ISSN: 2456-7760

AN EXPLORATORY STUDY INTO ANTICIPATED EFFECTS OF THE INTERPRETATION OF SECTION 198A (3) (B) OF THE LABOUR RELATIONS ACT ON BUSINESSES IN DURBAN.

Zak Narain
Department of Business Studies
Management College of Southern Africa (MANCOSA)
Durban, South Africa
Logan D. Naidoo
Department of Human Resource Management
Mangosuthu University of Technology
Umlazi, South Africa

Abstract

The banning of labour brokers has been debated extensively by Parliament, with the result being the implementation of Section 198A (3) (b) of the Labour Relations Act (LRA), Act 66 of 1995. The legislation has been in place since 2015, however a ruling by the LAC on 10 July 2017 ruled that contract employees of the Temporary Employment Services (TES) become permanent employees of the client company after 3 months. This study explores the perception on the potential effects of the implementation of Section 198A (3) (b) of the LRA on businesses in Durban, South Africa.

The study obtains the perspectives of interviewees on the effects of the implementation of Section 198A (3) (b) of the LRA, and determines its impact on businesses in Durban, it goes on to identify possible strategies to address the effects. An exploratory study, following the qualitative approach was used to gather specific non-numerical data leading to inductive reasoning that is probably true. Theoretical sampling was employed in the study as information was required from a sample of the population that knows the most about the subject.

The study revealed through the respondents that the implementation of Labour Relations Amendment Act 66 of 1995 (LRAA) as interpreted by the Labour Appeal Court (LAC) will have a negative impact on business and the TES, employees will derive short term benefit as workers will have access to permanent jobs with benefits, however, the long-term effect on employees is negative, as jobs are expected to be lost. The short-term effects of the LRAA do benefit temporary employees, but business is negatively affected, both in the short and long term.

Keywords: Labour Relations Act, Temporary Employment Services, labour brokers, contract employees, employment

Vol. 3, No. 05; 2019

ISSN: 2456-7760

LIST OF ACRONYMS

BCEA	Basic Conditions of Employment Act 75 of 1995
COSATU	Congress of South African Trade Unions
EEA	Employment Equity Act 55 of 1998

Introduction

The recent amendments to the Labour Relations Act, 66 of 1995 (LRA), pertaining to temporary employment, has been tested at the Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court (LC) and Labour Appeals Court (LAC), the decisions varied, in that the CCMA interpreted the amendment to the LRA strictly against business, whilst the LC ruled in favour of business, however, the LAC concurred with the CCMA and highlighted that temporary employees that were employed for over 3 months, automatically become permanent employees of the company. The matter is currently being appealed to the Constitutional Court and the status quo, being the duel employment relationship, will remain until the Constitutional Court has made a ruling. This study will explore the anticipated effects of the interpretation of Section 198A (3) (b) on businesses in Durban that utilise temporary employees. The background to the problem will be discussed; the aims and objectives will be laid out, followed by literature review and the chosen methodology.

The qualitative approach will be used to understand the new interpretation of the Act and its anticipated effects and impact on businesses. The research method was the mono method, where a single data collection technique consisting of interviews were employed. The data collection technique was the inductive approach, whereby data was collected and theory developed from the analysis of the data. Thereafter, the study attempted to understand and determine the impact that the new interpretation had on businesses in Durban, South Africa. The impact of the anticipated effects is discussed and finally recommendations made on how to minimize any challenges highlighted.

Background to the Problem

Businesses in Durban, South Africa have over the years employed strategies to increase their profit margins; these included employing workers on seasonal and fixed term contracts which benefitted business as they could reduce their salary expenses as required. This contentious strategy to avoid labour laws have been constantly challenged by employees and unions, highlighting that it is unfair labour practice as workers are being dismissed and are not afforded protection by the LRA.

Labour broking, part-time employment, outsourcing and fixed-term contracts are a large part of business strategies that have benefited businesses to achieve the competitive advantage. However, unions criticize this, stating that employees are being exploited and deprived of protection granted by labour and related laws.

The CCMA, in the case Assign Service (Pty) Ltd v Krost Services and Racking (Pty) Ltd and another (2015:12), on 29 June 2015 found that the deeming provision is interpreted to mean "that the client becomes the sole employer of the placed TES employees for purposes of the LRA, provided that they earn below the earnings threshold determined pursuant to section 6 of the BCEA of and have been placed with the client for longer than 3 months".

Business and the TES were clearly not satisfied with this decision as they took the matter on review. The LC on reviewing the arbitration award in the case ruled in favour of TES and business on the 8th of September 2017. In the case Assign Services (Pty) Ltd v CCMA and Others (2015:15), the judge reviewed the decision of the CCMA and set it aside, the ruling followed the duel employment relationship created by the LRA and maintained the status quo.

National Union of Mineworkers South Africa (NUMSA) was not satisfied with the outcome of the LC on reviewing the decision of the CCMA commissioner and appealed the matter to the LAC. The judge dismissed the review by the LC and ruled in favour of the workers and NUMSA, in that workers, who were contracted by TES, automatically become permanent employees of the company if they work at a company for longer than three months.

NUMSA's general secretary Irwin Jim said "this is a victory for contract and temporary workers everywhere. It confirms that labour brokers may not exploit workers on contract for indefinite periods of time. We have seen this example in Transnet in Richards Bay where 50 workers had their contracts terminated to circumvent the application of this law. They worked more than three months and yet Transnet has refused to grant them permanent status. NUMSA will now pursue their plight even more aggressively and demand justice for our members," (Mathope 2017:1)

Preston and Naidoo (2017:2), report that the Confederation of Associations in the Private Employment Sector (CAPES) has filed an application for leave to appeal the judgment of the LAC in the Constitutional Court. This suspends the effect of the judgement by the LAC until the outcome of the appeal. The present situation is thus, that the decision by the LAC is suspended and the LC decision will remain applicable until the Constitutional Court makes a finding.

This matter is of public interest and an application for leave to appeal the decision of the LAC has been filed by the TES to the Constitutional Court. It is business as usual for the TES industry and Businesses, pending the outcome of the Constitutional Court ruling. Understanding and determining its impact on businesses in Durban will be of great value in identifying possible strategies to circumvent its negative impact.

Problem Statement

This research explores the perception of businesses on the effects of the implementation of Section 198A (3) (b) of the LRA that deems contract employees of TES to automatically become permanent employees of the company after 3 months. The study seeks to address the perceived impact thereof on business and the temporary employment model.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

Aim of the Study

The aim of this study is to obtain the perception of the interviewees on the potential effects of the implementation of Section 198A (3) (b) of the LRA, as ruled by the Labour Court of Appeal on 10 July 2017, and to understand and determine its impact on businesses in Durban and to identify possible strategies to address the effects.

- **Objectives of the Study**

The research objectives are:

- To determine whether the old interpretation of Section 198 of the LRA was better for business.
- To explore the anticipated effects of the interpretation of Section 198A (3) (b) of the LRA on businesses in Durban.
- To explore the anticipated effects of Section 198A (3) (b) of the LRA on Temporary Employment Services.
- To understand the reasons for the unions pushing for the new interpretation of Section 198A (3) (b) of the LRA
- To identify possible strategies to address the effects of the act on businesses

- **Significance of the Study**

There have been no known studies carried out to explore the anticipated effects of the interpretation of Section 198A (3) (b) of the LRA on businesses in Durban. Studies pertaining to "The concept of 'flexicurity': a new approach to regulating employment and labour markets" by Wilthagen and Tros (2004:166), "Can Labour Regulation Hinder Economic Performance? Evidence from India" by Besley and Burgess (2004:91) and "The history of labour hire in Namibia: A lesson for South Africa" by Botes (2003:506), have been undertaken, but are not related to the new interpretation of Section 198A (3) (b) of the LRA. These studies have little or no relevance to the topic and location being proposed. Extensive studies have been conducted on this topic in a legal context, they pertain to the interpretation of the act and law, and it is not relevant to business, the topic and location being proposed. The proposed study seeks to understand the phenomenon from a business perspective and find answers that will greatly benefit business.

Warning bells, in the form of public comments by the unions, have been going off since the LRAA came into effect in 2015, but businesses operated as usual and continued to utilise TES as done in the past. The matter was then arbitrated by the CCMA and in June 2015, the deeming provision was interpreted in favour of the employees and against the employers and TES. Again, businesses operated as usual. In September 2015, the matter was heard by the LC that set aside the CCMA ruling, but this was appealed by the union to the LAC, who delivered its judgment on the 10th of July 2017, in favour of the employees and union. The decision is currently being appealed by the employer and TES to the Constitutional Court, resulting in the LC decision remaining until the matter is decided upon by the Constitutional Court. Again, businesses are

Vol. 3, No. 05; 2019

ISSN: 2456-7760

operating as usual, the lawyers are abreast of this matter and businesses need to be educated so that they can plan to mitigate any risks.

The research benefits businesses in Durban that utilise fixed term contracts. Employers' Associations will be presented with the anticipated effects of the interpretation of Section 198A (3) (b) of the LRA on businesses in Durban, this will be of value in identifying strategies to circumvent negative impact.

The study will be academically important as it proposes to understand the new interpretation of the LRA and its impact on businesses in Durban though the eyes of all the role-players that have a significant interest in this decision. Understanding the impact and identifying possible strategies to circumvent its negative impact, can help businesses to be proactive should the Constitutional Court rule in favour of the union employees.

Literature Review

This section provides an introduction into the research topic as well as the reasons for choosing to understand the new interpretation of Section 198A (3) (b) of the LRA and its impact on businesses in Durban. The unions and business have conflicting views on TES, unions argue that employment agencies should be banned, however business is in favour of the retention of agencies, with improved regulation (Van Eck 2014:63).

Statistics South Africa (2017:7), depict the conditions of employment for employees, the graphs indicate the changes in unspecified, limited and permanent contracts over a 3-month period (quarter) in 2017 and compares the change with the same period in 2016. The results for the first and second quarters show that, "Between Q1:2017 and Q2:2017, employment contraction affected all employees irrespective of the nature of employment contract, with the largest decreases among employees with contracts of a limited duration (71 000)". The results for the year to year comparison showed that, "Compared to the same period last year, the number of employees increased for all types of contract durations. The largest increase of 259 000 was recorded among employees with permanent contracts, followed by those with contracts of unspecified durations (119 000)" (Statistics South Africa. 2017:7).

The statistics clearly indicate that limited duration or fixed term contracts have increased, clearly indicating that business has not heeded to the amendment of Section 198A (3) (b) of the LRA.

- **Employment contracts**

This section provides an insight into employment contracts, they fall into 2 broad categories, namely, permanent and fixed term contracts. The study is only concerned with fixed term contracts as this is currently the issue at hand, and, more specifically duel employer contracts that creates a position whereby the TES and the client are both liable as employers. Grogan (2014:44) indicates that, a person, in terms of labour law, ceases to be an applicant and becomes an employee when an employment contract is concluded.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

Fixed term employment contracts and the use of TES is well established in business. Subcontracting is well established in both public and private sectors, as is the use of fixed-term contracts for staff in the public sector and temporary agency workers are used in about a quarter of all workplaces and freelancers by one in eight, though rarely in the public sector (Marchington and Wilkinson 2005:46).
Majority of the industries utilise temporary employees to provide more flexibility to the organisation and a more adequate staffing level when the demand increases. The agricultural sector relies on casual workers to harvest seasonally, the manufacturing sector uses temporary workers based on demand for their product, the educational sector makes use of contingent workers during examinations for marking and invigilating and the medical services employs on fixed term contracts (Nel and Werner 2014:10).

However, Geldenhuys (2017:2) believes that terminating a fixed-term contract upon the fulfilment of a resolutive condition is very controversial. The enforcement of an automatic termination clause in certain circumstances can be viewed as contrary to public policy, as the employer has no protection by the law, and be declared invalid because the affected employee would have no recourse against the employer.

Companies, when faced with a sudden need to employ staff rely on TES to supply skilled and unskilled workers as required. The TES has the capability of making staff available immediately, either from their pool of workers or the TES recruits the staff specified by the company, this relieves the company of the administrative tasks of recruitment and selection.

Long term employment costs such as pension or medical scheme are reduced, making
it a more cost-effective alternative to the business employing permanent employees. Unscrupulous labour brokers exist amongst ones that provide a professional service to business, who subject employees to low wages, unfavourable working conditions and job insecurity (Nel and Werner 2014:10).

In terms of the contract highlighted in the case, National Union of Metal Workers of South Africa v Abancedisi Labour Services (2012:18), the work assigned to every employee was dependent on the availability of work which is afforded to the TES by the client. There was no guarantee of work or security of employment.

Fixed term contracts with Labour brokers was highlighted in the case SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd (2015:21), where Judge Mosime stated that, "It can no longer be debatable that, following this legislative directive, labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment contract and undermines the employee's rights to fair labour, or that clads slavery with a mink coat, is now prohibited and statutorily invalid". Judge Mosime believed that labour brokers were using a contract to avoid

adhering to labour laws, specifically the protection afforded to employees by the LRA against unfair dismissal. He likened the employment relationship to slavery and ruled that it is invalid.

- **The Transformation and impact of Labour Legislation**

This section provides an overview of legislation governing labour. The Constitution is the supreme law of the country, and all other laws must conform to the basic principles contained in the Constitution. Section 23 of the Constitution states that "Everyone has the right to fair labour practices" (Constitution of the Republic of South Africa 1996:1251). Van Eck (2010:122) acknowledges the right to fair labour practices and states that this is the very reason that it is difficult to justify why workers with a short service record should be exempt from protection offered against unfair dismissal. The LRA is the highest of all labour legislation and conforms to the Constitution, section 1 (a) of the LRA highlights its purpose as, "to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution" (Constitution of the Republic of South Africa 1995:1255).

- **The Labour Relations Act in its original form**

This section describes section 198 of the LRA in its original form and explores the position of business, TES and employees under the old interpretation. Section 198 of the LRA will be interpreted through opinions of various authors, Commissioners and Judges, which will be considered to ascertain the most accepted interpretation. Business, TES and union operations under the original interpretation will be understood through interviews.

Labour Relations Act (1995:114), section 198 (1) of the LRA defines a TES. The definition highlights that the employee must procured and paid by the TES but, renders work to the client and not to the TES. The client does not recruit, select or perform any administrative function, however pays the TES for this service.

Labour Relations Act (1995:114), section 198 (2) of the LRA indicates that the TES is the employer and states that, "a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer". Cohen and Moodley (2012:11) highlights that temporary employment services contribute significantly towards working conditions that are insecure for employees and state that, "Section 198(2) of the LRA stipulates that the temporary employment service is the employer of the person whose services have been procured for a client, and limits the client's liability to joint and several liability with the employer for a contravention of the terms and conditions of a collective agreement, arbitration award, sectoral determination or provision of the Basic Conditions of Employment Act."

Labour Relations Act (1995:114), section 198 (4), however, allows for a duel employment situation and reads as follows, "The temporary employment service and the client are jointly and

Vol. 3, No. 05; 2019

ISSN: 2456-7760

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

Le Roux (2012:25) states that the TES has inserted provisions in their contracts of employment which provide that the contract will terminate automatically in certain circumstances. This was done in instances if the client no longer wants services of an employee, or if the contract between the TES and client expired. The automatic terminations would result in that there would be no dismissal and the fairness of which can be challenged.

The dual employment relationship benefitted the client as they could terminate the contract with the TES, that would in turn dismiss the employees. The employee, in this relationship had no recourse against the client as the client was not the employer and did not bear any obligations imposed under the LRA to ensure that employees not to be unfairly dismissed. For the company to dismiss one of their own employees for operational requirements, they would need to follow the requirements of the LRA and proceed with retrenchments, but under the duel employment relationship, none of these obligations were placed upon them. The TES would dismiss employees based on their contract ending and no benefits were due or payable.

The act provides for a situation where a person is excluded from the benefits of an employee if the worker is, according to the definition, an independent contractor. South Africa (1995:114), section 198 (3) of the LRA reads, "Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person." If the worker is deemed to be an independent contractor, he will have no recourse against the TES or the client according to the LRA.

- **The LRA as amended in January 2015**

This section describes the LRA in its amended form and explores the anticipated effects of the new interpretation of the Act on business, TES and employees. Section 198 of the amended LRA still deals with TES, but has split section 198 into 4 parts, bringing in the deeming provision, it however, only covers employees earning below a threshold. South Africa (1997:8), section 6(3) states that, "The Minister must, on advice of the Commission, make a determination that excludes employees earning in excess of an amount per year in that determination". The determined amount made by the Minister on the 1st of July 2014 was R205 433.30. (South Africa 2014(2):3).

This section will be interpreted through opinions of various authors, Commissioners and Judges, which will be considered to ascertain the most accepted interpretation. Business, TES and union perceptions under the amended version will be understood through interviews.

South Africa (2014(1):34) section 198A (1)(a) of the LRA defines temporary service as, "work for a client by an employee for a period not exceeding three months". This radically differs from the previous legislation as it stipulates a period of three months. The legislature has clearly indicated that any service conducted over the stipulated period is not considered as temporary service

Section 198A (3) of the LRA does away with the duel employment situation and brings in the deeming clause. The employee is still considered to be employed by the TES, but strictly according to the definition of temporary service and if the period exceeds three months, the employee is deemed to be employed by the client. The employee is at no stage seen to be employed by both the TES and client. (South Africa 2014(1):36)

Section 198A (5) of the LRA states that the employee, when employed through the TES does not receive the same benefits as the employees of the client, Salary scales, bonuses working hours, leave, sick leave, housing subsidies and medical aid benefits are amongst the perks that are generally excluded in temporary contracts. However, once the period of employment exceeds three months, the client is now obligated to ensure that the temporary employee, that has been deemed to be its employee, is treated the same as the employees of the client that are doing the same job. (South Africa 2014(1):36)

Section 57(1) of the EEA provides that, "a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where that person's employment with the client is of indefinite duration or for a period of three months or longer". (South Africa 1998:46). The LRA and the EEA are now aligned in that the definition of TES is the same, the deeming provision and the three-month period of employment has been included in the amended LRA

It is suggested by Van Eck (2013:607) that, rather than the worker being deemed to be the employee of the client, the section should have maintained the position that the TES is the employer with the added protection of rendering the TES and the client jointly and severally liable for all employer-related obligations after the initial six-month period. This, with the equal treatment provision, would prevent the interpretational problems that will likely result from the suggested amendments.

- **The CCMA ruling in June 2015**

In this section, the CCMA ruling in the case Assign Service (Pty) Ltd (Assign) v Krost Shelving and Racking (Pty) Ltd (Krost) and another will be discussed. Commissioner Osman of the CCMA ruled that, the placed workers supplied by the TES who earn below the threshold in terms of Sec 6(3) of BCEA and have been placed at the client company for more than three months on a full time basis, are deemed to be the employees of the client company on an indefinite basis and the client company is deemed to be their sole employer, with effect from 1

Vol. 3, No. 05; 2019

ISSN: 2456-7760

April 2015, and be treated no differently in wages, benefits and conditions to that of the client companies existing employees.

Krost offered storage solutions, the company employed approximately 130 workers and Assign was the TES that provided an approximate of 40 additional workers to their client Krost. 22 of the workers supplied by Assign to Krost were placed for a period longer than 3 months. Krost was administratively responsible for its 130 employees in that it disciplined them, whilst Assign was responsible for disciplining the 40 placed employees. NUMSA represented the placed workers and the matter was referred to the CCMA for Arbitration, to determine the interpretation of the deeming provision incorporated into section 198 A (3) (b) of the amended LRA.

Assign argued in favour of the dual employment relationship, stating that the employees remain as the employees of Assign and are also deemed to be the employees of Krost. The view of Krost differed, in that they believed that the placed employees are deemed to be the sole employees of Assign. NUMSA argued against both submissions, stating that the act must be interpreted strictly as the word, "deem" according to the Pocket Oxford Dictionary means "regarded as being". NUMSA maintained that Krost is the employer of the workers placed by Assign, not Assign and there is no room for the duel interpretation.

The Commissioner, in interpreting the LRA and considering the submissions of the parties, stated that, "Indeed, the legislature did not decide to ban Labour brokers but chose to strictly regulate the Industry. In doing so it chose to afford greater protection to vulnerable employees who earn below the threshold, set in Sec 6(3) of the BCEA, by the deeming provision and other subsections in Sec 198A. This means that as far as those employees earning above the threshold are concerned, Sec 198A does not apply to them and the triangular relationship, between the TES, the client and the placed worker continues, subject to the provisions of Sec 198 of the LRA. About those placed workers who fall within the ambit of Sec 198A of the LRA, the commercial relationship between the TES and the client may continue, however for purposes of the LRA the client is deemed to be the sole employer after the three months period has elapsed."

The decision highlights that Labour Brokers and the duel employment relationship continue to exist, but in a regulated form. Employees earning above R 205 433.30 are not affected by this decision and will continue to be employed by the TES and work for the client, however, employees earning below the threshold will be deemed to be employed by the client after 3 months.

Vulnerable employees that are subject to labour broking are now afforded protection by the LRA. "For years, the labour movement has made no bones about its abhorrence of labour broking, which it likened, in some cases somewhat hyperbolically, to slavery" (Grogan, 2015:4).

"Having been privy to reports published in various South African newspapers shortly after delivery of the award and the opinions expressed therein by spokespersons of various

Vol. 3, No. 05; 2019

ISSN: 2456-7760

organisations that represent agencies that provide temporary employment services, it became very much apparent that an application for the review ... may be forthcoming" (Scheepers, 2015:1). Section S145 of the LRA allows a party to review the decision in the Labour Court if they allege a defect with a commissioner's ruling or award, the ruling made by the commissioner was in favour of the employees, leaving Krost with the burden of not only assuming the role of the employer of the 22 employees, but ensuring that they are treated equally to the permanent employees.

- **The Labour Court ruling in September 2015**

In this section, the LC ruling in the case Assign Services (Pty) Ltd v CCMA and Others (2015) will be discussed. Assign Services was not satisfied with the decision of the CCMA and took the matter on review to the LC. Judge Brassey in reviewing the matter, ruled in favour of TES and business on the 8th September 2017, setting aside the award issued by the CCMA and restoring the status quo remains.

The Judge found that the employees placed by Assign at Krost are employed dually and that the commissioner has made an error in law by holding that Krost, the client, was deemed as the sole employer of the placed employees. The commissioner did not have the jurisdiction to decide on a question of law, he should have referred the matter to the LC for a decision.

In the case, Head of the Department of Education v Mofokeng & others (2015:15) the Judge cites the Bato Star Fishing finding where it was determined that, if an error caused a result that would have been different if it had not made, then the error will be assumed to be material and accepted that it caused an unreasonable result. The reviewing Judge is guided by this decision to analyse the decision to determine if a balance was reached according the LRA.

Judge Brassey based part of his decision on the reasoning that the result of the arbitration would have a different outcome had it not been for the error made by the commissioner of the CCMA. The mistake was in law and it was material to the commissioner making a finding and a balance was not reached according to the objects of the LRA.

- **The Labour Court of Appeals ruling in July 2017**

In this section, the LAC ruling in the case NUMSA v Assign Services (2017) will be discussed. Judge Tlaletsi, ruled on the 10th July 2017 that the order of the LC is set aside and dismissed the review application of the union. This was in favour of the workers and NUMSA, in that workers, who were contracted by TES, automatically become permanent employees of the company if they work at a company for longer than three months.

The Judge considered the reasoning of the LC Judge and the CCMA commissioner in making his findings, he highlighted that a material error in law will result from an incorrect interpretation of the law by a commissioner. The Judge proceeded to tested whether the outcome reached by the CCMA was incorrect or unreasonable and concluded that the LC was misdirected in its

Vol. 3, No. 05; 2019

ISSN: 2456-7760

interpretation of section 198 A(3)(b) of the LRA and that the outcome reached by the CCMA commissioner was reasonable and correct.

The interpretation of section 198 of the LRA was in dispute and the Judge used section 39(2) of the Constitution which reads as follows, "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." to guide him in interpreting the law (South Africa 1995:1267).

Section 7 (1) of the Constitution highlights the spirit, purport and objects of the Bill of Rights, highlighting that, "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom" (South Africa 1995:1245).

Section 198 A (3)(b) of the LRA was interpreted by the Judge to support the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers.

The Judge stated that, "The amendments further regulate the employment of persons by a TES in a way that seeks to balance important constitutional rights. The main thrust of the amendments is to restrict the employment of more vulnerable, lower- paid workers by a TES to situations of genuine and relevant "temporary work", and to introduce various further measures to protect workers employed in this way."

COSATU has interpreted the ruling of the LAC as final and a call for employers to comply with the ruling however COSATU can only plead with employers in the interim, as the ruling cannot be enforced by law at this stage (Politics Web 2017:1).
The current position is that judgement made in the LAC is suspended and the LC decision that was made in favour of the TES and business remains in force until the Constitutional Court decides differently (Preston and Naidoo 2017:1).

- **The position of business in Durban under the old LRA**

In this section, the position of business under the old LRA will be discussed. The actual employer avoids the responsibilities of providing employees with benefits by utilizing a labour broker (Tshoose and Tsweledi 2014:337).

Benjamin (2013:8) believes that the old LRA was intended to facilitate the supply of temporary staff but has however become a vehicle for enabling a permanent triangular arrangement of employment, where an employee is employed by one party and works for another party. This leaves employees without job security and the temporary employees earn less than those employed directly by the employer.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

Avoiding the responsibility of administration and the payment of benefits for employees allows a business to have the competitive advantage and achieve greater profit margins. The old LRA was beneficial to business as it operated like a free market system where the government intervention in business was minimal.

- **The impact of the amended LRA on businesses in Durban**

In this section, the impact of the amended LRA on businesses in Durban will be discussed. Mangcu-Lockwood (2014:6), highlights the impact of the LRA in that, “Termination by TES or client to avoid deeming provision, or because employee exercised a right in the LRA, is a dismissal”. The termination of an employee in this light will make the client liable as it is now considered to be a dismissal regulated under the LRA. The employee may be awarded compensation or reinstatement by the CCMA.

The vice-president of the Federation of African Professional Staffing Organization, Mr. KC Makhubele, was interviewed on SAFM to determine the impact of the labour law amendments on the national recruitment and staffing industry. His concern was that many companies have interpreted the amendment of the LRA as, any contracted employee after three months must be made permanent. He described in running a business you would run a fixed cost level in terms of your employees, as well as a variable cost, depending on the projects and the seasonality of your work. Mr. Makhubele stated that, “companies and the businesses are going to shed a lot of jobs. The interim estimation is that we will possibly lose anything to a region of about 250 000 current employments”. He went on to indicate that, instead of taking the people that they had employed through a TES, or through a fixed-term contract, which is a direct employment but on a contract basis, businesses have decided to let go of those people. He stated that, “the number that we currently have, a cross-section, is that from the current positions that we have on fixed term as well as TES, only 23% of those people are being employed permanently. And now that is going to add a huge, huge dent in terms of the employment rate in South Africa” (Mgabadeli 2014:1).

The workers will experience a serious impact from the LRAA, in that approximately 250 000 of them will lose their jobs, this will impact on service delivery and production in the business sector, resulting in shrinking profits, downsizing and even closure of smaller businesses.

- **Strategies to circumvent the impact on business**

In this section, various strategies how to circumvent the impact on business will be discussed. Gericke (2011:130) concludes that, "Most governments and policy makers, however, are neither pure free trade advocates nor pure protectionists. They do not think there is a simple choice between more jobs (free trade) and better jobs (protection).” They attempt to establish a balance between "free trade and investment on the one hand and employment growth and the [upliftment] of social and labour standards, on the other hand". When considering labour law reforms, "any new phase of labour law reform should be comprehensive and not limited to a specific objective".

The current labour reform revolves around a specific objective in that it seeks to afford greater protection to vulnerable employees who earn below the threshold. This should not be limited and should strike a balance between the TES, business and employees.
Judge Tlaletsi stated in the case NUMSA v Assign Services (2017:2) that, "the sole employer interpretation does not ban the TES, but regulates the TES by restricting it to genuine temporary employment arrangements in line with the LRAA. The TES will remain as the employer of the placed employee until the employee is deemed to be the employee of the client". A strategy for the TES to survive under the LRAA would be to comply with the law or reinvent itself to operate in a manner that is not legislated.

Section 198 (3) of the LRAA highlights that an independent contractor is not an employee of a TES, nor is the TES the employer of that independent contractor. An independent contractor is also not an employee of the client. This section allows for a situation where the TES can avoid the worker being deemed to be the employee of their client, all the TES needs to do is to change the relationship it has with the client, from being a TES to being a sub-contractor. This strategy will avert the client being deemed as the employer, however the sub-contractor (previously the TES) will now be deemed as the employer. It may be argued that this section changes nothing, as it merely passes the liability over to the TES, but it does create a place for the TES to function with business.

RESEARCH METHODOLOGY

According to Gupta and Gupta (2011:5), the research must meet certain criteria and it must be conducted in a structured manner that uses recognised methodologies which have been tested in terms of validity and reliability.
The research design of the study requires the researcher to gather specific non-numerical data, the qualitative approach was used to understand the anticipated effects of the interpretation of Section 198A (3) (b) of the LRA on Businesses in Durban. An exploratory study was conducted by interviewing individuals and experts to find an insight into the perception of businesses as the topic is new and literature pertaining thereto was limited.

- **The Research Philosophy**

The study used a qualitative method of gathering data through an inductive approach and adopted the philosophical approach of interpretivism, as the researcher's view of the nature of reality, the amendment to the LRA, is purely academic and the study seeks to understand the anticipated effects of this phenomenon.

- **Research Strategy**

The choice strategy for this research is the qualitative data collection technique and the interviewing strategy coupled with a search for literature. The data collection techniques require small samples with an in-depth investigation. Sampling Strategy

- **Target Population**

Vol. 3, No. 05; 2019

ISSN: 2456-7760

The population of the study is the companies that employ temporary workers through TES. Attempts have been made to quantify the number of companies but research has only indicated the number of temporary employees that are affected by this phenomenon. An estimated 250 000 temporary employees will be affected and these people are employed by various TES and business, of the number of employees that are on fixed term as well as TES, only 23% of them are being employed permanently. (Mgabadeli 2014:1).

The aim of this study is to obtain the perspectives of the respondents on the effects of the implementation of Section 198A (3) (b) of the LRA, to understand and determine its impact on businesses in Durban and to identify possible strategies to address the effects. The criteria set by the aim required the population to include only the: businesses in Durban that utilise TES; TES's in Durban that supply labour directly to businesses; commissioners employed by the CCMA situated in Durban; unions that represent workers employed by TES in Durban; employer organisations and labour advisory services that represent businesses in Durban that utilise TES; and lawyers practicing in Durban that specialise in labour law.

- **Sampling**

Theoretical sampling is employed in the study as information is required from a sample of the population that knows most about the subject, however the samples were purposively selected.

- **The Research Sample**

The study is not generalised to a larger population and the participants were not chosen randomly as the research questions seek insight into a specific subgroup of the population. The group offers specialised insight into the research questions and a small sample is appropriate.

- **The Research Instrument**

Techniques used to obtain and analyse research data include questionnaires, observation, interviews, and statistical and non-statistical techniques, however, interviews can help the researcher gather valid and reliable data that are relevant to research questions and objectives (Saunders et al. 2009:595).

- **Interviews**

The research utilises interviews that directs the respondent's attention to the effects of the amended LRA. The research instrument consists of seven structured questions that are guided by the research objectives, the individual questions are supplemented by a breakdown of sub-questions that guides the respondent in focusing thereon.

- **Pilot Study**

A pilot study was conducted. The researcher used one respondent who was not part of the selected sample to conduct a pilot study.. The respondent reported that the questions were clear and unambiguous without any repetitions.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

- **Data Collection**

The qualitative data collection method was adopted, using interviews as the data collection technique to generate non-numerical data. The interviews were non-standardised and were done on a one-to-one basis as the participants hold a rich knowledge in the field being studied. The researcher recorded the interview on a voice recorder and the researcher made notes of the highlights of the interview. If the interview was not recorded, then the researcher made in-depth notes thereof.

- **Data Analysis**

The ATLAS.ti 8 software program, a qualitative data analysis tool (QAD), was used to identify meanings, relationships, search for specific words or a combination of words and for logical batched and non-batched statistical analysis through the Statistics software package (SPSS).

INTERPRETATION OF FINDINGS AND DISCUSSION

The findings of the study are presented, analysed and interpreted in relation to the literature. Twenty-seven themes were identified by the researcher through coding. The emergent themes were then analysed further to arrive at the main themes.

- **Grouping of emergent themes into core themes**

- **The old LRA benefitted business**

The position of business and workers under the old LRA was an overriding theme identified in the study as respondents based the current experience on what was practiced previously.

- **Anticipated effects of the LRAA on business**

The anticipated effects of the LRAA on business and workers were identified as a core theme as respondents related their experiences to the changes in law.

- **Anticipated effects of the LRAA on the TES**

The anticipated effects of the LRAA on TES were identified as a core theme as respondents related their experiences to the changes in law. Unions reasons for pushing for the LRAA

The agenda of the unions came out strongly and was identified as a core theme with respondents giving their opinions on the matter. Strategies employers can use to mitigate the effects of the LRAA

Respondents shared strategies currently employed and suggested strategies that might mitigate the effects of the LRAA on business; it was identified as a core theme with respondents giving their opinions on the matter. Supplement to the five core themes

Vol. 3, No. 05; 2019

ISSN: 2456-7760

Respondents shared various other views that was too vast to capture a main theme thereof, however this information was used by the researcher to supplement the five core themes. The attempts to group the data are indicated in Figure 15.

- **Detailed analysis of Core Themes**

- **The old LRA benefitted business**

Data gathered through the interviews revealed that all respondents agreed that the old LRA benefitted business to a large extent.

Tshoose and Tsweledi (2014:337) and Nel and Werner (2014:10), both concede that the actual employer can avoid responsibilities, by reducing costs by not providing employees with benefits. Nel and Werner (2014:10) believes that majority of the industries utilise temporary employees to provide more flexibility to the business, thus indicating that the old LRA benefitted business.

The duel employment relationship benefitted the client as they could terminate the contract with the TES that would in turn dismiss the employees. The employee, in this relationship had no recourse against the client as the client was not the employer and did not bear any obligations imposed under the LRA to ensure that employees not to be unfairly dismissed. Financial benefit was achieved through avoiding the payment of UIF, benefits and market related salaries. Business avoided the tedious administrative task of advertising, recruiting, selecting, disciplining and dismissing this allowed companies to concentrate on its core business. Business operated in an efficient manner and had tremendous flexibility during seasonal and peak periods. General benefits included the use of scab labour to break strikes and not having to deal with unions.

- **Anticipated effects of the LRAA on business**

All respondents anticipated that business will experience negative effects from the LRAA.

Mangcu-Lockwood (2014:6) and le Roux (2012:27), indicate that business will be negatively impacted in that the termination of an employee to avoid the deeming provision will be a dismissal and make the business liable under the LRA. The employee may be awarded compensation or reinstatement by the CCMA. Mgabadeli (2014:1) was also of the opinion that business will be impacted as it would affect the fixed and variable costs pertaining to projects and seasonal work, which will impact on service delivery and production in the business sector, resulting in shrinking profits, downsizing and even closure of smaller businesses. Benjamin (2013:18) highlights that organized business believes that the LRAA is too restrictive and it will have negative consequences on job creation.
The impact of the LRAA on business is negative and, disruptions to operations, increase in expenses and time spent on administration are highlighted as the main challenges. Business is not able to employ all the temporary workers, and if this ruling is made, business will need to employ or retrench workers, in both cases business suffers financially and some may close. The

Vol. 3, No. 05; 2019

ISSN: 2456-7760

flexibility adopted previously will be lost and this will impact on the productivity and profit margins. Business will also be liable for any LRA infringements and be cited as the employer.

- **Anticipated effects of the LRAA on the TES**

All respondents concurred that the TES will be adversely affected; some suggest that they may close whilst others are of the opinion that they will experience financial difficulty.
Geldenhuys (2017:2), le Roux (2012:25) and SA Transport & Allied Workers (2015:21) agreed that fixed-term contract used by the TES under the old LRA unduly benefitted the TES, it is contrary to public policy and is invalid as it could be automatically terminated. le Roux (2012:21) goes on to indicate that the TES benefitted financially as it was often a small employer who has little contact with its employees, it has minor overheads, with few assets, and has no permanent office.

Benjamin (2013:8) states that TES has benefitted through the old LRA in that the avoidance of labour law is a major contributing factor to the rise in labour brokers. The TES has grown exponentially and in 2010, the National Association of Bargaining Councils estimated that TES's placed around 780 000 employees, however CAPES estimated that this number is closer to a million.

Van Eck (2010:121) predicts that Parliament will introduce stricter regulation for labour broking, which may include, registration of the TES; joint and several liability for the TES and their client; the prohibition against discrimination associated with different salaries and conditions of service between full-time employees and those placed by the TES. Geldenhuys (2017:10) suggests that a TES must always follow the proper dismissal procedures when terminating workers' employment or face liability for unfair dismissal in terms of the LRA.
The unions and business have conflicting views on TES, as highlighted by Van Eck (2014:63), unions, business and the TES have been at odds about the way forward, unions argue that the TES should be prohibited, whereas business agree that there is a need for improved regulation, but are in favour of the retention of TES.

The TES will be adversely affected, some may close whilst others will experience financial difficulty. Business may hold the TES liable for the payment of retrenchment packages as they were the employees of the TES. Genuine temporary service will continue and the act does not do away with the TES, however this is a small portion of their revenue. The TES is negatively impacted by the LRAA and faces closure in one hand, to a large drop in revenue with added regulation on the other.

- **Unions reasons for pushing for the new interpretation**

All but one participant believed that the union has ulterior motives for pushing for the new interpretation the LRAA.
The unions and business have conflicting views on TES, as highlighted by Van Eck (2014:63), "The South African social partners have been at odds about the way forward. The trade unions

Vol. 3, No. 05; 2019

ISSN: 2456-7760

argue that employment agencies should be prohibited, whereas business organizations are in favour of the retention of agencies, even though they agree that there is a need for improved regulation".

Nel and Werner (2014:10), Gericke (2011:106), Wilthagen and Tros (2004:169) and Benjamin (2013:8) believes that employees did not benefit under the flexibility of the old LRA as many labour brokers subject employees to job insecurity, low salaries, lack of training opportunities and unfavourable working conditions. SA Transport & Allied Workers (2015:21) and Benjamin (2013:9) indicate that vulnerable workers were exploited by labour brokers and likened the employment relationship between the TES and the employee to slavery.

One of the concerns highlighted by the union in the case, National Union of Metal Workers of South Africa v Abancedisi Labour Services (2012:18), was that in terms of the contract, the work assigned to every employee was dependent on the availability of work which is afforded to the TES by the client. There was no guarantee of work or security of employment.

Grogan (2015:4) believes that employees will benefit from the LRAA as vulnerable employees that are subject to labour broking are now afforded protection by the LRA, however, Mgabadeli (2014:1) and Besley and Burgess (2004:24) were of a different opinion with little evidence showing any benefit to workers from pro-worker labour market regulations, further, workers will experience a serious impact from the LRAA, in that approximately 250 000 workers will lose their jobs.
Van Eck 2010:112 indicates that the TES is not a bridge to permanent jobs and TES workers complain of a lack of benefits, job security and low wages.

Unions indicate that the basic human rights of dignity, equality and freedom of vulnerable worker is the reasons for the fight, whist business and TES maintain that the union want more income through membership.

Short term benefit is available for the workers that are deemed to be employees of the client, however the long-term benefit is not evident. The downsizing of businesses, automation and retrenchments can create a population that will be unemployable.

- **Strategies employers can use to mitigate the effects of the LRAA**

Responses to the question varied from the participants, however strategies were identified.

Benjamin (2013:19) suggests that the LRAA should be seen to promote the goals of creating decent work, rather than giving rise to new strategies to avoid labour laws, then only, would dialogue occur over the development of specific institutions to regulate the activities of TES's and to provide protection for the employees.

Wilthagen and Tros (2004:169) suggest a strategy called flexicurity, this involves a combination of flexibility in the labour market, combined with a degree of security for the worker. This is

however achieved through agreement between the employer and employee. Gericke (2011:130) states that, most governments and policy makers, are not pure free trade advocates nor are they pure protectionists and attempt to establish a balance between free trade and investment on the one hand and employment growth on the other hand. A strategy should seek to find a balance between free trade and protection of employees because concentrating on one will destroy the other.

Judge Tlaletsi stated in the case NUMSA v Assign Services (2017:2) that, the LRAA does not ban the TES, but regulates it by restricting it to operate genuine temporary employment arrangements. The TES will continue as the employer of the temporary employee until the employee is deemed to be the employee of its client. A strategy for the TES to survive under the LRAA would be to comply with the law or reinvent itself to operate in a manner that is not legislated.

Section 198 (3) of the LRAA highlights that an independent contractor is not an employee of a TES, nor is the TES the employer of that independent contractor. An independent contractor is also not an employee of the client. This section allows for a situation where the TES can avoid the worker being deemed to be the employee of their client, all the TES needs to do is to change the relationship it has with the client, from being a TES to be a sub-contractor. This strategy will avert the client being deemed as the employer, however the sub-contractor (previously the TES) will now be deemed as the employer.

Strategies identified by the respondents are as follows:

- TES starting the communication with the client to proactively mitigate any damage done to this relationship.
- To start reducing the number of employees.
- Reduce this cost to business and pull out of the benefit system, medical aid, funeral funds.
- Outsourcing or subcontracting its business to another company, or draw a new contract with the TES and instead of hiring their staff the TES should be hired as a contractor.
- TES need to find ways to give more benefit to the employees.
- Business to start employing their own workers or re-look at operations to see if current staff can do that job on overtime.
- Business to adjust the current contract to ensure that the TES is financially liable for the cost of the retrenchments.
- The act is quite clear, that it's after 3 months that the employee is deemed the employee of the client, so, work with the law.

CONCLUSIONS AND RECOMMENDATIONS

The conclusions and recommendations are presented in this section. The findings from the literature review and primary data collected is discussed and conclusions are drawn to each theme, recommendations are finally made and the study concluded.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

- **Findings from the Literature Review**

The literature reviewed responded to the objectives as follow:

- Objective 1 - To determine whether the old interpretation of Section 198 of the LRA was better for business.

Tshoose and Tsweledi (2014:337) and Nel and Werner (2014:10) supports the notion that business benefitted under the old LRA

- Objective 2 - To explore the anticipated effects of the interpretation of Section 198A (3) (b) of the LRA on businesses in Durban.

(Mangcu-Lockwood. 2014:6) and (le Roux 2012:27) anticipate that the impact of the LRAA on business will be negative.

- Objective 3 - To explore the anticipated effects of Section 198A (3) (b) of the LRA on Temporary Employment Services.

(Geldenhuys 2017:2), (Benjamin 2013:8), (le Roux 2012:25), (le Roux 2012:21) and SA Transport & Allied Workers (2015:21) agreed that fixed-term contract used by the TES under the old LRA unduly benefitted the TES.
The TES is negatively impacted by the LRAA, (Van Eck 2010:121), (Van Eck 2014:63), (Geldenhuys 2017:10).

- Objective 4 - To understand the reasons for the unions pushing for the new interpretation of Section 198A (3) (b) of the LRA

The LRA did not benefit temporary employees (Nel and Werner 2014:10), (Gericke 2011:106), (Wilthagen and Tros 2004:169) and (Benjamin 2013:8). The exploitation of vulnerable workers was rife under the LRA (SA Transport & Allied Workers 2015:21), (Benjamin 2013:9) and (National Union of Metal Workers of South Africa v Abancedisi Labour Services 2012:18).

- Objective 5 - To identify possible strategies to address the effects of the act on businesses

Benjamin (2013:19), Wilthagen and Tros (2004:169) and Gericke (2011:130) supports full compliance with the LRAA, flexicurity and a balance between free trade and protection of employees.

- **Findings from the Primary Research**

The primary research responded to the objectives as follow:

Vol. 3, No. 05; 2019

ISSN: 2456-7760

- Objective 1 - Evidence supports the notion that business benefitted under the old LRA, all participants concurred that the old LRA benefitted business financially, operationally and in avoiding their responsibility as the employer. The views of the respondents were echoed by Tshoose and Tsweledi (2014:337) and Nel and Werner (2014:10).

- Objective 2 - The expected impact of the LRAA on business is negative, disruptions in operations, increase in expenses and time spent on administration is anticipated. Further costs associated with mass retrenchments and inflexibility pose a significant risk to business. (Mangcu-Lockwood. 2014:6) and (le Roux 2012:27).

- Objective 3 -. Geldenhuys (2017:2), Benjamin (2013:8), le Roux (2012:25), and SA Transport & Allied Workers (2015:21) agreed that fixed-term contract used by the TES under the old LRA unduly benefitted the TES. Section 198A (3) (b) of the LRA limits the scope of the TES, this has serious financial implications as it considerably reduces their income. The deeming provision makes the TES undesirable as the business would rather employ directly if they are going to be liable (Van Eck 2010:121), (Van Eck 2014:63), (Geldenhuys 2017:10). The TES is negatively impacted by the LRAA and faces closure in one hand, to a large drop in revenue with added regulation on the other.

- Objective 4 - The respondents submitted different views, indicating that the LRA was both beneficial and not beneficial to the employee. The exploitation of vulnerable workers was rife under the LRA (SA Transport & Allied Workers (2015:21), Benjamin (2013:9) and National Union of Metal Workers of South Africa v Abancedisi Labour Services (2012:18). Protection to vulnerable workers by the LRAA and access to permanent jobs with benefits is an immediate benefit to employees (Grogan 2015:4), however, the anticipated long-term impact on employees is negative (Mgabadeli 2014:1 and Besley and Burgess 2004:24), the downsizing of businesses, automation and retrenchments will create a population that will be unemployable as jobs will be lost.

- Objective 5 - Business is aware of the negative impacts following the LRAA and strategies have commenced by some. Subcontracting has emerged as a decent alternative for business to detach itself from the liability and still retain the temporary workers through a contractor. Staff reduction, withdrawal from benefit systems, outsourcing, redesigning of operations, retrenchments and passing on the liability for retrenchments were indicated by respondents are possible strategies that business could use to mitigate the negative effects of the LRAA.

Benjamin (2013:19), Wilthagen and Tros (2004:169) and Gericke (2011:130) supports full compliance with the LRAA, flexicurity and a balance between free trade and protection of employees.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

Section 198 (3) of the LRAA allows for sub-contracting, this will avert the client being deemed as the employer; however the sub-contractor (previously the TES) will now be deemed as the employer.

- **Conclusion**

The aim of this study was to obtain the perspectives of interviewees on the effects of the implementation of Section 198A (3) (b) of the LRA, to understand and determine its impact on businesses in Durban and to identify possible strategies to address the effects.

The study revealed that the implementation of the LRAA as interpreted by the LAC will have a negative impact on business by disruptions in operations with reduced temporary employees, an increase in expenses, added time spent on administration, costs associated with mass retrenchments, inflexibility and liability as the employer. Implications on the TES industry are catastrophic, the law does not ban the TES, however it does make it difficult for them to survive. The study also indicated that employees will derive short term benefit as vulnerable workers will have access to permanent jobs with benefits immediately, however, the long-term effect on employees is negative with the downsizing of businesses, automation and retrenchments, jobs will be lost and the chances for re-employment will be extremely difficult.

The study has thus shown that the short-term effects of the LRAA does benefit temporary employees, but business is negatively affected, both on the short and long term. The new law is short-sighted as it does not favour economic growth, nor does it promote sustainable employment.

The study involved a small and unrepresentative number of cases and cannot be used to make statistical generalisations about the entire population of businesses in Durban that utilise TES. Further, the study pertained to the anticipated ruling of the Constitutional Court. It is recommended that this study should be repeated if the Constitutional Court rules against business and adopt a mixed method of study to include the responses of a large group of temporary employees.

- **Recommendations**

The study has highlighted that the business will experience a disruption in operations with reduced temporary employees, an increase in expenses, added time spent on administration, costs associated with mass retrenchments, inflexibility and liability as the employer. The table below, Figure 1, recommends the response to the risk: -

Vol. 3, No. 05; 2019

ISSN: 2456-7760

Figure 1 - Risk Response

Risk ID	Risk	Response
1	Disruption in operations with reduced temporary employees	Mitigate
2	Increase in expenses, salary and benefits	Accept/ Mitigate
3	Costs associated with mass retrenchments	Transfer
4	Added time spent on administration	Deflect
5	Inflexibility during peak and seasonal periods	Mitigate
6	Liability as the employer	Accept

The disruption in operations with a reduced number of temporary employees may be mitigated through streamlining of operations and project management to ensure that the temporary workers are used legitimately for the 3-month period. Using existing permanent employees and paying overtime is also an option.

The costs associated with the mass retrenchment of new employees may be transferred to the TES; this arrangement can be agreed upon between the parties as the TES would have been the previous employer of the employee. This can affect the future relationship between the parties and may cause a new challenge, the increase in costs for temporary staff from the TES, to emerge.

Added time spent on administration needs to be deflected, the current administrative staff of the business or the TES, no new structures should be formed as it will be costly. This can result in the company paying more during peak periods, but will save throughout other times.

Inflexibility during peak and seasonal periods can be mitigated by project management thus using temporary workers legitimately for the 3-month period.

A compromise can be sought with all parties coming together to create more employment and in turn more productivity, however, this would mean that the new law must be complied with and business accept liability as the employer.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

All risks, however, can be eliminated by using a sub-contractor. The law permits this employment relationship which will allow business to function as present without liability. It entails that either the TES becomes the sub-contractor to business or a sub-contractor is employed to function between business and the TES. Business will escape liability as the employer according to the LRAA; however the sub-contractor will be deemed as the employer and becomes liable. This manoeuvring may be viewed as shifting of responsibilities, but it is legitimate and will remove the risk from business.

REFERENCES

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)

Assign Service (Pty) Ltd v Krost Services and Racking (Pty) Ltd and another (ECEL1652-15) (CCMA) (26 June 2015)

ATLAS.ti 8 software program. 2018. http://atlasti.com/ Date of last access: 2 January 2018.

Benjamin, P., 2013. Law and practice of private employment agency work in South Africa. Geneva: ILO.

Besley, T. & Burgess, R. 2004. Can Labor Regulation Hinder Economic Performance? Evidence from India. *The Quarterly Journal of Economics*, 119(1):91–134, Feb.

Bhattacharyya, D. K. 2013. Research Methodology. 3rd Edition. New Delhi: Excel Books.

Botes, A. 2013. History of labour hire in Namibia: a lesson for South Africa. *Potchefstroomse Elektroniese Regsblad* 16(1):506-537. PER [online]. http://www.scielo.org.za/scielo.php?pid=S1727-37812013000100017&script=sci_arttext&tlng=en Date of access: 12 Sep. 2017.

Brynard, D. J., Hanekom, S. X., & Brynard, P. (2014). Introduction to research. 3rd Edition. Van Schaik Publishers.

Cohen, T. & Moodley, L. 2012. Achieving" decent work" in South Africa? *Potchefstroomse Elektroniese Regsblad*, 15(2):01-28.

Cooper, D. R., & Schindler, P. S. 2014. Business research methods. 12th Edition. McGraw-Hill.

Du Plooy-Cilliers, F. and Davis, C. and Bezuidenhout, R. 2014. Research Matters. Juta and Co.

Geldenhuys, J. 2017. The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa. *Potchefstroomse Elektroniese Regsblad*, 20(1):1-56.

Gericke, S.B. 2011. A new look at the old problem of a reasonable expectation: the reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment. *Potchefstroomse Elektroniese Regsblad*, 14(1):105-136.

Grogan, J. 2014. Workplace law. Eleventh edition, Juta and Company Ltd.

Grogan, J. 2015. "Let the 'Deemed' be Damned: Section 198A(3)(b) Deconstructed". *ELJ,* 4-9, Dec.

Gupta, M and Gupta, D. (2011). Research Methodology. Eastern Economy Edition. New Delhi: PHI Learning

Head of the Department of Education v Mofokeng & others [2015] 1 BLLR 50 (LAC).

Kumar, R. 2011. Research Methodology, a step-by-step guide for beginners. 3rd Edition. New Delhi: Sage SA.

le Roux, P.A.K., 2012. Protecting the employees of temporary employment services. Contemporary Labour Law Monthly Journal, 22(3).

Mangcu-Lockwood, N. 2014. Impact of LRA Amendments Bill, 2013, Paper presented at the 27th Annual Labour Conference. Sandton Convention Centre, Gauteng, South Africa. https://www.lexisnexis.co.za/pdf/TheImpactOfTheLRA_AdvNobahleMangcu.pdf Date of access: 18 Sep. 2017.

Marchington, M. & Wilkinson, A. 2005. 'Human Resource Management at Work. People Management and Development´. 3rd ed. The Chartered Institute of Personnel and Development, London

Maree, K. (2016). First steps in research. 2nd Edition. Van Schaik Publishers.

Mathope, G. 2017. LAC contract workers ruling a victory for workers. *The Citizen*:1, 25 Jul.http://citizen.co.za/news/south-africa/1574710/lac-contract-workers-ruling-a-victory-for-workers-says-jim/ Date of access: 15 Jul. 2017.

Mgabadeli, S. 2014 Labour Relations Act changes and the impact on companies: KC Makhubele, vice-president, APSO https://www.moneyweb.co.za/moneyweb-radio/safm-market-update/labour-relations-act-changes-and-the-impact-on-companies-kc-makhubele-vice-president-apso/ Date of access: 15 Jul. 2017.

National Union of Metal Workers of South Africa v Abancedisi Labour Services CC 2012 11 BLLR 1123 (LAC).

Nel, S.P. and Werner, A. 2014. Human Resource Management. 9th Edition. Oxford University Press. South Africa.

NUMSA v Assign Services (JA96/15) [2017] ZALAC 44 Labour Appeal Court of South Africa (10 July 2017)

Politics Web. 2017. Employers must respect LAC ruling on labour brokers – COSATU http://www.politicsweb.co.za/news-and-analysis/employers-must-respect-lac-ruling-on-labour-broker Date of access: 18 Sep. 2017.

Preston, N & Naidoo, P. 2017. The hammer is yet to go down on temporary employment services: Assign judgment taken on appeal to the Constitutional Court, available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/employment/Employment-Alert-03-August-tes-judgment-update-the-hammer-is-yet-to-go-down-on-temporary-employment-services-assign-judgment-taken-on-appeal-to-the-constitutional-court-.html Date of access: 10 Aug. 2017.

Saunders, M. Lewis, P. & Thornhill, A. 2009. Research methods for Business students, 5th Edition. Pearson Education.

Saunders, M. and Lewis, P. and Thornhill, A. (2016). Research Methods for Business Students. 7th Edition. Pearsons Education Limited.

SA Transport & Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd (2015) 36 ILJ 1923 (LC)

Scheepers, J. 2015. Regulation of 'non-Standard' or 'A-Typical Employment' - South Africa http://www.linkedin.com/pulse/regulation-non-standard-a-typical-employment-south-scheepers Date of access: 18 Sep. 2017.

Sekaran, U and Bougie, R. 2013. Research Methods for Business. 6th Edition. Wiley

South Africa. 1995. Labour Relations Act, Act no. 66 of 1995. Pretoria: Government Printers.

South Africa. 1996. Constitution of the Republic of South Africa, Act no. 108 of 1996. Pretoria: Government Printers.

South Africa. 1997. Basic Conditions of Employment Act, Act no. 75 of 1997. Pretoria: Government Printers.

South Africa. 1998. Employment Equity Act, Act no. 55 of 1998. *Government Gazette,* 19370:400, October 98.

Vol. 3, No. 05; 2019

ISSN: 2456-7760

South Africa. 2014(1). Labour Relations Amendment Act, Act no. 6 of 2014.*Government Gazette,* 37921:629, August 14.

South Africa. 2014 (2). Basic Conditions of Employment Act, Act no. 1997, Determination: Earnings Threshold (Proclamation No. R. 531, 2014). *Government Gazette,* 37795:531, July 14.

Statistics South Africa. 2017. Quarterly Labour Force Survey Quarter 2, 2017 http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf Date of access: 18 Sep. 2017.

Tshoose, C. & Tsweledi, B. 2014. A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa. *Law, Democracy and Development,*18:334-346.

Universal Teacher. 2018. Trustworthiness in Qualitative Research. http://universalteacher.com/1/trustworthiness-in-qualitative-research/

Van Eck, B.P.S., 2010. Temporary employment services (labour brokers) in South Africa and Namibia. PER: Potchefstroomse Elektroniese Regsblad, 13(2), pp.107-126.

Van Eck, B.P.S. 2013. Regulated flexibility and the Labour Relations Amendment Bill of 2012. *De Jure*, 46(2):600-612.

Van Eck, S. 2014. Revisiting agency work in Namibia and South Africa: any lessons from the decent work agenda and the flexicurity approach?

Walliman, N. 2011. Your Research Project. Designing and planning your work. 3rd Edition. New Delhi: Sage.

Wilthagen, T. & Tros, F. 2004. The concept of 'flexicurity': a new approach to regulating employment and labour markets. *European Review of Labour and* Research: 166-186.