek to provide some clarity regarding the true identity of the employer. It is to this extent that a comparative discourse is provided.

On 1 January 2015, the amendments to the Labour Relations Act, 66 of 1995 took effect.[2] For purposes of this paper, the amendment introduced by section 198A(3)(b)(i) dealing with temporary employment services or 'labour brokers', is particularly relevant. Section 198A(3)(b)(i) envisages that the phrase 'deemed employment' relate to employees working for more than three months as well as earning below the ministerial threshold. This section provides as follows:

> 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 service 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*[3]

This amendment sought to bring about improved regulation of temporary employment services and enhanced protection to employees who find themselves employed in such circumstances. It would appear that at its core, the legislature, by introducing the amendments, intended to prevent clients from circumventing their obligations in terms of labour laws. The Labour Court and Labour Appeal Court has recently had the

[2] Labour Relations Amendment Act, 6 of 2014.
[3] Section 19(A)(3)(i

opportunity to interpret the provisions of 198A(3)(b)(i) of the LRA in *Assign Services (Pty) Ltd v CCMA and Others*[4] and *NUMSA v Assign Services and Others*.[5]

The judgment of the LC and LAC provides conflicting interpretations. The LC held that section 198A(3)(b)(i) should be interpreted in a manner so as to give rise to a dual employment relationship. The LAC rejected the dual employer interpretation and held that the client of the TES was the sole employer of placed workers. The judgment of the LAC was taken on further appeal to the Constitutional Court. The Constitutional Court will need to determine the proper interpretation of section 198A(3)(b)(i) and the effect thereof. This paper considers the nature of the employment relationship in the context of section 198 and the effect of the parallel and dual employer interpretations in light of the interpretive injunctions of the LRA, the relevant provisions of the South African Constitution as well as international law. The authors argue that the sole employer interpretation should be preferred as it results in improved protection for employees in a manner that is consistent with the international and domestic law. In the next section an overview of section 198A of the LRA is given, after which a summary of the position in Namibia is provided. The manner in which the South African courts have dealt with section 198A is then considered, followed by a conclusion and recommendations.

## OVERVIEW OF SECTION 198A OF THE LABOUR RELATIONS ACT

From an international law perspective, the Private Employment Agencies Convention of the ILO[6] has not been ratified by South Africa.[7] However, this Convention provides a broad framework for States to adopt when creating legislation related to labour brokering. A key aspect of the Convention relates to the protection of vulnerable workers in this context. However, the continuity of labour brokers in South Africa was

4 *Assign Services (Pty) Ltd v CCMA and Others* (JR1230/15) [2015] *ZALCJHB* 283; [2015] 11 *BLLR* 1160 (LC); (2015) 36 *ILJ* 2853 (*LC*) (8 September 2015)

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

6 C181, 1997.

7 http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888 (Accessed 23 April 2018).

put to the test in 2010, when the legislature introduced rather awkward amendments to the LRA in relation to the issue. Shortly thereafter, further amendments were proposed in order to provide clarity on the continued existence of labour brokers in South Africa. Amendments were finally introduced in 2015, and it appears that the legislature's attempt in drafting the current provisions in section 198A falls short of clarity in relation to the true employer of the worker.

Thus the debate that has ensued as a result of the newly introduced amendments centered around what the legislature's intention was when stating that a labour broker employee is 'deemed the employee of the client'. The thorny question in this regard is whether the employee is in a sense transferred from the labour broker to the client; the client thus becoming the *sole* employer of the employee, or whether the provision creates a dual employment relationship with the client and the labour broker being regarded as the *dual* employers of the employer.

According to the Labour Relations Amendment Bill,[8] section 198A was introduced as additional protection for employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act.[9] For the purposes of the Act, employees are treated as the employees of the client if they work for a period in excess of three months. [10]

To prevent abuse of the three-month period, the section provides that a termination by temporary employment services of an employee's assignment with a client for the purpose of avoiding deemed employment by the client constitutes a dismissal.[11] Employees deemed under this provision to be employees of the client must be treated

8 http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/lraamendmentbill2013.pdf (Accessed 23 April 2018).

9 Currently R205 433.30.

10 The only exception to this is employees who work as a substitute for an employee of the client who is temporarily absent. Temporary services may also be regulated by a collective agreement concluded in a bargaining council, a sectoral determination, or a Ministerial notice.

11 This means that the fairness of the termination of an assignment may be challenged in terms of the Act.

on the whole not less favourably than employees of the client who perform the same or similar work, unless there is a justifiable reason for different treatment.[12]

The Bill does little to help with the current debate around the application of section 198A(3)(b)(i). It is also interesting to note that the CCMA has issued a directive obliging Commissioners to follow the decision of the Labour Appeal Court, despite the pending appeal to the Constitutional Court.[13] What follows is a brief overview of the position in Namibia in relation to labour brokers, and how Namibia identifies the 'true employer'.

**AN OVERVIEW OF THE POSITION IN NAMIBIA**

Section 128 of the Namibian Labour Act[14] banned labour brokers altogether.[15] This was mainly due to the harsh working environment workers found themselves in, particularly concerns relating to slavery, harsh working conditions with low wages with no benefits and no protection from unfair labour practices.[16] However, a labour brokering company in Namibia called Africa Labour Services, challenged section 128, claiming that it unconstitutionally limited their right to carry on any trade or business of their choice in terms of the Namibian Constitution. The Supreme Court of Namibia upheld the claim, and directed that parliament amend the legislation in order to regulate labour brokers in Namibia.[17] Effect was given to this in 2012, when new legislation was promulgated and which specifically regulates labour brokers in Namibia.[18] One of the key features of the amendment is that the client is considered the employer of the employee, seemingly irrespective of the duration of the contract. Further, in terms of the amendment,

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[12] This means, for example, that if an employee is procured by a temporary employment service for a client for three months, but is kept on after the expiry of the three-month period, then that employee must, unless there is a justifiable reason for different treatment, be paid the same wages and benefits as the client's other employees who are performing the same or similar work.

[13] Should the LAC decision be set aside, the Labour Court will have a number review applications in this regard.

[14] 11 of 1997.

[15] Botes, A: *A Comparative Study on the Regulation of Labour Brokers in South Africa and Namibia in Light of Recent Legislative Developments* SALJ (2015) 132 102-104.

[16] Bösl, Horn & Du Pisani 2010; Van Eck 2010.

[17] *Supra*, 103.

[18] Labour Law Amendment Act 2 of 2012. Came into effect in August 2012.

employees of the client enjoy the same rights and benefits accruing to those employees permanently employed by the client.[19]

For a number of reasons it makes sense that the client be seen as the true employer because the client has control over the employee, and the employee renders its services to the client. The client for example provides the tools of the trade and regulates the employee's working hours, and as a result, there is merit in the argument that the employee actually forms part of the client's organization, and also has to subscribe to and subject itself to the policies and disciplinary codes of the client. The client further pays a fee to the labour broker, and it is presumably from this fee that the employee is paid. This implies that the employee has some economic 'dependency' on the client. For these reasons, legal certainty is achieved in that the legislation reflects the reality of the circumstances on the ground. Yet the counter-argument is also plausible.

A client might want to enjoy a certain degree of flexibility regarding who, and for how long, the client wants to employ the would-be employee. In this instance one could speak of a 'commercial' contract concluded between the client and the employee, and an 'employment' contract between the labour broker and the employee. Under these circumstances, if the client no longer needs the services of the employee, it may simply ask the labour broker to remove the employee from the workplace of the client, thus bringing an end to the 'commercial' contract. This flexibility allows the client to 'terminate' the contract of the employee without having to comply with strict dismissal processes.[20] The reality in Namibia is that the client is in fact the employer *ab initio*, and therefore it is contended that flexibility of the client's business may decrease, and may very well result in job losses.

[19] Footnote 14 above, p114. The client is under an obligation not to subject the employees to terms and conditions which, on the whole, are less favourable than those of its permanent employees who perform the same or similar work.

[20] Botes, 115.

The amended Act provides that the client may be exempted under certain conditions.[21] This is permissible only if the client, the labour broker and the employee agree to this, and if the Minister of Labour is satisfied that no rights of the employee are adversely affected. Despite this exemption, the Act further enjoins the client and the labour broker jointly and severally for any breaches of the Act. However, no further legislative intervention would be necessary – seemingly, the buck stops at the office of the Department of Labour.[22] One of key features of the legislation is that, with the identity of the employer now clearly established as the client, the legislations goes one step further in providing a list of factors that can be considered in distinguishing the employer from an independent contractor.[23] Despite this, where there is evidence of a contravention of the Act, for example where the client attempts to sidestep its obligations, the labour broker and the client will be jointly and severally liable.

## THE INTERPRETATION OF S198A THROUGH THE CASES

Section 198A(3)(b)(i) gives rise to conflicting interpretations. The section is peculiar in that it can be interpreted to mean that once the deeming provision takes effect, the client becomes the sole employer of the placed worker (sole employment interpretation). It could also be interpreted to mean that once the deeming provision takes effect, the client and the TES are both considered employers of the placed workers (dual employment interpretation). The issue then is whether the provision has a substitution or augmentation effect. This was precisely the issue for determination before the CCMA, the Labour Court and the Labour Appeal Court. These dispute resolution *fora* have all provided different interpretations to the section. The CCMA case will first be discussed, followed by the decision of the Labour Court. Thereafter, an analysis of the Labour Appeal Court judgment is then provided.

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[21] Section 128(8) and (9) of Act 2 of 2012.
[22] Botes, 114.
[23] Akin to S200A of the LRA and s83A of the BCEA in South Africa.

***Assign services (Pty) Ltd v Krost Shelving and Racking (Pty) Ltd and National Union of Metal Workers of South Africa* CCMA, 2015**

The applicant (Assign Services), referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) relating to the interpretation of section 198(3)(b)(i), 'the deeming' provision of the LRA. The applicant (Assign) argued that the section should be interpreted in a manner that gives rise to a dual employment relationship. In other words, both the TES as well as the client should be regarded as the employers of the placed workers. The respondent (NUMSA) argued that once three months has lapsed and it is found that the employees did not render a temporary service as contemplated in section 198A, the client must be considered to be the sole employer, thus giving rise to a sole employment relationship. In considering the submissions made by the parties, commissioner Osman opted for the sole employment interpretation and found as follows:

> In my opinion the deeming provision in Sec 198A(3)(b) should be interpreted akin to how the law deals with the concept of "adoption". In the case of "adoption" a legal fiction is also created, in that for purposes of the law, the adoptive parent is regarded as the parent of the adopted child. In this regard the best interest of the child is considered to be in the scenario where the adoptive parent is afforded full rights in terms of guardianship and/or all obligations in terms of parenting and upbringing of the adopted child. The law does not regard a biological parent and the adoptive parent as dual parents, as doing so would lead to uncertainty and confusion.[24]

The commissioner was also mindful of the challenges that could arise if the dual employment interpretation is followed. For example who bears the responsibility of disciplining placed workers and which disciplinary code would be applicable? Furthermore, how would re-instatement be effected in unfair dismissal disputes? In addressing the issue of joint and several liability, the commissioner found that, the fact that the employee has a choice of instituting action against either the TES or client or both does not in itself elevate the TES to the status of employer. The purpose, it was

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

found, was to determine liability. The commissioner also recognised that the relationship between TES and client may continue, but for purposes of the Act, the client was deemed the sole employer of the placed workers after the expiration of the three-month period.

***Assign Services (Pty) Ltd v CCMA and Others* Labour Court, 2015**

On review in *Assign Services (Pty) Ltd v CCMA*,[25] the Labour Court per Brassey AJ found that the commissioner erred in law by making his finding and set aside the award. The court held with reference to the concessions of the parties that firstly, section 198(3)(b)(i) has the effect of the client becoming the employer of the placed employee after three months has lapsed for purposes of the LRA (and no other purpose) and that the client is not drawn into the contract between the TES and the worker.[26] Secondly, the "section does not serve to make the client the employer for any purpose other than the operation of the LRA." For the court, nothing in section 198(3)(b)(i) has the effect of invalidating the contract between the TES and the worker or detract from its terms. The contract therefore remains in force. The court illustrated the application of this interpretation by way of a few examples which is to the effect that where a contract exists between the TES and placed worker, the provisions of the contract must be complied with. Given the concessions made by the parties, the court was of the view that the only issue for determination was whether the TES continues to be the employer of the placed worker and is concurrently vested with rights, obligations, powers and duties arising from the LRA.

The court could not find any reason why the TES should be relived of its obligations due to the fact that the client acquires a set of parallel rights and obligation relative to the employee. According to the court, the worker becomes entitled to the statutory protection automatically as a result of contractually engaging with the TES and in the courts view, there seem to be no public policy considerations resulting in the placed worker having to sacrifice these rights on the basis that the TES found placement at the

[25] (JR1230/15) [2015] ZALCJHB 298.
[26] Para 11

client, especially where the designation of the client is in the discretion of the TES.[27] The court accordingly found that a dual employment relationship exists.

The position of the LC is therefore that the deeming provision has the effect of the client becoming the employee of the placed worker for purposes of the LRA and does not invalidate the contract of employment between the TES and the worker. The nature of the relationship between the TES and the employee is also "indubitably one of employment".

***NUMSA v Assign Services (Pty) Ltd and Others*** **Labour Appeal Court, 2017**

On appeal in *NUMSA v Assign Services (Pty) Ltd*,[28] the LAC per Wagley, Tlaletsi DJP and Phatshoane AJA overturned the judgment of the LC. The court commenced by outlining the relevant constitutional and statutory interpretive injunctions in the light of the purpose of the LRA and the provisions of section 198 as well as the Explanatory Memorandum accompanying the LRA Amendment Bill and found that "[t]he sole employer interpretation is consonant with the main thrust of the amendments to s198 and 198A outlined in the Explanatory Memorandum accompanying the LRA Amendment Bill as tabled in 2012 in Parliament…"[29]

The court held that in addition to the deeming provision, further measures were introduced into section 198A to protect vulnerable employees. Such measures include section 198A(4) which protects the employee deemed to be the employee of the client against termination of the contract in order to avoid the operation of section 198(3)(b) by declaring such a termination a dismissal. In addition, section 198(5) seeks to protect employees against unfair discrimination by the client as far as treating the employee on the whole, less favourably than an employee of the client, performing the same or similar work is concerned.[30]

[27] Para 12
[28] (JA96/15) [2017] ZALAC 44.
[29] Para 38
[30] Para 39

The protection against dismissal and unfair discrimination held the court, does not mean that the deemed employee is employed by both the client and TES, but must be interpreted as a measure put in place to ensure that affected employees are not treated differently in relation to other employees employed by the client and that these employees "are fully integrated into the enterprise as employees of the client."[31] According to the court, the protection provided takes into consideration the fact that the contractual relationship between the client and the worker does not come about by agreement, but by operation of law. It is on this basis according to the court, that the dual employment interpretation is not consonant with the context and purpose of the amendments.

In dealing with the issue of joint and several liability, the court held that the fact that the employee may institute action against either the TES or client or both is to be considered a measure to protect lower-earing workers and to confine a TES to employing workers for temporary work as contemplated in section 198A and that the joint and several liability provision have the potential, after three months has lapsed, to discourage the TES from further involvement in the administrative arrangements relating to the placed worker.[32] With regard had to the relationship between the placed workers and the client, the court found that there is no provision in the LRA to the effect that the contract of employment of the worker is transferred from the TES to the client as is an invariable consequence of section 197. There is also no provision to the effect that after the lapse of the three month period contemplated in the section, the client replaces the TES. The court found equally, that there is no provision in the LRA to the effect that the TES and the client become joint employers upon expiration of the three month period. Neither do the amendments stipulate that the client is added to the equation as an employer. The purpose then is not to transfer the contract, but to create a statutory employment relationship between the client and the worker.

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31 Para 40
32 Para 41

Bearing the purpose of the amendments in mind as discussed above, the intention said the court "must have been to upgrade the temporary service to the standard employment and free the vulnerable worker from atypical employment by the TES."[33] It would therefore make no sense if the TES were to be retained in the equation indefinitely in circumstances where the client assumed all the responsibilities previously held by the TES prior to the expiration of the three month period. The role of the TES then said the court is that it "would be the employer only in theory and an unwarranted "middle-man" adding no value to the employment relationship."[34]

The court also recognised that for various reasons and in accordance with established practice, the TES may continue to pay the employee. In the event that such payment is not forthcoming, the employee may institute action against the TES, client or both. However, where the TES for some or other reason ceases to pay the employee and the client pays the employee, the joint and several liability would also cease to exist.[35] The court asserted that it is important to note that the employment relationship is created by operation of law between the client and the placed worker and is independent of the relationship between the TES and the worker, the dismissal of the worker by the TES does not affect the employment relationship between the worker and the client.[36]

**CONCLUSION AND RECOMMEDATIONS**

In the South African context, where the labour broker is the employer for the first three months, and the client 'deemed' the employer after three months, the client has the legislative duty, after the 'deeming' provision kicks in, to employ the employee on terms and conditions that are on the whole not less favourable than its permanent employees. This, according to Botes,[37] seems to strike a balance between flexibility in the labour market and the much-needed protection for employees who are, or become, vulnerable in the long term. In the short term of course, namely the first three months, of

[33] Para 43.
[34] *Ibid.*
[35] Para 44.
[36] Para 45.
[37] Botes, 116.

employment, the employees are not protected against wage differentials until such time that the minimum wage legislative framework kicks in.

In Namibia, labour flexibility is compromised. However, temporary employees are protected against wage differentials the moment they are employed in the tri-angular relationship. The built-in recourse to the common-law in relation to the identity of the employee seems to provide a further safety mechanism in distinguishing the employee from an independent contractor.[38]

The Labour Appeal Court seems to avoid some pertinent concerns raised in the Labour Court. In the first instance, the Labour Court, in addressing the nature of the relationship between the TES and the worker post the ‘deeming” provision, found that the contract between these two parties remains firmly intact, and that the relationship is in fact one of employment.

Surprisingly, the Labour Appeal Court overlooked this issue and instead made the following findings. First, it found that there is no provision in the LRA Amendment Act of 2014 to the effect that the contract of employment is transferred from the TES to the client as is the case in instances of s197 transfers.[39] Secondly, there is also no provision to the effect that the client steps into the shoes of the TES after the three-month period.[40] Thirdly, there is also no provision in the amendments that the TES and the client become joint employers on the expiration of the three-month period.[41] Lastly, the amendments do not stipulate that the client is added as an employer.[42] In this regard one can deduce that the Labour Appeal Court focused on what the provision does not do, rather than determining what the relationship of the TES and the worker post “deeming” is.

It is also apparent from case law that the interpretation of section 198A(3)(b)(i) of the LRA can favour either the dual employer or sole employer view. The LAC opted for the

38 *Supra*.
39 Par 43, LAC.
40 *Supra*.
41 *Supra.*
42 *Supra.*

latter and made use of the purposive method of statutory interpretation to arrive at its finding. The effect of the LAC judgment as far as the proposed interpretation of the deeming provision is concerned is that once section 198A(3)(b)(i) is triggered, the worker employed by the TES becomes the employee of the client. The sole employment interpretation is not without challenges bearing in mind that the LC found that the contract remains fully in force between the TES and worker while the LAC also recognized "that the relationship between the placed worker and the client arises by operation of law and is independent of the terms of the contract between the worker and the TES. The LAC also recognized that the effect of the amendment was not to transfer the contract, but to create a statutory employment relationship between the client and the worker and that "the TES would be the employer only in theory and an unwarranted "middle-man" adding no value to the employment relationship." Thus the TES may terminate the contract it has with the worker and this would not affect the worker's employment relationship with the client.

Pending the judgment of the recent Constitutional Court case of *Assign Services v NUMSA and Others*,[43] it seems likely that the sole-employer interpretation would be the preferred approach. However, it remains to be seen whether the judgment will also refer the mischief created by the amendments, back to the legislature.

**Mr Rasheed Keith-Bandath**

**Mr David Abrahams**

Labour and Social Security Law Unit

Nelson Mandela University

Port Elizabeth

South Africa

[43] CCT 194/17