

# **Closing a Loophole in the Labour Relations Act: The Constitutionality of s198**

S. J. Harvey

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## **Prologue: the Problem**

Euginia Mangali,<sup>1</sup> a single mother of four, worked at the prestigious Cape Grace Hotel as a cleaner for weekly wages of R300. She was accused of having stolen US\$ 700 from a guest's room, and dismissed. Hotel records showed that Mangali had used her access card to enter the room and clean it on the day the guest reported the cash missing.

In a subsequent arbitration,<sup>2</sup> the Commissioner found that there was insufficient evidence linking Mangali to the alleged theft. The guest, having returned overseas, was unavailable, and his allegation could not be tested. It was possible that the allegation was false, made in pursuance of insurance fraud. It was equally possible that the guest had spent or lost the money, or that it had been stolen from him elsewhere. The mere allegation of a guest was insufficient grounds for depriving a vulnerable worker like Mangali of all access to a livelihood; given high levels of unemployment, she was likely to remain jobless: in fact the employer's evidence indicated that, once dismissed for theft, hotel employees will not be employed by any other hotel in the city due to the circulation of a blacklist.

Maki William Gqamani, a young man in his twenties, worked as a machine operator for the Cape Town Iron and Steel Company (CISCO). During his sixth year working for the employer, the negligence of a crane operator resulted in a heavy steel beam smashing into his face, severely injuring him. Gqamani underwent reconstructive surgery on his jaw and face, but was left with mild brain damage, making him unfit for machine operating. He was dismissed for incapacity.

In a challenge to his dismissal at the Metal and Engineering Industries Bargaining Council,<sup>3</sup> Gqamani's representative successfully argued that the employer had been under a duty to accommodate Gqamani, all the more so because his injury was sustained during the course of his employment duties. Although he was no longer

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<sup>1</sup> The author is a senior CCMA Commissioner and has personal knowledge of the two case studies presented in this prologue.

<sup>2</sup> *Mangali v Rebserve* CCMA case number WE 13242-06, date of award 12 September 2006.

<sup>3</sup> *Maki William Gqamani v Professional Employer Services*, case number MEWC925, heard 10 February 2005.

capable of machine operating, it was proven that Gqamani could successfully work under supervision as a general labourer. Gqamani's sister testified that, whereas he had previously supported his parents and siblings, there was now nobody working at home, and the entire family of six was plunged into crisis as the result of the loss of his job.

Both Mangali and Gqamani were found to have been unfairly dismissed. The Labour Relations Act<sup>4</sup> (LRA) provides that reinstatement is the preferred remedy for unfair dismissal.<sup>5</sup> This provision gives substance to the right not to be unfairly dismissed, which is an incident<sup>6</sup> of the constitutional right to fair labour practices.<sup>7</sup>

However, neither Mangali nor Gqamani could be reinstated. The reason? Both were formally employed through labour brokers, or Temporary Employment Services (TESs), as they are defined in s198 of the LRA.

Whilst Mangali was aware that she was a 'contract cleaner', having been recruited by Rebserve which placed her at the Cape Grace, Gqamani was unaware of the existence of his 'employer' Professional Employer Services (PES): although he readily admitted to his signature on a PES contract, he had thought nothing of the letterhead, having been recruited at the Cisco factory gate, and having been trained, and having at all times worked, under the supervision and control of Cisco staff. Although he was paid weekly, he was unaware that his payment emanated from PES, which was in turn paid by Cisco.

S198(1) of the LRA defines a Temporary Employment Service as:

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

S198(2) provides that the TES is deemed to be the employer of the employee.

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<sup>4</sup> Labour Relations Act 66 of 1995.

<sup>5</sup> Section 193(2) of the LRA states that 'The Labour Court or the Arbitrator must require the employer to reinstate or re-employ the employee' (subject to certain practical exceptions; emphasis added).

<sup>6</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC).

<sup>7</sup> Section 23(1) of the Constitution of South Africa, 1996.

When the Cape Grace Hotel received the complaint about Mangali, they informed Rebserve that they no longer wished it to place Mangali at their premises, in terms of their contract with Rebserve to provide cleaning staff. When Cisco found that Gqamani was no longer able to operate his machine, it informed PES that they no longer had any use for Gqamani's services, in terms of their contract with PES.

Both Rebserve and PES, in answering claims of unfair dismissal under the LRA, denied having dismissed their employees. Both pleaded that they themselves had not wished to terminate the employment relationship, but that they simply could no longer place the workers at those workplaces in the face of their client's rejection of them. Rebserve did not have the capacity to properly investigate the charge against Mangali,<sup>8</sup> any more than could PES require Cisco to accommodate Gqamani's injury.

How were Mangali and Gqamani so arbitrarily deprived of the fair labour practice rights accorded to all other South African workers? The answer lies in the peculiar triangular relationship between the client, the worker and the TES, and the fact that the legislature chose to deem the TES, and not the client, to be the employer for purposes of labour law. Whilst the worker is in fact dismissed and is eligible for LRA protection, the terms of the contract between the TES and the client enable both to avoid responsibility. The employee can bring an unfair dismissal claim only against the 'employer' and resultant proceedings have no jurisdiction over the client.

Thus the LRA, whilst giving substance to the right not be unfairly dismissed through the s193 reinstatement requirement, simultaneously makes reinstatement for a significant class of workers impossible. Was this intentional, and is it constitutionally sustainable in light of the s23 constitutional right to fair labour practices? How can this situation be remedied to restore the intended protections of the LRA to Mangali, Gqamani and the thousands like them who are currently second-class employees with second-class rights?

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<sup>8</sup> Because it had no arrangement or rights to access the client's hotel for such a purpose.

## **1. Introduction**

The constitutional and statutory rights of workers are of fundamental importance, not least because they are the product of sustained and intense social struggle against apartheid-era rights violations of black workers.

The history of apartheid in South Africa is to a large extent a history of the racial control of work, and it is therefore no accident that a significant part of the struggle against apartheid was undertaken by workers and in workplaces. For much of the 1980s, the trade unions were the only consistently legal organizations of the struggle inside South Africa.<sup>9</sup> Our trade unionism took the shape of a popularly-controlled social movement: unions did not confine their activities to workplace issues but were involved in many aspects of community organization and political struggle.

The powerful voice of the workers' movement at the Codesa negotiations resulted in workers' rights (including the right to strike, the right to fair labour practices and the right to engage in collective bargaining) being included in South Africa's new Constitution. The 1995 Labour Relations Act (LRA) heralded a new era in workplace relations, and gives substance to the s 23 rights which South African workers struggled for (as well as to dignity and equality rights).

In the words of Constitutional Court judge Navsa J: 'the rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organizations'.<sup>10</sup> In referring to these particular rights as 'hard-won' Navsa J refers not only to the history of trade union struggles, but also to the process of negotiation which resulted in the eventual Constitutionalisation of labour rights, as well as to the consultative process of the drafting of the LRA.

Unfortunately however, s198 of the LRA, which regulates labour brokers, has the effect of limiting these fundamental workers' rights in a growing section of the labour

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<sup>9</sup> Other organisations and movements suffered frequent bannings.

<sup>10</sup> *Sidumo* supra (n6).

market.<sup>11</sup> The deeming of the broker, rather than the client, to be the employer for the purposes of law,<sup>12</sup> works in practice to deny workers access to two fundamental Constitutional rights: the right to engage in collective bargaining, and the right to fair labour practices (which has been held to encompass employment security; particularly the right not to be unfairly dismissed and the right to reinstatement where dismissal was unfair).

There is a global tendency towards flexibility in the labour market and (unsurprisingly, since such flexibility detrimentally affects employment security) a growing body of analysis of this phenomenon.<sup>13</sup> This paper focuses solely on the phenomenon of labour broking, and considers in particular how employers' efforts to circumvent labour legislation, the text of the LRA, and the decisions of the CCMA and Labour Court, interact in practice to deprive a growing number of South African workers of fundamental rights.

Whilst recognising that limited circumstances do exist for the bona fide temporary provision of staff, the paper argues that the current provisions are being exploited by business at the expense of fundamental human rights in South Africa. Alternative proposals for resolving this problem are explored and briefly evaluated.

## **2. The Legislative framework: the Constitutional rights to fair labour practices and collective bargaining, and the LRA**

This paper is concerned with two core Constitutional rights.

s23(5) of the Constitution provides that 'every trade union ... has the right to engage in collective bargaining'.

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<sup>11</sup> A 2005 study by Jan Theron Shane Godfrey and Peter Lewis *The Rise of Labour Broking and its Policy Implications* (Institute of Development and Labour Law, UCT) reports the rapid growth of the labour broker sector in the past 10 years (page 19) and sets out official statistics for 2003 showing that approximately 25% of the workforce may be employed through brokers (page 10).

<sup>12</sup> In s198(2) of the LRA.

<sup>13</sup> The phenomenon encompasses casualisation, externalisation, 'regulated flexibility', outsourcing etc. The growing use by employers of labour brokers is part of this trend.

s23(1) of the Constitution provides that ‘everyone has the right to fair labour practices’.

One of the primary purposes of the LRA<sup>14</sup> is to give effect to the s23 Constitutional rights.<sup>15</sup> In giving substance to labour rights, the LRA, together with the Employment Equity Act,<sup>16</sup> aims also to protect and promote the Constitutional dignity<sup>17</sup> and equality<sup>18</sup> rights of South African workers. It is in this context of the strong link between fairness in the LRA, and fairness, dignity and equality in the Constitution, that any limitation or obstruction of workers’ access to their rights must be viewed.

### **Content of the right: (a) Collective Bargaining**

Workers have the right to form and to join trade unions,<sup>19</sup> which have the right to engage in collective bargaining with the employer. As the overall scheme of the LRA is based on voluntarism, there is no duty on employers to bargain; therefore a trade union’s ability to exercise this right is accessed through exercising a bundle of organisational rights<sup>20</sup> including rights of access to the workplace, election of shop stewards, deduction of membership subscriptions from workers’ wages, and disclosure of information for bargaining purposes. Together with the right to strike, organisational rights give trade unions the necessary leverage to compel employers to bargain, so as to affect conditions of employment.

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<sup>14</sup> Section 1 of the LRA provides that the purpose of the Act is to ‘advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act’ which include giving effect to the rights conferred by section 23 of the Constitution and promoting the effective resolution of labour disputes. Section 3 of the Act provides that any person applying it must interpret its provisions to give effect to its primary objects.

<sup>15</sup> For a comprehensive discussion of the ambit of the section 23 right see Ian Currie and Johan de Waal’s *Bill of Rights Handbook* 2005 at 498-520.

<sup>16</sup> Act 55 of 1998.

<sup>17</sup> Section 10 of the Constitution of South Africa, 1996.

<sup>18</sup> Section 9 of the Constitution of South Africa, 1996.

<sup>19</sup> Section 23(2) of the Constitution of South Africa 1996; see also sections 4 and 5 of the LRA dealing with freedom of association and protection of union membership.

<sup>20</sup> Sections 11 through 22 of the LRA.

### **Content of the right: (b) Fair Labour Practices**

The Court in *National Education Health and Allied Workers Union v University of Cape Town and Others*<sup>21</sup> found that the right to fair labour practices,<sup>22</sup> whilst incapable of precise definition, encompasses the right to security of employment and specifically the right not to be dismissed unfairly.<sup>23</sup>

The LRA provides in s185 that every employee has the right not to be unfairly dismissed.<sup>24</sup> Reinstatement is the primary remedy for unfair dismissal,<sup>25</sup> giving solid substance to the right.<sup>26</sup>

### **3. s198 of the LRA**

In terms of s198(1) of the LRA, a Temporary Employment Service (TES) is one which 'procures or provides' a worker to a client, and which also remunerates that worker.<sup>27</sup> (A TES is popularly referred to as a labour broker, and the terms 'TES' and 'labour broker' are used interchangeably in this paper.) Despite the word 'temporary', it is not by definition a requirement that the service provided by a TES actually be temporary or, in fact, have any limitation as to time.

s198(2) provides that where an employee is employed through a TES, it is the TES which is, for the purposes of application of law, the employer, and not the client at whose premises the employee is working.

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<sup>21</sup> 2003 (3) SA 1 (CC) (hereinafter referred to as *Nehawu*).

<sup>22</sup> The constitutionalisation of this right was unique to South Africa until Malawi followed suit. See *Sidumo* (n 6) at [55] which refers to Cheadle et al *SA Constitutional Law: The Bill of Rights 2005* at 18-8 fn 32.

<sup>23</sup> In *Sidumo* (n 6) at [55] Navsa J characterized security of employment as an essential component of the right to fair labour practices. This right is comprehensively regulated in the LRA. The bulk of the disputes referred to the CCMA and Bargaining Councils concern alleged unfair dismissals.

<sup>24</sup> A dismissal is unfair if the employer fails to show that it had a fair reason and that it followed a fair procedure in dismissing the employee. Dismissals effected contravention of workers' basic rights or for discriminatory reasons are automatically unfair (section 187).

<sup>25</sup> Section 193(2) of the LRA.

<sup>26</sup> Reinstatement aims to undo the effects of an unfair dismissal by putting employees back in the positions they would have occupied but for the unfair dismissal; thus reinstatement orders usually provide for reinstatement 'on the same terms and conditions as those that prevailed at the time of the dismissal, with no loss of service or benefits', and provide for payment of the full salary the employee would have earned during the period of dismissal.

<sup>27</sup> Although it is accepted that often the client will implement the remuneration of the worker, from monies provided by the TES.

s198 legitimizes what Theron has described as a triangular employment relationship.<sup>28</sup> Two contracts are concluded by the TES: a service contract with the client (in terms of which the TES agrees to provide workers at a certain price), and an employment contract with the worker. From the point of view of the worker, the functions of the employer are split between the TES (which recruits and pays her) and the client (which provides the workplace, tools of work, day-to-day supervision, and often the training).

The triangular relationship entails reduced protection for employees, who have limited bargaining power and are subjected to exploitative contractual provisions. The competitive price at which a worker is offered to a business by a TES is in practice often achieved at the expense of the employee's statutory rights:<sup>29</sup> many employment contracts concluded between labour brokers and workers purport to exclude statutory provisions<sup>30</sup> such as those providing for notice, leave and severance pay.<sup>31</sup> Some such contracts even stipulate that the employee agrees to work for undetermined or intermittent periods at the will of the client, which, as Theron notes 'envisages a relationship that endures notwithstanding periods of unemployment'.<sup>32</sup>

That unscrupulous brokers foist illegal contractual provisions on their employees is something that is neither required nor sanctioned by the LRA.<sup>33</sup> But the fact of its statutory recognition does interact with market forces in a way that tends to encourage such practices, because structurally a broker must supply labour at a lower cost than that at which it is generally available to the employer. The ability of the TES to supply workers on terms more favourable to the employer is a direct consequence of these workers' inability to exercise their bargaining rights.

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<sup>28</sup> Theron (n 10) at 5.

<sup>29</sup> Theron (n 10) page 30. See also the research report by the Namibian Labour Research and Resource Institute (LaRRI) Labour Hire in Namibia: Current Practices and Effects (2006) available at [www.larri.com.na](http://www.larri.com.na) accessed 5 August 2008, which confirms Theron's findings in the context of the Namibian market.

<sup>30</sup> Contained mainly in the Basic Conditions of Employment Act 75 of 1997.

<sup>31</sup> *Ibid.*

<sup>32</sup> Theron (n 10) at 31.

<sup>33</sup> Obviously, these provisions are *pro non scripto*. However, most workers are unaware of their statutory rights, and are hardly in a position to insist on them when being offered a contract. Also, enforcement of statutory rights must be attempted through the Department of Labour, which is neither simple nor guaranteed to achieve results.

In addition, the employer that uses labour-broker employees aims to benefit by avoiding the costs associated with the requirement to handle dismissals fairly;<sup>34</sup> it is argued below that:

- a) brokers have designed all manner of illegitimate contractual provisions to avoid their statutory duty to dismiss workers fairly, and they are having some success with such statutory avoidance in the courts and at the CCMA;<sup>35</sup>
- b) the TES is often not in a position to dismiss the worker fairly anyway, and
- c) the deeming of the TES as the employer for the purpose of law has the effect that the primary remedy of reinstatement, which gives substance to the right not to be unfairly dismissed, is not available to labour-broker employees.

#### **4. How s198 works to limit fundamental rights**

##### **(a) Collective bargaining**

Labour broker employees cannot bargain collectively because they cannot organise.<sup>36</sup> they cannot organise because they cannot exercise the organisational rights accorded to trade unions that are 'sufficiently representative of the employees employed by an employer in a workplace'.<sup>37</sup> 'Workplace' is defined as the 'place or places where the employees of an employer work',<sup>38</sup> and labour broker employees do not work at the workplace of their employer, but at that of the client. The language of the Chapter III provisions on organisational rights<sup>39</sup> assumes that workers work at the workplace of their employer. Labour broker workers are usually in a significant minority in any particular workplace and are therefore unlikely to achieve sufficient representivity.

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<sup>34</sup> Theron (n 10) page 30.

<sup>35</sup> Paul Benjamin 'An Accident of History: who is (and who should be) an employee under South African Labour law' (2004) 25 *ILJ* 787 at 795 describes how earlier attempts by employers to avoid their statutory duties towards their employees by concluding contracts with them which styled them 'independent contractors' (and thus beyond the reach of employees' statutory protections) was thwarted when the courts properly rejected such fraudulent contracts as a 'subterfuge' and a 'sham'; see the cases cited there. However, the courts have not been uniformly vigilant in respect of labour broking contracts, as discussed below. This is arguably partly due to the section 198(2) provision itself, and partly due to lax administration of the law.

<sup>36</sup> See above at page 8 and footnotes 25-26.

<sup>37</sup> Section 11 of the LRA.

<sup>38</sup> Section 213 of the LRA.

<sup>39</sup> Sections 11-22 of Chapter III pertain to organisational rights.

Another factor frustrating collective bargaining is that terms and conditions of employment have been determined in advance in terms of the contract between the TES and the client. Research undertaken in 2005<sup>40</sup> revealed that, typically, ‘what the worker is paid is an essential term of the contract between the TES and the client’.<sup>41</sup> Hence, as Theron and Godfrey point out:

‘The notion that wages and minimum standards are amenable to a process of collective bargaining between a TES and its workers has no practical application, unless the client varies its contract with the TES. It will obviously not be easy to persuade the client to do so.’<sup>42</sup>

Denying workers the ability to bargain collectively with the employer has serious consequences. Firstly, it constitutes a rights violation, removing the only defence workers have to their relative powerlessness in the face of market forces, which are particularly punishing in times of high unemployment.<sup>43</sup> Secondly, it builds in a structural tendency for labour brokers to ‘eliminate social protections’,<sup>44</sup> as TESs compete with each other for contracts with companies looking for the cheapest possible solution to their employment needs.

### **(b) Fair Labour Practices in the form of Employment Security**

Fair Labour Practices in the form of employment security finds expression in two practical rights in the LRA: the s185 right not to be unfairly dismissed, and the s193 right to reinstatement as a primary remedy where a dismissal has been unfair (without which the s185 right would be hollow indeed).

Workers employed through a labour broker are generally denied both of these rights.

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<sup>40</sup> Theron (n 10) at 28.

<sup>41</sup> As Theron (ibid) points out, this is ‘obviously ... less than what permanent workers doing the same job [are] paid.’

<sup>42</sup> Theron (n 10) at page 28.

<sup>43</sup> South Africa’s official unemployment rate is 23% as at September 2007 according to the Labour Force Survey 2007 available at [www.statssa.gov.za](http://www.statssa.gov.za) accessed 18 August 2008. (These official figures are generally thought to be very conservative.)

<sup>44</sup> Where employees are deprived of the possibility of bargaining collectively, market forces operate alone: the price of labour drops and the conditions of that labour, in terms of benefits, deteriorates. As described above, Theron and Godfrey’s research indicates that one TES can usually only undercut another by neglecting to pay statutory monies such as overtime, leave or sick pay.

Firstly, they are often denied the right not to be unfairly dismissed. Dismissals typically take place at the instance of the client (as in the cases of Mangali and Gqabani discussed in the Prologue). The employer, being the TES, does not make the rules or supervise the employee, and has no access to the workplace. It is unable to investigate the substance of the complaint against the worker. It cannot conduct a proper pre-dismissal enquiry at which the employee is afforded a chance to defend herself against dismissal. From the perspective of the TES, the reason for the dismissal is that the client no longer wants the worker.<sup>45</sup>

Secondly, they are denied the right to reinstatement, where their dismissal is later adjudged to have been unfair. Again, this is because the party to the unfair dismissal proceedings is the TES, who lacks control over the workplace and is unable to give effect to an order of reinstatement. Reinstatement into the 'employ' of the TES is a hollow remedy, because the TES provides neither workplace nor income to the worker, both of these deriving from a client and not the TES.

## **5. Problems posed by s198 for Judges and Commissioners**

The legislative fiction that it is the TES and not the client that is the employer for the purposes of labour law poses difficulties for Judges and Commissioners, who are tasked with administering a statute designed to facilitate quick, accessible, non-legalistic dispute resolution. The following section describes five problem areas which arise for adjudicators, and offers some commentary.

### **Problem 1: the worker is unaware that the TES is his employer, rather than the client at whose workplace he worked.**

Often workers refer disputes to the CCMA or Bargaining Council, citing the client as their employer. Such workers are often genuinely unaware that they are in fact

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<sup>45</sup> This is not in my view a fair reason for dismissal, but arbitrators frequently buy the argument that the contract terminates automatically because they find it hard to argue against the TES's protestations that they can hardly place a worker on the premises of a client who refuses to have him. However, see *Khumalo v ESG Recruitment CC Transportation (Mecha Trans)* [2008] JOL 21490 (MEIBC), where the arbitrator held that the LRA does not make provision for the cancellation of a contract by the client as a reason for dismissal, and that the dismissal was accordingly unfair.

employed by a TES. Like Gqabani, they have often been recruited at the factory gate, receive their pay packet at the factory, and work alongside other factory employees. They have been subject to the client's supervisors and have been dismissed by the client's personnel. They are genuinely amazed when the client produces a copy of the employment contract in the name of a TES.<sup>46</sup> Nevertheless, they have instituted proceedings against the wrong party.<sup>47</sup> Their applications must be dismissed, and these workers must start again, with the concomitant risk that their application will now be rejected for being out of time.<sup>48</sup> The dismissal of such an application does not rest easy with a Commissioner, who is especially trained to provide lay people with accessible, non-technical, substantive access to the LRA protection.

**Problem 2: although the worker's contract has in fact been terminated, the TES denies that it 'dismissed' the employee.**

The innovation of many TES employment contracts is that they style themselves as 'fixed term' or 'limited duration' contracts, but fail to specify an objectively ascertainable term or duration of validity.<sup>49</sup> Instead, these contracts often provide for their 'automatic' termination on the happening of some future uncertain event. The event might be an objective one such as 'the completion of the task for which the client requires the worker' (although this task itself usually remains unspecified), or it might be a subjective one such as 'when the client no longer wishes to make use of the services of the employee'.

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<sup>46</sup> Although employees may readily admit their signatures on such contracts, they have seldom been given a copy of their own, and have often simply not noted that the employer cited is different from the one who is in control of the workplace. Even where the involvement of a TES has been explained to them at the outset, such workers are usually unaware that the TES and not the client will be deemed to be the employer for the purposes of law, and what the implications of this are for the normal operation of rights.

<sup>47</sup> The approach of the South African Courts (and more especially that of the CCMA) has often been to favour substance over form. However the Act is very clear that it is to be the TES and not the client who is the employer and the strict application of this arrangement has been confirmed in *LAD Brokers (Pty) Ltd v Mandla* (2001) 22 ILJ 1813 (LC).

<sup>48</sup> As the unfair dismissal must be referred within thirty days (LRA s191(1)(b)(i)) whereas the mistaken citation will usually only be discovered at the conciliation meeting (within thirty days of the initial referral). Employees can apply for condonation, however, and if they are properly advised to cite the proper reason, condonation will usually be granted.

<sup>49</sup> It is arguable whether such contracts do in fact constitute fixed term contracts.

TESs rely on such contracts to deny having dismissed their workers.<sup>50</sup> They argue that the employment relationship terminated automatically ‘by operation of law’. This opens the door to TESs to summarily terminate workers in circumstances which would normally entitle those workers to due process.

a) Cancellation, or completion, of the service contract with the client

In *Khumalo v ESG Recruitment CC (Mecha Trans)*<sup>51</sup> the client cancelled its contract with the TES, which then argued that the employee had not been dismissed: his contract had terminated due to the cancellation. The Commissioner held that the LRA makes no provision for the cancellation of a labour broking contract by a client as a reason for dismissal, and that the dismissal was therefore unfair – a finding which sidestepped the employer’s contention that there was no dismissal to start with.

In *Numsa & Others v SA Five Engineering (Pty) Ltd & Others*<sup>52</sup> Revelas J approved a dictum in *Dick v Cozens Recruitment Services*<sup>53</sup> that

‘the (fictional) employment between broker and employee must be deemed, both by operation of law and the intention of the parties, to be coincident with the period of the applicant's employment on assignment.’

Revelas J declined to decide whether or not termination of the employment contract in such circumstances will constitute ‘dismissal’ for the purposes of the LRA, finding rather that ‘the dismissals (if any) ... were not unfair’.<sup>54</sup>

In this case the employees had denied that the work had come to an end. They claimed they had been targeted for dismissal because they had participated in protest action. The Court dismissed this argument as ‘a cynical attempt at establishing an ulterior motive’ for the dismissals.<sup>55</sup> The Court also declined to enquire into the

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<sup>50</sup> ‘Dismissal’ is defined in s186. s186(1)(a) provides that dismissal means that the employer ‘terminated a contract of employment’. This definition does not assist arbitrators faced with TES claims that they, as employer, did not terminate the contract – rather, the contract terminated on its own, or ‘by operation of law’. Employees bear the onus to show that they were dismissed, after which the onus shifts to the employer to show that the dismissal was fair: LRA s192.

<sup>51</sup> [2008] JOL 21490 (MEIBC).

<sup>52</sup> [2007] JOL 19505 (LC).

<sup>53</sup> (2001) 22 ILJ 276 (CCMA) at 279.

<sup>54</sup> *Numsa v SA Five* supra (n 76) at [45].

<sup>55</sup> *ibid* at [33].

employer's contested assessment that the work had come to an end,<sup>56</sup> despite the fact that the onus is on the employer to show that dismissal is for a fair reason. The Court appears to have disregarded or reversed the onus provision,<sup>57</sup> stating that 'substantive unfairness was not proved in this matter'.<sup>58</sup>

- b) 'automatic' termination at the whim of the client, as provided for in the employment contract.

The client itself may no longer wish to make use of the services of the employee for some reason that would usually entitle an employee to due process.<sup>59</sup> The TES then recalls the worker, and argues that the contract has terminated automatically by operation of law (thus no dismissal has taken place).

This is an apparently compelling argument, which is accepted by many Commissioners. The TES pleads that it would be impossible for it to place a worker on the premises of a reluctant client. See for example *Faeza April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group*<sup>60</sup>; *Viwe Tshangana v Adecco*<sup>61</sup>; and *CUSA obo Moutlana and Adecco Recruitment Services*<sup>62</sup> where Commissioners have regarded themselves to be bound by the employment contract, and have upheld the employer's submission that there was no dismissal.

An interesting question is whether CCMA Commissioners have the power to enquire into the validity of such 'automatic termination' contractual clauses, to determine whether they are *contra bonas mores*. In *Monakili v Peaceforce Security Cape CC*,<sup>63</sup> the Commissioner, relying in part on *Buthelezi and Others v Labour for Africa (Pty) Ltd*<sup>64</sup> found that the CCMA indeed has such a power.

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<sup>56</sup> *ibid* at [44].

<sup>57</sup> Section 192 of the LRA provides that the employee must establish the existence of a 'dismissal', whereafter the onus shifts to the employer to show that the dismissal was fair.

<sup>58</sup> *Numsa v SA Five* (n 76) at [44].

<sup>59</sup> Such as suspected theft, for instance, or incapacity, or alleged rudeness to a supervisor.

<sup>60</sup> CCMA case number WE7270-05; date of award 30 September 2005

<sup>61</sup> CCMA case number GAPT4948-05, date of award 21 September 2005

<sup>62</sup> CCMA case number GAPT8664, date of award 24 March 2006

<sup>63</sup> CCMA case number WE 14117-07, date of award 10 December 2007

<sup>64</sup> (1991) 12 *ILJ* 588 (IC)

Expressing the view that Commissioners who upheld such ‘automatic termination’ clauses were unmindful of the right of every employee to fair labour practices, as well as the right not to be unfairly dismissed, Commissioner de Kock held that ‘any provision in a contract of employment that interferes with these rights must be struck down.’ He characterised such a clause in a contract of employment as an ‘attempt by the employer to opt out of the protection afforded to employees from being unfairly dismissed’ and found it to constitute a ‘breach of an employee’s constitutional right to fair labour practices’. He found himself ‘obliged to enquire into the validity of such a clause’. The clause was ‘invalid and *contra bonas mores* insofar as it is being relied upon to argue that an automatic termination occurred’.

The approach in *Monakili* has not yet been tested in the higher Courts.<sup>65</sup> Bosch<sup>66</sup> argues that the CCMA does indeed have jurisdiction to enquire into such contractual clauses, and to disregard them if they are found to be invalid.<sup>67</sup>

### **Problem 3: the TES argues that the worker is still employed, but without pay.**

TESs often assert that, despite the fact that the worker was removed from the site by the client and has since been without income or employment, it has not dismissed the worker. Instead, argues the TES, the worker remains ‘on its books’, or in a ‘pool’, waiting ‘on standby’ for another assignment which may or may not materialize.

In both *Numsa obo Daki v Colven Associates Border CC* [2006] 10 BALR 1078 (MEIBC) and *Smith v Staffing Logistics* [2005] 10 BALR 1078 (MEIBC) Commissioners found that placing a worker on ‘standby’ or ‘in the pool’ after a client indicated it no longer wanted the worker on site constituted unfair dismissal. Compensation was awarded in both cases.<sup>68</sup>

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<sup>65</sup> However in *First National Bank v Faizel Mooi and others* (Labour Court case number JR 1018/07, decided on 24 July 2008), Molahlehi J found that CCMA Commissioners do not have the power to rule on the interpretation or application of agreements between employers and employees – in this case, a settlement agreement.

<sup>66</sup> Craig Bosch ‘Contract as a barrier to ‘dismissal’: the plight of the labour broker’s employee’: as yet unpublished article for the *ILJ* 2008.

<sup>67</sup> Bosch (ibid) stresses however that not every such clause will be invalid and that each case must be evaluated on its own merits.

<sup>68</sup> See however Bosch (supra n 74) who argues that there is no reason why remaining in a pool without remuneration should not constitute a valid employment relationship.

In other cases it was accepted that these workers 'reverted back' to the TES, which, if it could not place them, should then be required to retrench them.<sup>69</sup> There are however, conceptual flaws in this approach. The real reason for the dismissal is not operational requirements: it is the client's perception that the employee was in some way inadequate (that is, the real reason for dismissal was the employee's alleged poor performance or misconduct). The 'retrenchment' is thus entirely occasioned by an allegation of misconduct or poor performance and as such is a sham. This sham is evidenced by the fact that meaningful consultation around the TES's operational requirements<sup>70</sup> would involve an investigation of the situation which gave rise to it: which brings the parties back to the allegation made by the client against the worker in the first place and the real cause of the dismissal. In addition, fair retrenchment procedure involves objective selection criteria, whereas in this instance the victim is pre-selected.

In any event, such an outcome is inequitable for a worker who has actually been unfairly dismissed and should be eligible for reinstatement, not merely notice and severance pay.

#### **Problem 4: evaluating fairness in dismissals where the TES has no access to the client's workplace**

Some Commissioners have held that, where the client no longer wishes to make use of the employee's services due to some allegation of misconduct or poor performance, the TES as the deemed or fictional employer must discharge the employer's duty to dismiss the employee fairly.<sup>71</sup>

The problem with this approach is that it is in truth often impossible for the TES to discharge the duties of an employer in respect of the employee. Since the employee is only present on the premises of the client by virtue of the contract between the TES and the client, the TES must remove the worker on the say-so of the client. The TES

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<sup>69</sup> See *Jonas v Quest Staffing Solutions* [2003] 7 BALR 811 (CCMA).

<sup>70</sup> As required by s189 of the LRA, where an employer wishes to dismiss for operational requirements.

<sup>71</sup> Thus the TES must investigate the allegations, must give the employee adequate support and an opportunity to improve if work performance is at issue, or must hold an enquiry at which the employee is invited to state a case in response to allegations of misconduct. Where the TES has failed to do this the dismissal has been held to be unfair.

cannot and does not set the performance standards, nor can it counsel or support the poor performer once the client has rejected him.

Where the client has dismissed the worker for alleged misconduct, the TES does not have access to the workplace enabling it to investigate the allegations. A necessary condition for a proper enquiry is the power to secure the presence of necessary witnesses; whilst tribunals such as the CCMA can subpoena witnesses and whilst ordinary employers can instruct relevant personnel to attend enquiries, a TES has no such power.

Even were the TES able to secure the necessary level of cooperation from the client, it would nevertheless be unable to exercise the required discretion as to the appropriate disciplinary penalty; in the face of the client's refusal to continue to suffer the continued presence of the employee the TES has no option but to remove the worker.

In *Solidarity obo Lehman v Securicor*<sup>72</sup> the Commissioner found that although the TES had held a disciplinary enquiry, its decision to dismiss the worker was 'strongly influenced' by the fact that the client no longer wanted him. The dismissal was held to be unfair for this reason, and the worker was awarded compensation.

In *Diniso v Academia Cleaning Matters*<sup>73</sup> the Commissioner found that because workers enjoy statutory protection from unfair dismissal, the client/TES contract must make provision for the realization of workers' rights. It is however doubtful whether the CCMA has jurisdiction to enquire into or to pronounce upon the business contract between a TES and a client, its legitimate sphere of enquiry being confined to the employment relationship between the worker and the employer.

### **Problem 5: finding a meaningful remedy for unfair dismissal**

Where it is ultimately found that a dismissal was unfair,<sup>74</sup> arbitrators are unable to apply the preferred remedy of reinstatement.<sup>75</sup>

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<sup>72</sup> [2005] 2 BALR 227 (CCMA).

<sup>73</sup> CCMA case number WE 184-07, date of award 13 February 2007.

<sup>74</sup> Which will be a rare occurrence, as the preceding sections illustrate!

The client controls the workplace attaching to the job and the salary. Because the client is not a party to the arbitration proceedings, a Commissioner cannot reinstate the worker in the job from which he was unfairly dismissed. Reinstatement into a position with the TES itself is a hollow remedy, being reinstatement into a position with no work and no salary. The material consequences of this in the prevailing socio-economic conditions are devastating for the worker.

Instead, where dismissals are found to have been unfair, Commissioners order monetary compensation, commonly between 4 and 12 weeks' wages.<sup>76</sup> As TES employees are amongst the lowest paid, this compensation is usually a very low monetary amount.

TESs frequently ignore compensation awards. An unemployed person has difficulty paying for the necessary taxi fares, postage and photocopying when attempting to enforce an arbitration award through the Labour Court.

### **In conclusion on employment security**

Commissioners and Judges are charged with administering the LRA, which protects workers from unfair dismissal. The application of the law is, in general, straightforward. However, the statutory deeming of the TES as the 'employer' makes the application of unfair dismissal law very difficult. Arbitrators are faced with dismissals by clients, who are not themselves party to the employment relationship. The 'employer', the TES, is not present in the workplace, does not supervise the employee, and has not set or applied workplace rules or standards governing the work. In these circumstances, arbitrators find it difficult to exercise guardianship over

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<sup>75</sup> It might be thought that this is a reasonable restriction on the remedy available to a temporary worker. If the work is by its nature short-term, it would be unreasonable to expect reinstatement into it. However, it must be recognized that temporary employment does not necessarily imply short-term employment. It implies only employment that is not permanent. To get an idea of the time-scale involved in temporary employment, it is instructive to note that the MEIBC Main Agreement makes provision for the automatic consolidation of temporary employees as permanent after one year of continuous work at a company as a temporary employee. Employees outside this sector do not even have that level of protection and it is not unusual for temporary employment to persist for years.

<sup>76</sup> The CCMA does not have the power to award compensation in excess of an amount equivalent to twelve months remuneration, see section 193 of the LRA.

unfair dismissal jurisprudence, and to uphold and protect workers' Constitutional rights.

The result is that employees employed through a TES occupy a precarious position. They are deprived of the statutory protections available to regular employees. They are structurally subject to arbitrary dismissal by the client company that employs and controls them, without recourse to relief against that client company. Their remedies against the TES are limited by the frequent reluctance or inability of the CCMA, Bargaining Councils or Labour Court to find that there has been a dismissal in the first place.

Where it is found that they have been unfairly dismissed, such workers are uniformly deprived of the preferred remedy for unfair dismissal: reinstatement. Their security of employment is severely compromised, and their access to justice limited in comparison to those of their colleagues who have been directly employed by the same employer rather than through a TES.

## **6. Can the s198 rights limitation be justified?**

Our Constitution provides for the limitation of rights in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>77</sup> The LRA is a law of general application, and it remains to consider whether the s198 rights limitation can be justified.

The Memorandum to the LRA is silent as to the purpose of s198.<sup>78</sup> The purpose of the section is undoubtedly to relieve the client of administrative burdens associated with employing temporary workers, whilst assuring the continued protection of temporary workers. The section removes uncertainty that could arise as to which employer in the triangular relationship is to be the bearer of the employer's duties towards employees.

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<sup>77</sup> S36 Constitution of South Africa 1996.

<sup>78</sup> Theron (n 10) at 6 and fn 23. It is interesting that the identical provision was present in the 1956 LRA.

It is reasonable and necessary that employers be permitted some flexibility where they experience a need for genuinely temporary employees. The manufacturer with an unusually large once-off order, or the office with a receptionist on maternity leave, must find suitably qualified temporary staff quickly and without the usual attendant administrative burdens of recruitment, tax calculations, and termination procedures.

It is most unlikely that the purpose of the s198(2) provision is to limit workers' fair labour practice rights. That the legislature intended basic employment protections to remain in place is suggested by the fact that both s198(4) and other legislation expressly provide for the joint liability of the client where such protections are flouted.<sup>79</sup>

It might be argued that the purpose of the provision was to completely deregulate a section of the labour market. However this argument cannot be sustained. Such a radical step reducing the protection of employees would certainly have been the subject of debate between the social partners at Nedlac.<sup>80</sup> In fact, Nedlac has expressly rejected the proposals to this effect made by Business SA during input to the 2002 LRA amendments.<sup>81</sup> Should such a policy position be adopted, the relative importance of increasing business competitiveness and efficiency would have to be balanced against the importance of the rights to employment security and collective bargaining.

The rights limitations identified in this paper are the indirect, and, most probably, unintended consequence of the wording of s198.<sup>82</sup>

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<sup>79</sup> Section 198(4) provides for the joint and several liability of the client and the TES if the TES contravenes collective agreements, arbitration awards and other labour legislation. The Occupational Health and Safety Act 85 of 1993 stipulates that the client is considered to be the employer for the purpose of that Act, which compensates workers for injuries sustained at work.

<sup>80</sup> The National Economic Development and Labour Council comprises representatives of Government, organised business, organised labour and organised community groupings. Nedlac resolves disputes between the social partners over issues of socio-economic policy in terms of s77 of the LRA. All labour legislation is debated at Nedlac.

<sup>81</sup> Theron (n 10) on the 2-tier labour market.

<sup>82</sup> Although business has made out an argument for deregulation in certain sectors, these suggestions have to date been expressly rejected by Nedlac.

The abuse of s198: All workers in South Africa enjoy a Constitutional right to fair labour practices. No worker should be treated unfairly. No worker should lose his livelihood, however temporary, as the result of an employer's arbitrary or malicious actions. Mangali should not have been subjected to arbitrary dismissal on the basis of an untested allegation of dishonesty. Gqamani should not have been deprived of protection when, after six years, he was injured at work. Employers cannot be permitted to avoid compliance with labour legislation on a large scale, through the subterfuge of putting their employees onto the books of 'temporary employment services' which have not in fact recruited or provided those workers to them, and where the workers are not in fact fulfilling a temporary need of the employer. A 2006 ILO recommendation requires national policy to 'combat disguised employment relationships' which have the effect of 'depriving workers of the protection they are due'.<sup>83</sup>

Yet the LRA in its current form permits these rights violations. As businesses increasingly take advantage of the practical opportunities presented by the loophole, a growing proportion of the South African workforce finds itself without the 'hard-won',<sup>84</sup> protections fought over in the twenty years leading up to the proud negotiation of the 1995 LRA.<sup>85</sup>

The limitations are serious and cannot be justified. It is argued below that by re-drafting the section, it will be possible to retain the legitimate purpose of s198, whilst preventing its abuse.

## **7. The proposal**

This section outlines alternative ways of remedying the problems identified with the TES provision in the LRA. These alternatives are premised on the following principles:

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<sup>83</sup> ILO Recommendation concerning the employment relationship GG 1 Dec 2006 No 29445 at pg 45.

<sup>84</sup> Per Navsa J in *Sidumo* (n 6).

<sup>85</sup> Theron (n 10) argues at 6 that 'the legislation's failure to address the anomalies that result from holding the TES to be the employer ... has encouraged the further growth of labour broking'.

1. **Principle 1: Provision for genuine temporary requirements:** employers should be able easily to fill temporary vacancies or temporary work-load peaks, whilst outsourcing the HR function. They should also be able to outsource some of their operation.
2. **Principle 2: Protection of collective bargaining:** the LRA's provision of a framework to promote collective bargaining<sup>86</sup> should not be undermined.
3. **Principle 3: Protection of employment security:** there should be no opportunities for employers to avoid their statutory duties towards employees: in particular, there should be protection from arbitrary dismissal, and the primary remedy of reinstatement should remain available to unfairly dismissed employees.<sup>87</sup>

While considering options for legislative amendment, sight should not be lost of what employers can already accomplish under existing legislation, without the special s198 provision:

1. employers can conclude short-term or fixed-duration contracts with employees;
2. employers can dismiss workers for operational requirements;
3. employers can subcontract administrative functions to an external consultant;<sup>88</sup>
4. Nothing prevents employers from outsourcing work to independent contractors, and the provisions of s198 are not necessary to facilitate this.

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<sup>86</sup> Section 1, dealing with the purpose of the LRA, provides as follows in subsection (c): 'to provide a framework within which employees and their trade unions, employers and employers' organisations can (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest ...'.

<sup>87</sup> This will be appropriate in the case of long-term, ongoing outsourced work such as that performed by Mangali. Obviously, it will not be appropriate to reinstate a worker who was engaged for a short-term project which is completed by the time of the arbitration.

<sup>88</sup> Such as recruitment, administration of wages and other statutory payments, and the disciplinary function – which last function is already typically outsourced to an employer's organisation, an independent panel such as Tokiso Dispute Resolution, or a labour consultant.

As noted above, although s198 is headed ‘Temporary Employment Services’, there is in fact no requirement of temporariness in the s198 definition.<sup>89</sup> The section is increasingly relied upon in practice both by companies offering ongoing ‘outsourced’ services (such as cleaning) and those offering genuinely temporary replacement or short-term contract workers. It is convenient to deal with each of these separately.

**(a) Long term, ongoing, outsourced work**

Rebserve provides cleaning services to Cape Town city hotels, just as Supercare provides cleaning services to the University of Cape Town (UCT). Those who work for such an outsourcing employer are indeed its employees. The employer, however, in offering a service to the client, is in an independent contractor relationship with the client.

A company providing outsourced services to a client is in fact an employer like any other, and is not covered by s198. s198 should be interpreted to apply only to those who provide *temporary employees* (‘temporary’ will need to be defined as discussed below) rather than an *ongoing service*, to a client. I shall refer to employer who provides outsourced services as an Outsourcing Employer.

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<sup>89</sup> A possible solution is to define what is meant by ‘temporary’ – by linking it to a maximum time period – as suggested below (in the section dealing with proposed amendments) under (c).

### Collective Bargaining Rights for 'outsourced' employees

Under present legislation, the collective bargaining rights of outsourced employees are curtailed by the fact that they cannot access their organisational rights because of the requirement of 'sufficient' representivity in s11 read with the definition of 'workplace' in s213 of the LRA.<sup>90</sup>

Where a client employer subcontracts some non-core activities whilst continuing to directly employ for its core activities, the employees of the Outsourcing Employer will almost always be in a small minority at the workplace, and will thereby be deprived of their organisational rights.

An amendment to the definition of 'workplace' in s213 (to encompass an Outsourcing Employer's principle place of business, as suggested under proposed amendments below) or to the requirement of trade union representativeness in s11, would remedy this situation.

The argument made by Theron to the effect that collective bargaining is in any event rendered toothless by the TES/client contract, bears some qualification where the entity in question is an Outsourcing Employer, because the ability of any employer to bargain wages is curtailed by the market place. All employers study the potential effects of wage increases on the pricing structures of their goods and services, and resist wage increases that will have the effect of pricing them out of the market.<sup>91</sup>

Therefore, provided outsourced employees can effectively unionise and exercise their organisational rights (which requires the legislative amendment proposed below), their collective bargaining rights will be salvaged notwithstanding the constraints presented by the Outsourcing Employer's contract with the client.

### Employment Security for 'outsourced' employees:

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<sup>90</sup> This was comprehensively described and argued above at pages 13-14.

<sup>91</sup> It is also interesting to compare the position of the TES with that of public sector employers; they also bargain in difficult circumstances in which their budget is often predetermined by local, provincial and national departments of finance in their budgets. Despite this, the National Department of Education, for example, collectively bargains with teachers' unions despite the fact that the Minister of Finance has already tabled his budget before Parliament.

Principle 3, protection from unfair dismissal, is already present in the legislation as it stands, provided the Outsourcing Employer is treated as an employer in its own right (albeit providing a service to a client). Arbitrators and judges should not entertain Outsourcing Employers' attempts to style employment contracts as purportedly tied to their service contracts with clients. However, because there is now a body of case law apparently sanctioning or recognising the practice, the legislation must needs be clarified to provide that any term in a contract of employment purporting to make the validity of a worker's contract of employment dependent on any separate commercial contract with a client of the business will be invalid.<sup>92</sup>

Furthermore, a client's arbitrary rejection of a worker cannot constitute a fair reason for dismissal. Where a client rejects an individual employee, the Outsourcing Employer must properly investigate the charge. Where the employee is guilty of a transgression she may be fairly dismissed. Where there is no basis for the charge, the Outsourcing Employer will have to inform the client of that fact.

Because unfairly dismissed workers may be reinstated with their Outsourcing Employer, which must then remunerate them whether or not it provides work for them,<sup>93</sup> such Outsourcing Employers will have an incentive to conclude 'ethical' contracts with clients in terms of which they can access the workplace in order to investigate any allegations against their employees.<sup>94</sup>

### Proposed amendments

(a) In order to achieve the protection of collective bargaining rights (Principle 2), s213 of the LRA should be amended to provide that 'workplace' means 'the place or places

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<sup>92</sup> Manufacturing operations, for instance, also depend on contracts, or orders, from clients. A manufacturer cannot tie his employees' contracts to his contracts with his customers. Where such orders are cancelled resulting in a shortage of work, the employer can declare short time or in extreme instances can retrench (dismiss for operational requirements). It is hard to imagine that courts would countenance terms in contracts of employment which provide that should a contract with a major client fall through, the contracts of employment would terminate automatically.

<sup>93</sup> The notion (see above at page 11 fn 43) that the employment relationship may persist despite 'periods of unemployment' when no remuneration is payable is absurd.

<sup>94</sup> It may be objected that this places a burden on the client. Such burdens, however, are a necessary result of wide-ranging statutory protections for workers where the State has for policy reasons placed job security duties on employers rather than providing for it as the State itself through social security grants or meaningful unemployment insurance.

where the employees of an employer work, or, where those employees work mostly at the premises of the employer's clients, that employer's principle place of business'.

(b) In order to achieve employment security (Principle 3), the legislation should be clarified to provide that:

- (i) an employer who provides ongoing, long-term (outsourced) services to a client is the employer of his own workers,
- (ii) any term in the contract of employment of such workers that makes their contract of employment subject to, or conditional on the fate of, or that ties their contract to, the contract with the client will be invalid; and that
- (iii) the assertion by a client that he does not want a particular worker on his premises shall not be a fair reason for the dismissal of that worker.

### **(b) Genuinely "Temporary" Employment Services**

Employers should be able to fill temporary vacancies through short-term contracts administered by TESs (Principle 1).

#### Collective Bargaining Rights for Temporary Employees

It is difficult to see how the collective bargaining rights (Principle 2) of such employees can be preserved unless labour broking is abolished (see option (b) below).

An argument can be made out to the effect that collective bargaining rights are by their very nature only exercisable by workers with sufficient permanence to meaningfully collectivise and organise so as to affect their conditions of employment.

Such rights, it could be argued, were never intended to be exercised by temporary fill-in staff.<sup>95</sup>

A basic level of protection for temporary workers can nevertheless be achieved through the existing framework, notwithstanding that these workers would not be able to actively participate. Collective agreements concluded in Bargaining Councils, and Sectoral Determinations made by the Minister, should take care to specify that the applicable minima apply to TES workers deployed in those sectors. The Minister and parties to Collective agreements should also ensure that those job categories that are often outsourced (such as cleaning, gardening, maintenance, security etc) are included in the listed job categories in Agreements and Determinations, when specifying minimum wages.

#### Employment Security Rights for Temporary Employees

In order to fulfil the objectives of protecting temporary workers from arbitrary dismissal and retaining the primacy of the reinstatement remedy where appropriate (Principle 3), some amendment to the existing legislation is necessary. There are several alternative methods of amending it.

Although it might seem that a worker who is merely working on a short-term assignment has no expectation of job security, it is relevant that while the work itself might be of a temporary nature, the effects of an unfair dismissal can be more far-reaching, as illustrated by the case of Mangali (who, because she was dismissed on suspicion of theft giving rise to her sectoral blacklisting, will never again be given work in the hotel cleaning sector).

- a) provide in s198(4) that the client and the TES are jointly and severally liable in the case of unfair dismissal of a TES employee**

This would entail merely adding unfair dismissal liability to the list of joint and several liabilities already provided for under s198(4). Joint and several liability

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<sup>95</sup> Some better-placed temporary workers will, of course, be able to exercise their individual right to negotiate the terms of their employment contract with the TES before accepting an assignment.

would work to distribute any unfair dismissal compensation order between the client and the TES, thus to some extent discouraging the client from participating in or initiating arbitrary dismissals.

This however will not solve the problem that TES workers are denied access to the primary remedy of reinstatement, because the client would still not be a party to unfair dismissal proceedings, and an arbitrator would lack jurisdiction to order the client to reinstate.

A very similar proposal, introducing joint and several liability for the TES and the client and giving the worker a choice of party to proceed against, was included in the draft New Labour Bill submitted to the Namibian Parliament in 2007.<sup>96</sup> South African labour broking firms had become active in Namibia since the late 1990s with drastic effects for workers' rights.<sup>97</sup> The Namibian Parliament however rejected the Draft Bill in favour of an outright ban on labour broking,<sup>98</sup> finding the practice to be unacceptable under the Namibian Constitution.<sup>99</sup>

#### **b) Repeal s198, and outlaw labour broking entirely**

This approach, which is Namibia's preferred solution, is not as drastic as it may at first sound. It does not prevent employers from efficiently satisfying their genuine temporary employment needs by outsourcing the attendant administrative functions to a specialist independent contractor.

A legal firm wishing to replace a secretary, for instance, would contract a specialist contractor to recruit one, to manage her contract, and to terminate her fairly should this become necessary. Many employers already outsource their disciplinary functions to labour consultants or independent panels such as Tokiso Dispute

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<sup>96</sup> Clause 128(3) and (4) of Namibia's New Labour Bill 2007.

<sup>97</sup> Herbert Jauch 'Namibia's ban on labour hire in perspective' *The Namibian* 7 August 2007.

<sup>98</sup> Namibia's new Labour Act number 11 of 2007. See Herbert Jauch 'Namibia's New Labour Act (No 11 of 2007) from a labour perspective' *The Namibian* 18 January 2008 for an overview of the Act.

<sup>99</sup> The amendment to Namibia's New Labour Bill 2007 stipulates that labour hire will be prohibited in the Republic of Namibia: "No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party" – clause 128(1).

Resolution, so as not to have to develop specialised in-house skills for infrequent events.

Outlawing labour broking would satisfy all three principles, ensuring the full and equal protection of rights in all sectors of the South African workforce.<sup>100</sup>

**c) limit the application of s198 by defining the meaning of ‘temporary’**

Legislation could provide that any TES employee who is employed for more than, say, four months will automatically be deemed to be the employee of the client. It is noteworthy that the employment security provisions in the Collective Agreement governing conditions in the Metal and Engineering Sector<sup>101</sup> limits the use of ‘labour broker’ workers to four-month contracts<sup>102</sup> and provides stringent conditions<sup>103</sup> for their use.<sup>104</sup>

This would deny workers their statutory protections for the first four months of employment, in the interests of flexibility for employers. Although a rights infringement, it would be one that is more limited than that already constituted by the legislation. It might be argued that, as a policy choice, it is a justifiable limitation in terms of s36 of the Constitution.

**d) repeal s198(2) and provide that an arbitrator, when considering any case of unfair dismissal in a triangular employment situation, may make a determination as to who the ‘real’ employer is.**

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<sup>100</sup> A recent ILO protocol (to which South Africa is not party) legitimizes labour broking (discussion with Jan Theron, May 2008). This might discourage South Africa from following Namibia’s lead in outlawing labour broking.

<sup>101</sup> Annexure A to the Metal and Engineering Industries Bargaining Council Main Agreement.

<sup>102</sup> And to a maximum overall period of twelve months.

<sup>103</sup> Including having to register them with the bargaining council, and justifying the contract by showing that the employer has ‘secured additional work of a short-term nature’.

<sup>104</sup> Attempts to thwart this requirement by using successive 4-month contracts would be hit by the 12-month maximum provision. In addition, the limited duration contract would be invalid where the employer is unable to show a genuinely temporary or short-term increase in work-load. The consequence of invalidity of the written employment contract is that the worker, by virtue of performing work on the premises of the client, is an ordinary employee of the client.

Repealing only s198(2) would remove the statutory deeming of the TES to be the employer of the workers whilst leaving the rest of s198 intact.

As every triangular employment situation will be different, it may be best that an arbitrator, tasked with protecting the rights of both parties under the LRA, distribute the employer's duties in such a way as to ensure that fundamental statutory rights are not compromised.

The arbitrator, having regard to all the circumstances, will determine who the 'true' employer is for the purposes of the particular dispute.<sup>105</sup> The arbitrator will have the power to join or to substitute an employer party who was not cited in the original application.<sup>106</sup> The determination should be made according to the LAC's 'reality test',<sup>107</sup> having regard to s200A,<sup>108</sup> and relevant Codes of Good Practice.<sup>109</sup>

The Codes should provide guidelines for dealing with temporary workers, whose rights to training, assessment, and legitimate expectation of contract-renewal are arguably weaker than those of other workers, but whose rights to and interest in fair treatment in the workplace are undiminished.

Factors must be identified in order to assist the arbitrator to properly distribute the employer's duties. An important factor will be the overarching purpose of the LRA, including advancing economic development, and giving effect to constitutional (and statutory) rights, in particular rights to fair labour practices for both employers and employees, employment security, proper pre-dismissal procedures, and to reinstatement as the primary remedy for unfair dismissal.

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<sup>105</sup> In *State Information Technology Agency (Pty) Ltd v CCMA & others* [2008] JOL 21836 (LAC) the court applied the 'reality test' to a triangular situation, and found that the 'client' (and not the TES-type CC through which the employee was deployed) was the true employer.

<sup>106</sup> In terms of CCMA Rule 4.

<sup>107</sup> *Denel (Pty) Limited v Gerber* (2005) 26 ILJ 1256 (LAC); *State Information Technology Agency (Pty) Ltd v CCMA & others* (n121). But see André van Niekerk 'Personal Service Companies and the Definition of Employee – some thoughts on *Denel v Gerber*' (2005) 26 ILJ 1904, who argues that parties to employment relationships should be permitted to regulate their affairs to their advantage and that, 'shams aside' (p1908) there are limits to the courts' legitimate ability to intervene.

<sup>108</sup> Section 200A of the LRA establishes a rebuttable presumption that a person is an employee if any one of eight listed factors is satisfied.

<sup>109</sup> Code of Good Practice: Dismissals (Schedule 8 to the LRA), see also s138(6) of the LRA, and the Code of Good Practice: Who is an Employee (Government Gazette 29445 published 1 December 2006).

## **8. Conclusion**

Labour broking is a growth industry. Its competitive advantage lies in its ability to offer employers labour that is both cheap and relatively unprotected. This niche market, exacerbated by competition within the labour broking market itself, creates a pressure on labour brokers to exploit weaknesses in the legal framework of the LRA.

The LRA's weaknesses that have been revealed through this social process lie in the areas of collective bargaining and protection against arbitrary dismissal. Employees of labour brokers cannot effectively exercise bargaining rights and are subject to precisely the type of arbitrary treatment by employers that the LRA was enacted to prohibit. Exploitation of these weaknesses has become a key selling point for labour broking services. The legislative fiction of the labour broker as employer has provided businesses with immunity as statutory tribunals such as the CCMA have struggled to address the real relations of employment.

This niche market is built on a limitation of constitutional rights that is both unintended and unjustifiable. The limitation runs directly counter to the central thrust of the LRA as the key piece of legislation enacting the constitutional right to fair labour practices. The LRA therefore requires amendment.

The various possible remedies have different consequences. The (technically) least complex legislative amendment would be the abolition of the s198 provision (following the Namibian Parliament). This is a rational choice. It puts an end to the undermining of fundamental, hard-won workers' rights, and leaves intact the ability of employers to contract outside agencies to recruit and administer temporary staff.

Pending such an amendment, labour tribunals must be circumspect in their application of s198. Employers who perform 'outsourcing' work for other businesses are not TESs. Clauses that purport to tie workers' employment contracts to the fortunes of commercial contracts between the employer and third parties should not be permitted to relieve employers of their duty to dismiss fairly, whether the reason for dismissal be operational requirements, misconduct or incapacity. Tribunals must be alive to the

abuse by employers of provisions in employment contracts which aim to circumvent legislation, and must not hesitate to declare such provisions invalid.

Judges and arbitrators should not lose sight of the overall scheme and purpose of the LRA, in giving expression and substance to the rights of every South African worker to basic employment security, and to collectivise to improve terms and conditions of employment.

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