Temporary employment services (temporary agency) work: The South African case

Ronelle Nicchia BARRETO

K1546978

This thesis is being submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy (PhD) in the Faculty of Business and Law at Kingston University London

January 2020

To the memory of my father,

Dr. Johan van Wyk,

much loved and forever missed.

LIST OF TABLES

LIST OF FIGURES

LIST OF APPENDICES

LIST OF ABBREVIATIONS

ANC - African National Congress

APSO - The African Professional Staffing Organisation

Assign - Assign Services (Pty) Ltd

AWR - Agency Workers Regulations 2010 (No. 93) (UK)

BCEA - The Basic Conditions of Employment Act 1997 (No. 75 of 1995)

BCEAA - The Basic Conditions of Employment Amendment Act 2013 (No.20 of 2013)

BIS - The Department for Business Innovation and Skills

BST - Business Systems Theory

CAPES - The Confederation of Associations in Private Employment Sector

CC - Constitutional Court

CCMA - Commission for Conciliation, Mediation and Arbitration

CEO - Chief executive officer

COSATU - Congress of South African Trade Unions

EEA - The Employment Equity Act 1998 (No. 55 of 1998)

EEAA - The Employment Equity Amendment Act 2013 (No.47 of 2013)

ESA - The Employment Services Act 2014 (No.4 of 2014)

GDP – Gross domestic product

GEAR - Growth, Employment and Redistribution Programme

GP - Gross profit

HR - Human resources

ILO - International Labour Organisation

IR - Industrial relations

LAC- Labour Appeal Court

LC - Labour Court

LRA 1995 - The Labour Relations Act 1995 (No. 66 of 1995)

LRAA - The Labour Relations Amendment Act 2014 (No. 6 of 2014)

MSP - Managed Service Providers

NEDLAC - National Economic Development and Labour Council

NGO - Non-governmental organisation

NMWA - The National Minimum Wage Act 2018 (No. 9)

NUMSA - National Union of Metal Workers

OECD - Organisation for Economic Co-operation and Development

SACP - South African Communist Party

SARS - The South African Revenue Services

Stats SA - Statistics South Africa

TES - Temporary employment service

TWA - Temporary work agency

UIF - Unemployment Insurance Fund

UK - United Kingdom

VoC – Varieties of capitalism

ABSTRACT

The sharp increase in flexible and externalised work patterns over recent decades has caused concern on the part of trade unions and national and international organisations promoting labour interests. Industrial and employment relations academics have sought to measure and document the changes and consider the space for alternative approaches and outcomes that are more favourable to workers and their unions. While the literature is dominated by pessimistic perspectives regarding the negative consequences of global trends of flexibilisation and employment degradation, research on the potential for the state and other actors to exercise agency and regulate the use of labour market flexibility is of the utmost importance. Against this background, this thesis makes a notable contribution. It provides in-depth, contextual case study analysis from South Africa of both current strategies of temporary employment services (TES) firms and of experts' views regarding the current and likely impact of legislative interventions aimed at regulating temporary agency work.

In South Africa the comparatively privileged political and institutional position of trade unions combined with prevailing societal views regarding the necessity to protect workers against abuse, has underpinned a radical intervention by government in the form of legislation mandating parity in treatment between temporary agency and permanent employees, and including a provision whereby temporary employment service workers are 'deemed' to be employees of the client firm after a period of three months.

This thesis presents empirical evidence on trends and drivers in temporary agency work in South Africa, uniquely drawing on in-depth interviews with industry experts addressing the experience and perspectives of the primary players, namely temporary employment firms, clients, workers and trade unions. This data is supplemented by interviews with various legal experts regarding the likely consequences of the regulatory changes and other secondary evidence.

The findings highlight the quantitative scale of temporary employment services in South Africa. The need for some qualification of dualisation theories is suggested in that many workers remain on the books of TES firms and can therefore be seen as 'partial insiders.' While experts reported a reduction in prevalence of the most unscrupulous and unregulated TES firms as a consequence of the new legal framework, increasing use of 'master vendor' contracts seeking to avoid regulatory scrutiny was also identified. The legislation, as interpreted in recent court decisions, has the potential to effect very significant change in employer responsibilities towards TES workers. However, the potential for this to materialise in practice was seen to be limited due to the weakness of labour market enforcement mechanisms. For their part, South African trade unions are faced with multiple internal and operational challenges that impede their effectiveness in representing TES workers.

The findings highlight the value of in-depth case study research of temporary employment practices within national institutional and regulatory frameworks and contribute to debates around actor agency and social movement responses to dominant economic trends. Limitations and suggestions for further research are identified.

DECLARATION

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

Signed:……..

Date:…….

ACNOWLEDGEMENTS

The financial support of the fully-funded PhD studentship in the Faculty of Business and Law at Kingston University is gratefully acknowledged.

A special thanks to my First Supervisor, Dr. Enda Hannon. From the first coffee meeting where we discussed the possibility of a thesis, through the early stages of formulating my research proposal and throughout the drafts, meetings and discussions we had concerning my progress, Dr. Hannon has been unwavering in his support. His rigorous academic scrutiny, whilst demanding focus and reflection, was patient and calm. He allowed me to express my own views and dealt with my frantic telephone calls with perspective and kindness. I am forever in your debt.

I would like to thank my mother, Sylvia Wilmot, for providing me with every opportunity to thrive. For listening to my endless ramblings about my progress (or lack thereof) in writing up this thesis, with the patience only a mother can muster. Thank you for making the long journey to the UK to visit me and then selflessly sharing me with my work. Much love and gratitude to you mom.

In my final year of school, my father passed away after a short and tragic illness, I was 17 and he was 52. During the months before his death, and no doubt because I was in a critical year of my life, we spoke often about many important topics including my future, my education, and my career choices. His advice was always to do my very best and to test the limits of my abilities. At that time, I did neither and we had many heated debates. The work and effort that went into this thesis are dedicated to his memory. He was everything a father could hope to be and his impressive, yet short life remains my source of inspiration.

My three children Luc, Alec and Lara are my greatest joy. It is difficult to describe how proud I am of each of them. They have sacrificed a great deal for me to do this degree and have had to hear endless ‘no I can’t’, ‘I’m too busy’ and ‘not now’s’ from me. Thank you for who you are and will be, in my eyes you are perfect.

At the time of writing this, my husband Luis and I have been married for 25 years. Together we have raised three wonderful children, navigated careers, moved homes, moved cities, moved countries and generally embraced the chaos of a fantastic adventure together. I am his greatest

fan and he is mine. Thank you for all that you did to make this thesis possible and for making my life colourful and beautiful. You are my everything.

CHAPTER 1: INTRODUCTION

1.1. Introduction and context

The academic literature on labour markets and employment highlights dramatic changes in employment patterns. Although precise data about the scale and nature of changes is elusive, 'atypical' employment practices and the use of flexible and externalised labour have expanded dramatically over the last thirty years (Eurofound, 2008; Cotton, 2015). The standard employment model is becoming less dominant in advanced economies (ILO, 2015a) and starting in the 1990's, earnest attention has been given to the development of this trend (Prosser, 2015). The ILO (2015a) has indicated that wage and salaried employment accounts for about half of global employment and covers as few as 20 per cent of workers in regions such as sub-Saharan Africa and South Asia. Moreover, nearly six out of ten wage and salaried workers worldwide are in either part-time or temporary forms of employment (ILO, 2015a).

Academics identify these developments as being underpinned by powerful economic, political and social pressures and trends (Blossfeld *et al*, 2005; Deutschmann, 2011). International economic organisations such as the International Monetary Fund and World Bank have promoted a strongly neoliberal vision of economic growth and management, which has come to dominate thinking and policy implementation at regional and national levels (Deutschmann, 2011). Multinational companies have taken advantage of the increasingly liberal institutional framework for international trade and developments in communication and technology, to pursue globalisation strategies maximising flexibility and economic benefits (Blossfeld *et al*, 2005; Deutschmann, 2011). Financial measures and the interests of financial institutions are increasingly prioritised, dominating social and employment considerations (Thompson, 2003; Blossfeld *et al*, 2005; Deutschmann, 2011).

The decline in prevalence of standard employment models and parallel rise in flexible and externalised work patterns has caused great alarm and concern on the part of trade unions and national and international organisations promoting labour interests such as the International Labour Organisation (ILO). For their part, industrial and employment relations academics and work sociologists have sought to measure and document the changes and, crucially, consider the space for alternative approaches and outcomes that are more favourable to workers and their

trade unions (Vosko, 1997; Summers, 1997; Pfeffer and Baron, 1998; Kalleberg, 2000; Roux, 2010; Le Roux, 2009; Cotton, 2013; Cotton, 2015).

In this regard, recent literature has highlighted the importance of the careful study of national contexts (Coe *et al*, 2009; Knox, 2010; Mitlacher *et al*, 2014) and a variety of studies have considered the extent to which there are national variations in temporary staffing markets (Forde, 2001; Ward, 2003; Peck and Theodore, 1998; Mitlacher, 2007a; Coe *et al*, 2009; Vosko, 2000; Mitlacher *et al*, 2015; Kalleberg *et al*, 2015; Knox, 2018). The significance of national settings is often related to the inimitable regulatory frameworks and the complex set of employment relations that exist on a country by country basis (Knox, 2010). Regulation therefore being an important context for temporary employment agency workers as different institutional frameworks and regulatory approaches will influence the deployment and use of these workers in particular ways (Knox, 2010; Mitlacher, 2007).

While the necessity for and potential of close contextual case studies is emphasised, these are few and far between (Knox, 2010, Knox, 2018). A primary reason for this lies in the complex and resource intensive nature of research designs aimed at undertaking a contextually rooted examination of the drivers and regulation of flexible employment practices. In this regard, a PhD thesis provides an opportunity to undertake such a study and the aim of this thesis is to attempt to do so with regard to the South African case.

In line with the above trends, there has been considerable growth in the number of temporary employment services (TES) workers in South Africa since 2000. Temporary agency working, or 'labour broking' as it is known in South Africa, is the placement of workers by a TES in a client company. Despite the importance of TES work, the official labour market statistics in South Africa do not record the number of workers who are placed by temporary employment agencies (Benjamin, 2013). However, Bhorat *et al*. (2016) estimated that there were just under one million temporary jobs in 2014. The TES industry is worth 44 billion rand, employs around 19 500 internal staff and just over one million TES workers, which constitutes 7.5 percent of total employment in the South Africa market and is likely to grow further (Aletter and van Eck, 2016). Yet the use of temporary employment agencies in South Africa is plagued by controversy as it is

perceived as a cheaper alternative to permanent employment with the accompanying labour-related obligations (ILO, 2011; Senne and Nkomo, 2015).

Despite there being a genuine need for TESs to provide short-term placements for workers, a system of 'permanent casuals' developed where workers were kept on temporary contracts that 'rolled over' for years and provided cheap labour for South African companies (Dickson, 2015, p.5). For most of South Africa's recent past, TES workers did not have the same employment security or pay afforded to other workers and there has been heated debate about how these abuses should be resolved (Theron, 2005). As a nation in search of jobs (Bhorat, 2012), few debates are more important in South Africa than the nature and regulation of work. This research is motivated by these controversies, concerns and debates.

1.2. Prior research and rationale

During the 2000s when the growth in temporary agency work was an international trend, numerous academics and authors provided insight into the legalities and realities of the TES relationship in South Africa. For example, Theron (2005) looked at how the notion of the temporary employment service was adopted both in South Africa and internationally, and how the South African TES relationship was constructed with reference to the ILO. A few years later, Theron, (2008) dealt with the impact of labour legislation on the South African economy and the capacity of law to respond to social change. In this context, he addressed the question of how labour regulation should respond to the growth of services and the triangulation of employment from a global and local level. Whereas Benjamin (2009), focused on decent work and non-standard employees, looking specifically at the options for legislative reform in South Africa. Benjamin (2009) provided an understanding of the legal relationship that underlies the operation of temporary employment services and an overview of the regulation of labour broking in South Africa at that time. He called for an appropriate regulatory framework to prevent the widespread abuse that resulted from the exploitative use of TESs in South Africa.

In this 'pre-amendment period', referring to the period prior to the promulgation of *the Labour Relations Amendment Act 2014* (No.6) (LRAA) which sees to further regulate temporary agency employment in South Africa, the struggles of the South African precarious, casual and informal workers were well documented and located within a number of specific sectors. Examples of

these studies include those in retail (Kenny and Webster, 1999; Kenny 2007); metal engineering, glass, and paper industries (Barchiesi, 2010); mining (Pons-Vignon and Anseeuw, 2009, Forrest, 2015), forestry and agriculture (Pons-Vignon and Anseeuw, 2009); and cleaning (Bezuidenhout and Fakier, 2006).

In addition, the role and struggles of organised labour in representing an increasingly casualised, externalised and precarious South African labour force was scrutinised. For example, Barchiesi and Kenny, (2008) found that due to high unemployment, the proliferation of contingent occupations, and growing labour market fragmentation, unions were at risk of being marginalised unless they rebuilt alliances with activists and social movements articulating the struggles of non-union workers, the unemployed, and marginalised communities. They found a contingency of localised labour-community collaborations and reported growing precariousness and social vulnerability in wage employment. Similarly, Kenny (2011) examined the 'mall committee', a new organisational form introduced by the South African Commercial Catering and Allied Workers Union to facilitate accessing and representing precarious women workers in the retail sector. Kenny (2011) found an enduring movement by worker activists to confront conditions within their broader context but claimed that the way in which these networks emerged in practice, indicated the reproduction of hierarchies which marginalised precarious workers.

During 2009/2010 proposed amendments to labour laws were being debated and the TES industry came under intense scrutiny as it awaited legislative reform. At this time, the social partners engaged in negotiations about this issue at the National Economic Development Labour Council (NEDLAC) and were unable to reach consensus on future reforms. Importantly, the Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU) were in favour of a legislative ban on labour broking. Although it was relatively certain that South Africa's labour legislation would be amended, it was not clear what form the amendments would take. Whilst the African National Congress (ANC) preferred a regulatory solution, COSATU maintained its call for a complete ban of labour broking. Persuasive research was conducted about the legal situation that prevailed, and the debate around whether prohibition or regulation was the most suitable option for curbing abusive practices in the TES industry

(Brand, 2010). For example, Harvey (2011) considered the long-standing debate as to whether labour broker and workers' rights could co-exist in South Africa. Labour activists had called for the industry to be banned outright, complaining of exploitation in the workplace. Conversely, economists and researchers warned that this would impact negatively on the economy as statistics revealed a growth in the TES sector which they argued showed that the industry created jobs. Harvey (2011) believed that it was not the existence of labour brokers, but rather the legislative fiction that the broker was the employer, that resulted in the rights violations and the calls to ban the industry. It was this legislative fiction that needed to be removed through statutory amendment.

Moreover, during this transition period before the amendments, a slew of research was conducted comparing the South African TES industry, and more specifically its legal framework, to that of Namibia (Botes, 2015). The reason being that since the implementation of amendments to the *Namibian Labour Act 11 of 2007* (NLA) in 2007, attempts had been made to ban 'labour hire' in Namibia. Policymakers in both Namibia and South Africa were grappling with the regulation of agency work. Namibia had taken the lead and adopted legislation that strictly regulated agency work, whereas at that time South Africa draft bills had been published that sought to strike a balance between recognising TES work and providing security for agency workers (Van Eck, 2010). This all in the context of the ILO and the European Union (EU) having recognised triangular agency work arrangements. Despite these international trends, Namibia had introduced measures that established barriers against such work, which some academics believed would not withstand constitutional scrutiny.

Van Eck (2012) compared the regulation of employment agencies in South Africa and Namibia, and the role played by the Private Employment Agencies Convention 1997 (No.181). The argument was that a prohibition of employment agencies would contravene international standards even though the ILO convention dealing with employment agencies had not been adopted. He believed that it had already had an influence on developments in Southern Africa where arguments in favour of the banning of employment agencies had been placed on hold. However, trade unionists and politicians in both South Africa and Namibia had articulated calls for a total prohibition of temporary employment services. Benjamin (2013) traced the evolution

of the interwoven debates on the regulation of temporary employment services in these two countries. Before doing so, he also located the issue within an international and comparative context. Similarly, van Eck (2014) considered the regulation of employment agencies in Namibia and South Africa, focusing on the lessons that could be learnt from the decent work and flexicurity approaches. Botes' (2015) research warned that the South African Government should take note of the history of labour hire in Namibia and the risks involved when there was a lack of regulation for labour brokers. Botes' recommendation was that the South African Government should follow the Namibian Government's example by passing the new amended legislation as soon as possible to prevent any further disadvantageous treatment of employees associated with labour brokers.

During this period of uncertainty prior to the amendments, researchers also focused on the cost of the changes and the anticipated effect on the South African labour market. For example, Bhorat and van der Westhuizen (2010) conducted a cost-benefit analysis associated with the LRA Amendment Bill 2010[1]. One of their findings suggested a significant number of workers appeared to have been working for the same employer for between three and five years in non-permanent employment positions and that the proposed amendments would improve job security for these workers. Bhorat, Cassim and Yu, (2014, p.1) observed that surprisingly little academic research had been undertaken concerning the TES sector, 'be it simple 'bean-counting' exercises or more serious modelling work'. To close this gap in the literature, they researched the demand-side incentive to employers who opted for hiring TES workers. Their general focus was on the assessment of the role played by the TES sector in contributing to employment and output growth in post-apartheid South Africa. Broadly stated, they found that TES earnings had kept between three and seven percent of households above the poverty line and constituted over 300 000 households in the economy. Households with TES earnings were found to be better off than households without TES earnings, which suggested the pro-poor impact of TES employment. Furthermore, the TES sector contributed about nine percent to Gross Domestic Product (GDP) in 2013, which was significant in the context of South Africa's low levels of economic growth. The TES industry, through offering flexible employment arrangements, had become an important driver of employment and output growth.

[1] Government Gazette, 17 December 2010 No. 33873.

Shortly before the implementation of the amendments in 2015, broader, more holistic research was conducted by Benjamin, (2012); Benjamin, (2013) and Budlender (2013) as part of several research studies prepared in 2013 for the ILO on the impact of the Private Employment Agencies Convention, 1997 (No. 181). These studies focused on laws, regulations and practices relating to the work of private employment agencies. Empirical and statistical aspects of private employment agencies in South Africa were considered.

Just prior to, and shortly after the implementation of the 2015 amendments, a scattering of studies looked at different aspects of South African temporary agency or precarious work. Theron (2014b) considered the legal reforms from a wider, non-standard workers' perspective. He concludes that the amendments to the LRA 1995 were a first step to the inclusion of non-standard workers in the system. He however emphasised the importance of effective organisation of workers in non-standard employment, which he believed would not be achieved without a comprehensive strategy that addressed these workers' needs. Tshoose and Tsweledi (2014) defined the notion of South African labour broking, examining its trends and legal reforms. Senne and Nkomo's (2015) case study at two higher education institutions, highlighted the influence of labour broking on employment practices. They focused on the *Employment Equity Act 1998* (No. 55) provisions in the light of the LRAA of 2014. They found that employment equity policies and practices did not include employees in the cleaning and gardening job categories who were recruited through labour brokers. Dickinson (2015) outlined how casual workers ended labour broking in the South African Post Office (SAPO). He analysed how this took place, the challenges that the SAPO casual workers faced in organising, and the strategies and tactics that led to their eventual victory. SAPO had hoped that this victory would be a source of guidance for other precarious workers.

From a union perspective, Paret (2015) was concerned with the growing precariousness of the working class. He believed that the declining significance of unions had given rise to precarious politics: non-union struggles by insecurely employed and low-income groups. The research looked at the conditions under which unions incorporate these struggles as part of a broader labour movement in communities in California, USA and Gauteng, South Africa. It was found

that unions became fused with precarious politics in California but were separated from them in Gauteng. Whereas unions in California understood that non-citizen workers were central to their own revitalisation, the close relationship between unions and the state in Gauteng created distance from community struggles. Aletter and van Eck (2016) considered the compliance of the 2015 amendments with the ILO standards, with shortfalls being identified and suggestions made for future changes to the regulatory framework. Whereas, Bhorat *et al*. (2016) uncovered the growth traps and opportunities for the South African economy, with a focus on underlying labour market dynamics. Bhorat *et al*. (2016) reveal *inter alia* the skills-biased labour demand path of the South African economy and a rising trend in the use of labour brokers to source temporary workers.

Cassim and Casale (2018) examined whether there was a wage penalty for labour broker employees and, if so, its magnitude. They confirmed that temporary employment services could not be accurately identified in recent labour force surveys. However, during 2015 the South African Revenue Services and the National Treasury made company and employee income tax data available which explicitly captured labour brokers and employee wages. Their study used this data to examine whether there was a wage penalty for labour broker employees and, if so, its magnitude. They believed that this empirical evidence was important in debates on the sector's role in the South African labour market. They found that there was a large penalty of around 30 percent associated with TES employment in South Africa, when using total earnings.

For more than two decades researchers have emphasised the growth and importance of the TES industry in South Africa. While there has been a good deal of research, much of this has been narrow in focus and there is a need for more recent evidence regarding trends in TES work and the impact of the 2015 regulations. This research fills this gap as it considers the newly amended legislation post 2015, within the historical, political, social and economic context. It is based on 34 in-depth interviews with manager and director-level experts in the TES industry in South Africa. Many of these participants are experienced legal professionals and acting labour court judges who were required to assess and interpret the new legislation. Their influence on and knowledge of the industry is critical, however their input is neglected in previous research. Many large TES firms and clients that were interviewed expressed their reliance on their legal teams to

assist them in navigating what they believed to be technical and complex legal provisions, during a time of uncertainty. This research includes their contributions and considers TES work in South Africa from the TES worker, client, firm and the union perspective.

1.3. Contribution of this thesis

The South African case is of particular interest at present because recent developments in the country constitute something of a natural experiment regarding the potential to regulate flexible employment practices so as to better protect workers. Following the end of apartheid and the first free and fair elections, the elected ANC government set out an institutional framework for labour relations promoting collective regulation of employment. In addition, South African trade unions, who were so central to the civil rights movement to end apartheid, occupy a privileged position under the new regime. The unions' position combined with prevailing societal views regarding the necessity to protect workers against abuse, has provided for a radical intervention by the government in the form of legislation mandating parity in treatment between temporary agency and permanent employees, including a provision whereby temporary employment service workers are 'deemed' to be employees of the client firm after a period of three months (Section (3)(b)(i) of the LRA 1995).

By assessing empirical evidence on temporary employment agency working in South Africa, this thesis provides new insights into the views, responses, roles and functions of temporary employment firms, clients, workers and unions and how these key groups operate within the TES industry. In so doing, it addresses South African temporary agency work holistically, incorporating empirical data from the legal profession in South Africa, including senior employment law solicitors / attorneys, barristers / advocates, and judges of the Labour Court. These individuals shape the opinions and perspectives of the key groups involved and are relevant given the recent and important regulatory changes in South Africa. In addition, it sets the context for South African agency working by reference to both historical regulation and recent trends in the South African temporary employment agency labour market. It outlines measures to regulate TES work against the framework of current and proposed institutional structures and discusses the views and likely impact of these within the context of the literature on flexibility and atypical employment.

In conducting this research, the famous words by the Italian political theorist Antonio Gramsci (1891-1937; 1971) are most apt:

> The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum, a great variety of morbid symptoms appear.

These words have been applied to many varied situations in history and are an interesting insight, referring to a transition period of social, political or legal change where rules and conventions seem to bounce around without logic (Business Day Editorial, 2017). In many respects, these sentiments relate to this research as the interviews were conducted primarily during 2017, when the legal framework for TES workers was newly amended. There was uncertainty about the meaning of the sections pertaining to TES workers and their long-term consequences. The 'old' regulatory system affecting TES work was dying, but the 'new' could not be born. During 2015, *Assign Service (Pty) Ltd v Krost Services & Racking (Pty) Ltd and NUMSA* (the '*Assign* matter') was heard before the Commission for Conciliation, Mediation and Arbitration (CCMA) and was one of the most controversial and eagerly anticipated post amendment cases to unfold. The controversy in the *Assign* matter concerned the interpretation and effect of Section 198A(3)(b)(i) of the Labour Relations Act 1995 (No. 66 of 1995) (LRA 1995). This section is important for TES work as it concerns the identity of the employer party within the TES relationship. A lengthy court process culminated in an appeal being filed with the Constitutional Court (CC) on 31 July 2017. On 26 July 2018, the Constitutional Court (CC)[2] provided clarity in terms of the 'sole employer' or 'concurrent employer' debate within the TES employment relationship and found that the TES client is the sole employer of the TES worker after three months. The time period within which this research took place was a transition period between the 'old' and the 'new' and prior to the clarity provided by the CC in the *Assign* matter. It was a turbulent and interesting time for the TES industry, which was evident in some of the participants' responses, many of which were speculative about the future of the industry and revealing in terms of their hopes and anxieties.

Through semi-structured interviews conducted with participants representing a cross-section of the South African TES industry, the thesis intends building on this previous research. It covers

[2] [CCT194/17].

all three aspects of the triangular employment relationship (client, firm and employee) from a national rather than a sector-related perspective. In addition, the views and responses of organised labour to the TES industry are assessed, all within the framework of the recent legislation amendments. All participants were at the equivalent of director or management level and provided expertise and knowledge that revealed a more complex and varied reality of the TES industry post the recent legislative amendments. The thesis therefore addresses the broader question of the regulation of temporary agency work for the better through the lens of a case study of agency working in South Africa, looking at trends, perspectives of key groups and the prospects for legal regulation.

1.4. Disciplinary background and focus

This thesis is intellectually and theoretically located within industrial and employment relations and sociology of work literatures. As the research is problem focused it is, like much management research, cross-disciplinary in orientation. Insights are gleaned from a number of social science subject areas or disciplines which include law and economics in addition to the above.

1.5. Intended contribution

A primary contribution envisaged for the thesis is a substantive one, namely to conduct an in-depth investigation that will facilitate the collection of substantial, high quality empirical data on temporary agency work in South Africa; which will feed into the debates regarding the precariousness literature by exploring how some temporary agency worker disadvantages can be attributed to specific institutional settings. A further contribution of the thesis is the focus on the regulation of temporary agency work, and on trade union responses to temporary agency work.

1.6. Outline of the thesis

The next chapter, chapter two, will outline the academic context of the thesis by firstly exploring the essential characteristics of temporary agency work, its growth, recent trends and challenges, and secondly reviewing recent empirical research and theory development on the departure of the standard employment relationship, human capital formation, segmentation and dualisation, and job quality. Following this, after examining the regulation of temporary agency work from an international and state-based perspective, the chapter will discuss union efforts and responses

to temporary agency work, with a brief comparison between the global North and global South perspectives on temporary agency work. Thereafter the chapter will deal with South Africa as a useful case study for temporary agency work, focusing on the difficult economic and social conditions, the trade union movement and the specific regulatory environment. The chapter concludes with the research questions.

The following chapter, chapters three, will consist of a review of the South African historical and political context for temporary agency work, focusing on the legal framework, the rise and fall of the apartheid regime, and the regulatory framework. Following this, chapter four will outline the philosophical approach or 'paradigm' (Burrell and Morgan 1979) supporting the research in terms of the assumptions made in relation to issues of ontology and epistemology (Smith 1998; Bryman 2004). It will then outline the research approach and data collection techniques adopted. In addition, how the data was collected, recorded and analysed will be outlined, together with the ethical issues and limitations of the study.

Chapters five to nine will consist of the four main data chapters in which the information collected during the empirical research will be presented. Chapter five will provide an overview of the South African legal framework pertaining to TES work, chapter six will then set out the views of the TES employee, chapter seven discusses the TES firm and eight the TES client. Chapter nine outlines union responses to TES work.

The penultimate chapter, chapter ten, will draw out and discuss the findings in relation to the research questions, and how these findings relate to the main concepts and debates in the literature review. The final chapter, chapter eleven, will outline the main conclusions arising from the study, highlight its contribution and limitations, and make some suggestions for future research.

CHAPTER 2: THE LITERATURE REVIEW

The general growth of agency work internationally has generated a wide body of literature addressing different aspects of temporary agency work. This chapter reviews this literature and builds upon and contributes to current perspectives on agency work. The chapter is divided into three main sections, with the first introducing the concepts and key issues surrounding temporary agency work more generally, including a review of recent empirical research and theory development. The second section deals specifically with the temporary employment agency industry in South Africa, focusing on the difficult economic and social conditions, the specific regulatory and collective bargaining environment, and the trade union movement. However, the clear distinction between the general literature on temporary agency work and that pertaining to the South African context is not always possible. For example, in section 2.14 (that deals with the comparative capitalism approach) the general and South African literature is combined in order to describe South African varieties of capitalism. The third section concludes with the research questions.

Section 1: Temporary employment agency work

2.1. Essential characteristics of temporary agency work

Temporary agency work is defined by a relationship between a worker, an agency, and a client firm. It involves an employment agreement between an agency and a worker stipulating terms and conditions of employment and a commercial agreement that controls the sale of employment services between the agency and a client firm (Vosko, 2010, p633). The worker is engaged by the agency and there is no direct employment relationship between the client firm and the temporary agency worker (Forsyth, 2017), creating a triangular relationship (Vosko, 1997; Davidov, 2004; Vosko 2010; Knox, 2018). This work relationship creates a form of externalised labour that is known for its impermanence, as neither job assignments nor the employment agreement with the agency is ongoing (Knox, 2018). The non-standard nature of this work is a departure from the traditional, standard employment relationship (characterised by job security, career advancement, wage increases and social benefits) and facilitates greater flexibility in the way that firms organise work, enabling them to minimise their risks and responsibilities and maximise profits (Knox, 2018).

These changes to the traditional employment relationship, which can be seen in the triangular relationship, affect the legal, social and psychological constitution of the employment contract (Rubery *et al*, 2002; Mitlacher, 2007b). The precarious nature of this relationship relates to its temporary nature but also to the fact that it is indeed triadic (Vosko, 2009; Purcell 2014). The reason being that the traditional bilateral employment relationship defines the obligations and responsibilities between the employee and employer, whereas this triangular employment relationship is characterised by ambiguity with regards to responsibility (Purcell, 2014).

The ILO (2009c, p.1) has defined temporary agency employment as:

> Employment where the worker is employed by the temporary work agency, and then hired out to perform his/her work at (and under the supervision of) the user company. There is no employment relationship between the temporary agency worker and the user company, although there could be legal obligations of the user company towards the temporary agency worker, especially with respect to health and safety. A labour contract may be of limited or unspecified duration with no guarantee of continuation. The employment is often called 'temporary work', 'temping' or 'agency work'. The hiring firm pays fees to the agency, and the agency pays the wages (even if the hiring company has not yet paid the agency). Flexibility for both worker and employer is a key feature of agency work.

The worker is recognised as being in an employment relationship but because of the multiple parties involved, there may be limitations imposed on the rights of the worker or confusion regarding rights, particularly if the worker has provided services at the user firm for an extended period of time (ILO, 2015).

Theron (2005) argues that the difficulties with the temporary employment agency relationship are evident in the way that the ILO definition is constructed. The client or user company is designated as the third party which suggests that the primary relationship is between the party providing the service (the agency) and the worker. Yet the user company or client is the party that determines what labour or services are required and the parameters of the relationship. The user company is the dominant party in the relationship. It is therefore peculiar that the agent or provider of the service is identified as the employer because other than remunerating the worker, the temporary employment agency does not perform other employer functions (Theron 2005; Le Roux, 2009). A further peculiarity of temporary agency work is that the worker works at the site of the client and not that of the agency (Mitlacher, 2007b). Rubery *et al* (2002) point out several

difficulties that may be experienced by the temporary agency worker, primarily because the worker works at the premises of a client who has no contractual relationship with that worker. These include difficulties with supervision and control; initiating disciplinary processes; verifying information; grievance procedures; health and safety; equal pay concerns; duties of loyalty and confidentiality; and trade union rights (Rubery et al, 2002).

2.2. The growth of temporary agency work

The International Confederation of Private Employment Agencies (CIETT, 2015) reports that 60.9 million people gained access to work through the recruitment and employment industry during 2013, 40.2 million of these via temporary agency work. The biggest market for agency work is still the USA, with 11 million people engaged in this type of work. China is close behind with 10.8 million people, although the nature of agency work in China is not fully comparable to that in other countries (CIETT, 2015). Based on 2012 data, Japan is the third biggest market with 2.4 million individuals (CIETT, 2015). For the same period, South Africa is reported to have had 784,434 people in agency work and in the UK 1,155,900 people (CIETT, 2015). Agency work delivered the largest part of the sales revenue of the employment and recruitment industry, with CIETT reporting that it comprises 68 percent of its global sales revenue (CIETT, 2015). The penetration rate is the amount of agency workers as a share of the total working population (CIETT, 2015). During 2013, the USA, Japan and Europe all saw an increase in their penetration rates, bringing them closer together: 1.7 percent, 2.0 percent and 2.1 percent for Europe, Japan and the USA respectively (CIETT, 2015). In 2013, around the world 12 million people were employed daily as agency workers.

2.3. Trends in temporary agency working

Earlier research focused on agency workers being used by organisations as a means of providing numerical flexibility in response to fluctuating product demand or for short term specialist tasks. This created human resource and people management challenges, primarily because of the triangular employment relationship created between worker, agency and user firm (Grimshaw *et al*, 2001; Forde and Slater, 2016). More recently, developments in the temporary employment agency industry include *inter alia*, four important trends:

- The increasingly complex set of contractual arrangements between agencies and user firms. These may include more managed, collaborative arrangements (Forde and Slater, 2016);
- A change in the regulatory environment surrounding the supply of temporary workers, in that agency temps are treated equally compared to directly employed workers (Forde and Slater, 2016);
- An increase in regulatory avoidance in the temporary agency worker sector (Knox, 2018); and
- The express or formal, statutory allocation of employer responsibilities between the agency and the client within the triangular employment relationship (Davidov, 2004). Related to this trend, is the debate around joint and several liability between the agency and the client.

Growing international price competition and fluid capital markets pressurise firms to maximise profitability and respond to rapidly changing consumer tastes and preferences (Eichhorst *et al*, 2019). As a result, corporations are increasingly outsourcing many of their functions, leading to the 'fissuring' of the workplace and the proliferation of subcontracting relationships (Weil, 2014). In addition, the expansion of the service sector necessitates that employers engage staff for their organisations on a 24-hour, seven day a week basis (Eichhorst *et al*, 2019). Together, these changes have made fixed costs and overhead obligations less bearable for employers and have led to the rise of non-standard work arrangements (Eichhorst *et al*, 2019).

In the past, these non-standard contractual arrangements were based on what Forde and Slater (2016) term 'spot' contracting where the client firm chooses between many different suppliers of agency services. These contractual relationships were usually short term and for easily replaced skills, similar to the 'flexible firm' model (Pollert, 1988). From the 1990's onwards, the contractual arrangements between the client and the agency firm no longer resembled the 'spot' contracts of the past. Agencies developed long-term contracts with firms to supply large numbers of temps to firms on 'quasi-continuous' basis (Peck and Theodore, 1998; Coe *et al*., 2010; Forde and Slater, 2016, p.314). The characteristics of these relationships included 'permatemps', undertaking core roles at firms and the provision of 'repeat' temporary workers to firms each day.

The latter half of the 1990s saw the negotiation of 'block contracts' in some sectors such as financial services (Hoque *et al*, 2008, p.390). These contracts frequently involve a hands-on role for the employment agency often including a manager from the employment business working on site at the client firm (Forde and Slater, 2016, p.314). Other additional services are often provided by the agency firm, such as HR activities, payroll management, training and appraisals. An example of this type of relationship is the 'preferred supplier' approach where the client firm utilises multiple agencies but develops a close relationship with one agency and may receive discounted rates for buying in bulk (Kirkpatrick *et al*, 2011; Forde and Slater, 2016). There are also 'sole supplier' arrangements, where the client firm contracts with only one agency (Forde and Slater, 2016, p.315), and 'preferred, high volume supply relationships' (Druker and Stanworth 2004, p.58) offering special prices and discounts for volume purchases. 'Master vendor' contracts are where the client organisation engages a sole agency as 'master vendor' to meet all the client's needs at a reduced cost (Hoque *et al*, 2008, p.391).

Hoque *et al* (2008) itemises some potential benefits for employers as a result of the increase in collaboration between clients and agencies. It may result in a more engaged model with a broader range of attributes than price and result in reduced purchase costs. There is also the potential to improve the quality of placement matching especially where agencies are used to fill core professional roles. As agencies and clients work more collaboratively, there may be an increase in information-sharing, with joint learning and problem solving (Grimshaw *et al*, 2004). High frequency of contact between agency and client means agencies acquire 'substantial tacit knowledge' of client needs (Hoque *et al*, 2008). However, increasing the interdependency between agencies and employers may play a role in 'co-producing' HR services, possibly inflating the demand for temporary workers beyond what might otherwise have been required (Hoque *et al*, 2008, p. 114).

Although temporary agency work may yield benefits, it has been associated with substandard, insecure and often highly intensive work, inferior pay and a range of detrimental mental and physical outcomes for workers (Forde *et al*., 2015). These problems are often associated with the fact that temporary agency work inhabits a legal 'grey zone' (Stanford, 2017, p.385). Unsurprisingly therefore, the requirement that agency temps are treated equally comparable to directly employed workers in user firms has been introduced in various contexts (Forde and

Slater, 2016). However, in the UK for example, there remains a difference between day one rights and those that apply during a continuous assignment of twelve weeks or more (Forde and Slater, 2016). Section 2.6 below considers attempts to regulate temporary agency work in more detail.

Related to changes in the regulatory environment of the temporary agency work sector, is the recent trend of regulatory avoidance (Knox, 2018). Regulatory avoidance has intensified and expanded, normalising exploitation and further exacerbating precarious work and its detrimental outcomes (Knox, 2018). Temporary agencies are being used to avoid workplace laws and other statutory obligations, undermining the coverage and effectiveness of regulation established to maintain minimum labour standards and to protect against the immediate and broader social effects of precarious employment (Quinlan, 2012; Knox, 2018). Regulatory avoidance produces a range of problems, including increasing level of casualisation, leading to increased job insecurity and systemic work insecurity (Knox, 2018). The temporary employment sector has further been accused of developing elaborate strategies to avoid regulation, circumvent collective bargaining, bypass formally binding collective agreements, and undercut pay and conditions (Knox, 2018; Doellgast and Greer, 2007). These strategies illustrate the importance of examining how regulatory avoidance is constructed and played out within specific national contexts within the temporary agency industry.

An additional, central problem relating to the triangular employment relationship concerns the identity of the legal employer of the worker - the agency or the user firm (Davidov, 2004). Usually, the user firm assumes that the employer is the agency and the agencies rely on this assumption when offering services, but this is not always the reality (Davidov, 2004). The concept of ‘exercise of control’ is often central to the analysis of determining employment status (Glynn, 2011). This aspect of the analysis is important as a firm is not legally accountable unless it exercises sufficient control over workers' activities to be deemed an employer (Fudge, 2006; Glynn, 2011). If a firm can avoid exercising control by externalising production, it avoids the employment-related regulatory costs it would bear if it produced goods and services internally (Glynn, 2011). Consequently, identifying employees and their employer is important for attributing responsibility for costs and risks of utilising labour (Fudge, 2006).

Allocating employer responsibilities between the agency and the client within the triangular employment relationship is tricky because the recruitment, dismissal and employment functions usually undertaken by the employer are outsourced to an intermediary, while the 'task' side of the relationship is not outsourced (Davies and Friedland, 2004, p.141; Benjamin, 2016b). The intermediary administers the employment relationship, while the client exercises control over the worker's daily activities (Benjamin, 2016b). In addition, ascertaining the organisation responsible for complying with governmental regulations, the liability for work related accidents and other aspects of the employment relationship is also problematic (Kalleberg, 2000). Debates regarding these issues are often framed around principles of joint employer or co-employment (Kalleberg, 2000; ILO, 2016), as assigning liability to multiple firms helps mitigate the cost advantages employers may gain from outsourcing or subcontracting (Deakin 2003; Adams and Deakin, 2014).

Joint and several liability is a common labour law technique for ascribing employment related responsibilities to organisations involved in a common enterprise (Fudge, 2006; ILO, 2016). This measure is often found in the regulation of temporary agency work in both the developed and developing countries, particularly in relation to wages and social security entitlements (ILO, 2016). For example, in the United States of America, joint employment may be found when control and supervision over a worker's activity is shared by different entities (ILO, 2016). The joint employers are severally or collectively responsible for the obligations arising from the employment relationship under a given act (ILO, 2016). In the United Kingdom (UK), joint and several liability is an accepted method in tort law for ascribing responsibility to separate entities engaged in a common enterprise (Fudge, 2006). Similarly, joint liability rules between the TES client and the TES firm are found in Argentina, France, India, Italy, the Netherlands, Namibia, Ontario (Canada) and South Africa (ILO, 2016).

2.4. Issues and challenges arising from temporary agency work

The triangular employment working relationship and the commercial exchange between the client firm and the agency over the sale of the workers' labour power, shapes the quality and character of temporary agency work (Vosko, 2010). As a result of this unique contractual arrangement, temporary agency workers are often susceptible to practices constraining their

politico-legal freedoms. For example, they often waive their right to choose their worksite, their direct employer, and their preferred type of work as they may be assigned to work locations without regard for their skills set (Vosko 2010). This disjuncture of responsibility and control over their physical surroundings, coupled with a lack of training can lead to problems in the area of occupational health and safety (Trebilcock, 1997).

In addition, the high mobility of labour supplied affects the quality of the work performed (Coe *et al*., 2009). In this regard, temporary employment agency workers typically bear a heightened risk of performing substandard work, have reduced career opportunities, along with higher injury rates, and a lack of income security that affects living standards and financial independence (Knox, 2010; Knox, 2018). They have also reported difficulties obtaining bank loans, finding accommodation in the private rental market and maintaining relationships because of this lack of financial or employment security (Knox, 2018).

Wages and working conditions are key competitive factors for agencies, particularly where client firms operate in internationally exposed product markets (Alsos and Evans, 2018). These competitive factors may hamper collective action among temporary agency employees, which in turn exerts pressure on labour standards and collective wage regulation institutions (Arrowsmith, 2008). Further problems arise as a result of low levels of unionisation and/or coverage under collective agreements, such as relatively low wages (which may be a product of the mark-up on the 'invisible fee' that agencies charge the client), limited access to social benefits and entitlements (Vosko, 2010, p.634). Due to the temporary nature of the work, they establish occupational connections with multiple entities rather than one and are often dismissed with little or no notice (Vosko, 2010). A recent report from the Organisation for Economic Co-operation and Development (OECD) (2019) noted that non-standard workers are 50 percent less likely to be unionised than standard employees and, in some countries, 40-50 percent less likely to receive income support when out of work. Addressing these problems may differ depending both on a country's labour relations institutions and the legislation governing liability and compensation in case of accident or injury (Trebilcock, 1997).

2.5. Understanding temporary agency work

Recent empirical research and theory development that allows for a better understanding of temporary agency work is considered under four sub-sections. The first discusses the move from the standard employment model towards increased externalisation, and the second deals with the importance of human capital formation. Thereafter, the third looks at the importance of the segmentation and dualisation theories, and finally the concept of job quality is considered.

2.5.1. From the standard employment model to increased externalisation

The standard employment model, defined by the ILO (2015a, p.13) as a 'model, in which workers earn wages and salaries in a dependent employment relationship *vis-à-vis* their employers, have stable jobs and work full time', was the norm for industrialised nations of the twentieth century and formed the basis of the framework within which labour law, collective bargaining and social security systems developed (Summers, 1997; Kalleberg, 2000). There has been a decline in long-term employment and job stability in industrialised countries. However, the standard employment relationship remains the dominant form of work relationship in European economies (Adams and Deakin, 2014). The cause of this decline has been attributed to rising skills levels, growing competition, growth in technology and the free movement of capital, goods and services across national borders (Supiot, 1999; Fudge, 2012). One of the consequences of the decline in the standard employment relationship, is that millions of workers are finding themselves outside the ambit and protection of labour laws (Davidov and Langille, 2006). In the context of these changes, the future role of labour law as a tool for worker protection, is a recurrent theme and has often been termed a 'crisis' (Tekle, 2010).

There is voluminous literature about non-standard forms of work and an ongoing debate concerning their classification (Mitlacher, 2007b; Kalleberg, 2015). Different terms are used in the literature: flexible labour or flexible forms of employment (Cotton, 2015; Jahn, Riphahn and Schnabel, 2012), contingent work (Summers, 1997; Kalleberg, 2000; Mitlacher, 2007b), non-traditional (Kalleberg 2000) or atypical work (Peers, 2013). The ILO considers the following employment arrangements to be non-standard: temporary employment; contractual arrangements involving multiple parties, including temporary agency work; ambiguous employment relationships, including dependent self-employment and disguised employment relationships; and part-time employment (ILO, 2015). What these categories have in common, is that they

depart from the standard employment relationship, which is based on full time employment, an indefinite contract, performed at the employer's site and direction (Summers, 1997; Kalleberg, 2000; Mitlacher, 2007b; Theron, 2014). Adams and Deakin (2014, p. 787) define non-standard work as 'any working arrangement that lacks one or more of the key temporal or physical dimensions of the SER [standard employment relationship]'. Common characteristics of different types of non-standard work are that they do not fit within traditional economic and legal boundaries and are usually associated with poor working conditions and low labour standards (Fudge, 2012).

One of the ways that non-standard employment can be examined is by focusing on the broad concept of externalisation (Le Roux, 2009). Organisational theory takes for granted the existence of a workforce that is subjected to hierarchical and bureaucratic control and who are 'attached' to the organisation, with a clear boundary between those who are inside the organisation and those that are not (Pfeffer and Baron, 1998). As the employment relationship changed over time, many labour norms associated with the standard employment contract were diluted (Deakin, 2002; Hayter and Ebisui, 2013). A continuum of employment relationships has developed, ranging from long-term attachments between workers and organisations, under bureaucratic control, to relationships where workers have weak attachments to the organisation with regard to physical location, administrative control or duration of employment (Pfeffer and Baron, 1998).

This trend towards diminished attachments or increased externalisation can be found in three dimensions: externalisation of place; externalisation through diminishing the duration of the employment; and externalisation of the administrative control or who has responsibility for the worker. Each of these is a distinct form of externalisation (Pfeffer and Baron, 1998). Externalisation of place is where the workers are taken out of the workplace, not because the job requires it, but for other reasons. An example of this is working from home. Externalisation through diminishing the duration of the employment occurs when workers are hired for a limited duration or, if they are 'continuous but part time', which diminishes their attachment with the organisation (Pfeffer and Baron, 1998,p. 264).With regard to externalisation in terms of administrative control, firms are removing their task activities from their own administrative control, either by hiring temporary or contract workers who remain on another's payroll, while under the direction of the firm (Pfeffer and Baron, 1998). The externalisation of administrative

control may create a detached or triangular employment relationship, where a worker establishes a connection with more than one employer (Vosko, 1997; Kalleberg, 2000; Summers, 1997). It is in line with this thinking that externalisation is described by Cotton (2015, p. 139.) as obtaining labour from outside of a corporation's boundaries, linked to outsourcing and contracting out, motioning a change in the employment relationship with the introduction of a third party.

2.5.2. Human capital formation

'Human capital formation' is understood as the process of investment and accumulation of a set of skills, abilities and productivity characteristics acquired by an individual along their life cycle (Eichhorst *et al*, 2017). The human capital theory predicts that individuals with higher human capital have higher earnings. Global evidence confirms that generally the higher the level of educational attainment, the higher the probability of finding employment (World Development Report, 2007). Since the works of Schultz (1964) and Becker (1962), the role of human capital formation has become central to discussions about the development of individual potentials and their performance in the labour market, and the success of societies to improve the overall wellbeing of their citizens (Eichhorst *et al*, 2019).

The International Confederation of Private Employment Agencies (CIETT, 2000),[3] acknowledged that the lack of investment in human capital was one of the main concerns with temporary agency work. The lack of training offered to temporary agency workers can be framed in terms of the human capital theory (Storrie, 2015). Problems arise because temporary agency workers are only at the user firm for a limited period and are usually employed by the agency. Training would therefore not take place at the user firm and would be provided mostly by the agency (Storrie, 2015). As a result, difficulties arise in finding appropriate means of financing investment in human capital. The skills required for agency work are not firm-specific and according to human capital theory, firms will not be prepared to fully finance non-firm specific human capital as they may not be able to reap the return on their investment if the worker leaves their employment (Storrie, 2003). In addition, the inclination to resign may be high as the agency worker may be poached on assignment at the user firm. This affects both the client and temporary work agency. On the one hand, the client may be reluctant to invest in an individual

[3] The international organisation for the temporary work agency sector.

who is not officially an employee and whose attachment to their organisation is almost by definition limited. On the other hand, the TES firm bears the risk that a client may poach a worker it has trained up, also acting as a disincentive to invest in training agency workers.

Supporting Storrie's conclusions, the ILO (2016) informed that once workers were employed in firms that provided firm-specific training, holding a fixed term contract reduced the probability of being chosen to participate in training activities, even once other worker, job and employer characteristics were accounted for. Similarly, the 2010 European Working Conditions Survey reported that only 26 per cent of temporary agency workers received training, compared with 39 per cent of workers on an indefinite contract (ILO, 2016, p.207).

There are however agency workers who are highly skilled and sought after, and in these cases, the agency-worker-employer relationship is nurtured (Parkin, 2000). This may reflect a wider privilege of those with the capacity and power to be flexible, or to exploit flexibility, such as for example the highly skilled software developer. It also reinforces the widening socio-economic gap and opportunities for work (Parkin, 2000). There are some that have the skills and careers to meet 'consumerist expectations of late urban modernity' but for most workers, such as the general operative in manufacturing or the cleaner, temporary agency work simply meets basic needs (Parkin, 2000, p. xviii).

2.5.3. Segmentation and dualisation

Following on from the arguments raised in terms of the human capital perspectives discussed above, labour market theory considers the effects of the development of internal labour markets on those included within them, and on those excluded from and confined to the residual competitive secondary sector (Rubery, 1978). According to this theory, internal labour markets develop because skills become more firm-specific and a worker's productivity, a function of on-the-job training and experience, ties into length of service within a firm (Rubery, 1978). To develop a stable labour force, an employer will pay their workers more than their opportunity wage in the external labour market, thus reducing the incentive for mobility among the workers. With mobility restricted or eliminated, there will be little market influence on the internal wage structure of the firm, which will come to be determined by custom and by rules. As a result, the labour market will thus be divided up into independent sections (Rubery, 1978). This argument is

compatible with human capital theory, which had earlier predicted that long-term employment relationships and seniority-based wages would be found in contexts where firms and workers made mutual investments in firm-specific training (Becker, 1964; Deakin, 2013). In a similar vein, transaction cost economics identified stable employment with the presence of 'asset-specific' capabilities, in contrast to low-skill and low-discretion jobs which were associated with 'spot contracting' and 'market governance' (Williamson, Wachter and Harris, 1975).

Theories of dualism emerged in the field of labour economics to explain the existence of low paid, insecure, dead-end employment in mature industrial societies (Bertolini, 2018). During the 1970s and early 1980s, a group of economists and political scientists identified trends toward labour market segmentation. Some saw these developments as a response on the part of capital to changes in technology and product markets, while others emphasised political motives and the effort to control the labour process by cultivating divisions within the working class (Palier and Thelen, 2010). According to Pulignano *et al* (2015), dualisation has many faces: it can be seen as a globally emerging divide between classes (Standing, 2011); it is linked to employment status such as non-standard employment; socio-demographics as there is an over-representation of migrants and women in non-standard work (Vosko, 2010); and it is linked to specific welfare regimes (Häusermann and Schwander, 2012). Reich *et al* (1973) defined labour market segmentation as the historical process whereby political-economic forces encourage the division of the labour market into separate submarkets, or segments, distinguished by different labour market characteristics and behavioural rules.

In line with this thinking, segmentation theory suggests that there is a 'two-tiered' labour market: one primary segment offering well paid positions with good working conditions and structured career ladders, and one secondary segment offering short term, low paid work and providing no career prospects (Doeringer and Piore, 1971). As 'insiders', permanent workers are expected to be located in the primary segment, whereas less favoured peripheral workers with temporary contracts such as temporary agency workers, are usually found as 'outsiders' in the secondary segment, with almost no chance of entering the primary segment (Eichhorst *et al*, 2017). Continued career disadvantages for outsiders exist, such as lower wages as a result of reduced bargaining in the wage negotiation process (Lindbeck and Snower, 2002). Temporary workers therefore exhibit overall secondary labour market characteristics (Doeringer and Piore, 1971).

The terminology of the 'insider-outsider divide' comes originally from the standard insider-outsider model, which explains how persistent unemployment can arise when working conditions, and wages in particular, are determined by taking into account only the interests of employed insiders, thus disregarding the interests of unemployed outsiders (Lindbeck and Snower 1984, 1988; Bentolila, 2012). Yet, in the specific context of dual/segmented labour markets, this conventional interpretation was slightly modified. In line with the literature on this topic, not all employed workers were considered as being insiders but only those who held open-ended or permanent labour contracts subject to high employment protection (Bentolila, 2012). Conversely, employees under very flexible contracts were thought of as being part of the outsiders because, given that their role was precisely to bear the brunt of employment adjustments, their attachment to the job was fragile (Bentolila, 2012). The insider-outsider theory was often connected to the conflict of interest between the insiders and outsiders in the labour market. 'Insiders' were workers whose positions were protected by labour turnover costs[4] and 'outsiders' did not enjoy this protection (Lindbeck and Snower, 2002). There are many degrees of being an insider or an outsider and the distinction between them is made along a variety of divides, such as good jobs and bad jobs, unionised and non-unionised. These differences also translate into social differences (Lindbeck and Snower, 2002).

The entrapment hypothesis is also based on ideas from segmentation theory. The 'two-tiered' labour market offering a primary segment with well-paid positions and structured career ladders, and the other offering short term work with no career prospects (Doeringer and Piore, 1971). Gebel (2010) argues that there are continued career disadvantages for the temporarily employed labour market entrants. Education is the main source of human capital accumulation before labour market entry and permanent jobs typically require high levels of skills (Kahn, 2018). Secondary segment jobs offer poorer skill acquisition since temporary jobs have a shorter duration (Booth *et al*., 2000). Lower skill investments may hinder upward mobility into stable primary sector jobs and hinder compensating wage growth (Gebel, 2010). Individuals are therefore unwillingly caught in the temporary job trap: the less-educated are more likely to become temporary workers, and then most of them are caught in the temporary job trap due to the lack of opportunities to invest in their human capital through training (Choi, 2019, p.3).

[4] The costs associated with the dismissal of incumbent employees, and with the hiring and training of new recruits (Lindbeck and Snower, 2002).

More recently, Rubery and Piasna (2016) suggest that reform agendas should move beyond the insider-outsider debate to avoid over emphasising the division of interests between labour force groups. They believe that a more inclusive labour market policy should recognise that the interests of these groups may not be conflicting (Emmenegger 2009; Rubery and Piasna, 2016).

2.5.4. Job quality and employment degradation

Similar to theories of segmentation and dualisation, sociologists have long been interested in job quality. While recognising the complexity and debates surrounding the definition of job quality, the following aspects are central in considering job quality: compensation, diversity in the substance of work, control, stress and work intensification, and the employment contract especially with regard to involuntary non-standard aspects (Osterman 2013; Simms, 2017). Job quality is therefore a contextual phenomenon, differing among persons, occupations and labour market segments, societies and historical periods (Findlay *et al*, 2013).

Parallel to labour market economists highlighting increasing dualisation, employment researchers have noted a steady decline in aspects of job quality alongside a growth in the number of so called 'bad jobs' (Marx, [1867] 1967; Kalleberg et al, 2000). In the late 1960s and early 1970s economists drew attention to the notion of 'bad jobs' by suggesting that the labour market was divided into a primary segment of 'good jobs' and a secondary segment of 'bad jobs' (Kalleberg, 2000). The recent growth in non-standard jobs highlighted the concern that these jobs were worse for workers than regular full-time jobs, as workers were portrayed as peripheral workers in organisations (Kalleberg, 2000; Bosmans, 2015).

To the extent that non-standard jobs are poorly paid, lack health insurance and pension benefits, are of uncertain duration, and lack the protections that unions and labour laws afford, they are problematic for workers (Kalleberg, 2000; Webster, 2007). In particular, temporary employment agency workers are associated with higher job insecurity and irregular schedules (Håkansson and Isidorsson, 2012; Bosmans et al.2015); low wages and benefits (Elcioglu, 2010; Bosmans *et al*, 2015); poor training and employability (Håkansson and Isidorsson, 2012; Bosmans *et al*, 2015; Knox, 2010); poor health and safety (Bosmans *et al*, 2015) and experience unfair treatment from their supervisors (Kirkpatrick and Hoque, 2006).

A central concern for sociologists has been the 'degradation of work'. More specifically, how jobs that used to be 'good' quality become 'bad' and the variety of factors, conditions and processes that lead to such deterioration (Adamson and Roper, 2019). In this light, recent studies have highlighted the economic, social, political, industry-specific and organisational issues that contribute to the degradation of work (Hannon, 2010; Cunningham, 2016; Curley and Royle, 2013; Gale, 2012). Some researchers have considered the impact of individual choices and opportunities on job quality, as workers have different expectations and needs. For example, Kalleberg and Dunn (2016) researched aspects of the gig economy[5] and conclude that what makes a job 'good' or 'bad' depends on the characteristics of the individual as well as the job. For example, they explain that in some instances gig jobs may be good for immigrants who may not otherwise be able to secure employment and may be less likely to be subjected to discrimination since they don't come face-to-face with employers. These jobs may also be good for workers in remote areas where local labour markets do not offer them better job opportunities. Therefore, differences in geography may also affect job quality as countries or regions advance or develop differently (Ghai, 2003). For example, those with a higher level of education who live in urban areas are likely to have greater opportunities to choose among alternative jobs (Findlay et al, 2013). They are likely to have higher standards for what constitutes a good job, as compared to people with less education, or those who live in rural areas and as a result have fewer alternative job opportunities (Findlay et al, 2013).

Some researchers have focused on collective decisions and actions rather than individual choices that determine and improve job quality (Adamson and Roper, 2019). The role of unions and the collective pressure and engagement they may bring, have recently been considered by both Rothstein (2016) and Simms (2017). Firstly, Rothstein's ethnographic observations show that workers and unions who consent to management demands add to the degradation of jobs (Burawoy, 1979; Spangler, 2017). For example, Rothstein explains 'whip-sawing' as a process used by management to make workers feel continuously threatened by the possibility of them losing their employment, with these tensions affecting the union relationship. Unions are caught in a contradictory situation where they wish to represent their constituencies but are aware of

[5] Also referred to as the sharing economy, collaborating economy, crowd working, access economy, on-demand economy, freelance economy, 1099 economy, and platform economy, among other terms (Kalleberg and Dunn, 2016).

management demands. Another example of management 'discipline' is the idea of 'teamwork' that requires job rotation within a working group. Rather than allowing workers to diversify their skills and move up a job ladder, companies operate with a minimum number of workers and cross-train them to make them interchangeable. The theoretical point made by Rothstein (2016) is that the degradation of work is not as a result of neoliberalism (conceived as the market working purely from its own logic or hand in hand with new technologies). Rather, globalisation, which is a process in which markets, states, and supra-state entities like the World Trade Organisation (WTO) act as one, often against the public interest, is the driving force that makes 'good jobs go bad' (Spangler, 2017, p.472). [6]

Whereas Rothstein (2016) explained how job quality is affected if unions consent to management demands, Simms (2017) considered how unions attempt to expand their representational scope to improve aspects of job quality. Simms focused on how unions represent workers' job quality interests within institutional mechanisms such as collective bargaining, minimum wage regulation, and legal regulation. The argument is that collective actors such as unions have a central role in resisting threats of downward pressure on job quality and can even extend representative institutions in an effort to attempt to re-regulate job quality. It concludes with the idea that new interests can be promoted within institutions to improve job quality, despite internal resistance (Simms, 2017, p. 63).

Challenges remain in conceptualising job quality and how it should be measured (Kalleberg, 2016). In addition, further research is needed to explore why jobs vary in quality and the different conditions that facilitate their deterioration or improvement. Adamson and Roper (2019) believe that there is a clear gap in exploring how these issues play out differently in the countries of the global south, as most studies, with a few exceptions, remain focused on the European and North American context.

2.6. Regulation of Temporary Agency Work

2.6.1. Broader, global economic and political processes

[6] While technological developments and free trade agreements are often associated with the term globalisation, it is increasing levels of foreign investment and the growth in the power of multinational corporations that lie at the heart of contemporary globalisation (McNally, 2006). Developments like free trade agreements are part of a deeper process of reducing the constraints on the ability of corporate interests to ensure the free movement of capital (Thomas, 2009).

Employment standards are regulated through national and sub-national legislation. However, the development of employment standards and the social forces that influence their regulation are connected to broader global economic and political processes (Thomas, 2009). Global economic integration alters the environment in which labour, management and government interact, forcing each to respond and change the rules (Rothstein, 2016). This reconfiguration of the rules within countries makes changes to labour relations appear to be domestic change but may be attributable to, or influenced by, globalisation. Wherever a value chain 'touches down' firms encounter and shape local labour relations as actors within these national industrial relations systems (Rothstein, 2016, p. 125).

'Flexibility' in the global context refers to the capacity for capital to alter the geographical organisation of production through increased levels of foreign direct investment (FDI). This increased 'geographic flexibility' has developed as a result of the increased relocation of manufacturing production to the southern economies because of the lower labour costs in the south (Lipietz, 1987). Thomas (2009) believes that the mobility afforded to capital through these vertical disintegration strategies is one of the defining characteristics of economic globalisation (Thomas, 2009). The contemporary global political economy has shifted capitalist production to new spaces within the world economy - sites where means of production, labour and credit can increase profitability (McNally, 1999). These changes have led to the expansion of inter alia, subcontracting relationships and the prevalence of sweatshop labour within many nations of the south. (Thomas, 2009).

Employment conditions and labour practices in these production relationships have been associated with unregulated, low-wage labour-intensive production, gendered inequality, and violent resistance to workers' efforts to organise (Thomas, 2009). The patterns of global economic competition, intense labour exploitation in the south, and the increased insecurity in industrialised labour markets have led to concerns about a 'race to the bottom', of labour standards and working conditions (Wells, 2005). Competitive pressure lowers labour standards as jurisdictions compete to attract investment (Thomas, 2009). The challenge to regulate labour standards takes place against this backdrop and there have been several attempts to construct

mechanisms for improving labour standards in the global economy. These include efforts by the ILO for core labour standards and the EU Social chapter, discussed below (Thomas, 2009).

2.6.2. International regulation: The ILO

The Treaty of Versailles established the International Labour Organisation (ILO). It was created in 1919 to promote social progress and to overcome social and economic conflicts of interest, through dialogue and cooperation (Rodgers *et al*, 2009; Mitchell, 2010). The aim was to find common rules, policies and behaviour for all to benefit (Rodgers *et al*, 2009). It was unique in that it allowed for equal power of decision between the actors and introduced a new form of international treaty that was concerned with social aims and new ways to apply them (Rodgers *et al*, 2009). Mitchell (2010) and Langille (2009) suggest that the intention of the ILO was to promote the adoption of labour standards to prevent a 'race to the bottom' among industrial nations.

The results of the work of the ILO appear in its formal instruments that it adopts, namely, conventions, recommendations, resolutions, declarations and codes of practice. Conventions and recommendations both develop standards and ensure a stimulus component for national legislation (Laci *et al*, 2017). One of the more controversial aspects of ILO conventions, are the concerns surrounding their application and enforcement (Berg and Kucera, 2008; Laci et al, 2017). Member states are not obliged to ratify ILO Conventions as ratification is voluntary. Ratification does however entail certain obligations, such as adopting national legislation that meets standards set out in the conventions, the enforcement of these laws, and reporting on their application to the ILO (Berg and Kucera, 2008). However, the ILO is limited in its ability to sanction those countries that are in breach of their obligations. There is no strong enforcement mechanism however a supervisory system exists that is unique at the international level and that helps to ensure that countries implement the conventions they ratify (Berg and Kucera, 2008). The ILO regularly examines the application of standards in member states and points out areas where they could be better applied. If there are any problems in the application of standards, the ILO seeks to assist countries through social dialogue and technical assistance.

The history of agency work and ILO instruments show that as early as 1919, agency work was mentioned in both the ILO Convention on Unemployment 1919 (No.2) and the ILO

Recommendation on Unemployment 1919 (No.1). Table 1 below sets out some of the ILO Conventions and Recommendations from 1919 to 2007 that have relevance in relation to temporary agency working.

Table 1*: ILO Conventions, Recommendations and the status of agency working*

Date	**ILO Convention & Recommendation**	**Details regarding agency working**
1919	ILO Convention on Unemployment 1919 (No.2) ILO Recommendation on Unemployment 1919 (No.1)	Non-profit employment agencies were allowed to exist as long as they were strictly controlled by a central state authority. The Recommendation stated that fee-charging agencies for profit should be prohibited.
1933	Fee-Charging Agencies Convention 1933 (No. 34)	The banning of agency work was formalised and fee-charging employment agencies were to be abolished. Fee charging agencies were defined as 'employment agencies conducted with a view to profit, that is to say, any person, company, institution, agency or other organisation which acts as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker' (Art 1a).
1949	Convention on Fee-Charging Agencies Convention 1949 (No. 96)	The banning of agencies was relaxed in so far as it provided that member states could either abolish such agencies or regulate them. Most member states chose the option of prohibiting fee-charging agencies (Valticos, 1973).
1994	The Part-Time Work Convention, 1994 (No.175)	The framework provided by the ILO Convention on Part-Time Work, only applied fully to permanent part-time wage earners.
1997 & 1999	The Development of the Decent Work Agenda	The Decent Work Agenda liberated the approach towards agency work and legitimised the industry. Agency workers were protected with the adoption of Convention No. 181. The ILO introduced conventions and recommendations relating to vulnerable groups such as part-time workers.

	Private Employment Agencies Convention 1997 (No. 181) Private Employment Agencies Recommendation, 1997 (No. 188)	In terms of Convention 181, the ILO confirmed its awareness of the importance of flexibility in the functioning of labour markets. It sought to allow and regulate the industry rather than banning it. It acknowledged the need to protect workers against abuses and recognised the need to guarantee the right to freedom of association. Article 11 states that members shall take the necessary measures to ensure adequate protection for the workers employed by private employment agencies. Article 12 states that a member shall determine and allocate the respective responsibilities of private employment agencies and of user enterprises in relation to the protections and benefits mentioned in Article 11. The main purpose of Recommendation No. 188 is the protection of agency workers and the prevention of unethical practices. One of the key principles is the transferring of agency workers to become employees of clients (Article 15).
2006	The Employment Relationship Recommendation, 2006 (No. 198) (Recommendation 198)	Addressed the temporary employment agency relationship through a non-binding recommendation. It recommends that countries should adopt a national policy to ensure that employed workers, including those that are part of a multi-party relationship, should have the same standards applicable to all forms of contractual arrangements.
2007	The ILO's Guide to Private Employment Agencies, 2007 (ILO, 2007)	Provides guidance to national legislators in drafting employment agency legal frameworks. The Guide confirms that Convention No. 181 was implemented to replace earlier standards that abolished employment agencies.

Source: Adapted from Aletter and van Eck, (2016, pp.301-302) and the researchers own summary

As set out above, Convention No. 181[7] stressed the importance of flexibility and the role which private employment agencies played in the labour market. It furthermore seeks to ensure that workers placed at the client by the agency, receive protection under the labour laws as well as

[7] C181 - Private Employment Agencies Convention, 1997 (No. 181).

protection against discrimination and violation of their privacy rights (Benjamin, 2013). Article 12 requires legislation to be enacted by ratifying countries that sets out the responsibilities of agencies and the client (user enterprise) to ensure worker protection (Benjamin, 2013). More specifically, Article 11 states that members shall, in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by private employment agencies, in relation to: freedom of association; collective bargaining; minimum wages; working time and other working conditions; statutory social security benefits; access to training; occupational safety and health; compensation in case of occupational accidents or diseases; compensation in case of insolvency and protection of workers claims; and maternity protection and benefits, and parental protection and benefits. Article 12 states that a member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies and of user enterprises in relation to the protections and benefits mentioned in Article 11.

Article 4 of Convention No.181 states that measures should be taken to ensure the right to freedom of association and collective bargaining (Aletter and van Eck, 2016). However, Convention No. 181 does not set out how responsibilities should be allocated amongst the entities in the triangular relationship, and does not provide any guidelines (Vosko, 1997). Neither does Convention No. 181 deal with the circumstances that countries must consider when deciding whether to permit agencies being classified as employers, nor does it deal with the security of employment of agency workers hired by private employment agencies (Benjamin, 2013). Benjamin (2013b) states that at the time that the Convention No. 181 was adopted, it was not anticipated that workers of temporary employment agencies would be deprived of labour law protection to the extent that they have been. The Employment Relationship Recommendation, 2006 (No. 198) (Recommendation 198) is the only international standard that addresses the issue of the temporary employment agency relationship through a non-binding recommendation. Recommendation 198 recommends that countries should adopt a national policy to ensure that employed workers, including those that are part of a multi-party relationship, should have the same standards applicable to all forms of contractual arrangements (Benjamin, 2013b).

More specifically, Recommendation 198 4(b)-(g) stipulates that national policy should:

4 (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

(c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due;

(d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

Recommendation 198 on the employment relationship is an important articulation of the changes taking place in employment relations and the duties of states to establish the legal responsibilities of employers (Cotton, 2015).

A further important development for temporary agency work was the launching of the ILO's concept of 'Decent Work' in 1999. Decent Work is encapsulated in four pillars, namely, the promotion of fundamental principles and rights at work, the promotion of employment and income opportunities, the expansion and improvement of social protection coverage, and the promotion of social dialogue and tripartism (ILO, 2010). The Decent Work Agenda radically broadens the ILO's traditional constituencies to focus on people on the periphery of a formal system of labour and social protection (Fudge, 2012). According to the ILO (1999), 'decent work' has the following characteristics: it should be sufficient and allow for full access to income-earning opportunities, generate an adequate income, protect workers' rights, be productive, and provide adequate social protection (ILO, 1999; Tipple, 2006).

What is regarded as 'decent' varies across societies and cultures, although there may be some elements common to all (Rodgers, 2008). Several case studies report that those in triangular

employment, such as temporary agency workers, have poor protection from termination of employment and suffer decent work deficits (Ebisui 2012; ILO 2014, ILO 2015; Serrano 2015). These include low or stagnant wages, with no access to the social protection and benefits usually associated with full-time standard employment. They experience more occupational accidents and workplace hazards than regular workers and are often in low-skill jobs, with no opportunities for career advancement. In addition, they often lack access to the fundamental workers' rights of organising and bargaining collectively (Serrano and Xhafa, 2016).

The Decent Work Agenda is not however without problems. The ILO has largely moved to a 'soft' law technique and away from the traditional convention-based system. Although the Decent Work Agenda has expanded the ILO's focus beyond the four fundamental principles and rights at work, it has continued with the soft law approach (Fudge, 2012. p. 18). As a result, one of the major difficulties in relying on the ILO's international standards as a way of improving living conditions and standards of work, is that the nation states simply do not ratify or enforce international standards, which are often seen as mere 'window dressing' (Fudge, 2012, p. 21).

A further dilemma that the Decent Work Agenda faces is how to measure the concept of 'decent work'. The ILO has attempted a systematic definition of the quality of work through its 'Decent Work' concept. However, Burchell *et al* (2014) conclude that one of the main problems with measuring the quality of employment, is the fact that it is difficult to reach universal agreement on what constitutes a good job. In addition, the measurement of decent work is constrained by the availability of internationally comparable data on employment conditions across both developed and developing countries. Without comparable data, methodologies for the measurement of decent work make little sense (Burchell *et al*, 2014). During 2008, the International Organisation of Employers (IOE) stated that 'decent work' does not set clear parameters and does not take into account the particular conditions of each labour market. The ILO has still not produced a universally applicable methodology for the measurement of decent work (Burchell *et al* 2014).

2.6.3. The European Union

2.6.3.1. The EU Social Chapter

The Social Chapter provides for the development of EU-wide labour standards and a comprehensive approach to regionally based regulation (Rubery and Grimshaw, 2003). It is different to the ILO which promotes but does not require member states to adopt or implement its standards (Thomas, 2009). Once the European Council of Ministers has passed a labour standard directive, members of the European Union are bound by the directive and must incorporate it into national labour law (Thomas, 2009). In addition, it provides for a process of negotiation of new labour standards through social dialogue between employer and union representatives (Thomas, 2009).

Despite the EU's regional approach to labour standards, the Social Chapter displays a tendency to rely on the regulation of labour standards at the level of individual nation-states (Rubery and Grimshaw, 2003). Member states have therefore retained their decision-making sovereignty over certain employment related issues such as minimum wages, termination of employment and trade union rights. In these areas the European Union is prohibited from regulating. In the areas where it does regulate it is necessary for agreement on new regulatory instruments to be reached between the member states. There is also no intention to harmonise labour standards across the EU. Instead, they are designed to form a minimum base upon which individual states may build (Thomas, 2009).

2.6.3.2. The European Council Directive on Temporary Agency Work 2008

Similar to the developments at the ILO during the 1990s, EU Directives were adopted to address precarious employment. The need to allow workers in non-standard employment access to benefits and entitlements associated with the standard employment relationship (SER) was recognised. Although EU directives addressing atypical work preceding the 2008 EU Directive on Temporary Agency Work (the Directive) specifically subscribed to equal treatment, there were weaknesses to their approach (Vosko, 2009). For example, equal treatment based on a form of employment did not provide for minimum standards for all forms of employment (Fudge and Vosko, 2001). In addition, because of the requirement for a comparator, it only applied to restricted categories of workers and excluded temporary agency workers (Vosko, 2011, p.63).

The purpose of the 2008 EU Directive on Temporary Agency Work was to ensure:

> The protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working (Article 2).

The 2008 Directive applied strictly to employees and their equivalents 'who are assigned to user undertakings to work temporarily under their supervision and direction' (Council of the EU, 2008, Article 1.1). It departed from its precursors on part-time and fixed-term work, as it advanced a qualified version of equal treatment for temporary agency workers and extended further legitimacy to temporary work agencies (Vosko, 2009). The Directive aimed to protect temporary agency workers against abuse by affirming the employment relationship as a basis for labour protection. It constructed an employment relationship between a worker and an agency though not between the worker and the user firm (Council of the EU, 2008, Articles 1 & 2). The defining feature of the employment relationship was therefore postings of limited duration to user firms (Vosko, 2009). The concept of the 'comparable permanent worker' was set aside in favour of providing to temporary agency workers conditions, 'for the duration of their assignment at a user undertaking, at least those that would apply if the worker had been recruited directly by the user firm to occupy the same job' (Council of the EU, 2008, Article 5.1). With the new phrase 'recruited directly by that user firm', the Directive created the possibility for comparing temporary agency workers with not only permanent but other workers, such as fixed-term workers, employed by the user firm (Vosko, 2009). In other words, if a temporary agency worker was hired, it was to be on the same terms and conditions as if they were directly recruited on a fixed-term or permanent contract (Vosko, 2009).

The overall promotional tenor of the Directive is illustrated by Article 4 (Wynn, 2013).

Article 4 (1) provides:

> Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

Article 4 concerning the review of restrictions or prohibitions was redrafted and no longer included an obligation upon the member states to discontinue all restrictions or prohibitions on

the use of temporary agency work (Eklund, 2009). Article 4 refers to a 'review of restrictions and prohibitions' but according to Article 4(1) such restrictions and prohibitions are justified 'only on grounds of general interest, the requirement of health and safety at work and the need to ensure that the labour market functions properly and abuses are prevented' (Eklund, 2009). The Article called upon member states to review, by 5 December 2011, the restrictions and prohibitions, after consulting the social partners, in order to verify whether they were justified according to the terms of paragraph 4(1) (Sartori, 2016).

Deregulated environments such as the UK had little to review but more highly regulated environments such as France, Italy and Germany needed to deregulate in order to comply (Countouris and Horton 2009; Wynn, 2013). Article 4 did not seem to affect the Swedish legislative framework as no restrictions of any kind were laid down by law or collective agreements on 'the use of temporary agency workers', in particular (Eklund, 2009).[8] A number of EU member states had signed and ratified the ILO Private Employment Agencies Convention C-181 of 1997, which did not contain a similar provision and permitted states to 'prohibit […] private employment agencies from operating in respect of certain categories of workers or branches of economic activity' (Article 2(4)(a) of the C-181). However, Wynn (2013) believed that the improvement of general levels of protection under the directive would obviate the need for former restrictions on the use of temporary agency work.

Eight years after the EU Directive on temporary agency work was enacted, Sartori (2016, p.109) conducted comparative research to investigate the process of implementation and the impact on the relevant national legislations. Sartori (2016) specifically investigated the outcome of the Article 4 process and concluded that it did not move towards a liberalisation of temporary agency work. The reasons being that most member states although aware of the existence of prohibitions and restrictions, did not take steps to remove them. However, countries such as Belgium, Spain and Sweden took advantage of the Directive's provisions and eliminated a few. In some cases, as in Bulgaria, the Directive was used to introduce conditions of use and other limitations which did not exist before. Sartori (2016) argues that this paradoxical situation is due to the different interpretations of what constitutes a prohibition or restriction, as well as a

[8] Article 4 of the Directive limits any restriction or prohibition on the use of agency workers to 'grounds of general interest relating *in particular'* to 'the protection of agency workers', 'health and safety' 'or the need to ensure that the labour market functions properly and abuses are prevented' (Countouris and Horton 2009).

justification on the grounds of general interest. Member states such as Luxembourg, perceived the former in much less inclusive terms compared to the Commission. Almost all countries considered that their own provisions limiting temporary agency work were justified, without however providing the explanations required by the Commission (Sartori, 2016, p. 117).

The key protection for temporary agency workers in the EU Agency Directive, was Article 5(1) that contained the principle of equal treatment. The comparison of 'basic working and employment conditions' with workers 'recruited directly by the user undertaking to occupy the same job' allowed the user firm to compare the temporary agency worker with other temporary workers rather than permanent workers (Wynn, 2013, p. 61).

Article 5(1) reads:

> The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

The principle of equal treatment existed in some form in some member states before the implementation of the Directive (Sartori, 2016). Equality could be adjusted by national or sectoral social partners to suit different social models, by way of these derogations (Wynn, 2013). The Directive provided for three types of derogations: firstly as regards pay, and secondly when temporary agency workers who have a permanent contract of employment with a temporary work agency continue to be paid in the periods between assignments (the so-called Swedish derogation) (Article 5(2)). Thirdly, in terms of employment conditions generally, when different arrangements are provided for in collective agreements (Article 5(3)) or when such arrangements are established by the member states, after consulting the social partners, and provide, in particular, a qualifying period for equal treatment (Article 5(4)). Article 5(5) called upon member states to take appropriate measures to prevent the misuse of derogations as well as any attempt to circumvent the provisions of the Directive (Sartori, 2016, p.113).

Article 5 of the Directive therefore did not cover all temporary agency workers and contained the possibility for excluding (from provisions governing basic working and employment conditions) workers with permanent employment contracts with a temporary work agency who are paid

between postings (Council of the EU, 2008, Article 5.2).[9] For the workers that were covered, the principle of equal treatment was extended to 'basic working and employment conditions', encompassing, exclusively, working time and pay (Council of the EU, 2008, Article 3.1f). There were also measures to prevent misuse such as 'successive assignments designed to circumvent the provisions of the Directive', by which they mean the misuse of the qualifying period (Council of the EU, 2008, Article 5.5) (Vosko, 2009). Clauses that prevented the conclusion of a contract of employment between the user firm and the worker after the assignment (no-hiring clauses), were prohibited. However, a reasonable level of recompense for the agency services rendered were allowed. Unlike the Directive on Fixed-Term Work's instruction to member states to establish conditions under which fixed-term contracts or relationships may be changed into permanent employment relationships, there was no mention of circumstances requiring the conversion into a bilateral employment relationship (Vosko,2009).

In addition to what was outlined above, Sartori (2016) also investigated the principle of equal treatment and the review of the restrictions and prohibitions laid down in the law of member states. The research pointed out that the convergence brought about by the Directive was still very limited, owing to the several derogations permitted to EU Countries. Sartori (2016, p.109) concluded that the future degree of harmonisation of temporary agency work regulation was in the hands of the European Court of Justice, called to strike the right balance between the cornerstones of the Directive and the scope for derogation left to member states.

2.6.4. The UK: The Agency Workers Regulations 2010

The Agency Working Directive proposed by the EU as early as 2002 failed to progress past the Council of Ministers in 2003 (Eurofound, 2009). The UK supported the notion of equal treatment for temporary workers but expressed concerns over balancing the needs of the UK's flexible labour market, with the provisions of the Directive (Forde and Slater, 2011). In May 2008, a compromise was reached between the UK business and trade union social partners providing for equal treatment for temporary workers in the UK to be effective after a period of 12 weeks into assignments. The revised Directive was accepted by the EU Council in June 2008. In January

[9] Council of the EU. (2008) Directive on Temporary Agency Work 08/104/EC.

2010 the Agency Workers Regulations 2010 (AWR or Regulations)[10] were laid before Parliament (Forde and Slater, 2011). These Regulations were implemented virtually in an unchanged form in October 2011 (Forde and Slater, 2016).

A week after the UK declaration was signed, agreement was reached between Eurociett/Uni-Europa, the European social partners for the temporary work sector (McKay, 2010). This agreement confirmed the parties' support for a directive guaranteeing equal treatment to temporary agency workers but went further than the UK declaration in stating that the non-discrimination principle applied from day one of an assignment, unless a qualifying period was agreed on at a national level by the social partners and/or tripartite bodies (McKay, 2010). The UK social partners therefore negotiated a deal that fell short of that being pursued by most other social partner organisations in member states (McKay, 2010).

Nevertheless, for the management of agency workers in the client firm, the requirements of the AWR provided a significant change in responsibilities. Some rights for agency temps were available from day one of an assignment, such as access to staff canteens, childcare, transport and client-firm job vacancies equal to that enjoyed by a comparable employee of the hirer. After a 12-week qualifying period, agency workers were also entitled to the same basic conditions of employment as if they had been directly employed by the hirer on day one of the assignment (Forde and Slater, 2016). This specifically covered pay, including any fee, bonus, commission, or holiday pay relating to the assignment. It did not include redundancy pay, contractual sick pay, and maternity, paternity or adoption pay; nor working time rights, for example, any annual leave above what is required by law (Forde and Slater, 2014).

Essentially, the AWR gave effect to the purpose of the European Council Directive on Temporary Agency Work 2008 (the Directive).[11] As discussed above, the purpose of the Directive was to ensure that temporary agency workers were afforded protection and to improve the quality of their work by ensuring that the principle of equal treatment in Article 5 was applied to them (Ebrahim, 2017). Regulation 5(1)(a) of the AWR provided that an agency worker was entitled to the same basic employment conditions as they would have been entitled

[10] Agency Workers Regulations Statutory Instrument No 93 of 2010 (AWR).
[11] European Council Directive on Temporary Agency Work Directive 2008/104/EC (2008) (the EU Agency Directive).

to for doing the same work had they been recruited by the client without the intervention of a temporary work agency. Regulation 5(3) of the AWR stated that regulation 5(1)(a) shall be complied with if the agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee. In order for an employee to qualify as a comparable employee both the agency worker and the employee must work under the supervision and direction of the client, and both must be engaged in work that is the same or broadly similar having regard to, where relevant, whether they have a similar level of qualification and skills. Relevant terms and conditions of employment are terms that are ordinarily included in the contracts of employees of the client (Ebrahim, 2017).

Therefore, after a twelve-week qualifying period[12], agency workers are entitled to the same relevant terms and conditions as if they had been directly employed by the hirer on day one of the assignment (Forde and Slater, 2014). An agency worker can qualify for this equal treatment after 12 weeks in the same role with the same hirer, regardless of whether they have been supplied by more than one TWA over the course of that period of time (Agency Workers regulations 2010 guidance). The AWR regulation 6(1) sets out the following list of terms and conditions that will fall within the meaning of 'relevant terms and conditions': (a) pay; (b) duration of working time; (c) night work; (d) rest periods; (e) rest breaks; and (f) annual leave.[13] Pay is further defined as any sum payable to an employee of the client in connection with the employee's employment and this includes any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise (Ebrahim, 2017).[14] The following, *inter alia*, are specifically excluded from the definition of pay: (a) occupational sick pay; (b) pension payments or compensation for loss of office; (c) maternity, paternity or adoption leave payments; (d) worker's redundancy payments; (e) any payment made pursuant to a financial participation scheme; (f) bonus payments for an employee's loyalty or

[12] According to the Agency Workers Regulations 2010, an agency worker can accumulate these weeks even if they only work a few hours a week. The temporary work agency may ask for a work history from the agency worker to help establish when they are entitled to equal treatment

[13] Regulation 6(1)(a)-(f) of the Agency Regulations.

[14] Regulation 6(2) of the Agency Regulations.

long-term service; (g) payment for time off for carrying out trade union activities (Davies, 2010; Ebrahim, 2017).[15]

There has been much debate about which workers are in and out of scope of the AWR, with particular attention focusing on the Swedish Derogation or 'Pay Between Assignments' (PBA) model. The PBA was an additional type of contractual arrangement included in the Regulations after negotiations by the Swedish government (Forde and Slater, 2014). The Swedish Derogation occurs when a temporary work agency (TWA) offers an agency worker an ongoing contract of employment and pays the agency worker between assignments (Forde and Slater, 2014). In terms of a PBA, agencies take on temporary agency workers as employees, guaranteeing them some pay between assignments if no work is available, but under which the worker waives their right to comparability and equal pay with workers within client firms (Forde and Slater, 2014). Although, workers need to be informed that concluding this type of contract means giving up the entitlement to equal pay (Forde and Slater, 2014). During 2013, the Trade Union Congress' (TUC)[16] expressed grave concerns about the use of the Swedish derogation in the UK and took the unprecedented step of formally complaining to the European Commission. They believed that the UK government had failed to properly implement its obligations under the Directive (TUC, 2018a).

During January to August 2013, Forde and Slater (2014) studied the effects of the AWR on employer and agency practice. They conducted 28 interviews across 11 agencies, four user firms, union and industry representatives, and a small number of agency temps. They concluded that the AWR did not have the expected effect of reducing the demand for temporary agency work. In fact, just prior to the AWR in autumn 2011, there were 285,000 agency temps in work in the UK. This number rose to 321,165 by winter 2012 after the AWR came into effect (Forde and Slater, 2014). In cases where larger numbers of temps were being used, or where temps were being used on a longer-term basis, firms looked to alternative contracting strategies to transfer some of the risks associated with the regulations. Some client firms had looked at utilising alternative contract forms, such as casual workers. It appeared that the smaller agencies bore the

[15] Regulation 6(3)(a)-(g) of the Agency Regulations.
[16] The Trades Union Congress (TUC) represents more than 5.5 million working people in 48 unions across the economy (TUC, 2018b).

brunt of the changes. Firms weighed up the cost of providing equal treatment and made a judgment close to the 12-week period as to whether or not to offer their temporary employees permanent contracts. However, one agency reported an increase in temp to permanent contracts. Although there had been a perception of high bureaucratic costs of complying with the regulations, many agencies reported that the systems had been relatively straightforward to adopt as processes had been put in place prior to the regulations. Derogation contracts were most likely to be present where large numbers of temps were being supplied on a long-term basis. However, they stated that derogation contracts were not as commonplace as had been reported, and were unlikely to take hold significantly, given the risks associated with them for agencies. Long-term partnerships between agencies and firms played a role in shaping responses to the regulations. Conversely, the regulations had provided the opportunity to develop closer working relationships with client firms (Forde and Slater, 2014).

Research was also conducted by the Advisory, Conciliation and Arbitration Service (ACAS) on the impact of the AWR (ACAS, 2015). This research found that agency workers were often unaware of their rights especially regarding holiday pay, notice periods and the twelve-week threshold. In addition, these workers were afraid of asserting their statutory rights due to the perceived imbalance of power in the employment relationship. The ACAS research found that many agencies and hirers had developed stronger bonds after the AWR came into effect (Forde and Slater, 2014). It was also found that employers that regularly used agency workers changed their working practices to avoid using agency workers for more than twelve weeks in order to avoid offering agency workers paid annual leave or equal pay (ACAS, 2015). An ambivalence on the part of some agencies to share information and promote good practice with other agencies with whom they were competing, was reported.

When the AWR were being prepared, the TUC lobbied hard for anti-avoidance rules to prevent hirers from avoiding equal treatment by hiring agency workers on a succession of assignments. Whilst such measures were included, hirers often avoided equal treatment rights by dismissing agency workers after eleven weeks - only to rehire them shortly after (TUC, 2018a). As pointed out in the ACAS research, agencies and hirers used these strategies to ensure that agency workers never accrued the twelve weeks of continuous employment and therefore did not secure the right to equal treatment. The Directive anticipated this problem, stating in Article 5(5) that

member states opting for a qualifying period should take steps to prevent circumvention (Davies, 2010). In order to avoid employers abusing the twelve-week qualifying period, The AWR contains anti avoidance provisions designed to prevent the structuring of assignments to intentionally circumvent the AWR. In all circumstances, the agency worker must have completed at least two assignments or two roles (in substantively different roles which break the qualifying period) with the same hirer or connected hirers within the same group, in order for the anti-avoidance provisions to become relevant (The Agency Workers Regulations: Guidance, 2010). These provisions could be utilised if the agency moves a worker to a new assignment every eleven weeks in order to avoid the equality provisions that become effective after twelve weeks of employment. However, certain specified factors must be present that would indicate that a pattern of assignments was structured with the intention to deprive the worker of equal treatment rights. These factors include the length of the assignments; the number of role changes; whether the role changes were substantively different; and the length of the break periods (The Agency Workers Regulations: Guidance, 2010).

Agency workers could therefore bring a claim in the Employment Tribunal if they believed they were not receiving equal treatment under the AWR. All agency workers were also protected from detrimental treatment by the agency or hirer because they asserted their rights under the AWR. A Tribunal could make a declaration, order payment of compensation and make recommendations for action to be taken (Ince, 2011). However, the most obvious problem was that the provisions set up to avoid the abuse of the twelve-week period did not address the possibility that a single assignment may be structured to avoid the application of the Regulations (Davies, 2010). *The Agency Workers Regulations: Guidance provisions* only apply to agency workers who have completed two or more assignments, or who have worked in more than two roles. A hirer is therefore at liberty to use a succession of different agency workers for eleven-week assignments even though this would mean that none of the workers in question ever acquired the right to equal treatment (Davies, 2010). In addition, if agency workers qualified for equal treatment from day one, there would have been no need for elaborate anti-avoidance provisions (Davies, 2010). The very presence of the qualifying period deprived a high proportion of agency workers of equal treatment rights but was nevertheless agreed to by the social partners (Davies, 2010). Davies (2010) argues that given the history of the Directive, workers'

representatives may have felt that it was important to secure agreement to the Directive, even if it meant some undesirable compromises.

In October 2016, the UK Prime Minister commissioned Matthew Taylor (Chief Executive of the Royal Society of the Arts) to conduct an independent review into modern working practices, focused on assessing how employment practices might need to change in order to keep pace with modern business models (BEIS, 2018). In July 2017, the Review of Modern Working Practices (the Review) was published. The Review made a number of recommendations in relation to agency workers and enforcement of employment rights, which were considered in a consultation document entitled 'Good Work: The Taylor Review of Modern Working Practices. Consultation on agency worker recommendations' (the Consultation Document) (BEIS, 2018). The Consultation Document set out the details of a consultation process to seek views on the recommendations made by the Review. Importantly, included in the scope for consultations was the possibility of extending the provisions that policed umbrella companies and other intermediaries in a supply chain, and the possibility of the repeal of the legislation that allowed the Swedish Derogation (BEIS, 2018). The Department of Business, Energy and Industrial Strategy (BEIS) invited trade unions, employer associations and other interested organisations and individuals to submit their views for consideration for the consultation on the recommendations made by the Review.

The TUC responded to the BEIS' invitation to submit views for consideration. The TUC recommendations included a call for the UK government to introduce wide-ranging reforms to protect agency workers. Their call for reform included, *inter alia*, the repeal of the Swedish derogation, to ensure all agency workers had the same rights to equal pay. In addition, they recommended that after twelve weeks of doing the same job for the same hirer, hirers should be required to assess whether the work done by the agency worker was required on an on-going basis. If so, the agency worker should be offered a permanent contract with the hirer (TUC, 2018).

Simultaneously with the BEIS consultations and recommendations by TUC, Alsos and Evans (2018) compared the evolution of industrial relations and collective wage regulation arrangements in the temporary agency industries of Sweden, Germany, Norway and the UK.

Within a framework of institutionalisation and institutional change, they examined how the strategic choices made by key actors, principally employers, confronted by market deregulation, EU enlargement and EU-level regulation, have affected the form and strength of collective regulation. With regard to the UK, these authors report that there was much debate about which workers were in and out of the scope of the AWR. Furthermore, UK agency workers on direct pay between assignments (PBA) contracts with their agency had no equal pay rights with comparable hiring company workers, if payment was guaranteed for at least 4 weeks when no assignments could be found. There was evidence of agency staff being paid up to £135 a week less than such comparators (TUC, 2013). In addition, PBA contract numbers had grown rapidly in the UK since 2011, typically in industries where high-volume agency supply minimises the risks to agencies and justifies cost reductions for the client (Alsos and Evans, 2018).

As a result of the recommendation of the Taylor Review that the Swedish derogation should be removed, Regulations 10 and 11 of the AWR (which allowed for PBA instead of equal pay after twelve weeks) no longer apply from 6 April 2020. Minor changes to regulations 5, 7 and 18 also apply from the same date in order to repeal the Swedish derogation. These amendments have no effect on the rest of the Agency Workers Regulations (Agency Workers Regulations 2010: Guidance, p. 40). From 6 April 2020, a permanent contract giving pay between assignments no longer allows a worker to opt out of equal pay entitlements. All agency workers are entitled to the same pay as a permanent employee of the hirer after twelve weeks in the same role with the same hirer (Agency Workers Regulations 2010: Guidance, p. 40). Where a Swedish derogation contract's duration extends beyond 6 April 2020, TWAs are likely to move PBA agency workers onto a suitably amended or new contract that gives them their right to equal pay (Agency Workers Regulations 2010: Guidance). The repeal of regulations 10 and 11 will not automatically result in the termination of any contracts of employment that agency workers may already be engaged under prior to 6 April 2020. These contracts may continue, subject to their terms, but all agency workers will be entitled to equal pay after twelve weeks (Agency Workers Regulations 2010: Guidance).

2.6.5. Localised and state-based focus on legislation

As can be seen from the UK example above, temporary employment agency work can only be understood within the complex set of employment relations and regulations that exists on a country by country basis (Knox, 2010). Regulation is an important context for temporary employment agency workers, as different levels of regulation will influence the deployment and use of these workers (Knox, 2010; Mitlacher, 2007). There is no one universal model of temporary staffing industry regulation or of its relationship to the wider employment relationship (Coe *et al*, 2009). The internal composition of the non-standard workforce - the mix of agency, part-time and fixed-term employment - differs from one country to another (Coe *et al*, 2009). Employment regulation can range from the full spectrum of lightly regulated to unregulated in the USA, to closely regulated in Germany and to the prohibited such as in Italy, Spain and Sweden until recently (Burgess and Connell, 2004; Strauss and Fudge, 2013).

On a national basis, there are a multitude of reasons for the regulation of temporary agency work. These include *inter alia*, to standardise employment status for taxation, equity, safety, immigration and social security reasons (Burgess and Connell, 2004). Regulation of temporary agency work is also pivotal to preventing the exploitation of workers and to ensure the application of labour codes and rights across the workforce regardless of the nature of the employment contract (Burgess and Connell, 2004). The nature of employment status associated with temporary agency work also differs from country to country and these variations include the identification of the employer, whether the employee or worker has a contract of employment, and the regulation of the employment contract. In addition, there are also differences in terms of what is allowed in areas such as long-term temporary hires, the ongoing renewals of temporary contracts, and the provision of benefits to temporary agency workers (Burgess and Connell, 2004).

The regulation of temporary employment arrangements also applies at different levels such as the agency business, the contract of employment of the agency workers, and employment conditions associated with agency employment (Burgess and Connell, 2004). The business is primarily regulated by means of licensing and monitoring procedures, and some countries curtail the scope of the agency's activities, by for example, prohibiting recruitment services (Storrie, 2003). For agencies, regulation may also include the posting of financial guarantees to protect employment benefits, the involvement of social partners, annual reporting obligations and

limitations on the scope and activities and sectors of operation (Burgess and Connell, 2004; Strauss and Fudge, 2013). Collective agreements also play a role in the regulation of assignments and contracts, for example in the Netherlands and Sweden, and to a lesser extent in Belgium and France (Storrie, 2003).

One measure of fostering accountability in multi-party arrangements, is to distribute the liabilities for labour and employment obligations among the different parties involved (ILO, 2016). This may be achieved by regulations providing for joint and several liability between the parties. If a joint and several liability rule applies, a worker could claim the labour entitlements from both the agency and the user firm and could recover the full entitlements (for which the shared liability exists) from either of them (ILO, 2016). This measure is found in the regulations governing temporary agency work in both developing and industrialised countries, and usually relates to wages and social security entitlements (ILO, 2016). Joint liability rules are provided for example in Argentina, France, India, Italy, the Netherlands, Namibia, Ontario (Canada) and South Africa (ILO, 2016). The joint liability rule may assist in ensuring compliance with labour obligations in temporary agency work. The user firm being exposed to potential claims by the agency workers creates a strong incentive for the selection of reliable private employment agencies (ILO, 2016). In addition, coupling the joint liability rule with a non-discrimination principle[17] for agency workers employed by the user firm, may prevent temporary agency work from being used solely as a tool for shedding labour responsibilities and gaining access to cheaper workers (ILO, 2016).

Although different countries have different levels of protection for employment, Storrie (2003) argues that as a general requirement, agency workers should have the same employment protection as workers with a contract of employment. The presumption should be that employment is in terms of an open-ended contract unless there are objective grounds to contract otherwise (Storrie, 2003). Temporary work agencies should be allowed to pursue profitable

[17] Article 5 of the ILO's *Private Employment Agencies Convention No.181, 1997* discusses the principle of non-discrimination in relation to temporary agency workers: 'In order to promote equality of opportunity and treatment in access to employment and to particular occupations, a Member shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability.'

business activities, while maintaining the integrity of collective bargaining at the user firm. This is essential to ensure a degree of job security for agency workers, with the ideal being equal treatment for all (Storrie, 2003).

From a broader perspective, Cotton (2013) warns that at a national level there are some fundamental problems with taking a regulatory approach to externalised labour. The reason being that the 'raw material' of labour law is the employment contract, as this changes so does the scope of labour law. Changes to the employment relationship result in regulation being left without an object (Tsogas, 2009). A further problem is that externalised work forms are often set up with the purpose of avoiding legislation. In many cases the gains for contract and agency workers come through collective bargaining and dialogue with employers (Cotton, 2013). As a result of this national regulatory weakness, international standards and mechanisms are disproportionately important in the regulation of externalised labour (Cotton, 2013).

2.7. Union efforts and responses to temporary agency work

One of the primary issues surrounding temporary employment agency work is the ability of traditional class actors, such as trade unions, to represent temporary agency workers (Benassi and Doriatti, 2014). The literature points to several factors that make union representation of atypical workers difficult, such as their heterogeneity, vulnerability, their dispersion along the value chain and the unwillingness of unions to represent them (Benassi and Doriatti, 2014). In the main, trade unions regard the growth of externalised labour as directly responsible for the erosion of permanent jobs and decent work (Forde and Slater, 2005; ILO, 2009a).

Predictably, the position adopted by many trade unions is that externalised labour undermines fundamental rights and should be opposed (Cotton, 2013). The search for leverage or bargaining power leads to trade unions being regarded as the cause of insider-outsider divisions (Rubery and Piasna, 2016). The 'insider-outsider' literature proposes that unions act as obstacles to employment opportunities available to the outsiders resulting in labour market dualisation with only the insiders enjoying representation and protection (Pulignano *et al*, 2015). As a result of increasing economic pressure, unions have been found to support the use of atypical workers as a buffer in order to protect their core constituencies from market fluctuations and cost cutting pressure (Benassi and Doriatti, 2014). However, Palier and Thelen (2010) argue, and Pulignano

et al (2015) agree, that dualisation is as a result of the weakening of trade unions, rather than their intentional protection of insiders. This argument suggests that trade unions' preferred route would be increased protection for all and only resort to reduced outsider protection as a second-best solution (Pulignano *et al* 2015; Palier and Thelen, 2010).

Pulignano *et al* (2015) compared Belgian and German plants of multinationals and reveal that there are important country differences in regard to the treatment and protection of agency workers, with a particular emphasis on unionisation. They conclude that dualisation is not an inevitable outcome for coordinated market economies as unions in some countries are able to reduce the inequalities between insiders and outsiders. Their overall argument is that unions do have space for strategic choice, but they need to pay attention to the institutional setting as unfavourable legal and political contexts lead to the failure to prevent dualism (Pulignano *et al* 2015).

Theories of union revitalisation argue that unions seek to recruit atypical workers and bargain on their behalf. This they do as a result of an increasingly hostile environment for labour and to regain their bargaining power (Benassi and Doriatti, 2014). These contrasting perspectives, whether to exclude or include atypical workers, outline the dilemma that unions face in dual labour markets (Benassi and Doriatti, 2014). Goldthorpe (1984) believes that both inclusion and exclusion are viable strategies for unions to maintain their labour market power. In short, trade unions have had multiple responses to the introduction of agency workers including exclusion, engagement and regulation and their responses are often influenced by different country contexts (Heery, 2004; Cotton, 2013). However, little research exists on the conditions under which unions choose one or the other of these options and that their decision ultimately depends on how they define their boundaries and constituencies. (Benassi and Doriatti, 2014).

As the working and employment conditions of temporary agency labour differ from country to country, so do the possibilities of obtaining union representation for temporary agency workers (Håkansson and Isidorsson, 2014). In France and the Netherlands, for instance, temporary agency workers can be represented by the trade union at both the user firm and at the temporary work agency, whereas the legislation and the trade union organisational structure in Sweden requires union representation to be linked to the employer, that is the temporary work agency (Håkansson and Isidorsson, 2014). The possibility of temporary agency workers obtaining

representation is also dependent on the unions' attitudes towards agency workers. In other words, it is a matter of whether the union can represent temporary agency workers and whether it wishes to (Håkansson and Isidorsson, 2014).

The desire for unions to include non-standard workers was looked at in a study by Berntsen (2016), albeit in the context of migrant workers. Berntsen considered the nuanced processes of non-unionisation of migrant construction workers in the Netherlands. This study shed light on the ways migrant workers negotiate and navigate an increasingly flexible and pan-European labour market. It suggests that although some trade unions may have been reluctant in the past to represent migrant workers, migrants do join trade unions when unions make strategic and resourceful efforts to include them. Both the Berntsen (2016) and Håkansson and Isidorsson (2014) studies point to the desire and effort made by unions to include those in precarious employment such as migrant workers and temporary agency workers. Bearing in mind however, that the insecurity of these workers, as well as making union organisation a challenge, might also encourage worker demand for protection (Heery and Abbott, 2000; Dean, 2012).

A good example of strategies to include temporary agency workers may be found in the German case. Until the late 2000's trade unions in Germany made little effort to unionise temporary agency workers (Ferreira, 2016). This even though these workers were often working under worse conditions and had lower pay than their permanent counterparts. Ferreira (2016) explains several reasons for the low unionisation of these workers. Unions often had difficulties engaging these workers due to the short term (less than 3 months) work placements. Workers therefore felt they did not have the same attachment to their industry as permanent workers. The traditional methods of attracting members such as strikes, would be unlikely to attract temporary agency workers as they would simply be sent back to the agency and likely made redundant. During 2007, unions realised that the temporary agency industry was supported by labour regulation and embarked on new strategies, while remaining critical of temporary agency work. For example, they created information portals, developed petitions, established collective agreements, provided guidance and practical assistance and campaigned for change (Ferreira, 2016). These campaigns aimed to realise the principle of equal treatment and equal pay, reduce the use of temporary agency workers and focus on their recruitment. The hope was that by ensuring equal pay, employers would reduce their use of temporary agency workers. Ferreira (2016) however

concludes that despite these efforts to include temporary agency workers, the underlying message from unions remained negative. The unions stressed that temporary agency work should be used as a tool for short term flexibility and not as a viable employment option (Ferreira, 2016).

The UK union response to the AWR reflects a long-standing approach towards agency temps, ranging from 'opposition', to acceptance, to positive engagement (Heery, 2004; Forde and Slater, 2014). The dominant view is that the AWR do not provide enough protection for temporary agency workers. Unions perceived the equality rights (after twelve weeks) as a step in the right direction, but workers were still left relatively unprotected as it provided scope for employers to adjust their strategies, as discussed in the previous section (Forde and Slater, 2014). Unions realised that the AWR only provided some degree of protection and that new organising strategies were necessary to improve conditions for these workers. Unions continued to campaign for day one equal treatment rights and against PBA contracts[18] which were perceived as exploitative (Forde and Slater, 2014). Unions informed workers of their rights through emails, leaflets, media campaigns and union agency representatives as many workers were unaware of what the regulations meant (Forde and Slater, 2014). As outlined in section 2.6.4. above, the UK government has responded to such concerns. As from 6 April 2020, a permanent contract giving pay between assignments no longer allows a worker to opt out of equal pay entitlements. All agency workers are entitled to the same pay as a permanent employee of the hirer after twelve weeks in the same role with the same hirer (Agency Workers Regulations 2010: Guidance, p. 40).

2.8. A global north v global south perspective

Due to peculiar histories, legacies, boundaries, legal frameworks, and the nature of collective action, precarious work has different characteristics in different national settings. Nevertheless, there has been a tendency to consider the economic development of the west as a defining pattern where economic growth eventually produces a more affluent worker (Kalleberg and Hewison, 2012). In line with this thinking, growth leads to a mass consumption society where workers are

[18] PBA contracts no longer apply from 6 April 2020.

the consumers necessary for the maintenance of the capitalist economy. The informal sector[19] assumes a transition to formal employment as 'surplus labour' is absorbed and wages rise (Kalleberg and Hewison, 2012, p.398). There are however challenges to conceptualising precarious work in this manner because of its variations in the global south (Mosoetsa *et al*, 2016). Labour historians and labour studies scholars have often conceptualised workers as employees of specific firm concentrated locations such as factories, mines and other large organisations. However, this is a view of labour in a post-war era in developed economies (Mosoetsa *et al*, 2016).

For most of human history, and especially in the global south, work has occurred under unstable conditions, with little legal regulation and little expectation of long-term continuity (Mosoetsa *et al*, 2016). Externalisation, casualisation, mass unemployment and workers that fall outside the ambit of labour law as a result of economic, political and ideological globalisation, have long been a reality in the developing world and in particular in the Southern African region (Teklè, 2010; NALEDI, 2006). A great part of the active population has never performed work that corresponds with the 'conventional' or 'standard' employment model around which labour law is shaped (Tekle, 2010). These non-standard groups of workers usually escape the legal categories that determine the applicability of labour law and are explicitly excluded from labour law coverage, in whole or in part (Tekle, 2010). However, former colonies in Francophone and Anglophone Africa still retain some of the labour laws that were imposed on them during colonial times and 'borrow and bend' laws from other countries (Kalula, 2004, Tekle, 2010; Fenwick, Kalula and Landau, 2010). This has important implications. Labour laws are moulded on a model that does not reflect African realities as wage and salaried workers account for as few as 20 percent of workers in sub-Saharan Africa (Tekle, 2010; ILO, 2015).

[19] In Africa, during the 1970's, another term arose, namely that of 'informality' or the informal sector to describe workers outside the formal capitalist system. Hart (1973) popularised the notion of informality and believed that the distinction between formal and informal income opportunities was based on the difference between wage-earning and self-employment. Significantly the concept of 'informality' was used and developed around the same time by the ILO (ILO, 1972). The informal sector, or informal economy as it became known, embraces a whole range of occupations, from small-scale manufacturing and retail to domestic service and various illegal activities, united only in terms of being beyond the reach of labour law, labour contracts, licensing and taxation laws (Munck, 2013). According to the ILO the percentage of persons in informal employment in sub-Saharan Africa ranges from 33 per cent in South Africa to 82 per cent in Mali (Serrano and Xhafa, 2016).

In addition, the socio-political underpinnings of labour laws imported from Europe were not present in some African countries, such as a strong trade union movement, a functioning state administration, the rule of law and respect for civil and political liberties (Tekle, 2010). There are different reasons behind the retention of the European-originated model of labour law, one of them is that there was adherence to a set of values and rights widely shared by the international community and encapsulated by the international labour standards and human rights norms (Tekle, 2010; Meknassi, 2010). Another is that these 'transplanted' labour laws corresponded to the industrialisation and development strategies that the developing countries pursued, as they believed that this would trigger growth and they would 'develop' and resemble northern societies (Sankaran, 2010; Tekle, 2010).

Whether in the global north or the global south, Lee and Kofman (2012) agree with Kalleberg (2011) and Standing (2011) that precarity is a global challenge. However, the concept of precarious work developed from intellectuals and social movements battling work insecurity and welfare state retrenchments in the global north. For this reason, the concept of precarious labour seems to assume that Europe and the United States represent the norm of labour relations. Some scholars argue that the current rise of precarious work in the global north in some way emulates patterns already present in the global south (Mosoetsa *et al*, 2016). Others such as Munck (2013), suggest that the focus on the standard employment relation as something that must be recovered through political action originates from the European experience but may not be applicable to post-colonial societies where 'standard' employment was not the norm in the post-war era. In the global south, it may be historically inaccurate to call for a 'return' to standard employment relations that did not prevail in the past (Mosoetsa *et al*, 2016). The development of labour markets in the global south was different to that of the global north. Light industry and mining developed in the late nineteenth and early twentieth centuries, the largest increase in industrialisation happened during and after World War Two and involved a much smaller segment of the population than in the global North. Rapid industrialisation and urbanisation, but only a partial absorption of the adult work force, led to low levels of employment (Mosoetsa *et al*, 2016).

In the context of developing countries, precarious employment is not just a pendulum swing from security to flexibility but a core part of the state's strategy of development. Lee and

Kofman (2012) argue that the state, in collaboration with international institutions, deliberately creates a precarious workforce without full-citizen protection, in order to keep a competitive export niche in the global economy. Therefore, in many developing countries, precarious employment reinforces state legitimacy and labour politics becomes national politics, and class struggle becomes a citizenship struggle. Precarious employment in the global south has different roots and different consequences - it is not just a job issue. The history and legacy of colonialism, authoritarianism and late industrialisation and the neoliberal, structural adjustment by international financial institutions affected class relationships, labour movements, and state capacity (Lee and Kofman, 2012, p.405).

In line with the idea that precarious workforces are deliberately created, are Mezzadri's (2017) arguments which concern the comparative advantage of certain regions. The idea is that cheap labour is used as a 'natural' category for poor and developing countries (Mezzadri, 2017; Dutta, 2019). However, cheap labour is not naturally available and has to be 'manufactured'. The manufacturing of cheap labour occurs as a result of multiple 'capital-labour relations, labour practices and outcomes' that create 'typologies of vulnerability' in places of work and beyond (Mezzadri, 2017, p 18; Dutta, 2019). In contexts where there are existing socio-economic divides, inequalities and regional disparities, the manufacturing of cheap labour is created by utilising these pre-existing conditions. Framed within the neo-liberal development context, cheap labour and poor working conditions are reconceptualised as 'strategic assets' to be exploited (Mezzadri, 2017, p. 25). The informalisation of labour relations being a key feature of the neoliberal era and a key characteristic of global commodity chains that produce global sweatshops driven by labour intensity, frequent relocation, low capital investments and complex commercial agreements (Mezzadri, 2017, p. 26).

Section 2: South Africa as a useful case study of temporary agency work

2.9. South African temporary agency work

Lee and Kofman (2012) believe that one of the best country studies for precarious employment as a 'crisis of social reproduction' is South Africa. This was largely because of the colonial legacy of social underdevelopment, a despotic racial order using cheap labour, and ruthless suppression of political dissent in the 1980s that produced a national liberation movement in

which class and citizenship struggles were fused (Lee and Kofman, 2012, p. 390). The largest trade union federation, Congress of South African Trade Unions (COSATU), recognised the link between class and citizenship struggles and has stated that sub-contracting, casualisation and division of workers, denies workers their citizenship and is the rise of a new form of apartheid (Barchiesi, 2011; Lee and Kofman, 2012).Webster and Omar (2003) similarly believe that the effects of the apartheid regime on the workplace included low trust, low levels of skill, a reluctance to identify with the goals of the enterprise, and above all, the persistence of the racial division of labour that characterised apartheid.

Parallel observations were made in a study conducted by Pons-Vignon and Anseeuw (2009), fifteen years after the start of democracy in South Africa. The study draws on empirical research in three sectors of the South African economy - mining, forestry and agriculture. The authors argue that the post-apartheid era witnessed a marked increase in the precariousness of workers' status and situations. Regardless of formal labour market regulation, externalisation turned previously oppressed wage labourers into poor, casualised workers, trying to make ends meet in a liberalised economy. Their study concludes that although South Africa's transition profoundly changed the lives of workers, it had not improved their situation due to the casualisation of their status and conditions. While there had been a desire to change the exploitative labour regime in law, little had been done by the government to transform the reality in the workplace. Employers adapted to the political change by shifting to economic coercion and casualisation because of high unemployment.

In the same light, Gericke's (2010) perspective is that under the previous apartheid regime, labour relations were regulated by labour legislation which excluded black workers from the definition of an employee. The definition of an employee therefore constitutes the important starting point whereby a worker would be afforded protection under labour legislation.[20] The exclusion of migrant African workers, forming the majority of temporary workers in most sectors at the time, was of significant importance as they were employed in terms of fixed-term contracts. Historically, labour brokers used the same legal mechanism to control the employment

[20] Section 213 of the Labour Relations Act 1995 (No. 66 of 1995) (the LRA 1995) states that an 'employee means - (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.'

of temporary workers (employees of the broker) who were placed with a client (Theron, 2005; Gericke,2010). The idea was that the LRA 1995 prior to the latest 2014/15 amendments, facilitated externalisation[21] by creating loopholes for employers who wanted to avoid employment risks and the high costs of unfair dismissal proceedings (Theron, 2005; Gericke, 2010).

Due to ongoing abuse of temporary agency workers and the negativity surrounding the temporary agency industry, trade unions and politicians called for a total ban on temporary employment services (or labour brokers). The issue became one of the most high-profile political issues in the country. Legislation that sought to prevent all triangular employment was published by the government in 2010 but was subsequently withdrawn because of the problems that arose with this approach. Instead, legislation seeking to regulate temporary employment agency work and address the abuses associated with the sector was introduced in 2012, and promulgated in 2014/15 (Benjamin, 2013b).

Despite the growth in temporary agency work, the use of labour brokers as they are commonly known, remains plagued by controversy as it is perceived as a cheaper alternative to permanent employment and the accompanying labour-related obligations (ILO, 2011; Senne and Nkomo, 2015). Furthermore, the complex historical context and the development of the regulatory framework within this context provides a valuable setting for research. Yet as discussed in the introduction to the thesis, there is a paucity of research examining temporary agency work in South Africa adopting a holistic perspective and taking account of contextual aspects (Senne and Nkomo, 2015).

2.10. The difficult economic and social conditions that exist in South Africa

The vulnerability and precariousness of employment in South Africa is not confined to the lack of formal jobs. It is common for those who enjoy the protection of unionisation to earn wages that often barely cover necessities (Barchiesi, 2011). Wage labour in South Africa does not experience a stable social experience, inclusion and 'full social citizenship' (Barchiesi, 2008, p.123). Instead, it carries the mark of 'precariousness of subsistence' (Barchiesi, 2008, p. 123)

[21] In the context of this comment, 'externalisation' is defined by Gericke (2010) as 'a process used by employers to transform and delegate work formerly done by permanent employees, to temporary workers at the workplace who are engaged in a tripartite relationship between the worker(s), the client and the labour broker'.

defined by ‘shakiness and harmful unpredictability, as well as the lack of social recognition and appreciation’ (Offe, 1997, p. 82; Barchiesi, 2008).

In addition, the South African labour market remains racially biased, with one race at the bottom of the stratum and the other at the top[22]. The South African socio-economic context remains characterised by poverty, high unemployment and a history of racial segregation (Senne and Nkomo, 2015). As a result, temporary and casual labour have been ‘endemic features’ of the South African labour market for many decades and government policy in relation to the regulation of these arrangements is argued to be, or is seen as, incoherent, inadequate and inefficient despite more than two decades of democracy (Van Eck, 2010; Senne and Nkomo, 2015).

In order to place the South African labour market and economic environment in context, it is useful to look at the country within an emerging economy perspective. The five emerging economies, Brazil, China, India, South Africa and Turkey together comprise 41 per cent of the world’s population and 42 per cent of the world’s labour force. Each country liberalised its product markets to accelerate the country’s growth and development. In some, such as South Africa, this was coupled with democratic transition, with organised labour playing a key role in the process of political change. High degrees of informality and late or limited industrial development produced patterns of industrial relations that differ from those in advanced economies (Hayter, 2018).

[22] Large proportions of black Africans are employed in ‘Elementary and Domestic worker occupations’ (low-skilled occupations) compared to the other population groups. Among Indians/Asians and white populations large proportions are employed in Managerial, Professional, Technician and Clerical occupations. For every one black African in a Managerial occupation, there were five Indians/Asians in Managerial occupations and six white people in that occupation. In contrast, for every one Indian/Asian in Elementary occupation there were seven black Africans in that occupation. The ratio for white to black Africans in Elementary occupations is 1:10 (Stats SA, 2016, p.ix).

Table 2: *Emerging economies including South Africa: population, income, growth and labour markets (2016 or latest)*

Country	Population (000)	GDP (PPP) Per capita constant 2011 $	Inequality (Gini)	GDP Growth (%)	Trade (% GDP)	Labour Force Participation (rate)		Informal employment (% of total)
Brazil	207 653	14023	51.48	-3.6	24.6	62.0		43.0
China	1 378665	14339	42.16	6.7	37.1	70.9		51.9
India	1 324171	6092	35.15	7.1	39.8	53.9		90.6
South Africa	55908	12260	63.40	0.3	60.4	54.7		34.0
Turkey	79512	23756	40.04	3.2	46.8	52.0		31.7

Source: Hayter, 2018 p.11

Table 2 above shows the proportion of those in informal employment remains significant in many of emerging economy countries. Income inequality is high, and there has been a rise in insecure forms of employment, whether 'labour brokering' in South Africa, 'dispatched labour' in China or 'outsourced' labour in Brazil (Hayter, 2018).

South Africa is classified as an upper middle-income economy, yet gross domestic product (GDP)[23] growth rates over the last ten years have been sluggish. Between 1994 and 2007 real GDP growth averaged 3.6 percent per annum, but after the 2008 financial crisis this slowed to 1.9 percent, and growth has since fallen below one percent (Bhorat, Cassim and Hirsch, 2014; Bhorat and Stanwix, 2018). South Africa's labour market remains one of the most unequal in the world, with a wage Gini coefficient[24] of 0.62 in 2014. Bhorat and Stanwix (2018) explain this as a function of the difference in earnings between the rich and the poor, but it is also due to the vast number of unemployed in the labour market.

[23] The market value of goods and services produced within a country.

[24] The Gini coefficient is the most commonly used measure of statistical dispersion that represents the income or wealth distribution of a nation's residents. It is portrayed as a number between 0 and 1, with 0 representing perfect equality and 1 perfect inequality. It is derived from the Lorenz curve, a graphical depiction of societal inequality. A Lorenz curve is generated by plotting the cumulative population income on a vertical axis and population percentile on the horizontal axis; a straight 45-degree line represents total equality.

The South African TES sector has expanded at a growth rate of 8.7 percent in the last two decades (Bhorat and Stanwix, 2018). Bhorat and Stanwix (2018) point out that the TES growth rate was more than five times the tertiary sector growth that grew at an overall 1.6 percent between 2000 and 2016. In general, employment growth in the TES sector exceeded the national employment growth rate of most sectors, including the financial sector (Bhorat and Stanwix, 2018). TES employment as a proportion of financial employment increased from 27 percent in 1996 to 47 percent in 2014 (Bhorat, Naidoo, Oosthuizen, Pillay, 2015). TES employment as a proportion of total employment went from 2.2 percent to 6.44 percent from 1996 to 2014 (Bhorat and Stanwix, 2018).

The legacy of apartheid remains visible in all areas of the labour market, with education perhaps the most obvious case. Poor schooling for the majority of South Africans persists; leaving most individuals ill prepared to enter the job market, with very few low-skilled employment opportunities (Bhorat and Stanwix, 2018). The lack of opportunities is evident in the fact that the unemployment rate for South African youth aged 15-34 years was 37 percent in the first quarter of 2015 (Ingle and Mlatsheni, 2017). Youth unemployment rates are important for job search prospects because having current employment is highly correlated with having previous work experience (Banerjee, *et al*, 2008).

Another important legacy of apartheid was the geographic distance between where many of the unemployed reside and where most businesses are located, resulting in low levels of labour market participation and employment in rural areas (Banerjee *et al*, 2008). Turok *et al* (2011) believe that in rural areas the failure of the market is particularly stark, with obvious private sector neglect 'there is not enough demand for goods, so there is not enough money, there is no industry and there is no development in the rural areas and former homelands. There is market failure' (p. 183).

High levels of unemployment, coupled with rural areas that lack development, result in young people struggling to find jobs. Many of those who do find jobs, are employed only briefly before becoming unemployed again (Branson *et al* 2019). Due to their youth and disadvantaged backgrounds, they do not know where to look for employment, or how to apply for positions and have no access to the media or internet. In addition, they have no information about job vacancies or how the application procedures work, with no networks to introduce them to

potential employers (Dieltiens, 2015). Furthermore, having previously had a job is correlated with currently having a job (Branson *et al*, 2019). TES firms may therefore act as a key intermediary between new entrants into the labour market and labour market opportunities (Lam *et al*, 2008; Bernstein, 2012).

In addition, South African employment is mainly accessed through informal networks of friends or family who are aware of job openings, or who put people in touch with employers (Lekana 2006; Schoer and Leibbrandt 2006; Graham *et al.* 2016). Branson *et al* (2019) found that more than half (53 percent) of young people who were unemployed and who had found a job, indicated that they found work because friends, family or household members told them about the employment opportunity.

Bernstein (2012) conducted research on how TES firms affect people's chances of finding work. This research assessed the characteristics of over 10 000 people who registered with a branch of the largest TES firm in South Africa, Adcorp. The research compared the profile and employment prospects of TES beneficiaries against data from StatsSA.[25] Comparisons were also drawn between the TES data and data from the Jobs and Opportunities Seekers (JOBS) programme at the National Youth Development Agency (NYDA) (Bernstein, 2012). The research found that TES operate at a significantly larger scale than comparable government programmes; that in terms of salaries, there seemed to be little difference between TES workers placed by the Adcorp branch and those in other types of jobs. Moreover, TES firms may have important advantages as routes into employment. They are of use to unskilled, inexperienced workers whose connection to the labour market is particularly tenuous. Bernstein (2012) cautioned however that these findings apply only to the TES employees from a single data set, taken from one large corporate TES firm, and it could not be claimed that the findings applied to all workers placed by all TES firms. An important aspect of this research was that employment agencies may be a route into employment for people who do not have friends and family employed in firms that are looking to recruit staff and who could vouch for them. In other words, those who do not have access to informal networks.

Similar findings were obtained in the Cape Area Panel Study (CAPS), which began in 2002 and followed the lives of a large and representative sample of adolescents in Cape Town as they

[25] Statistics South Africa is the national statistical service of South Africa.

become adults (Lam *et al* 2008). CAPS data revealed that those who found jobs through employment agencies have amongst the lowest number of earners within the household, perhaps indicating that they had much less access to networks of people who would be able to assist them to find work. These data may mean that employment agencies are of assistance to people with limited attachment to the labour market and limited access to employed individuals who can help them find a job (Lam *et al* 2008; Bernstein, 2012). Employers seem to prefer people who come through a referral system and rely on social networks to find employees (Bernstein 2014, De Lannoy *et al*, 2018). Intermediary interventions[26] such as TES firms aim to minimise the barriers, costs and risks faced by youth whilst looking for work. Common methods employed by a TES to address unemployment include managing the process of recruiting, screening, assessing, selecting and placement of suitably qualified candidates on behalf of their clients (De Lannoy *et al*, 2018).

2.11. South Africa's regulatory environment

The modern-day South Africa is a Constitutional state that entrenches a Bill of Rights. Section 23(1) of the Constitution of South Africa provides that everyone has the right to fair labour practices, which means that the labour policy choices are constrained and the justification for any limitation of these rights is not simply a matter of economics (ILO, 2010). Although social inequalities remain (Barchiesi, 2008), labour enjoys rights and safeguards empowered by the Constitution and employment legislation. However, this empowerment has not counterbalanced the trends of joblessness, externalisation and casualisation of employment (Theron, 2004; Barchiesi, 2008).

According to Clarke *et al* (2004), the ANC's adoption of neo-liberal, macroeconomic trade and industrial policies after 1994 undermined the new regulatory regime and impeded the overall transformation of the labour market. The result was that formal employment shrunk, various forms of non-standard such as temporary agency work grew and 'old' forms of casual and contractual employment continued as holdovers from the apartheid labour market (Clarke *et al*, 2004). However, Betcherman *et al* (2001) explain that the labour market is often a controversial aspect of public policy and approaches are dominated by opposing views. One view favoured the

[26] Intermediary interventions are those that bridge the gap between young work seekers (18-35 years) and employers (De Lannoy *et al*, 2018).

protection of workers through labour legislation and collective bargaining, and the other emphasised the advantages of encouraging market processes. Freeman (1992) points out that there is wide disagreement between economists such as those from the World Bank, who see government regulation of wages, mandated contributions to social funds, job security, and collective bargaining as 'distortions' in an otherwise ideal world; and economists such as those from the ILO who stress the benefits of interventions. These latter economists argue that regulated markets adjust better than unregulated markets and recommend tripartite consultations and collective bargaining as the best way to determine labour outcomes (Freeman, 1992).

Initially in the late 1990s, South African policies and legislation encompassed the spirit of 'give-and-take' between business and labour and resulted in what has been described as 'well-crafted, carefully balanced legislation that had one eye on the 'decent work agenda', but which also gave employers a reasonable amount of flexibility in managing employees' (Altbeker and Masiangoako, 2019, p. 2). Shortly after democratisation in 1994, the Cheadle Task Team was briefed to prepare South Africa's first set of post Constitutional labour legislation and in its ensuing Explanatory Memorandum it mentioned that the draft Bills sought to 'avoid the imposition of rigidities in the labour market' as they aimed to 'balance the demands of international competitiveness and the protection of fundamental rights of workers' (Cheadle Commission,1995; Van Eck, 2013 However, since 1996 amendments to legislation have tended to strengthen worker protection and reduce flexibility (Altbeker and Masiangoako, 2019).[27]

Bhorat and Stanwix (2018) contend that South Africa is not overly restrictive or inflexible. Their reasoning is based on the standard Doing Business Survey measures that rank South Africa's labour codes as being close to the world average - slightly higher for the difficulty of hiring and firing, but significantly below average for both the costs of firing and non-wage labour costs. However, they point out that the extent to which employers comply with the labour codes is not captured by these measures. Their research suggests that many employers do not comply with basic aspects of the labour code. For example, sub-minimum wages, having no access to paid leave, not being registered for the Unemployment Insurance Fund (UIF), and not having a

[27] In contrast to the general trend in Europe, the South African collective bargaining system has not moved towards a more neo-liberal approach, whereas the trade regime and macroeconomic and monetary policies have (Maree, 2011). Maree (2011) believes that this lack of coordination in policy between different departments of the state has had negative consequences for the South African economy and its ability to create employment.

written contract. Institutions that deal with labour disputes such as the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Courts are not without their problems. The CCMA provides an accessible avenue for dispute resolution but can be costly for employers and the Labour Court's backlog make it an unattractive avenue for recourse (Bhorat and Stanwix, 2018).

Furthermore, Bhorat and Stanwix (2018) believe that the rapid growth in the TES sector is representative of firms implicitly viewing the labour regulatory regime as too restrictive for direct hiring. The suggestion is that employers wish to reduce their non-wage labour costs, including HR processes and management of employees, by hiring TES workers (Bhorat and Stanwix, 2018). The growth of TES work remains a controversial development in South Africa as although jobs are being created as a result of the industry, these jobs are usually more precarious (lower paid, less secure, and having limited recourse to the legal system for workers) (Bhorat and Stanwix, 2018).

During 2015 the South African *Labour Relations Act 1995* (No. 66) (the LRA1995) was amended to provide additional protection to vulnerable TES employees. The additional protections have resulted in the client and the TES being jointly and severally liable if the TES contravenes the *Basic Conditions of Employment Act* 1997 (No. 75 (BCEA) or sectoral determinations under the BCEA, as well as collective agreements or arbitration awards which apply in respect of these employees. If the TES employee works for a client for a period exceeding three months and is paid less than the annual earnings threshold (currently R205 433.43[28]per annum) (the Threshold Amount), the client becomes the 'deemed employer' of the TES employee. Once the TES employee is deemed to be the employee of the client, he or she must be treated on the whole no less favourably than an employee of a client performing the same or similar work, unless there is a justifiable reason for different treatment[29](Workman-Davies and Vatalidis, 2015). These LRA amendments were introduced following the growth of the TES sector and were aimed to secure permanent positions for temporary workers after a period of three months in the same job (Bhorat and Stanwix, 2018).

[28] £10 887 per annum as at 20 January 2020.
[29] Section 198A(5) of the LRA 1995.

2.12. South Africa's collective bargaining system

South Africa conforms to the international labour standards of the ILO by promoting collective bargaining. It has ratified *C087 -Freedom of Association and Protection of Right to Organise Convention 1948*, *C098 - Right to Organise and Collective Bargaining Convention 1949* (No. 98), and *C154 - Collective Bargaining Convention 1981* (No. 154). All these conventions embrace the right of an employee to engage in collective bargaining with a view to improving working conditions (Matete, 2014). The post-apartheid evolution of the South African collective bargaining institutions did not however follow international trends. There was an international increase in decentralised bargaining, whereas in South Africa the negotiations at the National Economic Development and Labour Council (NEDLAC)[30] resulted in an acceptance of sectoral or industry-level bargaining (OECD, 2010).[31] Centralised and sectoral bargaining were favoured by the larger and more organised unions, and Section 1(d)(ii) of the LRA 1995 expressly states that it is the preferred level (Grogan, 2017).

The LRA's 1995 overall approach to collective bargaining has been described as leaning towards centralised bargaining, while retaining voluntarism (Baskin, 1996; Benjamin, 2016), with collective bargaining widely regarded as a labour right (Holtzhausen, 2012). There is no legally enforceable duty to bargain. The LRA 1995 secures only the means of collective bargaining, without prescribing, or empowering the courts to prescribe how these means should be exercised or concluded (Grogan, 2017).32 The courts have accepted that the absence of a legally enforceable 'duty to bargain' does not violate the constitutional right to engage in collective bargaining (Benjamin, 2016). The rationale is that imposing a duty to bargain at sectoral level would violate the right of employers to elect not to bargain with other employers at sector level,

[30] NEDLAC is a representative and consensus-seeking statutory body established in law through the National Economic Development and Labour Council Act of 1994. It aims to facilitate sustainable economic growth, greater social equity at the workplace and in the communities, and to increase participation by all major stakeholders in economic decision-making at national, company and shop floor level.

[31] The term 'bargaining level' describes whether bargaining takes place between unions and individual employers (plant-level bargaining), or the holding company of a group (centralised bargaining), or between one or more unions and a group of employers from an industry or occupation (sectoral bargaining) (Grogan, 2017, p. 390).

[32] One reason for this approach was that the previous system that contained a duty to bargain, became a basis for attacks on majoritarian trade unionism as the courts carved out bargaining units for minority and craft trade unions (Benjamin, 2016). Another reason was that the drafters argued that a legally enforceable duty to bargain would undermine the LRA 1995's goal of promoting collective bargaining at sectoral level (Explanatory Memorandum, 1995).

which is generally seen as protecting the constitutional principle of freedom of association (Benjamin, 2016).

One of the more interesting developments in the LRA 1995, is the establishment of workplace forums in terms of Sections 78-94. Workplace forums are a form of works councils and are plant level consultative bodies (Wood and Mahabir, 2001). Workplace forums in South Africa, unlike in Germany,[33] must co-exist with formalised plant level bargaining (Wood and Mahabir, 2001). Section 23 of the LRA 1995 makes provision for collective agreements that deal with wages and conditions of employment to be concluded outside bargaining councils at workplace (plant) level, however workplace forums do not deal with wages and conditions of employment, allowing both of these systems to co-exist. The success of the system depends on unions taking the initiative and making a formal application to the CCMA for their establishment as employers cannot initiate the process. Unions have been reluctant to promote workplace forums because of fears of demarcation disputes and the general erosion of their traditional role. Workplace forums have therefore had limited success in South Africa, with only a very small number of forums operative (Wood and Mahabir, 2001).

Broadly speaking, South Africa' bargaining framework exists on two levels, as set out in table 3 below. The first is more centralised at industry level in bargaining councils, and the second is decentralised to individual firms or plants. In addition to bargaining councils, wages may also be negotiated in other ways, either through a statutory system of wage determination or outside the statutory system (Bhorat *et al*, 2009; OECD,2010).

***Table 3**: Levels of bargaining in South Africa under the Labour Relations Act 1995*

Governed by statute	**Functions and powers**	**Registration**
Bargaining Councils	• Make and enforce collective agreements • Prevent and resolve labour disputes • Establish and manage a dispute resolution fund • Promote and establish training	May be formed by one or more registered trade unions and one or more registered employers' organisations, given that these parties are 'sufficiently representative'. NEDLAC is assigned the task of determining

[33] German works councils constitute a part of what is in most respects a centralised system, with limited room for shop floor participation (Wood and Mahabir, 2001).

	and education schemes • Establish and manage schemes or funds to benefit its parties or members • Make and submit proposals on policies and laws that affect a sector or area	their scope and area of justification
Statutory Councils[34]	• Resolve labour disputes • Promote and manage education and training schemes • Form and manage schemes or funds for the benefit of its parties and members • Make collective agreements • May perform any other bargaining council functions	May be formed by a registered trade union or employers' organisation that does not have sufficient membership to meet the representivity requirement to form a bargaining council. Thus, registration is unilateral.
Outside of statute	**Functions and powers**	**Description**
Plant or firm level bargaining	Bargain over issues otherwise covered by Bargaining or Statutory Councils.	Collective bargaining between an individual employer and the trade unions(s) representing the employees of that particular employer.
Workplace forums	They promote the workers' interests by consulting and making joint decisions. A workplace forum has the right to be consulted by the employer on: restructuring and new work methods; partial or total plant closure; mergers and ownership transfers; retrenching workers; job grading; criteria for merits and bonuses; education and training; product development plans; export	Workplace forums may be formed when there are more than 100 employees by applying to the Commission for Conciliation, Mediation and Arbitration (CCMA).

[34] The rationale for the establishment of statutory councils was as a compromise between the voluntarist bargaining councils and statutory councils that had an element of 'compulsion'. This compromise was apparently in response to labour's demand for mandatory centralised bargaining. In establishing statutory councils, the LRA 1995 stipulates that one party, providing it is at least representative of 30 percent of the sector, can trigger statutory councils. Statutory Councils were never a success and have only been established in about 3 areas. In theory they can be used to compel employers to engage in sectoral bargaining, but they are limited to non-wage issues unless the employers agree, or the unions in the statutory council manage to increase their representation to 50 percent plus one (Coleman, 2013).

	promotions; and health and safety measures. They do not deal with wages and conditions of employment	

Source: Coleman (2013, p. 71); Leibbrandt, et al (2010, p.30) and OECD (2010, pp.236-237)

Together with bargaining councils, sectoral determinations fell under the statutory system of bargaining and wage determination (Bhorat et al, 2009). The Minister of Labour could establish a sectoral determination that set out basic conditions of employment for employees in a specific sector and area (Bhorat *et al*, 2009).[35] Sectoral determinations needed to be concluded in accordance with Chapter 8 of the BCEA and published in the Government Gazette. In general, sectoral determinations were in sectors where no bargaining councils existed and set minimum terms and conditions of employment, minimum wages, adjustment in minimum wages and regulated the payment of remuneration (Bhorat *et al*, 2009; OECD, 2010). *The National Minimum Wage Act 2018* (No. 9) (NMWA) repeals chapters 8 and 9 of the BCEA, dealing with the publication of sectoral determinations. However, existing sectoral determinations will remain in force except where they prescribe a wage less than the NMWA (Moodley, 2017).

Outside the statutory system of bargaining councils and sectoral determinations, non-statutory collective bargaining takes place and can be both centralised or at company plant-level (Godfrey *et al*, 2007). Two major industries are covered in full or in part by non-statutory, centralised bargaining arrangements, namely mining and automobile manufacturing (Godfrey *et al*, 2007). Within retail, bargaining takes place at either the national company-level, regional level or store level, and unorganised firms are bound only by the retail sectoral determination (Godfrey *et al*, 2007). Wage regulations have therefore developed in a fragmented fashion, with minimum wage levels exhibiting large variations between and within sectors, as well as regionally. The result is that a myriad of specific minimum wages exists, making it one of the most complex systems in the world (Oxford Analytica, 2017).

[35] Eleven sectoral determinations governing vulnerable workers in different sectors of the economy have been established. These are Forestry, Agriculture, Contract Cleaning, Taxi Operators, Civil Engineering, Learnerships; Private Security, Domestic Workers, Wholesale and Retail, the small business sector, children in the performance of advertising, artistic and cultural activities, and Hospitality.

Table 3 below sets out the trend in bargaining council numbers and registered employees covered from 1983 to 2010. Holtzhausen (2012) records that councils were on the decline and that new councils formed have been established with great difficulty and long periods of struggle. Four of the nine major sectors of the South African economy have no council, or the councils cover an insignificant proportion of the workers (Holtzhausen, 2012). Benjamin (2016) observed that in the period since the LRA (1995) came into effect, relatively few bargaining councils have been formed and fewer than ten per cent of workers in the private sector are covered by bargaining councils. This he argues, is proof of employers taking advantage of the voluntarism to resist sectoral bargaining Benjamin (2016). In 2014 there were 44 registered bargaining councils covering some 2,5 million workers (Du Toit et al 2015, p. 51). Over 60 per cent of these workers fall within the five public service bargaining councils (Benjamin, 2016). Coleman (2013 p.75) confirms that the number of Bargaining Councils has declined steeply in recent years as can be seen from table 4, but the number of workers covered by bargaining councils increased until 2004 but declined thereafter. Much of the increase is made up of the addition of the five public service councils after the new Labour Relations Act incorporated coverage of the public service (Bhorat *et al*, 2009). Those covered by Bargaining Councils declined by about 70 000 between 2004 and 2010 (Coleman, 2013).

Table 4: *Bargaining Council trends as displayed in number of councils and coverage of employees*

Year	**Number of councils**	**Total registered employees covered**
1983	104	1171 724
1992	87	735 533
1995	80	823 823
1996	77	810 589
2000	78	-
2004	57	2 358 012 (1 075 969 in the public sector)
2008	48	2 315 297
2009	46*	-
2010	47	2 290 600

Source: Holtzhausen (2012, p. 12); Coleman (2013, p. 81).

*This figure excludes two councils that were in the process of de-registration

The decline in the number of councils has been attributed to the amalgamation of regional councils and sub-sectoral councils into national councils, but also to some being de-registered or ceasing to function (Holtzhausen, 2012; Coleman, 2013). However, Benjamin (2016) states that while there has been some consolidation of regional councils into national institutions in some sectors, there has been no substantial growth in the number of bargaining councils. As far back as 2006, Godfrey *et al* (2006) stated that the bargaining council system might be teetering on the brink of a crisis. Coleman (2013) explains that once formed, new councils appear to struggle to get up to a reasonable level of representivity.

On 1 January 2019, the long awaited *The National Minimum Wage Act 2018* (No. 9) (NMWA) came into effect. The national minimum wage (NMW) is R20[36] per hour or R3,900[37] a month for a 45-hour work week (Isaacs, 2018).[38] The same mechanisms utilised to enforce the provisions of the BCEA will be used to enforce the NMW (Moodley, 2017). The NMWA repeals chapters 8 and 9 of the BCEA, dealing with the publication of sectoral determinations (Moodley, 2017). However, as stated above, existing sectoral determinations will remain in force except where they prescribe a wage less than the NMW (Moodley, 2017). If a sectoral determination already prescribes wages that are higher than the NMW, the wages in that sectoral determination, and the remuneration and associated benefits based on those wages, must be increased proportionally to any adjustment of the NMW for three years from when the NMW Act is enacted (Moodley, 2017). Based on household survey data, Patel *et al* (2016) estimate that many workers in South Africa report earning wages that are low, even relative to the current sectoral determinations. Approximately 30 percent of workers report earning less than R1 813 per month[39] (the lowest sectoral determination), while around 70 percent of workers earn below the highest sectoral determination of R6 506 per month[40] (Patel, 2016).

2.13. The strong trade union movement in South Africa

During the 1950s, the South African Nationalist government enacted laws to promote work committees for black workers to weaken trade unions (Benjamin, 2012). Those who organised

[36] Equivalent to £1.07 (based on exchange rates for 14 January 2020).
[37] £207.87 (on 14 January 2020).
[38] Domestic workers are entitled to R15 per hour, farmworkers R18 per hour and Public Works Programme workers R11 per hour.
[39] £91.92
[40] £329.85

black workers risked imprisonment for undermining the internal security of the apartheid state and for promoting communism (Benjamin, 2012). The aim of labour law in apartheid South Africa was political marginalisation and exploitation (Benjamin, 2012). The re-emergence of black independent trade unionism in the 1970s, and its focus on community and political struggles in the 1980s, resulted in the mobilisation and solidarity that played a decisive role in pre and post-apartheid democratisation and the rise to power of the African National Congress (ANC) in 1994 (Barchiesi, 2008). It was during this period, when the increase in atypical employment became a global phenomenon, that an emergent union movement in South Africa fought bitter and violent battles to secure its members' basic rights (Vettori, 2005).

Historically, the South African trade union strategies were highly innovative and ranged from establishing worker advice centres, building strong workplace structures, mobilising the support of community organisations for consumer boycotts, and participating in broad political alliances for liberation (Von Holdt and Webster, 2005). Trade union discourse and action was overwhelmingly shaped by the struggle against racial and colonial oppression. In democratic South Africa, the COSATU unions kept the broader discourse of social justice that focuses on the poor, the jobless, and the communities, but have arguably failed to develop innovative organisational strategies (Von Holdt and Webster,2005).

After the attainment of democracy in 1994, the South African union movement was cited as one of the few union movements in the world to be increasing in membership (Silver, 2003; Chinguno, 2010). However, the reorganisation of production and fragmentation of work caused the trade union density to decline from 57 percent in 1994 to 25 percent in 2007 (Pillay, 2008; Chinguno, 2010). During 2015/16 South Africa had a trade union density of 28.2 percent and collective bargaining coverage of 30 percent (Hayter, 2018). Chinguno (2010) argues that as mass-based organisations, trade unions can only sustain their credibility, legitimacy, representativeness as a social force if they engage workers in new forms of employment.

The South African union movement's fight against state repression contextualises the debates regarding atypical employment and there remains a fierce desire by the labour movement to avoid any trend that may attempt to reinstate the abusive situation experienced by workers under the apartheid government (Omomowo, 2010). In this regard, the debate in terms of the atypically

employed in South Africa is often perceived as a class battle because of the unique circumstances imposed by apartheid, which had a far-reaching effect on the development of the country's labour market policy (Bronstein, 2009). Various stakeholders in the debate for and against atypical employment differ on key issues, especially as to whether some forms of atypical employment should be banned. Importantly, these debates are set against a background of high unemployment in South Africa. COSATU advocates for the banning of temporary employment services and contends that it is against the African National Party's (ANC) Freedom Charter[41] and the ILO's notion of decent work (Mazanhi, 2012). Generally, South African trade unions have campaigned actively against temporary agency work (Cotton, 2013). Given the weakness of industry regulation and international standards, South African trade unions have had a preference for legislative responses which has been a successful strategy securing important gains for workers (Cotton, 2013).

In order to allow trade unions to engage temporary agency workers, regulatory gaps in the protection of collective rights and the right of these workers to establish and join trade unions, must first be established (ILO, 2016). An interesting development in this respect is contained in the *Labour Relations Amendment Act 2014* (No. 6 2014) (LRAA). The LRAA now allows trade unions representing the employees of temporary employment agencies to exercise their organisational rights not only at the workplace of the agency, but also at the user firm's workplace (Benjamin, 2013, pp.12-15; ILO, 2016). In addition, an arbitration award establishing organisational rights may be made binding on the TES agency and the TES client (Benjamin, 2013).[42] Moreover, workers employed by agencies who participate in a legally protected strike action are entitled to picket at the user firm's premises (ILO, 2016).

The South African Department of Labour (DoL) has provided some insight into the effect of these new organisational rights regarding non-standard forms of employment. The DoL produces

[41] Adopted at the Congress of the People, Kliptown, 26 June 1995.

[42] The Commission for Conciliation, Mediation and Arbitration (CCMA) is independent and governed by a tripartite Governing Body. The CCMA's functions include dispute resolution, dispute management, and institution-building within the labour arena and the provision of education, training and information to employers and employees and their organisations. The CCMA is funded by the national government and there are no charges for referring disputes to it. All disputes about unfair dismissals, trade union organisational rights, the interpretation of collective agreements and certain individual unfair labour practices, as well as interest disputes arising from collective bargaining, must be referred to conciliation. Arbitration is the route for adjudicating disputes about dismissals for a reason related to the employee's conduct or capacity, as well as disputes concerning trade union organisational rights, the interpretation of collective agreements and certain individual unfair labour practices (Benjamin, 2013b).

an Annual Industrial Action Report that reviews developments in industrial action for a particular year and highlights key trends (ILO, 2016). Since 2005, the report has provided chronological information on strike incidents which includes information reported by employers, the media, and industrial actions outside of working hours. An analysis of these reports show that non-standard employment represented an important element in strike action, including wildcat strikes (ILO, 2016). Close to eight percent of incidents were reported to have some relation to non-standard work in 2006, peaking at nearly 17 per cent in 2010. The demands included demands to regularise the contracts of casual or temporary workers and to align their terms and conditions with those of permanent workers. In addition, there were demands to end the use of 'labour brokers' or temporary agency work (ILO, 2016). The sectors in which most of the strikes took place were wholesale and retail trade, community, social and personal services, financial services, and manufacturing, representing almost 92 per cent of workdays lost. These sectors had a high proportion of their workers in flexible employment relations that were outside the reach of institutional safeguards (ILO, 2016). The report concluded that both the vulnerability of these workers and the fact that unions had begun to organise and represent them, were the main reasons for these developments. Some of these actions took place within the context of COSATU calling for a ban on the use of labour brokers. This received some support from the South African government, who, following lengthy tripartite dialogue on labour law reforms, introduced amendments over the course of 2010 to 2014, which sought to improve regulation of the use of temporary employment services, fixed term contracts and part-time employment (ILO, 2016).

Moreover, Webster and Englert (2019) looked at whether the role played under apartheid by labour in the transition to democracy can be revived in the struggle against inequality of the post-apartheid period. They argue that the transition to a neoliberal state in the post-apartheid period has fragmented workers and weakened their capacity to build sustainable workplace organisation. However, they identify the emergence of collective action and organisation amongst precarious workers in South Africa. They found that in response to the degeneration of their traditional organisations, these workers have rebuilt worker organisation in line with organising traditions built in South Africa 40 years ago. Webster (2019) argues that there is a general distrust of existing trade unions among many precarious workers. As a result, they were

forming worker committees or councils on a plant by plant basis instead of establishing trade unions. This illustrates that precarious workers are actively organising, and they remain very rooted in historical organisational traditions. These workers focus on accountability, participation and transparency thereby challenging the practices of the established unions. As a result, they have challenged the unequal neoliberal workplace and the pessimistic 'end of labour' thesis. Webster (2019) argues that there is danger that established unions will not be open to experimentation and the protection of vulnerable workers. Instead, they will defend the interests of permanent workers becoming dependent on the new post-apartheid labour institutions, rather than rebuilding power in the workplace (Webster, 2019).

2.14 The comparative capitalism approach

2.14.1. Varieties of capitalism

The comparative capitalism literature seeks to explain firm behaviour within a designated country context. There are two approaches considered in this section of the thesis: the Varieties of Capitalism (VoC) theory, that is concerned with how the nature of relationships between a firm and the institutional context in which it operates leads to competitiveness, and business systems theory that prioritises the importance of relationships between a firm and its internal (e.g. employees) and external (e.g. the state) stakeholders (Dibben *et al*, 2013, p.8).

The publication '*Varieties of capitalism: The institutional foundations of comparative advantage*' by Peter Hall and David Soskice in 2001 examined systematic similarities and differences in economic policy, firm behaviour, institutional arrangements, and 'strategic interactions' among economic actors in order to explain variation in growth, unemployment, or inflation across high-income economies (Pitcher, 2017). They categorised and described these economies based on the comparison of Liberal Market Economies (LMEs) characterised by arm's length interaction among market actors, and Coordinated Market Economies (CME) where informal networks and collaborative arrangements accompany market relations (Kiran, 2018). In the original Hall and Soskice (2001) study, six of the Organisation for Economic Cooperation and Development (OECD) countries are categorised as LMEs (the United States, Ireland, the United Kingdom, Canada, Australia and New Zealand), while ten as CMEs (Japan, Germany, Denmark, Sweden, the Netherlands, Belgium, Switzerland, Austria, Finland and Norway). They

later suggested the possible existence of a third type, called 'Mixed Market Economies' (MMEs), combining features of CMEs and LMEs (Hall and Gingerich, 2009; Witt *et al*, 2018).

Comparative capitalism literature's central line of thought is that at any point in time, there are discrete aspects of the institutional and business framework that combine, facilitate or promote particular ways of organising economic activity with implications for firm, sector and national performance (Hall & Soskice, 2001). Firms in all capitalist economies face co-ordination problems which require them to develop relationships with various actors, such as the state and organised labour, but also banking and financial institutions (Witt and Jackson, 2016). Key co-ordination problems include: setting wage and working conditions (which have implications not only for firm profitability, but also for unemployment, inflation and aggregate demand); securing skilled labour (which affects both firm profitability and the general level of competitiveness in the economy); forging relationships with suppliers (which may involve vertical integration) and developing forms of corporate governance that overcome transactions costs and ensure access to finance (Hall and Soskice, 2001, pp. 6-7). The overall objective of comparative capitalisms literature has been to shed light on how different economies navigate co-ordination problems, create complete complementarities, and how their institutional diversity shapes business outcomes (Witt and Jackson, 2016).

Although the VoC literature focuses on advanced capitalist economies, there have been attempts to apply it to developing countries (Nattrass and Seeking, 2010). These and other studies considerably expand the theoretical and empirical scope of Hall and Soskice's original study (Pitcher, 2017). For example, Schneider (2008) distinguishes two further varieties: 'Network Market Economies' in which co-ordination is achieved predominantly through trust (for example Japan, Taiwan); and 'Hierarchical Market Economies' characterised by strong degrees of vertical integration, a high degree of labour market segmentation, few (albeit diversified) large firms and decentralised labour relations (for example Latin America and South Africa) (Schneider 2009). Schneider (2010) classifies South Africa as a 'hierarchical' variety of capitalism on the grounds that firms in the leading sectors of the economy are predominantly large and concentrated (Schneider, 2008, p15).

Over the last decade, researchers have debated the presence of two to five models, if not more (Lallement, 2011). Some of this research, aimed at defining forms of capitalism, is summarised in table 5 below.

Table 5: *The use of the VoC framework to define forms of capitalism in Europe, Latin America and Asia*

Researcher	**Countries analysed**	**Summary**
Schneider (2009)	Latin American countries	Coined the term 'Hierarchical Market Economies' (HMEs) for these countries given the patronage relationship between the state and businesspeople and among firms in these countries.
King (2007); Nolke & Vliegenthart (2009)	Central and Eastern European countries	They have defined these countries as 'Dependent Market Economies' (DMEs) since the Central and Eastern European countries are highly reliant on foreign direct investments and transnational corporations.
Schmidt (2007)	Italy, France and Spain	Schmidt claimed that she brought the role of the state into the VoC framework by defining Italy, France and Spain as State-Influenced Market Economies (SMEs) given the distinctive influence of the state over labour and business.
Molina & Rhodes (2008)	Southern European countries, Italy and Spain	Focused on the welfare regimes and production systems of these two countries and concluded that they can be defined as Mixed Market Economies (MME) in which the state has an extensive role to compensate the deficiencies of the institutional structure in these countries.
Witt & Redding, (2013)	13 major Asian countries with one another and Germany, the UK, the US, France and Sweden	They concluded that the Varieties of Capitalism framework is not applicable to Asia given the heterogeneity and differing characteristics of business systems in different Asian countries.
Kiran (2018)	Turkey	Based on a qualitative comparison with the DMEs, MMEs and HMEs, Kiran claims that Turkey is a HME with four characteristic features found in Latin American economies: the dominance of the family-owned diversified business groups, state-regimented

		and weak industrial relations, low skills and the influence of MNCs.

Source: adapted from Kiran. (2018, pp.42-43)

Despite the abundant VoC literature available, little agreement has been reached about how many models should be discerned within capitalist economic spaces (Pitcher, 2017). Considerable agreement exists that national diversity occurs across several core institutional domains such as education and skills formation, employment relations, financial systems, interfirm networks, internal dynamics of the firm, ownership and corporate governance, and the institutions of the state itself (Witt & Redding, 2013; Witt and Jackson, 2016). Despite the lack of agreement on the number of models, most empirical studies focus on three fixed categories of capitalism, namely Liberal Market Economies (LME), Coordinated Market Economies (CME) and Mixed Market Economies (MME) (Hall and Soskice, 2001; Akkermans *et al,* 2009). These three models and their key characteristics are set out in table 6 below.

Table 6: *Varieties of capitalism: key characteristics of LMEs, CMEs and MMEs*

LMEs	**CMEs**	**MMEs**
United States, United Kingdom, Ireland, Canada, Australia and New Zealand are identified by this approach	**Japan, Germany, Denmark, Sweden, the Netherlands, Belgium, Switzerland, Austria, Finland and Norway** are identified by this approach	**Southern Europe, particularly in France, Italy, Greece, Portugal, Spain** are identified by this approach.
Large equity markets marked by high levels of transparency and dispersed shareholding.	Firms are connected by dense networks of cross-shareholding and membership in influential employers' associations.	MMEs are hybrids and seen as an inconsistent and inefficient form of capitalism. They are unlikely to attain the same levels of economic performance as the two pure forms.
Access to external finance depends on publicly assessable criteria such as market valuation.	These networks provide for exchanges of private information, allowing firms to access capital as a consequence of their reputation rather than share value.	Characterised by the central role of the state.

Regulatory regimes allow hostile takeovers that depend on share price, rendering managers sensitive to current profitability. Trade unions are weak. Wage-setting is usually a contract between workers and individual employers. Labour markets are fluid, so workers invest in general, transferable skills. Industry associations are weak, and firms lack the capacity for collaborative training that confers industry-specific skills. Technology transfer is accomplished by licensing or hiring experts, and standards are set by market races. Top managers have substantial authority over all aspects of firm strategy, including layoffs. The relationships firms form with other actors are mediated by competitive markets. Labour market characteristics include weak employment	Managers are less sensitive to current profitability. Strong trade unions, powerful works councils, and high levels of employment protection, result in less fluid labour markets and longer job tenures. Wage setting is coordinated by trade unions and employers' associations that also supervise training schemes. Workers acquire industry-specific skills and assurances of available positions if they invest in them. Industry associations are pivotal to standard setting, with legal endorsement and technology transfer taking place through collaboration between workforce representatives and business networks. Top managers have less scope for unilateral action, and firms adhere to more consensual styles of decision making. Labour market characteristics include intermediate level of	The private sector is often subservient to the public sector. Private exchange can only take place where the government has not forbidden it or already assumed that role. Government intervention is key and includes subsidies, tariffs, prohibitions, and redistributive policies, legal tender laws, monetary control by a central bank, public road and infrastructure projects, tariffs on foreign products and entitlement programs. There are strong relations between political parties and organisations such as trade unions. Trade unions and business organisations often hold monopolies, or quasi monopolies over membership domains and have privileged access to state resources and often demand compensation from the state. Government activities often offer benefits directly to a concentrated, organised group at the expense of the tax base. Labour market characteristics

protection. The preferred instrument of employment adjustment is external flexibility (redundancies, wage flexibility).	employment protection and mobility facilitated by high levels of generic qualifications and skills. The preferred instrument of employment adjustment is internal flexibility (working time, functional flexibility).	include dual flexibility that allows protection for the core labour force and precarity.

Source: Hall & Gingerich, 2005, pp. 8-9 (adapted by: Molina and Rhodes, 2007; Lallement, 2011, p.638; Hassel, 2014; Malik, 2017; Ross, 2019)

As can be seen from table 6, at one end of the spectrum are LMEs where relations between firms and other actors are coordinated primarily by competitive markets. At the other end are CMEs where firms typically engage in more strategic interaction with trade unions, suppliers of finance, and other actors (Hall & Gingerich). Somewhere between them are the hybrid MMEs, characterised by the central role of the state, where government activities often offer benefits directly to a small group at the expense of the wider tax base, resulting in an inefficient form of capitalism and precarity.

While as outlined in table 5 the varieties of capitalism approach continues to be adopted and refined, there have been numerous criticisms levelled against this approach. For example, Crouch (2005) argues that analytically, it tends towards description rather than analysis and there is the temptation to fit the empirical evidence to the model. Molina and Rhodes (2007) are critical of its neglect of the state, its divorce of the firm from national contexts, an over-concern with institutional equilibrium rather than dynamics of change, and its incapacity for dealing with non- Liberal Market Economies (LMEs) and Co-ordinated Market Economies (CMEs). Witt *et al* (2018) argue that Hall and Soskice's (2001) VoC theory would probably classify most economies in the world as MMEs. For example, Witt and Jackson (2016) examined 22 OECD countries, including those Hall and Soskice (2001) had originally classified as CMEs and LMEs. They found coherently complementary institutions across the five spheres of the political economy defined by Hall and Soskice only in six cases. These include five LMEs namely, Australia, Canada, Ireland, the UK and the USA, and one CME, Austria. The remaining 16

economies are MMEs, including Germany, which Hall and Soskice saw as an ideal CME (Witt *et al*, 2018). While the framework seems to work well on the LME side of the spectrum, Witt and Jackson (2016) suggest insufficient discriminatory power for understanding institutional variations outside that category. In line with Molina and Rhodes (2007), Witt *et al* (2018) believe that the VoC approach does not provide a theoretical foundation for the existence of MMEs, nor a basis for distinguishing possible types within this category (Witt and Jackson, 2016; Witt *et al* 2018). Importantly, the relevance of VoC outside of developed, industrialised countries has also been questioned (Padayachee, 2013). Critics have charged that the VoC literature ignores diversity and that the two models of LME and CME are too restrictive for analytical purposes (Bosch *et al*. 2010, p. 26; Dibben *et al*, 2013).

2.14.2. Varieties of capitalism: South Africa

2.14.2.1. South Africa in the apartheid era

The task of categorising pre-apartheid South Africa is particularly difficult as aspects of the HME and MME models can be identified when analysing this period. In addition, South Africa's peculiar historical trajectory does not fit neatly into any archetypal 'variety' of capitalism (Nattrass and Seeking, 2010). This is because the state intervened in ways which were often ideologically inspired and because the institutions which were created served a limited section of the population and discouraged job creation for the majority while still facilitating redistribution through the fiscus, reflective of the MME model (Nattrass and Seeking, 2010).

However, Schneider (2010) classifies South Africa as a 'hierarchical' variety of capitalism or as a 'Hierarchical Market Economy' (HMEs). The reason for his HME classification, is that the South African financial sector is by African standards large and well-developed as a consequence of the historical role played by British imperial capital and then Afrikaner financial capital which produced a unique corporate structure whereby a small group of conglomerates came to own and control both the major corporations and finance houses (Ashman and Fine, 2013). By 1994, the gold-mining giant Anglo American controlled 43 percent of the Johannesburg Securities Exchange (JSE) capitalisation, and the top five groups (Anglo American, Rembrandt, and life assurers: Sanlam, Old Mutual, and Liberty Life) controlled 84 percent through complex cross-holdings and preferential shares (Nattrass and Seeking, 2010).

Apartheid therefore produced an almost entirely white business elite that was highly concentrated in terms of corporate ownership and control (Nattrass and Seeking, 2010). In this 'hierarchical market economy', key co-ordination problems for business were solved through vertical relations within large conglomerates or hierarchical relationships between firms rather than through either the market or corporatist institutions (Nattrass and Seeking, 2010). This was compounded by sanctions against the apartheid regime which saw considerable withdrawal of international capital and the 'trapping' of large amounts of domestic capital, accompanied by illegal capital flight (Ashman and Fine, 2013).

A further characteristic of the apartheid variety of capitalism was the way that the state intervened aggressively in the economy to protect white employment through labour-market and trade and industrial policy, and to foster capital-intensive growth, thereby limiting the capacity of the economy to create unskilled jobs (Seeking and Nattrass, 2005; Nattrass and Seeking, 2010). At the end of apartheid, the state owned the TV stations, all the major radio stations, it controlled electricity generation and supply (through the parastatal Eskom), had a monopoly on telecommunications (through its control of Telkom) and the parastatal Transnet owned and ran the rail network and the national airline (Rumney, 2004, p. 402).

As such, the apartheid state shaped the business environment directly through parastatals (Nattrass and Seeking, 2010). Similarly, the apartheid state used its extensive powers of regulation to promote Afrikaner capital, to protect the living standards of white voters, and to promote domestic industry (Nattrass and Seeking, 2010). Both during and after apartheid, government policies provided strong incentives to capital to employ more capital and skill intensive production technologies, thereby contributing to South Africa's ongoing structural unemployment crisis (Nattrass and Seeking, 2010).

2.14.2.2. South Africa in the post-apartheid era

After the abolition of apartheid, attempts were made to nurture a more social-democratic and co-ordinated variety of capitalism, with the adoption of the Reconstruction and Development Programme (RDP) that reflected the ideas of a social democratic welfare state (Padayachee, 2013; Nattrass, 2014). Labour's struggles during apartheid reinforced the emergence of a new

industrial relations system influenced by key features of a CME, including collective bargaining, employee rights and representation, and the establishment of social accords bringing together organised labour, business and the state (Webster, 2013). However, the implementation of this vision proved problematic as the patterns of conflict, coercion and dispossession - characteristics of South African capitalism in its formative years - were perpetuated through market forces that underpinned problematic trends such as the fragmentation and flexibilisation work (Webster, 2013; Padayachee, 2013).

The African National Congress (ANC) soon replaced popular mobilisation (the RDP) for neoliberal macroeconomics (the Growth, Employment and Redistribution programme or GEAR) (Hart and Padayachee, 2013, p.61). Throughout GEAR, many LME model aspects were adopted, characterised by weak employment protection and external flexibility. These neoliberal macroeconomic policies were adopted against the wishes of organised labour, driven by global financialisation, competitiveness and a 'cozy corporatist culture' (Bond, 2013; Padayachee, 2013, p.23).

During this time, what was particularly concerning to trade unions was the highly flexible labour market that had emerged through the rapid growth of the temporary employment agency sector (Webster and Sikwebu, 2010). This led to the differentiation of the South African labour market into three zones - a core of formal sector employees with more or less stable employment relations, a zone made up of workers with less stable employment relations, and a peripheral zone made up of workers whose main source of livelihood is through informal sector activities (Webster and von Holdt, 2005, p. 27). 'Liberalisation' had therefore polarised the labour market by increasing the resources of the core, while reducing the resources for those who were in the non-core categories such as TES workers and those working for outsourced functions. During 2006, research from National Labour and Economic Development Institute (NALEDI) confirmed that trade liberalisation had exposed the local economy to competition resulting in increased casualisation. This they said had occurred because foreign capital demanded lower wages and the relaxation of regulations to increase profits. Companies therefore resorted to casual and flexible labour to reduce labour costs, extend working hours, and achieve easy deployment of labour (Bodibe, 2006)

Unemployment and poverty remained normal for the black majority and the white minority still controlled most major businesses (Hart and Padayachee, 2013). In addition, the big mining companies took advantage of an international regime favourable to free capital flows to move their headquarters and much of their money out of the country (Hart and Padayachee, 2013). According to Ashman, Fine and Newman (2011), 20 percent of gross domestic product (GDP) left the country after 1994 and the easing of exchange controls made this outflow increasingly legal. The unwillingness of South African firms to invest within the country meant that corporate savings were high and by the end of 2010, reached nearly 18 percent of GDP (R480 billion) (Hart and Padayachee, 2013).

Although considerable privatisation took place after 1994, by privatising what had become natural monopolies, the economic structure remained highly uncompetitive (Competition Commission, 2008; Nattrass and Seeking, 2010). The ANC's initial approach was encouraging the white conglomerates to unbundle and sell off parts of their business empires to aspirant black capital (Hart and Padayachee, 2013). When the pace was too slow, they then shifted to a more assertive regulatory stance, brokering with the main sectors (including agriculture, transport, autos and information technology) 'voluntary' mid- to long-term targets for change in ownership, participation and training (Hart and Padayachee, 2013). However, the beneficiaries of Black Economic Empowerment (BEE) were a small elite, many with close links to the ruling party, some of them party officials, plus a few prominent ex-trade unionists (Hart and Padayachee, 2013). These elites mostly became wealthy through boardroom deals and self-enrichment rather than empowerment. The reluctance of these elites to invest some effort into a common national development strategy is one reason why South Africa misses an important ingredient of Schmidt's state meditated model (Nölke and Claar, 2013).

In terms of the post-apartheid era, South Africa shares with the SME model the 'comparative advantage' of abundant, cheap, unskilled labour - a lasting element of apartheid (Nölke and Claar, 2013). It also shares some characteristics with CMEs such as its labour regulation and welfare system. In 1994 the post-apartheid government inherited a system of social grants which reaches 14 million people (28 per cent of the population) at a cost of 3.3 percent of GDP (Nattrass, 2014). But unlike the ideal-type CME, no significant or sustained support is provided for the unemployed (Nattrass, 2014).

In terms of the future, Nattrass (2014) suggests that one option is to move more towards becoming more CME-like by providing social welfare for the unemployed. This route is resisted by business and organised labour because of South Africa's relatively narrow tax base, which will necessitate that all income earners would pay higher taxes. Another option is to move more in the direction of an LME regarding labour laws whilst retaining statist components (for example, industrial policy) where they are effective (Nattrass, 2014). This, however, is not an option for organised labour. Those who propose labour-market reforms are labelled 'neo-liberal' and 'sell-outs.' Productive discourse about how to build an inclusive political economy in South Africa, remains difficult (Nattrass, 2014).

2.14.3. Business Systems Theory (BST)

Although often combined with the VoC approach, Business Systems Theory (BST) precedes it. Originally developed by Whitley (1999), the main theme of BST, in its approach to the comparative analysis of market economies, is that differences in societal institutions encourage or discourage kinds of economic organisation (Dibben *et al*, 2013). It is different to the VoC approach as BST focuses primarily on the firm as the centre of a broader web of embedded social relations and pays more attention to the role of the state (Morgan, 2007; Hancke *et al*, 2007).

Whitley (1999, p. 33) defines business systems as:

> Distinctive patterns of economic organization that vary in their degree and mode of authoritative coordination of economic activities, and in the organization of, and interconnections between, owners, managers, experts, and other employees.

Whitley originally identified six archetypes (or clusters of countries) associated with certain practices, involving economies of the developed world (1999). These six national archetypes are primarily drawn on the East Asian, European and North American experiences and encompass such diverse cases as Scandinavia, the United States, Hong Kong, South Korea, Italy and Japan, and can be considered economically successful (Wood and Frynas, 2006). Using BST, a further archetype has been developed by Wood and Frynas (2006), the 'segmented business system', based on the experiences of East Africa (Brewster *et al*, 2018).

Whitley (1999) argues that the nature of the firm will vary according to the relative importance of a range of stakeholders, consisting not only of owners, managers, and business partners, but also including different categories of employees (Whitley 1999). For example, in 'compartmentalised business systems' such as the UK, employer-employee interdependence will be low, reflecting competitive labour markets and relatively weak unions (Whitley 1999). In more 'collaborative and coordinated business systems', such as Germany, firms will be more dependent on the firm and industry skills of existing employees, which is associated with stronger unions and co-ordinated decision making (Whitley 2000). There would also be a strong emphasis on diversified quality production, formalised wage determination, industry specific training, high levels of commitment and problem solving and collaboration (Whitley 2010: 379).

As with VoC, BST is criticised for its focus on stylised ideal types and for paying too much attention to rules and formal process, rather than exploring how they are acted out on a day-to-day basis. A strength of the approach is that it does not assume that heterogeneity is pathological or a sign of systemic disintegration (Wood *et al*, 2011). It has therefore been recently used to explore the complexities within emerging economies (Wood and Frynas 2006; Wood *et al*., 2011). For example, Wood and Frynas' (2006) in east Africa, by Wood *et al* (2011) in Mozambique, and Witt and Redding (2013) in China and India.

Despite many differences across the African continent, researchers have identified certain common themes (Wood and Brewster; Kamoche, 2011). Firstly, in many sub-Saharan countries, labour rights lost during the one-party era were recovered after democratisation. This led to a return to freedom of union organising and the increase in individual employee rights (Brewster *et al*, 2018). Simultaneously, structural adjustment policies imposed by the International Monetary Fund (IMF) led to job losses, and the weakening of employee bargaining power and state capacity to enforce laws. Many existing practices have translated into poor outcomes (Kamoche, 2011; Kamoche, 2002; Wood and Frynas, 2006; Brewster *et al*, 2018).

Poor outcomes also represent the product of embeddedness of authoritarianism and patriarchy both within and beyond the workplace. This would make it difficult to maintain and introduce advanced HRM paradigms (Hyden, 1983; Kamoche, 2002). Harvey (2002) states that critical to understanding HRM in Africa is that not only laws but formal rules are often ignored or bent.

This may in part allow firms greater room to manoeuvre but also causes lower levels of systemic trust, given the greater difficulties of enforcement. This in turn raises transaction costs relating to operationalisation of the employment contract and the overall organisational effectiveness (Marsden, 1999).

2.14.4. Business Systems Theory: South Africa

Bischoff and Wood (2018) believe that South Africa represents an 'exceptional case'. It has one of the largest economies in Africa, a large industrial sector and excellent infrastructure. Unions mostly organise under the umbrella of COSATU and are the strongest on the continent. This is supported by a generally labour-friendly body of labour law (Bischoff and Wood, 2018). However, the bargaining position of labour has been undercut by high levels of unemployment, as much as 45 percent in some estimates. Mass immigration has provided new skills and entrepreneurial capabilities, however, intense competition for jobs has led to periodic outbreaks of xenophobic riots. COSATU has historically been aligned to South Africa's ruling party, the ANC, although in recent years the relationship has soured (Bischoff and Wood, 2018).

The South African government tends to play an important role in the formal sector as it performs a coordinating function, involves intermediaries, provides education and training, and ensures that laws are applied (Fransen and Bert, 2016). Education and training are generally of a high quality, although education and training for workers is not (Fransen and Bert, 2016). Formal sector firms mainly operate within the rules set by the state and benefit from a sophisticated support and financial system (Ashman and Fine, 2013; Bischoff and Wood, 2013; Fransen and Bert, 2016). As a result, formal sector firms tend to be larger, operate internationally, have a traditional departmental structure with transparent reporting lines, and are likely to take risks (Fransen and Bert, 2016). In contrast informal sector firms are casually organised and obtain almost no support from the financial system or from policies aimed at small and medium enterprises (Bischoff and Wood, 2013; Padayachee, 2013; Fransen and Bert, 2016). They therefore tend to be smaller, operate in the local market and their income levels are close to the poverty line (Ashman & Fine, 2013; Fransen and Bert, 2016).

Since the end of apartheid, major policy efforts have aimed at reducing the segmentation of business systems. Municipalities promote pro-poor growth, small and medium-sized firms have received some support, and black entrepreneurship and employment were promoted through black economic empowerment (BEE) initiatives (Fransen and Bert, 2016). However, the impact of these policies has been questioned and government's response to the challenge of segmentation has been described as weak and late in coming (Padayachee, 2013; Fransen and Bert, 2016). This weak response can possibly be explained by the ongoing relationship between organised labour and government. Historically, this relationship was complicated by the fact that the South African Treasury promoted orthodox fiscal policies without negotiating these with labour or taking them to the National Economic, Development and Labour Council (NEDLAC). Treasury therefore promoted a business-friendly set of policies, whilst the Ministry of Labour promoted pro (organised labour) policies; a policy incoherence which exacerbated the post-apartheid unemployment crisis (Nattrass and Seeking, 2010). In addition, collective action by business was undermined by established corporations and the emerging 'empowered' black business elite who pursued their own agendas through direct engagement with government. Tension remains between the objectives of BEE and forging business unity.

In considering the varieties of capitalism literature, certain key characteristics of present day South African capitalism become apparent: the corporate concentration, recent 'unbundling' and continuing forms of anti-competitive behaviour and BEE, which is introducing new forms of concentration, economic power and patronage into the economic system. In addition, the fragmented character of business organisation in South Africa is still an important consideration (Nattrass and Seeking, 2010). In terms of the future, until labour, business and the state agree on what needs to be done, and on what sacrifices and deals should be struck, there is little chance of a co-ordinated, egalitarian growth path in South Africa (Nattrass and Seeking, 2010, p.4).

Section 3: Conclusion and research questions

This chapter reviewed a wide body of literature addressing different aspects of temporary agency work. The first section introduced the concepts and key issues surrounding temporary agency work more generally, including a review of recent empirical research and theory development. The second section dealt with the TES industry in South Africa, focusing on the difficult

economic and social conditions, the specific regulatory and collective bargaining environment, and the trade union movement. The third section concludes with the research questions.

Flexibilisation and dualisation of employment are recurring themes in the literature. However, there is an absence of empirical research regarding the latest trends in temporary agency work, particularly in countries from the global south. The first of these trends is the increasingly complex set of contractual arrangements between agencies and user firms identified in wealth nations of the west, and that require closer attention in countries of the south. South Africa's sophisticated legal regime coexisting alongside a weak economy provides an interesting context for these arrangements.

Secondly, internationally there have been recent changes in the regulatory environment surrounding the supply of temporary workers. Certain aspects have received special focus, namely the equal treatment of TES workers, and the statutory allocation of employer responsibilities between the agency and the client within the triangular employment relationship. Debates around joint and several liability between the agency and the client have also come to the fore. These changes are of interest in South Africa given the more radical amendments to legislation in this regard. In addition, the important consideration of regulatory avoidance and how it is constructed and played out in the South African national context would be significant.

Finally, internationally unions face acute resource, logistical and operational challenges in attempting to organise the temporary employment agency sector. Given that South African trade unions have been particularly successful in promoting the regulation of TES work, how South African unions fare when facing the many challenges brought about by the flexibilisation and fragmentation of employment would be of interest.

In order to investigate the above themes from the literature, a holistic approach that provides the ability to look at different sub-units (the TES client, worker, firm and unions) situated within a larger case (South African TES working) and that considers the interrelationship between the phenomenon of TES work within the South African context, would be appropriate. The extensive literature review undertaken did not identify similar holistic case study research

drawing on interview data with experts from a cross section of the TES industry, post the 2015 amendments to the legislation framework.

This thesis therefore addresses the question of the regulation of temporary agency work for the better through the lens of a case study of agency working in South Africa, looking at trends, perspectives of key groups and the prospects for legal regulation. In this regard, the objective of the proposed research is to answer the following questions:

1. What is the current position and perspectives of the temporary agency worker, firm and client in South Africa?
2. What is the regulatory framework for temporary agency work in South Africa and the response of key groups to this framework? and
3. How is temporary agency work influenced by trade union responses?

The next chapter, chapter three '*The South African political and historical context',* aims to provide historical context, including that of the legal framework for TES work up to 2010. It does not contain any empirical evidence and is therefore deliberately placed before the methodology or findings chapters. It is different to chapter five '*The legal framework*', as chapter five deals with the current legal framework (from 2010 to present day) and contains empirical evidence.

CHAPTER 3: THE SOUTH AFRICAN HISTORICAL AND POLITICAL CONTEXT

3.1. Introduction

It is important to outline the far-reaching effects of apartheid's repressive legacy, to understand what had to be undone and to contextualise the current debates surrounding TES work. What follows is a summary of the historical, political and legal processes that supported TES workers, clients and firms in the South African context.

To this end, the chapter firstly considers the historical development of the legal framework from the rise of the apartheid labour regime, to the changing views between 1970 and the early 1990s. It secondly examines the transition to democracy and the post-apartheid context after 1994. Lastly, the chapter focuses specifically on South African temporary agency work from 1956 to 2010.

3.2. The historical development of the legal framework

Initially, South Africa was an agrarian community and agricultural workers constituted most the labour force (Nel, 1997). As the economy developed, laws regulating bilateral individual relations were inadequate and *The Masters and Servants 1856* (No.15 of 1856) was promulgated, which had a negative effect on employer-worker relations from the outset. Minor offences by a 'servant' or apprentice, for example a refusal to obey a command, warranted imprisonment, with or without hard labour (Nel, 1997). Even at this early stage, racial issues played a major role in the South African labour relations environment.

The discovery of diamonds and gold during the mid-19th century catapulted South Africa into the era of industrial revolution. Britain had a major influence on the country after gold and diamonds were discovered and the legal system remained static for almost two decades (Nel, 1997). A characteristic of all South African legislation during this early time was that it was based on racial discrimination. This approach was evident when the Nationalist Party came into power in 1948. The labour legislation was substantially updated, thereby locking South Africa into a system of apartheid in the business and industrial relations environment (Nel, 1997).

3.2.1. The rise of the apartheid labour regime

Officially, apartheid began with the National Party's election in 1948, although elements of apartheid existed long before this time. The root of apartheid was the legal segregation of the country by race, with the sole goal being white supremacy. This was achieved by depriving the majority of the South African people from basic democratic freedoms and instituting labour market regulation that ensured that white employment rights were not shared by the rest of the population (Donnelly and Dunn, 2006).

Compared to other southern African countries, the apartheid system in South Africa was not unique but extreme in its racial ordering of society (Bezuidenhout and Fakier, 2006). However, the colonisation of South Africa was peculiar for two reasons: its incredible mineral wealth and its 'white settler population of some size and cultural cohesion who were determined to maintain and enhance their group power and status' (Wallerstein, Martin and Vieira, 1992, p.4). Bezuidenhout and Fakier (2006) state that this caused a dilemma for the mining industry: they required cheap labour and the settler population regarded the urbanisation of the African population as a social and political threat. To resolve this 'dilemma' the migrant labour system was developed. Labour was secured through the deliberate destabilisation of rural economies, the 'legal' dispossession of land and the introduction of taxes that were required to be paid in cash (Ibid, 2006, p. 465).

As a form of control, African men who migrated to the urban areas and mines were typically housed in single-sex hostels and their wives and families remained in the rural areas and survived through the engagement of subsistence farming and money sent home to them by the working men in the family. Mineworkers were mostly employed on fixed-term contracts and had to return to rural areas when the contracts expired or they became unable to work (Ibid, 2006). Apartheid policies ensured that the mining industry could subsidise its profits by externalising a large part of the burden of social reproduction to rural subsistence economies. Johannesburg, founded in 1886, associated with the influx of labour and the Witwatersrand gold rush, soon became South Africa's most densely populated metropolis (Ibid, 2006; Wolpe,1972).

The Industrial Conciliation Act of 1924 (Act No. 11 of 1924), enshrined one of the pillars of the apartheid regime - the politics of boundary drawing. Labour was controlled through the concept

of the ‘pass’, a document that dictated where the bearer could and could not be at any time. Importantly, the 1924 Act, excluded ‘pass-bearing natives’ from the definition of ‘employee’. Initially this only applied to African men and African women were included during the 1950s (Bezuidenhout and Fakier, 2006). This 1924 Act excluded black people from membership of registered trade unions and prohibited the registration of black trade unions. Later, the state would enforce the racial segregation of trade unions and anti-communist laws were used to neutralise labour activities (Baskin, 1991; Bezuidenhout and Fakier, 2006).

There were three central characteristics of apartheid’s labour regime:

- The racial division of labour: colour bars were enforced in jobs and wages, which created a racially segmented labour market (Bezuidenhout and Fakier, 2006).
- The urban geographies and the migrant labour system: cities were divided into ‘white’ suburbs and ‘black’ townships, with industrial areas as ‘buffer zones’. Black workers were only allowed in white areas to work if they possessed a ‘passbook’ signed by their employers. Rural labour reserves (called ‘homelands’) became ‘self-governing states’ where African people were granted pseudo-citizenship rights. To stem the urbanisation of African people, subsidies were granted to firms who set up businesses in the homelands. The idea was to declare the homelands independent states with their black ‘citizens’ being ‘foreigners’ in a ‘white South Africa’. If hostel-dwellers lost their job, it meant losing their accommodation and they were forced return to the rural areas (Von Holdt 2003; Bezuidenhout and Fakier, 2006, pp. 466-467).
- Legislation segregated the facilities in the workplace: employers had to provide separate canteens, change houses and toilets for white and black workers. This legislation was only repealed in 1983, but as Von Holdt (2003, pp. 29-30) points out, many firms nevertheless continued with their previous practices well after the law’s abolition.

Black workers were effectively denied the opportunity ‘to seek work of their choice, to live where there was work and to have their families with them’ (Kraak, 1993, p.3). Regulating this segmented labour market was a dualistic system of labour control: collective bargaining rights for non-African workers, and a system of despotic control and the denial of *de facto* trade union rights for black workers (Kenny and Webster, 1999). The use of the strike weapon was severely restricted by the existence of tough industrial legislation, the pass laws, and the mine compound

system. South Africa accustomed itself to a regime of very tough security laws, which resistance movements found very difficult to circumvent (Davenport, 1987).

Fine and Davies (1990) provide an interesting assessment of the 1930s and 1940s in South Africa and the growth of the industrial labour force. The appearance of a 'new class of black proletariat' was a powerful motor for democratic change in South Africa. This growth provided the foundation for the trade union organisation and the dramatic escalation of black militancy during the 1940s that fought against the racial capitalist system (Fine and Davies, 1990, p.4). The militancy of the African proletariat stimulated a steady growth of political opposition by the black middle classes, with the revival of the African National Congress (ANC), the formation of the ANC Youth League and the waging of joint campaigns by the ANC and the Communist Party (Fine and Davies, 1990). The state was thrown into a profound crisis by these developments that was 'resolved' through the rise in Afrikaner nationalism. This nationalism functioned to suppress the threat posed by the working-class movement, primarily through the repression of the working class (Fine and Davies, 1990).

At the heart of the apartheid political regime was racially segregated and highly unequal labour rights (Pons-Vignon and Anseeuw, 2009). There was a range of rights, beyond employment rights, that white workers benefitted from: union rights, social security, medical insurance, unemployment benefits and access to labour courts. These were in strong contrast to the state's efforts to weaken African workers by subverting their organisations and repression of their rights (Pons-Vignon and Anseeuw, 2009). Black workers were relegated to the least qualified, most poorly remunerated jobs and they were prevented from contesting unfair practices or dismissal. In addition, they were deprived of indirect wages, such as pension or insurance, and professional advancement. Only the minority of black workers who were in formal employment (all temporary workers were excluded) had the capacity to bargain for improved working conditions and only if the employers' practices allowed for such capacity to bargain (Von Holdt, 2003, Pons-Vignon and Anseeuw, 2009).

The blurring of racial and technical hierarchies played a prominent role in the emergence of unions in South Africa. An increasingly structured union contestation eventually pushed the

government to adopt *the Industrial Conciliation Act 1979* (No. 94 of 1979)[43] and to recognise black workers' unions, which in turn modified the status of wage labour and eventually brought about the end of apartheid (Von Holdt, 2003, Pons-Vignon and Anseeuw, 2009). The result of the apartheid regime was profound inequality. Most obviously, real wages for black people were calculated to be a fifth of those of white people by the early 1970s, and still only a third by the early 1990s when apartheid laws were being abandoned (Wood and Harcourt, 1998p. 77-8; Donnelly and Dunn, 2006, p.5).

3.2.2. The changing views during the 1970s, 1980s and early 1990s

The struggle against apartheid led to democracy in South Africa in 1994 but labour reforms were being implemented from the late 1970s onwards (Bezuidenhout and Fakier, 2006). The apartheid system of labour control was being challenged through the emergence of shop floor based industrial unions for black workers in key sectors such as manufacturing (Baskin, 1991; Kenny and Webster, 1999). During 1979, racial dualism was abandoned, and black trade unions were recognised for the first time. By the mid-1980s these unions fought and won rights on the shop floor in companies that limited managements' unilateral power to dismiss and gave workers a voice in the workplace. Membership in trade unions grew dramatically from 700,000 in 1979, to nearly 3 million members by the late 1990's (Kenny and Webster, 1999).

During 1979 the government appointed a commission of inquiry into labour legislation, namely the Wiehahn Commission to investigate and advise on existing labour legislation. The recommendations by the Wiehahn Commission were the first crack in the wall of apartheid (Wiehahn Commission, 1979; Parsons, 2007). This commission enabled government to formulate a new labour policy and promulgate new legislation, which was mainly embodied in *the Industrial Conciliation Act 1979* (No. 94 of 1979), and other amendments thereafter. The acceptance of most of the recommendations of the Wiehahn Commission by the National Party Government of the day, was significant as it paved the way for the legitimising of black and

[43] Following the recommendations of the Wiehahn Commission during 1979, this act set up an Industrial Court which interpreted labour laws and heard cases of irregular employment practices such as dismissals, wage disputes and the legality of strikes (Davenport, 1987).

multiracial trade unions in South Africa and their recognition by commerce and industry (Parsons, 2007).

Despite these initial changes, there were still severe tensions between parties in the post 1980s period. The apartheid system had created a political vacuum and the South African trade union movement attempted to fill this vacuum (Parsons, 2007). For a short time, and partly because of employer disquiet, the state's response to the continued turmoil was to backtrack on the Wiehahn policy. *The Labour Relations Amendment Act 1988* (No. 83 of 1988), sought to curb union power by introducing the concept of unfair industrial practices, outlawing certain categories of strike and secondary action and making unions liable for unlawful striking by their members (Baskin, 1991, p.261-5; Donnelly and Dunn, 2006). The 1988 Act merely provided a focus for intensified dissent, including three national strikes in 1989, led by COSATU (Baskin 1991; Donnelly and Dunn, 2006). [44]

Throughout the 1980s, the labour movement played a significant role in the anti-apartheid struggle (Adler and Webster, 2000; Makino, 2010). COSATU's activism during the 1980s concerned issues of political liberation (Makino, 2010) and its role extended far beyond a general framework of an inclusive collective bargaining system (Parsons, 2007). The union movement's activities led leaders in organised business to realise that commerce and industry would continue to bear the brunt of these pressures unless there was meaningful political reform (Parsons, 2007). Consequently, calls for a political settlement from the organised business community grew more insistent and there were increased attempts to promote a broad-based commitment to fundamental human rights in South Africa (Parsons, 2007).

The economic crisis of the apartheid system during the 1980s contributed to the gradual decline in sectors such as manufacturing, which culminated in approximately eighty thousand jobs being lost in just one area of Johannesburg, called the East Rand, between 1988-1999. Throughout the 1990s, downsizing mirrored the outsourcing of production in sectors like metal, engineering, chemical, glass and paper. Small companies, largely non-unionised, proliferated especially in production segments that did not require substantial capital investment and overheads. The use of temporary employment services played a significant role in the casualisation of employment

[44] In 1983, black union movements were consolidated into a powerful union confederation consisting of more than half a million supporters and 34 unions, namely COSATU.

during these difficult economic times (Barchiesie, 2010). Employers used the decentralisation of labour recruitment across the local urban economy, as a powerful weapon to stratify the labour force and generalise its vulnerability (Barchiesie, 2010). The combination of temporary contracts and temporary employment services ensured workers' compliance and flexibility, while limiting companies' obligations towards their employees. The use of temporary employment agencies or 'labour brokers' ensured that long-term career orientations were impossible and workplace identities weakened (Barchiesie, 2010). Meanwhile, South Africa's unemployment rate increased from almost 16 percent in 1990 to more than 30 percent in 2002. Jobs classified as being in the informal sector grew as a proportion of all employment, from 1.7 million in 1990 to 3.5 million in 2002 (Bezuidenhout and Fakier, 2006, p. 468).

3.2.3. The position after 1994: the post-apartheid labour regime

Democratic elections were held in 1994 and Nelson Mandela was elected as President.

> The truly remarkable nature of South Africa's transition was captured in the election and the inauguration of Nelson Mandela as the new president during the last week of May 1994. … For South Africans, it became a deeply emotional experience, with the overwhelming majority of eligible voters participating in the first-ever democratic election. The atmosphere of euphoria carried through into the following week of national celebrations … However, the ambiguous character of this astonishing climax to South Africa's transition to democracy was clearest when Mandela stepped from his automobile to be ushered to the inaugural platform by none other than the white general officers of the security forces, the same men who had prosecuted the regime's brutal war against its opponents, especially the African National Congress (ANC) … As the commander-in-chief, Mandela took his place at the head of a Government of National Unity. (Adler and Webster, 1995, pp. 75-76).

3.2.3.1. 'Triple transition' and 'normalisation'

During 1990 the government began to negotiate with its opponents, a process that resulted in the interim *Constitution of the Republic of South Africa Act 1993* (No. 200 of 1993). In 1997 the final *Constitution of the Republic of South Africa Act 1996* (No. 108 of 1996) (the Constitution) came into effect. South Africa became a constitutional state with a supreme Constitution and a Bill of Rights.

With the transition to democracy in 1994, the ANC-led government had to resolve the economic contradictions that apartheid had created. To achieve this required enormous economic and

social change (Feinstein, 2005; Parsons, 2007). South Africa was undergoing a 'triple transition' which included a transition to a globally competitive economy, attempting to consolidate democracy and removing the legacy of apartheid (Webster and Omar, 2003, p. 3). Some writers described this triple transition as often involving contradictory processes, resulting in a tension between political, economic and social forces (Bezuidenhout and Fakier (2006); Von Holdt 2003; Webster and Omar 2003). Post-apartheid South African commentators used the word 'normalisation' to describe the intended reform of the employment relations system (Donnelly and Dunn, 2006, p.9).

> So, normality implied a blurring of the demarcation between employment relations and politics, between industry and society. Fragmented, decentralized, market-oriented arrangements along Anglo-Saxon lines would not do. A multi-layered, articulated system following the European pattern was preferred as a complement to political emancipation, one that upheld the independence of unions and employers, maintained some power equilibrium between them, yet gave them formal access to the state and involvement in broader social and economic policy making (Donnelly and Dunn, 2006, p.9).

The concept of 'normalisation' also included some ambiguity and tension, as political and employment relations would overlap. However, simultaneously, employment relations needed to become less 'political', in terms of being part of a national power struggle; more economically sensitive, in terms of national prosperity, towards a more enduring, integrative engagement (Donnelly and Dunn, 2006, p.9). This was the best way for 'redistributive justice' and 'dynamic efficiency' to co-exist (Standing *et al*, 1996, p.1-16).

Attempts were made to nurture a more social-democratic and co-ordinated response with the adoption of the Reconstruction and Development Programme (RDP) that reflected the ideas of a social democratic welfare state (Padayachee, 2013; Nattrass, 2014). As Naidoo (2003)[45] would later argue, the RDP was a class compromise, however, differences continued to bubble under the surface of this compromise. Nonetheless, the RDP was a highly consultative and collective process, that represented the consensus of the liberation movement (Naidoo, 2003). The RDP proposed a state-led, market assisted transformation process that promised to accommodate capital, but not be subordinate to it. Such an accommodation strategy required a strong developmental state mobilising people for transformation and regulating capital (Naidoo, 2003).

[45] Naidoo was the Director of National Labour and Economic Development Institute (NALEDI) at that time.

During and after 1994, there was a systematic removal of apartheid legislation and the introduction of legislation designed to create equal opportunity throughout society (Webster and Omar, 2003). A drafting committee that consisted of government, labour and business and international experts provided by the ILO, prepared legislation (Webster and Omar, 2003). This involved the introduction of a new labour relations regime, made up of five core statutes:

- *The National Economic Development and Labour Council Act 1994* (No. 35 of 1994).
- *The Labour Relations Act 1995* (No. 66 of 1995) (LRA 1995)
- *The Basic Conditions of Employment Act 1997* (No. 75 of 1997) (BCEA)
- *The Skills Development Act 1998 (No. 97 of 1998)*
- *The Employment Equity Act 1998 (No 55 of 1998)* (EEA)

For the first time, all workers were brought under the ambit of one industrial relations system. This included public service workers, farm workers and domestic workers (Kenny and Webster, 1999). The new *Labour Relations Act 1995* (No. 66 of 1995) (LRA 1995) promoted collective bargaining by providing for organisational rights of unions in the workplace. The law entrenched what many unions had struggled to achieve through private agreement: access to employer premises, meeting rights, and union subscription facilities. This new labour regime gave workers an institutionalised voice not only at the workplace but also at the sectoral and national levels through industry-wide bargaining councils and the multi-partite National Economic Development and Labour Council (NEDLAC) (Kenny and Webster, 1999).

This legislation was designed to position South Africa on the 'high road', emphasising skills through training, effective collective bargaining, rewards and incentives schemes (Webster and Omar, 2003, p.4). The approach adopted under the new legislation rested on the assumption that institutionalised collective bargaining would usher in new, less adversarial workplace relations. The 1995 LRA maintained and strengthened the system of workplace collective bargaining. Industrial Councils were renamed Bargaining Councils and could be established in industries with sufficient union and employer representation (Bezuidenhout and Fakier, 2006).

In addition to drafting legislation that attempted to reconstruct the judicial architecture for collective bargaining on a non-racial basis, legislation was drafted to put in place minimum standards (Bezuidenhout and Fakier, 2006). During 1997, the BCEA provided an inclusive

definition of an employee, which covered all workers (except the self-employed) and strictly regulated working conditions, such as 45 working hours per week, 21 days of leave per year and sick leave entitlement (Pons-Vignon and Anseeuw, 2009). Some of the regulations in the BCEA concerned all sectors, for example, unemployment insurance and retrenchment (redundancy) funds. Some social protection measures, such as pension funds and different types of insurance, depended on negotiated agreements within each business or branch. It was for this reason that the BCEA provided a mechanism called 'sectoral determination' which allowed the Minister of Labour to intervene in defining the minimum remuneration and working conditions for a sector if workers were insufficiently unionised to negotiate with their employers (Pons-Vignon and Anseeuw, 2009).

During 1995, NEDLAC was established in South Africa as a platform for social dialogue between the representatives of government, business, labour and community. NEDLAC is unique in that, in addition to the conventional tripartite partners, it includes the community constituency, which is represented by *inter alia* national organisations of civics, youth, women and disabled people (Makino, 2010). NEDLAC considers and seeks to reach consensuses about 'all proposed labour legislation relating to labour market policy before it is introduced in Parliament' as well as 'all significant changes to social and economic policy before it is implemented or introduced in Parliament' (NEDLAC Act No. 35, of 1994, Section 5). The fact that NEDLAC is a statutory body means that it has power and stability (Gostner and Joffe, 1998).

The legal design of the post-apartheid labour regime showed its intended collaborative nature and bears striking similarities to the northern European model of industrial relations (Donnelly and Dunn, 2006; Pons-Vignon and Anseeuw, 2009). The appeal to COSATU and to the liberation movement at large reflected the rejection of the apartheid workplace regime (Von Holdt, 2003; Pons-Vignon and Anseeuw, 2009). There was a desire to give credence to the social gains obtained by the liberation movement during the 20 years that preceded 1994. This was at odds with the market-oriented model encouraged by the World Bank and the International Monetary Fund who followed the South African transition closely and attempted to exert influence over it (Pons-Vignon and Anseeuw, 2009).

3.2.3.2. A shift to market liberalism and the informalisation of work

The African National Congress' (ANC) political roots are somewhat heterogenous, involving Christian and liberal socialist themes, pan-Africanism and elements of Marxism (Donnelly and Dunn, 2006). During the anti-apartheid struggle it was a coalition of several groups, with a predominantly Marxist ideology (Weeks, 1999).

The decisions initially made in relation to the entire employment relations system by the Government of National Unity after 1994, endorsed by the ruling ANC and its South African Communist Party ally after 1999, flew in the face of conventional wisdom (Donnelly and Dunn, 2006). During the 1990s, the International Monetary Fund, the World Bank and the World Trade Organisation orthodoxy was that transforming economies should 'free up' their labour markets. Instead, South Africa looked to Europe for inspiration. It legislated for social dialogue at national level, encouraged industry-wide bargaining and promoted workplace bodies (workplace forums) which were like works councils (Donnelly and Dunn, 2006). Reforms were introduced while international sanctions were lifted, and its economy was exposed to free trade. On the one hand, new institutions such as bargaining councils and workplace forums were established, while on the other hand economic liberalisation became more dominant.

With South Africa rapidly integrating into the global economy, there was pressure on the South African labour market in support of flexibilisation and deregulation (Makino, 2010). The ANC wanted the international financial community to see its economic policies as conventional in terms of fiscal and monetary discipline, tariff removal, public spending restraint and privatisation (Bhorat *et al* 2002, p.4; Donnely and Dunn, 2006). As apartheid began to disintegrate, economic policy shifted towards market liberalism. The ANC government began to implement a typically orthodox macroeconomic policy: fiscal deficit reduction through expenditure restraint and tight monetary policy, with rapid trade liberalisation (Weeks, 1999). The Department of Finance promoted a market orientated programme called the Growth, Employment and Redistribution Programme (GEAR) (Donnelly and Dunn, 2006). The stated purpose of GEAR was to increase economic growth, with a 4.2 percent rate programmed for 1996 to 2000 (Weeks, 1999). GEAR encouraged labour flexibility as an avenue to job creation and left the expansion of formal employment to the operation of market forces (Barchiesie, 2010). At that time, analysts and politicians argued that most unemployed individuals lacked the skills required for globally

competitive productions. They believed that the only option for most job seekers in South Africa were low-paid positions with limited security and bargaining protections (Barchiesie, 2010). COSATU rejected GEAR as 'neoliberal' but the informalisation of work nonetheless became a policy response to the country's employment crisis. As low-skilled workers found it exceedingly difficult to find regular employment, corporate outsourcing and subcontracting provided alternatives in multitudes of non-union small and micro enterprises (Barchiesie, 2010). Research on poverty conducted by National Labour and Economic Development Institute (NALEDI), would later describe the effects of GEAR on the poorest South Africans:

> With the adoption of government's Growth, Employment and Reconstruction programme (GEAR) from 1996, this focus on the poor and the inclusion of their stories and their contribution to the dilemma of solving poverty, grew silent. The development emphasis shifted from the previous rights-based focus grounded in the highly progressive South African Constitution1, to technocratic questions of economics, numbers and targets. Within government a prevailing sentiment developed that poverty would inevitably be addressed through the attainment economic growth. The classical neoliberal trickledown approach to poverty eradication became the dominant policy approach under GEAR, and the RDP office and ministry were closed (Frye, 2008, p. 9)

On the one hand, new institutions such as the industrial councils were set up, while on the other hand economic liberalisation became more dominant. As can be seen from the above quotation, the outcome of this era was that low-skill African workers found it exceedingly difficult to find regular employment. Corporate outsourcing and subcontracting provided alternatives in myriads of non-union small and micro enterprises that operated along the boundary between formal and informal (Barchiesie, 2010). Equally important in the decentralisation of production was the shift of labour recruitment towards temporary employment agencies (Barchiesie, 2010). The South African case seems to indicate that changing corporate strategies, a business-friendly policy environment, and growing working-class poverty are decisive features in the expansion of the informal economy (Barchiesie, 2010).

3.3. The South African regulatory framework: temporary agency workers

3.3.1. Historical developments and background: from 1956-2000

Flexible and insecure employment has been the norm in South Africa for a considerable time as evidenced by the way many mineworkers were employed, which was usually on a contract basis (Makino, 2010). For this reason, the issue of who should receive the protection of labour law remains an important question for the direction of labour market regulation. As set out in table 4

below, although TESs have been used in South Africa since the 1950s, they were not regulated by the *Labour Relations Act of 1956* (No. 28 of 1956) (1956 LRA). This Act did not contain a definition for these services and did not acknowledging their existence (Botes, 2014). However, TESs became popular in the 1980s and were introduced into South African law as part of the *Labour Relations Amendment Act 1983* (No. 2 of 1983) (the 1983 Amendment Act)[46]. The amendment deemed the broker to be the employer of the labour broker employee, creating a triangular employment relationship (Budlender, 2013). Section 198 of the 1995 amendment to the LRA[47] retained the statement that the labour broker, now referred to in the amended act as 'temporary employment services', was the employer (Budlender, 2013).

***Table 7**: Key events from 1956 to 2002 that impacted on the TES relationship in South Africa:*

Year	Event and its impact on the TES relationship
1956	Although temporary employment agencies were used in South Africa since the 1950s, they were not regulated by the *Labour Relations Act of 1956* (No. 28 of 1956). This Act did not contain a definition for these services and did not acknowledge their existence (Botes, 2014).
1983	'Labour brokers'[48] were introduced into South African law as part of the *Labour Relations Amendment Act 1983* (No. 2 of 1983). The broker was deemed to be the employer of the workers they supplied (Budlender, 2013).
1994	During and shortly after 1994, core employment statutes were introduced: *The Labour Relations Act 1995* (No. 66 of 1995) (LRA 1995); *The Basic Conditions of Employment Act 1997* (No. 75 of 1997) (BCEA)*;* and *The Employment Equity Act 1998 (No 55 of 1998)* (EEA). For the first time, all workers including TES workers were brought under the ambit of one industrial relations system. The BCEA provided an inclusive definition of an employee, which covered all workers except the self-employed (Pons-Vignon and Anseeuw, 2009).
1995	In the 1995 LRA the 'labour broker' was renamed a 'temporary employment service' (TES). The TES is the employer of the TES employees that they place with clients, if they assume responsibility for remunerating these employees. The TES client was made jointly and severally liable for breaches of the BCEA,

[46] Section 1 of the 1983 Amendment Act states: 'Labour broker's office' means any business whereby a labour broker for reward provides a client with persons to render service to or perform work for the client or procures such persons for him, for which service or work such persons are remunerated by the labour broker.'

[47] Section198(1) of the 1995 LRA states: 'In this section, "temporary employment service" means 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.'

[48] See par 7.2.1. for further discussion on the concept of 'labour broker'.

	sectoral determinations, collective agreements and arbitration awards. The concept of joint and several liability did not extend to unfair dismissal protection and other matters dealt with in the LRA 1995 (Benjamin, 2009b).

Source: researchers own summary

TESs were 'deemed' to be the employers of individuals that they placed with their clients, provided they were responsible for paying their remuneration (Benjamin, 2009). The TES employee had no recourse against the client as the client was not the employer and the risk of non-compliance rested on the TES employee and not the client (Benjamin, 2009). The client was made jointly and severally liable for the breach of the BCEA, sectoral determinations, collective agreements and arbitration awards (Benjamin, 2009). If the TES failed to pay its employee, the client was liable to make these payments. However, the client's liability was a default liability; the client could not be sued directly at the CCMA or the Labour Court as it was not the employer (Benjamin, 2009). The TES employee could only act against the client if it had obtained a judgment against the TES, which the TES did not pay (Benjamin, 2009). TESs marketed their services as a means of avoiding the risks of adverse findings at the CCMA, as it designated the temporary employment agency as the employer (Theron, 2008). The risk was further reduced as it was difficult for the TES employees to prove dismissal in a triangular employment relationship. Consequently, the TES sector grew prolifically during the 1990s (Cohen, 2008; Theron, 2008).

Many negatives persisted for these TES employees and section 198 of the 1995 LRA simply did not address all the elements in the triangular employment relationship (Botes, 2014). They were often engaged under a TES arrangement for long periods of time and had no security of employment. They could be 'withdrawn' from the client by means of a commercial arrangement with no fair reason provided and often did not know that the TES was the employer. In addition, they were deprived of Constitutional and other labour rights and were often paid significantly less for the same work as regular employees. In short, TESs were recognised under section 198 of the LRA without regulation (Benjamin, 2009). Furthermore, collective bargaining was undermined as organisational rights were almost impossible to enforce. The terms in the commercial agreement that governed the TES relationship usually provided for the 'automatic termination' of these workers on termination of the agreement by the client, resulting in an unfair redundancy process. These commercial agreements also made it impossible for the client to

employ the worker for six months after the termination of the assignment. Clients therefore had no obligation to find alternate work for these workers and the worker was left with no income (Benjamin, 2013). From a worker perspective, divisions were created on the shop floor between workers in different categories which affected the ways workers view themselves as workers in their workplace. Atypical employees felt detached from their jobs and the same time full time workers lost enthusiasm for improving their lot (Kenny, 1997; Bodibe, 2006). The 1995 LRA maintained a fiction that the temporary employment agency (TES) was the employer, when in fact it was just an intermediary (Cohen, 2008).

By 1996, the gains by labour triggered a major debate regarding labour market reforms (Kenny and Webster, 1999). Employers argued that the new labour relations regime was contrary to the global trend of labour market flexibility and raised the cost of labour (Kenny and Webster, 1999). Those not in favour of this argument pointed out that this drive by employers was an attempt to reduce labour costs and undermine the core rights won by the labour movement. They argued that flexibility was simply a re-segmentation of the South African labour market as it created greater insecurity and unemployment for both core and flexi-workers (Kenny and Webster, 1999).

During 1996 the South African Foundation (SAF)[49] released a document that advocated neo-liberal economic policies were the most realistic strategy for improving productivity and competitiveness by reducing wage costs (Kenny and Webster, 1999). It proposed a two-tier labour market, with two sets of rules: 'the existing high-wage capital-intensive low-employment sector, and a burgeoning free-entry labour-intensive sector with strong new investment' (South African Foundation 1996, p.102). The second tier would allow workers to be made redundant without severance pay or procedure and there would be no statutory rights to non-wage benefits. In addition, employers would be exempt from all minimum standards legislation (SAF, 1996; Kenny and Webster, 1999, p.218). At that time, Standing *et al* (1996, p. 12) wrote:

> It would be strange to promote 'two-tier' labour markets when the country has struggled so long to overthrow a two-tier society and a two-tier labour system, when the vestiges of that system were still being dismantled.

[49] The SAF was a powerful lobby group and think tank for big business. Fifty-three of South Africa's top companies, certain foreign companies, and some South African state-owned companies were members of the SAF (Baskin 1996, pp. 7-8)

COSATU argued that this approach would erode labour standards and rejected a two-tier labour market strategy. COSATU stressed that the flexibility trend was simply a re-emergence of the apartheid strategy to divide workers into those with and without rights, as was the case with migrant workers in the past and would be a 'recipe for perpetual instability in the labour market and the economy' (COSATU, 1997, paragraph 5.75)

At this time, the South African Department of Labour's Green Paper that was a spring board for the development of the new 1997 BCEA, was released. The 1996 Green Paper dealt explicitly with the rise of non-standard employment and its consequence for labour protection:

> The current labour market has many forms of employment relationships that differ from full-time employment. […] They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining. A high proportion are women. Frequently, they have less favourable terms of employment than other employees performing the same work and have less security of employment. Often, they do not receive 'social wage' benefits such as medical aid or pension or provident funds. These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult (Department of Labour, 1996; Benjamin, 2005, p. 31).

The BCEA introduced a regulatory framework for casual workers, but it also allowed individual contract and collective bargaining to change those minimum standards (Kenny and Webster, 1999). South African firms were moving in the same direction as the global trend towards flexibility, in increasing their use of casual and contract workers and through outsourcing (Standing *et al*, 1996; Kenny and Webster, 1999). This trend occurred simultaneously with the move to extend basic labour rights and standards to large sectors of the workforce that had in the past been excluded from the core labour regulation regime (Kenny and Webster, 1999). Meanwhile, unemployment continued to increase and by 2000 the official unemployment rate, which excludes discouraged work seekers, was at 26 percent (Paret, 2016). These figures increased informalisation from both above and below. In other words, from above as employers exploited the labour surplus by hollowing out the core of stable workers and replacing them with flexible, cheap labour through casualisation and subcontracting. From below, as poor communities were forced to rely on informal income generating activities and 'casual servitude' (Paret, 2016, p.90).

3.3.2. The period from 2000 to 2010

A strike in October 2002 by 4000 workers at the century old ERPM gold mine east of Johannesburg proved to be the pivotal event in the debate over temporary agency working in South Africa (Benjamin, 2005). Almost all the mine's workforce was employed by a temporary employment agency (or labour broker) rather than by the mine owners. The striking workers demanded that the temporary employment agency pay them money it had received from the mine, which they believed to be part of their wages. Prior to the strike, most of the workers believed that they were employed by the mine (Benjamin, 2005; Bezuidenhout 2008). A research project was commissioned by the South African Labour Department after this incident and this project concluded that strategies of externalising work through temporary employment agencies and outsourcing, were the major drivers of informalisation of work in South Africa (Bezuidenhout et al 2004; Benjamin, 2005). In addition, this report stated that employers' desire to avoid legislation had increased the use of TESs and the legislative provisions had provided the opportunity (Benjamin, 2013). The absence of specific rules dealing with atypical employment gave employers the freedom to manage the relevant relationship as they saw fit, leaving these workers vulnerable (Botes, 2015).

Significantly, as at September 2007, National Labour and Economic Development Institute (NALEDI) research records that:

> It would thus be expected that the problem of labour brokers would compel unions to put in place aggressive measures to ensure that they are strictly regulated and where necessary, used at the absolute minimum. The reality however is more disquieting. A number of unions may have concluded agreements previously on this issue but in the collective agreements considered by NALEDI, only NUMSA, NUM and CEPPWAWU address the problem in any significant way. NUMSA and employers in the retail motor sector state that they will regulate and better enforce the main agreement relating to labour brokers, while in the agreement with New Tyre Manufacturers, there is acceptance that where applicable, in-plant agreements will apply regarding the use of labour brokers (Ndungu, 2008, p.11).[50]

[50] 'NUM's agreement with Exarro stated contractors must be registered under the Compensation for Occupational Injuries and Diseases Act as well as under the Occupational Diseases in Mines and Works Act. Such contractors must also pay the applicable levies and employers should not make use of contractors to fill vacant permanent positions. Similar provisions are found in NUM's agreement with the Chamber of Mines (collieries-Kangra and Springlake) which requires the companies to introduce guidelines to deal with contractors. Furthermore, while labour contracting is to be monitored at mine level, there is agreement that the conditions of employment of contractors "should be in line with generally acceptable conditions of employment". CEPPWAWU's agreement

Towards the end of 2008 the ANC launched its election manifesto, which included a call for 'decent work' (Harvey, 2011). The ANC manifesto promised to:

> Avoid the exploitation of workers and ensure decent work for all workers, as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and outsourcing, address the problem of labour broking and prohibit certain abusive practices (ANC Election Manifesto, 2008, p.8).

During 2008, the South African Labour Department commissioned a report on labour brokers, proposing to outlaw labour brokers except in circumstances where they are to provide labour with specialist skills (Benjamin, 2013, Webster et al, 2008). The call to ban labour brokers was adopted as a campaign by the labour movement, especially COSATU, but the official policy of the ruling party was to retain labour brokers and further regulate the industry to avoid abuse (Benjamin, 2013). However, it became clear that more was required in terms of statutory regulation to prevent exploitation and infringement of parties' rights in the triangular employment relationship and the South African Minister of Labour proposed general amendments to the 1995 LRA in 2010 (Botes, 2014).

During 2010, the Minister of Labour changed the provisions regarding TESs and drafted proposed amendments that banned TESs, by declaring that all temporary employment should be deemed permanent unless the employer can provide a valid reason why the employment should be for a fixed term (Botes, 2014). Heated debates and arguments as to whether the TES industry should be further regulated or banned, ensued in South Africa. Those not in favour of a ban argued that the use of TESs provides some relief to the unemployment crisis in the country and allowed a measure of flexibility (Botes, A). A Regulatory Impact Assessment (RIA) of *inter alia* the proposed Labour Relations Amendment Bill of 2010, was requested by Cabinet. This assessment would indicate the impact of the proposed amendments on the South African labour market and a grave picture was painted of the adverse effects of a total ban of temporary agency

---

with employers in the metal industry states that the main agreement will apply to all labour brokers but it also goes on to add that where an employer intends to use labour broker workers, then such employer must give seven days notice to the union of his/her intention to do so. For the petroleum sector, the question of contractors and non-permanent staff is termed "a company/plant level issue". In the agreement signed by public sector unions in the Public Sector Coordinating Bargaining Council, its terms require that the salary and benefits of casual workers should comply with the requirements of the BCEA in an attempt, it seems, to avoid undercutting and a race for the bottom' (Ndungu, 2008, p.12).

working (Botes, 2014). The Labour Relations Amendment Bill 2010 was widely rejected, especially by employer organisations and was withdrawn and redrafted.

A new proposal was submitted to NEDLAC in March 2012. These amendments proposed an increase in the regulation of the TES industry rather than a total ban (Botes, 2014). These proposals were open to public debate, creating animosity between employer organisations and trade unions. COSATU organised a countrywide protest action during March 2012 in support of their demand to ban TESs (Botes, 2014). However, during 2012, a collection of labour law amendments were published and implemented in a staggered manner throughout 2013/2014: The *Labour Relations Amendment Act 2014* (No. 6 2014) (LRAA) is to be read together with *the Basic Conditions of Employment Amendment 2013* (No. 20 of 2013) (BCEAA), *the Employment Equity Amendment Act 2013* (No.47 of 2013) (EEAA), as well as a new statute, *the Employment Services Act 2014* (No.4 of 2014) (ESA).

In general, *the Labour Relations Amendment Act 2014* (No. 6 2014) (LRAA) places additional duties on temporary employment agencies as employers, with the aim of protecting these workers from possible exploitation. In addition, the relationship between the TES, the worker and the client were substantially amended by the LRAA with the introduction of section 198A. This new amended legislation will be discussed in detail in chapter five.

3.4. Conclusion

This chapter provided a brief description of the historical, political and legal context of South African TES work. What was highlighted was that TES work has a contentious history exacerbated by the inequalities of the apartheid era. The dramatic changes in the South African political economy that coincided with the transition to democracy led to the rapid expansion and growth of the newly emergent black unions (Paret, 2016). However, this period also saw a simultaneous rise in urbanisation, unemployment and declining wages that fuelled the informalisation of employment (Paret, 2016). TES workers for most of South Africa's recent past, have not had the same employment security or pay afforded to other workers (Theron, 2005; Dickson, 2015). There has been heated debate about how this problem should be resolved and after years of delay, new legislation aims to curb these abuses. The chapter focused on the development of the legal framework affecting TES workers at different points in South Africa's history, including the new legislation that promised reform to the industry.

As mentioned in the introduction to this chapter, this chapter is different to chapter five (*The legal framework*) in two respects. Firstly, it only contained background and contextual information, with no empirical evidence. Secondly, although the chapter dealt with the South African TES legal framework, it does so from a purely historical point of view up to 2010. Chapter five deals with the current legal framework. Although chapter five includes some background information to assist in the fluid reading of the text, it is essentially a 'findings' chapter. Chapter five contains empirical evidence in the form of participants' quotes, together with tables and explanations for the TES specific legislation that was introduced during 2014/15. Chapter five is therefore placed after the literature review and methodology sections, alongside other findings chapters.

CHAPTER 4: METHODOLOGY

4.1. Introduction

The purpose of this chapter is to describe and justify the choice of research design and methodology for the doctoral thesis. This is a qualitative study with the primary data obtained from interviews and secondary documentation. The research aimed to combine these data from different sources, with the main unit of analysis being temporary agency or temporary employment services (TES) work in South Africa. More specifically, the research aimed to answer the following research questions:

1. What is the current position and perspectives of the temporary agency worker, firm and client in South Africa?
2. What is the regulatory framework for temporary agency work in South Africa and the response of key groups to this framework? and
3. How is temporary agency work influenced by trade union responses?

The chapter sets out the choice of the methods used and details the practical difficulties encountered in researching this area. Included is an outline of the chosen research design, tools and fieldwork employed for the thesis. The chapter first discusses philosophical issues, specifically questions of ontology and epistemology regarding the research topic**.** Next, the key components, advantages and disadvantages of a case study design are detailed, together with an alternate research design that was considered. Other relevant research projects that utilised a case study design are tabled and compared to this research. The techniques used for data collection and data analysis were discussed thereafter. Finally, the chapter sets out considerations of ethics and limitations, and concludes with a summary of the research design choices made.

4.2. Ontological and epistemological standpoint

Philosophical ideas influence the practice of research and need to be identified by the researcher (Creswell, 2009) as they help explain why certain strategies of inquiry and research methods are chosen. The philosophical world view, the strategies of enquiry and research methods, are therefore all interconnected and inform the research design (Creswell, 2009).

The methodological framework of the research will be informed by 'critical realism' (Robson, 2002; Bhaskar, 1978), a philosophical approach that recognises reality as something that exists independently of those who observe it but that is only accessible through the perceptions and interpretations of individuals (Ritchie *et al*, 2014). Critical realism recognises the fundamental importance of participants' own interpretations of the issues researched and highlights that their different vantage points will result in different types of understanding. The belief is that external reality is diverse and multifaceted, and it is the aim of the researcher to capture that reality in all its complexity and depth (Ritchie et al, 2014).

Critical realism has a stratified rather than a flat ontology and the strata are: the empirical, the actual and the real. The empirical domain is where observations are made and experienced by observers. However, events occur in the actual domain that may not be observed or may be observed differently by different observers (Easton, 2010). A process of interpretation between the domains is needed since establishing the 'truth' about a situation may often be challenging and complex. Since there is no way of judging the 'truth', critical realism relies on the researcher to collect further data that help distinguish among alternative explanations and contributes to debate in the community of researchers. Criticality becomes essential as only by the same data being seen through different theoretical lenses, employed by different researchers, can understanding of some of the real world occur (Easton, 2010).

The fundamental tenet of critical realism is that the researcher can use causal language to describe the world (Easton, 2010). With regard to the nature of the research question, critical realism stipulates that the question must be in the form of 'what caused the events associated with the phenomenon to occur?' (Bolin *et al*, 2013). A critical realist approach is well suited to the study of clearly bounded, complex phenomena such as organisations, inter-organisational relationships or nets of organisations and is therefore appropriate for case study research. It justifies the study of any situation, regardless of the research units involved, but only if the process involves thoughtful, in-depth research where the objective is to understand 'why things are as they are' (Easton, 2010, p. 119).

4.3. The central features of a case study

Case studies are best suited for questions that ask 'how' and 'why' (Stake, 1995; Yin 2014; Boblin *et al*, 2013).

> A case study investigates a contemporary phenomenon (the 'case') in its real-world context, especially when the boundaries between the phenomenon and context may not be clearly evident (Yin, 2014, p. 2).

However, Haunschild and Eikhof (2009) state that a contemporary phenomenon within its real-life context can also be studied by, or be the result of, other qualitative research approaches that do not follow a case-study approach. They suggest that a more convincing characterisation of case study research is that it investigates

> A unique and defined social entity as unit of analysis, e.g. an individual, an organization, an industry or an event…A case study is then defined by what is studied and not by how a phenomenon is studied (Haunschild and Eikhof, 2009, p110)

Helen Simons (2009, p. 21) defines a case study as:

> An in-depth exploration from multiple perspectives of the complexity and uniqueness of a particular project, policy, institution, programme or system in a 'real life' context. It is research-based, inclusive of different methods and is evidence led. The primary purpose is to generate in-depth understanding of a specific topic (as in a thesis), programme, policy, institution or system to generate knowledge and/or inform policy development, professional practice and civil or community action.

Stake (1995, p.xi) states that a case study is

> The study of the particularity and complexity of a single case, coming to understand its activity within important circumstances.

What unites both the Simons (2009) and Stake (1995) definitions, is the commitment to studying complexity in a real-life situation and that they do not define the case study in terms of the methods used (Simons, 2009; Thomas, 2016). One of the main features of a case study inquiry is that it relies on multiple sources of evidence, with data converging in a triangulating fashion (Yin, 2014). A further distinguishing feature of the case study approach is the prominence placed on the what is 'in' and 'out' of 'the case', in other words, the boundaries are kept in focus (Stake, 2000).

Case studies do not emphasise a method or a set of procedures, it is rather a focus (Thomas, 2016). Within the design frame, a variety of methods may be used to answer the questions. As

Thomas (2016, p. 38) states, the case study is 'generous in its affection for methods - observation, diaries, questionnaires, tests, statistics, interviews, whatever… the options are limitless'. With different elements of the case study, the researcher may use other design frames under the umbrella of the case study (frames within frames) (Ibid, 2016).

4.4. Case study approach and its suitability for the research

4.4.1. The alternate research designs considered

In deciding on the appropriate research design for the research, two options were considered, the social survey and the case study design.

Most social surveys gather only a relatively small amount of detail from each case, whereas during a case study, large amounts of data are collected about one case, across a wide range of dimensions (Hammersley and Gomm, 2000). The kind of data collected in a case study are frequently, but not always, unstructured data and the case study involves qualitative analysis of those data. This has implications for the purpose of the research as it is argued that the case study's aim is to capture cases in their uniqueness, rather than to use them as a basis for wider generalisations or for theoretical inference of some kind (Hammersley and Gomm, 2000). This aim often requires a narrative approach rather than one framed in terms of variable analysis (Hammersley and Gomm, 2000, p. 3). Table 8 sets out a comparison of the case study and the survey research approach as outlined by Hammersley and Gomm (2000). These differences were taken into account when deciding on the design for the research.

Table 8*: A comparison of the case study approach with the survey approach*

	Case study	**Survey**
Investigates:	One case or a small number of cases	A relatively large number of cases
Data collected and analysed about:	A large number of features of each case	A small number of features of each case
Study of:	Naturally occurring cases where the aim is not to control variables	Naturally occurring cases selected to maximise the sample's representativeness of a wider population is a priority
Quantification of data:	Is not a priority	Is a priority

Using:	Many methods and sources of data	One method
Aiming to:	Look at relationships and processes	Look at generalisation

Source: Hammersley and Gomm, (2000) as adapted by Thomas, (2016)

The survey design was considered as an option for the research as it has been used in other temporary agency work research (Forde, 2001; Forde and Slater, 2005; Hoque and Kirtkpatrick, 2003; Lui, Wu and Hu, 2010; Kalleberg, 2010). While surveys can describe institutions and structures, it is challenging to investigate social processes using surveys (Gamwell, 2008; Kelly, 1998). This thesis aimed to describe and explain the complexity of TES work in South Africa as experienced by trade unions, TES firms, TES workers and TES clients, and influenced by the driving economic trends, the historical and political context, and the legal framework. Social phenomena were investigated, which made qualitative methods, within a case study research design, ideally suited (Gamwell, 2008). The research questions required an in-depth, qualitative approach as they are explorative in nature (Yin, 1994; Gamwell, 2008). In addition, the research themes needed to be understood within a wider context, making the case study the perfect approach (Kitay and Callus, 1998). The case study represents the most appropriate means of examining how events unfold; exploring causal relationships; researching motives; power relations; processes that involve understanding complex social interactions; strategies; dynamics and the realities of the case, all of which were important for the current research (Perrett, 2007; Kitay and Callus, 1998).

4.4.2. Other relevant research projects that utilised a case study design

A case study research design has been used in research projects concerning aspects of temporary agency working in different country settings. A selection of these research projects and their relevance to the research conducted for this thesis, are set out in Table 9 below.

***Table 9**: Examples of research projects that used a case study design, and their relevance*

Researcher/s	Study Focus	Type of research conducted	Relevance
Mitlacher (2007)	Why companies deploy temporary agency work. Case study evidence collected in Germany and the USA.	Explorative, qualitative study intended to identify the factors influencing the utilisation of agency work. Five German and five American companies were studied.	• Temporary agency workers in a country context. • Regulatory framework of the country settings assessed.
Heery (2004)	Analysis of the reaction of British unions to agency work. Four main responses identified: exclusion, replacement, regulation and engagement.	A case study of the Transport and General Workers' Union's policies was developed. In addition, a second pair of case studies was developed in further education and another in the healthcare sector.	• The evolution of union policy on agency work overtime. • Union responses to agency work. • Evaluation of union policies.
Pulignano and Doerflinger, (2013)	Trade union influence on temporary agency work in four Belgian and German workplaces.	A comparative case study analysis of four workplaces: American multinational companies operating in the automotive sector, located in Belgium and Germany.	• The role of trade unions with regard to temporary agency work. • Temporary agency work in a country context. • Regulatory framework of the country settings assessed.
Knox (2010)	Temporary agency work in the Australian hotel industry.	A case study involving qualitative methods, at four hotel sites in Sydney Australia.	• Temporary agency work in a country context. • Regulatory framework of the country settings assessed.
Håkansson and Isidorsson (2012)	Work organisational dynamics in workplaces using temporary agency workers.	Multiple case study methodology based on ten Swedish cases. Eight of the cases were in the private sector and two in the public sector.	• Temporary agency work in a country context. • Labour market trends and theories assessed. • Regulatory framework

			of the country settings assessed
Mitlacher *et al* (2014)	Temporary agency work and workers in Germany and Singapore.	Germany and Singapore were selected as case studies. The institutional foundations and forces that shape the position of agency workers in Singaporean and German systems of employment relations were compared.	• Temporary agency work in a country context. • The development and characteristics of agency work in both countries were discussed. • Union representation of temporary agency workers. • Union responses to temporary agency work assessed

Source: studies identified from social science research databases

4.4.3. The advantages of a case study design

Certain advantages of case study designs are relevant to this research. These are that case studies allow for:

- Small scale research through concentrating efforts on one or a few research sites (Denscombe, 2014);
- A focus on a particular instance, which allows the researcher to adopt a holistic view and to look in depth at the subtleties and intricacies of a phenomenon (Denscombe, 2014);
- The use of a variety of research methods and multiple sources of data are encouraged (Denscombe, 2014). Yin (2014) states that this is a unique strength of the case study approach, the ability to deal with a variety of evidence, such as, documents, artifacts and interviews. Multiple sources of data enable the most accurate understanding or interpretation to be developed. Data such as documents and other evidence provided by the participants also have the advantage of not being created as a result of the research and may broaden the coverage of the research in terms of their detail, time span and setting (Yin, 1994, p. 80).

- Studies that are concerned with investigating phenomenon as they naturally occur and where there is no need for the researcher to impose controls or implement changes to key factors or variables (Denscombe, 2014);
- The researcher to tease out and disentangle a complex set of factors and relationships, even though it is done in a single or a small set of circumstances (Easton, 2010). This is an iterative process of data collection and analysis that '…implies a continuous moving back and forth between the diverse stages of the research project' (Verschuren, 2003). The flexibility that case study research provides is not shared by the survey-based methods (Easton, 2010).

4.4.4. The disadvantages and limitations of a case study design

One of the concerns is the apparent inability to generalise from case study findings.[51] Yin (2014) states that case studies are generalisable to theoretical propositions and not to populations or universes. In this sense, the case study does not represent a 'sample' and in doing a case study, the goal is not to extrapolate probabilities (statistical generalisations) (Yin, 2014). Stake's (2000) view is that case studies are epistemologically in harmony with the reader's experience and therefore, to that person, a natural basis for generalisation. He argues that knowledge from case study research is a form of generalisation, not scientific induction but 'naturalistic generalisation' (Stake, 2000, p.22).[52] Naturalistic generalisations are not predictions, but expectations; particularisation more than generalisation and the power of attention to the local situation, not in how it represents other cases in general (Stake, 2005).[53]

A frequent concern about case study research is that it potentially takes too long and can produce massive, unreadable documents (Yin, 2014). Case studies are often incorrectly confused with ethnography or participant-observation; both methods require lengthy periods of time to complete. However, the case study need not rely solely on these two forms of data collection,

[51] See paragraph 4.9 for a further discussion on generalising from case study research.
[52] A naturalistic case study constitutes the science of the particular. The aim of naturalistic case study is to understand with minimum intervention the particularity of a case in its ordinary situation from multiple perspectives (Tineke and Stake, 2014).
[53] Tineke and Stake (2014, p.1152) explain this generalisation as: 'issues at the case level sometimes lead to the improvement of generalizations, particularly when rooted in a situation of stress, teasing out more of the complexity'. They speak of the 'vicarious experience' when those reading the case translate the experience from the case studied to their own context.

depending on the topic that is chosen (Yin, 2014). This research did not adopt either of these data collection strategies.

The boundaries of the case study may be difficult to define in an absolute and clear-cut fashion. This may cause difficulties when deciding what sources of data to incorporate and which to exclude (Denscombe, 2014). The boundaries of this case study are further discussed in section 4.4.5.1. below.

Denscombe (2014) warns that gaining access to case study settings can be a demanding aspect of the case study process and that the research may flounder if permission is withheld or withdrawn. In addition, access to documents, people and settings can generate ethical problems in terms of confidentiality (Denscombe, 2014). The difficulties experienced in this research with regard to accessing TES employees are detailed in section 4.9 below.

4.4.5. Type of case study

4.4.5.1. The case study unit of analysis and focus

Unlike other research methods, a comprehensive and standard catalogue of research designs for case study research has yet to emerge and case study designs have not been codified (Yin, 2014). Yin (1994) suggests that there are five main components of a case study design. These are the study's questions, its propositions, its unit of analysis, the logic linking the data to the propositions and the criteria for interpreting findings.

The boundaries that define the case include the unit of analysis on which the case will be based. Gerring (2004) supports the idea that a 'nation state' can be the unit of analysis for a case study:

> A unit connotes a spatially bounded phenomenon, for example, a nation-state, revolution, political party, election, or person - observed at a single point in time or over some delimited period of time (Gerring, 2004, p. 342).

Taking Gerring's views into account, TES work within the boundaries of South Africa formed the unit of analysis of this study, with the beginning and the end of the case defined as the eight-month period during which the data collection took place.[54] However, defining the boundaries of the unit of analysis does not artificially limit the study as one of the key features of case study

[54] Fieldwork was undertaken from 13 June 2017 (the first interview) to 15 February 2018 (the final interview).

research is the ability to explore the relationship between the unit and the wider environment (Kitay and Lansbury 1997).

4.4.5.2. The case study subject, purpose and approach

Writers on case studies explain that there are many different types of case studies, with important distinctions arising from the particular subject and purpose of the research in question, namely exploratory, descriptive or explanatory (Yin, 1994). The type of case study affects the focus of the research questions and the degree to which the aim of the case study was to analyse particular, unique circumstances or to focus on generalisation (Cassell and Symon, 2004). Thomas (2016, pp. 98-99) sets out different types of case studies as depicted in Table 10 below.

***Table 10**: The different kinds of case studies*

Subject	**Purpose**	**Approach**	**Process**
Special or outlier case Key case Local knowledge case	Intrinsic Instrumental Evaluative Explanatory Exploratory	Testing a theory Building a theory Drawing a picture, illustrative Descriptive Interpretive Experimental	Single or multiple: - Nested - Parallel - Sequential - Retrospective - Snapshot - Diachronic

Source: Thomas, 2016, p. 114

Having regard to Table 10 above, the *subject* of this research is a local knowledge case, which Thomas (2016) states is an example of something in the researcher's personal experience. The *purpose* and *approach* of the research will be to conduct an exploratory/descriptive case as more needs to be known about agency work in South Africa, i.e. 'what is happening and why?' (Thomas, 2016, p. 126). The principal purpose of the exploratory case study is to establish the

'shape' of the problem or issue (Thomas, 2016, p. 132). In this regard, Gerring (2004, p. 345) states that case studies often 'tackle subjects about which little is previously known or about which existing knowledge is fundamentally flawed'. The exploratory case explores the key issues affecting those in the case study setting, for example, problems and opportunities (Denscombe, 2014). The descriptive approach may 'help to identify the appropriate explanation to be analyzed' (Yin, 2014, p.140). Gerring (2004, p. 347) states that 'there is a methodological affinity between descriptive inference and case study work'. When a phenomenon is described, it is usually being compared to an ideal type definition (Gering, 2004). To describe it is to categorise, and to categorise is to rely on language to divide up the world into identifiable entities (Gerring, 2004). The research design used was therefore an explorative qualitative study, intended to identify the current views (client, firm, worker and union) of agency work in South Africa, within the historical and political context, regulatory framework and current economic trends.

4.4.5.3. The case study design: single or multiple cases

Rose *et al* (2014), suggest that case selection involves two linked decisions: what cases and how many cases to study. A choice should be made between the two primary case study designs, namely, the single and the multiple case study design. Yin (2014) sets out a basic set of research principles for doing single and multiple case studies and provides four types of designs: the single-case holistic design; the single-case embedded design; the multiple-case holistic design and the multiple-case embedded design.

One of the more controversial decisions is whether a single case is sufficient. There are various objections that have been raised regarding a single case, such as, the representativeness of the chosen case; the vulnerability to confirmation bias; the difficulty in carrying out a comparative analysis (Rose *et al*, 2014); and the difficulty in achieving the level of understanding required by examiners for a doctorate degree (Remenyi, 2012). However, Remenyi, (2012) advises that if the production of an answer to the research question is only obtainable by means of a single case design, it may be acceptable. Similarly, Yin (2014, p.51), states that the single case study design is appropriate under certain circumstances and provides 'five single-case rationales' which are having a critical, unusual, common, revelatory or longitudinal case.

Having considered the possibility of the single-case holistic design; the single-case embedded design; the multiple-case holistic design and the multiple-case embedded design for the research, the single-case holistic design seemed the most appropriate. The reason for single-case holistic design being selected, was that there was a desire to understand one wholistic case being TES work in South Africa as a nation state. In addition, taking Yin's (2014) guidelines into account, the researcher knows of no research that has focused on TES work in South Africa from four different perspectives, namely the TES worker, firm, client and union, under the newly amended regulatory framework. In addition, senior legal, union and business professionals were interviewed as participants in order to ascertain the impact of the historical and political context, regulatory framework and economic trends on South African TES work. The case study is therefore the first of its kind, and thereby revelatory (Yin, 2014). Yin (2014) stated that a rationale for selecting a single case is that the researcher has access to a 'situation previously inaccessible to empirical study. The case study is therefore worth conducting because the descriptive information alone will be revelatory' (Yin 2014, p. 52).

4.5. Access and location

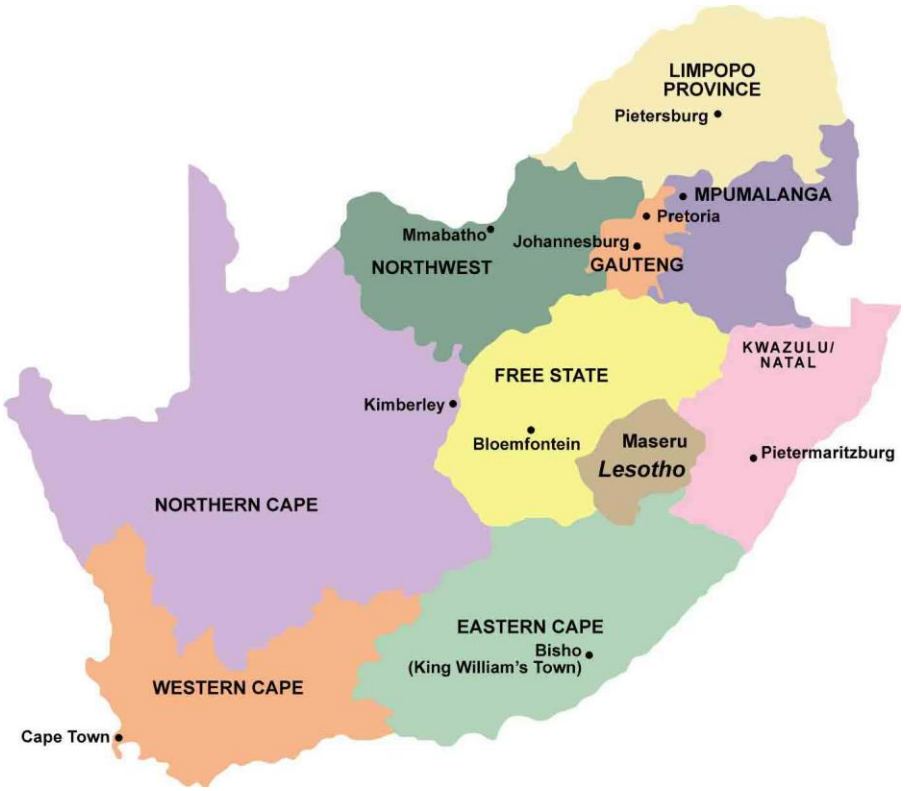
When considering the case study design, an important consideration is the adequate access to useful data through relevant and significant case study sites and participants, and this is often a major challenge (Remenyi, 2012). The researcher worked at the Parliament of South Africa in Cape Town for approximately three years and worked as an employment attorney in Johannesburg for approximately 15 years. This experience provided important access to a range of members of the South African legal profession and business environment for the purpose of the interviews.

This was a small-scale study and two primary locations in South Africa were initially identified for the research, Johannesburg and Cape Town. The researcher had lived in Johannesburg for 28 years and in Cape Town six years and was familiar with the surroundings, people and culture. Although most of the participants were located in these two areas, some of participants were from Pretoria in the Gauteng province (an approximate 40-minute drive from Johannesburg) and one was from the Eastern Cape.

These four locations were also informed by the researcher's access to participants who were willing to participate in the study. The decision to draw participants for the study from these

locations within South Africa was not motivated by the need for comparison and all data were treated as relating to the South African context as a whole. The locations of the participants are found on Figure 1.

***Figure 1**: Map of South Africa showing the four primary locations of the research*



4.6. Data collection techniques

4.6.1. Overview of data collected

The preparatory review of theory in the literature review provided an initial indication of the type of data to be collected (Ryan *et al*. 2002). In addition to exploratory research conducted from June 2017 to February 2018, the research draws upon secondary documents and the limited statistical data provided mostly by the participants.[55] In total, 34 in-depth telephonic interviews were conducted with 33 participants, representing a cross-section of participants in the TES industry. Interviews were primarily undertaken with participants at director level, and in some instances, management level. Some of the participants had represented either their union or

[55] See paragraph 6.2.1. for more details regarding the limited information available.

business at the National Economic Development and Labour Council (NEDLAC).[56] These participants included human resources (HR) professionals, union officials, business executives, legal professionals, government officials, a non-profit organisation director, senior employees at employer organisations, an international organisation director and a bargaining council manager. Participants all held positions that provided expertise and knowledge about the TES industry in South Africa.[57] English is widely spoken in South Africa and the interviews were all conducted in English.

In addition, secondary data were gathered that included corporate information published on websites, internal company documents, annual reports, statistical reports and information furnished by trade unions, and employers' associations. Informal records disclosed by the participants, data drawn from the International Labour Organisation (ILO), and the Organisation for Economic Cooperation and Development (OECD) country notes, were also viewed. South African Quarterly Labour Force Surveys from Statistics South Africa, South African news reports, and articles written by leading academics and attorneys were taken into consideration.

This study necessitated that the participants should have knowledge and experience of the study subject. Participants needed to be able to reflect on and discuss their experiences clearly and be willing to share them (Mollitt, 2006). The first two interviews were conducted with participants that the researcher knew from previous work experience and who had knowledge of the TES industry. These participants agreed to provide further names of individuals that they believed would be helpful and knowledgeable. In addition, the researcher telephonically contacted participants who she did not know personally, but knew were knowledgeable about TES matters, had written articles in the press, or who were named in articles relating to TES work, and/or who had specialised in employment related matters. Participants were therefore selected through a combination of purposive sampling as a result of their specific knowledge of the TES industry, and snowball sampling. Purposive or purposeful sampling selects participants on the basis of how useful they are for the pursuit of the inquiry and is a common sampling strategy in qualitative research (McEvoy and Richards, 2006). The idea is to select cases that will provide a

[56] NEDLAC is a representative and consensus-seeking statutory body established in law through the National Economic Development and Labour Council Act of 1994. It aims to facilitate sustainable economic growth, greater social equity at the workplace and in the communities, and to increase participation by all major stakeholders in economic decision-making at national, company and shop floor level.

[57] See appendix 1 for the generic details of the interview participants**.**

rich source of information relevant to the research (Patton, 1990). Snowball sampling uses connections between people that both includes and excludes individuals (Browne, 2005). It involves using contacts and informants to identify appropriate cases and is also referred to as a 'opportunistic' sampling, in that researchers take advantage of situations as they arise during the data collection phase of the research (Kemper *et al*., 2003, p. 283).

Some writers believe that the validity, understanding and insights gained from the data will depend more on data collection and analysis skills than with the size of the sample (Patton 2002; Saunders *et al* 2009). In addressing the issue of an appropriate sample size or 'sufficient' interviews, many research textbooks recommend continuing to collect qualitative data, such as by conducting additional interviews, until data saturation is reached. In other words, until the additional data collected provides few, if any, new insights (Saunders *et al* 2009, pp. 234-235). It was initially anticipated that there would be more than 34 interviews, but it became clear during the interview process that the same individuals were recommended for research by the participants and that a point of data saturation may have been reached within the professional TES community in South Africa. The sample size was also determined by the requirement to test understanding and add to the categories emerging from data analysis (Mollitt, 2006). After 34 interviews, there appeared to be no new categories emerging.

While not all participants approached agreed to participate, those that did participate provided information on the four areas of TES work, namely unions, TES firms, TES workers and TES clients. Initially, the participants were seen as key informers or gate keepers who may also have insight into the wider social, national and political context (Purcell, 2014). Whereas individual participants were seen as those that describe their personal feelings and opinions, key informants are more likely to provide information (Ibid, 2014). However, very early on during the interview process it became clear that the line between key informers and participants became blurred and that the 'key informers' possessed in-depth knowledge of the TES industry and were able to assist in providing information that informed the research. All interviews lasted approximately 45 minutes. Each participant was informed verbally and in writing prior to the interview that the interview would be recorded, and all participants consented to the recording. Data was recorded by note taking and electronic recording, and in all cases, the whole interview recording was transcribed.

The transcribed interviews formed two volumes, with page and paragraph numbers for reference purposes. In total, the two volumes consist of 585 pages of transcribed interviews. The transcribed interviews were not sent to the participants to verify as this had not been the agreement with the participants prior to the interview. The researcher was mindful of the participants' time, especially since many of the legal participants 'sell' time and may have been reluctant to participate if they thought their involvement would be a protracted affair where they were required to check transcripts. Although presenting the transcribed interviews back to the participants to confirm their content can avoid some misinterpretation and is useful as a form of triangulation, it was not possible in this study. However, case study interview data can be rigorously triangulated with information obtained from other sources, which was the case here (Mollitt, 2006).

4.6.2. Interviews

The research questions were suited to in depth, qualitative study as they were detailed and exploratory in nature (Yin, 1994). Qualitative, semi-structured interviews were therefore considered suitable for the research. The reason for this choice was that the semi-structured interview allows for predetermined questions but allows the interviewer the discretion of adding or omitting questions and probing interesting responses (Robson, 2002). The advantages of the interview are numerous: they provide opportunities to clarify misunderstandings, allow probing questions, and create a rapport and trust between the researcher and research subject (Robson, 2002; Gamwell, 2008).

Although a persistent line of enquiry was followed, the actual stream of questions was fluid rather than rigid (Rubin and Rubin, 2011; Yin, 2014). More specifically, the interviews followed a guided conversation approach, facilitated by a checklist of topics and questions to be covered. This broad checklist of topics was sent to each participant prior to the interview as part of the invitation letter.[58] This letter reflected the purpose of the interviews by providing relevant contextual information and provided an outline for the interviews. This approach acknowledged the need to explore the participants' specialised knowledge, while focusing on specific aspects of that knowledge. The specific application of this approach differed slightly according to the type

[58] Appendix 2 contains an example of the invitation letter sent to the participants. Two versions of the letter are attached as they were slightly different for union participants.

and purpose of the interview and the specific expertise of the participant. For example, the focus was slightly different for lawyers, union officials or industry specialists. It was expected that unanticipated themes would emerge from the interviews, so the questions were initially relatively broad so as not to restrict interviews by ascribing too many predetermined categories to the interview schedule (Patton, 1990). The aim was to draw out a range of relevant themes, including unexpected ones (Bauer and Gaskell, 2000).

All the participants were invited to participate in the interview process in writing, through email. Some of them were contacted telephonically before the interview invitation was sent and others were sent invitations without a prior telephone conversation. Some participants had no contact details other than email addresses and could therefore not be contacted telephonically prior to the written invitation. Where possible, telephonic contact was made prior to the written invitation to explain the research and to ensure that the contact information was correct. On occasion, discussions with the participants' administrative staff would precede the written invitation. The idea was to ensure the best possible means of communication for the participant and the logistics of the telephone call. Appendix 1 sets out the generic details of the 33 interview participants.

4.6.3. Documentation

Documentary evidence is likely to be relevant for every case study and should be the object of explicit data collection plans (Yin, 2014). Documents may also be used for contextual information about events that cannot be directly observed, or to question information from other sources (Stake, 1995; Boblin *et al* 2013). News clippings and other articles appearing in mass media or in community newspapers may provide a source of information for the case study (Yin, 2014). These add value to the case study making it more 'readable' and 'well documented' (Yin, 2014, p.108). It would however be important not to over rely on documentary evidence in a case study (Yin, 2014). Similarly, to take cognisence of the fact that documents were created for a purpose other than for a case study and the case study researcher is therefore a 'vicarious observer' (Yin, 2014, p. 108).

A variety of documents were collected to supplement the interview data, these included unpublished information such as court documents that were drafted by the participants but the matter never proceeded to trial; presentations, for example some participants had conducted training sessions and had provided their power point presentation slides; a report of a NEDLAC

meeting that a participant had attended; and examples of two TES worker agreements. Some documents were provided for background purposes with the agreement that they would not be made publicly available, other data were simply unpublished. Many of the documents were sent to the researcher after the interview was conducted. The process typically involved the researcher making a list of the documents or material referred to during the interview, a verbal request made for the documents at the end of the interview and a follow-up letter to the participant listing and requesting the required documents. On most occasions the participants were reluctant to provide details or documentation regarding the size of their organisations. Participants were also not able to provide confidential legal documents or employment / HR related documentation. The legal participants were bound by legal confidentiality rules and were unable to provide details concerning their clients. Throughout the thesis, the researcher was careful not to reveal information that could lead to the disclosure of the organisation or participant's identity.

4.6.4. Legal aspects of the research

It was essential for this thesis for the researcher to engage with legal aspects of temporary employment work. This took the form of detailed analysis of the constitutional and legislative frameworks around temporary employment in South Africa as well as the various amendments and case law developments regarding the latter. South African sources and provisions were also considered against the context of relevant International Labour Organisation Conventions and resolutions. In addition, a comparative perspective was provided by means of an outline and analysis of European Union and United Kingdom regulations on temporary agency work.

Conventional literature review sources and techniques were adopted to this end. It was necessary to obtain and analyse the primary text and subsequent amendments of legislative instruments which was possible using official government sources and legal databases. The latter were also used to search for case law updates and commentaries. Desk based research also enabled the views of leading South African constitutional and labour law scholars to be drawn on.

Uniquely and importantly this research adds to applied knowledge in terms of the legal aspects as attorneys and other legally trained individuals such as acting labour court judges and union officials were interviewed. These participants added depth of understanding in that they spoke of their personal views and the problems experienced in practically applying and understanding the legal framework.

As stated in the Introduction, Chapter 1 of this thesis, the research was conducted during a period of legal uncertainty, shortly after the introduction of new legislative amendments to the legal framework pertaining to TES work. During the research, the *Assign* matter was heard by the Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court and Labour Appeal Court and finally the Constitutional Court in South Africa. The outcome of this matter impacted upon the rights and responsibilities TES workers, firms, clients, and unions. The researcher was required to keep abreast of the outcome of this matter and subsequent court matters relating to TES work. Two of the participants, employment attorneys, provided the researcher with updates and alerts regarding the matter. In addition, the researcher created her own alerts in the South African online press to receive any news relating to the changes to the TES industry. As a supplement to any academic articles and textbooks that dealt with the changes to the TES industry, the researcher searched the online resources provided by legal firms with a reputation for providing excellent labour law advice. These legal firms often publish newsletters and information brochures for their clients that alert them to changes in legislation. It was important to keep abreast of the changes in 'real time' which is not always possible with academic articles and textbooks. These resources described in this paragraph were all collated, and where possible, the researcher drafted tables to explain the new legal position pertaining to TES work in South Africa.

In summary, it was necessary to adopt multiple data collection methods in parallel, with the fact that many high level legal practitioners were recruited as research participants being of great benefit to understanding the legal aspects of temporary employment in South Africa.

4.6.5. Data triangulation

A major strength in case study research is the opportunity to use many different resources or sources of evidence (Yin, 2014). Using multiple sources of information is often described as 'triangulation' (Boblin *et al*, 2013). The use of multiple sources of evidence allows for a broader range of historical and behavioural issues to be considered, however its most important advantage is the development of 'converging lines of inquiry' (Yin, 2014, p. 120). If the data is truly triangulated, the case study's findings will have been supported by more than a single source of evidence. In developing divergent evidence, data triangulation helps to strengthen the construct validity of the case. Multiple sources of evidence in effect provide multiple measures

of the same phenomenon and will increase confidence that the case study rendered the event accurately (Yin, 2014).

Multiple sources of evidence were used within the broad case study approach. The documentation provided by the participants, secondary data such as media articles, industry studies and reports, were all used as an additional source of information and as a benchmark for the findings from the participant interviews. Another frequently used method for triangulation is referred to as informant triangulation. The researcher obtains evidence from a number of different participants and in this way obtains the views of different people, who all have their individual perceptions of what has taken place (Remenyi, 2012). The 34 in-depth telephonic interviews were conducted in order to grasp the different perspectives of TES work in South Africa (union, firm, worker and client) and provided important information about the historical, social and legal context of TES work. The perspectives of these four different groups of participants were all taken into account to report or describe a topic or theme.

4.7. Data analysis

From an epistemological perspective, critical realism can be viewed as a philosophy of social science that informs the theory and method of social science rather than prescribing methods for analysing the social world (Yeung, 1997; Purcell, 2014). Although directing the researcher to seek out underlying structures and mechanisms that give rise to phenomena, as well as describing those phenomena, critical realism does not provide a methodological blueprint for research (Yeung, 1997; Purcell, 2014). For critical realism, methodological choices and strategy are determined by the nature of the research problem or issue to be addressed (McEvoy and Richards, 2006). The research strategy employed in this research was based upon the search for explanation through a deep understanding of the dimensions that constitute the phenomenon of agency work in South Africa (Purcell, 2014).

To this end, semi-structured or in-depth interviews were used to gather data, which was analysed qualitatively and used to understand the ‘what’, the ‘how’ and the ‘why’ of temporary agency working in South Africa (Saunders *et al* 2009). Three ‘concurrent flows of activity’ were adopted for the qualitative data analysis: data reduction, data display and conclusion-drawing/verification (Miles and Huberman,1984, p.23). Data reduction refers to the process of

selecting, focusing, simplifying, abstracting, and transforming raw data throughout the process of a qualitative project (Miles and Huberman,1984). Methods of data collection and data analysis were not mutually exclusive as the two processes overlapped and occurred simultaneously, in a process of 'explanation building' (Yin 1994). This simultaneous process occurred early on, for instance at the point where the questions for the participants were developed for the interviews. Questions were examined and modified based on subsequent findings (Mollitt, 2006). For example, the answers provided by one participant would be analysed and modified for subsequent participants. The reason being that participants would mention information that the researcher had not considered and that would then become part of the questions for following interviews.

During the interview process, ideas and impressions were recorded as soon as they occurred (Voss *et al*, 2002). Handwritten notes were made in a notebook during and directly after the interviews. The note taking consisted of writing down the main points of interest and possible documents that could be requested, while the participant was speaking. In addition, the researcher made notes of questions that could be asked at the end of the interview to clarify certain points. Once the fieldwork was conducted during 2017 and 2018[59], the interviews were transcribed in full and placed in chronological order and each page was numbered. There were two volumes of interview material (collectively 586 pages referred to as the 'Interview Volumes'), making data reduction imperative.

The first stage of the analysis involved the identification of relevant themes. Possible themes were considered early in the research process, even prior to formal data analysis, as the researcher was sensitive to the emergence of patterns observed during the fieldwork (Voss *et al*, 2002). In addition, the engagement with relevant literature allowed for the development of initial themes on South African temporary agency work. These initial themes developed during the fieldwork and the literature, were further developed through a first reading of the transcribed data before the data were coded (Prosser, 2016). Themes were therefore identified in three ways, firstly through intuitively deciding what may be important for the thesis (in the initial stages during the interviews), themes that emerged from the literature review and themes that emerged from reading the interview transcripts. All these themes had to be relevant to the research

[59] See appendix 1 for a list and identifiers of interviewees.

questions and all the research questions had to be dealt with. The overall aim was to draw out a range of relevant themes, including unexpected ones (Bauer and Gaskell, 2000). To allow unanticipated themes to emerge from the interviews, the researcher did not restrict interviews by ascribing too many predetermined categories to the interview schedule (Patton, 1990).

The second stage of the analysis process was to construct a visual format that presented information systematically so that the researcher could draw valid conclusions (Voss *et al*, 2002). Broadly speaking, the 'framework' analytical method was used to provide a data summary or visual display and provide a data management process. The framework method's distinctive feature is that it forms thematic matrices, as every participant is allocated a row and each column denotes a theme. Data are then summarised by case and theme/subtheme and the summary entered in the appropriate cell (Ritchie et al, 2013). Many researchers have stressed the importance of coding to reduce data into categories and bring structure into the data (Vos *et al*, 2002, Miles and Huberman, 1984; Miles and Huberman, 1994; Glaser and Strauss, 1967; Haunschild and Eikhof, 2009). To populate the matrix, codes or labels were developed from the themes identified (Miles and Huberman 1994, 55-69; Bryman, 2004). The finalised list of codes that were developed from the themes/subthemes are set out in Table 10 below.

Table 11: *Final coding used for the framework Document*

Workers	**Firm**	**Client**	**Union**	**Legal**
Reasons for employment • Retirement • Tax rules • Flexibility • Unemployment • Lack skills • Steppingstone • Experience	Nature of firms • Structure • Statistics • growth	Reasons for engagement • Unions • Risks • BEE • Costs • Know-how • Admin/HR	Rights • Collective • Historical • Current • Majority • Agency shop	Legal framework • Historical • Threshold earnings • Employment relationship • Deeming provision • Equality • Registration • Joint liability
Controversy • Worker experience • Abuse	Controversy • Historical • Political • Abuse • Reputation	Controversy • Casualisation • Abuse • Historical • Fees	Controversy • Banning • Corrupt • Political • Historical	

			• Fees	
Context • Unemployment • No social security • Minimum wage	Context • Youth based • Demographics • Tax structure	Context • Economy • History • unemployed	Context • History • Laws • Politics	Context • ILO • Constitution
Enforcement • Problems			Enforcement • Problems	Enforcement • Problems • ILO
	Responses • New laws • Contractors • Consolidate • High earners	Responses • New laws • contractors	Responses • Historical • New laws • organising	Responses • Prior 2015 • After 2015
Exploitation • Historical • Current	Exploitation • Historical • Current	Exploitation • Historical • Current	Exploitation • Response	
			Alternatives to unions	Interpretation /implementation • Difficulties • LRA s197 • LRA s189 • Dismissals
				ILO • History • Legalities • Conventions • Decent work

The third stage of the analysis process involved the manual coding of the interview transcripts. All the transcripts were read and coded using an initial list of codes. Codes were often combined, changed, or divided into sub-codes during this stage until the final codes as set out in table 10 were developed. Thereafter, the coded information was extracted by a manual system of cut and paste into the framework chart or matrix. Each column of the framework chart contained the data relevant to a certain code or theme, each row contained a summary of the data relevant to an interview participant, for example interview 1, interview 2 and so on. The aim was to create a useful resource to use for the analysis process, while retaining the integrity of what each person

said. However, early in the process of creating this tabular framework chart, it became unmanageable due to the sheer volume of relevant data and the many themes that emerged from the data.

The fourth stage in the analysis process involved changing the format of the visual presentation (the tabular framework chart/matrix) to a more user-friendly Word document (called the Framework Document[60] for purposes of this thesis). It was decided to take each theme (column) and place it in a Word document with a heading for that theme. The rows were replaced by inserting an exact reference after the quotation for example, 'Int. 1. Par. 2 pp.63-64' (the row). In other words, the identity of each person could still be traced back to the interview transcript so that the words could be located in context, or a simple word search could be conducted for 'Int.1' to show what that participant had stated within the theme. So, the reference replaced the row and the headings and sub-headings replaced the columns, but the information remined the same. The result was a user-friendly Word document with headings and sub-headings that depicted the themes and sub-themes that came from the framework columns. The net result of this change of format, was a document consisting of a summary of all the data relevant to the themes or sub-themes, and ultimately to the research questions, that could be tied back to the relevant person or interview. This Word document (reconfigured from the traditional framework document) effectively 'displayed' the important themes of the 586 pages of data in a manageable format. The Framework Document and the contents page of this document (that sets out the final themes and subthemes) is attached as appendix 4.

The fifth stage of the analysis process involved the population of the Framework Document by meticulously going through all the interviews and copying and pasting the relevant coded interview material and placing each quotation under a heading in the Framework Document. Some of this work had been completed in the third stage before the framework chart became unmanageable. Stage five therefore involved transferring the information from the chart to the Framework Document and continuing to populate the Framework Document with material that had not been covered in stage three. A quotation from a participant was often placed under more

[60] The term 'Framework Document' is not an official term and is a name used in this thesis to describe the visual aid developed using the framework method. It is a name given to distinguish the Word formatted document from the tabular framework chart that was originally created but became unmanageable. The name 'Framework Document' was chosen as it was created with the framework method in mind.

than one heading in the Framework Document. While populating the Framework Document the researcher remained reflective, considered the broader context of the interviews, and looked for new themes that would adequately answer the research questions. In addition, the researcher underlined and highlighted important sentences in the Framework Document. A 413-page Framework Document with headings, relevant quotations placed under the headings, together with related references to the interview. This visual format (Voss *et al*, 2002) or Framework Document was used throughout the drafting of the findings. Please see appendix 5 for an extract of the Framework Document, that provides an example of a theme (or column in the traditional framework system).

Once the visual format was complete, the researcher began looking for causality and patterns as the sixth stage of the process (Voss *et al*, 2002). This involved looking for both patterns and exceptions to patterns in the data (Eisenhardt, 1989; Voss *et al*, 2002). Essentially, interview data were analysed using an inductive, thematic approach, in which key themes were identified from the data. These primary data were supplemented with background data, gathered from publicly available sources, and from documentary evidence provided by the participants. In addition, the researcher looked at how themes could be grouped and combined to facilitate the coding process. Finding patterns in the data was achieved by comparing each incident with previous incidents in the same theme (the columns) and across different interviews (rows). It also involved word searches in the Framework Document. This is referred to as the 'constant comparative method':

> The simple principle of going through data again and again (this is the constant bit), comparing each element - phrase, sentence or paragraph - with all other elements (this is the comparative bit) (Thomas, 2016, p.204).

By continually comparing specific incidents in the data, the researcher refined the concepts, identified properties, and explored the relationships between them, formulating a coherent explanatory model (Taylor and Bogdan, 1984). Yin (2014) suggests that the analysis should show that all the evidence has been attended to; all plausible rival interpretations should be addressed; the most significant aspect of the case study should be considered; and the researcher should use their own prior expert knowledge in the case study to demonstrate awareness of current thinking about the topic (Yin, 2014).

The analysis process included close attention to the actual words spoken by the participants. Sense had to be made of any contradictions in the data, and any opposing views needed to be portrayed. For example, views from union participants and TES firm participants relating to TES work and especially in relation to how they viewed TES worker experiences, were often contradictory. Special attention was paid not only to what participants said, but what they were reluctant to speak about. For example, TES firm participants were hesitant to provide statistics relating to TES work, they were also unwilling to provide contact with TES workers for the purpose of the study. How participants defined certain terms was of interest, for example their definitions of 'decent work' depended on whether they were from a TES firm or a union and these varied considerable. The researcher was careful to pay attention to the actual words of the participants to ensure that the research was empirically derived. As far as possible, the researcher attempted to portray different views of TES work, from a worker, firm, client, and union perspective for each theme. Similarly, it was important to relate these views to both theory and the research questions.

To ensure that all the data was included the researcher read the transcripts three times. When the Framework Document was compiled, the transcripts were considered on a line by line basis, each sentence considered to ascertain whether that sentence or paragraph could be relevant for a theme identified, or if it may be relevant for more than one theme. As the Framework Document and the Interview Volumes were both Word documents, they could be crossed referenced using word searches. For example, one of the legal themes related to the parity provisions contained in Section 198A(5) of the LRA, which deals with the equality of treatment between TES workers and other workers. Firstly, the researcher manually added (cut and paste) every sentence relating to this theme contained in the Interview Volumes to the Framework Document under the theme entitled, section F '*The national legal framework for temporary agency workers*' sub-theme 6. '*Equal treatment' provisions'* (refer to the contents page for the Framework Document, Appendix 4). To double check that all possible information had been extracted from the Interview Volumes into the Framework document, a word search was done on the original Interview Volumes. So for this theme, words such as 'parity', 'equality', 'equal', 'the same', '198A(5)', 'fairness' were searched for in the Interview Volumes to ensure that oblique references to this theme were not missed in the original reading of the transcripts.

In terms of secondary documentation provided by the participants, such as employment agreements, case law and minutes of meetings, these were added to the thesis in a systematic way. All secondary documentation provided by the participants were sent electronically as there were no face-to-face meetings and participants were all in South Africa. This information was stored in an electronic file. Each interview participant (e.g. interview 1) had a separate electronic file with sub-files that contained secondary documentation pertaining to that participant. The transcribed information and the secondary information were read, re-read, and included for a certain theme. The researcher was familiar with all the material as the interviews were all conducted personally and most of the secondary documents was requested during the interviews. This actual verbal request for documentation was transcribed along with the other material for the interview and acted as a reminder and contained information important for a word search. A similar word search, as explained above, was conducted for the files that contained the secondary information to ensure that all information was included in the thesis.

4.7. Research ethics

Ethical issues were taken into consideration within the process of gaining access to individuals and no pressure was applied on intended participants to grant access. Full respect was given to the decision of intended participants not to take part in the research. All intended participants were provided with a date and time in writing as to when they would participate in the data collection process and the researcher contacted them telephonically at that time. The right of the participants not to answer any question was also respected. The right to anonymity and confidentiality were agreed between researcher and participant in a written document entitled '*Written consent to participate in a research study*'.[61] This document contained all the confidentiality provisions and was sent to each participant prior to the commencement of the interview. Informed consent was therefore obtained from all participants.

Most of the participants agreed to participate in the study on the conditions of confidentiality and anonymity. This promise was kept as the participants' names, gender and the names of the organisations they work for were not mentioned this thesis. Each participant was assigned an interview number and was described in terms of their profession, for example, 'a legal participant' and the organisation as 'a large TES firm'. The institutional ethical requirements of

[61] Please see appendix 3 for the details of the confidentiality agreement.

Kingston University were observed in this study. Please see appendix 6 for the 'Kingston University application form for ethical review (RE4) for research involving human participants.

4.8. Limitations

A common complaint about case study research is that it is difficult to generalise from one case to another. Yin (1994) argues that the problem lies with the very notion of genralising to other case studies. He suggests that researchers should generalise to theory the way a scientist generalises from experimental results to theory. In other words, the scientist does not attempt to find a 'representative' experiment, therefore a case study researcher should not attempt to find a 'representative' case study. What Yin (1994) is suggesting is that instead of reflecting the single experience of for example, the TES employee in Johannesburg, the study should incorporate broader theoretical issues such as the role of the TES worker, the role of decent work, the 'insider -outsider' concept in relation to TES work. Case study research can also extend existing theory by applying it to new situations or groups and investigating whether existing explanations provide an adequate account of the research findings (Gamwell, 2008).

The researcher planned to travel to South Africa during 2017 to interview participants. However, this was not possible as there were problems with renewing her South African passport. Due to time pressures and lack of resources, the researcher could not delay the research schedule for four months (this is the minimum time period required to renew a South African passport from the UK) and decided to conduct telephonic interviews with participants while waiting to travel. After conducting the first few telephonic interviews, the researcher realised that the participants preferred telephonic interviews as they were easier to schedule and could be fitted around their busy lives. For example, one participant was interviewed while travelling to the airport, another travelling to appear in court and another as he travelled to a client appointment. One participant was recuperating from an illness and was able to conduct the interview while at home. Similarly, another participant was only able to schedule a telephone call at home over the weekend due to their busy schedule. It was therefore decided to conduct all the interviews telephonically as the participants all had the necessary technology to conduct the interviews in this way, and due to their seniority in the business environment, were well versed with this approach. Due to this choice of interview style, direct observation was not possible. However, it was still possible to

sense emotions such as hesitation, reluctance, uncomfortable pauses, or nervousness from the sound of their voices and how they answered their questions.

Gaining access to agency workers to participate in the research was an important goal throughout the research. However, no TES workers were interviewed, despite many attempts to do so. Where relevant, all participants were asked to assist in accessing TES workers but none of them were able to provide this access. A union participant pointed out the reasons why TES workers were reluctant to participate. This was the response when the union participant was asked to assist in providing access to workers:

> There is a lot of suspicion in this environment, specifically of people that work for a labour broker because they are afraid they will lose their job and that is a major fear for them. So, this is why I'm saying I would rather prefer that you ask that question to one of the labour brokering employers and this will be at director level. So, they will be entitled to say okay no we will arrange that, and they will give that assurance to that person that he can feel free to speak and I'm quite sure that you will get the value out of the interview that you are looking for (Int12.p181-182. Par.160-162).

Following the advice from this participant, almost all the TES firm (labour broker) participants were asked to provide access to their workers, but none of them were successful in securing interviews with TES workers. However, a chief executive officer and a managing director of different TES firms, a TES client who is a senior human resources manager of a large retail company, employment lawyers, senior union officials, government department employees and acting labour court judges, who have all had extensive dealings with TES worker matters, were interviewed. The union participants and a non-profit organisation participant had worked extensively with TES workers and their views were invaluable in understanding the role, rights, problems and abuses experienced by TES workers. The legal participants' information was especially interesting as some had acted for TES firms, clients and employees and included all parties' perspectives in their responses. Three of the legal participants were acting labour court judges and had a wealth of experience from all sides of the triangular employment relationship because of their position. The participants that were spoken to had strong insight into the TES worker experience and secondary data shed light on these participants' views and supported their contentions.

While the original intention was to obtain direct temporary agency worker perspective, this proved impossible and consequently the worker perspective could only be obtained indirectly.

As mentioned above, these indirect perspectives were obtained through five of the 33 participants who could be classed as direct employee representatives (trade union reps, ILO official, NGO director) and many of the legal attorneys who were interviewed who specialised in employee cases. These interviews resulted in data relating to the concerns faced by the TES employees. However, there clearly is an important difference between first and second-hand perspectives on people's experiences. In addition, it is acknowledged that even union members do not accept that the union leaders speak for them, and neither union leaders nor lawyers can experience the working conditions of the employees. The research would have clearly benefitted from interviews from agency workers, since a key aim of the research was to understand the dynamics between agency worker, employment agency and user firm. Since some of the attorneys, union participants, the NGO director and ILO official had previous experience of agency work in the sector, it was possible to gain some direct insight into this dimension of the study. The implications of having to rely on these sources for the employee perspective was that the data obtained from these interviews lacked the depth that was required to adequately reflect the experiences of agency workers. These were retrospective accounts, and filtered through the lens of their current positions, such as a union official or attorney. The inclusion of first-hand agency worker views would have gone some way towards making the case study more holistic and contributed to applied knowledge.

Other researchers have recorded similar difficulties accessing temporary agency workers, as they tend not to exist in large numbers in single organisations and are often fearful of victimisation. They are thus difficult to access and studies of temporary workers often have small sample sizes (Alan and Sienko, 1997; Gardner and Jackson, 1996; McDonald and Makin, 2000; Purcell, 2014). Underhill and Michael Quinlan (2011) state that explanations for agency worker's greater vulnerability have been constrained by the problems researchers face in accessing these workers. In this research, these difficulties guided the researcher to place more emphasis on the legal aspects of temporary agency work. With this focus in mind, the TES worker representatives interviewed (union officials, attorneys and a non-profit organisation employee) were in a perfect position to comment on weaknesses in the legal and collective bargaining framework relating to TES workers. Despite the limitations and difficulties faced, the researcher is confident that those interviewed shed light on worker perspectives.

4.9. Conclusion

The first section of this paper dealt with the philosophical world view. It was decided that critical realism would inform the methodological framework as it recognises that reality exists independently of those who observe it, while at the same time it values the interpretations of individuals. It is well suited to case studies that involve complex phenomenon, especially if the objective is to establish 'why things are as they are' (Easton, 2010, p.119).

Having concluded that critical realism is the appropriate world view, the following two sections dealt with the central features of a case study and why a case study would be the best design for the research. This section tabulated previous studies, in reputable journals, that used the case study design to investigate phenomena involving temporary agency working in different country settings. The disadvantages and limitations of the case study approach were considered but were outweighed by the advantages. The case study design permits for a holistic view, whilst allowing for an in depth look at the subtleties and intricacies of complex phenomena such as agency working. One of the deciding factors for the design was that the case study uniquely allows for and encourages multiple sources of data to be collected. This aspect was pivotal to a study that would involve insight into TES work in South Africa.

After the decision was made to conduct a case study, a decision needed to be made about what case study design would be most appropriate. The single-case holistic design was chosen as there was a desire to understand one wholistic case, namely TES work in South Africa as a nation state. The research focused on TES work in South Africa from four different perspectives (employee, firm, client and union) and within the context of history, politics**,** the regulatory framework and economic trends. The case study is the first of its kind, and thereby revelatory, which according to Yin (2014), is a rationale for selecting a single case design.

Next, the data collection techniques and analysis were outlined. In this regard details were provided about the transcription of the interviews and the creation of the Interview Volumes, and the subsequent coding process. A Framework Document was created from themes that were initially developed from the literature review and later supplemented by the interview data. This Framework Document formed a visual presentation of the interview data, under theme headings,

together with a reference for each quotation that allowed the researcher to refer to the Interview Volume and the actual interview in context.

Thereafter, the chapter outlined some of the ethical considerations and attached the university ethical approval form as a schedule. Finally, the limitations of the study were pointed out, and these included the fact that no direct interviews with TES workers were conducted, the use of telephone interviews and the question of genralising from case studies. The justification for the decisions made, and approach taken were provided.

CHAPTER 5: THE LEGAL FRAMEWORK

5.1. Introduction

Whereas chapter three discussed historical legal aspects of South African TES work, this chapter concentrates on the current legal framework. The chapter firstly provides an overview of the relevant international laws and norms, together with a brief synopsis of the constitutional framework. After that, the chapter considers the two most important employment statutes for TES work, namely, *The Labour Relations Act 1995* (No. 66 of 1995) (LRA 1995), and *The Basic Conditions of Employment Act 1997* (No. 75 of 1997) (BCEA). Next, the chapter outlines what is termed the 'deeming provision' in this thesis, Section 198A(3)(b)(i) of the LRA 1995. The deeming provision concerns the identity of the employer party within the TES relationship. This section also includes the participants' views on the deeming provision. Thereafter, a discussion on the triangular employment relationship's principles of non-discrimination follows. The 'parity provision' as it is termed in this thesis, is contained in Section 198A(5) of the LRA 1995 and deals with issues of non-discrimination against TES workers. The participants' views on the parity provisions are provided. The final section of this chapter deals with regulatory avoidance and the lack of enforcement of legislation in the South African TES industry.

5.2. International law and the South African Constitution

South Africa left the ILO in 1966, in response to international pressure against apartheid. During 1994, the First democratic elections were held in South Africa and the country re-joined the ILO the following month. During 1995, South Africa adopted a new Labour Relations Act and in 1996, ratified Conventions No 87 and 98, implementing most of the recommendations made by the ILO (Rogers *et al*, 2009). South Africa is a current member of the ILO and international labour standards have a direct influence on South Africa's formulation of its labour policies (Aletter and van Eck, 2016).

Section 39(1)(b) of the *Constitution of the Republic of South Africa Act 1996* (No. 108 of 1996) (the Constitution) states that there is a constitutional obligation to consider international law when interpreting the Bill of Rights (Aletter and van Eck, 2016). The South African Bill of Rights provides for labour rights in section 23, *inter alia* the right to fair labour practice, to form and join a union, to strike, to form and join an employers' organisation, to organise and to

engage in collective bargaining (Ibid, 2016). The relevance and importance of international standards is reinforced in the 1995 LRA. This makes it obligatory, when applying the 1995 LRA, to interpret the Act's provisions in compliance with public international law obligations of the Republic (Ibid, 2016).

Section 233 of the Constitution provides that 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' Section 39 of the Constitution, which deals with the interpretation of the Bill of Rights, further draws a distinction between international law and foreign law. It directs that international law must be considered, and that foreign law may be considered (Ibid, 2016). The Constitution does not define 'international law' nor 'foreign law'. This is especially relevant to whether international law refers to international standards that South Africa has assented to, or whether it also refers to relevant ILO Conventions and Recommendations that South Africa has not ratified (Aletter and van Eck, 2016). In terms of temporary agency workers, this is an important question as South Africa has not assented to the relevant ILO Conventions and Recommendations which regulate employment agencies (Ibid, 2016). In a decision by the Constitutional Court, *S v Makwanyane and another*[62] the court decided that both binding and non-binding international instruments must be used when interpreting South African law (Ibid, 2016). In *Murray v Minister of Defence*[63] the court stated that Section 39(1) of the Constitution obliged the Court to consider international law, such as the ILO Conventions and Recommendations, when interpreting any right to fair labour practice. The courts have therefore confirmed that in terms of the meaning of international law, ILO Conventions and Recommendations constitute international law (Ibid, 2016). In addition, the 1995 LRA also confirms the commitment to the ILO in that it states that one of its objectives is to give effect to the obligations that the country incurs as a member state of the ILO (Aletter and van Eck, 2016).[64] South African legislation on agency work was enacted before the adoption of the Convention No. 181 (Benjamin, 2013). Table 8 below sets out South Africa's legislative changes that have affected TES workers and the role that the ILO played at different historical points during this process.

[62] 1995 (3) SA 391.
[63] 2006 11 BCLR 1357 (C) at 1358.
[64] Section 1(b) of the LRA.

Table 12: *South Africa's Legislative changes in respect of TES workers and the role of the ILO*

Phase	Legislation	Effect on employment agencies	Role of the ILO
1st phase: 1982-1994	The LRA 28 of 1956[65] was amended by the LRA 51 of 1982[66], which came into effect on 6 August 1982	• Triangular employment relationships were regulated for the first time in 1982. • The concept of 'labour broker' was introduced.[67] • Employment agencies were 'deemed' the employers of the agency workers, if they were responsible for paying their remuneration.	• South Africa was not a member of the ILO. • South African employment agencies were employers of agency workers more than a decade prior to these arrangements being regulated by the ILO's Private Employment Agencies Convention 1997 (No. 181).
2nd phase 1995-2014	The 1995 LRA.	• The TES was responsible for remuneration of the agency worker, the TES is the employer of that worker. • The agency and the client were jointly and severally liable for transgressions of collective agreements and the BCEA. Only the employment agency was liable for unfair labour practices or unfair dismissals.	• South Africa re-joined the ILO. • There was no indication that the ILO instruments in effect at that time played any role in drafting the 1996 provisions dealing with employment agencies.
3rd phase 2015 plus	The LRA Amendment Act 2014 (LRAA)[68]	• Policy makers attempted to improve the plight of temporary agency workers. • Protection for higher earning TES employees remained largely unchanged. • Lower earning agency	Compared to the provisions of the Private Employment Agencies Convention 1997 (No. 181) and the Private Employment Agencies Recommendation, 1997 (No. 188): • Most of the amendments are in line with international norms. • In line with international norms,

[65] *The Labour Relations Act of 1956* (No. 28 of 1956).
[66] *The Labour Relations Amendment Act of 1982* (No. 51 of 1982).
[67] The term 'labour broker' is used in South Africa to refer to what are more commonly referred to as labour hire firms or temporary employment agencies. Although the statutory terminology was changed to 'temporary employment services' in 1995, the term 'labour broker' has remained and is often used with a scornful meaning in public discourse. The broader category of labour market intermediaries is referred to as private employment agencies, and temporary employment services are therefore a sub-category of private employment agencies. The enterprise with whom the employees are placed is referred to in ILO terminology as the 'user enterprise' and are often referred to as the client, user or host enterprise (Benjamin, 2013).
[68] Labour Relations Amendment Act 2014 (No. 6 2014).

		workers, under the Threshold Amount[69] received wide ranging new protections. • The right to equality for lower income earners protected.	employment agencies are not be prohibited and allowed to operate in a flexible labour market. • 'Equal treatment' provisions went further than the international norm. • It is questionable if international norms were met for high earning group. • The amendments do not address fees being charged to agency workers. • The norm that requires that workers should not be prohibited from being employed directly by the client was not included.

Source: adapted from Aletter and van Eck, (2016, pp. 287-297).

5.3. The national legal framework for TES work

During and shortly after 1994, core employment statutes were introduced, amongst these were *The Labour Relations Act 1995* (No. 66 of 1995) (LRA 1995), *The Basic Conditions of Employment Act 1997* (No. 75 of 1997) (BCEA), and *The Employment Equity Act 1998 (No 55 of 1998)* (EEA). Employment protection legislation applies to all employees who ordinarily work in South Africa. It also applies regardless of the stated governing law of any employment contract or the nationalities of either the employee or the employer (Bhoola, 2002). The employee may not contract out of statutory employment protection unless the legislation specifically permits it and then, only to the extent permissible in terms of the legislation (ibid). The legislation is supported by codes of practice which may be statutory codes of practice drawn up by NEDLAC or non-statutory codes of practice issued by the Commission for Conciliation, Mediation and Arbitration (CCMA). These codes of practice often provide only guidelines and do not always have direct legal effect. They are however taken into account by the Labour Courts in deciding whether or not an employer has breached statutory employment regulations. Additionally, there are numerous laws implementing health and safety regulations (ibid). Table 13 provides a brief outline of the three most important Acts that govern TES work in South Africa.

[69] R205 433.80 gross pay per annum (£10 867.41 on 22 January 2020).

Table 13: *An outline of the three most important employment Acts*

Name of Act	Key aims	Coverage
Labour Relations Act (1995)	• Orderly collective bargaining • Workplace democracy • Collective labour dispute resolution (provisions for the CCMA)	• All workers except the Defense Force, Secret Services and essential services
Basic Conditions of Employment Act (1997)	• Improve minimum rights for all workers • Improve enforcement mechanisms	• All workers except Defense Force and Secret Services • Incudes part time and casual labour and TES employees
Employment Equity Act (1998)	• Eliminates unfair discrimination • Ensures the implementation of affirmative action	• Employees in 'designated' companies

Source: Adapted from Bhorat et al (2001), Leibbrandt *et al* (2010, p.28); *OECD (2010, p.234)*

The LRAA came into effect on 1 January 2015, but the provisions took effect on 1 April 2015 after the expiry of a three months' grace period (Strydom, 2017). Section 198 of the LRA 1995 was adjusted by the insertion of the changes and not merely amended (Strydom, 2017). The LRAA is to be read together with *the Basic Conditions of Employment Amendment Act 2013* (No. 20 of 2013) (BCEAA), *the Employment Equity Amendment Act 2013* (No.47 of 2013) (EEAA), as well as a new statute, *the Employment Services Act 2014* (No.4 of 2014) (ESA).

One of the most significant changes to the legislation pertaining to the TES industry, was the changes to section 198 of the LRA 1995. These changes add further protection to lower earning employees[70] against possible abuse of temporary appointments by employers. Essentially, the amendments to this section restrict the employment of TES workers to employment for a period

[70] Who earn below R205 433.80 gross pay per annum (£10 867.41 on 22 January 2020).

not exceeding three months; or as a substitute for a temporarily absent employee; or in a category of work which is considered to be a temporary service as determined by a collective agreement of a bargaining council or a sectoral determination, for a period of time. In any other situation the TES worker would be considered an employee of the client and not the temporary employment service. Table 14 sets out a summary of Section 198 of the LRA 1995, as amended by the LRAA. Importantly, the provisions of the LRAA apply to employees who earn below the Threshold Amount[71], who are historically vulnerable to abusive practices (Venter, 2015).

***Table 14**: Summary of some of the important provisions of Section 198 of the LRA*

Section of the LRA	Details
Section 198(1)	Defines a **'temporary employment service' (TES)** as any person who, for reward, procures for or provides to a client, other persons who perform work for the client and who are remunerated by the TES.
Section 198(2)	Provides that for the duration of the employment relationship the TES firm remains the **employer** of the TES employee. Often referred to as the 'first deeming' provision, which has been in the LRA since it was first promulgated and applies to all TES employees.
Section 198A	Defines a **'temporary service' (TS)** as work for a client by an employee for a period not exceeding three months; or as a substitute for an employee of the client who is temporarily absent[72]; or as a category of work or any period of time determined to be a temporary service by a bargaining council agreement, sectoral determination or ministerial notice. TES employees falling into these categories remain employees of the TES in terms of Section 198(2) and are immune from the application of the Section 198A(3)(b)(i) deeming provision.
198A(3)(b)(i)	The **'deeming'** provision states that if a TES employee is not performing a 'temporary service', the employee is 'deemed to be the employee of the client' and to be 'employed on an indefinite basis' by the client.
Section 198A(5)	The **'parity'** provision stipulates that a TES employee deemed to be an employee of the TES client, is to be treated on the whole not less favourably than a permanent employee of the client performing the same or similar work provided that there is a justifiable reason for different treatment. [73]

[71] R205 433.80 gross pay per annum (£10 867.41 on 22 January 2020).
[72] No time limit is mentioned in the Act.
[73] Please see paragraph 5.4. for further details about the deeming provision.

Section 198D	The justifiable **reasons for differentiation** include seniority, experience, length of service, merit, quantity or quality of work performed, or other similar considerations that are not discriminatory.
Section 198A(4)	The **termination** by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3)(b) (the deeming provisions) or because the employee exercised a right in terms of this Act, is a dismissal.
Section 198(4)	The temporary employment service and the client are **jointly and severally liable** if the temporary employment service, in respect of any of its employees[74], 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 sectoral determination made in terms of the Basic Conditions of Employment Act.
Section 198 (4A)	If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b)— (a) the employee may **institute proceedings** against either the temporary employment service or the client or both the temporary employment service and the client; (b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and **enforce compliance** against the temporary employment service or the client as if it were the employer, or both; and (c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either'.
Sections 198 (4C) & (4D)	A TES must comply with **employment conditions** in a sectorial determination or collective agreement concluded at a bargaining council that is applicable to a client for whom the employee works. The Labour Court (LC) or an arbitrator may rule on whether a contract between a TES and a client complies with the LRA, a sectorial determination or bargaining-council agreement.
Section 198 (4F)	Provides that TES's must **register** with the Department of Labour and cannot raise non-registration as a defense.[75]

Source: Adapted from Cohen (2014); Strydom (2017); the LRA 1995

[74] See table 12 for an explanation of liability.

[75] Note that the date of commencement of section 198(4F) is still to be proclaimed.

In explanation of the above table 14, section 198A(3)(b) becomes the operative clause determining the identity of the employer for employees earning below the Threshold. Then, once an employee becomes employed by the client by operation of section 198A(3)(b), the employee must, in terms of section 5, 'be treated not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment'. This would obviously only apply in the event that the terms and conditions of the employment applicable to the placed worker are less favourable than those applicable to the employee of the client. Last, to prevent the client from attempting to avoid the operation of section 198A(3)(b), the legislature added subsection (4). This states that if a TES or client terminates an employee's assignment to avoid the operation of section 198(3)(b), that termination will be considered a dismissal and the usual remedies available through the LRA will apply (*Assign Services (Pty) Ltd v NUMSA & Others*, paragraph 53).

5.4. The 'deeming provision' Section 198A(3)(b)(i) of the LRA

5.4.1. Who is the employer of the TES worker?

The amendments contained in the LRAA were designed to discourage the use of TES workers on a long-term basis to avoid the costs of the employment of permanent employees (Le Roux, 2015). The obligation imposed if clients make use of these workers in circumstances that fall outside the definition of a temporary service, consists of two parts. Firstly, that the TES worker assigned to the client is 'deemed' to be the indefinite employee of the client for the purposes of the LRA 1995 (van Eck, 2013). Secondly, the client must treat the 'deemed' employee 'on the whole not less favourably' than an ordinary employee who performs the same or similar work, unless there is a justifiable reason for not doing so (Le Roux, 2015).

However, on a practical level the 'deemed employer' provision created confusion. To apply and interpret the provision two mutually exclusive interpretations became popular with the legal profession, writers and academics after the promulgation of the amendments. The first being that once the deemed employer provision applied, the TES employees automatically transferred to the client and their employment with the TES came to an end. The second position was that the TES employees remained employed by the TES and that a dual employment relationship arose in respect of the client (Workman-Davies and Vatalidis, 2015). During 2015, *Assign Service (Pty)*

Ltd[76] *v Krost Services & Racking (Pty) Ltd and NUMSA* (the '*Assign* matter') was heard before the CCMA[77] and dealt with these conflicting interpretations.

The *Assign* matter was one of the most controversial and eagerly anticipated post amendment cases to unfold. The controversy concerned the interpretation and effect of Section 198A(3)(b)(i) of the LRA 1995. The relevant s198A(3) provides as follows:

> For the purpose of this Act, an employee-
> (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or
> (b) not performing such temporary service for the client is—
> (i) deemed to be the employee of that client and the client is deemed to be the employer; and
> (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

Table 15 sets out a summary of the progression of *Assign* matter focusing on the employer party in the TES relationship. At the CCMA the National Union of Metal Workers (NUMSA) argued that the employees, who fell below the Threshold Amount[78], had come to be exclusively employed by the client, Krost Shelving and Racking (Pty) Ltd, after the three-month period. The TES company Assign Services (Pty) Ltd argued that the employees in question remained its employees but for the purposes of the LRA 1995, there was a dual employment relationship with the client.

Table 15*: Summary of the Assign Service (Pty) Ltd matter: The employer party*

Date	**Court & Ref**	**Before**	**Outcome**
29 June 2015	Commission for Conciliation, Mediation and Arbitration (CCMA) [1652–15]	Commissioner A.C. Osman, N.O.	*Assign Service (Pty) Ltd v Krost Services & Racking (Pty) Ltd and NUMSA*[79]*:* The Commissioner interpreted Section 189A(3)(b)(i) of the LRA 1995 to mean that after the elapse of the three-month period, it gives rise to the client becoming the **exclusive employer** of the TES employees, as opposed to the client and the TES being dual employers.

[76] Assign is a TES as defined in s198(1) of the LRA1995 and is a member of the Confederation of Associations in the Private Employment Sector (CAPES).
[77] Commission for Conciliation, Mediation and Arbitration.
[78] R205 433.80 gross pay per annum (£10 867 on 22 January 2020).
[79] (2015) unreported.

8 Sep 2015	Labour Court (LC) [JR 1230/15]	Brassey AJ	*Assign Services (Pty) Ltd v CCMA & Others*[80]*:* Despite the deemed employer provisions in the LRA, the court found that the client is a **concurrent employer** rather than the sole employer. The TES is not substituted for the client after the three-month period.
10 July 2017	Labour Appeal Court (LAC) *[JA 96/15]*	Waglay JP, Tlaletsi DJP, Phatshoane AJA	*NUMSA v Assign Services & others*[81]*:* The LAC overturned the Labour Court's judgment and concluded that the plain language of Section 198A(3)(b) of the LRA supports the **sole employer** interpretation. The court ruled that the purpose of the deeming provision 'is not to transfer the contract of employment between the TES and the placed worker to the client, but to create a statutory employment relationship between the client and the placed worker.'[82]
26 July 2018	Constitutional Court (CC) [CCT194/17]	Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.	*Assign Services (Pty) Ltd v NUMSA & Others*: The first respondent in the LAC matter, Assign Services (Pty) Ltd (Assign) filed an appeal with the CC on 31 July 2017. On 26 July 2018, the CC upheld the LAC ruling of a **sole employer** interpretation.

Source: The researcher's own summary

The CC decision has provided clarity in terms of the 'sole employer' or 'concurrent employer' debate, in that the TES client is the sole employer after three months. The CC ruled that the language in section 198A of the LRA was clear enough (Mahlakoana, 2018). This means the TES will not have any legal standing in the employment terms of TES employees, nor be involved any further in the equation with regards to the LRA 1995, after the three-month period has elapsed (Mahlakoana, 2018). How the TES employees are to be treated in terms of principles

[80] [2015] 11 BLLR 1160 (LC).
[81] [2017] ZALAC 44 (10 July 2017).
[82] Paragraph 43.

of non-discrimination, once they are deemed to be the employees of the TES client, is dealt with in section 5.5.1. below.

5.4.2. The deeming provision and the issue of joint and several liability

In the past, South African legislation tended towards express allocations of employment law obligations to a single employer in both the 1956 and the 1995 LRA.[83] This is no longer the case as the new section 200B(2)[84] of the amended LRA1995 now explicitly recognises that there may be more than one employer for the purposes of liability. Historically, the temporary employment agency (or TES) was legislatively determined to be the true employer of the placed employee through the 1993 amendment to the old Labour Relations Act of 1956. The legislature at that time created a legal fiction by which the placed employees were 'deemed' to be employed by the TES firm. [85] This provision, though with a different construction, was carried through to section 198(2) of the LRA 1995.[86] Section 198(2) of the amended LRA 1995 provides that

> For the purposes of this Act, 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.

In addition, section 198A(3)(a)-(b) now explicitly provides a further deeming provision:

> For the purposes of this Act, an employee - (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or (b) not performing such temporary service for the client is - (i) deemed to be the employee of that client and the client is deemed to be the employer; and (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

[83] See Dlodlo AJ judgment at p. 15 paragraph 46 of the *Assign Services CC* matter.

[84] Section 200B(1)-(2) reads: '(1) For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law. (2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law'.

[85] See Dlodlo AJ judgment at p. 5 paragraph 10 of the *Assign Services CC* matter.

[86] Labour Relations Act (66 of 1995).

In other words, an employee not performing a temporary service for a client is deemed to be an indefinite employee of that client and the client is deemed to be the employer.[87] The intention of the legislature in the January 2015 amendments to the LRA 1995 was to provide additional protection to TES employees who earned below the Threshold amount of R205 433,30 per annum, and who had been placed with the TES client for longer than three months. This was essentially done through the introduction of an extended joint and several liability of the client and the TES in terms of s198(4A) of the LRA 1995. This provision, inter alia, meant that the client was now exposed to claims of unfair dismissal and the like, by employees of the TES (Pienaar and Naidoo, 2017).

When the *Assign* matter came before the Constitutional Court on 22 February 2018,[88] Dlodlo AJ acknowledged that section 198(4) of the LRA occasioned some difficulty. Section 198(4) stipulates:

> The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees[89], 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 sectoral determination made in terms of the Basic Conditions of Employment Act.

Dlodlo AJ explained that section 198(4) of the LRA 1995 effectively creates 'a substantive and statutory form of joint and several liability - which does not equate to joint or dual employment but rather creates a statutory accessory liability for the client in the circumstances set out in the section - where the TES carries principle liability as employer in terms of the LRA' (Dlodlo AJ, 2018, paragraph 58). Section 198(4A) adds to this that-

> If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b)— (a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client; (b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and (c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.

[87] *Assign Services CC* matter.
[88] Case CCT 194/17
[89] See table 12 for an explanation of liability.

Dlodlo AJ explained the perceived difficulties with 198(4) and 198(4A):

> I am persuaded that the sole employer interpretation is not hampered by section 198(4A). The section does not purport to determine who an employer may be from time to time. It provides that, while the client is the deemed employer, the employee may still claim against the TES as long as there is still a contract between the TES and the employee. This is eminently sensible considering that the TES may still be remunerating that employee. The view is buttressed by section 200B, which provides very broad general liability for employers. Section 198(4) and (4A) seems to carve out specific areas of liability for the TES pre-and post-deeming as opposed to general liability applicable in terms of section 200B (paragraph 61).

In other words, section 198(4) and (4A) stipulate specific areas of liability for the TES firm pre- and post-deeming, as opposed to the general liability applicable in terms of section 200B. Subsection 198(4A) was introduced to provide recourse directly against the client for contraventions in terms of section 198(4) without first having to institute proceedings against the TES (as was the pre-amendment case).

In order to explain how this thinking ties into the 'sole employer' reasoning, the following explanation from Dlodlo is helpful:

> A TES's liability only lasts as long as the relationship with the client and while it (rather than the client) continues to remunerate the worker. Nothing in law prevents the client and the TES from terminating their contractual relationship upon the triggering of section 198A(3)(b), with the client opting to remunerate the placed employees directly. If this happens, the TES that placed the worker will cease to be a TES in respect of that worker because it no longer meets the requirement in section 198(1) of remunerating the worker. The TES will then fall out of the relationship entirely.

Table 16 below sets out the identity of the employer, and the liability for both the TES client and TES firm, pre- and post the deeming provision in section198A(3)(b)(i). Liability is affected by whether the TES firm and the TES client continue the commercial contract and therefore the triangular employment relationship.

Table 16: *The identity of the employer and the liability of both the TES and the client pre- and post the deeming provision*

	The TES relationship	**3 MONTH point**	**CONTINUED relationship**
Liability	A 'substantive and statutory form of joint and several liability' in terms of 198(4)	1. The commercial contract remains between the client and the TES, and the TES continues to pay the worker. 2. The commercial contract terminates, and the TES no longer pays the worker	1. Joint and several liability in terms of 198(4A) as the triangular relationship still exists. 2. Liability rests with the TES client as there is no longer a TES in terms of 198(1) and no longer a triangular employment relationship
Employment	The TES remains the employer of the worker in terms of 198(2) for the duration of the 'TES relationship'.	1. The commercial contract remains between the client and the TES, and the TES continues to pay the worker 2. The commercial contract terminates, and the TES no longer pays the worker.	1. Client is the deemed employer of the TES worker in terms of the deeming provision198A(3)(b)(i). 2. Client is the deemed employer of the TES worker in terms of the deeming provision 198A(3)(b)(i).

Source: researcher's own summary

Dlodlo AJ explained that the placed employee retains the right to claim against the TES through section 198(4A) to the extent that they are still remunerated by the TES. This liability relates only to claims brought by the employee. The protections afforded by the sole employer interpretation go beyond this as they give employees certainty and security of employment (paragraph 80).

In addition, the LAC[90] had recognised that there was a perceived conflict between s198(2) and 198A(3)(b) referred to in s198(4A). Dlodlo AJ dealt with this conflict and confirmed that the deeming provisions in section 198(2) and 198A(3)(b)(i) cannot operate at the same time. When employees are not performing a temporary service as defined, then section 198A(3)(b)(i) replaces section 198(2) as the operative deeming clause for the purposes of determining the identity of the employer (paragraph 83f).

Dlodlo AJ believed that these restrictions of TES employment to genuine temporary work affords the clarity and precision needed to realise the constitutional right to fair labour practices and meaningful participation in trade union activity (paragraph 67). He furthermore believed that part of these protections entails that 'placed employees' are fully integrated into the workplace as employees of the client after three months. The contractual relationship between the client and the placed employees does not come into existence through a negotiated agreement or a recruitment process. The employee automatically becomes employed on the same terms and conditions of similar employees, with the same benefits, prospects of internal growth and job security. The purpose of section 198A was to fill a gap in accountability between client companies and employees who are placed with them (Paragraph 69).

5.4.3. The participants' views of the 'deeming provision'

The participant views of the deeming provision were obtained prior to the CC ruling in the *Assign* matter. However, their thoughts and ideas remain interesting, although most were critical of the lack of clarity of the deeming provision at the time. One acting Labour Court judge believed that instead of a deeming provision there should rather have been an enquiry into *bona fides* (i.e. good faith) because the *bona fides* enquiry already exists in South African law. This participant explained that for over two decades the courts had dealt with similar issues on the basis that certain transactions were a sham and declared them as such (Int29.p485. Par.98-100). The argument was that if the TES structure was a sham, a device, or subterfuge, then the aggrieved party should bring an application to the Labour Court and have it declared as such (Int29.p485. Par.102).

[90] *NUMSA v. Assign Services and others*

> Do not legislate yourself out of a genuine scenario… if you have an artificial creation like 198A, you have got all the problems associated with the artificial creation, and that is, how does it practically work? How do you just move somebody from one employer to another?' (Int29.p485. Par.104).

One participant who was involved in the NEDLAC consultations prior to the 2014 amendments, believed that the law is incorrectly constructed and too complex (Int19.p289. Par.34). This participant argued that the interpretation of the law in the LAC decision[91] was correct 'I think the interpretation is exactly what the stakeholders and social partners meant, even though the guys at the labour brokers don't agree' (Int19.p299. Par.152). However, this participant believed the negotiated solution incorporated into the legislation by the stakeholders was incorrect (Int19.p299. Par.162). Furthermore, this participant thought that if the CC had overturned the LAC decision (which we now know it did not), the labour movement would simply have lobbied to have the legislation changed (Int19.p299. Par.162). However, an acting Labour Court judge participant disagreed with this view and believed that the LAC erred in interpreting the law as it simply ignored the clear and unambiguous meaning of the word deemed 'I think it [the LAC decision] is a sensible approach, I think it is probably the right approach, but whether it is correct in law is debatable' (Int23.p384. Par.16). This participant argued that if the correct meaning of the word 'deemed' was used it would lead to a dual employment relationship as per the LC decision handed down by Brassey AJ.

Participants thought that several unintended consequences flowed from the deeming provision as interpreted by the LAC judgement. One of these consequences was that the TES employees may not want to be the employees of the TES client and may prefer working for the TES firm. For example, working for the TES client may increase their prospects of being made redundant (Int23.p384. Par.22). An acting LC judge believed that there should be a provision in Section 198 of the LRA 1995, similar to Section 197[92] of the LRA 1995, that dealt with the transfer of

[91] The LAC concluded that the plain language of Section 198A(3)(b) of the LRA supported the **sole employer** interpretation. The court ruled that the purpose of the deeming provision 'is not to transfer the contract of employment between the TES and the placed worker to the client, but to create a statutory employment relationship between the client and the placed worker'.

[92] Transfer of contract of employment: (1) In this section and in section 197A - (a) 'business' includes the whole or a part of any business, trade, undertaking or service; and (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern. (1) If a transfer of a business takes place**, unless otherwise agreed** in terms of subsection (6) - (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer (Section 197 of the LRA 1995). [Emphasis added].

employees when a business is sold as a going concern. Section 197 of the LRA provides that the employees transfer to the new entity 'unless otherwise agreed' and gives a representative trade union and the employer the option of contracting out of a Section 197 transfer. 'I think it would have made sense to give a representative trade union that sort of discretion' (Int23.pp384-385. Par.24). However, another participant was sceptical about this view 'I think that is probably a hopeful view [chuckle] because I haven't yet come across a worker who doesn't want to be transferred' (Int25.p415. Par.100). However, the LAC specifically stated that no automatic transfer of employment similar to that envisaged by section 197 of the LRA (dealing with the transfer of a business as a going concern) takes place in section 198 (dealing with TES work) (Jones, 2017).

According to one participant, the primary difference between Section 198 of the LRA and a transfer of employees in terms of Section 197 transaction, is that in the latter, the old employer is substituted by the new employer as if the old employer never existed. In the context of the construction that the LAC in the *Assign Services* matter gave to Section 198 of the LRA, there is a deemed creation of new employment with the TES client, with the effect from the expiry of the date of three-month period (Int29.p486. Par.112-116). Another participant believed one of the unintended consequences of the LAC judgment was that if the TES employee was made redundant soon after becoming an employee of the TES client, their severance pay would be negatively affected, especially if they had been in the employ of the TES company for a long period of time. Unlike in Section 197 of the LRA, where the employee transfers to the new entity and kept their length of service from the old entity to the new entity, there was no such guarantee in terms of Section 198 of the LRA (Int24.p401. Par.46).

The three-month period of the deeming provision was an additional topic of concern for the participants and their views varied greatly. A union participant believed there should never have been a three month-period at all and that TES employees should have the same rights from day one.

> Employees must, as soon as they start working, have the same rights as workers who had been there for longer. These three months provides a way in which they can dodge … it was put in obviously as a concession to the employers (Int21.p344. Par.32).

One legal participant believed that the three-month period may not be regarded as sufficient in some industries and should have been drafted in a flexible manner to cater for different industry or sector needs. The argument is that some industries work on six-month contracts rather than three months. The example provided was the farming industry that may have a six-month fruit picking period and would require TES employees for this period (Int6.p106. Par.96). Another employment lawyer participant believed that due to high unemployment and low skills levels, the three-month period was simply too short. The participant explained that the three-month period resulted in a cost increase for business (Int14.p201. Par.12).

> We warned in the negotiations equal treatment should not be a race to the bottom, because you know equal treatment might mean that from now on, we are going to employ people at X rate. So, whether they are temps, permanent that becomes the new rate to be employed (Int14.p201. Par.14).

A manager at a large bargaining council agreed that the TES period of three months before the TES employee become the employee of the TES client, should be extended to a longer period given the high unemployment rate in South Africa. The participant's rationale was that extending the three-month period would provide workers with more opportunity for employment or movement to permanent job opportunities. TESs may also be used as a catalyst to give young people or new entrants to the job market, an opportunity to enter into the job market (Int27.p451. Par.34).

5.5. The 'parity provisions' Section 198A(5) of the LRA

Other jurisdictions provide for principles of non-discrimination between non-standard workers and their standard counterparts. For example, for the European Union (EU) the EU Directive 1999/70/EC on fixed-term work and Directive 97/81/EC on part-time work, both provide for the removal of discrimination against fixed-term and part-time workers respectively (ILO, 2016). The Republic of Korea prohibits discrimination against fixed-term or part-time workers on the grounds of their employment status (Ibid, 2016). Japan prohibits unreasonable working conditions that result from the difference in work periods of fixed-term employees as compared to an undetermined-term employee (Ibid, 2016).

Temporary service employees in the United Kingdom receive statutory protection for equal pay in terms of the AWR (Ebrahim, 2017). The AWR protect agency workers from less favourable working conditions compared to employees, after they have completed twelve weeks of service (Leighton and Wynn, 2011; Elenor, 2017). To qualify as a comparable employee both the agency worker and the employee must work under the supervision and direction of the client and both must be engaged in work that is the same or broadly similar having regard to where relevant, whether they have a similar level of qualification and skills (Ebrahim, 2017). The Department for Business Innovation and Skills (BIS) Guidance on the Agency Workers Regulations (the Agency Workers Guide) states that the meaning of equal treatment is usually a matter of common sense and what is required is simply to treat agency workers as if they had been employed directly to the same job without the intervention of a temporary work agency (Ebrahim, 2017).

In South Africa, Section 198A(5) of the LRA 1995 provides that TES employees employed for more than three months must not be treated less favourably than an employee employed on a permanent basis who performs the same or similar work, unless there is a justifiable reason for different treatment (ILO, 2016).

5.5.1. The 'parity' provision' and the principles of equality

Section 198A(5) of the LRA 1995 stipulates:

> An employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

An important aspect of Section 198A(5) of the LRA (referred to as the 'parity provision') is the interpretation of the words 'must be treated on the whole not less favourably'. Clause 38 of the *Memorandum of Objects of the Labour Relations Amendment Bill*, 2012 provides the following examples of what would constitute treatment that is 'on the whole not less favourably' in terms of section 198A(5) of the LRA: '…the same wages and benefits as the client's other employees who are performing the same or similar work'. Section 198D of the LRA 1995 stipulates that the following factors may be taken into account in determining whether justifiable reasons exist for treating TES employees differently: seniority, experience or length of service; merit; the quality or quantity of work performed; and any other criteria of a similar nature.

The *Employment Equity Act 55 of 1998* (EEA) deals with equity in the workplace for all employees, including temporary agency or TES workers. The equal pay protection provisions in the LRA 1995 are therefore unusual (Ebrahim, 2017). This 'novel equal pay legal framework' does not require TES workers to prove that they are paid less as a result of the employer discriminating against them unfairly. Instead, the employer bears the onus of proving that the differential treatment is based on a justifiable reason and such reason is not unfairly discriminatory (Ebrahim, 2017, p.9).

Interpretation issues are no doubt going to arise in relation to the words 'must be treated on the whole not less favourably' in Section 198A(5) of the LRA. Interestingly, the same words are used in respect of part time employees in Section 198C(3)(a) of the LRA 1995. In respect of fixed-term contracts the words 'on the whole' are missing in Section 198B(8)(a) of the LRA 1995, which simply says 'must not be treated less favourably. In respect of Section 197 of the LRA 1995 (transfers of contracts of employment) the words 'on the whole not less favourable' are also used in relation to conditions of service on the transfer of employees from one employer to the next (Pemberton, undated). The different wording of sections of the LRA 1995 indicates that the standards regarding equal pay for equal work are different. There appears to be two approaches to equal pay claims; the first requires an equalisation of the overall general package received by the employees, while the other requires a line by line equalisation of the pay and benefits received by employees (Patel, 2014). No reasons for the differentiation have been provided by the LRA 1995 and how these words will be interpreted will be left in the hands of the judiciary (Patel, 2014).

5.5.2. Principles of non-discrimination: the participants' views

> Wage equality in this country is horrendous. I mean we have one of the biggest wage differentials in the world. And at the end of the day you've got to look at your temporary employment services are very often entry into the workplace. And historically they have been your lower income earners and they are your vulnerable workers [TES Executive] (Int5. p87. Par284-286).

As with the above quotation, participants from both the employer and labour movements acknowledged that in the past TES employees were likely to experience unequal treatment and there was a general need for the legislation to provide further protection against such abuse (Int2.p15. Par.32 [legal participant]; Int12.p166. Par.32 [union participant]). One TES

executive participant stated that the unequal pay rates between permanent employees and the TES employees encouraged the casualisation of employment as it was a stimulus to reduce the permanent workforce in favour of engaging TES workers. According to this participant, TES clients and companies eroded the permanent component of employment and replaced it with the TES component because it was cheaper 'the primary objective is not strategic in the sense of flexibility, it is only in the spirit of cutting down costs' (Vol 2: Int32.p22. Par.244). An advocate (barrister) participant pointed out that TES employees were often paid lower wages than their permanent counterparts even in industries where minimum wages were prescribed by a bargaining council. In these instances, permanent employees of the TES client may have negotiated preferential terms and conditions above the minimum requirements. However, this participant warned about the possible consequences for the TES client if the wages and other benefits were immediately equalised in terms of Section 198A(5) (Int20.p331. Par.166). This participant suggested that parties consider a negotiated solution to phase in the changes, rather than an expensive legal solution, to avoid redundancies and job losses (Int20.pp331-132. Par.168).

Participants focused much of their criticism on the lack of clarity of the wording of Section 198A(5) of the LRA 1995 and the unintended consequences that may flow from the implementation of its provisions. How to deal with TES employees' pension funds in relation to the parity provisions, was one such area that lacked clarity. If the TES employee was deemed to be the employee of the TES client and that client was part of an industry with a very specific industry retirement or pension fund, the question arose as to how the TES client would comply with the parity provisions with regard to that fund. One TES company participant stated that the wording of Section 198A(5) of the LRA 2015 allowed for a degree of flexibility. This participant supported the idea that the TES employee need not join the new TES client pension fund but should rather be provided with an increase in remuneration to compensate for the fact that they were not part of the fund. The participant believed that this would satisfy the requirement of the wording 'on the whole' not less favourable than the TES client's own employees (Int3. p57. Par28).

Some participants believed that the parity provisions would simply be ignored or circumvented (Int12.pp166-167. Par.34 [union participant]; Int20.p322. Par.70[legal participant]) and since

the TES workers were poorly unionised and earned low wages, it would be difficult to challenge (Int33. Vol 2. p37. Par122[legal participant]). One legal participant stated that TES employers circumvented the provisions of the LRA 1995 by simply rotating employees from one employer to another so that they did not work for more than three months for the same TES client (Int33. Vol 2. p37. Par118). Another legal participant pointed out that using the outsourcing 'model' was a popular way of avoiding the parity provision.[93] This participant explained that if the TES company could no longer provide a temporary employment service in terms of section 198 of the LRA, an outsourced service could be provided, and the parity provisions would not apply.

> So, you just shift labour broking into outsourcing, and you get the same result. You continue to be able to employ workers on different terms and conditions and now there is nobody to compare them to in the main client industry because nobody in the client's operation does that job (Int20.p330. Par.148).

A legal participant expressed concern that the larger trade unions were not active enough in defending the rights of the TES workers in terms of the parity provisions

> You'd expect there to be pushback. What you would have expected is that the big trade unions would have taken up these new rights, because they after all were the ones who fought for them (Int20.pp322-323. Par.72).

However, another participant believed that trade unions had simply waited for the CC to pronounce on the *Assign* matter before embarking on litigation to protect TES workers' rights. This participant believed that the bulk of litigation would flow from the parity provision in the future and that the courts would adopt a strict approach, requiring compelling reasons for paying a lower rate than permanent employees (Int23.pp387-388. Par.54).[94]

5.5.3. The GIWUSA v Swissport matter: the next case in the TES debate

During July 2018 the CC in the *Assign* matter dealt with the identity of the employer party in the TES relationship, where the TES employee was deemed to be the employee of the TES client. During March 2019, *General Industries Workers Union of South Africa obo Mgedezi and Others*

[93] See par. 7.3.2. for a further discussion relating to the outsource model.

[94] Interestingly, the participants did not highlight the latitude employers seem to potentially have in justifying different treatment, for example, different employee qualifications, skills etc. This may be due to the changes to the legislation being relatively new when the interviews were conducted.

v Swissport SA (Pty) Ltd and Others[95] (the *GIWUSA v Swissport* matter) was heard before the CCMA, which is the next case in the TES debate.

In terms of the facts of the case, the three applicants were employed by the second respondent, the Workforce Group ('Workforce'). The first respondent, Swissport SA (Pty) Ltd ('Swissport / client') was the client of Workforce. Two of the applicants were employed as forklift drivers and the third as an acceptance clerk. The applicants had rendered their services at the client's premises. The facts indicated that the applicants earned below the Threshold Amount and that Swissport was responsible for daily operations and supervision of the applicants. There was a commercial relationship between Swissport and Workforce, and the applicants were 'on the books' of Workforce and received the benefits that Workforce employees received (van Wyk *et al*, 2019). Swissport employees received benefits such as pension fund contributions, medical insurance, discretionary bonuses and shift allowances that were not afforded to the applicants. The applicants had to demonstrate that they performed the same or similar work to Swissport's employees. The difficulty facing the applicants was that there was no comparator, as Swissport did not employ any forklift drivers or acceptance clerks as these were all supplied by Workforce. The applicants therefore argued that the position of cargo controllers was sufficiently similar to the position of forklift drivers for the purposes of section 198A(5) of the LRA.

Three issues arose in *GIWUSA v Swissport* in relation to section 198A(3)(b) of the LRA 1995. Firstly, were the applicant's permanent employees of the client? Secondly, if so, were they entitled to be 'on the books' of the client? In other words, the matter dealt with the demand to be employed in terms of permanent employment contracts with the client (in this case Swissport) which was not a question directly before the CC (Frahm-Arp and Willem, 2019). Thirdly, whether they were entitled to equal benefits as compared to certain employees of the client (van Wyk *et al*, 2019).

The CCMA held that it was common cause that the applicants had been employed with Swissport for a period in excess of three months and no evidence was led that this employment was a temporary service. The deeming provision in section 198A(3)(b) therefore applied. However, the CCMA found that job functions of the forklift drivers and cargo controllers were not the same or sufficiently similar to invoke section 198A(5) of the LRA 1995. Further, there was no comparator for the acceptance clerk. As a result, the applicants did not have to be treated

[95] General Industries Workers Union of South Africa obo Mgedezi and Others v Swissport SA (Pty) Ltd and Another [2019] 9 BALR 954 (CCMA). Case no. WECT 18794 on 18 March 2019.

‘on the whole’ not less favourably than cargo controllers and were not entitled to the additional benefits available to Swissport's employees (van Wyk *et al*, 2019; Robins and Olley, 2019).

Three important principles may be extracted from this case:

Firstly, that TES employees who are placed at a client in excess of three months and earn under the threshold are deemed *permanent* employees of the client for purposes of the LRA. In this matter, it was not disputed that they were deemed to be employed by Swissport in terms of section 198A(3) of the Labour Relations Act.

Secondly, in terms of the requirement for TES employees to be transferred ‘to the books’ of the client. The CCMA held that the applicants remained ‘on the books’ of Workforce provided that a contractual relationship remained between workforce and the client, maintaining a tripartite relationship. This was made clear from *Assign* matter where the court held that it was not required for TES employees to be transferred to a new employment relationship. All that was required was for the TES employees to be indefinitely employed by the client for the purposes of the LRA 1995. The CCMA held that the deeming provision, as per paragraph 75 of *Assign judgment*, was not a transfer to a new employment relationship, but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship (Ncume, 2019). The triangular relationship then continues for as long as the commercial contract between the TES and the client remained in force and required the TES to remunerate the workers. This did not imply that the applicants had to be ‘on the books’ of Swissport. Swissport was required to take responsibility for the applicants in terms of the deeming provision of the LRA 1995 (Ncume, 2019). In other words, just because the applicants were deemed to be employees of Swissport, it did not mean that they had to be employed by the client. The Commissioner therefore held that the relief sought, namely that the employees be employed in terms of permanent employment contracts with Swissport could not be granted (Frahm-Arp and Willem, 2019).

Thirdly, an employee can only claim equal benefits if their employment is of an indefinite nature and there is an identifiable comparator who does the same or similar work to that of the employee (van Wyk *et al*, 2019). It is important to remember that the obligation to treat the deemed employees no less favourably only arises in respect of employees doing the same or similar work. It is not a blanket comparison of the terms and conditions of the entire workforce of the client (Frahm-Arp and Willem, 2019).

Frahm-Arp and Willem (2019) argue that in terms of this mater, the employees of the TES do not become the employees of the client in all circumstances, such that they need to be offered employment contracts with the client. Rather, the client, for the purposes of the LRA 1995, is deemed to be their employer and is in those instances liable or responsible for the employees. These instances are in respect of unfair dismissals, unfair labour practices, collective bargaining, and unfair discrimination claims in relation to union membership and union activities.

5.6. Regulatory avoidance and lack of enforcement

Mitlacher *et al* (2015) compared experiences of agency work across different national or regulatory contexts, including Australia, Germany and Singapore and found that increased regulation improved outcomes for temporary agency workers. However, regulatory avoidance in the temporary work agency industry has expanded and intensified, normalising exploitation and increasing the negative outcomes of precarious work (Knox, 2018). Knox (2018) defines regulatory avoidance as overt avoidance or breaches of specific regulations, or the exploitation of loopholes and shortcomings.

In South Africa, the avoidance of protections in labour legislation for TES workers has in the past provided the motive for firms to use TESs, and the legislative provisions concerning TESs provided the opportunity to achieve this (Benjamin, 2016a). One legal participant perceived the entire purpose of the TES industry as a mechanism of avoiding the employment relationship:

> You now have this labour brokering industry which just acts as a subsidiary … entity to distance employers from their actual workers. So, the way … around labour brokering in South Africa today, is not really about how to regulate labour broker people who are … in labour broker companies, it is just to get rid of the mechanisms that employers are using through labour brokers to not engage with their own employees (Int7.p111. Par.16).

Tightening the regulations for the TES industry in South Africa has provided more protection for the TES employees, but a legal participant believed that more effective enforcement and increased resources are still needed.

> There are inspectorates for all of those main agreements, there is a process of enforcement through arbitration in terms of the main agreement, you don't have to run to the Department of Labour and rely on each inspectorate. You have your own inspectorate and you do not even have to enforce it at the Labour Court, you have got

> the Section 33A LRA arbitrations under the bargaining councils, where the bargaining councils by way of an arbitrator, can enforce their agreement and issue arbitration awards which are binding. So, everything is there, all the mechanisms are there, it is just to commit the resources to enforce it and that should solve your problem. And I have got a huge issue with trying to legislate yourself out of resource issues because it never works (Int29.pp481-482. Par.62).

A union participant expressed similar concerns regarding the lack of resources:

> Bargaining councils have agents who are supposed to go out, and of course the Department of Labour has labour inspectors. But none of these bodies have enough people, so you know someone could complain … to the bargaining council and it could be weeks, months before someone could actually be able to go out there and see what was actually happening (Int26.p438. Par.120-122).

Another union participant mentioned that as part of the union's national minimum wage negotiations, they were to include the general 'tightening up' and improvement of the enforcement processes by the Department of Labour and the bargaining councils.[96] 'so that we can also try and bring this up to the required standard for fair labour practises' (Int12. p170. Par60-62). However, a legal practitioner participant stated that they were sceptical about the enforcement challenges ever improving and believed that the solution rested on self-compliance:

> The national minimum wage is going to be the same, where the Department of Labour has not got the resources to police the national minimum wage, so we have enforcement problem in South Africa … And, again, you can understand how much bribery and corruption opportunity this induces as well… But I mean, the point is, and again that is the problem you got to encourage employers to self-comply, you are not going to have a big brother policeman ever in South Africa doing effective enforcement via the Department of Labour. That is not going to happen in my or your lifetime, unless we develop a private-public type model like in the Netherlands (Int14. Pp. 204-205. Par44-48).

A key development in South Africa has been a shift from generalist labour inspectors to specialist inspectors (Cameron, 2015; Hastings and Heyes, 2016). Since 2012, the policy has been to appoint specialist labour inspectors in the provinces who are experts in particular areas (such as Electrical, Health and Safety, Construction and Explosives). Specialisation has improved the effectiveness of provisional offices (Hastings and Heyes, 2016). However, the

[96] The media reported during April 2019 that the South African Labour Minister, Mildred Oliphant, had stated that there would be tough enforcement of the implementation of the National Minimum Wage. Government's intention was to strengthen the inspectorate and the CCMA's monitoring roles (Africa Daily Voice, 2019)

state labour inspectorate (Inspection and Enforcement Services (IES)) has severe resourcing challenges such as a lack of sufficient number of inspectors and high turnover (Hastings, 2019; Hastings and Heyes, 2016). Labour inspectors may issue compliance orders against employers who break statutory obligations, which are enforced as orders of the Labour Court where financial penalties may result from noncompliance to obligations. Despite these powers, in a recent report Kretzmann (2017) noted the Department of Labour had just one inspector for every 120,000 economically active citizens, a figure which compares unfavourably to the ILO's recommended rate of one for every 20,000 (Kretzmann, 2017).

At the time that the amendments to the employment legislation were debated, a self-regulatory model rather than formal legislative amendments was proposed by some TES firms (Int22.pp367-368. Par.48). An influential self-regulatory body, funded by large South African and international staffing firms, had been proposed. A participant who had held different senior government department positions and had been involved in the NEDLAC negotiations prior to the recent legislation amendments, confirmed that the idea at that time was that those in the TES industry who did not operate according to the rules established by the body, could be fined. This approach had been successful in the private security industry and certain parallels could be drawn between the two industries. The security industry had grown quickly, with a violent history and had many 'fly by night' operators (Int19.p292. Par.66). The participant believed that despite these difficulties, a security industry was formed that provided a provident fund, a minimum wage process and managed smaller employers to ensure that workers were not abused. 'There is a reporting hotline, together with all the other industry bodies' (Int19.p292. Par.70).

> Putting the regulatory process into the CCMA and making it a highly complex legal process, instead of it being a process that could have been addressed through maybe a regulatory body … I think it is going to slow down the CCMA, it is going to slow down dispute resolution (Int19.p292. Par.72).

A legal participant however disagreed with the idea that setting up a regulatory body would have been preferable for the TES industry 'I mean that is still a legal solution isn't it? That's just regulating it in terms of a council or a regulatory body rather than in the LRA' (Int20.p337. Par.244). When asked if this would have been a preferable solution for the TES industry, this participant argued that what was preferable for the TES employer may not be beneficial for the TES worker (Int20.p337. Par.245). 'It all depends on your perspective you know, if you are a

worker you would prefer the LRA as it stands and if you are a manager you won't (Int20.p338. Par.246).

A director at a government department participant explained that although a self-regulatory model had not been introduced, it was 'not mutually exclusive' with the regulatory framework that was implemented. Despite the self-regulatory model being rejected, the participant thought that there was still a general commitment to regulation within the industry and its associations (Int22.p368. Par.50).

5.7. Conclusion

This chapter has outlined the legal framework within which the South African TES industry operates. The chapter provided an overview of the international laws and norms affecting TES work, the constitutional framework and important national statutes. The chapter's focus rested on the 'deeming provision'[97] and the 'parity provisions'. [98] Participants' views and criticisms of these two important provisions of the LRA 1995, were also discussed. The final section of this chapter discussed regulatory avoidance and the lack of enforcement of legislation in the TES industry, with a brief discussion on a self-regulatory model that was proposed by some employer parties at the time that the 2015 amendments were debated.

This chapter was the first of the findings chapters. The next four chapters set out the findings of the research from four different perspectives: in chapter six from a TES employee perspective, chapter seven from a TES firm perspective, and chapter 8 from a TES client perspective. Finally, chapter nine deals with union responses to TES work.

[97] Section 198A(3)(b)(i) of the LRA.
[98] Section 198A(5) of the LRA.

CHAPTER 6: THE TES EMPLOYEE

6.1. Introduction

This chapter outlines the principle findings in relation to South African TES employees, in three parts. The first part deals with the context within which TES employees work, such as the paucity of TES statistical information, their employment status, and the high unemployment rate. The next part reflects on TES employees' access to work and looks at their use of networks, the concept of 'flexicurity', and whether TES work is a steppingstone to permanent work. The final part considers TES employees' access to social insurance and retirement benefits, and whether these compare to the benefits provided to permanent employees.

6.2. Contextual matters

6.2.1. Paucity of statistical information relating to TES work

The limited availability of statistics for the TES sector in South Africa must be highlighted. Bhorat *et al* (2014) state for example, that it is not possible to ascertain directly the number of workers employed through TES firms in the South African economy as the nationally representative household surveys do not probe whether workers are employed through TES firms. A participant who is a senior member of staff of a large TES firm, discussed the difficulties faced in obtaining proper statistical information.

> It is the developed countries with mature workforces that are actually able to produce decent labour market stats. We only get our stats by ourselves through some assumptions, we don't actually have hard-core facts that we use. We also have contribution to an industry levy, and it goes by turnover and headcount and based on that, we can work out how many players we've got out in the industry. But we do not actually have pure data coming through. (Int5.p89. Par.318).

This participant explained that South African statistics, such as Statistics South Africa (Stats SA), do not differentiate between different types of work so it was very difficult to isolate tends in TES work (Int5.p89. Par.314). The same difficulties were mentioned by a participant from an employers' federation. This participant added that the industry was not a singular industry and falls under the larger grouping of 'financial and business services' which makes it difficult to

isolate statistically. In addition, there has been no historical legal requirement for the industry to report[99] to a centralised body which has resulted in a lack of reliable statistic information.

> It is a difficult thing to measure because there isn't a singular. We are not a singular industry that gets reported. So, if we fall under financial and business services, which is obviously very big as an industry, and … we know that we are a significant employer in that sector. But you know, there is a challenge in trying to actually get data because there is no one place to report. But one of the things that with the Employment Services Act, which was promulgated last year, we now will have regulation for our industry requiring compulsory licensing for companies who operate in the recruitment and staffing sector, whether offering permanent or temporary employment services. And through that mechanism we anticipate a reporting that will allow us to draw more accurate statistics about how many temporary employees are actually out there, and what sort of services and sectors they are fulfilling (Int30.p498-499. Par.22).

Section 198(4F) of the LRA introduced the requirement that 'no person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation'. This amendment came into effect on 1 January 2015, but the regulations for registration of TES have not been finalised[100] (Jorge and Adams, 2019). The Employment Services Act 4 of 2004 (ESA) came into effect on 9 August 2015 and Section 13(1) reads 'The Minister may, after consulting the Board, prescribe criteria for the registration of private employment agencies.' Section 13 of the ESA has been excluded from coming into operation. On 5 December 2018, the Minister of Labour published draft regulations on the registration of Private Employment Agencies and TES for public comment and the opportunity for public comment closed on 28 February 2019 (Jorge and Adams, 2019). The participant from the employers' federation explained that there had however been a requirement to register a TES business with the Department of Labour prior to the ESA.

> We have always had to as an industry since 1998 register your business with the Department of Labour. And so, it wasn't a license, but you were supposed to register, and that continues. But with the new Act, we have to, well companies will now have to get a license to operate. And without that, they will obviously be breaking the law … the Employment Services

[99] This participant is referring to a reporting system to an industry specific body. Employers, including TES firms, must still register with the Unemployment Insurance Fund (UIF) through the Department of Labour, or the South African Revenue Services (SARS). Registration with UIF: All employers who have employees working 24 or more hours a month (based on section 10, of the Unemployment Insurance Contributions Act). Registration with SARS: All employers as soon as they have an employee who earns taxable income must also register with SARS (based on section 10, of the Unemployment Insurance Contributions Act) (Department of Labour, 2014). See paragraph 6.4 for further details on the UIF.

[100] The Draft Regulations require that all Private Employment Agencies and TES register with the Department of Labour.

> Board was constituted this year and there are draft regulations pending, which obviously need to be approved by the Board. … Because the Act was promulgated but Section 13, which talks to the licensing requirement, that has not yet been promulgated because it's a bit of a chicken and an egg. You know, we have got to get the Board together, and get the regulations, and once those are ready, and then that section of the Act can be promulgated (Int30.p499. Par.24).

In addition to the lack of reliable statistics for the TES industry, Bhorat (2016, p.1) states that 'surprisingly little academic research has been undertaken concerning the sector, be it simple 'bean-counting' exercises or more serious modelling work'.

6.2.2. The concept of 'worker' and 'employee'

Temporary agency workers are generally considered as employees, except for the UK where they are not granted the employee status under tax regulations and employment laws (Fu, 2016). However, differences exist in different countries regarding who should be considered the legal 'employer'. In East Asia and most European countries it is the agency, in Canada it is usually the user firm, in the US it is quite often both, and in the UK it is neither (Davidov, 2004; Fu, 2016).

In the UK there is a distinction between a 'worker' and an 'employee'.[101] An employee has a contract of employment whereas, a worker is a wider category which includes someone who has a contract of employment or a contract where the individual undertakes to do or perform personally any work or services for someone who is not a client or customer (BIS Guidance on the Agency Workers, 2011). All employees in the UK are workers, but an employee has extra employment rights and responsibilities that don't apply to workers who aren't employees. An individual is considered an agency worker in the UK if they have a contract with an agency but work temporarily for a hirer. An individual is not an agency worker if they find work through an agency but work for themselves (self-employed). Neither are they agency workers if they use an agency to find permanent or fixed-term employment, or conclude a 'pay between assignments' contract - in other words, they become an employee of the agency.[102]

In South Africa, the first question is whether the parties are indeed 'employees' and 'employers' within the meaning of the applicable statute and/or the common law (Grogan, 2017). If the

[101] In the UK a person is considered a 'worker' if they have a contract or other arrangement to do work or services personally for a reward; their reward is for money or a benefit in kind; they only have a limited right to subcontract the work; they have to arrive for work even if they don't want to; their employer has to have work for them to do as long as the contract or arrangement lasts; and they aren't doing the work as part of their own limited company in an arrangement where the 'employer' is actually a customer or client.

[102] https://www.gov.uk/agency-workers-your-rights

parties are not employees, then the employment statutes do not apply to them, they are not entitled to social security benefits and have no access to statutory tribunals for violations of employment rights (Ibid, 2017). The critical distinction is whether the parties have concluded a contract of employment or a contract for the provision of work. The latter entails the provision of work or services but is not a contract of employment.[103] (Ibid, 2017).

The word 'worker' is not defined in the *Labour Relations Act 1995* (No. 66 of 1995). An 'employee' is defined in section 213 of the LRA 1995:

> Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.[104]

However, the Constitutional Court in the *Assign* matter stated that

> The usual TES employment relationship is not covered by section 213. If it were, there would be no need for the employment relationship to be deemed to exist in section 198(2) (Dlodlo AJ at paragraph 55).

In chapter 9 of the LRA 1995 entitled 'Regulation of non-standard employment and general provisions', section 198(2) states that:

> For the purposes of this Act, 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. [emphasis added].

In the *Assign* Constitutional Court matter [105] Dlodlo AJ in his majority judgement stated that:

> It is immaterial, for the purposes of section 198(2), whether an employee and a TES enter into an employment contract. Once the employee provides a service to the TES's client, they automatically become the TES's employee. Under both the 1956 LRA and the 1995 LRA (before the 2014 Amendments), the TES was expressly designated as the employer for purposes of the LRA. Section 198A(3)(b) applies a different regime to employees who have provided a service for more than three months if they fall below a specified earning threshold. But section 198A(3)(b) does not proclaim that an employee 'is' the client's employee. Rather, the employee is 'deemed to be' the client's employee. This disjuncture does not in itself mean that 'deemed to be' is lesser than 'is' and both sections are, in their true senses, 'deeming provisions' (at paragraph 44-45 of the judgement).

[103] For example, independent contractors, partners, and agents.
[104] Section 213 of the LRA 1995.
[105] Case CCT 194/17.

Dlodlo AJ further explains that nothing turns on the difference between the word 'deemed' and 'is' in section 198(2) and that the difference should not cause controversy in the interpretation of section 198A(3). He was of the belief that both sections create a statutory employment relationship which does not depend on the way the word 'deemed' is interpreted (Paragraph 50 of the judgment). Dlodlo AJ however clarified at paragraph 56 of the judgment, that 'sitting on the books of a TES does not make you an employee'. Section 198(2) clearly states that the individual's services are to be 'procured for or provided to a client by a temporary employment service'.

The Constitutional Court in the *Assign* matter dealt with the question of the relationship between the TES worker and the TES firm after the worker is deemed to be the employee of the client. Once the deeming provision takes effect, the client becomes the only employer for the purposes of enforcing rights granted to employees in terms of the LRA. The court noted that the contractual relationship between the client and the placed employee does not come into existence through negotiated agreement or through the normal recruitment processes used by the client. Instead, the employee automatically becomes employed by the client and he or she must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment (Le Roux and Alcock, 2019).

6.2.3. High unemployment

The unemployment rate in South Africa was 27.6 percent in the first quarter of 2019 (Mkentane, 2019). Job losses were recorded in the formal sector (-65 thousand), private households (-30 thousand) and in agriculture (-1 thousand), while gains occurred in the informal sector (+188 thousand). The expanded definition of unemployment, including people who have stopped looking for work, was 37.3 percent in the third quarter of 2018 (Trade Economics, 2018). South Africa has one of the highest ILO defined[106] unemployment rates in the world. In this upper

[106] In application of the international definition adopted in 1982 by the ILO, an unemployed person is a person of working age (15 or over) who meets three conditions simultaneously: being without employment, meaning having not worked for at least one hour during the reference week; being available to take up employment within two weeks; having actively looked for a job in the previous month or having found one starting within the next three months (INSEE, 2016).

middle-income country, on average over a 20-year period, one out of every four members of the labour force was jobless (Bhorat *et al*, 2016).

The negative consequences of the unemployment rate in South Africa was highlighted in a report on the drivers of youth unemployment (Graham *et al*, 2018) and two further studies conducted in different provinces in South Africa. One a longitudinal, qualitative study in Cape Town showed extensive attempts by young people to find work without consideration of the wage (Newman and De Lannoy, 2014). The other, a qualitative study conducted with employed and unemployed youth in Gauteng, the Western Cape, Kwa-Zulu Natal, the Eastern Cape, and the North West[107], showed that when young people were asked about the lowest wages they would accept, they indicated a willingness to work for wages below sectorally determined minimum wages because they realised that they needed the work experience (Patel *et al*, 2016).

This challenging work environment and the resultant desperation of many to find work, was a strong theme that flowed from the interviews. According to a managing director of an international TES firm, at the time of the interview, South Africa was experiencing a stagnant economy 'so, it is a challenging environment from a temporary staff worker point of view' (Int10.p141-142. Par.20-26). A union division manager acknowledged that TES firms 'fill an important gap in supplying job opportunities for people' and did not believe that banning[108] TES work would be beneficial because of the high unemployment rate (Int12.pp166-167. Par.34). This union participant acknowledged that the high unemployment rate affected the unions' approach to TES employee matters. The approach preferred by this participant was to deal with each specific case or 'transgression' that was reported individually and with care, as employment was scarce (Int12.p167. Par.36-38). The participant explained that TES employees feared losing their jobs if they reported wrong doings.

> People are scared to complain they would rather earn a few rand per day instead of what they are really entitled to earn to get some money. To get some money to pay for their daily needs than to be without a job and be on the street for quite some time before they find something else (Int12. p170. Par58-60).[109]

[107] These are different geographical areas or provinces in South Africa. See Image 1 in par.6.5.
[108] See paragraph 3.3.2. of the 'South African historical and political context' chapter for a further discussion on the union movements' drive to ban TES work.
[109] The same sentiment was expressed by a TES firm participant who stated, 'rather a job than no job' (Int5.p88. Par.300). In addition, minutes of a NEDLAC National Social Dialogue Institution meeting held during 2017, on the

This participant believed that the high unemployment rate in South Africa created the circumstances for some unscrupulous TES firms to employ individuals without complying with minimum statutory provisions. 'A few people get rich and they're abusing people that are just so glad that they have an opportunity to have some income that they are open for abuse' (Int12.p176. Par.106). This view was supported by another union participant who agreed that the high rate of unemployment resulted in millions of individuals desperate to be employed. Consequently, they were in no position to negotiate with an employer for decent conditions and wages, and simply accepted whatever was offered. Employers were aware of their position of power, which made it difficult for the enforcement of laws pertaining to TES workers (Int21.p345. Par.38).

In addition to the high unemployment rate, South Africa has been identified as having a high percentage of unskilled workers who have no access to employment, thereby exacerbating the plight of TES workers attempting to find employment (Int14.p201. Par.12). The oversupply of unskilled and semiskilled workers in South Africa is well documented (Bell, 2018; Maree,2011). For example, Maree (2011, p.11) states that

> A very important feature of the South African economy is the imbalance in the labour market. There is a chronic shortage of skilled labour, which co-exists with a very large surplus of low-skilled and unskilled workers. This gives rise to massive unemployment, which has existed for many decades and goes back to the apartheid era and beyond.

Bhorat *et al* (2016) suggests that the TES industry appears to have absorbed a lower skill set of workers and is a sector whose employment expansion is explicitly focused on semi-skilled and unskilled workers. A union division manager referred to above, itemised a variety of problems experienced by unskilled and semi-skilled TES workers (Int12.pp167-168. Par.44). The participant maintained that professional TES employees were generally employed in terms of fair principles, for specific projects, with proper compensation (Int12. p169. Par52). In contrast, unskilled and semi-skilled workers were often employed for extended periods as 'temporary' TES workers, on very low pay and benefits. If a legal dispute was declared, it took a considerable amount of time for a final judgment to be reached and for the employee to be employed as a permanent employee as a result of the court's decision. However, this

---

future of work, was provided by one participant. This document states 'a strong argument has been made that the immediate goal should be any job rather than a decent job if the high unemployment levels are to be lowered as targeted by the National Development Plan (NDP).'

'permanence' did not last long as the employer usually found a reason to dismiss the employee (Int12.pp167-168. Par.44). The participant reasoned that these practices continued because of the high unemployment rate in South Africa as individuals who had very little or no skills continued to accept potentially exploitative positions to access employment from 'fly by night labour brokers' as 'when they get any opportunity of work, they jump for it' (Int12. p169. Par56). This participant believed that the latest amendments to the labour legislation improved the plight of the TES employee as new legal mechanisms to deal with abuse now existed (Int12. p170. Par58).

6.3. Access to TES work

6.3.1. Access to TES work through networks

A director of a relevant government department believed that a large and increasing component of people in South Africa are those who struggling to get a foot in to the labour market.

> From a policy point of view, that is a huge challenge. How does one try and bridge for those who don't even work through temporary employment service companies or other intermediaries, how does one assist them into the labour market? Even if it is on a short-term basis … That's where the big numbers are… that raises a very important question, and that is how the industry operates in relation to that cohort - of those who are unemployed, but seeking employment, I mean. … That I think would be a very interesting issue with regard to the industry itself (Int22. P379. Par190-195).

The ILO suggests that agency work can be vital for less skilled workers who lack the informal networks and contacts that are often necessary to gain permanent employment (ILO, 2011). In the South African context of mass unemployment, job search activities are influenced by financial constraints, geographical isolation, networks and perceptions of opportunity. One of the most important ways of finding a job is through networks (Altman and Potgieter-Gqubule, 2009, p.31).

The director of a government department mentioned above, confirmed that most employment in South Africa originated through networks and contacts that individuals may have. It was therefore very difficult for the unemployed to access the labour market unless they were linked into these networks (Int22.p379. Par.200). The participant explained that the TES industry operated within a certain network of people that they have 'on their books' and therefore did not 'tap into' the cohort of unemployed people (Int22.p379. Par.198).

> In South Africa sort of common sense says that most employment comes through networks and particular contacts and that access to the labour market is a hugely difficult issue for many people. Unless you are linked into networks. And I suppose the question is, does the temporary employment sector operate any differently in respect of that issue? Or, does it also link into particular networks and not genuinely assist however many five, six million unemployed that are seeking employment, as a foot into the formal labour market? (Int22.p379. Par.200-202).

According to a TES firm participant who has been in senior positions in the industry for decades, the number of individuals who benefit from these internal networks are significant. This participant stated that they have as many as five million people 'on their database' who they can select for positions that suit their clients.

> I have … probably on record in terms of my database, shoo [chuckle], we can put it probably four, five million… Because we send out a sales team to go and hunt down these job opportunities, and because you know our operation team … support them so well, we can literally handpick the individuals that will suit a particular job function. If it is a critical one for example, with specific skill, but where a client is prepared to allow us to help upskill someone, they are prepared to give you know one or two people, not a lot but one or two people the opportunity to get in there first and to start to earn money and to start to get experiences, and that to me is invaluable (Int15.p219. Par.16-18).

The access to employment (whether it be temporary employment or permanent employment) via TES firms in South Africa appears to have three different contexts:

- The 'fly-by-nights' that employ those who were desperate and consequently take any opportunity of work: As one union participant pointed out 'So, every person in that grouping, and most of them are illiterate or semi-skilled when they get any opportunity of work, they jump for it. And this is where the fly-by-night labour brokers then abuse the situation by giving the people a lesser salary than the industry pays, or lesser benefits than the industry normally supplies' (Int12. p169. Par56);
- Expanded networks where reputable TES firms employ the unemployed from a wider group of those looking for work: As one senior TES firm participant mentioned stated 'There is no other institution in South Africa that is able to take 80 000 most of whom are youth and previously unemployed workers and in two years convert that temporary employment of 30 percent of them into a permanent job' (Int3. P44. Par174-176)[110]; and

[110] During 2010, Bhorat and van der Westhuizen (2010, p.61) suggest that more than 3.5 million workers had been placed by TES since 2000 and that half of these workers were previously unemployed.

- An internal network of workers that were 'on the books' of the TES firms therefore not extending the employment to those who were unemployed but rather using existing people within a contained network: As one senior legal participant explained 'there are labour brokers that have people on their books. I can call them to have someone that is available I don't need to go out into the market and recruit because that takes a month you know to get someone in on an urgent well to get someone in as an employee' (Int2. P20. Par90).

The issue surrounding access to TES employment using 'networks' is interesting as it appears that the TES industry creates employment for some unemployed who then become in a sense, partial insiders of an internal network. They dominate TES employment opportunities at the expense of other unemployed people who fail to get any foothold in the labour market or are forced to join 'fly-by-night' operators. As argued by the above participant, 'if you are working with a very specified pool of employees, you know, then it doesn't really help the problems we face in the labour market' (Int22.p380. Par.206).

6.3.2. 'Flexicurity' and the transition into employment

Balancing the security needs of labour market participants with pressures for flexibility has driven much of the policy-making in Europe (Russell *et al*, 2019).[111] The concept of 'flexicurity' originated as a policy framework in Denmark and the Netherlands in the early 1990s (Murphy, 2018) and is defined as:

> A policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of labour markets, the work organisation and labour relations on the one hand, and to enhance security - employment security and social security - notably for weaker groups in and outside the labour market (Wilthagen and Tros, 2004, p.4).

One of the central tenets of the flexicurity approach is that greater flexibility of labour supply supports transitions into employment (Russell *et al*, 2019). However, with increased flexibility there is a greater risk of job insecurity, both objective and subjective, with less stable contracts and more frequent unemployment spells (Russell *et al*, 2019).

[111] Flexicurity become influential in academic and political discourse when it was placed at the core of the European Employment Strategy by the European Commission (Burroni and Keune, 2011).

According to Zekic (2016), employment security and employability have become important notions in labour market policies and are often used as an alternative to job security. Job insecurity has been defined as the subjectively perceived risk of involuntary job loss and is generally understood as the security of staying in the same job with the same employer (Klug, 2019). Job security is believed to be a traditional form of security for workers whereas, employment security is a relatively new notion and is seen as a component of the more global notion of security of work and explained as the ability to easily find a job (Virtanen *et al*, 2002; Zekic, 2016). Due to the idea that lifetime employment is eroding, many policy makers are increasingly claiming that workers' income security should not depend entirely on their current job, but on their ability to find new employment in the labour market (Zekik, 2016). The idea that TES employees had greater employment security, especially during volatile economic times, was supported by a director of an employers' confederation participant.

> The employment security rather than job security, we argue is higher for a TES employee than somebody who is permanent. Because just because you are permanent, doesn't mean you are not at risk of being retrenched[112] at any given time, especially in economic volatility… in many cases the TES's are upskilling their TES workers significantly because there's obviously a benefit for them. Because the higher the skill level of their temp workforce, the more easily they are able to put them into clients and obviously their rates of pay goes up and so it's good for everybody (Int30.pp498-499. Par.22).

A participant from a confederation of business organisations shared a similar view. This participant believed that from a security of employment perspective, the TES industry played a valuable role. This participant argued that although long-term security could not be guaranteed, the reality was that the industry was creating opportunities for short term work and was a major labour market facilitator. (Int11.p155. Par.40).

In line with these participants' views, Smith and Neuwirth (2009) researched temporary agencies' ability to find new employment for their workers. They studied a temporary help agency firm in Silicon Valley in the United States over several years. They were interested in how temporary agencies attract the best possible employees and how they negotiate with client companies to ensure a good 'fit' for the temporary workers they place. They found that temporary agencies help applicants to improve their resume's and refine their job expectations. In addition, Smith and Neuwirth (2009) state that they often advocate for better wages, higher-

[112] Made redundant.

level positions, and more humane, safer working conditions for their temporary workers. Although they warn against their analysis being construed as an endorsement of temporary help service agencies, they argue that the infrastructure of the temporary help industry may provide unusual forms of assistance and protections for workers who lack options for better jobs. They conclude that while, on average, agency temps receive lower wages and rarely can purchase health insurance, they can also be buffered from the worst aspects of new employment relations by labour market intermediaries such as temporary placement agencies (Smith and Neuwirth, 2009, p.56).

The notion of employment security as opposed to job security was further discussed by the participants in the context of decent work, and conflicting views emerged.[113] A participant from a large TES firm believed that decent work as a concept in South Africa was moving away from the idea that it needed to be a permanent job, with a pension, medical insurance and job security, towards the concept of employment security[114] (Int3.p46. Par.200). Whereas a senior director of a government department believed that although temporary work, by definition, did not provide long-term employment security, there was no fundamental conflict between the concept of decent work and temporary work *if* temporary work had access to rights, such as social security benefits (Int22.pp366-367. Par.36-40). However, the need for job security as a necessity for decent work was stressed by a manager at a national bargaining council. The participant argued that even though the TES industry provided work for individuals, these opportunities lacked job security and consequently deprived individuals of the ability to make commitments and buy assets, such as homes and motor vehicles, or any decision that required long-term financial security (Int27.p452. Par.49).

A few participants raised similar concerns regarding the lack of job security experienced TES employees. A union participant believed that TES workers were unable to make long term plans as they were uncertain of where they would be working from month to month, weekly or even daily (Int21.p342. Par.6). According to this participant, virtually no TES employee felt confident that they would be working at the same place after a year. The participant explained that

[113] The participants were asked to consider the International Labour Organisation's (ILO's) concept of decent work in relation to TES industry in South Africa. The interview invitation letter (see appendix 2) asked the following question 'What are your thoughts about labour brokers and the ILO concept of 'decent work'?' The question was purposefully broad as the idea was to focus on their individual understanding of the concept.
[114] See paragraph 6.3.2. for further discussion on job security and paragraph 6.4. on social security.

although this lack of certainty was not problematic for a small minority of very highly skilled TES workers, for most semi-skilled manual workers, life was extremely precarious. They may have a reasonable job one week and be completely unemployed the next week, as there would be no available work for the TES firm they were working for (Int21.p342. Par.8-9). However, in line with flexicurity principles discussed above, a participant who worked for a non-profit, voluntary organisation argued that it is these very risks that TES employees face, that makes employing them attractive to some employers, thereby aiding their transition into employment.

> Our sort of biting joke is to say that the workers who are the most precariously based are the permanents, because why would the employer want to have a permanent employee worker there, with high wages, with benefits like medical aid and provident fund? Why should you want to do that if you can have these labour broker workers that you can, you know, bring into your workplace and expel at will? If I were an employer, I would probably be doing the same thing it makes perfect sense (Int9.p136. Par.68).

Wright *et al* (2019) however caution against the flexicurity model being seen as a purely positive solution. They argue that although in Denmark and the Netherlands, flexicurity systems were an innovative design to encourage flexible labour markets in a manner mutually beneficial to businesses and but its reliance on high levels of public spending and the resilience of unique institutional arrangements are likely difficult to replicate in other countries. Additionally, while flexicurity may be beneficial for the unemployed, its ability to reduce the harmful effects of job insecurity has been seriously questioned.

6.3.3. TES work as a steppingstone to permanent employment

Bhorat *et al* (2016) considered the aggregate and sectoral employment trends relative to the TES sector for South Africa over the past nineteen years (1995 to 2014). [115] As part of this study, they mentioned that the temporary to permanent placements conversion rate between July 2013 and June 2014 was 19.9 percent. This means that 19.9 percent of TES workers who were initially employed on a temporary basis were permanently employed as at June 2014. However, Bhorat *et al* (2016) stated that the result is in contrast to their findings using the Quarterly Labour Force Survey (QLFS) data, which show that more than half of TES employees were actually permanently employed.

[115] Although the TES sector was not listed as a separate sector in the labour force and household survey data, Bhorat *et al* (2016) state that the sector is possible to capture in a 'more statistically circuitous and complicated manner'. The TES sector they claim, manifests itself in respect of the financial and business services sector.

In addition, the qualification and occupation data for young people in South Africa shows that the TES sector is a vital port of entry for young people, with incomplete schooling or a Matric[116], who are hoping to enter the labour market (Bhorat, Cassim and Yu (2017). However, on average, the conditional wage penalty for being a TES employee is around 17 percent and this penalty is greater as one moves up the wage distribution (Bhorat and van Der Westhuizen, 2013).

Accessing TES work as a means of acquiring permanent work was a strong theme that emerged from the interview data. In other words, TES work as a steppingstone into permanent employment and increased skills. A senior member of staff of a large TES firm pointed out that after a two-year period, about thirty percent of their temporary workers that were placed with TES clients, obtained permanent employment (Int3. p44. Par172). [117] The participant maintained that their TES firm was a channel into the formal or permanent labour market.

> There is no other institution in South Africa that is able to take 80 000, most of whom are youth and previously unemployed workers, and in two years convert that temporary employment of 30 percent of them into a permanent job (Int3. p44. Par176).

Similarly, a chief executive officer of a prominent TES firm, that had been operating in the South African market for many years, supported the idea that TES firms create permanent employment.

> I think I've placed on average about ten odd thousand people every single day throughout the country, and different entities, and different job categories. And I've placed probably about three million people in permanent employment since I've started. And the stories I can tell you are some wonderful heart-warming stories about how people have come in with literally nothing (Int15. p218. Par6).

A human resources specialist of a large retailer who is a TES client, agreed that TES employees obtained permanent employment as a result of their placements, especially in the supply chain environment. Many of the participant's permanent employees came via the TES firms that they engage (Int16. p248. Par142).

> A lot of people in our business today have, in fact some of my colleagues, have come through those ranks and sort of joined the business. So, I do think there is an element of in the good cases, it does provide a step into permanent employment, as a sort of first experience (Int16. p248. Par142-144).

[116] The final year of schooling in South Africa (year 12).

[117] See par. 6.2.1. above for a discussion on the limitations in available statistics on TES workers in South Africa.

However, a legal participant who acts for TES workers, firmly disagreed with the idea that TES firms found long-term employment for their employees. This participant believed that there was a demand for employment in South Africa and this demand would exist whether the TES industry operated or not. Instead of employing individuals permanently, TES firms created an environment where TES clients preferred to employ TES workers to meet that demand. The participant argued that by providing TES staff, TES firms simply ensure that employers can easily dismiss workers, thereby making employment more perilous and reducing the demand for permanent employment (Int7. P116. Par64).

The TES industry creates opportunities rather than employment, was the argument posed by another senior legal participant. This participant believed that if the temporary nature of a position fell away, the TES client would need to consider whether the position was permanent. If the TES employee was familiar with the work and understood the client's system, that individual would inevitably be given preference. 'Why wouldn't I hire someone that has been working my systems and understands my systems for X amount of time?' (Int31. p509. Par20). The participant further explained that the commercial contract between the TES and the TES client would not prevent the TES employee being employed permanently by the client, as there was usually a 'conversion' clause built into a TES service level agreement.[118] The conversion clause usually converted the fees payable by the client to the TES firm.[119] If the TES client hired the TES employee permanently, the client was required to pay a recruitment fee to the TES firm. Interestingly, the participant stated that this fee would inevitably be significantly lower than the fee payable if the TES client approached a recruitment company to recruit an employee for that position, creating an incentive for firms to hire TES employees permanently (Int31. pp509-510. Par22-26).

[118] Compared to the provisions of the Private Employment Agencies Convention 1997 (No. 181) and the Private Employment Agencies Recommendation, 1997 (No. 188), the norm that requires that workers should not be prohibited from being employed directly by the client has not been specifically included in South African legislation (Aletter and van Eck, 2016).

[119] Secondary data, being two examples of TES employment contracts were provided by an attorney participant who had acted for the TES employees (Int33. Vol 2. Pp.40-41. Par172-186). The contracts were from two different TES firms and the employees' names had been removed for purposes of confidentiality. Both contracts stipulated that the TES employee was to immediately notify the TES firm if they were approached by the client to work for the client. If the TES employee failed to notify the TES firm, both contracts made provision for the TES worker to pay an amount to the TES firm. One contract mentioned an amount equal to one month's remuneration for the TES employee, and the other stated that this amount would be the 'usual placement fee' to the TES firm. Neither contract specified the terms of the 'transfer' if proper notification was received.

However, a legal participant who was an acting Labour Court judge, described a legal matter within his personal experience, where the TES firm contractually prohibited the permanent employment of the TES employee by the client. This participant argued that such a clause would be tantamount to a restraint of trade agreement. In this matter, the TES client undertook not to directly employ anybody who was engaged through the TES firm (Int33. Vol 2. p40. Par172). However, the TES workers in this matter did not proceed legally against the TES firm as the participant stated that they were too afraid to litigate.

6.4. Access to training, social insurance and retirement benefits

6.4.1. Access to training

There were polarised responses amongst the participants regarding the training of TES workers. A union participant explained that TES workers often did not have access to the training that was offered to permanent, full-time employees (Int26.p429. Par.20). However, one TES client participant stated that there were TES firms who acted professionally and were 'specialised' in providing TES services. These firms provided medical aid, provident fund, training, induction, uniforms, and 'permanent employment status' within the TES firm. According to this participant these firms were 'doing it the right way'. However, the participant acknowledged that these firms were in the minority within the TES industry (Int16.p241. Par.52-54).

In South Africa, companies may claim back a part of their training expenditure according to *the Skills Development Levies Act 1999* (No. 9), as amended. A legal participant believed that from a skills levies perspective, the TES industry was the largest contributor in South Africa.[120] Which, according to this participant, meant that TES workers were being trained and developed by TES firms and that the negativity surrounding this aspect was merely 'rhetoric' (Int31.p508. Par.14). This participant argued that temporary employment service providers were historically the greatest contributor to employment in South Africa as they provide young workers with experience and training which allows them to access future employment (Int31.p513. Par.56). According to a senior TES firm employee, there was a need to keep the currency of their skills up to date with labour market requirements. This participant believed that TES employees' access to skills development is significantly addressed as it was a TES firm's function to ensure

[120] This information was supported by secondary information provided by a TES employee participant, namely a Confederation of Associations in the Private Employment Sector (CAPES) 'Temporary Employment Services Stakeholders Pocketbook 2008'.

that they have a 'talent pipeline'. As a result, both the payment of the levy and the access to skills development was critical (Int5.p71. Par.82).

In addition to the skills levy, the senior TES firm employee mentioned above, outlined the TES industries' role in the Employment Tax Incentive (ETI). The ETI is the package of tax incentives that Treasury of South Africa introduced which encouraged business to employ young people. It is a wage subsidy that employers receive for employing people under the age of twenty-nine, earning below the Threshold Amount, for a two-year period and encourages the employment of first-time employees. According to this participant, a high number of labour broking employees were ETI beneficiaries. The participant explained that the ETI encourages TES firms to take first time employees, very often through temporary employment services, in order to access skills (Int5.p71. Par.82).

6.4.2. Access to social insurance schemes

Although the right to social security and assistance is constitutionally mandated, there remains no comprehensive social security system (Cohen and Moodley, 2012). South Africa has contributory social insurance, whereby employers and employees contribute to a scheme to protect employees against contingencies which may interrupt their income-earning capacity due to ageing, sickness, disability, death, loss of employment and due to the birth of a child (Patel, 2013). South Africa therefore takes a risk-based approach to social protection and compensates beneficiaries for lost income because of exposure to these contingencies (Kaseke, 2010). The impact of South Africa's social insurance schemes is limited in that only two broad principal risks are covered, namely unemployment and employment injury (Kaseke, 2010). In addition, there is a significant gap in social provision as those that are not formally employed[121] do not have access to occupational benefits (Ibid, 2013). These schemes are authorised by legislation and oversight is provided by statutory institutions that also regulate the feasibility of different schemes operated by financial and insurance industries (Ibid, 2013).There are two[122] social insurance schemes in South Africa that are employment based, namely the Unemployment

[121] Those outside of formal employment are informal sector employees, independent contractors, the self-employed and unemployed (Patel, 2013).
[122] The third scheme, the Road Accident Fund, is not employment-based and is financed out of an obligatory fuel levy. It provides protection against the risk of road accidents (Kaseke, 2010).

Insurance Fund (UIF) and the Compensation for Occupational Injuries and Diseases Fund (Kaseke, 2010).

The Unemployment Insurance scheme is provided under the terms of the *Unemployment Insurance Act 2001* (No. 63 of 2001) (UIA), that provides protection to workers against the risk of temporary unemployment caused by termination of employment, maternity, illness and adoption (Kaseke, 2010). Contributions come from both the employee and employer and these are paid into the Unemployment Insurance Fund (UIF). Employees and employers contribute one percent of the employee's monthly earnings and, if the employee has accumulated enough credits, benefits are paid on a sliding scale for 34 weeks (Patel, 2013). Approximately 45 percent of the labour force is covered by the scheme (Patel, 2005). Those outside of formal employment namely, informal sector employees, independent contractors, the self-employed and unemployed are not included in the coverage (Patel, 2013). The fund has become more sustainable as higher income earners now contribute, but the current scheme does not provide adequate income protection for higher income earners (Ibid, 2013).

The UIA applies to all employees, but not to those who work less than 24 hours a month for an employer; learners; public servants; foreigners working on contract; workers who get a monthly state pension; or workers who only earn commission. Unemployment benefits are only available to employees who have involuntarily lost their jobs. For example, if their employers are insolvent; the termination of the contributor's contract of employment by the employer of that contributor or the ending of a fixed term contract; or if they are dismissed (Section 16 of the UIA). Benefits can be calculated on a daily, weekly or monthly rate (Section 13).

These schemes are normally attached to formal employment[123], and hence an increasing number of people are largely excluded. Also, the better paid typically secure the largest share of the benefits (Pauw *et al*, 2007). Importantly, the way benefits are calculated may adversely affect TES employees who work erratically. Section 13(2) stipulates that if the contributor's remuneration fluctuates significantly from period to period, the calculation must be based on the average remuneration of that contributor over the previous six months. A contributor's entitlement to benefits in terms of this Section 13 accrues at a rate of one day's benefit for every

[123] Those outside of formal employment are informal sector employees, independent contractors, the self-employed and unemployed (Patel, 2013).

completed six days of employment as a contributor subject to a maximum accrual of 238 days benefit in the four-year period immediately preceding the date of application for benefits (Section 13(3) of the UIA). As benefits are calculated on completed days of employment, and in terms of an average remuneration over a six-month period for those whose employment fluctuates, the TES employee may receive significantly less than an employee who works permanently over the same period.

In terms of the *Compensation for Occupational Injuries and Diseases Act 1993* (No.130) covers employees for injuries and diseases at work. Although, once again, those outside formal employment are excluded from claiming benefits (Patel, 2013). The Compensation for Occupational Injuries and Diseases Fund is funded out of employers' contributions, which vary from employer to employer depending on the risks inherent in their businesses (Kaseke, 2010). This Act specifically includes a 'labour broker' employee in its definition of 'employee' in section 1(xix)(c) '…and includes a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker'.

6.4.3. Access to retirement benefits

Part of the debate regarding social security in South Africa revolves around the question of whether housing, transport, education and other forms of income support provisions should be included in the social security framework (Olivier, 2000). Government appears to be of the view that for South African purposes, social security includes both public and private measures, inclusive of private savings (Olivier, 2000).

South Africa is unique in the way its pensions are administered as it has no compulsory or national pension fund scheme. However, the provision of healthcare and retirement benefits is piecemeal and is largely limited to employees in permanent employment (Cohen and Moodley, 2012). Unlike the majority of countries, most South African retirement funds are privately administered and funded (deVere Acuma, undated).[124] Under the current system, a large portion of employed workers do not have retirement provision due to this absence of a mandatory contributory system. Employers are not required by law to enrol their employees in retirement funds but, due to generous tax incentives, at least 50 per cent of formal sector employers do enrol

[124] The Government does provide retirement schemes for its own employees.

(Hunter, 2018). In 2008 there was 11701 retirement funds with 10.8 million members according to the Registrar for Pension Funds (Oxford Policy Management Africa, 2011).

Most occupational retirement funds are funded by contributions made by both employers and employees. Some are funded only by employers and others only by employees (Hunter, 2018). Financial services providers, trade unions and bargaining councils[125] may establish umbrella funds under the LRA 1995 or by the Minister of Labour in terms of sectoral determinations issued in terms of the BCEA (Ibid, 2018). In some unionised workplaces collective agreements have been concluded between employers and unions in terms of which union employees are required to belong to a multi-employer or 'umbrella' fund established by the unions. Non-unionised employees may be allowed to belong to either union funds or other occupational retirement funds identified for the purpose by their employers ((Hunter, 2018).

Budlender (2013) points out that the Confederation of Associations in the Private Employment Sector (CAPES) introduced several initiatives for TES workers. In 2009 CAPES developed the CAPES Provident Fund. TES workers who were not covered by bargaining council retirement funds were offered the option of joining this fund, which preserved their savings over periods during which they were unemployed. CAPES and its affiliates did not however contribute to the fund on behalf of workers but offered the opportunity of membership. At that time, Budlender (2013) recorded that the fund had in excess of 4,000 members. The fund experienced challenges however, in that it was not designed for workers who were employed intermittently as it required regular monthly deductions from earnings.

Important for TES purposes, is that an employer may exclude certain employees from participation in its retirement plan but must ensure that the fund's rules exclude all employees within the relevant category from membership of the fund (Hunter, 2018). The category may not be determined on a basis that unfairly discriminates on prohibited grounds (for example, race or gender). The rules of a fund may provide that an employee must have worked for a participating employer for a specified period before he or she will be eligible for membership of the fund (Ibid, 2018).

[125] A director of a confederation in the employment sector mentioned that sixty percent of the TES employees are either covered by a collective agreement or bargaining council agreement (Int30.p498. Par.20).

6.4.4. TES employees' access to social insurance and retirement benefits

Tshoose and Tsweledi (2014) believe that social protection afforded to employees in non-standard employment is inferior to that afforded to formal employees. This owing to the insecure nature of the employment and the lack of the social security arrangements associated with this type of employment, such as medical schemes and retirement provisions. This belief was supported by a participant from the ILO. The participant stated that historically, TES employees could have been employed by a TES firm for as long as 20 years without ever being employed permanently and were not receiving these benefits, therefore saving costs for the employer (Int17.p255. Par.20). The participant believed that social security remained a current dilemma for TES employees and organised labour because of the mobility of the TES worker. The challenge was to ensure TES employees retained their benefits when they changed employers, rather than accessing them[126] and starting a new (Int17.p256. Par.32).

> So, that is linked very much to the very debate that's going on in the country on social security reform. And ensuring that people do not lose access to their contributions[127] if they move from one employer to the other. And that means there must be […] a national scheme which can then make it possible for people to contribute even though they came from one employer to the other. I think that is at the heart of the conversation and there is an ongoing policy debate now at NEDLAC for social security reform.' (Int17.p256. Par.34-36).

A senior employee of a large TES firm discussed these potential changes to social security and pointed out that organised labour had not supported the changes largely due to their members desire to retain the right to access their retirement contributions when they leave their employ. [128]

> In the past year there was a desire in the country to make social protection more formalised, in other words, compulsory. And, of course, Government wanted to do this because they wanted to make sure that all workers contribute, so that they didn't fall back

[126] Until recently, South African law did not require the preservation of retirement savings on change of employment and most employees 'cashed in' those savings in such circumstances. This 'leakage' results in wholly insufficient provision for retirement. The Minister of Finance sought to address this by publishing regulations that will require preservation by default (Hunter, 2018). Media resources reveal that new default regulations to the Pension Funds Act were implemented from 1 March 2019. When a member leaves employment before retirement, the fund must automatically preserve the member's benefit in the fund and convert the member to a 'paid-up' member. The benefit will only be paid out to the member or transferred to another fund selected by the member when the fund has been specifically instructed to do so by the member The member can still choose to receive payment of their benefit - or 'access' their benefits as mentioned by this participant (Businesstech, 2019). However, many funds are not ready to implement new regulations under the Act and have applied for exemptions (Brown, 2019).

[127] It was assumed that the participant was referring to pension or provident fund contributions that the employer, or the employee and employer jointly contribute to throughout the course of employment.

[128] See footnote 25 above for a further discussion on what it means to 'access' pension fund money.

> on a government responsibility when they were unemployed or retired (Int5.p72. Par.90). But the trade unions are remarkably distrustful of pension funds so there was a huge amount of resistance for this and it was pended for a further year as was the principle of preservation of provident funds. And I really think this comes through a desire for workers, particularly low-income workers wanting to have access to their money (Int5.p72. Par.90-92).

This participant explained how their large TES firm dealt with their TES employees in terms of social insurance and pension benefits. What is interesting about this account is how the firm has dealt with the mobility of TES employees.

> From a benefit perspective in this country, both medical aid and your retirement fund are voluntary, but what we did do was make sure that temp workers or labour broking employees, if they are not covered under the bargaining council, that they have access to similar benefits to a permanent worker, and they would be able to have mobility in terms of moving from their workplace. So, there are central funds and we made it quite flexible in terms of an alignment to contribute, not contribute when they not working, etcetera. So that it actually accommodating the requirements that are needed from temporary work (Int5.p72. Par.88). I think a fairly unique set up, from a legislative perspective.[129]

A legal participant mentioned that the amendments to the employment legislation, more specifically the deeming provisions and the parity provisions, aim to improve the benefits that the TES employee receives. However, the changes referred to are only after the three-month period when the TES employee is deemed to be the employee of the TES client.

> That is also one of the purposes behind the amendment to ensure that employees who are provided through a labour broker are on the whole not treated less favourably than permanent employees of the client. In monetary terms they would therefore need to be compensated in respect of the benefit fund that permanent employees would be members of so that they can make their own arrangement. Or, you know, get the labour brokers to offer those kinds of benefits to the employees. And, in that way I think that the legislation aims to up the level of remuneration and benefits enjoyed by this category of employee (Int3.p20. Par.100).

However, referring to paragraph 5.5.3. of this thesis, in terms of *General Industries Workers Union of South Africa obo Mgedezi and Others v Swissport SA (Pty) Ltd and Others*[130] (the *GIWUSA v Swissport* matter), we now know that access to these benefits may not be as simple as this participant anticipated during 2017 when the interviews were conducted.

[129] The 2018 annual report of this group states that all employees including temporary employees are entitled to core benefits, including a funeral plan; debt counselling; healthcare and retirement funding. However, the retirement/provident fund is only compulsory for all permanent employees.
[130] Case no. WECT 18794 on 18 March 2019.

From the above, it appears that in terms of access to social insurance and pension benefits the TES employee in South Africa is a partial insider. Although they have access to certain minimum statutory rights in terms of the UIA, these are contributory and accrue on completed days of employment in a four-year period,[131] which may be far less than a permanent, full-time employee. In terms of pension and medical benefits, which are not compulsory and do not include a national pension fund scheme, TES employees are reliant on employer, union or bargaining council plans. These plans may specifically exclude certain types of workers and may provide for a minimum employment period before being able to join the plan. TES employees may therefore be excluded on both counts. Some TES firms do provide these benefits, but this appears to be in the minority. In the event that TES employees work for a client for longer than three months, they will become the employee of the client and the parity provisions may apply in terms of these benefits, but may not be the same as those provided to the permanent employees,[132]making them partial insiders in terms of their employment with the client.

6.5. Conclusion

The first part of the chapter dealt with three contextual issues relating to the TES employee. Firstly, the lack of statistical information regarding the TES sector made it difficult to study trends within the sector. One TES firm participant explained that they compile their own statistics 'through some assumptions'.[133] The reason for the lack of statistical material relating to this sector was largely because Stats SA did not differentiate between different types of work and trends could therefore not be isolated. The hope was that this situation would change as soon as the ESA came into operation as this Act would require compulsory licensing for TES firms, which would result in more accurate statistics.

Secondly, whether individuals working for TES firms were considered 'employees' or 'workers' and if their status as 'employee' or 'worker' made a material difference, was discussed. Whereas in the UK there is a distinction between a 'worker' and an 'employee', in South Africa the same distinction is not made. The word 'worker' is not defined in the LRA 1995, but 'employee' is defined in section 213. However, the TES employment relationship is not covered by section 213

[131] Section 13 of the UIA: that benefits accrue at a rate of one day's benefit for every completed six days of employment as a contributor subject to a maximum accrual of 238 days benefit in the four-year period immediately preceding the date of application for benefits.
[132] See par. 5.5.3. for further discussion on the parity provisions and the access to benefits.
[133] (Int5.p89. Par.318).

but rather in section 198 of the LRA 1995. In chapter 9 of the LRA 1995 entitled 'Regulation of non-standard employment and general provisions', section 198(2) states that: 'for the purposes of this Act, 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'. [emphasis added]. In the *Assign* Constitutional Court matter [134] Dlodlo AJ in his majority judgement stated that once the employee provides a service to the TES's client, they automatically become the TES's employee. Furthermore, nothing turned on the difference between the word 'deemed' and 'is' in section 198(2) and that the difference should not cause controversy. He was of the belief that both sections create a statutory employment relationship which does not depend on the way the word 'deemed' is interpreted[135]

Thirdly, the negative effect of the high unemployment rate in South Africa (27.5 percent in the third quarter of 2018) was examined. Unemployment together with an over-supply of unskilled workers in the labour market, created an environment of general desperation to find work. This in turn affected collective labour's approach to TES employee matters as they felt that collective action was too risky and that each matter had to be dealt with on a case by case basis. The reason being that employees were afraid that they would lose their employment if they 'complained' and tried to enforce their rights. Individuals would rather accept low wages and abusive conditions than be unemployed. This environment of fear created a scenario where 'fly-by-night' TES firms were in a position of power and enforced low wages and poor working conditions on their employees who were willing to accept these conditions as an alternative to unemployment.

The second part of the of the chapter dealt with access to work. Firstly, the access to work through networks was explored. This access appeared to have three different contexts, through the 'fly-by-night' TES firms that employed people from a pool of desperate individuals; through expanded networks where TES firms employed the unemployed from a wider group; and internal TES firm networks where workers remained 'on the books' of the TES firms. The latter group created partial insiders of an internal network who accessed work at the expense of other unemployed people. Secondly, the chapter discussed the concept of 'flexicurity', more

[134] Case CCT 194/17.

[135] At Case CCT 194/17, paragraph 50 of the judgement.

specifically the belief that greater flexibility of labour supply supported transitions into employment. The notion of employment security and job security were discussed by the participants in the context of decent work, and conflicting views emerged. Some participants believed that the employment security as opposed to job security was higher for TES workers especially during volatile economic times. There was a belief that it was easier to find employment as a TES worker as TES firms invested in their training and created opportunities for further employment, which was not the case for those trying to access employment through their own means. However, some participants believed that job security was still a necessity and was lacking in the TES industry. A lack of job security deprived people of the ability to make commitments and made life extremely precarious for especially unskilled and semi-skilled people. One participant argued that it was TES employees' lack of decent wages and benefits that made them attractive to employers and allowed them to access employment through TES work. Thirdly, the idea that TES work was a steppingstone into permanent employment was explored. Some TES firm participants believed that it was a successful means of accessing permanent employment and examples were provided. However, one opposing view came from a legal participant who acted for TES workers. This participant believed that there was a demand for employment in South Africa and this demand would exist whether the TES industry operated or not and that TES work allowed clients to employ TES workers instead of meeting this demand, thus creating fewer permanent positions. Interestingly, a legal participant explained that commercial arrangements between the TES and the TES client usually allowed for the TES employee to be hired permanently by the client for a lower recruitment fee, which created an incentive for hiring TES employees permanently.

The third part of the chapter deals with the TES employee's access to social security and retirement benefits. Once again, the TES employee in South Africa can be described as a partial insider in terms of their access to social security. Although TES employees have access to certain minimum statutory rights, these are contributory and accrue on completed days of employment. In terms of pension and medical benefits, which are not compulsory and do not include a national pension fund scheme, these plans may specifically exclude certain types of workers and may provide for a minimum employment period before being able to join the plan, with potentially negative consequences for TES employees.

CHAPTER 7: THE TES FIRM

7.1. Introduction

This chapter will outline the principal findings relating to temporary employment services (TES) work from the TES firm perspective. It consists of two main sections. The first section deals with the nature of the TES industry in South Africa, commencing with the first part that deliberates relevant terminology, including colloquial terms used for TES firms. The second part sets out the growth and importance of temporary agency work, including recent estimates of the size of the industry. Thirdly, the negative rhetoric that is used to describe the industry, together with the idea that 'labour is not a commodity' is discussed.

The second section contains a discussion of four themes that emerged from the interviews. The first theme was how TES work had changed and how this affected the participating TES firms. The second theme concerned the range of different 'staffing solutions' or 'outsourcing' services offered to TES clients and the reasons these arrangements were considered by clients. The third theme involved the consolidation of the TES industry and whether the participants believed that the change in legislation had confined the TES industry to the larger, more formal operators. The final theme dealt with a renewed focus on higher earning TES workers and the reasons for this focus.

7.2. The nature of the TES industry

7.2.1. Terminology

The term 'labour broker' is used in South Africa to refer to what are more commonly referred to as labour hire firms or temporary employment agencies. Although the statutory terminology was changed to 'temporary employment services' (TES) in 1995, the term 'labour broker' has remained and is often used with a scornful meaning in public discourse (Benjamin, 2013). The negative connotations surrounding this term were discussed by a participant from a large auditing firm in Johannesburg:

> These days companies that are labour brokers don't like to be called labour brokers, you know they are service providers. They also shy away from the name labour broker because of the negative connotation. There is one company that I visited that said hell no! We are not a labour broker, we are an employment company that provides the right skills, to the right client, whenever they want to, you know whenever they need it. So, it is just dressed up differently. So as long as you don't use the name, you may not have the negative connotations associated to it. So, if companies that are labour brokers don't want

> to be called labour brokers, then it shows me that there is a perception that the concept of labour broker is not invited, is not good. But you can dress a sheep up or cow up in wool and call it a sheep, but it is still a cow [chuckle] (Int1. p9. Par64-66).

For the purposes of this thesis 'temporary employment services' (TES) will be used for the South African context, and 'temporary employment agencies' for the international context.

The TES industry in South Africa is diverse, ranging from well-established TES companies that abide by statutory rules and regulations and provide certain benefits for the workers, to low end, more informal operations associated with the abuse of workers, referred to by many as the *'bakkie brigade'* (Int22.pp364-365. Par.20). Table 17 sets out the different categories of TES firms in South Africa.

***Table 17**: Types of TES firms in South Africa*

Category of firm	**Features**
Large scale, established firms	Firms ranging from multinationals or regional firms, usually publicly listed. Many have been established for decades. General practice is to operate within labour legislation.
Subsidiary firms and Black Economic Empowerment (BEE)[136] partnerships/fronts of large established companies	Large firms often establish subsidiary companies or partnerships. This allows them to focus on a range of different market segments. This is also done to obtain business which requires BEE credentials. Subsidiary companies often practice more flexibility than their parent companies in adhering to labour legislation. Likely to be registered with the Department of Labour.
Independent agencies	Usually private companies, ranging from well-established organisations with a national footprint to small start-up operations with a single office. These are often entrepreneur driven, sometimes assisted by having Black Economic Empowerment (BEE) credentials. Sometimes almost entirely dependent on a single client. Likely to be registered with the Department of Labour.[137]
'*Bakkie* brigade' & informal recruiters	Small scale labour brokers using a *bakkie* (a small truck) to transport workers and usually without any business premises. They often act as *gang masters* responsible for payment and generally take a percentage of the pay. They draw on personal networks, sometimes extending into neighboring countries, to

[136] Please see paragraph 8.2.3. for further discussions regarding BEE.
[137] See paragraph 6.2.1. for a further discussion on the registration of TESs.

	recruit. Mostly not registered with the Department of Labour.

Source: information provided by participant interview 3.

7.2.2. The growth and importance of temporary agency work

The TES sector[138] is the single highest creator of jobs in the South African economy and contributed around nine percent to gross domestic product (GDP) in 2013, which is significant in the context of South Africa's low levels of economic growth (Bhorat, Cassim and Yu, 2017). South Africa has exceptionally high levels of youth unemployment, reaching 36 percent in 2014 and the TES sector disproportionately employs more young people than the national economy or other sectors (Bhorat, Cassim and Yu, 2017). TES employment has contributed R256 157 million to GDP in 2013 (representing 9 percent of total GDP), which was greater than that of Agriculture (2.1 percent), Utilities (2.7 percent) and Construction (3.5 percent) in 2013 (Bhorat, Cassim and Yu, 2017).

Most participants interviewed expressed general views on the growth of the TES industry. However, there was a reluctance from TES company participants to offer specifics. Through further prompting and discussion, senior members of staff or owners/CEOs of three large TES companies did provide some opinions regarding the size and general trends in the industry. As discussed in the previous chapter, there was consensus amongst participants regarding the lack of reliable statistics for the TES industry. A senior member of staff of a confederation for the South African staffing industry, agreed that the industry was 'a difficult thing to measure because there isn't a singular … industry that gets reported … because there is no one place to report.' (Int30.pp498-499. Par.22). The exact number of TES workers in South Africa is therefore not known. Table 18 provides recent estimates proffered by certain writers and research units about the number of TES workers in South Africa. These statistics lack precision, and some do not distinguish between TES work and other forms of atypical work. However, collectively, they do provide a sense of the size of the industry.

[138] Bhorat, Cassim and Yu (2014) refer to the TES 'sector'

***Table 18**: Recent estimates provided in terms of the number of TES workers in South Africa*

Source	Details of the TES industry provided
Bhorat and van der Westhuizen (2010)	Estimate that in 2007, the number of TES workers in South Africa was about 600 000. The Confederation of Associations in Private Employment Sector (CAPES) estimate that the number is 850 000.
Scully (2015)	42 percent of South Africa's employed labour force can be identified as precarious in one way or another.
Bezuidenhout *et al* (2017)	Draws his data from Statistics South Africa (Stats SA) data and estimates that there are 3.3 million casual, outsourced and limited-duration contract workers out of a total working population of 15 million.
Benjamin (2012)	Reported that the National Association of Bargaining Councils (NABC) had estimated that there were 780 000 TES workers in the private sector in 2010.
COSATU (2012)	Three million was the estimate of COSATU's research unit, NALEDI in 2012. This research unit further reported in 2012 that the National Association of Bargaining Councils (NABC) had estimated that there were 979, 539 TES workers in South Africa.
Bhorat, Cassim and Yu (2016)	Found that the TES employment increased from 0.2 million in 1995 to 0.97 million in 2014, accounting for 6.4 percent of total employment.

Source: researcher's own summary

The online information provided by TES companies is similarly vague. Table 19 sets out information obtained from the interviews, together with annual reports online, for four TES companies. The total number of temporary or contract workers placed daily in only four companies total 117,304 workers, which provides some sense of the size of the industry. A participant from an international staffing company estimated that there is a total of 900 000 temporary workers placed on a daily basis in South Africa (Int10. P141. Par18). Another TES company participant indicated that their company had approximately 4 to 5 million individuals on their TES 'data base' when the interview was conducted during September 2017 (Int15.p219. Par.16).

***Table 19**: Four TES companies in South Africa: Employee and contractor numbers*

Company	No of Permanent staff	No of Contractor/ Temporary staff	No of people placed daily
Company A[139]	118	32 304	32304
Company B[140]	230 permanent & 100 contractors that fulfil a support function for the business	Not available	7500 to 10 000
Company C[141]	3466	74041	+/- 60000 (industrial services only)
Company D[142]	Not available	Not available	15 000

Source: researcher's own summary

A participant who spent many years working for a large union was of the opinion that the TES industry was not only flourishing but had become the standard form of employment in South Africa, a 'dominant form of labour, this is not just like an aberration you know …' (Int9. p134-135. Par54). However, participants from a government institution, an international TES firm and the ILO disagreed with the notion that the TES industry had become 'standard' employment and that it remains just one of the offerings that exist in the South African employment market (Int10. p149. Par92; Int12.p175. Par.102; Int22.p378. Par.188). These participants believed that the permanently employed were a far larger group than the TES workers in South Africa. Interestingly, both the union participant (Int12.p175. Par.102) and government institution participant (Int22.p378. Par.188) estimated the number of TES workers in South Africa to be close to 1.5 million workers. All three acknowledged that the TES industry plays a significant role in the labour market (Int12.p175. Par.102) although the importance and size of the industry continues to be a contested subject in South Africa (Int17.pp255-256. Par.28).

[139] Company A, information was obtained from its integrated annual report 2016.
[140] Company B, information obtained from the CEO during the interview process.
[141] Company C, information was obtained from the integrated annual report 2017 and through the interview process.
[142] Company D, information obtained from the CEO during the interview process.

7.2.3. The reputation and negative rhetoric: 'They believe that we are selling people like goods'

'Labour is not a commodity' is a familiar maxim that forms part of the 1919 ILO Constitution and the 1944 Philadelphia Declaration (Evju, 2013).[143] O'Higgins (1997) contends that the principle that 'labour is not a commodity' represents one of the most fundamental principles of international labour law. However, Theron (2005,p.624) argues that despite the ILO being resolutely opposed to labour being treated as a commodity, during 1997 in a 'historic volte face', ILO Convention 181 acknowledged the existence of agencies that provided 'services consisting of employing workers with a view to making them available to a third party'- precisely offering labour as a commodity.[144] In line with Theron's observations, Marin (2013) believes that precarious forms of employment, used as a strategy, look very much like treating labour as a commodity. As such, precarious forms of work 'dismantle' labour legislation and relegate it to 'just a museum piece that sits prettily in its glass case while, in practice, forms of work are being accepted to which it applies as little as possible' Marin (2013, p.162). Chang (2008) however explains that there is an intrinsic contradiction in labour law as on the one hand it is a commodity but on the other it deals with human beings that cannot truly be subjected to the rule of the market.[145] In line with Theron (2005) and Marin (2013), a participant who is the head of human resources at a large retailer and a TES client, argues that the essence of what TES firms do is sell labour as a commodity, which leaves TES employees vulnerable to mistreatment (Int16.p239. Par.34).

> So, their commodity is labour. So, you must expect that they are going to be cutting corners to make money out of what their trade is. And I think that by doing that, that has got an impact ultimately on what and how they deal with the employees. I think that leads in many cases to ill-treatment or poor treatment and not the standards of what a full-time employee or permanent employee might receive (Int16.p240. Par.36-40).

However, some TES firm respondents believed the industry had been unfairly tainted by the idea that they sell labour as a commodity. A chief executive officer of a large TES firm thought that there was a lack of understanding of how the TES business operated, perpetuated by two

[143] See paragraph 9.2.4. for further discussion on labour as a commodity.
[144] Art 1(b) of the Private Employment Agencies Convention, Convention 181 of 1997.
[145] Chang (2008) argues that there are two poles of labour law. The first pole defines labour as exchangeable and buyable private property, and the second, as a quasi-commodity that is attached to a human body and soul and therefore cannot be completely subjected to the rule of the market. Labour law reform swings in between those two aspects of the law.

misconceptions (Int15. P230. Par134). Firstly, organised labour did not understand the necessity for the industry, nor the need for flexibility (Int15. p230. Par135). Secondly, the idea that they were 'selling people like goods' had originated from the fact that TES firms charge their clients a fee in addition to the cost for each TES worker (rate of pay and benefits). The participant explained that what the unions failed to appreciate was that TES firms had offices and recruitment centres to run, their own staff to pay and general overheads 'like any other business'. They had to train and develop people and ensure that they were in line with changing legislation. In addition, TES firms needed to deal with their clients' operational requirements. This participant provided an example of these requirements (Int15. pp230-231. Par137).

> I have two hundred people at a particular centre in [a location in the Johannesburg area], they come off shift at 02h00 in the morning. There is no public transport available at all in that area. How do I get those people home safely? How do I make sure they get to their homes which could be all over the place? It cost me R400 000[146] a month, to give you an idea, because you've got to have transport to support that particular client. Where does that money come from? So that is why you have this 'they see us selling people like goods' as opposed to, we are providing a service, funny enough. The people themselves, plus to the client and we've obviously got to survive. It is a three-way relationship' (Int15. p231. Par139-143).

In order to remedy the negative reputation that the industry had acquired, this participant believed that disseminating the correct information was important: 'you've got to be very honest in terms of information that you have, you've got to spread it, you've got to educate, you absolutely have to do that'. In support of this view, this participant relayed a situation where they were asked to explain the wage structure for the TES industry during a nationally important presentation.

> A couple of years ago, when I was doing the [*name of the presentation*] for the industry regarding this concept of minimum wages etcetera, etcetera. And [*details of the person asking the question*] said to me yes, but you charge a hundred rand an hour and you pay thirty rand and you pocket seventy. I said excuse me sir, I don't. I said in actual fact, we pay seventy rand an hour all-inclusive and yes, we pocket thirty, we are entitled to do so … So, in other words, all they are looking at is a rate of pay. Let's say the rate of pay is fifty rand for arguments sake, they see what the charge rate is a hundred rand because they happened to see an invoice lying on one of the client's desks. …This is one of the reasons why I print on our payslip x amount rate of pay for whatever they've done, and to date for this week you've earned x amount for your annual leave, x amount for your

[146] £21,240 on 24 January 2020.

> bonus, x amount for whatever the Provident Fund was etcetera, etcetera (Int15. Pp145-232. Par147).

In addition, the negative rhetoric concerning the TES industry in South Africa was of concern to some participants. A senior employment lawyer at a Johannesburg law firm stated that the entire industry was often unfairly 'painted with the same brush'. This participant believed that only a small portion of the industry (the *bakkie brigade*) worked 'under the radar', and that the remainder of the industry was compliant. 'So, the whole rhetoric and language around, you know, labour brokers and '*bakkie brigade*', that they are slave drivers and stuff, often is just that, rhetoric' (Int31. pp507-508. Par8). As pointed out by a director of an employer's confederation, negative emotive rhetoric about the TES industry was very difficult to counter.

> The slave trader, human trafficker, exploitative, you know that narrative that tends to dominate from a trade union point of view is quite difficult to counter with rational, sane logic. So, we do what we can to try and show particularly around the diverse forms of employment (Int30.p497. Par.14).

7.3. Four themes relating to the South African TES industry

7.3.1. The changing nature of TES work

Some senior TES employee participants had noticed a change in the type of TES employee and the services required from TES clients over the last decade. Interestingly, a general decrease in the need for untrained TES employees in certain areas had been noticed by some TES firm participants. One TES firm employee mentioned that 'first level environments' such as logistics, call centres and bank tellers, were completely disappearing and being replaced by self-service and automation, leading to job losses in these areas (Int5.pp74-75. Par.120). This observation was supported by another large TES firm participant, who explained that client behaviour and growth in the TES industry varied for different categories of TES workers. Table 20 sets out the names of the different categories of TES employees (as provided by this participant) and the trends noticed within these categories.

***Table 120**: A large TES company in South Africa: The types of services offered, and recent trends in TES services*

Category/Type of service	Types of TES workers[147]	Recent trends
Industrial services	Traditional 'blue-collar' workers. This category includes a wide range of workers, from general workers through to engineers.	There was not much change in customer/client behaviour noticed in this category by the participant. This category was described as the 'life' of the business and experienced the 'bulk placement' of temporary employees. Approximately 60 000 temporary workers in this category were placed daily in South Africa (Int3. p30. Par16). Most of these placements were longer term, 'recurring annuity income type contracts' (Int3. p30. Par18). The blue-collar category was a mature market and had grown by approximately 5 to 6 percent a year since the 2015 legislation amendments (Int3. p30. Par14).
Support services	Traditional 'white-collar' workers. This category would include individuals such as bank tellers and call centre agents	A noticeable decline in use of this category (Int3. p31. Par24). There was a change in the utilisation and headcount of this category of workers. The primary change was from longer term assignments, to more contingency work and project based, shorter term assignments. This trend was partly attributed to an increase in the automation of work. Businesses that required repetitive work, such as call centre agents and bank tellers, were most affected by technology. [148] A further reason for the decline in use of this category was attributed to the amendments of the legislation post 2015. Clients who utilised support services were traditionally entities such as insurance companies, financial services and the information and communications technology (ICT) sectors. These

[147] The description of the categories such as 'blue-collar' or 'white collar' workers were provided by the participant.
[148] During March 2019 the South Africa media reported that about 1 200 jobs would potentially be lost after Standard Bank South Africa announced that it will be closing 91 of its 630 branches by end of June 2019. According to the bank, it was 'realigning its retail and business banking delivery model amid a rapid adoption of digital banking products and services' (Dewa, 2019).

		clients were highly regulated, required skilled employees and were risk averse. As a result, they preferred permanent employees to the potential risks associated with using TES employees for longer periods of time (Int3. p31. Par22).[149]
Professional services	Professional services This category includes IT professionals, java programmers, systems analysts and developers.	There was substantial demand and growth in this category. The growth in this area was driven by a skills deficiency or skills gap in project management and the IT sector (Int3. p30. Par12).

Source: from the interview with participant (interview 3).

In line with the above trends, a TES client participant explained how their needs had changed in terms of TES requirements and that skilled TES employees were more in demand:

> Our experience is starting to shift, because as you start moving into bigger and better and more effective technology. So … it becomes more in your interest actually, to have someone who is trained properly, who is more permanent, who knows the technology, and who operates at the best level instead of five different guys going through the same place every week … Things like scanning and coding and pricing, and how you store logistically … so the technology and the attitude and the competence to manage that stuff becomes more important (Int16. p250. Par176-178).

7.3.2. The range of staffing solutions offered to clients

Ward (2002) suggests that since experiencing rapid growth during the 1990's, staffing agencies have promoted themselves as specialist business services, with an expanded human resource management role in partnership with the client organisation (Ward, 2002). 'Temporary' or `flexible staffing' has been replaced by `staffing solutions' that reflect the remaking of the product offered by temporary staffing agencies (Ward, 2002). These expanded services may

[149] See chapter 3 for a further discussion regarding the 2015 amendments. The participant mentions the risk attached to TES employees as opposed to permanent employees. It is assumed that the participant is referring to the 'deeming' provision in the 2015 amendments. The TES employee becomes the employee of the client after a period of three months. At the time of the interviews, there was uncertainty about who the employer would be after the three-month period, i.e. whether it would be the TES firm and the TES client jointly, or only the TES client.

include a full range of human resources services often referred to as human resources or human capital services (Bartkiw, 2014). Other services and terminology include ‘project management’, ‘outsourcing’ 'complete staffing solutions', ‘recruitment process outsourcing’, ‘master vendor’, ‘neutral vendor’, and ‘managed service provider’ (MSP) - all terms given to different arrangements for placing workers (Ward, 2002).

Sanders *et al* (2007) studied these different outsourcing activities in order to understand the growing lexicon of terminology. Based on in-depth interviews with 19 senior executives experienced in outsourcing and a synthesis of available research, Sanders *et al* (2007) formulated a framework clarifying the broad spectrum of outsourcing arrangements. They suggest that ‘outsourcing’ is an umbrella term that includes a range of sourcing options that are external to the firm and involve choosing a third party or an outside supplier to perform a task, function, or process, in order to incur business-level benefits.[150] In terms of the types or categories of outsourcing arrangements, Sanders *et al* (2007) found that the degree of responsibility assigned to a supplier, and associated relinquishing of control by the client, is the primary differentiating characteristic between them. In the present study TES firm participants largely used the umbrella terminology of ‘outsourcing’, some specifically referred to managed service providers (MSP). Sanders *et al* (2007) defines ‘managed services’ as a service where the supplier designs, implements and manages an ‘end-to-end solution of a complete function’, for example a client’s transportation system. The supplier is responsible for all aspects of the function, including equipment, facilities, staffing, software, implementation, management and ongoing improvement (Sanders *et al*, 2007, p.7).[151] A participant who is the managing director of a large international employment services group indicated that their firm had worked with the MSP model in South Africa[152] and outlined their understanding of this model.

[150] Freytag *et al* (2012) define outsourcing as ‘the operation of shifting a transaction previously governed internally to an external supplier through a long-term contract and involving the transfer to the vendor.’

[151] In order to understand the practical difference between outsourcing and MSP, the website of a consulting group that provides these services was viewed. The Network Consulting Group defines itself as ‘a premier provider of business-level telecommunications and IT solutions and consulting services’. Their explanation is that an MSP provides individuals who can offer specialised services, in multiple environments, who manage certain aspects of the client’s business. In comparison, traditional outsourcing provides a cost-effective business function but not the consultative function or expertise that an MSP provides (Network Consulting Group, 2016).

[152] Another participating, large TES firm’s annual report (2017) confirmed that their business model creates value by leveraging elements within the organisation to build a sustainable organisation and create value for their

> It is a Managed Service Provider (MSP) where we have one company that is managing all the providers, the suppliers for temporary workers, and then the client itself only deals with one person. So, there is one company that is managing all these individuals for the client. But the client has only one point of contact, being the MSP managing company (Int10. p146. Par66).[153]

According to Ward (2002), how TES firms offer specialist business services is largely influenced by the legal framework governing the TES industry. This idea was mostly supported by TES firm participants who indicated that outsourcing and MSP arrangements had been considered by their clients in response to changes in legislation. More specifically, in terms of the amended section 198A(3)(b(i) of the LRA 1995, a TES employee earning under the Threshold Amount[154], who is placed at a client and is not employed for any other reason outlined in section 198A(1), is deemed to be the employee of the client after three months. In addition, there is a duty on the client to remunerate these TES employees on the same or similar level as its own permanent staff who perform the same or similar work (referred to in this thesis as the 'parity provisions'). The parity provisions attract additional costs and potential equal pay and treatment disputes for the client (Pienaar and Jamieson, 2018). A partner at a large law firm in Johannesburg had noticed that the parity provisions had caused a change in the 'value propositions' offered by TES firms as it was no longer possible to offer a client a cheaper labour force immune from litigation - which was possible before the amendments.[155]

> So, the difficulty for the labour broker is the terms and conditions not less favourable. So, I can't provide you with (a) a discounted value proposition (b) I can't take away the fear of litigation (Int25.p418. Par.148).

Pienaar and Jamieson (2018) suggest an alternative relationship to the traditional TES model, based on the MSP model. The starting point to their model is the LRA 1995 provision that specifically excludes the independent contractor relationship from the extended liability of the

---

stakeholders. This is achieved by their four service lines, one of which is the 'outcomes' service line that includes MSP and functional outsourcing.

[153] Another participating TES firm's annual report for 2017, defined managed services as a contingent workforce or supplier that is managed from one point of control, by the TES firm, that 'handles this from end to end and even on-site'.

[154] R205 433.80 gross pay per annum (£10 867 on 22 January 2020).

[155] During March 2019 Workforce Holdings reported its revenue for the year ending 31 December 2018. The media reported that 'Workforce said its core businesses operated under uncertainty stemming from the interpretation of section 198A of the Labour Relations Act, better known as the "deeming provision", which the group said led to cautiousness in the use of certain of its services' (SIA, 2019).

'parity provisions'. [156] They suggest an MSP model that provides a specialised outsourced service to an independent contractor (Pienaar and Jamieson, 2018). More specifically, the client firm contracts with a service provider who takes over the responsibility for all the company's service delivery functions, which might include operational or functional areas, cleaning services and the like. The expert MSP then sub-contracts all the required services to provide a range of services to the client. This they say, increases the productivity, sales and efficiency of the company in typical non-core activities (Pienaar and Jamieson, 2018). Some participants mentioned that they had noticed the increase in the MSP products offered to clients. It was not clear from the information provided whether the structure of the MSP models offered followed the same structure as that suggested by Pienaar and Jamieson (2018). What was suggested was that they were offered as a direct consequence of the new amendments and, according to a senior legal participant at a large Johannesburg law firm, as a means of circumventing negative client consequences.

> Those amendments came into effect in 2014, and in practise what we've noticed is that since then there definitely has been a move amongst companies that traditionally were just providing labour broking services to … providing more a managed service type of product … so instead of just supplying labour to their clients a lot of the old traditional labour brokers are now trying to provide an outsourced service because of the increased regulation and the consequences for their clients of just getting labour from these companies. So, they now try and say rather than just giving you people, we'll give you a fully managed service so that those individuals won't be considered to be labour broking employees, and the amendments won't apply to them (Int4. pp54-55. Par.2-6).

An interesting initiative was outlined by a senior employee of a prominent TES firm. Their TES firm had pre-empted the changes to the legislation and had, as part of a 'co-design collaboration' with their large clients, developed sophisticated software to assess their clients' changing needs. This software allowed them to analyse their clients' permanent staff in comparable jobs, to the temporary workers that were placed by their firm, from a payroll and benefits perspective (Int3.

[156] According to the South African Revenue Services (SARS, 2019), an independent contractor is 'a colloquial term for a small-time sub-contractor. An independent contractor is merely another word for 'entrepreneur', or perhaps, 'employer' (or potential employer). The word 'independent' in the concept 'independent contractor' refers to independence from the employer's organisation, as well as from the employer's control' (SARS, 2019, p.23). Section 198 of the LRA 1995, as amended reads: 'In this section, temporary employment service‖ means any person who, for reward, procures for or provides to a client or other persons - (a) who perform work for the client; and (b) who are remunerated by the temporary employment service. (2) For the purposes of this Act, 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. (3) 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*' [emphasis added].

p37-38. Par96-100). As a direct result of this exercise, they changed their 'value proposition' to their clients away from simply offering a 'brokering' service, to offering 'fully outsourced independent contracting' services.

> As part of our business strategy over the last three four years we made a very conscious decision to look at our current revenue from labour broking and to migrate that across the fence through full independent contracting arrangements. So instead of just supplying the cleaner we've now got a fully-fledged cleaning business, instead of just you know providing pickers, packers and fork lifters to the warehouse, we actually now run the warehouses …So, we've transitioned what was originally a temporary employment labour broker relationship where the client was enjoined to all these issues after three months, we've now successfully transitioned that (Int3. p37-38. Par100-106).

In accordance with the need for these specialised services, another senior TES employee confirmed that their large TES firm was increasing their 'workforce management' services to clients. The idea was that their firm managed a 'functional area' for the client, for example, the client's logistics or canteen. These functional areas were run 'end to end' by the TES firm, with the workers reporting into the workforce management company or the TES firm (Int5.p74. Par.114-116). Similarly, a participant from a large international employment services group explained that their firm had opted for the 'outsourcing model', subsequent to the Labour Appeal Court decision in the *Assign* matter. What was interesting about this participant's explanation of the outsourcing model, was that there was essentially no change to what had been offered in terms of TES - they were now simply offering an alternate model that remained legally compliant.

> So, I'll invoice your business for a hundred thousand rand a month as an example for managing the debt collection department. … So, we are providing them with a service, so we can bring in people or take off people as we need, as long as we are still actually going to bring the service. There is no difference really, it is just a different way of structuring agreements. Because if the contract comes to an end, you know, the outsourcing contract comes to an end, the client no longer requires the services, then we still need to obviously retrench the individuals and the client still, you know becomes liable for that cost as well. So, it's just a different model to make sure that we are still operating within the realms of the law. So, yes, outsourcing is an option to go for as long as you can identify a specific function that's being outsourced, what that function is, and what you as the outsource provider are actually responsible for (Int10.p143-144. Par.39-40).

Hoque *et al* (2008, p. 391) explore the nature and consequences of new contractual relationships in the agency worker market in the UK's National Health Service. They researched how these contractual relationships impact on direct costs and how they add value by improving the quality of placement matching. The reasons employers were opting for 'collaborative contractual relationships' were because of reduced costs,[157] increased quality of placement matching, and the benefit of dealing with only one supplier (Hoque *et al*, 2008). However, the study found that these benefits were at the expense of relationship building and had potential negative consequences for the agency workers (Hoque *et al*, 2008). A subsequent study conducted by Hoque *et al* (2011) that involved 'vendor managed services' (VMS) in English social services, revealed that VMS did deliver cost savings but resulted in less effective placement matching, rising line manager workloads and concerns about service quality.

Concern about the negative consequences of these 'staffing solutions' for TES workers, was raised by a human rights lawyer participant. This participant stated that these 'very complicated schemes' entailed different entities that did not consider themselves to be TES firms, but for all practical purposes, performed the functions of a TES firm. This participant went so far as to label these 'schemes' as 'perverse' as their aim was to ensure that they circumvented the provisions of the labour legislation that protect TES employees (Int7. pp116-117. Par68).[158] The participant argued that these 'nefarious agreements' were concluded to prevent workers from interacting properly with their employers and made the employer party difficult to identify (Int7. p117. Par70-74). An employer that was difficult to identify led to complications for employees who wished to exercise or enforce their legal rights.

However, the schemes mentioned by the above participant were anticipated by the legislature as the amended LRA 1995 contains section 200B. This section provides that:

> (1) For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.

[157] Costs were reduced because of prices being agreed in advance, volume discounts and reduced transaction costs.
[158] During March 2019, the National Union of Metalworkers of South Africa (NUMSA) went on strike at a South African steel company ArcelorMittal, mainly over a dispute involving TES or 'labour brokers'. According to press reviews, ArcelorMittal was of the opinion that the workers in question were not employed by a TES firm but by 'service providers.' The union's view regarding these 'service providers' reflects this participant's view (Ntsabo, 2019; Faku, 2019).

(2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of the employer in terms of this Act or any other employment law.

During 2019, the LAC scrutinised the application of section 200B in *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others.*[159]The summarised facts were that Pick 'n Pay Retailers (Pty) Ltd (PNP) operated in-store bakeries to produce baked goods at some of their stores. As part of an empowerment initiative, PNP used these bakeries to train previously disadvantaged persons to operate self-standing bakeries, capable of operating independently of PNP. As part of this initiative, PNP contracted with Assist Bakery 115 CC (AB) for the acquisition and mixing of baking ingredients that would then be supplied to the store. The Appellants were employed by AB as bakery assistants and they picked ingredients from stores and delivered them to AB's workplace, where AB's other employees would mix the ingredients. They were employed by AB on 12 month fixed-term contracts. The appellants' contracts commenced on 1 March 2015 and were due to terminate on 1 March 2016. On 17 November 2015, the appellants referred a dispute to the CCMA in which they cited PNP and AB as the 'other party' with whom they were in dispute. In their referral form, the appellants characterised their dispute as one in terms of section 198A of the LRA. Their view was that AB was a TES and that they had been placed by AB to work in a PNP store. Further, in terms of section 198A, they had become permanent employees of PNP. The relief sought by the appellants was to be deemed permanent employees of PNP, and for PNP to pay them the same salary as its permanent employees (Dube, 2019)

At the Commission for Conciliation, Mediation and Arbitration (CCMA), the Commissioner found that, based on the various contracts regulating the relationship between PNP and AB, a close association had been established and section 200B of the LRA 1995 applied. Thus, PNP and AB were joint or co-employees of the appellants. The Labour Court (LC) held that the invocation, by the Commissioner, of section 200B was misguided and an irregularity. On this basis, the LC reviewed and set aside the award (Sibika, 2019). On appeal, the LAC held that there was no credible averment that PNP and AB engaged in subterfuge by utilising an empowerment scheme for deceitful purposes. More particularly, that PNP was using the scheme and AB as a sham to avoid its legal obligations toward its employees. It was consistent with the workings of a genuine employment scheme that AB carried on business in PNP's premises and

[159] (JA14/2018) [2019] ZALAC 59 (12 September 2019).

that PNP supplied AB with equipment and tools. The LAC upheld the LC's judgment (Sibika, 2019).

The Labour Appeal Court (LAC) ruled on the scope and effect of this section and held that:

> The effect of section 200B, while crucial, is merely to fix or extend the liability that would ordinarily be that of the employer, as per the traditional tests, to another or others, who carry on as an associated or related activity or business by or through an employer. They are regarded as employers for the purposes of liability. But it is only if they are in an associated or related business with the employer which is intended to defeat, or has the effect of defeating, the purposes of the LRA or any other employment law, either directly or indirectly, that they would be treated as the employer. The purpose for this is clear from section 200B(2). They are regarded or treated as such for the purposes of liability - they are held jointly and severally liable for a failure to comply with the obligations of an employer in terms of the LRA or any other employment law. In other words, section 200B(1) defines "employer" for a very specific purpose and that purpose is found in section 200B(1) read with section 200B(2). The section cannot be utilised generally for making persons or entities the employer(s) of others.

Section 200B therefore seeks to stop complex contractual and other schemes used by true employers to avoid their obligations under the labour legislation. Because of the scope of section 200B, it could be used to scrutinise a wide range of employment relationships or arrangements for the purposes of liability, provided that a case for such scrutiny has been made, and it is done fairly (Dube, 2019).

In the matter of *CHEP South Africa (Pty) Ltd v Shardlow N.O and others*,[160] (the *CHEP* matter), Contracta-Force Corporate Solutions (Pty) Ltd (C-Force) rendered pallet refurbishment services to CHEP South Africa. The C-Force workers referred a dispute to the CCMA in which they wished to enforce the rights contained in section 198A(3)(b) and (5) of the LRA.[161] CHEP argued that it had outsourced re-conditioning services to C-Force and paid for the refurbished product per item. According to CHEP, C-Force was therefore an independent contractor and not a TES. The relationship between CHEP and C-Force was regulated by a two written Service-level Agreements (SLA). The SLA provided that CHEP appoint C-Force as a service provider to render conditioning services at the CHEP plant in Jet Park. In addition, the agreement stipulated that the relationship between CHEP and C-Force was one of client and independent contractor

[160] [2019] JOL 40990 (LC).
[161] Section 198A(3)(b) of the LRA 1995 is the 'deeming' provision', and section 198A(5) contains the 'parity' or equalising provisions.

and C-Force warranted that it is not a broker, employee or personal service provider. The question that the Commissioner had to determine was if C-Force rendered a TES to CHEP. If this was the case, the employees would be given rights in terms of the deeming provision. The Commissioner concluded that the relationship between CHEP and C-Force was determined by the factual relationship between these two parties and that the 201 workers were employed by C-Force as it was acting as a TES provider. Therefore, CHEP was deemed to be the employer for the purposes of the Labour Relations Act (Goldberg and Wilkinson, 2019; Vermaas, 2019).

On review, the Labour Court concluded that section 198A(1) of the LRA 1995 defined a TES. The critical elements of the definition are the provision of other persons, to provide work for the client, while being remunerated by the TES, and the persons are provided by the TES for reward. Applying this to the facts, the court found that C-Force was not acting as a TES and the award was set aside. The SLA specifically provided for the delivery of a specified product, namely the refurbished pallets and C-Force was therefore not providing CHEP with 'other employees' or that it placed workers with CHEP. C-Force provided a product and not individual labour to CHEP and the relationship therefore fell outside of section 198 of the LRA 1995. In addition, C-Force was not receiving a reward or fee for providing employees to CHEP. C-Force as a service provider was receiving an agreed price for a specified product which is remarkably different to a TES which receives a fee for every employee that it places with the client. The Court found that on a proper interpretation of sections 198(1), (2) and (3) of the LRA, C-Force was not a TES as defined. This finding placed the workers outside the scope of the deeming provisions. The CCMA decision was reversed and set aside, and C-Force was found to be an independent contractor and not a TES.

It is interesting to compare the UK provisions regarding 'master vendor' or 'neutral vendor' arrangements. The Agency Workers Regulations 2010 guidance document stipulates that:

> Sometimes the supply of agency workers is managed on behalf of a hirer by a master vendor or neutral vendor that may or may not engage and supply workers directly or indirectly. These arrangements exist where a hirer appoints one agency (the master vendor) to manage its recruitment process, using other recruitment agencies as necessary ("second tier" suppliers) or appoints a management company (neutral vendor) which normally does not supply any workers directly but manages the overall recruitment process and supplies temporary agency workers through others. Master or neutral vendors

fall within the legal definition of TWA in view of their involvement in the supply of individuals and/or their role in forwarding payments to such individuals.

The individual is therefore not prevented from being an agency worker under the regulations because they work through an intermediary body, an umbrella company who finds work for the agency worker or is managed on behalf of a hirer by a master vendor arrangement. These UK Regulations would have resulted in a very different result for the workers in the *CHEP* matter if the same facts had been heard in the UK.

7.3.3. Consolidation of the TES industry

Bhorat, Cassim and Yu (2016) state that public discourse suggests that the TES industry is dominated by large firms, but they believe TES industry is split into two distinct types of firms: a few large corporate players, and a number of small and medium-sized firms with 20 to 60 full-time staff members (Ibid, 2016). Prior to the 2015 amendments, the African Professional Staffing Organisation (APSO) and Career Junction carried out a survey in 2010 with a sample of 197 recruitment companies from across South Africa. The data collected by APSO suggest that 66.5 percent of recruitment companies have fewer than ten employees (Ibid, 2016). Further, of those surveyed, 90 percent of recruitment companies have fewer than 50 employees and 86 percent have up to 25 employees. Bhorat, Cassim and Yu (2016) argue that the bulk of the TES industry is made up of small and medium enterprises.

The effect of the new legislation on the structuring of the TES industry was an important consideration for some participants. The type of TES firms that provide temporary employment services and whether, through regulation, the industry was confined to the larger more formal operators, was a question raised by a senior government employee participant. The participant questioned whether the smaller TES operators were finding it more difficult to keep a foothold in the sector since the new amendments came into force (Int22.p371. Par.90). In this regard, a senior employee of a staffing confederation noticed that the changes to legislation had caused consolidation of the TES industry, as smaller TES firms were not able to navigate the complex legal requirements.[162] Some 'small players', particularly those where temporary employment

[162] On March 2019, it was reported in the South African press that The World Economic Forum ranks South Africa number 137 out of 137 countries in the latest World Competitiveness Report. The report states that South Africa has the worst labour-employer relations in the world. A contributing factor to this poor ranking is how complex South

services were just a part of their service offering and not their primary business, no longer offered these services. The participant believed this trend was occasioned by the complicated compliance requirements, cash flow issues, legislative requirements, and the complexities of managing the industrial relations.

> We have seen consolidation, where you know some of the bigger players have obviously absorbed business from some of the smaller ones. They have economies of scale in terms of being able to still operate at relatively small margins, whilst delivering all the infrastructure, compliant systems, people, processes that gives the client or end users, what's the right word, not satisfaction, comfort maybe, in ensuring that even if there is joint and several liability, their risk is smaller you know because policies and procedures should be followed. So that if somebody is terminated in terms of a contract, it is done correctly according to the law (Int30.p495. Par.6).

This trend was confirmed by a senior employee of a large TES firm, who had noticed a difference in the TES industry post the 2015 amendments.

> What we saw there Ronelle, is the smaller to medium size labour brokers literally lost half of their headcount, you know, so for every hundred people a small to medium size labour broker had placed with their clients 50 people were removed from their headcount, you know…So, the irony is that labour in terms of trade unions and government, they thought that if they bring more draconian laws into place more of the temporary workers employed by labour brokers would be permanently employed by clients. Cut out the labour broker, but in fact the exact opposite happened where you just saw a decimation of the labour broking industry in the small medium size space (Int3. p33. Par44-46).

Interestingly, the decrease in the small-medium sized firms in the TES industry was perceived as a positive consequence of the new legislation, not only by the participants who were employed by larger TES firms, but by some legal and union participants. This was largely due to the smaller firms being viewed as non-compliant, abusive and responsible for the negative image of the South African TES industry. In comparison, the larger TES firms were perceived as compliant with both national and international norms and regulations. As a union participant pointed out:

> Your large companies supplying this service, they are complying with the basic principles of the ILO. I think they are doing it also in the spirit of our legislation. But then

---

Africa's labour legislation is for a business to navigate. The most recent Business/Partners SME Index revealed that only 41 percent of SMEs are confident that the current labour laws are conducive to business growth (eNCA, 2019).

> your smaller ones, the ones that they almost set up overnight, they are not complying with this legislation they try to get away as long as possible (Int12. p168. Par48).

A partner and senior employment attorney at a large Johannesburg firm believed that the new legislation would be a 'shot in the arm' for TES firms as they would no longer have to argue a case with their clients for the fair and legal treatment of their employees as this was now entrenched in law (Vol 2: Int32.p24. Par.264).

> So, I don't need to get into that. So, those that would want to use my services for any other reason except what's in the law. I need to obviously you know, step off and I would step off, knowing that no other competitor would step in there because they would be noncompliant (Vol 2: Int32.p24. Par.266).

In addition, all competitors in the industry would be required to comply (Vol 2: Int32.p24. Par.266). Consequently, the smaller *bakkie brigades* who lowered the 'entrance bar' in the industry, would be 'flushed out.'

> So, non-compliant TES's will be out of the picture, and then we'll have everyone complying. And already steps are afoot in terms of ensuring that we've got our own standards, and our own terms, as well as our code of conduct[163] in that regard. And also, this will then dissuade user enterprises who are ever ready to use noncompliant partners in crime because it could be an offense to do so (Vol 2: Int32.p24. Par.268).

Although the participants' observations suggested a consolidation of the TES industry, with a decrease in smaller TES firms post the 2015 amendments to the legislation, these observations were presented without support from additional or secondary documentation. No other evidence was available in relation to smaller TES firms, especially the *bakkie brigades*. Smaller TES firms were invited to present their views, via e-mail invitation and follow-up phone calls, but were not willing to participate and further research is necessary on this trend.

7.3.4. A focus on higher earning TES employees

There was consensus amongst some participants that the TES industry would 'restructure' to include a renewed focus on employees that earned above the Threshold Amount. As set out in chapter 5, the Constitutional Court considered the recent amendments to section 198 of the LRA (1995) in the *Assign* matter. The court ruled that temporary employees who earn less than the Threshold Amount, and who are contracted through a TES to a client, will be deemed to be

[163] The Confederation of Associations in Private Employment Sector (CAPES) has a code of conduct called 'Code of Professional Conduct for Labour Recruitment' (CAPES, undated).

employees of the client after a period of three months. Thereafter, the temporary employees must be treated 'on the whole not less favourably' than permanent employees of the client performing the same or similar work. other permanent employees. However, temporary employees earning above the Threshold Amount may conclude contracts for longer periods of temporary employment (Read and Hanif, 2018). Therefore, not all temporary employees are affected in the same manner by the amendments and the subsequent ruling in the *Assign* matter. A managing director of a large international employment services group set out their understanding of the law in this regard.

> Those earning above the Threshold Amount are not affected by the amendment. There is still that requirement for people over the Threshold Amount. So, if anyone's earning over the Threshold Amount, this is not impacted by law. It is only for your blue-collar general workers that are earning below the threshold that would be impacted …So not all of our business would be impacted by that (Int10.p145. Par.46).

Two participants believed that employees who earned above the Threshold Amount in some cases preferred to work for TES firms. One participant, a director of a government department, thought that these individuals favoured the flexible hours that came with working on a contract basis rather than 'mainstream' employment (Int19.p291. Par.52-54). The second participant, a partner in a top Johannesburg law firm, emphasised the fact that these employees were still able to provide their services unaffected by the amendments to the legislation.

> Labour broking itself wasn't banned and employees earning above the threshold, you know, are very much still able to give their service as a labour broking employee. And we see it in companies like you know Ericsson, Vodacom, MTN, those kinds of companies, where they develop software and even in the engineering space you know like the contract engineering sector. The employees are very highly qualified and give their services to these entities through labour brokers and once those projects are done, they would move onto the next client. So, there is also you know employees who particularly like that arrangement you know, they don't want to be employed permanently by a particular entity, they want the diversity of moving across clients. So, for them, that is very useful. I mean I don't think that there has been any decline in the use of labour brokers for those industries or in those circumstances (Int2.p16. Par.46-52).

An acting labour court judge predicted that in response to the amendments to legislation, and in order to survive, the TES industry would undergo significant restructuring. This participant predicted that this restructuring would include a focus on higher earning TES employees who earned above the Threshold Amount.

> I think the industry will restructure itself and focus on higher earning employees who fall outside the deeming provisions of the LRA. So, I think you will see TES's place more emphasis on specialised skills, the IT industry for instance where people earn above the threshold, such provisions aren't applicable to them. But I think the … security guards, cleaners, that sort of thing, I think is going to be very, very difficult for them to survive in their current form (Int23.p389. Par.67).

The intention to position their business to areas that require employees who earn above the Threshold Amount, was confirmed by a managing director of an employment services group. This participant believed that the higher earning workers ensured greater profits and required less 'hands-on' management.

> It is a lot less work with a lot higher margin. So, as an example, if you placed ten accountants at a client it's not that you have to be managing the ten accountants, they are there to do a job they get paid on an hourly basis, so there is not a lot of manual management of the team that has to happen. And the gross profit you'd make on ten accountants, as opposed to if you've got a client who wants a hundred and fifty general workers, you generally have to be on site, you need to be managing. And remember because it is low level workers, high volume and the GP's [gross profits][164] are normally a helluva lot lower. So, you know there is always the opportunity to make money on the lower threshold individuals. Its high volume, but it is hard work and less GP. So, you know from a [company name] point of view, we also like to, we do have blue collars, we do. We got one branch in particular that focuses purely on blue collar. But it's also, we'd like to be growing, that is more of our focus, is to grow that business that's above the threshold because there is so much more profit that can be made, with less hands-on involvement, if that makes sense' (Int10.p146. Par.60-62).

An interesting observation was made by two senior legal participants, who both believed that TES work was better suited for highly trained individuals who earned above the Threshold Amount. A partner at a large Johannesburg law firm had noticed that TES employees who earn above the Threshold Amount did not suffer the same abuses as those earning below the Threshold Amount as the nature of the relationship was different. The participant stated that it was unlikely to see 'those kinds of high-level employees on indefinite labour broking contracts, it is mostly on fixed term contracts related to the needs of that client' (Int2.p17. Par.62).[165] A director at a different Johannesburg law firm argued that TES work should be limited to highly skilled workers, who work for short periods of time as the power base was different. Highly

[164] A company's profit from selling goods or services before costs not directly related to producing them, for example interest payments and tax, are subtracted (Cambridge Dictionary).

[165] The participant was speaking about their experience in the legal profession rather than referring to any statistical information. This participant is a partner in a top South African law firm and specialises in employment related matters.

skilled workers were in demand and this allowed them to 'call the shots' with the TES employers (Int33. Vol 2. p31. Par28).

> If you have a highly skilled worker who is in demand, it allows for that flexibility. They won't be tied into the single employment relationship with one employer. They can then sit at home and work from their laptop, service employers, various individuals around the country, not be tied to a single employer. Or, if they work for one employer but there is an alternate for somewhere else, then it is very easy for them to be shifted around and moved around. It is not intended for blue collar work (Int33. Vol 2. p30. Par22).

7.4. Conclusion

The first section of this chapter dealt firstly with the nature of the TES industry in South Africa and considered relevant TES industry terminology, including the use of the colloquial term 'labour broker', with its negative connotations. The categories of TES firms range from large scale, established companies that include multinationals and publicly listed companies, to '*bakkie brigades*' and informal recruiters that have been likened to '*gangmasters.*' According to the participants, there are differences in how these types of firms operate in the South African TES industry, with the larger firms being described as compliant and the *bakkie brigades* and informal recruiters held responsible for the abuse and resultant negative image of the industry.

Secondly, the growth and importance of the TES industry was discussed. An accurate assessment of the size of the TES industry in South Africa is difficult to obtain. Participants' estimates were that there could be as many as 1.5 million TES workers in South Africa (Int12.p175. Par.102; Int22.p378. Par.188). However, participants acknowledged that reliable statistics were not readily available and that TES firms use their own numbers and assumptions to estimate the size of the industry (Int5.p89. Par.318). From the information obtained from the interviews, together with annual reports online, it was estimated that only four TES companies placed 117,304 workers daily in South Africa. One TES company participant indicated that their company had approximately four to five million individuals on their TES 'database' during September 2017, which was a surprisingly large number (Int15.p219. Par.16). However, no details were offered about the 'database' and how often these individuals worked.

Thirdly, the reputation and negative rhetoric that was used to describe the industry, together with the idea of labour as a commodity, was discussed by the participants. Although one TES client participant believed that TES firms sell labour as a commodity (Int16.p239. Par.34), other TES

firm participants disagreed with this sentiment. They believed that the industry had been unfairly tainted by negative rhetoric which stems from a lack of understanding of how the TES business is run. The misconception that they were 'selling people like goods' derived from the fact that TES firms charge the client a fee in addition to the fee charged for each worker. The participants pointed out that they had offices and recruitment centres to run, their own staff to pay and general overheads 'like any other business'. In addition, they were responsible for the operational requirements of their clients such as night-time transport for their employees. In order to remedy the negative reputation that the industry had acquired, one TES firm participant believed that disseminating the correct information was important. A director of an employer's confederation, however pointed out that the negative emotive rhetoric about the TES industry was very difficult to counter (Int30.p497. Par.14).

The second section outlined four themes that emerged from the interviews. The first theme was the changing nature of TES work. The participants pointed out the changes in client requirements over recent years and the reasons for these changes. There had been a notable decrease in the need for untrained or unskilled TES workers, as well as workers in 'first level environments' such as the logistics, call centres and bank tellers (Int5.pp74-75. Par.120). One explanation offered for this finding was that changes in technology had necessitated the employment of trained, permanent staff who had the competence to manage new technology (Int16. p250. Par176-178). The noticeable decline in 'support services' that included individuals such as bank tellers and call centre agents, was explained by one participant: clients who utilised support services were traditionally entities such as insurance companies, financial services and the information and communications technology (ICT) sector. The TES firm participant believed that it was the uncertainty in the TES legal environment, and the fact that they required skilled employees, that caused these clients to prefer permanent employees as opposed to TES workers. (Int3. p31. Par22). This participant had however noticed growth in the need for professional service, which was largely driven by a skills deficiency in project management and the IT sectors (Int3. p30. Par12).

The second theme concerned the range of different 'staffing solutions' or 'outsourcing' services offered to TES clients and the reasons that firms and clients considered these arrangements. Some TES firm participants indicated that outsourcing and MSP arrangements had been

considered by their clients in response to changes in legislation. The deeming and parity provisions of the amended section 198A(3)(b)(i) of the LRA 1995 were of particular concern. The amendments to legislation had made it difficult for TES firms to provide TES employees without the 'fear of litigation' (Int25.p418. Par.148). One employment lawyer participant believed that 'managed service arrangements' provided temporary workers to clients in a form that would ensure that the workers would not be considered TES employees and the amendments would therefore not apply to them (Int4. pp54-55. Par.2-6). Another TES firm participant argued that there was no practical difference between outsourced or managed services arrangements and TES work, as they could still add or remove workers to suit the client's flexibility requirements (Int10.p143-144. Par.39-40). The only difference, according to this participant, was a change in the legal structure of the agreements between the firm and the client. One human rights attorney criticised the rationale for outsourcing arrangements and called them 'nefarious agreements' that were designed to circumvent the provisions of the labour legislation that protect TES employees (Int7. pp116-117. Par68).

The third theme involved the consolidation of the TES industry. Some participants believed that the change in legislation had confined the industry to the larger, more formal operators as the smaller TES firms were not able to navigate the complex legal requirements. Larger firms were perceived to be able to operate at relatively small margins whilst delivering compliant systems, people and processes that protected the client from potential risk (Int30.p495. Par.6). An interesting finding was that the decrease in the small-medium sized firms in the TES industry was perceived as a positive consequence of the new legislation. The smaller firms were generally viewed as non-compliant, abusive and responsible for the negative image of the South African TES industry. However, no secondary evidence was presented for this consolidation trend and it was based on the participants' views and perceptions.

The final theme concerned a renewed focus on higher earning TES workers who earned above the Threshold Amount. The recent amendments to legislation applied largely to employees earning below the Threshold Amount and therefore the 'deeming provision' and 'parity provisions' did not apply to those earning above this amount. Some participants believed that higher earning TES employees preferred to offer their services on a flexible basis, with the ability or freedom to move across clients. One managing director of an employment services

group thought that higher earning workers ensured greater profits for TES firms and required less 'hands-on' management. In addition, a legal participant argued that TES work was far better suited to higher paid, highly skilled workers, who work for short periods of time as the power base was different. These workers were in demand and this allowed them to 'call the shots' with the TES employers, making abuse unlikely (Int33. Vol 2. p31. Par28).

CHAPTER 8: THE TES CLIENT

8.1. Introduction

This chapter outlined the findings in relation to TES work from a TES client perspective. It focused on the reasons that motivate TES clients to use TES firms and employees. Overall, there was a desire to manage costs and externalise risk. Six key reasons or themes for their use emerged from the interviews. The first theme dealt with the desire to obtain labour free from union involvement. The second theme looked at the broader topic of how TES employees avoid the obligations and risks associated with the employer relationship by utilising TES firms. Thirdly, how using TES firms affect clients' obligations in terms of the Black Economic Empowerment (BEE) legislation. Utilising TES services from specialist providers to achieve economies of scale and specialisation in providing services, was the fourth theme. The fifth theme, the desire for greater workforce flexibility, was a key theme that emerged from the data and remained a key motivator for the use of TES employees. Finally, the sixth theme looked at the clients' ongoing desire to externalise their legal, industrial relations (IR) and human resources management (HRM) functions by utilising TES firms.

8.2. Managing costs and externalising risk

Coe *et al* (2010) divides the literature that explains the drivers that motivate client firms to use temporary staffing agencies, into three main groups. The first reason is a 'just-in-time' strategy designed to deliver numerical flexibility (Coe *et al*, 2010). This literature argues that firms make decisions about which jobs to outsource and which to retain based on complexity, skills required and level of firm knowledge needed for the job (Mangum *et al*, 1985; Purcell et al. 2004; Coe *et al*, 2010). The second is the reduction of labour costs as, on average, temporary agency workers are paid less than permanent members of staff (Coe *et al*, 2010). However, once the temporary employment agency has charged its 'mark-up' fee it often does not actually result in a cheaper wage bill for the client firm (Forde 2001; Kalleberg 2000; Segal and Sullivan 1997; Coe *et al*, 2010). The third reason is the aim to reduce the fixed costs of labour hiring and recruitment. Outsourcing certain functions such as advertising and interviewing allows the client firm to limit non-core competencies (Coe *et al*, 2010).

Bartkiw (2014) similarly provides a range of explanations for the use of temporary agency workers. There are those employers who wish to 'avoid' the effects of labour legislation, others

have more 'legitimate' purposes (Bartkiw, 2014). Whatever the rationale behind employing staff through a TES employer, Bartkiw (2014) argues that if the labour policy or social protection is undermined by the triangular employment relationship, it is *prima facie* (at first view) a problem

The reasons for the use of TES companies in South Africa remains complex. Alford (2015) conducted semi-structured interviews with farming units at thirteen commercial fruit farms located in Ceres, Western Cape in South Africa and ascertained that there were different opinions regarding the use of temporary employment agencies. Some fruit producers employed casual workers directly to retain control over legal and contractual arrangements for farmworkers and offset any risks of malpractice (Alford, 2015). Others employed labour contractors to source casual workers over seasonal periods and to offset the administrative burden associated with recruiting and transporting large numbers of workers over a short time (Alford, 2015).

As part of this thesis, participants were asked for their views on why TES services were engaged in South Africa. Their responses largely support Alford's (2015) findings set out above and could be placed in both the 'avoidance' and 'legitimate' categories outlined by Bartkiw (2014).

8.2.1. To obtain labour free from union involvement

Some TES companies and their clients are accused of collaborating to engage in strategies to provide cheap labour, free from union involvement and negatively perceived employer obligations (Forrest, 2015). Forrest (2015) studied recruitment regimes in the mining industry in the Rustenburg area in South Africa and suggests that 'without a supply of cheap labour mines cannot realise the profits they envisage after paying wage and production costs' (Forrest, 2015, p.509). TES companies know that discouraging union membership is key to sustaining low wages so that they can offer competitive rates and secure their own profits (Forrest, 2015, p.516).

> The contract at the point of recruitment thus once again, as with the migrant labour system pre-1980, is the whip that allows the employer to forego responsibilities for the long-term reproduction of its labour force (Forrest, 2015, p.516).

In the present study, the idea that TES clients used TES firms to circumvent unions and other employer responsibilities, was supported by some participants. One participant who worked for a voluntary organisation attributed the growth in the TES industry to the collapse of the union movement and the refusal to organise TES workers. The belief was that the lack of union involvement provided employers with more control, which translated into cheaper forms of

labour. This participant believed employers were engaging TES workers to ensure ‘a labour-free shop, a union-free shop’ (Int9. P134. Par52). This participant had worked in the union movement for many years and believed that the South African labour movement that had garnered world-wide admiration and respect in the eighties and early nineties, had now regressed.

A union participant believed that union involvement and strength was sector specific. For example, in sectors such as retail, catering and fast food, where much of the work was outsourced or casualised, trade unions were weak. As a result, there would be no need to hire TES workers to avoid unionisation in these sectors (Int21.pp350-351. Par.102). However, in the public sector, especially in teaching, where anti-union sentiments were rife, clients engaged TES firms to avoid unionisation (Int21.p351. Par.104).

Participants from large TES companies were asked to express their opinions about whether clients engage TES staff to deliberately avoid unionisation, and the responses were mixed. Some appeared reluctant to answer the question and linked client preference of non-unionisation to other factors such as performance, pay threshold and the size of the client. One such TES company participant believed that unionisation and a lack of performance were connected and that clients hired TES workers as they performed better because they wanted to be permanently employed. The participant believed that unions were a negative influence on performance.

> The clients, who did take on a whole bunch of temporary people permanently are bitterly regretting it. What happens is your temporary members of staff, and I'm speaking generally okay, want permanent employment so they perform. But the moment they become permanent employees, then they get influenced by all the other workers around them, by whatever trade union happens to be in place, and then … you don’t get the same performance that you had initially (Int15. p230. Par129-133).

Another TES company participant disagreed with the notion that companies deliberately try to avoid unionisation by hiring TES workers. This participant believed that there were many temporary workers who do belong to unions and that the level of unionisation depended on how much the TES worker was paid, and whether they fell below or above the BCEA’s Threshold Amount. If the TES employee hired was above the threshold, then they were unlikely to be a member of a union (Int10. p150. Par102). A third TES company participant stated that trade unions cost their clients time and money, and were often obstructive, which resulted in their preference for TES workers.

> Now if they engage the TES, … they avoid this rigorous thing of consulting on something that is there. You know, where you get trade unions coming to say, but why you retrench us, not us, why do you do this? Why do you choose this person and not this other person? And often times, those discussions are just marred by obstruction … and user enterprises, for them to remain contracted, they need to act with speed on certain things as well … Who are you going to bill for the extra three months, you know, of consulting when there is no production? (Vol 2: Int32.p9. Par.76).

This participant also believed that smaller employers simply did not have the skills or the experience to deal with unions.

> It is one of the considerations, the guys will say you know what, I've got problems, I cannot deal with trade unions. I'm not trained to do that, I'm an engineer … I don't have time to see to the trade unions and meetings that are endless. … Can I get you to come here as a TES, and amongst others take care of my industrial relations? So yes, I think negative people would say to avoid trade unions, but people will say not necessarily to avoid, but to give it to people who specialise in that field. … I must comply with the laws, but I don't have the capacity, nor the need, nor the desire, nor the appetite for it (Vol 2: Int32.p19. Par.202).

Speaking in context of union avoidance, the above participant acknowledged that there were clients that did not wish to comply with legislation and in these instances, the TES would have to decide about their future involvement. However, there were always unscrupulous *bakkie brigade* TES firms who would accept the work and encourage employers not to comply.

> You still have others to be honest. You still have those others you know, that don't want to comply, and therefore there is this thing. But it is up to you as a TES whether you want to get it. … but you still get your *bakkie brigades* who are encouraging employers not to comply, which is unfortunate (Vol 2: Int32.p19. Par.208-210).

8.2.2. To avoid the obligations and risks associated with the employer relationship

Von Broembsen, (2012) studied the role of intermediaries in facilitating participation in markets by poor producers. She drew on 23 semi-structured interviews with intermediaries in the craft and agribusiness sectors. Interviews were conducted with non-profit organisations, businesses and senior managers or directors of two South African retail giants, namely Pick 'n Pay and Woolworths. One surprise finding of the study was the use of temporary employment agency contracts, as opposed to fixed term contracts (Von Broembsen, 2012). Given the flexibility that fixed term contracts offered producers, it was surprising that at least two of the sites studied still

resorted to labour brokers (Von Broembsen, 2012). This was the case even though the wages of the brokers' workers were 20 to 25 percent higher than that of directly appointed workers. The reasons provided for still engaging TES workers despite the extra cost, was that the TES company offered team supervision, professionalism and had an 'obligation' towards the client (Von Broembsen, 2012, p.24).

Similarly, the participants in the present study were asked why they chose to engage TES employees rather than conclude fixed term contracts with individuals. The question was asked in the context of the similarities in the benefits to the employer - both the fixed term contract and the TES contract offered flexibility and short-term employment. This question was posed primarily to labour attorney participants, as they are best suited to advise clients on the most appropriate employment relationship to suit specific client needs. One labour attorney participant confirmed that clients used TES companies to avoid the risk of being the employer.

> If they went via a labour broker, they could say, well, we are not the employer, the labour broker is the employer and if you want to pursue any sort of unfair dismissal claim or unfair labour practise claims, you have to look to your labour broker that is your employer. So, I think primarily it was to avoid the employment relationship and to avoid the risk of any claims associated with that sort of a relationship' (Int4. p61. Par60).

However, the participant acknowledged that the 2015 legislative amendments had specifically targeted this avoidance behaviour and made it more difficult to escape the liabilities associated with the employment relationship, such as unfair dismissal claims (Int4. p61. Par62).[166]

> It almost means that it isn't worth going via a labour broker unless you have a really proper justifiable business reason for doing it, because the work is really of a temporary or defined nature. And you don't want the administrative hassle of, you know, bringing these people onto your books, and increasing your headcount, and potentially having to provide them with certain benefits. But you can't really get away with trying to go via the labour broker to avoid an employment relationship anymore, in light of these amendments (Int4. p61. Par64).

However, another attorney participant stated that clients were still willing to risk the 'gamble' of a TES service rather than concluding a fixed term contract, despite the 2015 legislative amendments.

> So, well look if you want to gamble a little bit, if you do a TES you only become the deemed employer. So, with a fixed term contractor you still have additional

[166] See par. 5.4. for further discussion on joint and several liability between the client and the TES firm.

> administrative burdens such as payroll, disciplining employees, clocking issues, and so on and so forth. So, that you can outsource for your TES employee. But if you employ them on fixed term basis, then you are going to take on that administrative burden (Int28.p467. Par.138).

A large, established TES company participant confirmed that clients choose TES employees rather than fixed-term contract employees, to avoid employee-related costs and the perceived liabilities associated with the termination of employment at the end of the contract period.

> If you ramp up and employ, and unfortunately … whilst you talk of engagement you need to talk of the end game, which is de-mobilisation … Now if you engage them on a fixed term contract … They need to have the HR setup that would accommodate five thousand employees … that comes with a cost … So, it makes it prohibitive (Vol 2: Int32.p9. Par.70-72).

8.2.3. To meet the requirements of Black Economic Empowerment (BEE) legislation

One participant, a senior tax expert at a top auditing firm in South Africa, outlined how using TES employees affects clients' Black Economic Empowerment (BEE), or as it is technically known, Broad-Based Black Economic Empowerment (B-BBEE) obligations. B-BBEE is a growth strategy targeting inequality in the South African economy (Brand South Africa, 2013). South Africa's first democratic government had a mandate to redress the inequalities of the past in all spheres, political, social and economic (DTI, 2014). In 2003, in the light of this mandate, the B-BBEE Strategy was published as a forerunner to *the B-BBEE Act 2003 (*No. 53 of 2003*)*. The primary objective of this Act was to advance economic transformation and enhance the economic participation of black people in the South African economy (DTI, 2014). The Act provided a legislative framework for the promotion of BEE, empowering the Minister of Trade and Industry to issue Codes of Good Practice, publish Transformation Charters and establishment a B-BBEE Advisory Council (DTI, 2014). Members of the B-BBEE Advisory Council were appointed during 2009, as contemplated in Section 6(1)(c) and (d) of the Act (DTI, 2014). The B-BBEE Advisory Council provides guidance and monitoring of the state of B-BBEE performance in the economy and makes policy recommendations to address challenges in the implementation of this transformation policy (DTI, 2014). The B-BBEE Codes of Good Practice were introduced during 2007, as an implementation framework for B-BBEE policy and legislation (DTI, 2014). This framework measures the level of compliance of an entity under the pillars of ownership, management control, employment equity, enterprise development, skills

development, preferential procurement and socio-economic development (Ernst & Young, 2012). The B-BBEE Act has resulted in all businesses being required to be assessed in terms of the B-BBEE compliance levels to remain competitive (Ernst & Young, 2012).

A director-level tax expert participant explained how this legislation works in practice:

> Black Economic Employment is a move, or a look at if you want to call empowering, employing, retaining individuals who fall within the definition of black within the South African context. What would happen here is you are looking particularly at black employees and black ownership, so the rating scores … would be dependent on the amount of individuals that you have who may be regarded as black, previously disadvantaged individuals; who have either ownership or are in the employment of the company. Also affected by things like who you are procuring services from. So, if you are procuring services from a very good BEE rated company then the amount that you could claim as a deduction as well as your rating from a BEE perspective, will improve. … You will succeed as a business in South Africa if your BEE rating is high. And, in fact, you often can't get business from the government unless your BEE rating is good (Int1. pp4-5. Par16-24).

According to the above participant, white employees of a company who hold senior positions, may leave the employ of the company with a severance package. The reason for this would be to avoid them being part of the employee population which would affect the BEE scores of the company. They are then contracted back to the company via a TES company. The participant provided the following example of this scheme:

> Let's say I resign from a company and I then contract with a labour broker the company still wants me back, they require my services. They would go to the labour broker and say please employ this person we will pay you five percent of the remuneration as a fee… And the nature of the BEE now changes because in the past you were an employee rendering a service, but now what's happening is that you are being provided by a service provider to deliver on something. So, the nature of the BEE effectively has changed, and it benefits then the company. And it benefits the individual because the individual can still get his money, still gets the same benefits that he got whilst in the employ of the company. And the company then also gets to retain the services of the individual at a cost, of let's say five percent. And all of that is obviously deductible from a tax perspective, as it is in the production of income (Int1. p5. Par26-30).

The participant strongly disapproved of companies that participate in these arrangements as they could be viewed as 'fronting'. 'Fronting' means a deliberate circumvention or attempted circumvention of the B-BBEE Act and the Codes (DTI, 2014). It involves the reliance on data or claims of compliance based on misrepresentations of facts, either by the party claiming

compliance, or by any other person (DTI, 2014). This participant believed that despite the risk of hefty fines attached to fronting, it still occurred 'it is something that is being picked up by the government, but the fact is that a lot of people still do it, a lot of companies still do it (Int1. p6. Par34).

As set out in table 13, TES firms often establish subsidiary companies or partnerships that allow them to focus on a range of different market segments.[167] For example, to obtain business which requires BEE credentials. These companies are often referred to as 'BEE labour brokers' and in some instances would even be owned by the government (Int20.p321. Par.52-56). The wide-scale involvement in BEE 'schemes' using BBE labour brokers was explained by a legal participant. In this participant's experience, BEE schemes were commonplace, often involved the government, and were mostly concluded at the expense of the TES worker (Int20.p321. Par.52).

> A lot of labour brokering companies are owned and controlled by government, and a lot of labour brokering companies are in fact BEE schemes… a lot of government functions have been outsourced to BEE labour broker firms. So, for instance, street cleaning in [name of municipal area], which is a municipal function, has been outsourced to a BEE labour broker and the workers who perform these municipal services are paid a third of what they would get if they were municipal employees … Many government functions, including health and other types of government functions that are being outsourced to BEE labour broker firms with a huge saving, obviously to the municipality, and the profits to the labour brokering firm. And all of this is being done at the expense of the workers (Int20.p321. Par.52-56).

8.2.4. Economies of scale optimisation

Large firms and modern enterprises are characterised by newer technology, efficient production, economies of scale, and effective management of physical, financial, and human resources through specialised departments, all working toward higher profits in a competitive environment (Fox and Kaul, 2017; ILO, 2015; Lucas, 2017). The public sector is also tapping into the expertise of the private sector where they have proven, larger and established footprints, which enables them to be more efficient and cost effective (USAID, 2010). In contrast to the

[167] An example of this could be found in the South African Post Office (SAPO). At the time when SAPO engaged TES companies to provide TES workers, the only real requirement imposed within SAPO when contracting for labour was that the TES be BEE compliant. In response, Kelly established at least two BEE companies, Marula Staffing24 and Workforce Management25 as fronts to compete for what was a lucrative market. These organisations joined a plethora of other companies that provided labour to SAPO (Dixon, 2015, p.11). However, this is no longer the situation as Dixon (2015) details the account of the 'Mabarete's strike' of 2011 /2012 that amounted to SAPO negotiating the end of labour broking.

Organisation for Economic Cooperation and Development (OECD) countries where agency employment is prohibited in the public sector (ILO 2009; Zhang *et al*, 2015), the South African public sector engages TES workers. As one participant from a large TES company pointed out, the South African government remained one of the largest users of TES services. However, pressure from trade unions have forced the government to consider *in*sourcing[168] workers from TES services who work for universities. This strategy has proved to be financially problematic, as pointed out by a large TES company participant:

> There is apparently some debate and discussion in the public arena because the universities are saying they actually can't afford to bring them [TES workers] on board, because of course one of the reasons for using us [the TES company] is the economies of scale in terms of how we actually manage workforces, I mean it is what we do best (Int5.p80. Par.189).

As the above participant acknowledged, the contracting for services from specialist providers is a way to achieve economies of scale and specialisation in providing services (Ghani and Kharas, 2009). With respect to external contracting, economic theories of firm size demonstrate that the relevant cost considerations may often be finely balanced (Collins, 1990). In many instances the additional cost of subcontracting work engendered by the contractor's profit margin can be more than offset by the lower management costs of the core firm and the efficiency of the subcontractor arising from lower overheads, better economies of scale, and hiring workers from a lower paid labour market (Collins, 1990). In this light, reasons for the growth of the TES industry are often explained in terms of neoclassical economic analysis, especially the 'theory of the firm' (Knight, 1921; Bartkiw, 2014). Storrie (2002) provides a succinct explanation of when a firm will procure labour services in the market:

> A firm will procure services in the market when the inputs are standardised (in this case, labour services); there are several competing suppliers (in this case, temporary work agencies); economies of scale exist in these supply firms that are too significant to be duplicated by the buyer (the user firm); economies of scope exist that would otherwise force the vertically integrated firm (the user firm) into unrelated business; and no specific investments on the part of either the buyer or seller (the user or the [temporary work agency]TWA) are involved. How suitable it may be to outsource the recruitment function will thus depend on the degree to which the above conditions are met in specific markets Storrie (2015, p.34).

[168] From the context of this participant's response, 'insourcing' meant permanently employing the employees from the TES firm to work for the client.

In line with this thinking, a senior tax expert participant pointed out that in times of economic crises, businesses such as TES companies flourish as they can take on the employer responsibilities:

> As companies are under financial pressure and are rationalising their staff, or what you call rightsizing these days. It doesn't mean that the associated responsibilities of these ex-employees are gone, it is still there, which means that someone has to then take on this responsibility. So, it will be an external service provider, […], and that external service provider may be in the form of what may be called a labour broker (Int1. pp8-9. Par62).

One participant from a confederation of business organisation, explained this as '[…] clients want to use a TES firm to avoid the hassle around employment. And I say the hassle it's the administrative burden (Int11. p153. Par18)'. This view was generally supported by the participants and examples were offered on how clients externalise their employer responsibilities to save costs and 'hassle'. A senior tax expert participant mentioned that TES companies sell or 'tout' their services on this basis:

> We are able to provide you with a person with the right skills for a fixed amount of time that is not just part of your books, you don't need to worry about your HR issues, you don't need to worry about payroll issues, all you need to be worried about is getting whatever it is that you need to have done (Int1. pp8-9. Par54-68).

Similar views were expressed by a participant from an employers' association:

> Ja, I mean it just makes life easier because you don't have to go through the whole recruitment process of interviewing them and doing background checks. You don't need to if you are an organisation that has a payroll, you don't now need to load them onto the payroll and do all of the administrative tasks that come along with having to employ an employee (Int13.p185. Par.26).

A strong theme that emerged from the data was that clients use TES companies to alleviate the administrative burden and costs of running the payroll. An attorney participant suggested that this was what the TES industry 'is about':

> I think it is about running the payroll, the cost of running the payroll. So, there are a whole range of combination of factors that people say, well, that's why you outsource. Why don't you run your own security guards? why don't you run your own trucks? Because just it is too much hassle, there are more economies of scale dealing with a transporter a security company and, and, and - the same as outsource. […] there is no difference to the outsource model of logistics, or security, or cleaning than there is to

> labour brokering. It is the same thought process; it is the same rationale (Int14. p209. Par82).

The importance of 'running the payroll' was corroborated by other participants. An attorney participant stated that 'all the labour broker does is act as the channel for their wages' (Int33. Vol 2. p31. Par28). Similarly, a TES company participant suggested that their ability to run the payroll lay at the heart of the TES industry's appeal.

> You've got a client and he sees your appeal and remember this is how we operate, you provide the services and then you pay your employees. That's me now, I pay my employees who are placed with your enterprise, and then I pay them every week. They are weekly paid employees, they are waged employed, I pay them every week. Come month end, I consolidate my bill I send you an invoice and now all of a sudden you are paying one consolidated invoice of two million for an example (Vol 2: Int32.p20. Par.218-220).

Economies of scale optimisation is a primary concern for clients from the outset of the TES relationship, when commercial terms are negotiated. A participant from a large TES company advised that how they engage clients has changed in recent years. They mentioned that fifteen years ago, client presentations were made primarily to the clients' human resources and production departments, and decisions were based on the strategic needs of the client. However, the participant currently presents to clients' procurement and finance departments. The participant believes that this is an important change and affects the decisions that TES clients make. The participant believes that the TES companies have become 'victims' of the client's desire to cut costs.

> Their decisions are within the scope of what they need to do, cutting costs, cutting corners, non-compliance as far as possible, that has been the issue. And the issue of commodification of labour in the way it is related to TES, we also are victims thereof, you know (Vol 2: Int32.p20. Par.218).

The commodification of labour raised by this participant is an important consideration in the context of TES work.[169] Coe *et al*, (2010, p.1057) points out that despite the categorisation as 'temporary', many agency employees are in effect 'perma-temps', workers on uninterrupted placements. Agencies 'sell' the labour of the temporary employment agency worker to client firms, and make a profit, not by investment in capital or the means of production, but from extracting a portion of the workers' wages (Parker, 1994; Vosko 2000; Coe *et al*, 2010). The

[169] See paragraph 7.2.3. for a further explanation of labour as a commodity.

commodification of labour was acknowledged by a participant who held a senior human resources position in a major retail industry in South Africa. The participant believed that the company they worked for was a 'values-based organisation' that engaged TES services. The participant was of the opinion that hiring TES workers was often at the expense of the company's values, despite the cost efficiencies that they deliver.

> Our experience is starting to get to a point where the efficiencies of labour brokers are starting to compete with the values. So, if you are a values-based organisation, you start asking yourself the question: well can you actually say that if you are employing people on a strictly efficient basis, from a cost perspective. So, I think that incongruence is becoming more manifest (Int16. p249. Par156-160).

This participant explained why they felt that the use of labour brokers was incongruent with the company's values. They believed that TES workers who worked for their company on a regular basis, were in fact in jobs 'that are there anyway' (Int16.p238. Par.24) and that these were not temporary jobs that warranted TES services 'and you need to treat them properly and do the right thing. […] there's almost like a values question' (Int16.p238. Par.24). The participant's suggestion was that the company either introduce a guaranteed number of hours to a set number of employees or offer employees permanent employment contracts. A further option would be to offer flexible employment contracts, such as fixed term employment agreements, to achieve the desired flexibility.

8.2.5. The desire for greater workforce flexibility

One of the dominant theoretical approaches used to explain the growth of temporary agency work have been demand side orientated, and focus on new institutional economic theories (Mitlacher, 2007b). This approach looks at employers' needs for flexibility, cost savings and access to skills (Purcell *et al*, 2004). This method is based on assumptions of rational choice within assumed free labour markets (Purcell *et al*, 2004). Demand-side theory, in the form of transactional cost analysis (Williamson 1970, 1975), and human capital theory (Becker, 1964) have been combined, with insights from the resource-based view of strategy by Lepak and Snell (1999, 2002), to form a model of human resource architecture (Purcell *et al*, 2004).

> Employers, it is argued, have the fundamental choice: to externalise employment by using the market as the prime regulatory mechanism, hiring labour only when it is

> needed, or to develop internal labour markets where the 'hierarchy' of values and bureaucratic rules provide controls and incentives. Employers, acting rationally, can differentiate between those jobs that should be done by their own employees and those for which there are advantages in allocating them to externally resourced staff, whether by subcontracting, outsourcing or using temporary labour (Purcell *et al*, 2004, p. 707).

The utilisation of demand side economic theories to explain the growth in temporary agency work, is not surprising as the rationale for using temporary agency workers has much in common with downsizing and restructuring (Mitlacher, 2007). For example, the need to reduce labour costs, the need to introduce new technology, responding to changing markets. In all these instances, there is a demand for flexibility and the temporary employment agency worker provides a 'flexible buffer' that can be adjusted rapidly to changing demands (Abraham, 1988; Mitlacher, 2007).

Participants were asked why they believed firms used TES services, and the need for flexibility emerged as a key theme from a range of different participants. Table 21 below sets out six participants' views on why clients use TES services in relation to their flexibility requirements and many of the reasons are in line with the above literature, namely that they aid during difficult financial times and ensure that their organisations remain globally competitive. TES engagement also helps with the 'peaks and valleys' experienced in business and allows them to concentrate on their core functions.

***Table 21**: Six participants' views regarding the flexibility requirements of TES clients*

Participant	Reason why flexibility is important for TES clients	Explanation
Labour law attorney	The efficient operation of the business.	'And the efficient operation of businesses is also a very important factor in South Africa you know that we are not a welfare state in the sense that private companies are necessarily required to carry employees when they actually don't have work for them…But that talks to that need of flexibility' (Int2. P18-19. Par78).
HR specialist and TES	Greater flexibility than full time	I think really the simple answer is that they provide a serious amount of flexibility that you don't

client	employment	necessarily get out of your full-time employment base (Int16.p237. Par.18).
Managing director of an international staffing company	Remaining profitable	'And we need to be sure that we can provide that flexibility for our clients. I think it is a huge part of our economy and that is why it is so important that whatever the labour legislation does, it doesn't inhibit the flexibility of those clients, because they will not have the budget or the capacity to employ the people they need on a full-time basis and still be profitable' (Int10. P148. Par86).
Labour law attorney	Assistance during difficult financial times	'And that's quite interesting you know if someone had done research in South Africa 2008/9/10, you would have seen that because the temporary employment service industry could switch off employment quite quickly. I think you would have seen a lot of businesses survive because of that cost reduction, quickly' (Int14. pp206-207. Par60).
Director of an employer's association	To remain globally competitive	'It is the belief that in today's global market, for a company to be globally competitive it needs to have at least a thirty-five percent flexibility in their workforce, to allow them to right size and take advantage of good and bad cycles in the economy' (Int30.p496. Par.10).
CEO of a large TES company	The requirement for different staffing solutions during 'peaks and valleys'.	'I think companies use us for a lot of different reasons as I said to you, first of all, peaks and valleys in their business. I mean no company runs flat. No company in the whole world runs flat, I'm yet to find one that does that' (Int15. p219. Par20).
Labour attorney	Allows companies to concentrate on their core functions	'The real reason for utilising temporary employment service is obviously to allow the business to focus on its core functions and what their business really is. Is to allow for the sort of temporary placements to allow for ebbs and flows in productivity' (Int31. p508. Par12).

Source: researcher's own summary of interview data

However, the need for flexibility expressed by the above participants, comes at a cost for the workers involved.[170] A TES client participant pointed out that TES workers are often employed under the guise of flexibility, where a permanent position exists, therefore perpetuating the casualisation of permanent jobs:

> But I think what's happened is that it's become an easy out to employ flexible labour where there are in fact permanent jobs. And if you look at places where labour brokers are actually providing labour, in many cases those people have been coming back to that same piece of work for many, many years, and that can't be – just from a values perspective – something is not right about that. It should be a job, absolutely it is a job. And you just not filling it the way you should be filling it (Int16.p243. Par.80-82).

One union participant suggested that it was convenient for companies to place the need for flexibility above the needs of the TES worker. This participant claims that the TES worker ultimately pays for the cost of flexibility as it erodes job security.

> Basically, it is a way of enabling a company, rather than employing workers, to engage a company which will supply them with workers whenever they require them. And it is very convenient for the company because it gives them a great deal of flexibility which wouldn't be possible if there was a strict enforcement of labour laws which protect workers' rights to job security, and only to be dismissed if there is a good reason (Int21.p342. Par.4-6).

A labour law attorney corroborated this view and stated that the need for flexibility was merely an excuse proffered by the client and that the real reason that TES workers are used was to reduce the costs associated with employer responsibilities such as fair dismissal procedures:

> The employer says we need the flexibility because the cost of dismissing a worker fairly, is too high…That's their argument, but the flexibility for the employer really relates to the cost …And look frankly, I think that's nonsense because our labour law is no more restricted than any other country … In terms of labour market flexibility, South Africa rates quite well internationally (Int33. Vol 2. p31. Par28-34).

A participant from a dispute resolution organisation had similarly observed that TES clients engage TES workers to avoid fair dismissal processes:

> We have this flexibility which allowed us to compete internationally, so that if we get orders, we can say to people, listen no problem at the drop of a hat. I can effectively get

[170] Wright and Kaine (2015) identify some negative consequences of engaging TES workers: inferior wages and conditions, precarious employment arrangements, work intensification, work health and safety risks and minimal investment in employee development as commonly identified consequences and low morale amongst workers. In addition, conflicts often arise among workers at the lead firm who are forced to work alongside subcontractors out of fear that their own jobs and conditions are at risk.

> people in to up my production that I deliver, and should that change, I don't have to run through a lot of processes or/and, a very costly exercise to then sort of exit employees again (Int18.p266. Par.18).

8.2.6. The desire to externalise the industrial relations, legal and human resources management (HRM) functions

Tied into the need for flexibility mentioned above, temporary employment agency workers support client companies in the restructuring of their internal labour market, as firms shift parts of their recruitment functions to an external provider. Externalising these functions allows them to lower recruitment costs and dismissal costs (Mitlacher, 2007; Forde and Slater, 2005; Booth *et al* 2002). Baron and Kreps (1999) suggest principles to determine whether operations should be internally allocated or outsourced and suggest two main considerations. Firstly, the degree to which the task is strategically important for the firm, that is whether it is a core competence; and secondly, the degree to which the activity displays high technical or social interdependence with tasks done by regular employees (Baron and Kreps, 1999, p. 460).

The need to externalise the human resources management (HRM) and industrial relations (IR) functions was mentioned as key reasons for using the services of TES firms by some participants. The key idea was that they simply did not have the know-how, time or resources to engage in these complex and technical areas. One participant, a labour lawyer, believed that especially smaller organisations choose to outsource the HRM and IR functions, as they simply could not justify the costs involved if these functions were performed internally.

> I don't think people have got the human resources departments to run the employees. I think that is, the skill level is not there… The big labour brokers… [have] much better resources to run those cases at the CCMA if there is a dismissal, than me having a hundred people, because I can't really employ an IR specialist in respect of that cost…And the liability with a decent labour broker affectively means they can run the IR stuff. I mean [name of large broker] got a team of lawyers behind them that no other company in South Africa's got. So, they can run the IR properly…So, there are cases where it warrants it and it is proper you can't just do a scam it has got to be proper. And the other cases where it doesn't warrant it (Int14. pp208-213. Par70-118).

The CEO of a large TES company supported this view and stated that engaging a TES firm enabled organisations to focus on their core business while the TES 'picks up the flack'.

> There is a client concern, doesn't want to, doesn't have the time to focus on dealing with HR issues, disciplinary hearings investigation, all that sort of stuff… I've got to focus on my core business … therefore somebody else must just handle all these issues. And that's pretty much what we do. So, we pick up the flack where all the things which companies out there either can't do or don't want to do (Int15. p221. Par31).

A director of an employer's federation mentioned that managing 'people on non-traditional structures' is complex and that organisations utilise TES companies as they have the skill and know-how to deal with the legal and pay-roll requirements involved.

> Often companies directly don't have the infrastructure or capability to manage people on non-traditional structures … I mean TES's are running payrolls where you know one temp could work for three completely different industries in one week, with different bargaining council, terms and conditions and their payrolls have become sophisticated enough to be able to manage each of those shifts independently and to at the end of the week to produce one pay slip which is correctly compliant from a tax and payments point of view and to handle all of that (Int30.p497. Par.14).

A participant from a large TES company similarly stated that the legal complexity required in the HRM and IR functions is one of the reasons why companies engage TES services.

> In our country, we have different sets of labour legislation which are quite tricky to deal with and very complex. And what companies do, is that they think ugh no, we can't handle this … I deal with seventeen different sets of labour legislation in this country. Basic Conditions, Bargaining Council, sector determinations, and so on. We have to know that intimately [chuckle] so that we know exactly what wages we have to pay. What sort of benefits we have to pay to the various individuals for whatever work they are particularly doing for a particular company, it is highly complex (Int15. Pp.220-221. Par25-29).

An advocate and acting Labour Court judge participant agreed with the view that organisations utilise TES companies as they often do not have the necessary HRM and IR facilities. However, this participant believes that since the 2015 amendments to the legislation dealing with TES workers, these organisations will no longer be able to use TES companies for this purpose.

> No, I think there is a lot of merit in that, I think that is one of the facts that make a TES attractive. The point is this, they now will have to do these things, they don't have any option anymore (Int23.p389. Par.66).

The 2015 amendments to the labour legislation ensure that after a period of three months of working for a client, a TES employee earning below the Threshold Amount will be deemed to be the employee of the TES client. The above participant no doubt was referring to the fact that the

client would not be able to hire TES employees indefinitely as they did prior to 2015. Different liabilities may now arise after the three-month period[171]. However, the TES firm's responsibilities remain clear for HR and IR functions for those TES employees over the Threshold Amount, and for those under the Threshold Amount who work for the client for a period less than three months.

8.3. Conclusion

This chapter focussed on the TES client and looked at seven reasons why they use TES workers and firms. Overall, there was a desire to manage costs and externalise risks, which is in line with the wider international literature (Mangum *et al*. 1985; Purcell *et al,* 2004; Coe *et al*, 2010). However, in South Africa the reasons for TES firm use remains complex (Alford, 2015) and often fall into both the 'avoidance' and 'legitimate' categories of use (Bartkiw, 2014).

The desire to obtain labour free from union involvement was one reason outlined by the participants. More specifically, the participants supported the idea that TES companies were often used to circumvent unions and other employer responsibilities. However, this depended largely on the sector of the client firm. Unions were weak in some sectors such as the retail, catering and fast food industries, and strong in the public sector. The idea was that there would be no need to hire TES workers to avoid unionisation in sectors where unionisation was weak. Participants were asked to express their opinions about whether clients engage TES staff to deliberately avoid unionisation, and the responses were mixed. Some linked client preference of non-unionisation to factors such as performance, pay thresholds and the size of the client. Others believed that unionisation and a lack of performance were connected and that clients hired TES workers as they performed better because they wanted to be permanently employed. Other participants believed that smaller employers simply did not have the skills or the experience to deal with unions and engaged TES firms so that they could remain compliant. However, participants acknowledged that there were clients that simply did not want to comply with legislation and employed *bakkie brigade* TES firms to avoid union involvement.

The next section looks at the broader topic of how TES employees avoid or circumvent the obligations and risks associated with the employer relationship by utilising TES firms. More specifically, it discussed the reasons why TES clients would choose TES firm employees as

[171] See table 12 for a discussion of these liabilities.

opposed to fixed term contract employees as both offer flexibility and short-term employment. Participants provided a range of different opinions about why clients hire TES employees. For example, to avoid employer associated risks, although the 2015 legislation amendments have targeted this type of avoidance. Another reason was that employing TES firms alleviated the administration 'hassle' attached to the payroll, discipline and time-keeping issues of fixed term or permanent staff. Some employers simply wished to avoid the employee-related costs associated with permanent or fixed-term contract employees, for example redundancy costs and the human resources investment needed to remain compliant.

Participants outlined strategies adopted by clients using labour TES services to circumvent the requirements of Black Economic Empowerment (BEE), or Broad-Based Black Economic Empowerment (B-BBEE). For example, they may provide severance packages to senior white staff to leave the organisation to avoid them being part of the employee population which would affect the BEE scores. Thereafter, they would hire them back through a TES firm, at a cost, which was tax deductible. These arrangements could be viewed as 'fronting' which is illegal in South Africa. However, according to a tax expert participant, these 'fronting' schemes remain popular. In addition, participants mentioned BEE 'schemes' where government functions were outsourced to government-owned TES firms. These BEE TES firms saved the local municipalities large amounts of money as they provided TES employees who performed municipal services and were paid a third of what they would get if they were municipal employees. The TES firms were earning fees and the municipalities were saving costs, all at the expense of the TES employees who should be permanently employed by the municipalities.

Clients utilising TES services to achieve economies of scale and specialisation, was examined in the next section. Clients were externalising their employer responsibilities to save costs. The externalisation of payroll responsibilities was important as some participants believed that running the payroll was the TES firm's primary purpose, a simple 'channel for wages'. In addition, economies of scale optimisation influenced the way in which the TES firm engaged the client from the outset. In the past, TES firms would initially meet with the human resources and production departments to assess their TES employee needs. However, this had changed, and they now met with the procurement and finance departments which was indicative of what the client prioritised - cutting costs. An interesting point was raised by a TES client participant who

expressed concern about the commodification of labour when employees were employed on a strictly efficient basis. This participant explained that TES workers were often hired at the expense of the company's values, despite the cost efficiencies they offer, as the company used TES employees for existing positions at the company.

The next section looked at the desire for greater workforce flexibility as a key reason for using TES employees. Participants discussed the reasons why they believed flexibility was important to the TES client. These included the efficient operation of the business; greater flexibility than hiring full-time employees; remaining profitable; providing assistance during difficult financial times, ensuring their organisations remain globally competitive; helping with the 'peaks and valleys' experienced in business and allowing them to concentrate on their core functions. However, this flexibility came at a cost for TES employees. For example, it led to the casualisation of permanent jobs, cased the erosion of job security, and provided a means for the client to avoid their duties and responsibilities in dismissal processes.

The final section of the chapter dealt with the clients' ongoing desire to externalise their legal, industrial relations (IR) and human resources management (HRM) functions by utilising TES firms. The key idea was that they simply did not have the know-how, time or resources to engage in these complex and technical areas. These areas included the fair dismissal of employees, effective industrial relations, and navigation of complicated laws. The HR infrastructure needed to run complicated payrolls and shift patterns were also mentioned. In general, these participants perceived TES firms as having the necessary skills and resources to deal with these complex issues.

CHAPTER 9: TRADE UNION RESPONSES TO TES WORK

9.1. Introduction

The purpose of this chapter is to outline South African trade union responses to the temporary employment services (TES) industry. The chapter has three main sections. Firstly, the South African union legislative structure is summarised, and the TES industry's impact on the principle of majoritarianism is discussed. Secondly, the South African unions' responses to TES work are set out in relation to Heery's (2004) framework for British unions' responses to agency work. The third contains a more detailed account of the challenges faced by unions in representing the interests of TES employees, set out under six sub-headings each depicting a theme that emerged from the interviews. Importantly, these data do not allow for general conclusions to be drawn about how unions respond to the TES industry in South Africa. Rather, the aim was to use the interviews with participants to illustrate ways in which unions may approach TES employees and the difficulties they may encounter in doing so.

9.2. The legislative framework and majoritarianism

Labour unions are pivotal to the collective bargaining system in South Africa (OECD, 2010). Due to the history of collective bargaining in South Africa, unions have a broad mandate and objectives, including matters of economic justice, fair working conditions, standardisation of wages, addressing inequalities, and raising wages and social benefits (Moll, 1996; Godfrey *et al*, 2007; OECD, 2010). The abuse of trade unions under apartheid led to a unique entrenchment of labour rights in the *Constitution of the Republic of South Africa Act 1996* (No. 108 of 1996) (the Constitution) (Kruger and Tshoose, 2013). Section 23(5) of the Constitution gives all employees the right to belong to a trade union. One of the most significant changes in the *Labour Relations Act* (No. 66 of 1995) (LRA 1995) was that it provided for legislated organisational rights (Kruger and Tshoose, 2013). In addition, in order to achieve industrial peace, the LRA 1995 made a policy choice to discard the previous duty to bargain in favour of a system of voluntary collective bargaining, preferably at sectoral level, underpinned by the principle of majoritarianism (Leppan, 2016). Table 22 below provides a summary of how trade unions and employers' organisations operate within the collective bargaining system in South Africa - their registration, membership, agency and closed shop agreements, collective agreements, thresholds, rights and representatives.

***Table 22**: South African unions' legislative structure*

Trade Unions	Details
Definition	An association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation (Section 213 of the LRA 1995)
Registration	• Trade unions may exist and function without registration • Organisational and other LRA 1995 rights are restricted to registered unions. • Registered unions may become members of bargaining councils, establish statutory councils, enter into binding collective agreements, conclude agency and shop-agreements, establish workplace forums and consult on redundancies. • No level of representation required for registration. • Registration indemnifies union officials and representatives against personal liability.
Membership	• Right to join a union is part of the general right to freedom of association. • Racially exclusive unions may not be registered • Union membership is only open to employees as defined by the LRA 1995. • All employees irrespective of seniority have a right to join a union.
Closed-shop agreements	• Allowed in terms of Section 26 of the LRA 1995. • All employees to whom closed-shop agreements are extended are required to be members of the union party. • Only union members may be employed by the employer parties. • The union parties must be registered, have a majority in the workplace or sector, and two-thirds of the employees must have voted,[172] and that there is no provision in the agreement requiring membership of the union parties before employment commences.[173] • The employer party may dismiss employees who cease to

[172] Section 26(3) of the LRA states: A closed shop agreement is binding only if - (a) a ballot has been held of the employees to be covered by the agreement; (b) two thirds of the employees who voted have voted in favour of the agreement. Section 26 (4) states: despite subsection (3)(b), a closed shop agreement contemplated in subsection (2)(b) may be concluded between a registered trade union and a registered employers' organisation in respect of a sector and area to become binding in every workplace in which - (a) a ballot has been held of the employees to be covered by the agreement; and (b) two thirds of the employees who voted have voted in favour of the agreement.

[173] Section 26(2)(a) therefore only permits 'post-entry' closed shops, where union membership is a term of a contract of employment, not a condition of its making. The counterpart is 'pre-entry' closed shop where no one can apply for a job unless they are a member of the union party (Grogan, 2017).

	be union members.
Agency-shop agreements	• Allowed in terms of Section 25 of the LRA 1995. • An agency[174] shop agreement is a collective agreement that allows the employer to deduct an agreed fee from the wages of non-union employees, that is paid into a special fund administered by the union.[175] • The fee may be deducted without the employees' consent • The union must be registered, enjoy a majority in the workplace or sector, and the amount cannot be more than the membership fee. • The money is used to advance the socio-economic interests of all employees.
Collective agreements	• Collective agreements are legally binding on all future union members and those that cease to be members. • The union's authority to conclude agreements flows from the principle of 'majoritarianism'. • Unions don't need a specific mandate each time they act on behalf of their members.
Thresholds	• 'Sufficiently representative' is not defined in the LRA 1995. • The term applies to employees in the workplace as a whole, not a part or a bargaining unit. • The CCMA decides on what is sufficiently representative.
Rights	• Unions need to be 'sufficiently' representative to acquire access, payment of union dues and leave for shop stewards. • They need a majority of members at the workplace to acquire the election of shop stewards and the disclosure of information.
Representatives	• In a workplace of more than 10 employees, trade unions may elect representatives. • The number of representatives depends on the size of the workplace.

Source: adapted from Grogan, 2017, pp. 346-365.

[174] The term 'agency' in this context does not relate to temporary agency workers and refers to a type of collective agreement that requires employers to deduct a fee from the wages of non-union workers to ensure that they do not benefit from the union's bargaining efforts without contributing towards these efforts. In other words, an agreed agency fee is deducted from the non-union workers' pay.

[175] Section 25(4)(b) states that 'conscientious objectors' (workers who refuse to belong to a union on the grounds of conscience) may request that their fees are paid to a fund administered by the Department of Labour.

As can be seen from Table 22 above, the principle of majoritarianism is important in the South African union context. Majority trade unions are entitled to appoint representatives and have the right to disclosure of information by the employer to enable the trade union representative to effectively perform their duties (Kruger and Tshoose, 2013). In addition, the incentives for majoritarianism in the LRA1995 include the right to enter into a collective agreement setting thresholds of representivity for the granting of access, stop-order and trade union leave rights to minority unions[176], the right to conclude agency shop and closed shop agreements, the right to apply for the establishment of a workplace forum and the right to conclude collective agreements which will bind employees who are not members of the union or unions party to the agreement (Kruger and Tshoose, 2013).

In the South African context, pluralism is a term used in the predecessor of the LRA 1995 to describe a system of collective bargaining that contrasts with the majoritarian model and grants recognition to more than one trade union, provided they are sufficiently represented (Du Toit *et al,* 2003; Kruger and Tshoose, 2013). The pluralist approach presumes that with different trade unions representing different interests, power will be distributed fairly (Bendix, 2001; Kruger and Tshoose, 2013). The model of majoritarianism, on the other hand, bestows a degree of primacy on unions with majority membership (at least 50 percent plus one) in a workplace (Kruger and Tshoose, 2013). Baskin and Satgar (1997, p12) note that

> The LRA is profoundly majoritarian. Unions with majority support get distinct advantages. Small, minority and craft-based unions are disadvantaged. The message for unions is clear...grow or stagnate.

The impact of the new legislation pertaining to TES employees discussed in chapter 5 may affect trade union majority rights. An employment lawyer participant explained that the new legislation that allowed TES employees to become permanent employees of the TES client after a period of three months, impacts on union representivity (Int24.p403. Par.72). Potentially, unions could access majority rights, or they could forfeit these rights based on the number of TES employees

[176] Section 18(1)of the LRA states: (1) An employer and a *registered* trade union whose members are a *majority* of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more organisational rights such as access, deductions of subscriptions or levies and leave for trade union activities. Section 18(2) states that a collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to *any registered* trade union seeking any of the organisational rights referred to in that subsection.

that became permanent employees after the three-month period. The participant stated that the percentages of employees that they organise is crucial to the rights that a union may access, such as recognition rights (Int24.p403. Par.74). However, the participant acknowledged that it may prove risky for unions to have an entirely different labour pool after a three-month period, especially considering the rivalry between unions in South Africa (Int24.p404. Par.78-80).

On the other hand, an acting Labour Court judge participant believed that the single employment relationship with the client after a period of three months as envisaged by section 198 of the LRA, has brought certainty for unions. It allows unions to organise TES employees working 'under one roof', meaning TES employees can now be counted and organised together with the permanent employees (Int23.p387. Par.48). 'I think the single employer interpretation is going to increase and improve the collective bargaining muscle of the unions' (Int23.p387. Par.50). The participant anticipated that one of the positive consequences of the recent legislation amendments, was that increased union involvement may in turn lead to additional regulation and better policing which may decrease exploitation of TES employees (Int23.p391. Par.94). The participant further believed that trade unions should be the custodians of the fight against exploitation of TES workers and that it should not be left entirely to the inspectorate (Int23.p391. Par.92).

Importantly, there has been interesting developments in the protection of TES worker collective rights. The LRAA now allows trade unions representing the employees of temporary employment agencies to exercise their organisational rights not only at the workplace of the agency, but also at the user firm's workplace (Benjamin, 2013, pp.12-15; ILO, 2016). In addition, an arbitration award establishing organisational rights may be made binding on the TES firm and the TES client (Benjamin, 2013). Moreover, workers employed by agencies who participate in a legally protected strike action are entitled to picket at the user firm's premises (ILO, 2016).

A senior TES employee pointed out that these additional organisational rights have created complexities for both the client and the TES firm to navigate:

> And now you've got to involve the client and say what should the protocols be in that regard you know in terms of time off for union representatives. You know obviously the

> TES, the labour broker, needs to protect its margins. So, now the question is who pays for the ten to twelve days that the trade union representative goes on these conferences and what have you? So, it is a very, very complex environment. And then … the trade union wants to engage in agreeing a collective agreement that regulates annual wage negotiations and stuff like that. You know, so you are just compounding the complexities as you move up the value chain around organisational rights collective bargaining (Int3.p36. Par.82-84).

9.3. Union responses to the TES industry

Heery (2004) famously analysed the reaction of British unions to agency work. As part of his study, Heery (2004) mapped union response to employment agencies and gauged union success either in blocking their growth or in establishing meaningful contact based on collective bargaining and joint consultation. He identified four main responses to agency work namely, exclusion, replacement, regulation and engagement. These four responses, together with an explanation of each are set out in table 23 below.

Table 23: *Heery's British union responses to agency work*

Response	Details of the response
Exclusion	Unions reject the legitimacy of both agency suppliers and agency workers and seek to drive them from the labour market.
Engagement	Acceptance of both and an attempt to represent agency workers through a negotiated accommodation with agency suppliers.
Replacement	The inclusion of agency workers combined with a rejection of agency suppliers, and an attempt to replace them with a more acceptable labour market intermediary.
Regulation	Unions do not seek to represent agency workers but rather strive to regulate their terms and conditions through engagement with agency suppliers in order to protect their core membership from undercutting.
Intermediate position	Standing midway between two of the pure types.

Source: Heery (2004, p.437)

There was consensus amongst some participants that a uniquely acrimonious relationship existed between organised labour and the South African TES industry. These participants offered different reasons and opinions for this trend. A senior executive at a large TES firm blamed an extreme divergence of opinion between organised labour and organised business for the

acrimony (Int5. P76. Par138). The participant explained that the 'anti-labour broking' sentiments expressed by the union movement gained momentum approximately fifteen years ago, when it was indicated that the TES industry employed over a million workers (Int5. P77. Par144). This number was widely published by the media and communicated by the industry.[177] This participant acknowledged that the present negative sentiment attached to the TES industry was also due to the industry's practices in the past. TES workers were used as cheap labour, without the basic rights they currently enjoy (Int5. P77. Par152).[178] Although historically the compliant TES firms differentiated themselves from the non-compliant firms, little was done to regulate the industry (Int5. p78. Par158).

According to a senior employee of an employers' association, one of the reasons for the adversarial relationship between organised labour and the TES industry, is the strength of the 'voice' of organised labour. The argument is that the tripartite system[179] that exists between the South African Communist Party (SACP), the African National Congress (ANC) and The Congress of South African Trade Unions (COSATU), allowed COSATU to have a much stronger voice regarding TES issues than most trade unions have internationally and importantly, that their representation should allow (Int30.p503. Par.50).

> So, I think it's a system which has some inherent flaws in it, which creates an adversarial-type face, where we kind of have to be against each other instead of working with each other. And that I think … makes bigger challenges of things, than if we actually just sat down and talked about them, we might be able to find win-wins. (Int30.pp503-504. Par.52).

Similarly, a senior member of a prominent union agreed that the relationship between organised labour and organised business in the TES industry was not only acrimonious but highly litigious. This participant stated that this had not been the envisaged relationship at the advent of democracy when the 1995 legislation was promulgated.

---

[177] This participant shed light on what appeared to be a reluctance from the TES firm participants to provide detailed statistical information regarding the industry, especially in relation to the size of the industry. For further discussion on the paucity of statistical information, see paragraph 6.2.1.

[178] Please see chapter 4 for a detailed discussion regarding the history of TES work in South Africa.

[179] When political organisations were unbanned, in the early 1990s, the ANC, SACP, and COSATU agreed to work together as an alliance - known as the tripartite alliance (Bhorat *et al*, 2014). This implicit and explicit political contract has held its political position since the ANC was democratically elected into power in 1994 (Ibid, 2014). The Alliance is centred around short, medium to long terms goals of the National Democratic Revolution - the establishment of a democratic and non-racial South Africa, economic transformation and continued process of political and economic democratisation (COSATU, undated).

> You know that old saying, be careful what you wish for? We wished for a Labour Relations Act which gave us the right to organise trade unions without government interference. We wished for an Act which would stop people from being dismissed ... we wanted an Act that would stop people selling the business simply to get rid of workers and then starting off somewhere else. We wished for all those things, but we didn't really know, it was sort of heady days of freedom and of liberation ... It says everything about how disputes began to be resolved. Not through workers power and workers saying we are not having this we are going on strike, we are going to protest ... we suddenly had courts intervening. The law being interpreted in ways that had never been the idea of the original draft of the '95 Act' (Int26.p442. Par.162-164). (Union participant).

Trying to explain the extent of legal intervention in South Africa is difficult. However, a quotation from the Commission for Conciliation. Mediation and Arbitration's (CCMA)[180] then Director in the CCMA's Annual Report 2012/13 provides a sense of this intervention and offers a possible explanation:

> We have seen a further case load rise this year, from 649 to 679 every working day, a six percent increase without an increase in the number of commissioners.…This increased caseload could be interpreted as there being serious malaise in our society, with such a high level of conflict in the workplace. The work on which we tend to focus is that of dispute resolution and yet, if we had placed more emphasis on dispute prevention and management, perhaps there would be less need for resolution. Conversely, cases continue to be brought to us in seemingly ever-increasing numbers … (CCMA Annual Report, 2012/13, p.8)

In line with Heery's (2004) exclusion response by unions to agency work, a strong theme that emerged from the data was a call by unions for a total ban of the TES industry. A senior employee of a confederation of businesses observed that the union movement had run a comprehensive and systematic campaign against the TES industry. [181] The participant felt that the goal of the campaign was for society to regard the industry as exploitative. As a result, clients of TES firms avoided hiring TES employees as they did not want to be associated with the

[180] The Commission for Conciliation, Mediation and Arbitration (CCMA) is an independent, juristic body that helps to resolve disputes and offers advice and training on labour relations, with jurisdiction in all the provinces. It is mainly state-funded and has on its governing body representatives from government, business and labour, each with three representatives. The main function of the CCMA is to try to resolve disputes through conciliation. If conciliation fails, the CCMA may resolve the dispute through arbitration (Department of Labour, 2007).

[181] During 1997 that the Report of the September Commission on 'The Future of the Unions' was tabled at COSATU's Congress. The report argued that labour market flexibility, as a key characteristic of globalisation, generates increased differentiation and fragmentation of the organised working class. The report stated that labour market flexibility results in an increase in non-standard forms of employment and workers who are vulnerable and difficult to organise. By 1999, COSATU took a bold step and called for a total ban of TES work or 'labour broking' but without success. Since then the issue of representing and organising non-standard workers remained point of contention for organised labour (LRS, 2014). This ongoing campaign against labour brokers is well documented in the South African press.

negativity surrounding the industry (Int11. p154. Par22-26). A union participant regarded this campaign as successful as it had highlighted the plight of TES workers and placed pressure on the government to change the laws for TES work. However, a senior employee at an employer confederation believed that unions use the TES industry as a rallying tool to poach members from each other, usually correlating with election time (Int30.p502. Par.47).

More in line with Heery's (2004) engagement and regulation strategies, a senior member of staff from a union federation disagreed with the call to ban TES work and regarded the campaign as unsuccessful. This participant itemised several alternate union strategies to protect and represent TES workers, such as raising TES worker issues during sector related negotiations and investigating and questioning working conditions during their site visits. These strategies may include requesting access to details concerning wages, benefits, period of employment and reasons for their employment. The rationale behind this strategy was that TES workers were frequently afraid to report illegalities to their union or to the Department of Labour inspectors as they fear that their contracts will be terminated (Int12. p168. Par50). Union visits to TES worker premises was therefore vital to ascertain first-hand whether they were being treated in line with their legal rights. In addition, according to this participant, TES employees were often unskilled or semi-skilled and in some cases illiterate. They were frequently unaware of their rights and required union officials to provide awareness of the provisions of legislation to ensure that they are treated fairly.

> Many a time, some of these people are not literate people they are not aware of legislation the things they are entitled to and they need therefore somebody to tell them and we see that as the role of the trade unions such as [name of union]. We will go into the workplace we will look at the people that's employed and we will look at their status. We are entitled to ask those questions and then we will make sure that they receive a fair dispensation. (Int12. p169. Par52).

9.4. Union strategies of inclusion and exclusion

In general, non-standard employees pose a challenge for traditional actors of industrial relations because of the difficulties in defining, aggregating, 'voicing' and representing interests of a heterogeneous workforce (Czarzasty, 2017, p. 111). While a strategy of exclusion is a common response, unions cannot afford to ignore non-standard forms of employment as this is a growing segment of the labour force (Czarzasty, 2017). As discussed in the literature review, theories of

union revitalisation argue that unions increasingly seek to recruit atypical workers and bargain on their behalf. This they do as a result of an increasingly hostile environment for labour and to regain their bargaining power (Benassi and Doriatti, 2014). Goldthorpe (1984) believes that both inclusion and exclusion are viable strategies for unions to maintain their labour market power. However, Benassi and Doriatti (2014) argue that little research exists on the conditions under which unions choose one or the other of these options and that their decision ultimately depends on how they define their boundaries and constituencies. Benassi and Doriatti (2014, p.2) argue that

> The inclusion of peripheral workers into unions depends on the changing perception of potential alignment of interests between the union and its core members, on the one hand, and either management or peripheral employees, on the other.

Interestingly, in South Africa, research conducted by Naidoo and Frye (2005, p.197)[182] found that as far back as 2000, the National Congress of the Congress of South African Trade Unions (COSATU) identified the recruitment and organising of informal sector and atypical workers as 'a major and necessary challenge'. At that time, a COSATU resolution committed each COSATU affiliate to develop a strategy for recruitment of informal and atypical workers. The resolution called for the release of adequate resources for the campaign and identified four key strategies. Firstly, they were to organise a range of types of workers in the informal economy but target certain categories first. Secondly, they were to address gender dynamics of the informal economy. Thirdly, creative organising strategies were to be developed for informal workers whose work situation was too different to fit into existing categories of informal work. Finally, they were to recognise the voice of informal workers by not attempting to speak on their behalf. These historical efforts reflect a strategy of inclusion of atypical workers as far back as 2000.

In the current study, participants focused much of their responses on the difficulties that unions face when attempting to include TES employees. The reasons for these difficulties varied. Some participants believed that due to the internal structure of unions, and especially in situations where agency shop agreements[183] prevail, unions have little interest in TES employees, and they

[182] Naidoo being the Director of the National Labour and Economic Development Institute (NALEDI).

[183] In terms of Section 25 of the LRA 1995, an agency shop agreement allows the employer to deduct an agreed fee from the wages of non-union employees, that is paid into a special fund administered by the union party. The fee may be deducted without the employees' consent (Grogan, 2017). See table 1 above for further details.

are excluded from being represented. A detailed account of their responses is set out under six headings that depict the themes that emerged from the interviews.

9.4.1. TES employees fear reprisals from employers if they join a union

A legal participant, who is an acting labour court judge, acknowledged the insecurity of TES workers in the workplace. He observed that they are afraid to join trade unions making them difficult to recruit (Int33. Vol 2. p30. Par16). This view was supported by a senior member of a union who stated that the reason that TES employees were not unionised was not because unions fail to include them and fight for their rights, but because they *do* fight for their rights. The participant explained that union representatives ask questions about TES employees' remuneration and benefits at meetings held with the employers. If it transpires that there has been abuse, unions will ensure that the situation is corrected. As a result, unionised TES employees stand a good chance of losing their employment as they are perceived as 'troublemakers' (Int12. p173-174. Par90). 'If you were looking for a stick in the dark, you'll find it … there will be a problem in his work, and then he will be charged, and eventually they will get rid of the so-called problem' (Int12. p174. Par92-94).

The idea that TES workers fear reprisals from their employers if they join a union, was one of the outcomes of a project embarked on by a large union and large TES firm. This was an experimental project mentioned by a participant who is a senior union employee.[184] The purpose of the initiative was for the union to ascertain how to improve representation and inclusion of TES workers. In addition, the project aimed to alter negative perceptions of unions in the TES industry (Int12. p179. Par137). After the most recent amendments to the labour legislation, an employer's association group randomly selected five hundred people who were then employed with TES firms within their group (Int12. p178. Par126-130). The employer's association subsidised the union membership fees for these five hundred[185] individuals for a period of six months. These individuals were placed on the membership list of a large, well established union (Int12. p178. Par132). The union met with these individuals on a regular basis to provide union services to them 'as normal members.' In addition, the union had monthly feedback meetings

[184] The project was also mentioned by an employer's association participant.
[185] The employer's association participant recalled 1000 individuals but was not too sure of this number (Int30. P504. Par54-56).

with the employer's association. At these feedback sessions, complaints and concerns were raised and experiences shared. Mutual concerns were resolved, and the union was perceived as a positive influence, working together with the employer for the benefit of the employees (Int12. pp178-179. Par134).

Problems arose after the initial six-month period when TES employees were required to pay the full union membership fee. A large number resigned from the union. The employees advised that while the employer subsidised their union membership, they 'were protected' but when the fees were their own responsibility, that protection ceased (Int12. pp177-178. Par122). The employees' fears were relayed to the employer party and assurances were provided to the employees, but they still left the union (Int12. p179. Par136).

However, an employer's association participant expressed a different view as to why TES employees did not retain their union membership after the project came to an end. This participant believed that unions need to recreate their value proposition as younger workers no longer require union representation as they are willing to express their own opinions and represent themselves (Int30. P504. Par54).

9.4.2. Unions rely on a traditional 'job for life' model and do not cater for a changing world of work

The concept of a 'job for life' being an outdated concept in a changing world of work, was a prominent theme that emerged from the interviews. Some participants believed unions relied heavily on a traditional model of employment, being full-time and permanent. In line with this theme, an employment lawyer participant believed that the unions were finding it difficult to include TES employees as the world of work was changing. Accordingly, the 'average eighteen to twenty-two-year-old' is not interested in belonging to a trade union or having a 'job for life'.

> They say, listen here, I don't need protection if this job doesn't work out. I'm going to leave in any case, I'm not looking at a job for life. They realised that that promise for a job for life is a load of rubbish. And no one can promise you that. So, the youth are prepared to be mobile, they are not scared of going to another country taking a part time job, doing a bit of a jobbing here, doing a bit of jobbing there (Int14.p204. Par.40).

This employment lawyer participant believed that unions needed to change their focus and approach to include and retain membership. Accordingly, unions needed to become more

'electronic, much more act driven, much more benefit type driven. Like the Discovery Medical Aid[186], … it is not about the medical aid anymore it is about the vitality and the discounts' (Int14.p204. Par.42). A CEO of a large TES firm corroborated this view and stated that unions have a 'very conservative approach to employment' as young people have a desire for technology and information, they do not want to be in the same job for twenty years 'They want to be in a job maybe for six months a year, two years maybe and then move on' (Int15. pp224-225. Par75). A senior employee at an employer confederation pointed out that this concept of 'a job for life', is one of the most difficult concepts to challenge. 'I think our strategy in South Africa is still very industrial orientated. This idea of a very labour intensive industry and people who have these permanent jobs … is very sort of old style' (Int30.pp502-503. Par.48).

Unions' reliance on a traditional 'old style' model of work was also raised by a participant who for many years held senior positions in different government departments concerned with labour and employment issues. The participant perceived the union movement as distant from the 'real issues' concerning the TES industry and referred to the National Economic Development Labour Advisory Council (NEDLAC) negotiations prior to the latest legislation amendments as an example of this argument. According to the participant, organised labour negotiated a 'perfectly good Rolls Royce solution' for TES employees that they do not represent and have agreed on views that support an 'old fashioned' approach to work (Int19.p290. Par.46-50).

> It suits them if guys are employed in mainstream old-fashioned work. It fails to take into account the changing nature of work i.e. that people work different hours people don't work in mainstream jobs anymore… taking into account the fourth industrial revolution of IT and stuff, the nature of work is changing. In fact, … lots of people actually do maybe want to contract (Int19.p291. Par.52-54).

A link between this 'mainstream, old-fashioned' model of work and union fees was made by a senior attorney participant, who argued that unions exclude TES workers as they cannot be relied on to pay their membership fees. This participant outlined their understanding of how unions perceive TES employees:

[186] Discovery Medical Aid (private medical insurance) in South Africa has a 'Vitality' programme that they define as 'the world's leading science-based behavioural-change programme that encourages and rewards you for living healthier, driving well and banking well'. These rewards may include half-price movies, flight savings, cash back on groceries, fuel savings and the like (Discovery, 2019).

> I cannot really count on that membership because they might, if they are not permanent, they don't pay subscriptions all the time. And in the end, it is all about the money (Int29.p489. Par.148).

Another participant believed it was not the inability of union members to pay fees that was prohibitive, but that joining a union was not in line with TES employees' values. This senior executive at a large TES firm suggested that trade unions' value propositions were outdated, as young TES employees were more concerned about disposable income than political issues. The participant explained that the average age of a union member in South Africa is in the upper forties and that eighty percent of the people placed by TES firms were young.

> So, the youth of today as you know are radically different, they couldn't give a rat's arse about even the political issues necessarily, you know they want a mobile phone, and smart phone, and they want apps, and they want disposable income. So, I think that unions are totally mismatched with the sort of people that we place (Int3. p43. Par164).

The idea that unions were focusing or 'targeting' TES employees using the wrong strategies was supported by another senior member of staff of a large TES firm. Unions' *modus operandi* and organising strategies were 'out of touch and out of date with the realities of the current world of work' (Vol 2: Int32.p17. Par.182). This participant believed that an increasing number of employees were opting to be employed by TES firms. For example, it afforded them increased mobility and improved their chances of finding further employment. The TES firm's role was to seek employment opportunities and ensure the employee remains in employment for longer - an important factor considering the high unemployment rate[187] in South Africa (Vol 2: Int32.p17. Par.182).

A changing world of work and increased mobility has created further problems for organised labour, according to a participant who works for an employer's association. According to this participant 'knowledge economy workers' are not catered for under the traditional services offered by unions. These workers command a salary based on their skills, the market and other factors and consequently do not require the mass negotiation skills offered by organised labour. In addition, the trade union environment in South Africa is sector specific and TES employees are often mobile and flexible, as pointed out by the previous participant. For example, a TES worker may work a day in a logistics company, a manufacturer the next and a hotel the third, covering three different sectors in a week. As a result, the employee would need to belong to a

[187] The unemployment rate for Q1:2018 was 26.7 percent (Stats SA, 2018)

different sector specific trade union for each of those days and this is not a viable option (Int30.pp504-505. Par.58).

Moreover, South African unions have traditionally organised certain categories of employees, such as mineworkers, construction employees and hospitality employees.[188] However, TES employees are engaged in different types of work and do not have a clear position in the labour market (Int21.p346. Par.52). A participant who has spent many years working for unions in senior positions, pointed out that that it would be impossible to have a different union for every different workplace that engages TES workers 'it just isn't feasible to be able to organise like that. You have to have a membership across at least a sector' (Int21.p348. Par.72). Despite these difficulties, the participant understood that unions should 'stop just recruiting workers who traditionally have been recruited' and focus on employees who 'are maybe not technically workers in the traditional sense, but frankly suffer many of the same problems' (Int21.p347. Par.58-60).

'Dualisation' has been described as the division between workers who have stable jobs, a regular salary and decent working conditions and those precarious workers who occupy unstable and poorly protected jobs (Kalleberg, 2011; Manky, 2018). In the 'traditional' industries such as mining, favoured by unions, these differences are particularly stark (Manky, 2018). In this context, an interesting link between the reluctance of TES workers to join unions and the unions' focus on certain traditional categories of full-time employees, was provided by a participant who is a director of an international organisation (Int17.p258. Par.52). TES employees are reluctant to join unions as unionisation is associated with traditional, fulltime employment at a mine or factory, and there is a negative perception of TES workers amongst these 'traditional' employees. According to this participant, these negative sentiments stem from their belief that TES workers are used to undermine both the benefit and the negotiating power of organised labour. When members of a union go on strike, the non-unionised temporary workers continue to perform their work functions, which raises the ire of organised labour (Int17.p258. Par.54).

[188] In a 1997 COSATU document that assesses the changing nature of the labour market in South Africa, COSATU committed itself to the strategic objective of organising 'vulnerable sectors.' The construction industry, farming, parts of retail and catering, domestic sectors, contract cleaning and security services were characterised as vulnerable. They were sectors in which the labour process, working conditions and production cycle combined to make it difficult to build stable organisations or maintain membership (COSATU, 1997).

Consequently, unions will need to 'reimagine their business model' to recruit not only their traditional full-time paid employees, but temporary workers (Int17.pp258-259. Par.58).

Bargaining councils offer a further deterrent for unionisation of TES employees, according to a participant who is the owner of a TES firm. If TES employees enter a workplace governed by a bargaining council agreement, that forum dictates the terms and conditions of employment and there is therefore little need for trade union intervention (Vol 2: Int32.p17. Par.184). In addition, if TES employees are embroiled in a workplace dispute, they can approach a dispute resolution centre under the auspices of the bargaining council and they are entitled to represent themselves, if they so wish.

In changing the way that unions traditionally attempt to include TES employees, a senior member of a prominent union suggests that unions may consider offering additional benefits to union membership. Some larger unions have offered benefits such as medical aid and insurance. However, this participant believed that only larger unions have the resources to run 'benefit unions.' The participant acknowledged that these benefits do attract members, but most unions do not have the additional resources required (Int26.p443. Par.171-172). For unions who do not have the required resources, this participant offered further advice, 'so, you have to prove yourself in action' (Int26.p443. Par.174).

> First of all, you have to get to all these people, you need dedicated organisers who will go out there, and who actually engage with workers. And that often is going to the factory at 05h00 in the morning, being there at 23h00 at night, you know when the next shift comes out. It means proving that you got a … good deal, not just on wages, but on holidays, medical aid, provident fund... They are interested in you know, the long-term interest in them and their families (Int26.pp443-444. Par.178-180).

9.4.3. Union fees and agency shop agreements

Union membership fees as a deterrent for TES employees joining unions was discussed with a few of the participants. Once a union has been officially recognised by the Department of Labour, the union can apply for the employer to deduct union subscriptions directly from the employee's wages.[189] Unless the employer has good reason not to deduct the money, they are legally obliged to do so. Traditionally, union fees are one percent of the employee's salary. A

[189] Section 13(1) of the LRA states that any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.

union participant explained that all workers were likely to raise issues of affordability, with no noticeable distinction between vulnerable workers and other workers (Int26.pp444-445. Par.182-190). Interestingly, this participant mentioned that higher paid employees were more likely to object to paying the fees as they perceived the one percent of their salaries as a substantial amount. Another participant who had spent many years working for unions in senior positions, believed that union fees were a deterrent to recruiting non-standard employees.

> A lot of these workers are so poor that there's no way they could join anyway, and it is not good having a union which the workers are not financially organisationally committed to. You can't be organised from an office (Int21.p347. Par.60).

This view was supported by a senior executive at a large TES firm, who argued that unions fail to include TES employees, as these employees prefer disposable income and do not want to spend one percent of their income per month on trade union membership. Due to the South African economic situation, TES employees would rather spend it on transport, food or airtime (Int3. p43. Par166).

Apart from the actual membership fees payable, participants also mentioned agency shop agreements as a deterrent to unionisation amongst TES employees. A senior government department participant warned that if trade unions wished to operate in the temporary employment sector, they would have to carefully reconsider agency shop agreements. This participant believed that unions should not impose the high costs of membership and the benefits of collective bargaining on the lower income workers. Consequently, unions would need innovative ways of dealing with their fees without excluding the temporary employment sector (Int22.p374. Par.124). This participant went so far as to suggest that the reason why TES employees are moving away from the traditional union membership, and towards non-profit organisations and other associations, was the cost of union membership and the agency shop contribution (Int22.p374. Par.130). This view was supported by a participant who had spent many years working for the union movement in South Africa. The participant believed that unions have no need or desire to re-orientate themselves and as a result exclude TES workers because of agency shop agreements.

> That movement is in terminal decline. I mean, if you know these organisations, then you know it is impossible to see who in those organisations will take the trouble to re-orientate them. Why should they? They earn huge salaries, they got all kinds of benefits,

> the money pours in through the agency shop agreements that they have, especially the public-sector ones, and the state is the biggest users of these precarious forms of labour. The public-sector unions have these agreements with the state - agency shop agreements. They get millions a month they don't have to organise. The organisers sit there with big salaries, they've got cars which are subsidised, they have you know, their whatever, their laptop computers and their cell phones and why should they bother… I worked in the organisation for a long time, so I'm not saying this as an outsider you know [chuckle] (Int9.p136-137. Par.76-82).

Another union participant focused on the difficulties experienced by unions in collecting the membership fees from TES employees. As mentioned above, once a union is recognised by the Department of Labour, the employer is obliged to deduct union subscriptions directly from the employee's wages. However, this participant explained that employers try to circumvent these responsibilities in relation to TES workers. This participant suggested that the problem may be avoided if unions resort to collecting union membership fees directly from the employees and not through the company. The participant pointed out that this was not a new concept for unions in South Africa. During the apartheid years, union organisers had to physically stand at the gate of the workplace to collect fees from the employees as they left the promises on a Friday after work. 'So, we have to find a way of getting back to that early tradition, while of course not stopping the pressure on employers to deduct money' (Int21.p354. Par.146).

9.4.4. Trade Unions' internal affairs and lack of resources

An interesting study conducted by Paret (2018) drew on interviews with COSATU officials and workers in 2013. The study examined how union activists understood their relationship to the unemployed and local protests within residential areas.[190] Paret (2018) stateed that according to official statistics at the time, trade union members accounted for 30.7 percent of employees (this number excludes employers, own account workers, and unpaid workers in household businesses), and about 17 percent of the entire South African labour force (including the unemployed and the aforementioned groups of excluded workers). Union members therefore represent a shrinking proportion of the labour force in South Africa (Paret, 2018). A legal participant in this study observed a decline in general union membership in South Africa from about 50 percent in the 1990's, to approximately 23.5 percent currently (Int20.p323. Par.74). This

[190] This study revealed support for union involvement in extra-workplace struggles and the results showed that South Africa's social movement unionism remains strong. Paret (2018) found that some union activists felt the need to discipline, educate or speak for the unemployed and that this 'paternalistic' view may become an obstacle to broad working-class solidarity in South Africa.

decline in union membership was also mentioned by a senior mediator and arbitrator. Referrals received from unions representing their members were less than 40 percent of their overall referrals and could be as low as 30 percent. The participant believed that this was due to union density dropping over the last decade in all sectors of the economy (Int18.p273. Par.94). The participant believes that decreased union membership, results in decreased fees payed to unions. This in turn creates a situation where unions are forced to 'rationalise' themselves and question themselves on how to remain relevant and retain even their current membership (Int18.p274. Par.100). Under these generally difficult circumstances, unionising the TES industry poses many additional challenges. The participant stated that in attempting to recruit union members trade union officials are met with many logistical and resource problems. For instance, a province in South Africa could be an area of 360 x 360 kilometres and there would be approximately six union officials working in that vast area. Under these circumstances, with different employers throughout the region, it has been near impossible for unions to access TES employees scattered throughout these large areas (Int18.p274. Par.102). In addition to the sheer size of the region that each union organiser needs to contend with, the 'intangible body' of TES employees causes additional hardships for the unions. This point was raised by a participant who is the head of human resources at a large retail company, and a TES client.

> It is very hard for unions to actually organise and get membership and have a voice in that. And so, it becomes a sort of intangible body for them to create a membership base in, and therefore they have an issue with it (Int16. p242. Par66).

Further logistical difficulties experienced in unionising TES employees were mentioned by a legal participant who acts on behalf of union clients. As mentioned in paragraph 9.4.2., unions traditionally want workers to have long term employment, at a single workplace, to facilitate stop orders and the establishment of local regional offices (Int20.p323. Par.76). Generally, unions require stability in order to form leadership structures at the local level. The participant pointed out that when workers are itinerant and very precarious, it is not possible for them to establish stable structures, resulting in union breakdown. The participant believes that because of the breakdown in the union structure, unions exclude TES employees 'unions either won't let them join, or don't assist them' (Int20.p326. Par.102) and are reluctant to fight for their rights (Int20.p323. Par.78). This participant argues that because the union membership has shrunk,

union organisers are consequently under resourced, overworked, underpaid and out of their depth 'they just don't know what's going on' (Int20.pp326-327. Par.108).

In addition to declining membership, the decrease in resources and tricky logistical issues, the internal 'politics' of South African unions are a further deterrent to the unionisation of TES workers.[191] An employment attorney participant, who often acts on behalf of unions, explained that unions have experienced internal upheaval resulting in a change in their leadership, orientation and focus; 'there is a crisis in this sphere of the unions, that the unions themselves have readily spoken about' (Int7. P114. Par40). This participant believes that the internal changes and 'crises' that unions face has affected their ability to involve themselves with TES issues. As a result, unions have not done enough to bring the legislative amendments that assist TES workers into full force (Int7. P114. Par40). An owner of a TES firm supported this view and believes that unions are increasingly perceived as being 'more political than addressing the bread and butter issues of workers in the workplace', in other words being increasingly more involved in the external political arena (Vol 2: Int32.p18. Par.190). According to this participant, until trade unions start to change their trajectory and their outlook, there will be an increase in employees leaving the trade union fold (Vol 2: Int32.p18. Par.196). One union participant warned that unions are not just ineffective but corrupt, with leaders 'embezzling members money. So obviously you can see why workers wouldn't want to join a union like that' (Int21.p348. Par.70).

9.4.5. 'Flexible networks' and new ways of organising

Overcoming tough economic circumstances, limited resources and the need to reach non-standard employees, are difficulties experienced by unions in many countries. According to Czarzasty (2017), non-standard workers are not 'natural clientele' for trade unions. This heterogeneous workforce lacks stability and socio-economic security and requires 'different institutional arrangements to facilitate their interests: not stable structures but flexible networks' (Czarzasty, 2017, p114). For example, Lithuanian trade unions battle limited human and financial resources, and market related problems such as low minimum wages, low living

[191] By 'politics' it is believed that the participant was referring to the recent upheavals in the general union movement in South Africa. SAFTU was three years in the making. In 2014, COSATU expelled NUMSA, its largest and most radical affiliate, after the metalworkers' union withdrew its electoral support for the ANC, COSATU's alliance partner. The next year, the trade federation dismissed its general secretary Zwelinzima Vavi, who became SAFTU's first general secretary (Luckett and Munshi, 2017).

standards, a low incentive to work and scarcity of skills due to high emigration rates (Blažiene and Gruževskis, 2017). Despite these limitations, trade unions have survived the economic downturn by co-operating with foreign trade unions, employers, civil society and international organisations (Blažiene and Gruževskis, 2017). These trade unions consider non-government organisations (NGOs) as partners in the pursuit of their political objectives to reach the youth and attract new members to their ranks. Similarly, Bernaciak and Kahancová (2017) point out that in developing countries, unions often cooperate with social movements and NGOs on rule enforcement and social justice issues (Moody 1997; Waterman 2001).

As far back as 2006, the National Labour and Economic Development Institute (NALEDI) in their *The state of COSATU: phase one report*, stated that if COSATU wished to expand its organisation in the non-core employees it should consider innovative social movement strategies for organising externalised workers, such as 'mobilising them on a community-wide basis' rather than trying to establish shop steward structures and negotiating relations with each sweatshop employer. They furthermore recommended that COSATU 'build alliances with community organisations and social movements to strengthen efforts to organise in the non-core zone' (NALEDI, 2006, 16). In addition, NALEDI (2006, p.16) suggested that COSATU should establish alliances with organisations that do have appropriate structures and organising practices and assist them with resources and joint campaigns. Where such organisations did not exist, they recommended that COSATU facilitate or support the establishment of such organisations.

Years later, Bonner and Spooner (2011) similarly emphasised the importance of relationship building to increase visibility, influence and institutional power. They examined organising labour in the informal economy, more specifically relationships between informal workers' organisations, trade unions and NGOs. They conclude that a flexible, multi-faceted approach to organising is required. In South Africa, Barchiesi and Kenny (2008) come to a similar conclusion

> Due to high unemployment, the proliferation of contingent occupations, and growing labour market fragmentation, many intellectuals and trade unionists argue that unions are at risk of being marginalised unless they rebuild alliances with activists and social movements articulating the struggles of non-union workers, the unemployed, and marginalised communities (Barchiesi and Kenny, 2008).

In the present study, participants from the employer, union and client perspective mentioned that TES workers in South Africa were moving away from joining unions and experimenting with 'new ways of organising' (Int9. pp129-130. Par6). From the interviews, a strong impression was left that TES workers were organising themselves with the help of non-profit, voluntary organisations, or simply forming 'self-sorted committees' or associations (Int16. p242. Par72) as an *alternative* and not in partnership with existing unions. A participant who spent many years working for the union movement explained that TES employees are beginning to organise themselves in this fashion as a result of the traditional union movement failing to include TES workers (Int9. pp129-130. Par6). However, this participant stressed that this 'new way of organising' is still in its experimental phase and covers new terrain for all involved; 'the old way of organising is not working, but the new way has not yet emerged very clearly' (Int9. p130. Par6). The participant stated that TES workers have responded 'magnificently' to the idea of organising themselves and their quest is to exercise their rights under section 198A of the LRA 1995 (Int9. p131. Par18). TES workers are quite determined to set up workers committees and workers' councils, outside of the traditional union structures (Int9. pp131-132. Par26). The participant has noticed that not only are there no unions involved in most cases, but where unions are involved, the TES workers are hostile towards them (Int9. p132. Par32).

> There is I mean like Simba Chips we've got Heineken we've got Proctor & Gamble you know the big companies like that, Nestle, then on the other hand there are big national companies like Pick 'n Pay, Shoprite, you know Barloworld, Luxor Paint, companies like that, where workers have organised themselves into these various committees, and have entered into negotiations with their employers, and the employers have been obliged to respond because the workers have organised (Int9. p132. Par32).[192]

The prevalence of these non-profit organisations and associations was stressed by an employment law attorney participant who works for a large firm. This participant had dealt with non-profit organisations rather than unions in all matters relating to TES referrals.

> Whenever we see TES's especially large referrals coming up for a declaration from the CCMA of a deemed employer.…I haven't had one yet where they [a non-profit organisation] haven't been involved. But I haven't actually dealt with a union. I've dealt

[192] Secondary data in the form of newspaper reports and an online petition https://awethu.amandla.mobi/petitions/tell-heineken-to-stop-abusing-labour-broker-workers-in-south-africa, mention the relationship between TES workers and some of the companies mentioned by this participant. See (Smit, 2017; Smit, 2018; Brandt, 2018).

> with a number of TES matters and not once have I dealt with a union (Int28.p468. Par.152-156).

The idea that TES employees were opting for alternatives to unions was corroborated by a senior human resources employee at a large retailer, who is also a client in the TES industry. This participant stated that apart from the traditional unions, or groups organised by non-profit organisation and self-sorted committees, there are 'associations' of TES employees emerging. The participant described these associations as small clusters of independent groups that claim to represent labour broker employees and who have become quite effective in certain places. 'So, Shoprite I think about a year or two ago, it got a significant strike at its Midrand distribution centre and that was through an organisation that was unheard of until the day the workers downed tools' (Int16. p242. Par72). The participant believes that these associations are as a result of the changes to the legislation as they are using the new legislation as a vehicle to demand better pay and to become permanently employed at the TES client (Int16. p242. Par72).[193]

9.5. Conclusion

Generally, participants viewed unions as key actors in the TES environment, partly due to their historical importance in the South African labour market. However, there was a marked view of despondency amongst participants regarding the union movement's attempts at recruiting, assisting and representing TES workers. This, according to the participants, is in stark contrast to the traditionally active role in pursuing employee rights under difficult circumstances during the apartheid years. Several of the participants acknowledged the real difficulties faced by the union movement because of decreasing membership and resources, logistical hindrances and the sector-orientated collective bargaining arena. However, the participants also placed the blame on the union movement's outdated support of a 'job for life' concept that fails to consider the needs of young TES employees and 'knowledge economy workers'. Some participants urge union officials to return to 'old fashioned' principles of organising, which entail working hard and taking an interest in their member's lives. In addition, according to a few participants, the union

[193] Secondary data in the form of a news article supports this statement. The article mentions that outsourced Shoprite workers organised under the #OutsourcingMustFall movement went on strike to protest against poor pay and their employment through labour brokers at Shoprite's (a large retailer) largest distribution centre in the Gauteng province (Reporter, 2016).

movement should re-think their fee-structures and agency shop agreements to attract TES employees. The experimental project mentioned by one participant, where 500 employees' membership fees were paid by a TES firm that was committed to improving the TES union-employer relationship, had a positive outcome for the those who participated. The participants involved encouraged an alternative to the traditionally highly acrimonious relationship between unions and the TES industry.

TES workers organising themselves with the help of non-profit, voluntary organisations, or forming 'self-sorted committees' or associations as an *alternative* and not in partnership with existing unions, pose a challenge for the trade union movement. In other jurisdictions, these organisations have successfully worked in partnership with unions to assist non-standard employees. One participant suggested that this was a new way of organising in South Africa and still in its experimental phase and is possibly still open to change.

CHAPTER 10: ANALYSIS

The chapter contains two sections. The first will summarise the main findings in relation to the research questions. This section includes the current perspectives of TES workers, clients and firms. It furthermore looks at the historical and legal context for TES work in South Africa, as well as union responses. Following this the second section will discuss how the findings relate to the theories, concepts and debates in the literature review.

Section 1: summary of the findings in relation to the research questions

10.1. What is the current position and perspectives of the temporary agency worker, firm and client in South Africa?

10.1.1. The temporary employment agency worker

In order to ascertain the position of the temporary agency worker or temporary employment services (TES) worker as they are known in South Africa, the starting point would be to establish their employment status. In the UK there is a distinction between 'worker' and an 'employee' where a 'worker' is a wider category than 'employee'. All UK employees are workers, but an employee has extra employment rights and responsibilities that don't apply to workers who aren't employees. in South Africa the same distinction is not made. The word 'worker' is not defined in the LRA 1995, but 'employee' is defined in section 213.[194] However, the usual TES employment relationship is not covered by section 213 but rather in section 198 of the LRA 1995. In chapter 9 of the LRA 1995 entitled 'Regulation of non-standard employment and general provisions', section 198(2) states that: 'for the purposes of this Act, 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'. In the *Assign* Constitutional Court matter [195] Dlodlo AJ in his majority judgement stated that once the employee provides a service to the TES's client, they automatically become the TES's employee. Dlodlo AJ however clarified at paragraph 56 of the judgment, that 'sitting on the books of a TES does not make you an employee'. Section 198(2)

[194] Section 213 reads: 'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer'.
[195] Case CCT 194/17.

clearly states that the individual's services are to be 'procured for or provided to a client by a temporary employment service'. The employment status of the TES worker is important as the employment statutes, together with their rights and remedies, do not apply unless the person is an employee. As a result, there would be periods where TES workers fall within the reach of the employment statutes and the benefits that they hold, and periods where none of the employment statutes apply. The negative consequences of the periods of unemployment cannot be underestimated.

One such negative consequence is the TES worker's right to access medical and pension benefits. South Africa has a contributory social insurance system that protects against certain contingencies. TES employees have access to the social security minimum rights, but they are prejudiced by the fact that contributions accrue on completed days of employment and average days of remuneration over a six-month period. Pension and medical benefits are not compulsory and TES employees rely on employer, union and bargaining council schemes. These plans may exclude certain categories of employees and may provide for a minimum employment period before joining. TES employees are therefore likely to receive inferior benefits in terms of these provisions.

In addition to receiving inferior benefits compared to those who are permanently employed, TES workers face the reality of long periods of unemployment. The consequences of the high unemployment rate (27.6 percent in the first quarter of 2019)[196] together with an over-supply of unskilled workers, was a strong theme that emerged from the interviews. The participants commented on the negative consequences of this economic environment on the TES employee. These include a general desperation to find work, and limited options available for those looking for employment. It also affects union representation as there is a need to adopt a cautious approach to negotiations due to the fear that their members may lose their jobs. Linked to this approach is an overall acceptance of low wages, a reluctance to bargain for better conditions and a tolerance of an environment of exploitation.

The reality is that a large component of people in South Africa struggle to access the labour market. According to some participants, the access to TES work appears to have three different routes. Firstly, through 'fly-by-night' TES firms who employ desperate individuals who have no

[196] QLFS Q1:2019 Stats SA

alternatives and who will accept exploitative conditions. Secondly, through expanded networks where TES firms employ the unemployed from a wider group of unemployed individuals. Thirdly, individuals are employed from a contained, internal network of workers that are 'on the books' of the TES firms.

Due to the dire economic context for South African TES workers, some participants believed that TES employees had a greater need for employment security than job security. The idea was that the TES industry provided security of employment through upskilling and training, thereby increasing their employability. However, long-term security regardless of the format of the employment contract, could not be guaranteed. 'Decent work' that entailed job security, that in turn allowed long-term plans and commitments, was lacking. In this light, a range of different views were expressed as to whether TES work was a steppingstone to permanent employment. Some TES firms and one client participant believed that TES work did provide access to permanent employment. Secondary documentation supported this view as the written contractual arrangements between TES firms and TES employees allowed and encouraged permanent employment. Alternate views were that TES work provided opportunities rather than employment, and that the supply of TES workers encouraged employers to fill permanent positions with TES workers therefore discouraging full-time employment. Overall, the employment risks that TES employees face, such as the lack of long-term security, made them attractive to employers who took advantage of their precarious situation.

Recent amendments to the employment legislation pertaining to the TES industry has gone a long way to protect the TES employee by the introduction of a three month limit for employing TES workers before they will be deemed permanent employees of the client and be subject to parity provisions that require them to be treated 'on the whole not less favourably ' than permanent employees of the client. Despite an active legislature, specific legislation dealing with the TES employees and a strong legal system in South Africa, some participants believed that TES workers still experience inferior working conditions. Due to the high unemployment in South Africa, there is a wide belief that 'a bad job is better than no job' and TES workers are not only willing to work for lower wages and benefits, they are also reluctant to allow unions to bargain for their rights in the fear of losing the little work that they have.

10.1.2. The temporary employment agency firm

Although specific information regarding the size of the South African TES industry remained difficult to ascertain, participants agreed that the TES industry is important and growing. TES firm participants from large, prominent firms provided useful information about the industry. These participants estimated that the total number of temporary or contract workers placed daily in only four firms was 117,304 individuals, with approximately 900 000 temporary workers placed daily at clients throughout South Africa. Some participants believed that there were as many as 1.5 million TES workers in South Africa at the time the interviews were conducted.

A large TES firm participant had noticed trends in the demand for different categories of TES workers post the 2015 legislation amendments. These trends included the 'traditional blue-collar workers' category (e.g. general workers through to engineers) experiencing a growth of five to six percent. The growth was attributed to this category being a mature market for this TES firm, with workers placed daily at clients. Most of these placements were longer term, 'recurring annuity income type' contracts. The 'white collar workers' category (e.g. bank tellers and call centres) had experienced a noticeable decline in demand at this firm. The primary change in this category, was from longer term assignments to more contingency work and project based, shorter term assignments. The decline in this category was partly attributed to an increase in automation, and partly because these clients preferred permanent employees to the potential risks associated with employing TES employees for longer periods post the amendments. Professional services (e.g. IT professionals, java programmers, systems analysts and developers) saw substantial growth in demand. The growth in this area was driven by a skills deficiency or skills gap in project management and the IT sector.

A further trend noticed by some participants was that TES firms increasingly offered a range of different staffing solutions to clients. The deeming provision, (section 198A(3)(b)(i) of the LRA 1995)[197] was of concern to TES firm participants as it was no longer possible to offer clients TES employees without the fear of litigation. Outsourcing and managed service arrangements were an alternate offering to traditional TES services in the light of these changes in legislation. One option was the managed service provider (MSP) model. Pienaar and Jamieson (2018) suggest an

[197] According to this section, a TES employee earning under the Threshold Amount, who is placed at a client and is not employed for any other reason outlined in section 198A(1), is deemed to be the employee of the client after three months.

MSP model that provides a specialised outsourced service to an independent contractor. More specifically, the client firm contracts with a service provider who takes over the responsibility for all the company's service delivery functions, which might include operational or functional areas, cleaning services and the like. The expert MSP then sub-contracts all the required services to provide a range of services to the client. This they say, increases the productivity, sales and efficiency of the company in typical non-core activities. Some participants mentioned that they had noticed the increase in the MSP products offered to clients. It was not clear from the information provided whether the structure of the MSP models offered followed the same structure as that suggested by Pienaar and Jamieson (2018). Some participants saw it as no different to the TES model, just an alternate way to restructure the commercial agreement. Others saw these arrangements as 'complicated schemes' used to circumvent employee rights.[198]

Some participants believed that the TES industry was consolidating as a result of the 2015 legislation amendments, with the larger firms 'absorbing' the medium and smaller sized TES firms. The reasons for this trend was that larger firms were able to operate on smaller margins, had superior infrastructure, with compliant systems, and correctly trained people to navigate an increasingly complex legal landscape. This was generally perceived as a positive trend as the smaller firms were considered abusive to their workers and non-compliant.

TES firms were also increasing their focus on higher-earning TES employees. Some participants believed that the focus on TES employees who earn above the Threshold Amount was due to the changes in legislation that came into effect in 2015 (e.g. the deeming and parity provisions). Participants explained that these higher earners favoured the flexible hours and diversity of TES work. They were often home based, working on laptops and TES work catered for this mode of work. A high demand existed for their skills as they required less management and TES firms made more money from their services (the gross profits 'GPs' were higher). Overall, they were unlikely to suffer abuse from the client as the power base of the employment relationship was in their favour as they were in demand. Critically, the new legislation that came into force in 2015, generally only applied to those who earned under the Threshold Amount.

[198] Section 7.3.2. discusses section 200B of the LRA 1995. This section deals with joint and several liability of the employer in the instance of more than one employer.

A strong theme that emerged from the data was the concern raised by the TES firm participants about the negative reputation of the TES industry. These concerns included the industry being accused of treating employees as commodities. Participant views were however divided regarding these negative perceptions. Some participants believed that firms cut corners to save costs which led to ill-treatment of employees, rightly earning the industry its reputation. Others believed that the industry was tainted by negative rhetoric and a lack of understanding of how the business operated in terms of its overheads and operational costs. These participants believed that negativity was perpetuated by two misconceptions. Firstly, a lack of understanding for the necessity for flexibility and secondly, a lack of appreciation for how TES business was conducted. TES firms had offices and recruitment centres to run, their own staff to pay and general overheads 'like any other business'. They had to train and develop people and ensure that they were in line with changing legislation. In addition, TES firms needed to deal with their clients' operational requirements. As a result of these costs, TES firms charge their clients a fee in addition to the cost for each TES worker (rate of pay and benefits). TES firm participants believed that regardless of any positives that may flow from the TES industry, negative rhetoric was hard to counter as it was historically entrenched. However, there was consensus amongst all participants interviewed that the '*bakkie brigade*' were validly criticised for 'slave driver' practices.

10.1.3. The temporary employment agency client

The reasons why clients use TES firms in South Africa is complex. The desire to circumvent union involvement was mentioned by some participants. Some believed that possible union avoidance tactics by the clients depended largely on the sector of the client firm. In this regard, there was no need to hire TES workers to avoid unionisation in sectors where unionisation was weak. Some linked client preference of non-unionisation to factors such as the performance of TES workers and the size of the client. In terms of performance, it was argued that TES workers performed better because they wanted to be permanently employed. Others believed that smaller employers did not have the legal know-how to deal with unions and engaged TES firms to remain compliant. Some clients, however, simply did not want to comply with legislation and employed *bakkie brigade* TES firms to avoid union involvement, although some participants mentioned that these smaller TES firms were declining in influence.

TES employees and fixed term contract employees both offer flexibility and short-term employment. The reasons why TES clients chose TES firm employees rather than fixed term contract employees, was discussed. Some participants believed TES employees were chosen to avoid employer associated risks, or to alleviate the administration 'hassle'. For example, payroll, disciplinary issues and time keeping problems were associated with fixed term or permanent staff. Some wished to avoid the employee-related costs, for example redundancy costs and the human resources investment needed to remain compliant.

Participants outlined strategies adopted by TES clients to circumvent the requirements of Black Economic Empowerment (BEE) legislation, or Broad-Based Black Economic Empowerment (B-BBEE). For example, they paid severance packages to senior white staff to leave the organisation to avoid them being part of the employee population which would affect the BEE scores. Thereafter, they hired the same employees back through a TES firm. A senior tax expert participant explained that the client company was then able to retain their services at a cost to the employer. The costs of the TES service were deductible from a tax perspective, as these costs were incurred in the production of income. These arrangements were considered 'fronting'[199] which is illegal but according to the tax expert participant, remain popular. TES firms were also popular in the public sector. For example, local municipalities saved large amounts of money hiring TES employees to perform municipal services at a third of the cost of permanent employees. These costs were saved at the expense of the TES employees who should have been permanently employed by the municipality.

Clients externalising their employer responsibilities to save costs was a strong theme that emerged from the data. The externalisation of payroll responsibilities was popular, with some participants believing that running the client's payroll and being a simple channel for wages, was the TES firm's primary purpose. In addition, economies of scale optimisation influenced the initial engagement of the client. In the past, TES firms would initially meet with the human resources and production departments to assess their TES needs. However, they now met with the procurement and finance departments which was indicative of the fact that clients prioritised cost cutting. One TES client participant expressed concern that TES workers were often hired at

[199] 'Fronting' means a deliberate circumvention or attempted circumvention of the B-BBEE Act and the Codes. It involves the reliance on data or claims of compliance based on misrepresentations of facts, either by the party claiming compliance, or by any other person (DTI, 2014).

the expense of the company's values, despite the cost efficiencies they offer, as the company used TES employees for existing, permanent positions at the company. The interplay between economic forces and the TES industry ensures that the TES client still exerts commercial control over the TES firm by undercutting prices and treating employees as commodities. Due to dire economic conditions and exceptionally high unemployment, TES clients were able to manipulate the relationship to achieve the cheapest rate possible and to find loopholes in legislation to benefit their organisations at the expense of the TES worker.

Greater workforce flexibility emerged as a key reason for using TES employees. Participants discussed the reasons why flexibility was important to the TES client. These included the efficient operation of the business, remaining profitable during difficult financial times, and ensuring global competitiveness. Using TES firms assisted with the 'peaks and valleys' experienced in business and allowed them to concentrate on their core functions. Clients were also able to externalise their legal, industrial relations (IR) and human resources management (HRM) functions by using TES firms. This was important as clients often did not have the know-how, time or resources to engage in areas such as dismissal processes and IR. They also lacked the legal expertise and HR infrastructure to navigate the payroll for temporary employees, especially if there were shift patterns involved. In general, these participants perceived TES firms as having the necessary skills to deal with these complex issues. From a negative perspective, participants believed that this desire for flexibility led to the casualisation of permanent jobs and the erosion of job security for these workers.

10.2. What is the regulatory framework for temporary agency work in South Africa and the response of key groups to this framework?

In considering the legal framework for temporary agency workers in South Africa, this thesis focused on two important employment statutes namely, *The Labour Relations Act 1995* (No. 66 of 1995) (LRA 1995), and *The Basic Conditions of Employment Act 1997* (No. 75 of 1997) (BCEA). Recent amendments to these statutes were promulgated during 2015. Section 198 of the LRA 1995, that deals with temporary agency or TES work, was of interest to the participants and therefore discussed in some depth. In particular, the 'deeming provision', Section 198A(3)(b)(i) of the LRA 1995 concerns the identity of the employer party and Section 198A(5) of the LRA

1995 contains the principles of non-discrimination relevant to the TES relationship, termed the 'parity provision' in this thesis.

Participants' views regarding the meaning of the deeming provision varied as the interviews were conducted prior to the Constitutional Court (CC) judgement in the *Assign* matter. The CC in a landmark ruling on 26 July 2018, subsequently ruled that the language in section 198A of the LRA1995 was clear and that the TES client was the sole employer of the TES employee after a period of three months. Opinions expressed concerning this three-month period ranged from participants who believed that three months was far too short, to participants who were of the view that there should be no waiting period for the provisions of Section 198 to take effect. These participants felt that any waiting period allowed a loophole for employers to abuse TES employees.

With regard to the parity provision, the amended Section 198A(5) of the LRA 1995 provides that TES employees employed for more than three months must not be treated less favourably than an employee employed on a permanent basis who performs the same or similar work, unless there is a justifiable reason for different treatment. Most participants acknowledged that there had been a need for a change in this area of the law as TES employees were historically more likely to receive inferior pay and benefits than permanently employed employees of the TES client. However, concern was expressed that if the new parity provisions were suddenly implemented, the increased costs may lead to job losses and redundancies in the TES industry. One of the important aspects of Section 198A(5) of the LRA (referred to as the 'parity provision') is the interpretation of the words 'must be treated on the whole not less favourably' in respect of TES employees being deemed to be employees of the TES client. Section 198D of the LRA 1995 stipulates that the following factors may be taken into account in determining whether justifiable reasons exist for treating TES employees differently: seniority, experience or length of service; merit; the quality or quantity of work performed; and any other criteria of a similar nature. These equal pay provisions do not require TES workers to prove that they are paid less as a result of the employer discriminating against them unfairly. Instead, the employer bears the onus of proving that the differential treatment is based on a justifiable reason and such reason is not unfairly discriminatory. Participants believed that the unclear wording of the parity

provision would give rise to interpretation issues in the future and focussed their criticisms on the unclear wording of the section.

Some participants believed that in the past firms used TESs to avoid labour law provisions and that the law concerning TESs provided the opportunity to achieve this goal. Tightening the regulations for the TES industry in South Africa had provided more protection for the TES employees, but that more effective enforcement and increased resources were needed. A legal practitioner participant stated that they were sceptical about the enforcement challenges ever improving and believed that the solution rested on self-compliance. A self-regulatory model had been proposed by some employer parties at the time that the 2015 amendments were debated. A director at a government department participant explained that although a self-regulatory model had not been introduced, it was 'not mutually exclusive' with the regulatory framework that was implemented. Despite the self-regulatory model being rejected, the participant thought that there was still a general commitment to regulation within the industry and its associations.

10.3. How is temporary agency work influenced by trade union responses?

The legislative framework for unions in South Africa includes the entrenchment of labour rights in the Constitution and legislated organisational rights. In order to achieve industrial peace, the LRA 1995 adopted a policy of voluntary collective bargaining, at sectoral level, underpinned by the principle of majoritarianism. Under the Labour Relations Amendment Act 2014, trade unions representing the employees of temporary employment agencies are now able to exercise their organisational rights not only at the workplace of the agency, but also at the user firm's workplace (ILO, 2016). Moreover, workers employed by agencies who participate in a legally protected strike action are entitled to picket at the user firm's premises (ILO, 2016). Taking into consideration the importance and incentives of majoritarianism in the LRA 1995, participants discussed how the new changes to the legislation may affect trade unions. Potentially, unions may access or forfeit their majority rights based on the number of TES employees that become permanent employees after the three-month period and thereafter either choose to become union members or reject union membership. This may be risky for unions bearing in mind the importance of retaining their majority status. However, the single employer relationship with the client after the three-month period may also bring certainty for unions, allowing them to organise

all employees ‘under one roof’. This in turn may increase their bargaining muscle, leading to additional regulation, better enforcement and decreased exploitation.

A few participants acknowledged that an acrimonious and litigious relationship existed between organised labour and the South African TES industry. From a TES firm perspective, this was described as an ‘anti-labour broking’ campaign against TES work. This sentiment was attributed to the growth in the TES industry approximately fifteen years ago and the resultant media attention. In addition, the historical exploitation of TES workers, and a largely non-compliant industry, attributed to this negative sentiment. An employer’s association participant believed that the tripartite system that existed in South Africa allowed COSATU to have a much stronger voice regarding TES issues than most trade unions have internationally, and that the current level of their representation should allow. As a result of this troublesome relationship between organised labour and the TES industry, there is largely an exclusion response by unions in relation to agency work (Heery, 2004). Unions have embarked on a systematic and comprehensive campaign to ban TES work. A union participant attributed the legislation amendments to the success of this campaign, but not all participants viewed the campaign as positive. For example, an employer confederation participant stated that the campaign against TES firms was simply a rallying tool used by unions to poach members from each other during election times. More in line with Heery’s (2004) engagement and regulation strategies, one union has instead opted for raising TES worker issues at sector related negotiations. In doing so, they have successfully bargained for ‘inspection-like’ rights at work premises to prevent TES employee victimisation and provide awareness of legal rights.

Participants focused much of their responses on the difficulties that unions face when attempting to include and recruit TES employees. The reasons for these difficulties varied. Some participants believed that due to the internal structures of the unions, and especially in situations where agency shop agreements prevail, unions have little interest in TES employees, and they are excluded from being represented. Other participants acknowledged the insecurities faced by TES employees even in circumstances where unions attempt to include them. Once unionised, they were often labelled as ‘troublemakers’ and dismissed, making them afraid to join unions. Union strategies of inclusion of TES workers were largely criticised by the participants. These strategies centred around an outdated ‘job for life’ concept that South African unions preferred.

This concept was perceived as obsolete in a changing wold of work, where the average TES employee was young compared to the average union member. According to this argument, young employees were not interested in a job for life and preferred the flexibility of TES work. One employment lawyer participant believed that it would be more appropriate for unions to focus on a 'benefits type driven' approach to retain members. Another TES firm participant believed the focus should be on technology and information.

A link between this 'mainstream, old-fashioned' model of work and union fees was made by a senior attorney participant, who argued that unions exclude TES workers as they cannot be relied on to pay their membership fees. Unions faced a further difficulty attempting to include 'knowledge economy workers', who according to an employer's association participant, command a salary based on their skills, the market and other factors and consequently do not require the mass negotiation skills offered by organised labour. A few participants mentioned that the sector specific South African union environment posed practical issues for unions as it was impossible to have a different union for every different workplace that engages TES workers.

In line with dualisation theories, a participant who is a director of an international organisation pointed out that there was a negative perception of TES workers amongst 'traditional' employees who believe that TES workers are used to undermine both the benefit and the negotiating power of organised labour. This comment was made in relation to non-unionised, temporary workers continuing to perform their work functions during a strike.

Union membership fees as a deterrent to unionisation, was an area of questioning that offered contradictory responses from participants. One union official suggested that all workers were likely to raise issues of affordability, with no noticeable distinction between vulnerable workers and other workers. However, the same participant mentioned that higher paid members were more likely to consider the one percent of salary, which is the customary union membership fee in South Africa, as substantial and therefore they were more likely to object to paying it. Other participants stated that union fees were a deterrent for TES workers as they were 'so poor that there's no way they could join anyway' and would prefer to spend their money on necessities. One union participant pointed out that unions experience problems collecting union membership fees from TES workers as employers simply do not deduct the required membership fees. One of

the surprising findings was the participants' strong criticism of agency shop agreements.[200] According to some participants, agency shop agreements impose the costs of membership and the benefits of collective bargaining on lower income workers. Agency shop agreements were also blamed for the lack of desire by union officials to engage TES workers as 'the money pours in through the agency shop agreements' and there was therefore no need to work hard to increase their membership.

Union internal conflict and politics, together with a lack of resources added to the difficulties that unions face in organising and representing TES workers. Declining union membership and the resultant decrease in membership fees has forced unions to rationalise their resources to retain their existing membership. In addition to their decreasing finances, unions faced logistical problems with each union organiser having a large area to cover as they were understaffed. These issues made organising 'traditional' employees difficult, let alone the 'intangible body' of TES employees. In addition, a legal participant pointed out that when workers are itinerant and very precarious, it is not possible to establish stable structures, resulting in union breakdown. Unions require stability in order to form leadership structures at the local level. In addition to stretched resources, unions have experienced internal upheaval resulting in a change in their leadership, orientation and focus which has resulted in 'a crisis' that has affected their ability to involve themselves with TES issues. One participant blamed the union movement for being 'more political than addressing the bread and butter issues of workers in the workplace', including those of TES workers. A union participant went so far as to state that union leaders were corrupt and 'embezzling members money' which makes unionisation unattractive to TES workers (Int21.p348. Par.70).

An experimental project mentioned by one participant, where 500 employees' membership fees were paid by a TES firm that was committed to meeting with employers to improve union-employer relationships in the TES environment, had a positive outcome for the TES workers participating in the project. This positive outcome encouraged an alternative to the traditionally highly acrimonious relationship between unions and the TES industry.

[200] In terms of Section 25 of the LRA 1995, an agency shop agreement allows the employer to deduct an agreed fee from the wages of non-union employees, that is paid into a special fund administered by the union party. The fee may be deducted without the employees' consent (Grogan, 2017).

A few participants mentioned that TES workers were experimenting with 'new ways of organising'. They were organising themselves with the help of non-profit, voluntary organisations, or simply forming 'self-sorted committees' or associations (Int16. p242. Par72). This was done as an alternative to and not in partnership with existing unions, as the traditional union movement was perceived as failing to assist TES workers. However, this 'new way' of organising was still in its experimental phase and covered new terrain for all involved.

Section 2: How the findings relate to the main concepts and debates in the literature review

10.4. The complex contractual arrangements between agencies and user firms.

The internationalisation and fragmentation of business activity and ownership has greatly increased product and financial market competition, while weakening the bargaining power of traditionally organised labour. This has driven changes in how business contractually engages its workforce (Wright *et al* 2019). The large, vertically structured, bureaucratic organisation of Fordism, has now been replaced by a network organisational form, where the traditional boundaries of organisations are blurred as organisations establish joint ventures, partnerships and subcontracting arrangements with a network of other small and large organisations (Grimshaw, 2005). These arrangements have led to a 'fissuring' of the workplace through the proliferation of subcontracting ventures (Weil, 2014; Eichhorst *et al*, 2019). In this regard, client organisations are engaging agencies to meet all staff needs, often referred to as human resources or human capital services and may include HR activities, payroll management, training, and appraisals (Purcell and Purcell 1998; Purcell *et al*. 2005; Hoque *et al*, 2008, p.391; Bartkiw, 2014). Other services may include 'project management', 'outsourcing' 'complete staffing solutions' and 'managed service provider' (MSP) agreements - all terms given to different measures for placing workers (Ward, 2003).

Similar trends were confirmed by the participants in the current study, with some participants mentioning the umbrella term 'outsourcing', or more specifically, the MSP model. Interestingly, according to some participants, in South Africa these options are considered in response to changes in legislation. The idea was that the provision of 'a fully managed service' model would not be considered a TES in terms of legislation (Int4. pp54-55. Par.2-6). The LRA 1995 specifically excludes the independent contractor relationship from the extended liability of the

parity provisions. Section 198(3) of the LRA 1995, as amended, provides that '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'. The MSP, or other similar model may therefore be designed in such a manner as to provide a specialised outsourced service by an independent contractor (Pienaar and Jamieson, 2018). The expert MSP then in-turn may sub-contract various services to be provided to the client.

In this regard, the current study revealed interesting collaborations between large TES firms and their larger clients. A senior employee of a prominent TES firm outlined an initiative where their firm had pre-empted the changes to the employment legislation that affected the TES industry and had developed sophisticated software to assess their clients' changing needs. This software allowed them to analyse their clients' permanent staff in comparable jobs, to the temporary workers that were placed by their firm, from a payroll and benefits perspective. As a direct result of this exercise, they changed their 'value proposition' to their clients away from simply offering a 'brokering' service, to offering 'fully outsourced independent contracting' services.

The literature points to some potential benefits for employers as a result of these collaborations between clients and temporary employment agencies. These may include a more engaged model with a broader range of attributes than price and reduced purchase costs. There may also be greater information-sharing, joint learning and problem solving (Hoque *et al* (2008); Grimshaw *et al*, 2005). The MSP model also purportedly increases the productivity, sales and efficiency of the TES client in typical non-core activities (Pienaar and Jamieson, 2018).

However, in this study, a human rights lawyer participant believed that these collaborative 'schemes' were put in place simply to circumvent the provisions of the labour legislation that protect TES employees (Int7. pp116-117. Par68). The participant argued that these complex arrangements made the employer party difficult to identify and their rights difficult to enforce. In contrast to this view, a senior employment lawyer participant argued that it was not easy to circumvent the law as the outsourcing arrangement would need to be genuine. The commercial agreement between the TES client and the TES firm would be scrutinised and if it transpired that the TES firm merely supplied 'bodies', it would be a simple TES contract. If it was found that the commercial agreement stipulated that the client relinquished control of a certain

function/department, then it may be considered an outsourcing agreement (Int25.p421. Par.181-188).

This later view is supported by an important recent amendment to the LRA, 1995, namely section 200B. This section deals with the joint and several liability to comply with the obligations of the employer when more than one person is held to be the employer of an employee. In *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others*,[201] (the *Masoga* matter) the Labour Appeal Court (LAC) ruled on the scope and effect of section 200B of the LRA 1995. While it contemplates that a single person may be the employer, it does not provide criteria for determining what makes that one person the employer. The section provides for joint liability in a situation where that one person is a party to a simulated arrangement or sham, the true intent or effect of which is to defeat the purposes of the LRA, or any other employment law, and there is a failure by that person to comply with the obligations of an employer (Dube, 2019). If this is the case, any other person or entity which is complicit in this scheme is treated as an employer for the purposes of liability. The other person or entity is jointly and severally liable in terms of section 200B together with anyone else held to be an employer and in respect of the employer's obligations under the LRA or any other employment law. (Dube, 2019). The net result of section 200B and the ruling in the *Masoga* matter is that it would be legally risky for clients and TES agencies to engage in 'simulated arrangements' or 'shams' to avoid the provisions of section 198 of the LRA.

While section 200B deals with a situation where TES agencies are involved in a sham or simulated arrangement, there are however many instances where there is no sham or subterfuge and the 'outsourcing' or independent contracting arrangement is constructed in terms of prevailing legislation. However, in these instances the potential TES employees may still not be afforded parity rights as they do not fall within the provisions of section 198. These arrangements would therefore be attractive to employers seeking to employ temporary staff.

In the matter of *CHEP South Africa (Pty) Ltd v Shardlow N.O and others*,[202] (the *CHEP* matter), the relationship between CHEP and Contracta-Force Corporate Solutions (Pty) Ltd (C-Force)

[201] (JA14/2018) [2019] ZALAC 59 (12 September 2019).
[202] [2019] JOL 40990 (LC).

was regulated by a two written Service-level Agreements (SLA). The CCMA Commissioner concluded that the relationship between CHEP and C-Force was determined by the factual relationship between these two parties and that the 201 workers were employed by C-Force as it was acting as a TES provider. Therefore, CHEP was deemed to be the employer for the purposes of the Labour Relations Act (Goldberg and Wilkinson, 2019; Vermaas, 2019). On review, however, the Labour Court concluded that C-Force was not acting as a TES and the award was set aside. The court found that C-Force provided a product and not individual labour to CHEP and the relationship therefore fell outside of section 198 of the LRA 1995. This finding placed the workers outside the scope of the deeming provisions. The CCMA decision was reversed and set aside, and C-Force was found to be an independent contractor and not a TES.

In comparison, in the UK, 'master vendor' or 'neutral vendor' arrangements are treated differently to those in South Africa. The Agency Workers Regulations 2010 guidance document stipulates that an individual is not prevented from being an agency worker under the regulations because they work through an intermediary body, an umbrella company who finds work for the agency worker or is managed on behalf of a hirer by a master vendor arrangement. These UK Regulations would have resulted in a very different result for the workers in the *CHEP* matter if the same facts had been heard in the UK. The recent court decision thus points to a weakness in the South African legislation from a worker perspective.

10.5. The human capital perspective: accessing the labour market

Given the high unemployment rate in South Africa, an important theme that emerged from the interviews is how individuals access work. [203] The human capital theory is important in the South African context as it predicts that individuals with higher human capital have higher earnings and higher probability of finding employment (World Development Report, 2007). One of the main international concerns about temporary agency work, is the lack of investment in human capital as both TES firms and clients face disincentives to invest in TES workers (CIETT, 2000). From a client perspective, the temporary agency workers are only at the client firm for a limited period, are usually employed by the agency and the skills required for agency work are not necessarily firm-specific. From a TES firm perspective, the inclination to resign may be high as the agency

[203] The South African unemployment rate was 27.6 percent in the first quarter of 2019 (Mkentane, 2019).

worker may be poached on assignment at the user firm. As a result, firms are reluctant to finance non-firm specific human capital as they may not be able to reap the return on their investment if the worker leaves their employment (Storrie, 2002). These realities are reflected in a 2010 European Working Conditions Survey that reported that only 26 per cent of temporary agency workers received training, compared with 39 per cent of workers on an indefinite contract (ILO, 2016, p.207).

In this study, there were polarised responses amongst the participants regarding the training of TES workers. Union participants believed that TES workers often did not have access to the same training as permanent employees, whereas a TES client believed that TES firms did offer training but these firms were in the minority.[204]TES company participants disagreed with these sentiments and were adamant that they trained their employees and mentioned the skills levy as proof. In South Africa, companies may claim back a part of their training expenditure according to the *Skills Development Levies Act 1999* (No. 9). A legal participant believed that from a skills levies perspective, the TES industry was the greatest contributor in South Africa and that the negativity surrounding this aspect was merely rhetoric.[205] According to a senior TES firm employee, TES employees' access to skills development was significantly addressed as it was a TES firm's function to ensure that they have a talent pipeline. As a result, both the payment of the levy and the access to skills development was critical.[206] In addition to the skills levy, a high number of TES employees were Employment Tax Incentive (ETI) beneficiaries.[207] The ETI encourages TES firms to take first time employees, very often through temporary employment services, in order to access skills. [208]

However, a more contextually rooted analysis of the human capital perspective is important. In the global south and southern Africa where there is high unemployment and an uneven geographical distribution of employment, the positive aspects of temporary agency work as a

[204] (Int16.p241. Par.52-54).
[205] (Int31.p508. Par.14).
[206] (Int5.p71. Par.82).
[207] The ETI is the package of tax incentives that Treasury of South Africa introduced which encouraged business to employ young people. It is a wage subsidy that employers receive for employing people under the age of twenty-nine, earning below the Threshold Amount, for a two-year period and encourages the employment of first-time employees.
[208] (Int5.p71. Par.82).

route to work experience and skills is important. High levels of unemployment, coupled with rural areas that lack development, result in young people struggling to find jobs (Branson *et al* 2019). In addition, youth from disadvantaged backgrounds do not have networks to introduce them to potential employers (Dieltiens, 2015). The ILO has suggested that agency work can be vital for less skilled workers who lack the informal networks and contacts that were often necessary to gain permanent employment (ILO, 2011).

The present study revealed that access to employment (whether it be temporary employment or permanent employment) via TES firms in South Africa appeared to have three different contexts. Firstly, individuals may be employed through 'fly-by-night' TES firms that employ those who were desperate and consequently take any opportunity of work. These fly-by-night TES firms often paid inferior salaries and benefits. Secondly, there were expanded networks where reputable TES firms employ the unemployed from a wider group of those looking for work. In this regard, South African studies have found that employment agencies are of assistance to people with limited attachment to the labour market and limited access to employed individuals who can help them find a job (Lam *et al* 2008; Bernstein, 2012). For example, a senior TES firm participant mentioned that their firm had taken on 80 000 youth and previously unemployed workers over a period of two years, and had 'converted' their temporary employment into permanent employment.[209] Thirdly, TES firms utilise or offer employment to individuals who are 'on their books' forming an internal network of TES workers.[210] Those TES workers who access employment through this 'internal network' system of the TES firm, may partly be seen as insiders in particular in comparison to the unemployed who cannot get a foothold in the labour market.

In relation to this third context, the refinement of the segmentation or dualisation theory is called for as the South African TES industry in some cases seems to create employment for some unemployed individuals who become partial insiders of an internal network. They dominate TES employment opportunities at the expense of other unemployed people who fail to get any

[209] (Int3. P44. Par174-176).

[210] Dlodlo AJ clarified at paragraph 56 of the *Assign* judgment, that 'sitting on the books of a TES does not make you an employee'. Section 198(2) clearly states that the individual's services are to be 'procured for or provided to a client by a temporary employment service'.

foothold in the labour market or are forced to join 'fly-by-night' operators. As argued by one participant, 'if you are working with a very specified pool of employees, you know, then it doesn't really help the problems we face in the labour market' (Int22.p380. Par.206).

10.6. Segmentation and dualisation

Considering the above discussion on the refinement of the segmentation or dualisation theory, a key interest of this research has been the disadvantages experienced by TES workers compared to permanent or standard workers in South Africa. This theme ties into the general debate about the existence of an insider-outside divide in contemporary labour markets (Lindbeck and Snower, 2001), of labour market dualism (Emmenegger *et al*., 2012), an overall polarisation of the labour force (Kalleberg, 2013), and an emergence of a social class of precarious workers (Standing, 2011; Bertolini, 2018). The literature points to many degrees of being an 'insider' or an 'outsider' and the distinction between them was made along a variety of employment-related divides, such as good jobs and bad jobs, unionised and non-unionised. These differences also translate into social differences (Lindbeck and Snower, 2002), and poorer skill acquisition for temporary employees (Booth *et al*., 2002), which may result in a temporary job trap due to the lack of opportunities (Choi, 2019, p.3)

One such definition of 'dualisation' is the division between workers who have stable jobs, regular salary and decent working conditions, as opposed to precarious workers who occupy unstable and poorly protected jobs (Kalleberg, 2011; Manky, 2018). South Africa has a long, historically entrenched dualistic labour market as black workers were denied the opportunity to seek work of their choice and to live with their families where there was work (Kraak, 1993). Regulating this segmented labour market was a dualistic system of labour control. There were collective bargaining rights for non-African workers, and a system of despotic control and denial of trade union rights for black workers (Kenny and Webster, 1999). Even after apartheid was abolished, there were calls for an entrenched 'two-tier' labour market (SAF, 1996; Kenny and Webster, 1999).[211] These proposals called for two sets of rules, one for a high-wage, capital-intensive, low-

[211] This 'two-tier' labour market was proposed by the South African Foundation (SAF) after 1994. The SAF was a powerful lobby group and think tank for big business. Fifty-three of South Africa's top companies, certain foreign companies, and some South African state-owned companies were members of the SAF (Baskin 1996, pp. 7-8). This was an incredulous stance as South Africa had struggled long and hard to overthrow a two-tier society and a two-tier labour system (Standing et al, 1996, p. 12).

employment sector, and the other for a bourgeoning free-entry labour-intensive sector, with strong new investment (South African Foundation 1996; Kenny and Webster, 1999, p.218). These propositions reflected the highly flexible system of contract labour which was at the core of the apartheid regime's migrant labour system (Kenny and Webster, 1999). Unsurprisingly, COSATU argued that this approach would erode labour standards and stressed that the flexibility trend was simply a re-emergence of the apartheid strategy to divide workers into those with and without rights, as was the case with migrant workers in the past and would be a recipe for perpetual instability in the labour market and the economy (COSATU, 1997).

Research conducted by the National Labour and Economic Development Institute (NALEDI) during 2006, explored the extent of casualisation in the southern African region formal sector and its impact on workers and the economy. It was based on country studies in Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe (Bodibe, 2006). The study found that there was an increase in casual employees filling positions that were permanent in nature. Behind employee vulnerability in the region was high levels of unemployment and accompanying poverty. Poverty had bred a dangerous work environment where many desperate job seekers in the labour force were willing to take any job for survival purposes rather than dignity. This posed a challenge for trade unions in their pursuit to protect and advance workers' rights and foster decent work at that time (Bodibe, 2006).

In present day South Africa, the 'insider-outsider' divide is still a stark reality as the labour market remains racially biased, and the socio-economic context is characterised by poverty and high unemployment (Senne and Nkomo, 2015). As a result, temporary and casual labour have been endemic features of the South African labour market (Van Eck, 2010; Senne and Nkomo, 2015). In many respects this divide is not in relation to temporary agency employees versus permanent employees, but rather the employed versus the unemployed. Ultimately, employers have adapted by shifting to economic coercion and casualisation because of high unemployment (Pons-Vignon and Anseeuw, 2009). This adaption perpetuates the divide between the employed and the unemployed, forcing individuals to accept 'any job' to cross this divide. This is evident in the minutes of a NEDLAC National Social Dialogue Institution meeting held during 2017 on the

future of work. [212] These minutes state that 'a strong argument has been made that the immediate goal should be any job rather than a decent job if the high unemployment levels are to be lowered as targeted by the National Development Plan (NDP)'. Senne and Nkomo (2015) argue that while there had been a desire to change the exploitative labour regime in law, little has been done by the government to transform the reality in the workplace.

Historically, transformation of the South African workplace has notably been driven through the union movement. However, organised labour has largely adopted an exclusionary response in relation to agency work (Heery, 2004). In line with dualisation theories, an ILO participant pointed out that there is a negative perception of TES workers amongst 'traditional' unionised employees who believe that TES workers are used to undermine both the benefit and the negotiating power of organised labour. TES employees are reluctant to join unions as unionisation is associated with traditional, fulltime employment at a mine or factory, and there is a negative perception of TES workers amongst these 'traditional' employees. When members of a union go on strike, the non-unionised temporary workers continue to perform their work functions, which raises the ire of organised labour and traditional union members.[213] Consequently, unions will need to 'reimagine their business model' to recruit not only their traditional full-time paid employees, but temporary workers in order to cross the many divides between these two categories of individuals.

10.7. The regulatory environment governing South African temporary agency workers

Although temporary agency work may yield benefits, it has been associated with substandard work, inferior pay and detrimental outcomes for workers because it inhabits a legal 'grey zone' (Forde *et al*., 2015, Stanford, 2017, p.385). As a result of the negative consequences associated with this type of work, there has been increased focus on three aspects of the regulatory environment affecting temporary agency workers. Firstly, the requirement that agency temps are treated equally comparable to directly employed workers in user firms (Forde and Slater, 2016). Secondly, the debate around joint and several liability between the temporary employment

[212] These minutes were provided by a participant during the interview process.
[213] (Int17.p258. Par.54).

agency and the client. Thirdly, the increase in regulatory avoidance in the temporary agency worker sector (Knox, 2018).

10.7.1. Equal treatment of temporary agency workers

The literature points towards a range of legal instruments that embed the principles of equal treatment and equal pay for workers in all forms of contractual arrangements. These include ILO standards and EU Directives, as well as the laws and collective agreements of individual countries (ILO, 2016). They provide that workers in non-standard employment should be guaranteed the same minimum labour standards and receive the same wages as comparable standard workers (ILO, 2016). For example, the ILO Recommendation 198 recommends that countries should adopt a national policy to ensure that employed workers, including those that are part of a multi-party relationship, should have the same standards applicable to all forms of contractual arrangements (Benjamin, 2013b). Similarly, the 2008 EU Directive on Temporary Agency Work was adopted to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers (Article 2). On a national level, many jurisdictions provide for principles of non-discrimination between non-standard workers and their standard counterparts for example, the Republic of Korea, Japan, the United Kingdom and in South Africa.

Whether equal treatment principles are applied to temporary agency work from day one, or if there is a qualifying period before their application, is an important consideration. For example, certain qualifying periods apply in both the UK and South Africa. The UK supports equal treatment for agency workers, although only after twelve weeks. There is a difference between day one rights and those that apply during a continuous assignment of twelve weeks or more (Forde and Slater, 2016). Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency went further than the UK declaration in stating that the non-discrimination principle applied from day one of an assignment, unless a qualifying period was agreed on at a national level by the social partners and/or tripartite bodies (McKay, 2010). The UK social partners therefore negotiated a deal that fell short of that being pursued by most other social partner organisations in member states (McKay, 2010).

In South Africa, the LRA 1995 contains a similar time period of three months before any parity provisions may apply. Those working for a TES firm will be considered temporary employment services workers (performing a 'temporary service') for three months if certain conditions are met[214] and will not be compared to any permanent employees for that period. Section 198A(3)(b)(i), the 'deeming' provision, states that if a TES employee is not performing a 'temporary service', the employee is 'deemed to be the employee of the client' and to be 'employed on an indefinite basis' by the client.[215] In this event, Section 198A(5) of the LRA 1995 provides that these TES employees (employed for more than three months) must not be treated less favourably than an employee employed on a permanent basis by the client, who performs the same or similar work, unless there is a justifiable reason for different treatment. Section 198A(5) of the LRA 1995 stipulates:

> An employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

Clause 38 of the *Memorandum of Objects of the Labour Relations Amendment Bill*, 2012[216] provided the following examples of what would constitute treatment that is 'on the whole not less favourably' in terms of section 198A(5) of the LRA: 'The same wages and benefits as the client's other employees who are performing the same or similar work'. Section 198D of the LRA 1995 stipulates that the following factors may be considered when determining whether justifiable reasons exist for treating TES employees differently: seniority, experience or length of service; merit; the quality or quantity of work performed; and any other criteria of a similar nature.

---

[214] Section 198A of the LRA 1995 defines a 'temporary service' and restricts the employment of TES workers to employment for a period not exceeding three months, or as a substitute for a temporarily absent employee, or in a category of work which is considered to be a temporary service as determined by a collective agreement of a bargaining council or a sectoral determination, for a period of time.

[215] After much debate and protracted legal proceedings, as to whether the 'deemed employer' provision in section 198A(5) of the LRA 1995, meant a 'sole employer' or 'concurrent employer', the Constitutional Court (CC) *in Assign Services (Pty) Ltd v NUMSA & Others* provided clarity. The TES client is the sole employer after three months, this means that the TES will not have any legal standing in the employment terms of TES employees, nor be involved any further in the equation with regards to the LRA 1995, after the three-month period has elapsed (Mahlakoana, 2018).

216 This Memorandum does not speak to the Act in its final form and must be treated with caution - these sentiments were expressed by Dlodlo AJ about the Memorandum in paragraph 66, p. 23 of the *Assign Services (Pty) Limited* matter in the Constitutional Court, Case CCT 194/17)

Participants in the present study, from both the employer and labour movements, acknowledged that in the past TES employees were likely to experience unequal treatment and there was a general need for the legislation to provide further protection against such abuse.[217]However, participants criticised the lack of clarity of the wording of Section 198A(5) of the LRA and predicted that interpretation issues were going to arise in relation to the words 'must be treated on the whole not less favourably' in section 198A(5) of the LRA. Interestingly, the participants did not highlight the latitude employers seem to potentially have in justifying different treatment, for example the different employee qualifications and skills. This may be due to the changes to the legislation being relatively new when the interviews were conducted. This latitude provided for by the LRA 1995 is interesting when compared to similar provisions in the UK's Agency Workers Regulations 2010 (AWR).

In the UK, Regulation 5(1)(a) of the AWR states that an agency worker must be entitled to the same basic employment conditions that the worker would have been entitled to had they been recruited by the client without the intervention of the temporary work agency (Ebrahim, 2017). The AWR furthermore provides that regulation 5(1)(a) will be met if the worker receives the same relevant terms and conditions as the comparable employee of the client. Regulation 6(1)(a)-(f) set out a detailed list of terms and conditions that will fall within the meaning of 'relevant terms and conditions' (Ebrahim, 2017). Unlike the South African legislation that broadly refer to a 'on the whole not less favourable' test, the UK provisions are far more prescriptive.

Some insight into how the courts may treat the interpretation of the 'on the whole less favourable' provision was provided by the CCMA during March 2019, in *GIWUSA obo Moedezi and Others v Swissport SA (Pty) Ltd and Others (*the *GIWUSA* matter*)*.[218] In this matter, the CCMA held that the obligation to treat the deemed employees 'on the whole no less favourably' only arises in respect of employees doing the same or similar work. It is not a blanket comparison of the terms and condition of the entire workforce of the client (Ncume, 2019). This rather narrow interpretation of the words 'on the whole not less favourably' may open avenues to unscrupulous employers who will ensure that the positions filled by TES workers are deliberately 'different' in

[217] (Int2.p15. Par.32 [legal participant]; Int12.p166. Par.32 [union participant]).
[218] Case no. WECT 18794 on 18 March 2019.

order to avoid the risk of parity provisions applying in the future.

Deliberate attempts to avoid equality provisions applying to temporary agency workers are of concern in both in the UK and in South Africa. The UK AWR contains 'anti avoidance' provisions designed to prevent assignments that are put in place to intentionally circumvent the equality provisions of the AWR. However, the agency worker must have completed at least two assignments or two roles (in substantively different roles which break the qualifying period) with the same hirer or connected hirers within the same group, in order for the anti-avoidance provisions to become relevant. These provisions could be utilised if the agency moves a worker to a new assignment every eleven weeks in order to avoid the equality provisions that become effective after twelve weeks of employment. However, certain specified factors must be present that would indicate that a pattern of assignments was structured with the intention to deprive the worker of equal treatment rights (The Agency Workers Regulations: Guidance, 2010).

The South African legislature dealt with a TES client avoiding the provisions of the section 198A(3)(b) (the deeming provisions), by the addition of subsection 198A (4). This subsection states that:

> The termination by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3)(b) or because the employee exercised a right in terms of this Act, is a dismissal.

If a TES or a client terminates an employee's assignment to avoid the operation of section 198A(3)(b), that termination would be considered a dismissal and the usual remedies available through the LRA 1995 would apply. Unlike in the UK, there is no requirement for there to be two or more 'assignments' in order to prove that the employer attempted to avoid the equality provisions and the worker may access the remedies under the LRA 1995 even on a single unfair 'dismissal'.

Possible inequalities that may exist for temporary agency workers may also be diminished through the provision of collective rights. For example, in Italy the law explicitly provides that agency workers can exercise collective rights *vis-à-vis* both the agency and the user firm, limited

to the duration of their assignment in terms of the user firm (LIO, 2016). Similarly, the amended LRA 1995 now allows trade unions representing the employees of temporary employment agencies to exercise their organisational rights not only at the workplace of the agency, but also at the user firm's workplace (Benjamin, 2013, pp.12-15; ILO, 2016). In addition, an arbitration award establishing organisational rights may be made binding on the temporary employment agency and the temporary employment agency client (Benjamin, 2013). Moreover, workers employed by agencies who participate in a legally protected strike action are entitled to picket at the user firm's premises (ILO, 2016). The idea is that by allowing these workers to bargain with all relevant parties, alongside permanent employees of the principal or user firms, may be an effective approach for ensuring equal treatment (ILO, 2016). In the UK, agency workers have a statutory right for their union to be recognised where the majority of agency workers support it. However, a union will need to seek statutory recognition with the agency, rather than the hirer (TUC, 2011).

10.7.2. Joint and several liability within the TES relationship

A further way of counteracting the inequities or negative legal consequences affecting temporary agency work, is through allocating employer responsibilities within the triangular employment relationship. Ascertaining the organisation responsible for complying with regulations and liabilities applicable to the triangular employment relationship, may however be problematic (Kalleberg, 2000). Debates regarding these issues often include discussions of joint employer or co-employment (Kalleberg, 2000; ILO, 2016). Joint and several liability is a common labour law technique for ascribing employment related responsibilities to organisations involved in a common enterprise (Fudge, 2006; ILO, 2016). This measure is often found in the regulation of temporary agency work, particularly in relation to wages and social security entitlements (ILO, 2016). For example, in the United Kingdom (UK), joint and several liability is an accepted method in tort law for ascribing responsibility to separate entities engaged in a common enterprise (Fudge, 2006). Similarly, joint liability rules between the TES client and the TES firm are found in the US, Argentina, France, India, Italy, the Netherlands, Namibia, Ontario (Canada) and South Africa (ILO, 2016).

In the past, South African legislation tended towards express allocations of employment law

obligations to a single employer in both the 1956 and the 1995 LRA. This is no longer the case as the new section 200B(2)[219] of the amended LRA1995 now explicitly recognises that there may be more than one employer for the purposes of liability. In *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others*,[220] section 200B of the LRA 1995 was scrutinised by the LAC. The LAC ruled that the effect of section 200B is to fix or extend the liability that would ordinarily be that of the employer, as per the traditional tests, to another or others, who carry on as an associated or related activity or business by or through an employer. The purpose for this is clear from section 200B(2) where they are regarded or treated as such for the purposes of liability - they are held jointly and severally liable for a failure to comply with the obligations of an employer in terms of the LRA or any other employment law. In other words, section 200B(1) defines 'employer' for a very specific purpose and that purpose is found in section 200B(1) read with section 200B(2). The section cannot be utilised generally for making persons or entities the employer(s) of others. Section 200B therefore seeks to stop complex contractual and other schemes used by true employers to avoid their obligations under the labour legislation. Because of the scope of section 200B, it could be used to scrutinise a wide range of employment relationships or arrangements for the purposes of liability, provided that a case for such scrutiny has been made, and it is done fairly (Dube, 2019).

Additional protection is provided to TES employees who earn below the earnings threshold of R205 433,30 per annum, and who have been placed with the TES client for longer than three months. This protection was achieved by the introduction of an extended joint and several liability of the client and the TES in terms of s198(4A) of the LRA 1995.[221] These provisions expose the client to claims of unfair dismissal and the like, by employees of the TES (Pienaar and

[219] Section 200B(1)-(2) reads: '(1) For the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law. (2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law'.

[220] (JA14/2018) [2019] ZALAC 59 (12 September 2019).

[221] Section 1984A of the LRA 1995 reads: 'If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b) :- (a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client; (b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and (c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either'.

Naidoo, 2017). Section 198(4) of the LRA 1995 effectively create 'a substantive and statutory form of joint and several liability - which does not equate to joint or dual employment but rather creates a statutory accessory liability for the client in the circumstances set out in the section - where the TES carries principle liability as employer in terms of the LRA' (Dlodlo AJ, 2018).[222]In other words, section 198(4) and (4A) stipulate specific areas of liability for the TES firm pre- and post-deeming, as opposed to the general liability applicable in terms of section 200B[223]. Importantly, the TES firm's liability only lasts for the duration of its contractual relationship with the client, and while it continues to remunerate the worker (Dlodlo AJ, paragraph 64). Subsection 198(4A) was introduced to provide recourse directly against the client for contraventions in terms of section 198(4) without first having to institute proceedings against the TES (as was the pre-amendment case).

Therefore, the contractual relationship between the client and the TES can be terminated when section 198A(3)(b) is triggered, with the client directly remunerating the placed employee. If this happens, the TES will cease to be a TES in terms of section 198(1) as it no longer 'remunerates' the worker and will fall out of the relationship entirely (Dlodlo AJ, paragraph 64). The contractual relationship between the client and the placed employee does not come into existence through negotiated agreement or through the normal recruitment processes used by the client. Instead, the employee automatically becomes employed by the client and he or she must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment (Le Roux and Alcock, 2019).

Comparatively, in the UK, hirers are solely responsible for agency workers' rights to equal treatment on collective facilities or their right to receive information about vacancies. Employment tribunals can find that either the hirer or the agency is liable for breaches of equal treatment rights to pay, holidays or working time, depending on who is responsible for the failure to provide equal treatment (TUC, 2011). *The Agency Workers Regulations 2010: Guidance* specifically excludes the possibility of joint and several liability for the TES worker, however the

[222] CCT194/17 (26 July 2018).

[223] See table 12 for an explanation of the pre- and post-deeming provision liability created by section 198 of the LRA 1995.

AWR allows for either the hirer of the TWA to be named or joined to a claim:

> In a Tribunal claim, where the responsibility or a breach of Regulations is not clear, or has not been conceded, as between TWA and hirer, the agency worker may claim against both the TWA and the hirer at the outset. This does not mean that a Tribunal can be asked to find that there is 'joint and several liability' for breaches. The Regulations ensure that any party in the chain of relationships (i.e. a hirer or a TWA) can be named at the outset or joined to a claim and be liable to the extent that the Tribunal finds they are to blame for the infringement (The Agency Workers Regulations 2010: Guidance, p.46).

10.7.3. Regulatory avoidance in the temporary agency worker sector

Knox (2018) defines regulatory avoidance as overt avoidance or breaches of specific regulations, or the exploitation of loopholes and shortcomings. Internationally, regulatory avoidance in the temporary work agency industry has expanded and intensified, normalising exploitation and increasing the negative outcomes of precarious work (Knox, 2018). Some suggest that the growth of temporary agency work may be linked to those employers who wish to avoid the effects of labour legislation (Bartkiw, 2014). In South Africa, the lack of protections in labour legislation for TES workers has in the past provided the motive for firms to use them (Bezuidenhout *et al* 2004; Benjamin, 2005; Cohen, 2008; Theron, 2008; Benjamin, 2013; Benjamin, 2016a). South African law historically designated the temporary employment agency as the employer, reducing the risk for the client (Theron, 2008). It was difficult for the TES employees to prove dismissal and employers had the freedom to manage the relationship as they saw fit, leaving these workers vulnerable (Botes, 2015).

The amendments contained in the LRAA were designed to discourage the use of TES workers on a long-term basis to avoid the costs of the employment of permanent employees (Le Roux, 2015). The obligation imposed if clients make use of these workers in circumstances that fall outside the definition of a temporary service, consists of two parts. Firstly, that the TES worker assigned to the client is 'deemed' to be the indefinite employee of the client for the purposes of the LRA 1995 (van Eck, 2013). Secondly, the client must treat the 'deemed' employee 'on the whole not less favourably' than an ordinary employee who performs the same or similar work, unless there is a justifiable reason for not doing so (Le Roux, 2015). Despite these legal reforms, a legal participant in the present study still perceived the entire purpose of the industry as a mechanism

of avoiding the employment relationship. The participant believed that TES firms acted as subsidiary entities that distanced employers from their workers, allowing them a mechanism to disengage (Int7.p111. Par.16).

Regulatory avoidance was a strong theme that emerged from the data, across all aspects of the TES relationship, with several examples provided. One legal participant stated that TES employers circumvent the provisions of the LRA 1995 by simply rotating employees from one employer to another so that they do not work for more than three months for the same TES client.[224] However, this tactic may prove unsuccessful as the current section 198A(4) provides that the termination by a TES of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection section (3)(b), is considered a dismissal. However, nothing prevents the TES and client from routinely rotating employees after a short period of time in order to avoid the provisions of section 198A(4) of the LRA 1995. This type of rotation would be difficult to detect as falling foul of section 198A(4) even though the intention would be to circumvent its provisions.

Another legal participant pointed out that the use of outsourcing was a popular way of avoiding the parity provisions of section 198 of the LRA (Int20.pp329-330. Par.148). The participant explained that if workers were moved from a TES model into an outsourcing arrangement, the TES client would be able to employ TES workers on different terms and conditions after three months as there would be no comparison employees at the client premises (all the employees in that category would be outsourced). The reason for this would be that nobody in the client's operation would be performing that job post the outsourced arrangement (Int20.p330. Par.148). This participant's views were supported by the *GIWUSA* matter discussed above. However, the new section 200B of the LRA 1995 seeks to stop complex contractual and other schemes used by true employers to avoid their obligations under the labour legislation. Because of the scope of section 200B, it could be used to scrutinise a wide range of employment relationships or arrangements for the purposes of liability, provided that a case for such scrutiny has been made, and it is done fairly (Dube, 2019).

[224] (Int33. Vol 2. p37. Par118).

Further examples of employer strategies for avoiding regulations, obligations and liabilities by employing TES employees, were outlined by the participants. These include employers using TES workers to avoid unionisation in sectors that had a strong union presence such as the public sector (Int9. P134. Par52; Int21.pp350-351. Par.102-104). Another involved TES clients engaging TES workers to avoid fair dismissal processes, using the need for flexibility as the rationale (Int18.p266. Par.18). A further strategy involved circumventing BEE requirements by recruiting white people through a TES in order to avoid them being part of the employee population which would affect the BEE scores (Int1. p5. Par26-30).

10.8. Comparative capitalism debate

The varieties of capitalism (VoC) theory (Hall and Soskice, 2001) categorised and described economies based on the comparison of Liberal Market Economies (LMEs), characterised by arm's length interaction among market actors, and Coordinated Market Economies (CME) where informal networks and collaborative arrangements accompany market relations (Kiran, 2018). A third type, called 'Mixed Market Economies' (MMEs) was later added, combining features of CMEs and LMEs (Hall and Gingerich, 2009; Witt *et al*, 2018).

Due to their 'mixed' character, MMEs tend to be characterised by organisational fragmentation and the greater role of the state as a regulator (Molina and Rhodes, 2007). While unions and employers in MMEs often have stronger organisational structures than in LMEs, they are generally weaker than in CMEs. There are strong incentives to invest in political power and mutually supportive relations between political parties and trade unions are common (Molina and Rhodes, 2007). State regulation tends to perpetuate long-term inefficiencies because of collective action problems and actors that tend to pursue their independently defined interests (Molina and Rhodes, 2007). MMEs are therefore often considered a hybrid, unproductive form of capitalism that are unlikely to obtain the same level of economic performance as LMEs and CMEs. These characteristics often play out in a labour market characterised by dual flexibility that allows protection for the core labour force and encourages precarity for those in the periphery (Nattrass and Seeking, 2010).

The findings from this thesis suggest that South Africa continues to fall between two stools,

combining the elements of CMEs and LMEs, thus showing MME characteristics. On the one hand increasing employment regulations such as the legislation and court decisions regarding TES employees; on the other hand, facilitating more market-based relationships such as those described in this thesis where activities are externalised or outsourced. In support of this trend, a senior TES firm employee pointed out that if all independent contractors, labour brokers and 'smaller atypical types of work arrangements' such as freelancers were added together, they estimated that three to four million of South Africa's thirteen million economically active work-force would be considered 'atypical'. According to this participant, this could amount to an approximate thirty percent atypical rate of employment in the labour market in South Africa (Int.3. pp.45. Par.188).

Conversely, some participants believed that the South African labour market was over-regulated from a global perspective. This they believed has contributed to slow economic growth and widespread capital flight (Int.5. p91-92. Par.35).[225] Participants noted that this 'global mobility' was a concern, especially in the financial services and motor manufacturing sectors. Firms simply did not wish to operate within the rigid conditions imposed by the new legislation for TES employees and went off-shore (Int.5. pp.67. Par.38). Participants had also noticed an increase in market-based relationships as a reaction to this perceived rigidity, with TES firms increasingly offering outsourced services to those clients who traditionally utilised TES employees (Int.4. Par.6. p.64). With the result that these 'outsourced' employees fall outside the ambit of the TES legislation. Whether through temporary agency work or outsourced arrangements, an increasing number of regular workers are being replaced with non-regular workers, undermining the job protection and working conditions of all employees.

As with the VoC framework the business system theory (BST), more specifically the extension of this work by Wood and Frynas (2006) to segmented business systems, is of value in providing theoretical insights on South African employment. Underlying dualism is a key characteristic of the segmented business system (Wood and Frynas, 2006, Wood *et al*, 2012, Bischoff and Wood, 2018, Darwish *et al* 2020). Often large organisations show alignment with formal employment relations, and smaller organisations disregard these regulations (Darwish *et al* 2020). These laws

[225] According to Ashman, Fine and Newman (2011), 20 percent of GDP has left South Africa since 1994.

or formal rules that are ignored or bent, reflect both limitations in the state and civil society (Wood and Frynas, 2006). A lack of labour law enforcement enables an arbitrary and authoritarian management style, weak communication, and a tendency to rely on low-cost, unskilled labour (Wood *et al*, 2018; Darwish *et al* 2020). If unions are present, they are likely to be weak because of high unemployment (Wood *et al*, 2018). Recruitment occurs through informal networks and results in informal employment, with far-reaching flexibility in terms of leave and rewards (Darwish *et al* 2020). These abovementioned strategies may result in low productivity, poor quality control and a 'sweat-shop' mentality – all made possible by a limited capacity to enforce labour laws (Kamoche, 2011; Wood and Frynas, 2006; Bischoff and Wood, 2018).

Generally, South Africa adheres to the segmented business framework mentioned above. There is both a growing informal sector and a developed financial system (Dibben, 2007). Whilst core employees enjoy strong and enforced protection from one of the most progressive bodies of labour legislation in the world, unions battle to deal with widescale job losses and to make themselves relevant to those in atypical employment (Brewster and Wood, 2007).[226] In addition to high levels of unemployment, the South African labour market is characterised by a growing peripheral workforce that holds part-time, temporary or casual jobs that are often precarious, lack benefits and offer low wages (Dibben, 2007). True to the segmented business system, the South African labour market has many forms of non-permanent employment, such as temporary employment agency work, and there is a tendency to rely on this low-cost labour.

In line with the underlying dualism of the segmented business system theory, participants spoke of the vast differences between large and small TES firms. Large firms conduct their business in accordance with the laws and regulations, whereas the smaller '*bakkie brigade*' firms flouted the law. Whether in large or small firms, TES employees in theory enjoy the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights difficult. They often receive no medical aid, pension or provident fund benefits and are dependent upon statutory employment standards for basic working conditions.

To counter these insecurities, there has been radical intervention by government in the form of the

[226] The difficulties faced by unions in representing TES workers due to widespread unemployment was a strong theme outlined in chapter nine of this thesis.

latest amendments to the TES legal framework. These new amendments have provided sophisticated legal rights and obligations which include joint and several liability between the TES firm and client, parity of treatment between TES employees and those employed permanently by the TES client, and provisions whereby TES workers are deemed the employee of the client after three months. Yet, in line with the segmented business framework, exploitation persists due to a high unemployment and over-supply of unskilled workers, a lack of enforcement of the law coupled with weakened trade unions.

Although legislation has taken major steps towards the regulation of temporary agency work with the introduction of these new amendments to section 198 of the LRA 1995, not all atypical workers have received protection. Temporary workers are still required to fit the definition of 'employee' and not be independent contractors to receive the protection of legislation and the statutory benefits that flow from this protection. As set out in chapter six of this thesis, those defined as independent contractors fall outside of the scope of the LRA 1995. The traditional reading of the word 'employee' has restricted the scope and protection that the LRA 1995 offers to people who are contracted to provide work under a contract of service (i.e. a contract of work and not just 'employment') (Clarke, 2004). Participants have pointed out that this has led to a scenario where TES firms creatively arrange contractual agreements to take advantage of this loophole. A wider interpretation of the word 'employee' that campaigners have argued for, would include workers who provide personal services for another, whatever the form of contract (Clarke, 2004).

Whatever their shortfall, the recent amendments to the legislation pertaining to TES work does begin to address the extreme inequalities that workers have inherited in this sector due to the apartheid regime. Given the experiences of deregulation in other countries and the national and international pressure from business to increase competitiveness and flexibility, the new legislation pertaining to TES workers has tried to balance protection of TES employees with flexibility. Enormous challenges have faced South Africa since independence and even a partial transformation of the labour market since 1994 has been a significant achievement (Clarke, 2004). However, the legacy of apartheid market policies, rising unemployment, combined with poor enforcement of legislation, has caused non-standard employment to flourish (Clarke, 2004). This in turn undermines the effectiveness of the legislation and causes the erosion of worker

rights.

10.9. Conclusion

This chapter was divided into two sections, the first dealt with a summary of the findings *vis-à-vis* the research questions, and the second set out how the findings related to the key points from the analysis.

The first subsection of section one dealt with the perspectives of the temporary agency worker, firm and client, and key findings were highlighted for each of these parties. Firstly, in relation to the temporary agency worker, the South African TES workers' status as an employee was contemplated as this status is vital for the access to any employee rights in terms of South African legislation. Secondly, their access to medical, pension and other benefits and how these compare to permanently employed individuals was discussed. The negative consequences of the exceptionally high unemployment rate in South Africa and how this affects the TES worker was looked at. Ultimately, despite specific legislation dealing with the TES employees and a strong legal system in South Africa, TES workers still experience inferior working conditions.

For the temporary employment agency firm, interesting information was provided by the participants on the estimated size of the industry, with an overall estimate of 1.5 million TES workers in the South African labour market. Some important post-amendment TES industry trends were outlined, with a noticeable increase in demand for professional, higher earning TES workers. Also, a wider range of staffing solutions were being offered to clients, such as outsourced services or the managed service provider (MSP) models. These offerings were seen by some as an alternate way to restructure the commercial agreement, and by others as 'complicated schemes' used to circumvent employee rights. The consolidation of the industry with larger firms 'absorbing' the smaller TES firms was mentioned by participants. Of concern to TES firm participants was the negative rhetoric and reputation of the TES industry in South Africa, which they advised was based on misconceptions.

Participants provided their views on the reasons why clients use TES firms. These included the

desire to circumvent union involvement, or to obtain the legal know-how to deal with unions. Avoiding employer associated risks, costs and administration 'hassles', with the need to externalise their payroll responsibilities was of importance to clients. Participants stressed that the priority for the TES client was cost cutting. To this end, TES workers were often hired for existing, permanent positions at the company instead of employing individuals on a permanent basis, thereby exacerbating externalisation of employment. Overall, the client exerted commercial control within the TES relationship, undercutting prices and treating employees as commodities. In addition, the legitimate need for workforce flexibility was a large driver for TES work. These flexibility needs included the efficient operation of the business, remaining profitable during difficult financial times, and ensuring global competitiveness. However, some participants pointed out that the benefits associated with flexibility reside with only a handful of well-qualified, high-status and affluent TES workers and encourages the growth of precarious employment contracts and relations among those who struggle to access the labour market.

The second subsection dealt with the newly amended regulatory framework for TES workers in South Africa, with a focus on section 198 of the LRA 1995. In particular, the 'deeming provision', section 198A(3)(b)(i) that includes the identity of the employer party, and section 198A(5) that contains the principles of non-discrimination, termed the 'parity provision' in this thesis. In addition, the subsection considers the all-important Constitutional Court (CC) *Assign* matter that clarified the employer party in the TES relationship - the TES client being the sole employer of the TES employee after a period of three months.

The third subsection considers how temporary agency work is influenced by trade union responses. Ultimately, unions played a key role in campaigning for change in the TES industry. However, due to their historical reliance on agency shop agreements, the perceived corruption within union ranks, and the required union fees for workers who are poor and trying to make ends meet, unionisation of TES workers has been largely unsuccessful. The data revealed that TES workers preferred to organise themselves into self-sorted committees or associations as an alternative to and not in partnership with existing unions. However, this trend was still in its experimental phase. Importantly, recent legislation amendments allow trade unions representing TES employees to exercise their organisational rights at the workplace of the agency and the user

firm.

The second section of the chapter considered how the findings relate to main concepts and debates in the literature and reflects on seven important themes, each dealt with under a separate sub-section. Firstly, the complex contractual arrangements between agencies and user firms are discussed, and thereafter, the human capital perspective in relation to TES work. The penultimate subsection deals with the important theories of segmentation and dualisation in the context of South African TES work. The final subsection considers the regulatory environment governing temporary agency workers. This final subsection contains three parts, the first deals with the equal treatment of temporary agency workers; the second takes a deeper look into the complex issue of joint and several liability, and the third considers regulatory avoidance in agency work.

CHAPTER 11: CONCLUSION

11.1. Introduction

The purpose of this chapter is to outline the suggested contribution of the research, highlight its limitations and make some suggestions as to how this project might be built on by future research efforts.

11.2. Contribution of the research

11.2.1. Empirical contribution

Flexibilisation and dualisation of employment have been recurring themes in the literature in recent years. Yet there is an absence of empirical research on the latest trends in temporary agency work. This is particularly the case in countries from the global south. This research provides illuminating evidence in this regard. It has found that trends identified in wealthy nations of the west such as the growth in subcontracting or managed service provider (MSP) arrangements, are also present in countries such as South Africa. This can perhaps be attributed to South Africa's unique context of a sophisticated legal regime coexisting alongside a weak economy.

While the literature is dominated by pessimistic perspectives regarding the negative consequences of global trends of flexibilisation and employment degradation, research on the potential for the state and other actors to exercise agency and regulate the use of labour market flexibility is of the utmost importance. Research of this nature is, on the one hand, particularly crucial, and on the other hand, particularly lacking, in sub-Saharan Africa. Against this context, this thesis makes a notable contribution. It provides in-depth case study analysis of both current strategies of TES firms and of experts' views regarding the current and likely impact of legislative interventions aimed at regulating temporary agency work.

The legal provisions in South Africa can be seen as more radical or powerful than those introduced elsewhere. For example, the deeming and joint and several liability provisions, in comparison to the UK where these are absent. Whereas the parity or equality provisions are comparable to those found in the UK. However, the latitude South African employers seem to potentially have in justifying different treatment, for example the different employee

qualifications and skills, is far wider than the prescriptive provisions found in Regulation 6(1) of the Agency Workers Regulations 2010 (AWR) in the UK.

The important question lies in the extent of actual labour market change effected or realised, and crucial here are institutions and resources dedicated to labour market enforcement. The South African case demonstrates that while the legislative changes have had some significant influence on TES firm and client practice, a dominant perception was that the potential impact would be limited due to the under resourced nature of labour market enforcement in South Africa.

The extensive literature review undertaken did not identify holistic case study research similar to that undertaken in the current study, drawing on high quality interview data addressing temporary employment from the perspective of the various interested parties post the 2015 amendments to the legislation framework affecting TES workers. This has enabled a holistic assessment of trends and the likely impact of regulatory measures.

11.2.2. Theoretical contribution

The South African case is arguably particularly interesting as an example of a country from the global south, which while economically weak, has introduced some radical legislative provisions regulating the use of temporary agency work in the form of the deeming and parity provisions. This represents an example of government or social movement agency pushing back against the dominant trends towards flexibility. The South African case may be seen as comparable to attempts by populist leaders in other developing countries to introduce social market principles. For example, Bolivia under Morales, where social movements united in their opposition to the neoliberal principles, engaged in constant actions that included road blockades, strikes, and multisectoral mobilisations (Kohl and Bresnahan, 2010). Equally in Venezuela, the Bolivarian revolution of Hugo Chavez represented a popular rejection of an externally imposed political economy of liberalisation (Riggirozzi, 2010). Argentina's political and economic collapse in 2001 was emblematic evidence of the failure of neo-liberal governance, captured in the slogan of the demonstrations 'Que se vayan todos' ('out with all of them'). This slogan expressed the rejection of the corrupt governing class and a loss of faith in the neo-liberal economic model Riggirozzi, 2010).

In terms of the general debates about the existence of an insider-outside divide in contemporary labour markets (Lindbeck and Snower, 2002), of labour market dualism (Emmenegger *et al*., 2012) and an overall polarisation of the labour force (Kalleberg, 2013), this thesis offers a refinement of the segmentation or dualisation theory. In many respects the 'insider-outsider' divide in South Africa is not in relation to temporary agency employees versus permanent employees, but rather the employed versus the unemployed. TES firms utilise or offer employment to individuals who are 'on their books', forming an internal network of TES workers. Those TES workers who access employment through this 'internal network' system of the TES firm, may partly be seen as insiders in particular in comparison to the unemployed who cannot get a foothold in the labour market. Therefore, the South African TES industry, in some cases, seems to create employment for some unemployed individuals who become partial insiders of an internal network.

South Africa is a useful case country study due to its particularly difficult economic and social conditions set out in chapters 2 and 3, making it an ideal case in which to study the regulation of temporary employment agencies and the effect of such regulation. In this regard, the thesis adds to the debates on two important themes or developments in the temporary employment agency literature. Firstly, equal treatment of temporary agency workers and secondly, joint and several liability within the triangular employment relationship. These debates are important in the South African context post the promulgation of the *Labour Relations Amendment Act 2014* (No. 6 of 2014) (LRAA), that came into effect on 1 January 2015. The new section 198 of the LRA 1995 adds further protection to lower earning TES workers against possible abuse of temporary appointments by employers. Essentially, the amendments to this section restrict the employment of TES workers to employment for a period not exceeding three months, or as a substitute for a temporarily absent employee, or in a category of work which is considered to be a temporary service as determined by a collective agreement of a bargaining council or a sectoral determination, for a period of time. In any other situation the employee would be considered an employee of the client and not the temporary employment service. The interviews were conducted from June 2017 to February 2018, shortly after the amendments and a critical time in the legislative history of TES employment regulation.

Importantly, the study contributes to debates regarding regulatory avoidance and how it is constructed and played out in the South African national context (Knox, 2018). On the one hand, temporary employment agency firm participants pointed out the benefits of temporary employment agency work. For the client this includes increased flexibility and access to specialised industrial relations, legal, management and human resources functions. For the temporary employment agency worker, increased employment security and a stepping-stone into permanent employment. However, evidence pointing towards these benefits stemmed primarily from the TES firm participants themselves and some secondary documentation. In contrast, data related to regulatory avoidance and its negative effects were far more extensive and stemmed from a broader range of parties. This was especially true for smaller, '*bakkie brigade*' temporary employment agency firms. Perhaps most importantly, these findings underscore the absence of appropriate responses to address problems. The lack of response can be attributed to decreased unionisation in general and particularly within the TES industry, and an understaffed and overstretched inspectorate that did not inspire confidence with any of the participants.

Like in other countries trade unions in South Africa are struggling for legitimacy facing many challenges from the flexibilisation and fragmentation of employment, employer opposition and changing attitudes of young workers towards union membership. They also face acute resource, logistical and operational challenges in attempting to organise the TES sector. At the same time, South African trade unions have been successful in promoting the regulation of TES work. Due to the tripartite system that exists in South Africa, the important legislative changes were introduced primarily due to union influence and lobbying. In addition, and relatedly, unions have influenced public opinion, which in turn legitimised the legislative changes introduced.

Finally, this study contributes to understanding the debates around the South African variety of capitalism and provides valuable theoretical insights on the interaction between global trends in work and employment and the particular features of the South African context. Ideal types of national systems cast light on why specific types of firm do better at different times and in different places, and how national level governance systems, and dominant clusters of relations between firms, may promote certain common practices (Lane and Wood, 2009).

In terms of the VoC theoretical framework, South Africa contains elements of LMEs and CMEs but does not approximate an ideal CME nor LME (Nattrass, 2014). Macroeconomic, trade and

investment policies are economically liberal, but while it is relatively easy to retrench workers for economic reasons, labour legislation is protective in other respects, raising costs to employers (Bhorat and van der Westhuizen 2009; Nattrass, 2014). The small size of the domestic market together with the extreme income and wealth inequality, makes for unattractive foreign direct investment (Padayachee, 2013; Nölke and Claar, 2013). Compared to the other middle-income and developing countries, South Africa has a relatively high coverage of collective bargaining and involvement of trade unions and business in government policy (Nattrass, 2014). The state has strong regulatory capacity, particularly regarding tax and labour legislation, yet the enforcement of this regulation is weak. In addition, there are high unemployment rates and no significant informal sector (Nattrass, 2014).

The rapid expansion of atypical and precarious work, legal loopholes, weak monitoring and enforcement, all provide employers with greater flexibility. South African TES employment trends are characterised by both regulating/coordinating and deregulating/liberalising tendencies - which is becoming more dominant in South Africa is difficult to conclude. However, the trends towards flexibility arguably reflects the continued and growing dominance of neo-liberal ideas and principles. Employers seem to have 'won' the flexibility battle, with the labour market remaining very flexible for most of them (Clarke, 2004). Despite labour's victories with the new amendments, these reforms are unlikely to reverse the deeper trends that have dominated the evolution of the segmented, post-apartheid South African labour market.

11.2.3. Methodological contribution

The research comprised a constructive research approach through a single holistic case study, using qualitative research methods including document analysis, interviews with experts and secondary data. The holistic case study with embedded units enabled a thorough exploration of TES working in South Africa, while considering the influence of the TES worker, client and agency (Baxter and Jack, 2008). This holistic approach provided the ability to look at different sub-units (the TES client, worker, firm and unions) that were situated within a larger case (South African TES working) and considered the interrelationships within the phenomenon of TES work within the South African context (Yin, 2003). The literature did not reveal any research that has focused on TES work in South Africa from four different perspectives, namely the TES worker, firm, client and union, within the newly amended legislative framework. In addition, the

use of expert interviews greatly aided the data collection and analysis process. Senior legal, union and business professionals were interviewed as participants in order to ascertain the impact of the historical, political, regulatory, and economic trends in South African TES work. Further research in this area would benefit from the strategies adopted for this thesis.

11.3. Limitations of the research

The research would have benefitted from interviews with temporary agency workers. As documented in chapter five, no agency workers were interviewed, however the alternative approach taken was to speak to experts and this was arguably a strong methodology in this case in that the difficulties experienced by TES workers are well documented. What is less documented however is the strategy, response and views of key players such as TES firms and clients and the legal practitioners regarding industry trends.

TES firm participants were reluctant to provide information or documentation regarding the size of their firms or how many TES employees they engage. This reluctance stems from a historically negative view of TES firms in South Africa and a belief that this negativity relates to their size and growth within the labour market. Participants were therefore guarded when pressed for specifics relating to statistical or contractual information. Similarly, legal participants were unable to divulge details relating to their clients and could only provide general information or views. Consequently, a lack of specific statistical and contractual information necessitated a reliance on secondary information that could be found in the public domain such as annual reports, legal judgements and local media reports. However, although specific information on numbers employed and contractual relations were not provided, quite precise estimates of TES worker numbers were provided on specific TES firms. These estimates combined with other secondary data enabled a good sense to be obtained regarding the scale of the industry.

As a result of this lack of quantitative information provided, the thesis was primarily qualitative in nature. While the high quality and triangulated nature of the qualitative data obtained means that the findings and analysis outlined are robust, greater use could have been made of quantitative data, most notably in the form of figures on the size of TES firms, their growth over time, the number of TES workers they employ and details regarding their pay and benefits.

Related to the above, a limitation in certain sections of the thesis is that participant observations are in some instances presented without support from additional or secondary documentation. For example, the participants perceptions of consolidation in the TES industry or that the '*bakkie brigade*' has declined in incidence. Participants did not provide any secondary documentation and no other evidence is available especially in relation to smaller TES firms. Smaller TES firms were invited to present their views, via e-mail invitation and follow-up phone calls, but were not willing to participate and further research would be useful on these issues.

The actual number of interviews conducted differed from the what was originally intended as no TES employees were interviewed, which resulted in far fewer interviews. The reasons why these interviews did not take place is set out in chapter 4. Even though only 34 interviews were conducted with participants in the TES industry, the general analysis and conclusions were valid. The input from experts such as lawyers and trade union representatives who have access to, and speak on behalf of, a much wider client or constituency base provided a much broader understanding of the TES industry than just the 34 individuals. In addition, the strategy of triangulating via secondary data and from a number of different sources (the TES firm, worker, client and union representatives), means that this research avoids a possible limitation or weakness of case study research, namely that conclusions are drawn on the basis of one or a small number of pieces of information or organisational perspectives that do not reflect the complete or 'true' picture of the situation or issue being examined (Yin 2003, pp. 97-101).

Despite the limitations of this study the methods used produced data sufficient to address the research questions. However, as any exploratory study it provides an initial overview of the issues of temporary agency working in South Africa. Further research is needed in order to complement, broaden and also challenge the findings presented in this thesis.

11.4. Suggestions for future research

The regulatory framework differs in each country as it reflects legal traditions, national character of trade unions and employers' associations and historical differences in the balance of power (Cousins, 1999). This research touched on the comparisons between the UK and South African temporary employment agency regulatory framework, but the focus was on the South African

case. There would be great potential in undertaking further research comparing the UK and the South African temporary employment agency environments. For example, the South African legislation dealing with equal pay of atypical employees that came into effect during 2015 and the lessons that can be learnt from the UK's equal pay provisions. Although a brief UK-South African comparison has been made by Ebrahim (2017), an in-depth analysis of the comparative consequences of these provisions for TES employees, firms and clients would be useful. In addition, broader comparative research into how economic trends, pressures and initiatives to regulate precarious work both in South Africa and the UK could be conducted.

In line with the above, due to peculiar histories, legacies, boundaries, legal frameworks, and the nature of collective action, precarious work has different characteristics in different national settings. Nevertheless, there has been a tendency of research to consider the economic development of the west (Kalleberg and Hewison, 2012). As pointed out in chapter three, in the global south, work has occurred under unstable conditions, with little legal regulation and little expectation of long-term continuity (Mosoetsa *et al*, 2016). A great part of the active population has never performed work that corresponds with the 'conventional' or 'standard' employment model (Tekle, 2010). Research that investigates disadvantages among TES workers from a south-south comparative is lacking. For example, a comparison between South Africa and Venezuela or Bolivia would be of interest. There is also a need for north-south comparison between the institutional settings that affect temporary agency work, specifically relating to the working conditions and experiences for TES workers, efforts by governments and unions to promote principles and policies such as the ILO's decent work, and how these have had impact or been limited and why. In addition, research into the impact of regulatory reform and union efforts in countries in the global south, as compared to those in the global north, would be beneficial.

Finally, further South African domestic-focused research could be undertaken. This research was conducted primarily during 2017, when the legal framework for TES workers was newly amended. There was uncertainty about the meaning of the sections pertaining to TES workers and their long-term consequences. A clearer picture regarding the potential benefits of these changes for TES workers could be obtained. In this regard, interviews with TES workers would be ideal. This research could include insight into how the issues and challenges raised in this

research have been addressed and whether the amended framework has, over time, improved TES worker experiences. In addition, a more in-depth analysis of how migration status, ethnicity, gender, geographical location, educational attainment, political ideology and age influence agency work in the South African context would be very useful.

REFERENCES

Abraham, K. (1988) 'Flexible staffing arrangements and employers' short-term adjustment strategies', in Hart, R. (ed.) *Employment, Unemployment and Labor Utilization*. London: Unwin Hyman Press, pp. 288-311.

ACAS (2015) 'Three sides to every story: the impact of the Agency Worker Regulations', Employment Relations Comment, March. ACAS [online]. Available from www.acas.org.uk. Accessed on (18 August 2019).

Adams, Z. and Deakin, S. (2014) 'Institutional Solutions to Precariousness and Inequality in Labour Markets', *British Journal of Industrial Relations*, 52(4), pp. 779-809.

Adamson, M. and Roper, I. (2019) ''Good' Jobs and 'Bad' Jobs: Contemplating Job Quality in Different Contexts', *Work, Employment and Society*, 33(4), 551-559.

Adler, G. and Webster, E. (1995) 'Challenging transition theory: the labour movement, radical reform and transition in South Africa', *Politics and Society*, 23(1), pp. 75-106.

Adler, G. and Webster, E. (2000) *Trade Unions and Democratization in South Africa, 1985-1997*. Johannesburg: Witwatersrand University Press.

Africa Daily Voice (2019) 'South Africa ensures tough enforcement of National Minimum Wage'. Africa Daily Voice [Online]. Available at: https://africandailyvoice.com/en/2019/04/12/south-africa-ensures-tough-enforcement-national-minimum-wage/ (Accessed on 14 April 2019).

African Development Bank (2018) 'The future of work: regional perspectives' African Development Bank [Online] Available at: https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/The-Future-of-Work-regional_perspectives.pdf (Accessed on 16 April 2019).

African National Congress (ANC) Election Manifesto (2008) 'Working together we can do more', ANC [Online]. Available at: http://www.anc.org.za/docs/manifesto/2009/manifesto.pdf (Accessed on 31 January 2017).

Akkermans, D., Castaldi, C. and Los, B. (2009) 'Do 'liberal market economies' really innovate more radically than 'coordinated market economies'?: Hall and Soskice reconsidered', *Research Policy*, 38(1), pp.181-191.

Aletter, C. and van Eck, S. (2016) 'Employment Agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisation's standards?' *South African Mercantile Law Journal*, 28(1), pp. 285-310.

Alford, M. (2015) *Public governance and multi-scalar tensions in global production networks: crisis in South African fruit.* Doctor of Philosophy in the Faculty of Humanities. PhD thesis. The University of Manchester.

Alford, M., Barrientos, S. and Visser, M. (2017) 'Multi-scalar labour agency in global production networks: Contestation and crisis in the South African fruit sector', *Development and Change*, 48(4), pp.721-745.

Alsos, K. and Evans, C. (2018) 'Temporary work agencies: Triangular disorganization or multilevel regulation?', *European Journal of Industrial Relations*, 24(4), pp.391-407.

Altbeker, A. and Masiangoako, T. (2019) *The Growth Agenda: Making South Africa More Labour Intensive*. Africaportal [Online] Available at: https://www.africaportal.org/publications/growth-agenda-making-south-africa-more-labour-intensive/ (Accessed on 20 January 2020).

Altman, M. and Potgieter-Gqubule, F. (2009) *The state of youth - Labour market status and policy challenges*. Pretoria: Human Science Resource Council.

ANC (African National Congress) (1994) *The Reconstruction and Development Programme*. Johannesburg: Umanyano Publications.

Arrowsmith, J. (2008) *Temporary Agency Work and Collective Bargaining in the EU*. Dublin: Eurofound.

Ashman, S. and Fine, B. (2013) 'Neo-liberalism, varieties of capitalism, and the shifting contours of South Africa's financial system', *Transformation: Critical Perspectives on Southern Africa*, 81(1), pp.144-178.

Ashman, S., Fine, B. and Newman, S. (2011) 'Amnesty international? The nature, scale and impact of capital flight from South Africa', *Journal of Southern African Studies*, 37(1), pp.64-85.

Assign Services (Pty) Ltd v CCMA & Others [Unreported JR 1230/15 8 September 2015] Available at: http://www.saflii.org/za/cases/ZALCJHB/2015/283.html (Accessed on 4 February 2017).

Banerjee, A., Galiani, S., Levinsohn, J., McLaren, Z. and Woolard, I. (2008) 'Why has unemployment risen in the new South Africa?', *1. Economics of Transition*, 16(4), pp.715-740.

Barchiesi, F. (2008) 'Wage Labor, Precarious Employment, and Social Inclusion in the Making of South Africa's Postapartheid Transition', *African Studies Review*, 51(2), pp. 119-142.

Barchiesi, F. (2010) 'Informality and casualization as challenges to South Africa's industrial unionism: manufacturing workers in the East Rand/Ekurhuleni region in the 1990s', *African Studies Quarterly*, 11(2/3), p.67-85.

Barchiesi, F. (2011) *Precarious liberation: Workers, the state, and contested social citizenship in postapartheid South Africa*. New York: Sunny Press.

Barchiesi, F., and Kenny, B. (2008) 'Precarious Collaborations: Working-Class Subjectivities, Community Activism, and the Problem with 'Social Movement Unionism' in Late-Apartheid East Rand (South Africa)' Paper presented at the North Eastern Workshop on Southern Africa, Burlington, VT, October 17-19.

Baron, J. and Kreps, D. (1999) Hum*an resource management: A framework for general managers*. Danvers, MA.: John Wiley & Sons.

Barrientos, S., Bee, A., Matear, A. and Vogel, I. (1999) *Women and Agribusiness: Working Miracles in the Chilean Fruit Export Sector*. Basingstoke, Macmillan.

Bartkiw, T. (2014) *Labour Law and Triangular Employment Growth.* Master of Law. York University Toronto.

Basic Conditions of Employment Act 1997 (No.75). Available at: http://www.labour.gov.za/DOL/downloads/legislation/acts/basic-conditions-of-employment/Amended%20Act%20-%20Basic%20Conditions%20of%20Employment.pdf (Accessed on 3/2/2017).

Basic Conditions of Employment Amendment Act 2013 (No. 20). Available at: http://www.labour.gov.za/DOL/downloads/legislation/acts/basic-conditions-of-employment/bcea_dec2013.pdf (Accessed on 4 February 2017).

Baskin J. and Satgar V. (1995) *South Africa 's New Labour Relations Act: A Critical Assessment and Challenges for Labour*. Johannesburg: National Labour Economic and Development Institute.

Baskin, J. (1991) *Striking Back: A History of COSATU*. Johannesburg: Ravan Press.

Baskin, J. (1996) 'The Social Partnership Challenge, Union Trends and Industrial Relations Developments' in Baskin J. (ed.) *Against the Current: Labour and Economic Policy in South Africa*, Johannesburg: Ravan Press.

Baskin, J. (1996) *Against the Current: Labour and Economic Policy in South Africa*. Johannesburg: Ravan.

Bauer, M.W. and Gaskell, G. (2000) *Qualitative Researching with Text, Image and Sound: a Practical Handbook*. London: Sage.

Baxter, P. and Jack, S. (2008) 'Qualitative case study methodology: Study design and implementation for novice researchers', *The Qualitative Report*, 13(4), pp.544-559.

Becker, G. (1964) *Human Capital*. New York: Columbia University Press.

Bell, T (2018) 'There is an alternative to labour broking', City Press [Online] Available at: https://www.fin24.com/Economy/there-is-an-alternative-to-labour-broking-20180803 (Accessed on 20 January 2019).

Benassi, C. and Dorigatti, L. (2015) 'Straight to the core - explaining union responses to the casualization of work: the IG Metall campaign for agency workers', *British Journal of Industrial Relations*, 53(3), pp.533-555.

Bendix, S. (2001*) Industrial Relations in South Africa.* 4th edn. Cape Town: Juta.

Benjamin (2013) 'The persistence of unfree labour: The rise of temporary employment agencies in South Africa and Namibia', in Fudge, J and Strauss, K. (eds.) *Temporary Work, Agencies and Unfree Labour*. London: Routledge, pp.118-142.

Benjamin, P. (2005) *A Review of Labour Markets in South Africa: Labour Market Regulation - International and South African Perspectives*. Cape Town: Human Sciences Research Council.

Benjamin, P. (2006) 'Beyond the Boundaries: Prospects for Expanding Labour market Regulation in South Africa', in Davidov, G. and Langille, B. (eds.) *Boundaries and Frontiers of Labour Law*: *Goals and Means in the regulation of Work*. Oregon: Hart Publishing.

Benjamin, P. (2009) 'Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document' 31 *Industrial Law Journal* 845, pp. 845-871.

Benjamin, P. (2012) 'To Regulate or Ban? Controversies over Temporary Employment Agencies in South Africa and Namibia', in Malherbe, K. and Sloth-Nielsen (eds.) Labour *Law into the Future: Essays in Honour of D'Arcy du Toit*. Juta: Cape Town.

Benjamin, P. (2013a) *Law and practice of private employment agency work in South Africa,* Geneva: International Labour Organisation.

Benjamin, P. (2013b) Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) *(Working Paper No.47).* Geneva: International Labour Organisation.

Benjamin, P. (2016) 'Restructuring Triangular Employment: The Interpretation of Section 198A of the Labour Relations Act', *Industrial Law Journal*, 37(1), pp. 28-44.
Benjamin, P. (2016a) '*South African Labour Law: A Twenty-Year Assessment'*. Swiss Programme for research on Global Issues for Development [Online]. Available at:

https://www.cth.co.za/wp-content/uploads/2016/09/South-African-Labour-Law-A-Twenty-Year-Review.pdf (Accessed on 1 July 2018).

Benjamin, P. (2016b) 'The persistence of unfree labour: The rise of temporary employment agencies in South Africa and Namibia', in Fudge, J. and Strauss, K. (eds.) *Temporary work, agencies and unfree labour: Insecurity in the new world of work*. New York: Routledge, pp.118-142.

Benjamin, P. and Theron, J. (2007) '*Costing, Comparing and Competing: Developing an Approach to the Benchmarking of Labour Market Regulation'*. Development Policy Research Unit Working Paper No. 07/131. Available at: https://ssrn.com/abstract=1139034 (Accessed on 23 December 2019).

Bentolila, S., Dolado, J. and Jimeno, J. (2012) 'Reforming an insider-outsider labor market: the Spanish experience', *IZA Journal of European Labor Studies,* 1(1), p.4.

Berg, J. and Kucera, D. (2008) 'Labour institutions in the developing world: Historical and theoretical perspectives', in Berg, J. and Kucera, D. (eds.) *In defence of labour market institutions: Cultivating Justice in the developing world*. Geneva: ILO, pp. 9-31.

Bergstrom, O. (2001) 'Externalization of employees: thinking about going somewhere else', *The International Journal of Human Resource Management*, 12(3), pp. 373-388.
Bernaciak, M. and Kahancová, M. (2017) 'Conclusions', in Bernaciak, M. and Kahancová, M. (eds.) *Innovative union practices in Central-Eastern Europe.* Brussels: European Trade Union Institute, pp. 219- 236.

Bernstein, A. (2012) 'Routes into formal employment' CDE [Online]. Available at: https://www.cde.org.za/wp-content/uploads/2018/07/Routes-into-formal-employment-Public-and-private-assistance-to-young-job-seekers-CDE-In-Depth.pdf (Accessed on 28 May 2019).

Bernstein, A. (2014) 'South Africa's key challenges: tough choices and new directions', *The ANNALS of the American Academy of Political and Social Science*, 652(1), pp.20-47.

Berntsen, L. (2016) 'Reworking labour practices: On the agency of unorganized mobile migrant construction workers', *Work, employment and society*, 30(3), pp.472-488.

Bertolini, A. (2017) *The experience of labour market disadvantage: A comparison of temporary agency workers in Italy and the UK*. Doctorate in social policy. University of Edinburgh.

Betcherman, G., Luinstra, A. and Ogawa, M. (2001) *Labor market regulation: international experience in promoting employment and social protection*. World Bank, Social Protection Discussion Paper Series, 128.

Bezuidenhout, A. (2008) 'New Patterns of Exclusion in the South African Mining Industry' in Habib, A. and Bentley, K. (eds.) *Racial Redress and Citizenship in South Africa*. Pretoria: HSRC Press, pp. 179-209.

Bezuidenhout, A. (1997) 'The Subcontracting of Labour in South Africa: Breaking Mirrors and Extracting Smoke'. Paper presented to the South African Sociological Association Congress, July. University of Transkei, Umtata.

Bezuidenhout, A. and Fakier, K. (2006) 'Maria's Burden: Contract Cleaning and the Crisis of Social Reproduction in Post-apartheid South Africa', *Antipode*, 38(3), pp.462-485.

Bezuidenhout, A., Godfrey, S., Theron, J. and Modisha, M. (2004) *Non-standard employment and its policy implications. Report submitted to the Department of Labour*. Johannesburg: Sociology of Work Unit, University of the Witwatersrand.

Bezuidenhout, A., Tshoaedi, M. and Bischoff, C. (eds) (2017) *Labour beyond COSATU: Mapping the rupture in South Africa's labour landscape*. Johannesburg: Wits University Press.

Bhaskar, R. (1978*) A Realist Theory of Science*. 2nd edn. Brighton: Harvester Press.

Bhoola, U. (2002) *'National Labour Law Profile: South Africa'*. ILO [Online]. Available at:https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm (Accessed on 15 April 2019).

Bhorat, H. (2003) *The post-apartheid challenge: Labour demand trends in the South African labour market, 1995-1999*. Development Policy Research Unit: University of Cape Town.

Bhorat, H. (2004) 'Labour Market Challenges in the Post-Apartheid South Africa', *South African Journal of Economics*, 72(5), pp.940-977.

Bhorat, H. (2012) *A nation in search of jobs: Six possible policy suggestions for employment creation in South Africa*. University of Cape Town Development Policy Research Unit Working Paper, (12/150).

Bhorat, H. and Stanwix, B. (2018) *Wage setting and labor regulatory challenges in a middle-income country setting: The case of South Africa* - Background note for the South Africa systematic country diagnostic. World Bank Group Working Paper 127303. Washington, D. C.: World Bank Group.

Bhorat, H. and van der Westhuizen, C. (2010) *Amendments in the LRA Related to TES, the Definition s of Employee and Employer; and Temporary Employment: A Cost- Benefit Analysis*. Annexure One in Benjamin, B, Bhorat, H and Van Der Westhuizen, C (2010) Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010 Basic Conditions of Employment Amendment Bill, 2010 Employment Equity Amendment Bill, 2010 Employment Services Bill, 2010. Prepared for the Department of Labour and The Presidency, 9 September 2010.

Bhorat, H. and Van der Westhuizen, C., (2009) A synthesis of current issues in the labour regulatory environment. Development Policy Research Unit Working Paper, (09/135).

Bhorat, H. Cassim, A. and Hirsch, A. (2017) 'Policy co-ordination and growth traps in a middle-income country setting: The case of South Africa', in: Page, J. and Tarp, F. (eds.) *The Practice of Industrial Policy: Government -Business Coordination in Africa and East Asia*. Oxford: Oxford University Press, pp 211-233.

Bhorat, H., and van Der Westhuizen, C (2013). '*Temporary Employment Services in South Africa: A Brief Note*'. Washington, DC: The World Bank Group, World Development Report. Available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.895.9699&rep=rep1&type=pdf (Accessed on 6 January 2020).

Bhorat, H., Cassim, A. and Yu, D. (2016) *Temporary Employment Services in South Africa: Assessing the Industry's Economic Contribution.* Labour Market Intelligence Partnership [Online]. Available at: http://www.lmip.org.za/sites/default/files/documentfiles/Temporary%20employment%20services%20in%20South%20Africa.pdf (Accessed on 17 April 2019).

Bhorat, H., Lilenstein, K., Oosthuizen, M. and Thornton, A. (2016) Vulnerability in employment: Evidence from South Africa. Africaportal [Online]. Available at: https://www.africaportal.org/publications/vulnerability-in-employment-evidence-from-south-africa/ (Accessed on 18 January 2019).

Bhorat, H., Lundall, P. and Rospabe, S. (2002) *The South African Labour Market in a Globalizing World: Economic and Legislative Considerations*. ILO (Employment Strategy Department), Employment Paper 2002/32.

Bhorat, H., Naidoo, K. and Yu, D. (2014) *Trade unions in an emerging economy: The case of South Africa (No. 2014/055)*. WIDER Working Paper. World Institute for Development Economics Research.

Bhorat, H., Naidoo, K., Oosthuizen, M. and Pillay, K. (2015) Demographic, employment, and wage trends in South Africa (No. 2015/141). WIDER Working Paper. Econstor [Online]. Available at: https://www.econstor.eu/bitstream/10419/129460/1/846230402.pdf (Accessed on 29 May 2019).

Bhorat, H., Van der Westhuizen, C. and Goga, S. (2009) 'Analysing wage formation in the South African labour markets: The role of bargaining councils' Development Policy Research Unit Working Paper, (09/135). SSRN [Online]. Available at: SSRN: https://ssrn.com/abstract=2184181

Bischoff, C and Wood, G. (2013) 'Selective informality: The self-limiting growth choices of small businesses in South Africa', *International Labour Review*, 152(3–4), 493–505.

Bischoff, C. and Wood, G. (2018) 'HRM in sub-Saharan Africa: comparative perspectives', in Brewster, C., Mayrhofer, W. and Farndale, E. (eds.) *Handbook of Research on Comparative Human Resource Management*. Cheltenham: Edward Elgar Publishing.

Blažiene, I. and Gruževskis, B. (2017) 'Lithuanian trade unions: from survival skills to innovative solutions', in Bernaciak, M. and Kahancová, M. (eds.) *Innovative union practices in Central-Eastern Europe.* Brussels: European Trade Union Institute, pp. 111-124.

Blossfeld, E., Mills, M. and Kurz, K. (2005*) Globalization, Uncertainty and Youth in Society*. London and New York: Routledge.

Boblin, S., Ireland, S., Kirkpatrick, H. and Robertson, K. (2013) 'Using Stake's qualitative case study approach to explore implementation of evidence-based practice', *Qualitative health research*, 23(9), pp. 1267-1275.

Bodibe, O. (2007) 'The extent and effects of casualisation in Southern Africa. Analysis of Lesotho, Mozambique, South African, Swaziland, Zambia and Zimbabwe'. National Labour and Economic Development Institute (NALEDI) Research Report for the Danish Federation of workers, 6, p.122.

Bond, P. (2013) 'Historical varieties of space, scale and speculation in South Africa: The uneven and combined geographical development of financialised capitalism', *Transformation: Critical Perspectives on Southern Africa*, 81(1), pp.179-207.

Bonner, C. and Spooner, D. (2011) 'Organizing labour in the informal economy: Institutional forms & relationships', *Labour, Capital and Society/Travail, capital et société*, 44(1), pp.126-152.

Booth, L., Francesconi, M., and Frank J. (2000) *Temporary jobs: who gets them, what are they worth, and do they lead anywhere?* Essex: Institute for social and economic research.

Bosch, G., Mayhew, K., and Schmitt, J. (2010) 'Industrial relations, legal regulation and wage setting'. In Gautie, J. and Schmitt, J., (eds), *Low Wage Work in the Wealthy World*. New York: Russell Sage Foundation, pp 91-145.

Bosmans, K., De Cuyper, N., Hardonk, S. and Vanroelen, C. (2015) 'Temporary agency workers as outsiders: an application of the established-outsider theory on the social relations between temporary agency and permanent workers', *Society, Health & Vulnerability*, 6 (1).

Botes, A. (2014) 'Answers to the questions? A critical analysis of the amendments to the Labour Relations Act 66 of 1995 with regard to labour brokers', *SA Mercantile Law Journal - SA Tydskrif vir Handelsreg,* 26(1), pp.110-137.

Botes, A. (2015) 'A comparative study on the regulation of labour brokers in South Africa and Namibia in light of recent legislative developments', *South African Law Journal*, 132(1), pp.100-121.

Brand South Africa (2013) 'Black Economic Empowerment', Brand South Africa [Online]. Available at: https://www.brandsouthafrica.com/investments-immigration/business/trends/empowerment/black-economic-empowerment (Accessed on 6 March 2018).

Brand, H. (2010) *The legal framework for the protection of employees of labour brokers in South Africa*. LLM Dissertation. University of Cape Town.

Brandt, F. (2018) '*No access to the right to strike for workers at Heineken Sedibeng*'. Maverick [Online]. Available at: https://www.dailymaverick.co.za/article/2018-09-19-no-access-to-the-right-to-strike-for-workers-at-heineken-sedibeng/ (Accessed on 28 April 2019).

Branson, N., De Lannoy, A. and Brynde, K (2019) *'Review of youth labour market research' A NIDS/SALDRU Policy Paper*. Southern Africa Labour and Development Research Unit, University of Cape Town. [Online]. Available at: http://www.opensaldru.uct.ac.za/handle/11090/948?show=full (Accessed on 26 May 2019).

Brewster, C. and Wood, G. (2007) 'Introduction', in Wood, G. and Brewster, C. (eds.) *Industrial relations in Africa*. Hampshire: Palgrave MacMillan, pp. 10-14.

Brewster, C., Mayrhofer, W. and Farndale, E. eds. (2018) *Handbook of research on comparative human resource management.* Cheltenham: Edward Elgar Publishing.

Bronstein, A. (2009) *International and comparative labour law: current challenges*. Hampshire: Palgrave Macmillan.

Brown, D. (2019) '*Pension funds buy time on new rules*'. Businesslive [Online]. Available at:https://www.businesslive.co.za/bt/money/2019-03-10-pension--funds-buy--time-on-new-rules/ (Accessed on 24 January 2020).

Browne, K. (2005) 'Snowball sampling: using networks to research non-heterosexual women', *Journal of Social Research Methodology*, 8(1), pp. 47-60.

Bryman, A. (2012) *Social Research Methods*. 4th edn. Oxford: Oxford University Press.
Budlender, D. (2013) *Private employment agencies in South Africa*. Geneva: International Labour Organisation.

Buhlungu, S. (2010) *A paradox of victory: COSATU and the democratic transition in South Africa.* Scottsville, South Africa: University of KwaZulu–Natal Press.

Burawoy, M. (2008) 'The public turn: From labor process to labor movement', *Work and Occupations*, 35(4), pp.371–387.

Burchell, B., Sehnbruch, K., Piasna, A. and Agloni, N. (2014) 'The quality of employment and decent work: definitions, methodologies, and ongoing debates', *Cambridge Journal of Economics*, 38(2), pp.459-477.

Burgess, J. and Connell, J. (2004) 'International aspects of temporary agency employment: an overview: An overview Introduction and aims', in Burgess, J. and Connell, J (eds.) *International Perspectives on Temporary Work* London: Routledge, pp. 23-45.

Burrell, G, and Morgan, G. (1979) *Sociological Paradigms and Organisational Analysis*. London: Heinemann.

Burroni, L. and Keune, M. (2011) 'Flexicurity: A conceptual critique', *European Journal of Industrial Relations*, 17(1), pp. 75-9.

Business Day Editorial (2017) *'ANC's morbid symptoms -Jacob Zuma supporters not only don't want to accept failure, they cannot believe failure exists'.* Business Day [Online]. Available at: https://www.businesslive.co.za/bd/opinion/editorials/2017-10-03-editorial-ancs-morbid-symptoms/ (Accessed on 3 October 2017).

Business Day Editorial (2017) *'ANC's morbid symptoms -Jacob Zuma supporters not only don't want to accept failure, they cannot believe failure exists'.* Business Day [Online]. Available at: https://www.businesslive.co.za/bd/opinion/editorials/2017-10-03-editorial-ancs-morbid-symptoms/ (Accessed on 3 October 2017).

Businesstech (2019) *'3 big South African pension fund changes coming in 2019'.* Businesstech [Online]. Available at: https://businesstech.co.za/news/finance/292112/3-big-south-african-pension-fund-changes-coming-in-2019/ (Accessed on 19 April 2019).

Cameron, R. (2015) Labour Administration in South Africa. *Report Prepared for the ILO*. Geneva: ILO.

Cassell, C. and Symon, G. (2004) *Essential guide to qualitative methods in organizational research.* London: Sage.

Cassim, A. and Casale, D. (2018) *How large is the wage penalty in the labour broker sector? Evidence for South Africa using administrative data (No. 2018/48).* WIDER Working Paper. Helsinki: The United Nations University World Institute for Development Economics Research.

Chang, D. (2008) 'Reclaiming labour law and beyond', *Asian Labour Law Review*, 1(1), pp. xiii-xxvi.

Cheadle Commission (1995) 'Explanatory Memorandum prepared by the Ministerial Task Team', *ILJ*, 278(1), pp. 285-286.

CHEP South Africa (Pty) Ltd v Shardlow N.O and others [2019] JOL 40990 (LC) Honey Attorneys [Online] Available at: http://www.honeyattorneys.co.za/img/files/1_%20CHEP%20South%20Africa%20(Pty)%20Ltd%20v%20Shardlow%20N_O%20and%20others%20%5B2019%5D%20JOL%2040990%20(LC)%20(2).pdf (Accessed on 16 November 2019).

Chinguno, C. (2010) 'Trade unions and workers in the periphery: forging new forms of solidarity?', *Journal of Workplace Rights*, 15(3-4), pp.367-386.

Choi, I. (2019) '*A Temporary Job Trap: Labor Market Dualism and Human Capital Accumulation*'. IZA [Online]. Available at: http://conference.iza.org/conference_files/LaborMarketInstitutions_2019/choi_i28364.pdf (Accessed on 27 July 2019).

CIETT (2000) Orchestrating the *Evolution of Private Employment Agencies towards a Stronger Society*. Brussels: CIETT.

CIETT (2011) *The Agency Work Industry Around the World*. Brussels: CIETT.

CIETT (2013) 'Adapting to Change How private employment services facilitate adaptation to change, better labour markets and decent work. Weceurope [Online]. Available at: https://www.weceurope.org/fileadmin/templates/ciett/docs/Stats/Adapting_to_Change/CIETT_Adapting_to_Change.pdf (Accessed on 1 June 2019).

CIETT (2015) Economic Report 2015 Edition (Based on data of *2013/2014*). Brussels: CIETT.

Clarke, M. (2004) 'Challenging segmentation in South Africa's labour market: "Regulated flexibility" or "flexible regulation"?', in Stanford, J. and Vosko, L. (eds.) *Challenging the market: The struggle to regulate work and income*. Montreal: McGill-Queen's University Press, pp. 97-118.

Clarke, M. (2004) 'Ten Years of Labour Market Reform in South Africa: Real Gains for Workers?', *Canadian Journal of African Studies/La Revue Canadienne Des études Africaines,* 38(3), pp.558-574.

Coe, N. (2013) 'Geographies of production III: Making space for labour', *Progress in Human Geography*, 37(2), 271-284.

Coe, N. Jones, K. and Ward, K. (2010) 'The business of temporary staffing: A developing research agenda', *Geography Compass,* 4(8), pp1055–1068.

Coe, N., Johns, J. and Ward, K. (2009) 'Managed Flexibility Labour Regulation, Corporate Strategies and Market Dynamics in the Swedish Temporary Staffing Industry', *European Urban and regional studies,* 16(1), pp.65-85.

Cohen, T and Moodley, L (2012) 'Achieving decent work in South Africa', *PER* 15 (2), pp. 320-344.

Cohen, T. (2008) 'Placing Substance over Form Identifying the True Parties to an Employment Relationship' 29 *Industrial Law Journal* 863, pp. 863-880.

Cohen, T. (2014) 'The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships', *35 Industrial Law Journal,* p. 2607-2622.

Coleman, N. (2013) '*Towards new collective bargaining, wage and social protection strategies in South Africa - Learning from the Brazilian experience'* ILO [Online]. Available at: http://www.ilo.org/public/libdoc/ilo/2013/483839.pdf (Accessed: 25 March 2018).
Collins, H. (1990) 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration', *The Modern Law Review*, 53(6), pp. 731-744.

Collis, J. and Hussey, H. (2009*) Business Research: A Practical Guide for Undergraduate and Postgraduate Students.* 3rd edn. Wakefield: Palgrave Macmillan.
Commission for Conciliation. Mediation and Arbitration (CCMA) 'Annual Report 2012/13'. CCMA [Online] Available at: http://pmg-assets.s3-website-eu-west-1.amazonaws.com/131010ccma.pdf (Accessed on 30 April 2019).

Competition Commission (Policy and Research Division) (2008*) Review of Changes in Industrial Structure and Competition. Input paper for 15 year review.* Policy and Research Division, Competition Commission, 18 March 2008.

Confederation of Associations in Private Employment Sector (CAPES) (undated) ''Code of Professional Conduct for Labour Recruitment'. ABSO [Online] Available at: https://cdn.ymaws.com/www.apso.co.za/resource/collection/95FC1474-533F-4A4D-BFA9-83A2F8298C14/CAPES_Code_of_Conduct_for_Labour_Recruitment.pdf (Accessed on 3 May 2019).

Congress of South African Trade Unions (COSATU) (1997) 'Sixth Congress Report', COSATU [Online]. Available at: http://www.cosatu.org.za/show.php?ID=2155 (Accessed on 28 January 2017).

Congress of South African Trade Unions (COSATU) (1997) '*The report of the September Commission on the future of unions - to the Congress of South African Trade Unions, August 1997*' COSATU [Online]. Available at: http://www.cosatu.org.za/docs/reports/1997/sept-ch7.htm Accessed on 30 April 2019).

Congress of South African Trade Unions (COSATU) (2012), 'Labour Brokers', COSATU [Online]. Available at: http://www.cosatu.org.za/docs/discussion/2012/discus0726.html (Accessed on 2 March 2018).

Congress of South African Trade Unions (COSATU) (undated) '*Tripartite Alliance'*. COSATU [Online]. Available at: http://www.cosatu.org.za/show.php?ID=2051 (Accessed on 27 April 2019).

Constitution of the Republic of South Africa Act 1996 (No. 108), Available at: http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf (Accessed on 4 February 2017).

Cotton, E (2013) 'Regulating precarious work: the hidden role of the Global Union Federations', in: Sargeant, M. and Ori, M. (eds.) *Vulnerable Workers and Precarious Working*. Cambridge: Cambridge Scholars Publishing, pp.71-91.

Cotton, E. (2015) 'Transnational regulation of temporary agency work compromised partnership between Private Employment Agencies and Global Union Federations', *Work, Employment and Society*, 29(1), pp. 137 -153.

Council of the EU. (2008) Directive on Temporary Agency Work 08/104/EC.
Countouris, N. and Horton, R. (2009) 'The Temporary Agency Work Directive: Another Broken Promise?', *Industrial Law Journal* ,38 (3), pp. 329-338.

Cousins, C. (1999) 'Changing regulatory frameworks and non-standard employment: a comparison of Germany, Spain, Sweden and the UK', in Felstead, A. and Jewson, N. (eds.) *Global Trends in Flexible Labour*. Palgrave: London, pp. 100-120.

Crankshaw, O. and Macun, I. (1997) 'External Labour Market Flexibility: Is there Employment Flexibility in South African Industry?' Paper presented at Conference on Labour Markets and Enterprise Performance in South Africa. Sociology of Work Unit. University of Witwatersrand. Johannesburg.

Creswell, J. (2009) *Research design: Qualitative, quantitative and mixed methods approaches*. 3rd edn. London: Sage.

Creswell, J. (2013) *Qualitative Inquiry and Research Design: Choosing among five approaches*. Los Angeles: Sage.

Crouch, C., (2005) 'Models of capitalism', *New Political Economy*, 10(4), pp.439-456.

Cunningham, I. (2016) 'Non-profits and the 'hollowed out' state: the transformation of working conditions through personalizing social care services during an era of austerity', *Work, Employment and Society*, 30(4), pp.649-668.

Curley, C. and Royle, T. (2013) The degradation of work and the end of the skilled emotion worker at Aer Lingus: is it all trolley dollies now? Work, Employment and Society 27(1): 105–121.

Czarzasty, J. (2017) 'Who Speaks for Whom? Interest Representation for Non-Standard Employees', *Warsaw Forum of Economic Sociology,* 7:1(13), pp. 105-120.

Darwish, T., Muda, P. and Fattaah, A. (eds.) (2020) *Human Resource Management in an Emerging South Asian Economy: The Case of Brunei.* New York: Routledge.

Davenport, T. (1987) 'Unrest, Reform and the Challenges to Law 1976 to 1987', *Acta Juridica*, 1(1), p.1-33.

Davidov, G. (2004) 'Joint employer status in triangular employment relationships', *British Journal of Industrial Relations*, 42(4), pp.727-746.

Davidov, G. and Langille, B. (2006) 'Introduction: Goals and Means in the Regulation of Work', in Davidov, G. and Langille, B. (eds.) *Boundaries and Frontiers of Labour Law*: *Goals and Means in the regulation of Work*. Oregon: Hart Publishing.

Davies, A. (2010) 'The implementation of the Directive on temporary agency work in the UK: a missed opportunity', *European Labour Law Journal*, 1(3), pp.307-331.

Davies, P. and Freedland, M. (2001) 'National styles in labor law scholarship: The United Kingdom', Comparative Labor Law and Policy Journal, 23(1), p.765-788.
Davies, P. and Freedland, M. (2004) *Changing perspectives upon the employment relationship in British labour law. The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC*. Oxford and Portland: Hart.

De Lannoy, A., Graham, L. Patel, L. and Liebbrandt, M. (2018) '*What drives youth unemployment and what interventions help*?' Redi3x3 [Online]. Available at: http://www.redi3x3.org/sites/default/files/Youth%20Unemployment%20report_Dec18.pdf

Deakin, S. (2002) 'The evolution of the employment relationship', in Auer, P. and Gazier, B (eds). *The future of work, employment and social protection: The dynamics of change and the protection of workers. Proceedings of the France/ILO Symposium Lyon, 2002.* London: International Institute for Labour Studies, ILO.

Deakin, S. (2013) *Addressing labour market segmentation: The role of labour law*. Cambridge: Centre for Business Research, University of Cambridge.

Dean, D. (2012) 'The relevance of ideas in a union's organization of contingent workers: 'Here come the fairy people!'', *Work, employment and society*, 26(6), pp.918-934.

Denscombe, M. (2014) *The good research guide: for small-scale social research projects*. 5th edn. Berkshire: Open University Press.

Department for Business Innovation and Skills (BIS) Guidance on the Agency Workers (2011), Government UK [Online]. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf (Accessed on 28 July 2018).
Department of Labour (1996) Green Paper: Policy Proposals for a New Employment Standards Statute, Government Gazette, 23 February.

Department of Labour (2007) 'Basic guide to the Commission for Conciliation. Mediation and Arbitration (CCMA)'. DOL [Online] Available at: http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-the-commission-for-conciliation-mediation-and-arbitration-ccma (Accessed on 30 April 2019).

Department of Labour (2014) '*Basic guide to UIF registration*'. Department of Labour [Online]. Available at: http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-uif-registration (Accessed on 20 April 2019).

Deutschmann, C. (2011) 'Limits to Financialization', E*uropean Journal of Sociology*, 52(3), pp. 347-389.

deVere Acuma (undated) '*Pension structure'*. deVere Acuma [Online]. Available at: https://www.devere-acuma.co.za/pension-structure (Accessed on 19 April 2019).

Dewa, C. (2019) 'Jobs bloodbath looms as Standard Bank SA is set to close 91 branches'. The Southern Times [Online]. Available at: https://southerntimesafrica.com/site/news/jobs-bloodbath-looms-as-standard-bank-sa-is-set-to-close-91-branches (Accessed on 26 March 2019).

Dibben, P. (2007) 'Industrial relations and employment insecurity in South Africa: The possibilities of social justice unionism', in Wood, G. and Brewster, C. (eds.) *Industrial relations in Africa*. Hampshire: Palgrave MacMillan, pp. 111-133.

Dibben, P., Wood, G. and Ogden, S. (2013) 'Comparative Capitalism without Capitalism, and Production without Workers: The Limits and Possibilities of Contemporary Institutional Analysis', *International Journal of Management Reviews*, 16 (4), pp. 384-396.

Dickinson, D. (2015) *Fighting their own battles: The Mabarete and the end of labour broking in the South African Post Office*. IRS [Online] Available at: http://lrs.org.za/media/2018/2/0c83d4e1-d73d-4009-abe4-b1b895a8533c-1517987092141.pdf#page=23 (Accessed on 25 January 2020).

Dieltiens, V. (2015) '*A Foot in the Door: Are NGOs Effective as Workplace Intermediaries in the Youth Labour Market?*'. Econ 3X3 [Online]. http://www.econ3x3.org/sites/default/files/articles/Dieltiens%202015%20NGOs%20as%20workplace%20intermediaries%20-%20FINAL.pdf (Accessed on 28 May 2019).

Discovery (2019) '*Join Vitality'*. Discovery [Online]. Available at: https://www.discovery.co.za/vitality/join-today (Accessed on 30 April 2019).

Doellgast, V. and Greer, I. (2007) 'Vertical disintegration and the disorganization of German industrial relations', *British Journal of Industrial Relations*, 45(1), pp. 55-76.

Doeringer, P. and Piore, M. (1971) *Internal Labor Markets and Manpower Analysis*. Lexington, Mass: Health.

Donnelly, E. and Dunn, S. (2006) 'Ten years after: South African employment relations since the negotiated revolution', *British Journal of Industrial Relations*, 44(1), pp.1-29.

Druker, J. and Stanworth, C. (2004) 'Mutual expectations: a study of the three-way relationship between employment agencies, their client organisations and white-collar agency "temps"', *Industrial Relations Journal*, 35 (1), pp.58-75.

Du Toit, D. *et al* (2003) *Labour Relations Law: A Comprehensive Guide*. 4th edn. Durban: Lexis Nexis Butterworths.

Dube, S (2019) *'Section 200B of the Labour Relations Act: The Labour Appeal Court's interpretation'*. Lexology [Online]. Available at: https://www.lexology.com/library/detail.aspx?g=274c5edf-fe55-41e9-995f-ed1562620dab (Accessed on 2 November 2019).

Dugard, J. (1997) 'International law and the South African constitution', *European Journal of International Law*, 8 (1), p.77-92.

Dutta, M. (2019) '*Resistance against 'Unfreedom' The Sweatshop Regime: Labouring Bodies, Exploitation, and Garments Made in India*', Researchgate [Online]. Available at: https://www.researchgate.net/profile/Madhumita_Dutta3/publication/334459913_Resistance_against_'Unfreedom'_The_Sweatshop_Regime_Labouring_Bodies_Exploitation_and_Garments_Made_in_India/links/5d2c69e4a6fdcc2462e12fd7/Resistance-against-Unfreedom-The-Sweatshop-Regime-Labouring-Bodies-Exploitation-and-Garments-Made-in-India.pdf (Accessed on 27 July 2019).

Easton, G. (2010) 'Critical realism in case study research', *Industrial Marketing Management*, 39(1), pp. 118-128.

Ebisui, M. (2012) *Non-standard workers: Good practices of social dialogue and collective bargaining, Working Paper No. 36*, Industrial and Employment Relations Department. Geneva: ILO.

Ebrahim, S. (2017) 'A Critical Analysis of the New Equal Pay Provisions Relating to Atypical Employees in Sections 198A-198D of the LRA: Important Lessons from the United Kingdom', *Potchefstroom Electronic Law Journal*, 20(1), pp.1-30.

Eichhorst, W., Kalleberg, A., Portela de Souza, A., Visser, J. (2019) '*Designing Good Labour Market Institutions: How to Reconcile Flexibility, Productivity and Security*?'. IZA [Online]. Available at: http://ftp.iza.org/dp12482.pdf (Accessed on 27 July 2019).

Eichhorst, W., Marx, P. and Wehner, C. (2017) 'Labor market reforms in Europe: towards more flexicure labor markets?', *Journal for Labour Market Research*, 51(1), p.3.

Eisenhardt, K. (1989) 'Building theory from case study research', *Academy of Management Review*, 16(4), pp. 532-550.

Eklund, R. (2009) 'Who is afraid of the temporary agency work directive'. *I: Skrifter til Anders Victorins minne*, pp.139-166 Available at: 166.http://arbetsratt.juridicum.su.se/Filer/PDF/ronnie%20eklund/Eklund.pdf (Accessed on 1 Feb 2020).

Elcioglu, E. (2010) 'Producing precarity: The temporary staffing agency in the labor market', *Qualitative Sociology*, 33(2), pp.117-136.

Elenor, N. (2017) 'Agency workers to the rescue?*' Commercial Motor*, 228(5765), pp. 32-33.

Elias, N. and Scotson, J. (1994) *The established and the outsiders (Vol. 32)*. London: Sage.

Emmenegger, P., Häusermann S., Palier, B. and Seeleib-Kaiser, M. (eds.) (2012) *The Age of Dualization: The Changing Face of Inequality in Deindustrializing Societies*. New York: Oxford University Press, pp.3–26.

Employment Equity Amendment Act 2013 (No.47). Available at: http://www.labour.gov.za/DOL/downloads/legislation/acts/employment-equity/eea_amend2014.pdf (accessed on 4 February 2017).

Employment Services Act 2014 (No.4). Available at: http://www.labour.gov.za/DOL/downloads/legislation/acts/public-employment-services/employservact2014.pdf (Accessed on 4 February 2017).

eNCA (2019) 'SA has the worst 'labour relations' in the world: report'. eNCA [Online]. Available at: https://www.enca.com/news/sa-has-worst-labour-relations-world (Accessed on 30 March 2019).

Engwall, M. (2003) 'No project is an island: linking projects to history and context', *Research policy*, 32(5), pp.789-808.

Ernst and Young (EY) (2012) 'Broad Based Black Economic Empowerment', Ernst and Young [Online]. Available at: http://www.ey.com/Publication/vwLUAssets/Broad-Based_Black_Economic_Empowerment/$FILE/BBBEE%20brochure%20%20-%2017%20August%202012-1.pdf (Accessed on 6 March 2018).

European Foundation for the Improvement of Living and Working Conditions (Eurofound) (2008) *Temporary agency work and collective bargaining in the EU*. [Online] Available at: http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/temporary-agency-work-and-collective-bargaining-in-the-eu (Accessed on 1 February 2020).

Evans, J. and Gibb, E. (2009) *Global Union Research Network: Moving from precarious employment to decent work*. Geneva: ILO.

Evju, S. (2013) 'Labour Is Not a Commodity: Reappraising the Origins of the Maxim', *European Labour Law Journal*, 4(3), pp. 222-229.

Faku, D. (2019) 'Numsa to lead an indefinite shutdown of ArcelorMittal', Business Report [Online]. Available at: https://www.iol.co.za/business-report/companies/numsa-to-lead-an-indefinite-shutdown-of-arcelormittal-19853459 (Accessed on 14 March 2019).

Feinstein, C. (2005). *An Economic History of South Africa: Conquest, Discrimination and Development*. Oxford: Oxford University Press.

Fenwick, C., Kalula, E and Landau, I., (2010) 'Labour law: A southern African perspective', in Tekle, T. (ed.) *Labour law and worker protection in developing countries.* Oregon: Hart Publishing.

Ferreira, J. (2016) 'The German temporary staffing industry: growth, development, scandal and resistance', *Industrial Relations Journal*, 47(2), pp.117-143.

Findlay, P., Kalleberg, A., and Warhust, C. (2013) 'The challenge of job quality', *Human Relations*, 66(4), pp. 441-451.

Fine and Davies (1990) *Beyond apartheid: labour and liberation in South Africa*. London: Pluto Press.

Fine, J. (2006) *Worker Centers: Organizing Communities at the Edge of the Dream*. New York and London: ILR Press, Ithaca.

Forde, (2008) "You know we are not an employment agency': manpower, government, and the development of the temporary help industry in Britain', *Enterprise and Society*, 9(2), pp. 337-365.

Forde, C. (2001) 'Temporary arrangements: the activities of employment agencies in the UK', *Work, Employment and Society,* 15(1), pp. 631–644.

Forde, C. and G. Slater, (2005) 'Agency Working in Britain: Character, Consequences and Regulation', *British Journal of Industrial Relations*, 43 (2), pp. 249-271.

Forde, C. and Slater, G. (2014) 'The effects of Agency Workers Regulations on agency and employer practice', Research Paper, 01/14, London: ACAS (www.acas.org.uk).

Forde, C., and Slater, G. (2016) 'Temporary Agency Work: Evolution, Regulation and Implications for Performance', *Journal of Organizational Effectiveness*, 3(3), pp. 312-322.

Forde, C., MacKenzie, R., Ciupijus, Z., *et al*. (2015) 'Understanding the connections between temporary employment agencies and migration', *International Journal of Comparative Labour Law and Industrial Relations*, 31(4), pp.357–370.

Forrest, K. (2015) 'Rustenburg's labour recruitment regime: shifts and new meanings', *Review of African Political Economy*, 42(146), pp.508-525.

Forsyth, A. (2017) 'The Victorian inquiry into labour hire and insecure work: addressing worker exploitation in complex business structures', *E-Journal of International and Comparative Labour Studies*, 6(3), pp. 1-33.

Fox, L. and Kaul, U. (2017) 'The evidence is in: How should youth employment programs in low income countries be designed?' USAID[Online]. Available at: https://static.globalinnovationexchange.org/s3fs-public/asset/document/YE_Final-USAID.pdf (Accessed on 8 March 2018).

Frahm-Arp, L. and Willem, D. (2019) 'Just because you are deemed to be an employee does not mean you need to be employed by the client of the labour broker – the next case in the labour broker debate'. Fasken [Online]. Available at: https://www.fasken.com/en/knowledge/2019/04/just-because-you-are-deemed-to-be-an-employee-does-not-mean-you-need-to-be-employed/ (Accessed on 23 January 2020).

Fransen, J., and Bert, H. (2016) 'Breaching the Barriers: The Segmented Business and Innovation System of Handicraft Exports in Cape Town', *Development Southern Africa*, 33(4), pp.486-501.

Freeman, R. (1992) 'Labor market institutions and policies: help or hindrance to economic development?', *The World Bank Economic Review*, 6(1), pp.117-144.

Freytag, P., Clarke, A. and Evald, M. (2012) 'Reconsidering outsourcing solutions', *European Management Journal*, 30, pp. 99-110.

Friedman, S. (1987) *Building Tomorrow Today: African Workers in Trade Unions 1970-1984*, Johannesburg: Ravan Press.

Frye, I., (2008) 'What is Poverty? A Qualitative Reflection of People's Experiences of Poverty'. Johannesburg, South Africa: National Labour and Economic Development Institute (NALEDI).

Fu, H. (2016) 'Introduction: Temporary Agency Work and Globalisation', in Temporary Fu, H. (ed.) *Agency Work and Globalisation*. London: Routledge, pp. 23-36.

Fudge, J. (2012) 'Blurring legal boundaries: regulating for decent work', in Fudge, J, McCrystal, S. and Sankaran, K. (eds.) *Challenging the Legal Boundaries of Work Regulation.* Oregon: Hart Publishing, pp. 1-26.

Fudge, J. and Vosko, L. (2001) 'Gender, segmentation and the standard employment relationship in Canadian labour law and policy', *Economic and Industrial Democracy*, 22(1), pp. 271-310.

Fudge, J., Tucker, E. and Vosko, L. (2002) *The Legal Concept of Employment: Marginalizing Workers. Report for the Law Commission of Canada.* Canada: York University.

Gale, J. (2012) 'Government reforms, performance management and the labour process: the case of officers in the UK probation service', *Work, Employment and Society*, 26(5), pp.822-838.

Gamwell, S. (2008) *Agency workers in social care: Management, experience and access to voice at work.* Doctor of Philosophy thesis. University of Warwick.

Gardner, C. and Jackson, P. (1996) 'Worker Flexibility, Worker Reactions', Unpublished MSc Project, University of Sheffield.

Gebel, M. (2010) 'Early career consequences of temporary employment in Germany and the UK', *Work, employment and society,* 24(4), pp.641-660.

Gericke, E. (2010) 'Temporary employment services: Closing a loophole in section 198 of the labour relations act 66 of 1995', *Obiter,* 31(1), pp.92-106.

Gerring, J. (2004) 'What Is a Case Study and What Is It Good for?' *The American Political Science Review,* 98(2), pp. 341-354.

Ghai, D. (2003) 'Decent work: Concepts, models and indicators', *International Labour Review*, 142(2), pp. 113-145.

Ghani, E. and Kharas, H. (2009) 'The Service Revolution in South Asia: an overview', in E. Ghani and H. Kharas (eds), *The Service Revolution in South Asia*. Washington, DC: World Bank.

Glaser, B. and Strauss, A. (1967) *The Discovery of Grounded Theory: Strategies for Qualitative Research*. New York: Aldine De Gruyter.

Godfrey, S. and Clarke, M. (2002) 'The basic conditions of employment act amendments: more questions than answers', *Law, Development and Democracy*, 6(1), pp.1-26.

Godfrey, S. Theron, J. and Visser, M. (2007) *The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining*. DPRU Working Paper 07/130. Cape Town: Labour and Enterprise Policy Research Group University of Cape Town.

Goldberg, J. and Wilkinson, G. (2019) 'The deeming provision put to the test', *Without Prejudice*, 19(3), pp. 16-18.

Goldthorpe, J. (1984) 'The end of convergence: corporatist and dualist tendencies in modern western societies', in Goldthorpe, J. (ed.), *Order and Conflict in Contemporary Capitalism*. New York: Oxford University Press, pp. 315-342.

Gostner, K. and Joffe, A. (1998) 'Negotiating the future: Labour's role in NEDLAC', *Law Democracy and Development*, 2(1), p.131.

Graham, L, Patel, L., Chowa, G., Masa, R., Khan, Z., Williams, L., & Mthembu, S. (2016) '*Siyakha Youth Assets. Youth Assets for Employability: An Evaluation of Youth Employability Interventions'* (Baseline Report). University of Johannesburg [Online]. Available at: https://www.uj.ac.za/faculties/humanities/csda/Documents/Siyakha_Report___Oct_2016_Print_FINAL[1].pdf (Accessed on 28 May 2019).

Graham, L., De Lannoy, A., Patel, L. and Leibbrandt, M. (2018) 'What drives youth unemployment and what interventions help? – A systematic overview of the evidence and theory of change', University of Johannesburg [Online] Available at: https://www.uj.ac.za/faculties/humanities/csda/Documents/Youth%20Unemployment%20exec%20summary%20FINAL%20interactive.pdf (Accessed on 20 January 2019).

Gramsci, A., 1891-1937 (1971). *Selections from the prison notebooks of Antonio Gramsci*. New York: International Publishers.

Grimshaw, D. and Rubery, J. (2005) 'Inter-capital relations and the network organisation: redefining the work and employment nexus', *Cambridge Journal of Economics*, 29(6), pp.1027-1051.

Grimshaw, D., Ward, K., Rubery, J. and Beynon, H. (2001) 'Organisations and the transformation of the internal labour market', *Work, Employment and Society*, 15(1), pp. 25-54.

Grogan, J. (2017) *Workplace Law*. 12th edn. Claremont South Africa: Juta.
Guba, E. (1990) 'The alternative paradigm dialog', in Guba E. (ed.) *The paradigm dialog*. Newbury Park, CA: Sage, pp. 17-30.

Guba, E., and Lincoln, Y. (1981). *Effective evaluation*. San Francisco: Jossey Bass.
Håkansson, K. and Isidorsson, T. (2014) 'The trade union response to agency labour in Sweden', *Industrial Relations Journal*, 45(1), pp.22-38.

Håkansson, K., and Isidorsson, T. (2012) 'Work Organizational Outcomes of the Use of Temporary Agency Workers', Organization Studies, 33(4), pp. 487-505.

Hall, P. and Gingerich, D. (2009) 'Varieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis', *British Journal of Political Science*, 39(1), PP.449-482.

Hammersley, M. and Gomm, R. (2000) 'Introduction', in Gomm, R., Hammersley, M. and Foster, P. (eds.) *Case study method*. London: Sage, pp. 1-16.

Hancke, B., Rhodes, M. and Thatcher, M. (eds) (2007) *Beyond Varieties of Capitalism: Conflict, Contradiction, and complementarities in the European Economy*. Oxford: Oxford University Press.

Hannon, E. (2010) 'Employee-focused research in HRM: the case of dairy processing', *The International Journal of Human Resource Management*, 21(6), pp. 818-835.
Hart, K. (1973) 'Informal income opportunities and urban employment in Ghana', *Journal of Modern African Studies*, 11(1), pp 6-84.

Hart, K. and Padayachee, V. (2013) 'A history of South African capitalism in national and global perspective', *Transformation: Critical Perspectives on Southern Africa*, 81(1), pp.55-85.

Harvey, M. (2002) 'Human Resource Management in Africa: Alice's Adventures in Wonderland', *The International Journal of Human Resource Management*, 13(7), pp.1119-1145.

Harvey, S. (2011) 'Labour brokers and workers' rights: Can they co-exist in South Africa', *South African Law Journal*, 128 (1), pp. 100 -122.

Hassel, A. (2014) 'Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe', *IDEAS Working Paper Series from RePEc*.

Hastings, T. (2019) 'Leveraging Nordic links: South African labour's role in regulating labour standards in wine global production networks', *Journal of Economic Geography*, pp.1-22.

Hastings, T., Heyes, J. (2016) *Comparative developments in labour administration*. Geneva: ILO.
Haunschild, A. (2004) 'Employment rules in German theatres: an application and evaluation of the theory of employment systems', *British Journal of Industrial Relations*, 42 (1), pp. 685-703.

Haunschild, A. and Eikhof, D. (2009) 'From HRM to employment rules and lifestyles. Theory development through qualitative case study research into the creative

industries', *German Journal of Human Resource Management: Zeitschrift für Personalforschung*, 23(2), pp.107-124.

Häusermann S. and Schwander H. (2012) 'Varieties of dualization? Labor market segmentation and insider-outsider divides across regimes', in: Emmenegger P., Häusermann S., Palier B., et al. (eds.) *The Age of Dualization: The Changing Face of Inequality in Deindustrializing Societies*. Oxford: Oxford University Press, pp.27–51.

Hayter, S. (2018) 'Industrial relations in emerging economies', in Hayter, S. and Lee, C. (eds.) *Industrial Relations in Emerging Economies: The Quest for Inclusive Development*. Geneva: ILO, pp.69.

Hayter, S. and Ebisui, M. (2013) 'Negotiating parity for precarious workers', *International Journal of Labour Research*, 5(1), pp 79-96.

Hayter, S. and Pons-Vignon, N. (2018) 'Industrial relations and inclusive development in South Africa: A dream deferred?', in Hayter, S. and Lee, C. (eds.) *Industrial Relations in Emerging Economies: The Quest for Inclusive Development*. Geneva: ILO, pp.69.

Heery, E. (2002) 'Partnership versus organising: Alternative futures for British trade unionism', *Industrial Relations Journal*, 33(1), pp.20–35.

Heery, E. (2004) 'The trade union response to agency labour in Britain', *Industrial Relations Journal*, 35(5), pp. 434-450.

Heery, E. (2009) 'The representation gap and the future of worker representation', *Industrial Relations Journal*, 40(4), pp. 324-336.

Heery, E. and Abbott, B. (2000) 'Trade unions and the insecure workforce', in Heery, E. and Salmon J (eds.) *The Insecure Workforce*. London: Routledge, pp.155-180.

Hewison, K. and Kalleberg, A. (2013) 'Precarious work and flexibilization in South and Southeast Asia', *American Behavioral Scientist*, 57(4), pp.395-402.

Holtzhausen, M. (2012) 'A comparison of some global collective bargaining trends with developments in the South African private sector centralised collective bargaining system' UNISA [Online]. Available at: http://ilera2012.wharton.upenn.edu/RefereedPapers/HoltzhausenMaggie.pdf (Accessed: 29 March 2018).

Hoque, K. and I. Kirkpatrick, (2003) 'Non-standard employment in the management and professional workforce: Training, consultation and gender implications', *Work Employment Society*, 17(4), pp. 668-689.

Hoque, K., Kirkpatrick, I., De Ruyter, A. and Lonsdale, C. (2008) 'New contractual relationships in the agency worker market: The case of the UK's National Health Service', *British Journal of Industrial Relations*, 46(3), pp.389-412.

Hoque, K., Kirkpatrick, I., Lonsdale, C. and De Ruyter, A. (2011) 'Outsourcing the procurement of agency workers: the impact of vendor managed services in English social care', *Work, Employment & Society, September*, Vol.25(3), pp.522-539.

Hunter, R. (2018) 'Pensions and Retirement Plans'. Getting the Deal Through [online]. Available at: https://gettingthedealthrough.com/area/57/jurisdiction/2/pensions-retirement-plans-2018-south-africa/ (Accessed on 19 April 2019).

Hyman, R. (2001) *Understanding European trade unionism: Between market, class and society*. London: Sage.

Hyman, R. (2005) 'Trade unions and the politics of the European social model', *Economic and industrial democracy*, 26(1), pp.9-40.

ILO (1972) *Employment, Incomes and Inequality: A Strategy for Increasing Productive Employment in Kenya*. Geneva: ILO.

ILO (1999) *Report of the Director General: Decent Work, International Labour Conference, 87th session*. Geneva: ILO.

ILO (2009) Private employment agencies, temporary agency workers and their contribution to the labour market'. Issues paper for discussion at the Workshop to Promote Ratification of the Private Employment Agencies Convention, 1997 (No. 181), 20–21 Oct 2009.

International Labour Office, Sectoral Activities Programme, Geneva.
ILO (2009a) *Celebration of the 60th Anniversary of Convention No. 98: The Right to Organize and Collective Bargaining in the Twenty-First Century*. Geneva: ILO.

ILO (2009b) *Global Employment Trends - Update May 2009*. Geneva: ILO.

ILO (2010) *Republic of South Africa Decent Work Country Programme (DWCP) 2010-2014.* Geneva: ILO.

ILO (2011) *Issues paper for discussion at the Global Dialogue Forum on the Role of Private Employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors (18–19 October 2011).* Geneva: ILO.

ILO (2011) Private employment agencies, promotion of decent work and improving the functioning of labour markets in private services sectors. Issues paper (18–19 October). Geneva: ILO.

ILO (2014) *Transitioning from the informal to the formal economy*. Geneva: ILO.

ILO (2015) *Non - standard forms of employment. Report for discussion at the meeting of Experts on Non-Standard Forms of Employment*. Geneva: ILO.

ILO (2015a) 'World Employment and Social Outlook - Trends 2015' ILO [Online]. Available at: http://www.ilo.org/global/research/global-reports/weso/2015/lang--en/index.htm (Accessed on 8 March 2018).

ILO (2015b) *Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment.* Geneva: ILO.

ILO (2016) Non-standard forms of employment around the world: Understanding challenges shaping prospects. ILO [Online] Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf (Accessed on 20 January 2019).

ILO (2018) *Men and women in the informal economy. A statistical* portrait. 3rd ed. Geneva: International Labour Organisation.

ILO (2019) *Work for a Brighter Future. Global Commission on the Future of Work*. Geneva: ILO.

ILO) (2009c). *Issues paper for discussion at the Workshop to promote ratification of the Private Employment Agencies Convention, 1997 (No. 181) (20–21 October 2009)*. Geneva: ILO.

Ince, T. (2011) '*UK Agency Workers – understanding the new regulation*'. Employment Law Watch [Online]. Available at: https://www.employmentlawwatch.com/2011/09/articles/employment-uk/uk-agency-workers-understanding-the-new-regulations/ (Accessed on 12 January 2019).

Ingle, K., Mlatsheni, C. (2017) *The extent of churn in the South African youth labour market: Evidence from NIDS 2008-2015(SALDRU Working Paper Number 201/ NIDS Discussion Paper 2016/1.NIDS [Online] Available at:* http://opensaldru.uct.ac.za/bitstream/handle/11090/884/2017_201_Saldruwp.pdf?sequence=1 (Accessed on 26 May 2019).

Institut National de la Statistique (INSEE) (2016) 'Unemployed person (ILO)'. Metadonnees [Online]. Available at: https://www.insee.fr/en/metadonnees/definition/c1129 (Accessed on 24 January 2020).

Isaacs, G. (2018) *'Op-Ed: Five problems with the National Minimum Wage Bill'* The Daily Maverick [Online]. Available at: https://www.dailymaverick.co.za/article/2018-02-07-op-ed-five-problems-with-the-national-minimum-wage-bill/#.WspMMIjwbIU (Accessed on 8 April 2018).

Jackson, T. (2002) 'Reframing human resource management in Africa: a cross-cultural perspective', *International Journal of Human Resource Management*, 13(7), pp.998-1018.

Jahn, E., Riphahn, R. and Schnabel, C. (2012) 'Feature: flexible forms of employment: boon and bane', *The Economic Journal*, 122(August), pp. F115-F124.

Jones, J. (2017) 'Interpretation of Section 198 of the Labour Relations Act', Norton Rose Fulbright South Africa Inc. [Online]. Available at: https://www.insurancegateway.co.za/ShorttermConsumers/PressRoom/ViewPress/Irn=15938&URL=Interpretation+of+section+198+of+the+Labour+Relations+Act#.W0ob-9JKjIU (Accessed on 14 July 2018).

Jorge, J. and Adams, S. (2019) 'The Registration of Temporary Employment Services'. Cliffe Dekker Hofmeyr [Online]. Available at: https://www.lexology.com/library/detail.aspx?g=e16ba9a1-7b4d-4b57-8f3f-c39b87a2c28b&l=8CT62DR (Accessed on 25 April 2018).

Kahn, L. (2018) 'Permanent jobs, employment protection, and job content', *Industrial Relations: A Journal of Economy and Society*, 57(3), pp.469-538.

Kalleberg, A. (2000) 'Non-standard employment relations: part-time, temporary and contract work', *Annual Review of Sociology*, 26, pp. 341-365.

Kalleberg, A. (2011) *Good jobs, bad jobs: The rise of polarized and precarious employment systems in the United States, 1970s-2000s*. New York: Russell Sage.

Kalleberg, A. (2016) 'Good jobs, bad jobs', in: Edgel S, Gottfried H and Granter E (eds.) *The SAGE Handbook of the Sociology of Work and Employment*. London: SAGE, pp.111-128.

Kalleberg, A., Nesheim, T. and Olsen, K. (2015) 'Job quality in triadic employment relations: Work attitudes of Norwegian temporary help agency employees', *Scandinavian Journal of Management*, 31 (1), pp. 362-374.

Kalleberg, A., Reskin, B. and Hudson, K. (2000) 'Bad jobs in America: Standard and nonstandard employment relations and job quality in the United States', *American sociological review*, 65(2), pp.256-278.

Kalula, E. (2004) 'Beyond borrowing and bending: Labour market regulation and the future of labour law in southern Africa', in Barnard C. *et al* (eds.) *The Future of Labour Law*, Oxford University Press, pp. 275-287.

Kamoche, K. (1997) 'Managing human resources in Africa: Strategic, organizational and epistemological issues', *International Business Review*, 6(5), pp.537-558.

Kamoche, K. (2011) 'Contemporary developments in the management of human resources in Africa', *Journal of World Business*, 46(1), pp.1-4.

Kaseke, E. (2010) ‘The role of social security in South Africa’, *International Social Work*, 53(2), pp. 159-168.

Kelly, J., (2002) 'Voices from the Shop floor', *Industrial & Labor Relations Review*, 56(1), pp. 181-182.

Kemper, E.A. Stringfield, S. and Teddlie, C. (2003) ‘Mixed methods sampling strategies in social science research.’ *Handbook of mixed methods in social and behavioral research*, pp. 273-96.

Kenny, B. (2007) ‘Claiming workplace citizenship: “Worker” legacies, collective identities and divided loyalties of South African contingent retail workers’, *Qualitative Sociology*, 30(4), pp.481-500.

Kenny, B. (2011) ‘Reconstructing the Political?: Mall Committees and South African Precarious Retail Workers’, *Labour, Capital and Society/Travail, capital et société*, 44(1), pp.44-69.

Kenny, B. (2014) ‘Walmart in South Africa: Precarious Labor and Retail Expansion’, *International Labor and Working-Class History*, 86(1), pp.173-177.

Kenny, B. (2015) ‘Retail, the service worker and the polity: attaching labour and consumption’, *Critical Arts*, 29(2), pp.199-217.

Kenny, B. (2016) ‘The Regime of Contract in South African Retailing: A History of Race, Gender, and Skill in Precarious Labor’, *International Labor and Working-Class History*, 89, pp.20-39.

Kenny, B. and Webster, E. (1999) ‘Eroding the core: Flexibility and the re-segmentation of the South African labour market’, *Critical Sociology*, 24(3), pp.216-243.

Kenny, B. and Webster, E. (1999) ‘Eroding the core: Flexibility and the re-segmentation of the South African labour market’, *Critical Sociology*, 24(3), pp.216-243.

Kinnie, N., Purcell, J., Hutchinson, S., Terry, M., Collinson, M. and Scarbrough, H. (1999) ‘Employment relations in SMEs: market-driven or customer-shaped?’, *Employee relations*, 21(3), pp.218-236.

Kıran, J. (2018) ‘Expanding the framework of the varieties of capitalism: Turkey as a hierarchical market economy’, *Journal of Eurasian studies*, 9(1), pp.42-51.

Kirkpatrick, I. and Hoque, K. (2006) ‘A retreat from permanent employment? Accounting for the rise of professional agency work in UK public services’, *Work, employment and society*, 20(4), pp. 649-666.

Kirkpatrick, I., De Ruyter, A., Hoque, K. and Lonsdale, C. (2011) 'Practising what they preach'? The disconnect between the state as regulator and user of employment agencies', *The International Journal of Human Resource Management*, 22(18), pp. 3711-3726.

Kitay, J. and Lansbury, R. (eds.) (1997) *Changing Employment Relations in Australia*. Melbourne: Oxford University Press.

Kitay, J. Callus, R. and Straus, W. (1998) 'The Role and Challenges of Case Study design in Industrial Relations Research', in Whitfield, K. and Strauss, G. (eds.*) Researching the World of Work*, London: ILR Press, pp101-112.

Klug, K., Bernhard-Oettel, C., Mäkikangas, A., Ulla Kinnunen, U., Sverke, M. (2019) '*Development of perceived job insecurity among young workers: a latent class growth analysis'*. International Archives of Occupational and Environmental Health [Online]. Available at: https://doi.org/10.1007/s00420-019-01429-0 (Accessed on 21 April 2019).

Knight, F. (1921) *Risk, Uncertainty and Profit*. New York: Cosmo Classics.

Knox, A. (2010) ''Lost in translation': an analysis of temporary work agency employment in hotels' *Work, employment and society*, 24(3), pp. 449-467.

Knox, A. (2018) 'Regulatory avoidance in the temporary work agency industry: Evidence from Australia', *The Economic and Labour Relations Review*, 29(2), pp.190-206.

Kohl, B. and Bresnahan, R. (2010) 'Bolivia under Morales: Consolidating power, initiating decolonization', *Latin American Perspectives*, 37 (3), pp.5-20.

Kraak, A. (1993) *Breaking the Chains: Labour in South Africa in the 1970s and 1980s*. London: Pluto Press.

Kraak, A. (1996) 'Transforming South Africa's Economy: From Racial-Fordism to Neo-Fordism?', *Economic and Industrial Democracy*, 17(1), pp.39-74.

Kretzmann, S. (2017) '*Labour department can't protect workers*'. GroundUp [Online]. Available at: https://www.dailymaverick.co.za/article/2017-05-09-groundup-labour-department-cant-protect-workers/ (Accessed on 23 December 2019).

Kruger, J. and Tshoose, C. (2013) 'The impact of the Labour Relations Act on minority trade unions: A South African perspective', *PER*, 16(4), pp.285-326.
Labour Relations Act 1995 (No. 66). Available at: http://www.labour.gov.za/DOL/legislation/acts/labour-relations/labour-relations-act (Accessed on 3 February 2017).
Labour Relations Amendment Act 2014 (No. 6). Available at: http://www.labour.gov.za/DOL/downloads/legislation/acts/labour-relations/amendments/labourrelationsact_amended2014.pdf (Accessed on 4 February 2017).

Labour Research Service (LRS) (2014) *'Bargaining Indicators 2014: A collective bargaining omnibus'* LRS [Online]. Available at: http://lrs.org.za/media/2018/2/0c83d4e1-d73d-4009-abe4-b1b895a8533c-1517987092141.pdf (Accessed: 27 April 2019).

Laci, A., Maxhelaku, A. and Rusi, I. (2017) 'Equality at Work and Discrimination in Employment and Occupation', *Journal of Educational and Social Research,* 7(2), pp.67-72.

Lallement, M. (2011) 'Europe and the economic crisis: forms of labour market adjustment and varieties of capitalism', *Work, employment and society,* 25(4), pp.627-641.

Lam, D., Ardington, C., Branson, N., Case, A., Menendez, A., Leibbrandt, M., Seekings, S., and Sparks, M. (2008) '*The Cape Area Panel Study: Overview and technical documentation -Waves 1-2-3-4 (2002-2006)*' CAPS.UCT [Online]. Available at: http://www.caps.uct.ac.za/resources/capsw1234_overview&technical_v0810.pdf Accessed on 28 May 2019).

Le Roux (2015) 'Temporary employment services: an important decision', Lexology. [Online] Available at: http://www.lexology.com/library/detail.aspx?g=9eea5533-30d3-472e-8bad-75441fb93b19 (Accessed on 4 February 2017).

Le Roux, P. and Alcock, R. (2019) 'Recent developments in employment disputes in South Africa'. Mail [Online]. Available at: https://mail.google.com/mail/u/0/#inbox/FMfcgxwGBmxPlmlvSdwFxsmHxNkCdJGg (Accessed on 29 November 2019).

Le Roux, R. (2010) 'Dialogue concerning Externalisation and Multilateral Employment', De Jure, *43(1),* pp.129-148.

Le Roux, R. (2009) *The world of work: Forms of engagement in South Africa. Institute of Development and Labour Law*. Cape Town: University of Cape Town.

Lee, C. and Kofman, Y. (2012) 'The politics of precarity views beyond the United States', *Work and Occupations,* 39(4), pp.388-408.

Leibbrandt, M., Woolard, I., McEwen, H. and Koep, C. (2010) 'Employment and inequality outcomes in South Africa' Southern Africa Labour and Development Research Unit (SALDRU) and School of Economics, University of Cape Town [Online]. Available at: http://www.oecd.org/els/emp/45282868.pdf (Accessed on 9 September 2018).

Leighton, P. and Wynn, M. (2011) 'Classifying Employment Relationships - More Sliding Doors or a Better Regulatory Framework?', *Industrial Law Journal,* 40(1), pp.5-44.

Lekana, M. (2006) '*Youth employment in the Cape Town Area: Insights from the Cape Area Panel study.'* Mini dissertation in partial completion of Masters in Economics. University of Cape Town.

Lepak, D. and Snell, S. (1999) 'The strategic management of human capital: determinants and implications of different relationships', *Academy of Management Review*, 24(1), pp.1-18.

Lepak, D. and Snell, S. (2002) 'Examining the human resource architecture: the relationship among human capital, employment and human resource configurations', *Journal of Management*, 28(1), pp. 517-543.

Leppan, F. (2016) 'The labour Appeal Court gives the majoritarian principle a shot in the arm', CDH [Online] Available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-4-april-the-labour-appeal-court-gives-the-majoritarian-principle-a-shot-in-the-arm-.html (Accessed on 14 December 2018).

Lincoln, Y. and Cuba, E. (2000) 'Paradigmatic controversies, contradictions, and emerging confluences', in Lincoln, Y. and Cuba, E. (eds.) *Handbook of qualitative research.* Thousand Oaks, CA: Sage, pp. 163-188.

Lindbeck, A., and Snower, D. (2002) *The insider-outsider theory: A survey. IZA Discussion Paper*. Bonn, Germany: Institute for the Study of Labor.

Lipietz, A. (1987) *Mirages and miracles: the crisis in global Fordism*. Trans. Davis Macey. London: Verso.

Lucas, J. (2017) *Sustainability and financial implications of the Labour Relations Amendment Act No.6 of 2014 for Western Cape health services outsourcing.* Master's in public administration Dissertation. Faculty of Economic and Management Sciences at Stellenbosch University.

Luckett, T. and Munshi, N. (2017) 'Rebuilding a workers' movement'. Jacobin [Online]. Available at: https://jacobinmag.com/2017/05/south-africa-trade-unions-saftu-numsa-anc-zuma (Accessed on 24 May 2019).

Lui, C., Wu, C. and Hu, C. (2010) 'Managing temporary workers by defining temporary work agency service quality', *Human Resource Management*, 49(4), pp. 619-646.

Mahlakoana, T. (2018) 'ConCourt ruling deals a blow to labour brokers', Times Live. [Online] Available at: https://www.timeslive.co.za/news/south-africa/2018-07-26-concourt-ruling-deals-a-blow-to-labour-brokers/ (Accessed on 27 July 2018].

Makino, K. (2010) 'The Changing Nature of Employment and the Reform of Labor and Social Security Legislation in Post-Apartheid South Africa', in Usami, K. (ed.) *Non-Standard Employment under Globalization – flexible work and social security in newly industrializing countries*. Basingstoke: Palgrave Macmillan, pp. 73-97.

Malik, T. (2017) 'Varieties of Capitalism, Innovation Performance and the Transformation of Science into Exported Products: A Panel Analysis', *Technological Forecasting & Social Change*, 118 (1), pp.324-33.

Mangum, G., Mayall, D. and Nelson, K. (1985), 'The temporary help industry: a response to the dual internal labour market', *Industrial and Labour Relations Review*, 30 (1), pp. 599–611.

Manky, O. (2018) 'Resource Mobilisation and Precarious Workers' Organisations: An Analysis of the Chilean Subcontracted Mineworkers' Unions', *Work, Employment and Society*, Vol. 32(3), pp. 581-598.

Maree, J. (2011) 'Trends in the South African collective bargaining system in comparative perspective', *South African Journal of Labour Relations*, 35(1), pp. 7-37.

Marin, E. (2013) 'Precarious work: An international problem', *International Journal of Labour Research*, 5(1), pp. 153-168.

Marsden, D. (1999) *A theory of employment systems. Micro-foundations of societal diversity*. Oxford, UK: Oxford University Press.

Marx, K. [1867] (1967). *Capital.* Vols. 1, 2, and 3. Reprint, New York: International Publishers.

Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others (JA14/2018) [2019] ZALAC 59 (12 September 2019) Available at: http://www.saflii.org/za/cases/ZALAC/2019/59.html (Accessed on 1 February 2020).

Matete, P. (2014) *The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho.* Mini-dissertation for the degree *Magister Legum* in Labour Law. North-West University.

Mazanhi, I. (2012) 'Labour Broking: to ban or to regulate?' [On-Line] Available at: https://www.newsday.co.zw/2012/04/18/2012-04-18-labour-broking-to-ban-or-regulate/ (Accessed on 16 August 2016).

McDonald, D. and Makin, P. (2000) 'The Psychological contract, organisational commitment and job satisfaction of temporary staff', *Leadership and Organization Development Journal*, 21(2), pp. 84-91.

McEvoy, P. and Richards, D. (2006) 'A critical realist rationale for using a combination of quantitative and qualitative methods.' Journal of Research in Nursing, Vol. 11, no. 1, pp. 66-78.

McEvoy, P. and Richards, D. (2006) 'A critical realist rationale for using a combination of quantitative and qualitative methods', *Journal of Research in Nursing*, 11(1), pp. 66-78.

McKay, S. (2010) 'The operation and management of agency workers in conditions of vulnerability', *Industrial Relations Journal*, 41(5), pp. 446-460.

McNally, D. (1999) 'Turbulence in the world economy', *Monthly Review*, 51(2), pp.38-52.

McNally, D. (2006) *Another world is possible: Globilization and anti-capitalism*. 2nd ed. Winnipeg: Arbeiter Ring Publishing.

Meknassi, R. (2010) 'Worker access to labour law protection: Historical challenges and the impact of globilization', in Tekle, T. (ed.) *Labour law and worker protection in developing countries.* Oregon: Hart Publishing.

Mezzadri, A. (2017) *The Sweatshop Regime: Labouring Bodies, Exploitation, and Garments Made in India*. Cambridge: Cambridge I University Press.

Miles, M. and Huberman, A. (1984) 'Drawing valid meaning from qualitative data: Toward a shared craft', *Educational Researcher*, 13(5), pp.20-30.

Miles, M. and Huberman, A. (1994) *Qualitative Data Analysis: A Source Book.* Beverly Hills, CA: Sage.

Mitlacher L, Burgess J, Connell J and Waring P (2015) 'Temporary agency work in Australia, Germany and Singapore', in Fu, H. (ed.) *Temporary Agency Work and Globalisation: Beyond Flexibility and Inequality*, Farnham: Gower Publishing, pp. 71–94.

Mitlacher, L. (2007a) 'The Role of Temporary Agency Work in Different Industrial Relations Systems - a Comparison between Germany and the USA', *British Journal of Industrial Relations*, 45(3) pp. 581-606.

Mitlacher, L. (2007b) 'Temporary Agency Work and the Blurring of the Traditional Employment Relationship in Multi Party Arrangements - The Case of Germany and the United States', *International Journal of Employment Studies*, 15(2), pp. 61-89.

Mitlacher, L., Waring, P., Burgess, J. and Connell, J. (2014) 'Agency Work and Agency Workers-Employee Representation in Germany and Singapore' *International Journal of Employment Studies*, 22(1), pp.6-24.

Mkentane, L. (2019) Unemployment rate climbs to 27.6% in the first quarter'. Business Day [Online]. Available at: https://www.businesslive.co.za/bd/national/2019-05-14-unemployment-rate-climbs-to-276-in-first-quarter/ (Accessed on 24 May 2019).

Molina, O. and Rhodes, M.(2007) 'The political economy of adjustment in mixed market economies: A study of Spain and Italy' in Hancké, R., Rhodes, M. and Thatcher, M. (eds.) *Beyond Varieties of Capitalism: Conflict, contradictions and complementarities in the European economy*, pp.223-252.

Molina, O., and Rhodes, M. (2007) 'The Political Economy of Adjustment in Mixed Market Economies: A Study of Spain and Italy', in Hancké, *et al*. (eds.) *Beyond Varieties of Capitalism: Conflict, Contradictions, and Complementarities in the European Economy*. Oxford: Oxford University Press pp.223-252.

Moll, P. (1996) 'Compulsory Centralization of Collective Bargaining in South Africa', *The American Economic Review*, 86(2), pp. 326-329.

Mollitt, S. (2006) *The Case of `Unwanted Flexibility': a study of Temporary Agency Workers in the U. K.* Doctor of Philosophy thesis. Leeds University Business School.

Moodley, S. (2017) '*The National Minimum Wage Bill released for public comment'* (2017) ENSight [Online]. Available at: https://www.ensafrica.com/news/The-National-Minimum-Wage-Bill-released-for-public-comment?Id=2920&STitle=employment%20ENSight (Accessed on 8 April 2018).

Moody, K. (1997) 'Towards an international social movement unionism', *New Left Review*, 225, 52–72.

Morgan, G. (2007) 'National business systems research: Process and prospects', *Scandinavian Journal of Management*, 23(1), pp.127-145.

Mosoetsa, S., Stillerman, J. and Tilly, C. (2016) 'Precarious labor, south and north: An introduction', *International Labor and Working-Class History*, 89(1), pp.5-19.
Munck, R. (2013) 'The Precariat: A view from the South' *Third World Quarterly* 34 (5), pp. 747-762.

Murphy, M. (2018) 'Irish Flex-insecurity: The Post-crisis Reality for Vulnerable Workers in Ireland', *Social Policy and Administration*, 51(2), pp. 308-327.

Naidoo, R. (2003) '*The union movement and South Africa's transition, 1994–2003. In a Centre for Policy Studies seminar*' (Vol. 23), [Online] available at: https://pdfs.semanticscholar.org/e34d/a6c616c55c63a8104ca6e435c30f5acf6398.pdf 9Accessed on 7 June 2020).

Naidoo, R. and Frye, I. (2005) 'The Role of Workers' Organizations in the Extension of Social Security to Informal Workers', *Comparative Labour Law and Policy Journal*, 27(1), p.187-206.

Naki (2018) 'Innovation can save temp workers, labour brokers', Citizen [Online]. Available at: https://citizen.co.za/news/south-africa/1991337/updated-innovation-can-save-temp-workers-labour-brokers/ (Accessed on 7 January 2019).

National Labour and Economic Development Institute (NALEDI) (2006) *The state of COSATU: phase one report*. Johannesburg: National Labour and Economic Development Institute.

National Labour and Economic Development Institute (NALEDI) (2006) *The Extent and Effects of Casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe: Research Report for the Danish Federation of Workers.* [Online] Available at: http://www.sarpn.org/documents/d0002568/Effects_Casualisation_Nov2006.pdf (Accessed on 29 May 2016).

Nattrass, N. (2014) 'A South African variety of capitalism?', *New Political Economy*, 19(1), pp.56-78.

Nattrass, N. and Seekings, J. (2010) State, business and growth in post-apartheid South Africa. Research Programme Consortium on Improving Institutions for Pro-Poor Growth, 34. IPPG Discussion Papers available at www.ippg.org.uk

Ncume, A. (2015) 'The Employment Services Act.' Maserumule [Online] Available at: https://www.masconsulting.co.za/wp-content/uploads/2017/08/Employment-Services-Act.pdf (Accessed on 16 April 2019).

Ncume, A. (2019) 'The deeming provision: Temporary employment services.' Maserumule [Online] Available at: https://www.masconsulting.co.za/wp-content/uploads/2019/06/The-Deeming-Provision-Temporary-Employment-Services.pdf (Accessed on 17 November 2019).

Ndungu, S. (2008) 'Collective Bargaining: Wage and non-wage settlement trends in the South African labour market', NALEDI [Online]. Available at: http://us-cdn.creamermedia.co.za/assets/articles/attachments/14288_wage_and_non_wage_trends_may_2008.pdf (Accessed on 7 June 2020).

Nel, P. (1997) *South African Industrial Relations: Theory and Practice*. 3rd ed. Pretoria: J. L. van Schaik Publishers.

Network Consulting Group (2016) 'Why 'managed services' and 'outsourcing' are not exactly the same thing', NCG [Online]. Available at: https://ncgtelecom.com/2016/03/managed-services-outsourcing-not-exactly-thing/ (Accessed on 15 March 2018).

Newman, K. and De Lannoy, A. (2014). *After Freedom: The Rise of the Post-Apartheid Generation in Democratic South Africa*. Boston, Massachusetts, United States: Beacon Press.

Nölke, A. and Claar, S., (2013) 'Varieties of capitalism in emerging economies', *Transformation: Critical Perspectives on Southern Africa*, 81(1), pp.33-54.

Nölke, A. and Vliegenthart, A. (2009) 'Enlarging the varieties of capitalism: The emergence of dependent market economies in East Central Europe', *World politics*, 61(4), pp.670-702.

Ntsabo, M. (2019) 'NUMSA workers on strike at ArcelorMittal over labour brokers', Eyewitness News [Online]. Available at: https://ewn.co.za/2019/03/12/numsa-workers-on-strike-at-arcelormittal-over-labour-brokers (Accessed on 14 March 2019).

NUMSA v. Assign Services and others [2017] ZALAC 44 (2017) Saffli [Online]. Available at: http://www.saflii.org/za/cases/ZALAC/2017/44.pdf (Accessed on 19 July 2018).

OECD (2010), '*Tackling Inequalities in Brazil, China, India and South Africa: The Role of Labour Market and Social Policies'*, OECD Publishing Paris [Online]. Available at: https://doi.org/10.1787/9789264088368-en (Accessed on 7 September 2018).

OECD (2019) *Employment Outlook 2019*. Paris: OECD.

Offe, C. (1997) 'Towards a New Equilibrium of Citizens' Rights and Economic Resources?', in Michalski, W., Miller, R. and Stevens, B.(eds.) *Societal Cohesion and the Globalising Economy: What Does the Future Hold?* Paris: OECD, pp. 81-108.

O'Higgins, P. (1997) 'Labour Is Not a Commodity'- an Irish Contribution to International Labour Law', 26(3), pp. 225-234.

Olivier, M. (2000) 'Revisiting the Social Security Policy Framework in South Africa', *Law, Democracy & Development*, 4(1), pp.101-108.

Omomowo, K. (2010) *Atypical work and social protection in post-apartheid South Africa: preliminary thoughts about social policy imperative*. Grahamstown: Rhodes University.

Osterman (2013) 'Introduction to the special issue on job quality: What does it mean and how might we think about it?', *Industrial and Labor Relations Review*, 66(4), pp.739-752.

Oxford Analytica Daily Brief Service (Oxford Analytica) (2017) '*South Africa: National minimum wage will prove elusive*'. Oxford Analytica Daily Brief Service [Online]. Available at: https://search.proquest.com/docview/1969024365?accountid=14557 (Accessed on 8 April 2018).

Oxford Policy Management Africa (2011) *South Africa - social budget: Phase 2 Report (1) Extract*. Pretoria: Oxford Policy Management Ltd.

Padayachee, V. (2013) 'Introducing varieties of capitalism into the South African debate: uses and limits', *Transformation: Critical Perspectives on Southern Africa*, 81(1), pp.5-32.

Palier, B. and Thelen, K. (2010) 'Institutionalizing dualism: Complementarities and change in France and Germany', *Politics & Society*, 38(1), pp.119-148.
Paret, M. (2015) 'Precarious labor politics: Unions and the struggles of the insecure working class in the United States and South Africa', *Critical Sociology*, 41(4-5), pp.757-784.

Paret, M. (2016) 'Precarious Class Formations in the United States and South Africa', *International Labor and Working-Class History*, 89, pp84-106.

Paret, M. (2018) 'Building labor solidarity in precarious times: The danger of union paternalism', *Labor Studies Journal*, pp.1-19.

Parker, R. (1994) *Flesh peddlers and warm bodies: the temporary help industry and its workers*. New Brunswick: Rutgers University Press.

Parkin, D. (2000) 'Forword', in Burbules, N. and C. A. Torres (ed.) *Globalization and education, critical perspectives*. New York, NY: Routledge, pp. xvii-xxi.

Parkin, D. (2016) 'Foreword' in Fu, H. (ed.) *Temporary agency work and globalisation: Beyond flexibility and inequality*. New York: Routledge, pp. xvii-xxi.

Parsons, R. (2007) 'The emergence of institutionalised social dialogue in South Africa', *South African Journal of Economics*, 75(1), pp.1-21.

Partington, D. (2000) 'Building grounded theories of management action', *British Journal of Management*, 11(1), pp. 91-102.

Patel, A. (2014) 'What does 'on the whole not less favourable' mean?' Cliffe Dekker Hofmeyr [Online]. Available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2014/employment/employment-alert-20-october-whatdoes-on-the-whole-not-less-favourable-mean.html (Accessed on 24 May 2018).

Patel, L. (2005) *Social Welfare and Social Development in South Africa*. Cape Town: Oxford University Press Southern Africa.

Patel, L. (2013) 'Social protection in South Africa: History, goals and strategies', in J. Midgley and D. Piachaud (eds.) *Social protection, economic growth and social change*. Cheltenham: Edward Elgar Publishing, pp. 201-216.

Patel, L., Khan, Z., Graham, L., Baldry, K., & Mqehe, T. (2016). *An Investigation into how a National Minimum Wage Might Affect Young People's Labour Market Outcomes*. Johannesburg: Centre for Social Development in Africa, University of Johannesburg.

Patton, M. (1990) *Qualitative Evaluation and Research Methods. Newbury Park.* CA: Sage Publications.

Patton, M. (2002) *Qualitative Research and Evaluation Methods*. 3rd edn. Thousand Oaks, CA: Sage.

Pauw, K. and Mncube, L. (2007) '*Expanding the Social Security Net in South Africa: Opportunities, Challenges and Constraints*' Development Policy Research Unit DPRU Working Paper 07/127 [Online]. Available at:

https://open.uct.ac.za/bitstream/handle/11427/7272/DPRU_WP07-127.pdf?sequence=1 (Accessed 18 April 2019).

Peck, J. and Theodore, N. (1998) 'The business of contingent work: growth and restructuring in Chicago's temporary employment industry', *Work, Employment and Society,* 12(4), pp. 655-674.

Peck, J., Theodore, N. and Ward, K. (2005) 'Constructing markets for temporary labour: employment liberalization and the internationalization of the staffing industry', *Global Networks*, 5(1), pp.3-26.

Peers, S. (2013) 'Equal Treatment of Atypical Workers: A New Frontier for EU Law?', *Yearbook of European Law,* 32(1), pp.30-56.

Pemberton, (undated) 'Applying equity in the case of transfers of contracts', Garlicke Bousfield Attorneys [Online]. Available at: http://www.gb.co.za/publications/articles1/94-applying-equity-in-the-case-of-transfers-of-contracts (Accessed on 24 May 2018).

Perrett, R. (2007) 'Worker voice in the context of the re-regulation of employment: employer tactics and statutory union recognition in the UK', *Work, Employment & Society*, 21(4), pp.617-634.

Pfeffer, J. and Baron, J. (1988) 'Taking the Workers Back Out: Recent Trends in the Structuring of Employment', in Staw, B. and Cummings, L. (eds.) *Research in Organizational Behavior*. Greenwich, CT: JAI Press, pp. 257–303.

Pienaar, H. and Jamieson, S. (2018) 'Alternative model to labour brokers in South Africa', Cliffe Dekker Hofmeyr [Online]. Available at: https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2018/employment/alternative-model-to-labour-brokers-in-sa.html (Accessed on 24 February 2019).

Pienaar, H. and Naidoo, P. (2017) 'Labour brokers: Is the client the only employer?' Without Prejudice [Online]. Available at: https://withoutprejudice.co.za/free/article/5766/view (Accessed on 28 November 2019).

Pillay, D. (2008) 'Globalization and the informalization of labor: The case of South Africa', in Bieler, D., Lindberg, I. and Pillay, D. (eds.) *What prospects for transnational solidarity?* London: Pluto Press, pp.45–64.

Pitcher, M. (2017) 'Varieties of residential capitalism in Africa: Urban housing provision in Luanda and Nairobi', *African Affairs*, 116(464), pp.365-390.

Pollert, A., 1988. 'The 'Flexible Firm': Fixation or Fact? *Work, employment and society*, 2(3), pp.281-316.

Pons-Vignon, N. and Anseeuw, W. (2009) 'Great expectations: Working conditions in South Africa since the end of apartheid', *Journal of Southern African Studies*, 35(4), pp.883-899.

Prosser, T. (2015) 'Dualization or liberalization? Investigating precarious work in eight European countries', *Work, Employment & Society*, August, pp.1-17.

Pulignano, V. and Doerflinger, N. (2013) 'A head with two tales: trade unions' influence on temporary agency work in Belgian and German workplaces', *The International Journal of Human Resource Management*, 24(22), pp.4149-4165.

Pulignano, V., Meardi, G. and Doerflinger, N. (2015) 'Trade unions and labour market dualisation: a comparison of policies and attitudes towards agency and migrant workers in Germany and Belgium' *Work, Employment & Society*, 29(5), pp. 808-825.

Purcell, C. (2014) *Temporary agency workers in the French car industry: working under a new variant of 'despotism' in the labour process*. Doctor of Philosophy thesis. Manchester Metropolitan University.

Purcell, J., Purcell, K. and Tailby, S. (2005) 'Temporary work agencies: here today, gone tomorrow?', *British Journal of Industrial Relations*, 42 (4), pp.705-725.

Purcell, K. and Purcell, J. (1998) 'In-sourcing, outsourcing, and the growth of contingent labour as evidence of flexible employment strategies', *European Journal of Work and Organisational Psychology*, 7 (1): 39–59.

Quinlan, M. (2012) 'The 'pre-invention' of precarious employment: the changing world of work in context', *The Economic and Labour Relations Review*, 23(4), pp.3-24.

Read, S. and Hanif, N. (2018) 'Is temporary employment a permanent problem?', Price Waterhouse Coopers Legal (Pty) Ltd [Online] Available at: https://www.pwc.co.za/en/assets/pdf/taxalert/legal-alert-labour-brokers.pdf (Accessed on 15 March 2019).

Reed, M. (2005) 'Reflections on the 'realist turn' in organization and management studies', *Journal of Management Studies*, 42(8), pp.1621-1644.

Reich, M., Gordon, D. and Edwards, R. (1973) 'A theory of labor market segmentation', *The American Economic Review*, 63(2), pp.359-365.

Remenyi, D. (2012) *Case study research: The quick guide series*. Reading: Academic Publishing International.

Reporter, A. 'Shoprite distribution centre hit by strike'. ILO [Onlin]. Available at: https://www.iol.co.za/business-report/companies/shoprite-distribution-centre-hit-by-strike-2005306 (Accessed on 28 April 2019).

Republic of South Africa (1998) *Government Gazette*, Vol. 397, No. 19040. 3 July. Pretoria.

Riggirozzi, P. (2010) 'Social policy in post-neo-liberal Latin America: the cases of Argentina, Venezuela and Bolivia', *Development*, 53(1), pp.70-76.

Ritchie, J., Lewis, J., Mcnaughton Nicholls, C., and Ormston, R. (2013) Qualitative Research Practice: A Guide for Social Science Students and Researchers. Los Angeles: Sage.

Ritson, N. (2011) 'Strategic Management' Neil Ritson and Ventus Publishing ApS [Online]. Available at: https://www.kau.edu.sa/Files/0057862/Subjects/Strategic%20Management%20Book.pdf (Accessed on 1 February 2010).

Robins, T. and Olley, J. (2019) 'Same same but different' Baker McKenzie [Online]. Available at: https://www.lexology.com/library/detail.aspx?g=3e552f12-58e9-4051-bfd9-ca5f02c80401&l=8CZ54G9 (Accessed on 1 February 2010).

Robson, C. (2002) *Real world research: A resource for social scientists and practitioner-researchers*. 2nd edn. Oxford: Blackwell.

Rodgers, G. (2008) 'The goal of decent work', *IDS Bulletin*, 39(2), pp.63-68.

Rodgers, G., Lee, E., Swepston, L. and Van Daele, J. (2009) *The International Labour* Organization and the quest for social justice, 1919-2009. Geneva: International Labour Office.

Rodgers, L. (2012) 'Vulnerable Workers, Precarious Work and Justifications for Labour Law: a Comparative Study', *E-Journal of International and Comparative Labour Law*, 1(3-4), pp. 87-113.

Rose, S., Spinks, N. and Canhoto, A. (2014) *Management research: Applying the principles*. London: Routledge.

Ross, S. (2019) 'What Are Some Common Features of a Mixed Economic System?', Investopedia [Online] Available at: https://www.investopedia.com/ask/answers/043015/what-are-some-common-features-mixed-economic-system.asp (Accessed on 16 May 2020).

Rothstein, J. (2016) *When Good Jobs Go Bad: Globalization, De-Unionization, and Declining Job Quality in the North American Auto Industry*. New Brunswick, NJ: Rutgers University Press.

Rubery, J. (1978), Structured Labour Markets, Workers Organisation and Low Pay, *Cambridge Journal of Economics*, 2(1), pp.17-36.

Rubery, J. and Grimshaw (2003) *The organisation of employment: An international perspective*. Houndsmills, Basingstoke, Hampshire: Palgrave MacMillan.

Rubery, J. and Piasna, A. (2016) *Labour market segmentation and the EU reform agenda: developing alternatives to the mainstream. ETUI Research Paper*, 10.

Rubery, J., Earnshaw, J., Marchington, M., Cooke, F. and Vincent, S. (2002) 'Changing organizational forms and the employment relationship', *Journal of management studies*, 39(5), pp.645-672.

Rubin, H. and Rubin, I. (2011) *Qualitative interviewing: The art of hearing data.* 3rd edn. Thousand oaks, CA: Sage.

Rumney, R. (2004) 'Who own South Africa: An Analysis of State and Private Ownership Patterns', *in State of the Nation*, 2004-5, HSRC Press, Pretoria, pp.401-422.

Russell, H., Leschke, J. and Smith, M. (2019) 'Balancing flexibility and security in Europe? The impact of unemployment on young peoples' subjective well-being, *European Journal of Industrial Relations*, pp.1-19.

Ryan, B., Scapens, T. and Theobald, M. (2002) *Research Method and Methodology in Finance and Accounting*. London: Thomson.

Sanders, N., Locke, A., Moore, C. and Autry, C. (2007) 'A Multidimensional Framework for Understanding Outsourcing Arrangements', *Journal of Supply Chain Management*, Vol.43(4), pp.3-15.

Sankaran, K. (2010) 'The need for an inclusive approach', in Tekle, T. (ed.) *Labour law and worker protection in developing countries.* Oregon: Hart Publishing.

Sartori, A. (2016) 'Temporary Agency Work in Europe: Degree of Convergence following Directive 2008/104/EU', *European Labour Law Journal*, 7(1), pp. 109-25.

Saunders, M., Lewis, P. and Thornhill, A. (2009) *Research methods for business students*. 5th edn. Harlow: Pearson Education Limited.

Sayer, A. (2000) *Realism and social science*. London: Sage.

Schneider, B. (2008) Comparing capitalisms: liberal, coordinated, network, and hierarchical varieties. Copy: Northwestern University, 37.

Schoer, V. & Leibbrandt, M. (2006). Determinants of job search strategies: evidence from the Khayelitsha/Mitchells Plain survey. South African Journal of Economics, 74(4), 702-724.

Scully, B. (2015) 'From the shop floor to the kitchen table: the shifting centre of precarious workers' politics in South Africa', *Review of African Political Economy*, 23 October, pp.1-17.

Seekings, J. and N. Nattrass (2005*) Class, Race and Inequality in South Africa*. Yale University Press: New Haven.

Segal, L. and Sullivan, D. (1997), 'The growth of temporary services work', *Journal of Economic Perspectives*, 11(2), pp. 117–136.

Senne Y., and Nkomo, S. (2015), 'The influence of labour broking practices on employment equity in South Africa: a case of two universities' *South African Journal of Labour Relations*, 39(1) pp. 58-70.

Serrano, M. (2015) *Regulating non-standard employment in ASEAN and East Asia: A comparative survey of labour laws and union strategies, paper presented in the 4th Conference of the Regulating for Decent Work Network*. Geneva: ILO.

Serrano, M. and Xhafa, E. (2016) From 'precarious informal employment' to 'protected employment': The positive transitioning effect of trade unions (No. 42). Global Labour University Working Paper. Econstor [Online] Available at: https://www.econstor.eu/bitstream/10419/156306/1/866055894.pdf (Accessed on 17 August 2019).

Sibika, R. (2019) *'Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others (JA14/2018) [2019] ZALAC 59 (12 September 2019'. Schindlers* [Online]. Available at: http://www.schindlers.co.za/2019/masoga-and-another-v-pick-n-pay-retailers-pty-ltd-and-others-ja14-2018-2019-zalac-59-12-september-2019/ (Accessed on 9 November 2019).
Silver, B. (2003) *Forces of labour: Workers' movements and globalization since 1870*. Cambridge: Cambridge University Press.

Simms, M. (2017) 'Unions and job quality in the UK: extending interest representation within regulation institutions', *Work and Occupations*, 44(1), pp. 47-67.

Simons, H. (2009) *Case study research in practice*. London: Sage.

Singh, A. and Zammit, A. (2004) 'Labour standards and the 'Race to the Bottom': Rethinking globalization and workers' rights from developmental and solidaristic perspectives', *Oxford Review of Economic Policy,* 20(1), pp.85-104.

Smit, N. and Fourie, E. (2010) 'Extending Protection to Atypical Workers, Including Workers in the Informal Economy, in Developing Countries', *The International Journal of Comparative Labour Law and Industrial Relations*, 26(1), pp. 43–60.

Smit, S. (2017) *'Heineken issue ferments: Labour-broking shows few signs of disappearing'*. Mail and Guardian [Online]. Available at: https://mg.co.za/article/2017-11-01-00-heineken-labour-issue-ferments (Accessed on 28 April 2019).

Smit, S. (2018) 'Luxor workers: 'After seeing one of our comrades lost his eye, we cried like babies.' Mail and Guardian [Online]. Available at: https://mg.co.za/article/2018-04-23-luxor-

workers-after-seeing-one-of-our-comrades-lost-his-eye-we-cried-like-babies (Accessed on 28 April 2019).

Smith, M. (1998) *Social Science in Question*. London: SAGE/Opcn University Press.

Smith, V. and Neuwirth, B. (2009) 'Temporary Help Agencies and the Making of a New Employment Practice', *Academy of Management Perspectives*, 23(1), pp.56-72.

Soskice, D. and Hall, P. (2001) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford: Oxford UP.

South African Foundation (1996) *Growth for All: An Economic Strategy for South Africa.* Johannesburg: South African Foundation.

South African Foundation (SAF) (1996). *Growth for All: An Economic Strategy for South Africa*. Johannesburg: South African Foundation.

South African Revenue Services (SARS) (2019) 'Interpretation note 17 (issue 5) Employees tax: independent contractors' SARS [Online]. Available at: http://www.sars.gov.za/AllDocs/LegalDoclib/Notes/LAPD-IntR-IN-2012-17%20-%20Employees%20Tax%20Independent%20Contractors.pdf (Accessed on 21 March 2019).

Spangler, E. (2017) 'When Good Jobs Go Bad: Globalization, De-Unionization, and Declining Job Quality in the North American Auto Industry', *Contemporary Sociology*, 46(4), pp. 471-473.

Staffing Industry Analysts (SIA) (2019) 'South Africa -Workforce Holdings full year revenue and profits up'. SIA [Online]. Available at: https://www2.staffingindustry.com/eng/Editorial/Daily-News/South-Africa-Workforce-Holdings-full-year-revenue-and-profits-up-49445 (Accessed on 30 March 2019).

Stake, R. (2005) *Multiple Case Study Analysis*. New York: Guilford Publications.

Stake, R. (1995) *The Art of Case Study Research*. Thousand Oaks, CA: Sage.

Stake, R. (1998) 'Case Studies', In Denzin, N. and Lincoln, Y. (eds) *Strategies of Qualitative Inquiry*. London: Sage Publications, pp.100-102.

Stake, R. (2000) 'The case study method in social inquiry', in Gomm, R., Hammersley, M. and Foster, P. (eds.) *Case study method*. London: Sage, pp. 19-26.

Standing, G. (1999*) Global Labour Flexibility: Seeking Distributive Justice*. Basingstoke: MacMillan.

Standing, G. (2011) *The Precariat: the new dangerous class.* London: Bloomsbury.

Standing, G., Sender, J. and Weeks, J. (1996) *Restructuring the Labour Market: The South African Challenge. An ILO Country Review.* Geneva: International Labour Office.

Stanford, J. (2017) 'The resurgence of gig work: historical and theoretical perspectives', *The Economic and Labour Relations Review*, 28(3), pp. 382-401.

Statistics South Africa (Stats SA) (2016) 'South African Quarterly Labour Force Survey, Quarter 1, 2016' *Stassa* [Online]. Available at http://www.statssa.gov.za/publications/P0211/P02111stQuarter2016.pdf (Accessed: 19 August 2016).

Statistics South Africa (Stats SA) (2018) 'Youth unemployment still high in Q1:2018', Stassa [Online]. Available at: http://www.statssa.gov.za/?p=11129 (Accessed on 10 December 2018).

Storrie, D. (2002) *Temporary agency work in the European Union*. Dublin: European Foundation for the Improvement of Living and Working Conditions.

Storrie, D. (2003) 'Conclusions: contingent employment in Europe and the flexibility-security trade-off' in Bergström, O. and Storrie, D. (eds.) *Contingent employment in Europe and the United States*. Cheltenham: Edward Elgar Publishing, pp.224-247.

Strauss, K. and Fudge, J. (2013) 'Temporary work, agencies and unfree labour: insecurity in the new world of work', in Fudge, J and Strauss, K. (eds.) *Temporary Work, Agencies and Unfree Labour*. London: Routledge, pp. 17-4.

Strauss, K. and Fudge, J. (2014) 'Temporary work, agencies and unfree labour: Insecurity in the new world of work', in Strauss, K. and Fudge, J. (eds.) *Temporary Work, Agencies and Unfree Labour*. New York: Routledge, pp. 17-41.

Strydom, M. (2017) *The status of employees employed by temporary employment services. Masters in Labour Law in the Faculty of Law.* The Nelson Mandela Metropolitan University South Africa.

Summers, C. (1997) 'Contingent employment in the United States, *Comparative Labor Law Journal*, 18(4), pp. 503-522.

Supiot, A. (1999) 'The transformation of work and the future of labour law in Europe: A multidisciplinary perspective', *International Labour Review*, 138(1), pp. 31-46.

Supiot, A., Meadows, P. and Casas, M. (2001) *Beyond employment: Changes in work and the future of labour law in Europe*. Oxford: Oxford University Press.

Tan, E. (2014) 'Human Capital Theory: A Holistic Criticism', *Review of Educational Research*, 84(3), 411–445.

Taylor, S. and Bogdan, R. (1984) *Introduction to Qualitative Research methods: The Search for Meanings.* New York: Wiley.

Tekle, T. (2010) 'Labour law and worker protection in the South: An evolving tension between models and reality', in Tekle, T. (ed.) *Labour law and worker protection in developing countries.* Oregon: Hart Publishing.

The Agency Workers Regulations 2010. UKSI [Online]. Available at: http://www.legislation.gov.uk/uksi/2010/93/contents/made (Accessed on 12 January 2019).

The Agency Workers Regulations 2010: Guidance. Government [Online]. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841981/agency-workers-regulations-2010-guidance.pdf (Accessed on 12 January 2019).

The Department for Business, Energy and Industrial Strategy (BEIS) (2018) Good Work: The Taylor Review of Modern Working Practices: Consultation on agency workers recommendations. Beisgovuk [Online] Available at: https://beisgovuk.citizenspace.com/lm/agency-workers/supporting_documents/20180206%20Agencyworkerconsultationdoc%20Final.pdf (Accessed on 14 January 2019).

The Department of Trade and Industry of South Africa (DTI) (2014), 'Economic Empowerment', DTI [Online]. Available at: http://www.dti.gov.za/economic_empowerment/bee.jsp (Accessed on 6 March 2018).
The Department of Trade and Industry of South Africa (DTI) (2014), 'Fronting', DTI [Online]. Available at: http://www.dti.gov.za/economic_empowerment/fronting.jsp (Accessed on 6 March 2018).

The International Confederation of Private Employment Agencies (CIETT), (2000) 'Orchestrating the Evolution of Private Employment Agencies towards a Stronger Society, International Confederation of Private Employment Agencies'. CIETT [Online]. Available at: http://www.wecglobal.org/fileadmin/templates/ciett/docs/Stats/Survey_Orchestrating_PrEAS_-_McKinsey-2000.pdf (Accessed on 15 March 2018).

The Memorandum of Objects of the Labour Relations Amendment Bill, (2012) DoL [Online]. Available at: http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf (Accessed on 24 May 2018).

The National Economic Development and Labour Council (NEDLAC) (2017) Nedlac - about us, NEDLAC [Online]. Available at http://nedlac.org.za/aboutus/ (Accessed on 9 February 2018).

The South African labour Guide (undated) 'UIF Unemployment Benefits'. Department of Labour [Online] Available at: https://www.labourguide.co.za/uif/907-uif-unemployment-benefits (Accessed on 18 April 2019).

The Trades Union Congress (TUC) (2011) *Delivering Equal Treatment for Agency Workers: a TUC bargaining guide.* TUC [Online] Available at: https://www.tuc.org.uk/sites/default/files/Agency-Workers-Bargaining-Guide.pdf (Accessed on 14 January 2020).

The Trades Union Congress (TUC) (2018a) *'Taylor Review: Agency Workers Recommendations*'. TUC [Online] Available at: https://www.tuc.org.uk/sites/default/files/TaylorReviewresponseAgencyworkers.pdf (Accessed on 14 January 2020).

The Trades Union Congress (TUC) (2018b) 'Ending the Undercutters Charter'. TUC [Online]. Available at: https://www.tuc.org.uk/research-analysis/reports/ending-undercutters-charter (Accessed on 14 January 2019).

The Unemployment Insurance Act 2001 (No. 63 2001) (UIA) Available at: https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/cooperatives/a63_01_0_UIFAct.pdf (Accessed on 18 April 2019).

Theron, J. (2004) 'Employment Is Not What It Used to Be: The Nature and Impact of the Restructuring of Work in South Africa', in Webster, E. and von Holdt, K. (eds.) *Beyond the Apartheid Workplace: Studies in Transition*. Pietermaritzburg: University of KwaZulu-Natal Press, pp. 302-323.

Theron, J. (2005) 'Intermediary or employer? Labour brokers and the triangular employment relationship' 26 *1ndustrial Law Journal*, 26(April), pp. 618-649.

Theron, J. (2008) 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' *1ndustrial Law Journal*, 29(1), pp.1-21.

Theron, J. (2014a) *'Working Paper No. 302. Non-Standard Work Arrangements in the Public Sector: The case of South Africa'*. Geneva: International Labour Organization.

Theron, J. (2014b) *'Non-standard employment and labour legislation: The outlines of a strategy'*, Institute of Development and Labour Law: Development and Labour Monograph Series. Cape Town: University of Cape Town.

Theron, J., Godfrey, S. and Visser, M. (2007) *Globalization, the impact of trade liberalization, and labour law: The case of South Africa*. Geneva: International Institute for Labour Studies.

Thomas, G. (2016) *How to do your case study*. 2nd edn. Los Angeles: Sage.

Thomas, M. (2009) *Regulating flexibility: The political economy of employment standards*. Quebec: McGill-Queen's Press-MQUP.

Thompson, P. (2003) 'Disconnected capitalism: or why employers can't keep their side of the bargain' Work, employment and society, 17(2), pp.359-378.

Tineke, A. and Stake, R. (2014) 'Science of the Particular: An Advocacy of Naturalistic Case Study in Health Research', *Qualitative Health Research*, 24(8), pp. 1150 -1161.

Tipple, G. (2006) 'Employment and work conditions in home-based enterprises in four developing countries: do they constitute decent work?', *Work Employment and Society*, 20(1), p.167-179.

Trade Economics (2018) 'South African Unemployment Rate' [Online] Available at: https://tradingeconomics.com/south-africa/unemployment-rate (Accessed on 19 January 2019).

Trades Union Congress (TUC) (2013) *Agency Workers and Equal Pay*. London: TUC.
Tshoose, C. and 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(1), pp. 334-346.

Tsogas, G. (2009) 'International Labour Regulation: What Have We Really Learnt So Far?', *Relations Industrielles/Industrial Relations*, 64(1), pp.75-94.

Turok, B., Chang, H. and Feraz, J. (2011) *Development in a divided country*. Auckland Park South Africa: Jacana Media (Pty) Ltd.

USAID, (2010) 'Emerging trends in supply chain management - Outsourcing public health logistics in developing countries' USAID [Online]. Available: http://apps.who.int/medicinedocs/documents/s21806en/s21806en.pdf (Accessed on 8 March 2018).

Valodia, I. and Devey, R. (2010) 'Formal-informal economy linkages: What implications for poverty in South Africa?', *Law, democracy & development*,14(1), pp. 1-26.

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

Van Eck, S. (2012) 'Employment Agencies: International Norms and Developments in South Africa', *The International Journal of Comparative Labour Law and Industrial Relations*, 28(1), pp.29-44.

Van Eck, S. (2014) 'Revisiting agency work in Namibia and South Africa: Any lessons from the Decent Work Agenda and the flexicurity approach?', *The International Journal of Comparative Labour Law and Industrial Relations*, 30(1), pp.49-66.

Van Wyk, J., van Heerden, A. and Roux, C. (2019) '*Section 198A3b deeming provision liability for the client employer regardless of the role that the employer still retains'*.

Werksmans [Online]. Available at: https://www.werksmans.com/legal-updates-and-opinions/section-198a3b-deeming-provision-liability-for-the-client-employer-regardless-of-the-role-that-the-employer-still-retains/ (Accessed on 1 February 2020).

Vatalidis, A. (2017) *The LAC rules on the TES deeming provision.* Werksmans Attorneys [Online] Available at: https://www.werksmans.com/legal-briefs-view/the-lac-rules-on-the-tes-deeming-provision/ (Accessed on 15 July 2017).

Venter, D. (2015) 'Who is the employer?', *Without Prejudice*, November, pp. 25-27.

Vermaas, A. (2019) '*Independent contractor or temporary employment service'*. Honey Attorneys [Online]. Available at: http://www.honeyattorneys.co.za/article/1130/Independent-Contractor-or-Temporary-Employment-Services (Accessed on 16 November 2019).

Verschuren, P. (2003) 'Case study as a research strategy: some ambiguities and opportunities', *International Journal of Social Science Research Methodology*, 6(2), pp. 121-139.

Vettori, M. (2005), *Alternative means to regulate the employment relationship in the changing world of work*. Unpublished Doctor of Laws Dissertation. University of Pretoria.

Virtanen, P., Vahtera, J., Kivimäki, Pentti, M., Ferrie, J. (2002) 'Employment security and health', *Journal of Epidemiology Community Health,* 56 (1), pp. 569-574.

Visser, J. (1998) 'Learning to Play: The Europeanisation of Trade Unions', in Pasture, P. and Verberckmoes, J. (eds.) *Working-Class Internationalism and the Appeal of National Identity*. Oxford: Berg, pp. 231-256.

Von Broembsen, M. (2012) 'Mediating from the margins: The role of intermediaries in facilitating participation in markets by poor producers', *South African Journal of Labour Relations*, 36(1), pp.31-53.

Von Holdt, K. (2002) 'Social movement unionism: The case of South Africa', *Work, Employment and Society*, 16(2), 283-304.

Von Holdt, K. (2003) *Transition from Below: Forging Trade Unionism and Workplace Change in South Africa*. Pietermaritzburg: University of KwaZulu Natal Press.

Von Holdt, K. and Webster, E. (2008) 'Organising on the periphery: new sources of power in the South African workplace', *Employee Relations*, 30(4), pp.333-354.

Vosko, L. (1997) 'Legitimizing the triangular employment relationship: emerging international labour standards from a comparative perspective', *Comparative Labour Law and Policy Journal*, 19(1), pp.43-77.

Vosko, L. (2000) *Temporary work: the gendered rise of a precarious employment relationship*. Toronto: University of Toronto Press.

Vosko, L. (2006) 'What is to be Done? Harnessing Knowledge to Mitigate Precarious Employment', in Vosko, L. (ed.) *Precarious Employment: Understanding Labour Market Insecurity in Canada*. Canada: McGill Queens University Press, pp. 379-388.

Vosko, L. (2009) 'Less than adequate: regulating temporary agency work in the EU in the face of an internal market in services', *Cambridge Journal of Regions, Economy and Society*, 2009(2), pp. 395-411.

Vosko, L. (2010) 'A new approach to regulating temporary agency work in Ontario or back to the future?', *Relations Industrielles/Industrial Relations,* 65(4), pp.632-653.

Voss, C., Tsikriktsis, N. and Frohlich, M. (2002) 'Case research in operations management', *International journal of operations & production management*, 22(2), pp.195-219.

Wallerstein I., Martin W. and Vieira S. (1992) *How Fast the Wind? Southern Africa, 1975-2000*. Trenton, New Jersey: Africa World Press.

Ward, K. (2002) 'UK temporary staffing: industry structure and evolutionary dynamics', *Environment and Planning A*, 35(1), pp. 889-907.

Waterman, P. (2001) *Globalization, social movements and the new internationalisms*, London, Continuum.

Webster (2019). www.merriam-webster.com. Webster's online dictionary. Available at: http://www.merriam-webster.com/dictionary/precarious. (Accessed on 14 June 2019).
Webster, E. (1985) *Cast in a radical Mould: Labour process and trade unionism in the foundries*. Johannesburg: Raven Press.

Webster, E. (2007) 'Labour in the era of globilisation', in Edigheji, O. (ed.) 'Rethinking South Africa's development path', *Policy: Issues and Actors,* 20(10), pp. 1- 214.

Webster, E. (2013) 'The promise and the possibility: South Africa's contested industrial relations path', *Transformation: Critical Perspectives on Southern Africa*, 81(1), pp.208-235.

Webster, E. (2019) *'New dawn or end of labour?: from South Africa's East Rand to Ekurhuleni'*. Daily Maverick [Online]. Available at: 'https://www.dailymaverick.co.za/article/2019-11-12-the-end-of-labour-revisiting-the-past-to-understand-the-future/ (Accessed on 16 November 2019).

Webster, E. and Englert, T. (2019) 'New dawn or end of labour?: from South Africa's East Rand to Ekurhuleni', Globilizations, DOI: 10.1080/14747731.2019.1652465.

Webster, E. and Omar, R. (2003) 'Work restructuring in post-apartheid South Africa', *Work and Occupations*, 30(2), pp.194-213.

Webster, E. and Sikwebu, D. (2010) 'Tripartism and economic reforms in South Africa and Zimbabwe', in Fraile, L. (ed.) *Blunting Neoliberalism*. London: Palgrave Macmillan, pp.176-223.

Webster, E., Benya, A., Dilata, X., Joynt, K., Ngoepe, K., & Tsoeu, M. (2008*) Making visible the invisible: Confronting South Africa's decent work deficit: Research Report prepared for the Department of Labour by the Sociology of Work Unit, University of the Witwatersrand, Johannesburg.* [Online] Available at: http://www.labour.gov.za/DOL/downloads/documents/research-documents/webster.pdf (Accessed: 30 June 2016).

Webster, E., Lambert, R. and Beziudenhout, A. (2011) *Grounding globalization: Labour in the age of insecurity*. Victoria Australia: Blackwell Publishing.

Weeks, J. (1999) 'Stuck in low GEAR? Macroeconomic policy in South Africa, 1996-98' *Cambridge Journal of Economics*, 23(1), p. 795-811.

Weil, D. (2014) *The fissured workplace: why work became so bad for so many*. Cambridge, Massachusetts: Harvard University Press.

Wells, D. (2005) 'Best practice in the regulation of international labor standards: Lessons of the US-Cambodia textile agreement', *Comparative Labour Law and Policy Journal*, 27(1), p.357-376.

Whitley, R. and Kristensen P H. (eds.). (1997). *Governance at Work: The Social Regulation of Economic Relations in Europe.* Oxford: Oxford University Press

Wiehahn Commission (1979) *Report of the Commission of Inquiry into labour legislation RP47/1979.* South Africa: Departments of Labour and Mines.

Williams, S., Abbott, B. and Heery, E. (2011) 'Non-union worker representation through civil society organisations: evidence from the United Kingdom', *Industrial Relations Journal*, 42(1), pp.69-85.

Williams, S., Abbott, B. and Heery, E. (2017) 'Civil governance in work and employment relations: how civil society organizations contribute to systems of labour governance', *Journal of Business Ethics*, 144(1), pp.103-119.

Williamson, O. (1970) *Corporate Control and Business Behaviour*. Englewood Cliffs, NJ: Prentice-Hall.

Williamson, O. (1975) *Markets and Hierarchies: Analysis and Antitrust Implications*. New York: Free Press.

Williamson, O. (1985) *The economic institutions of capitalism*. New York: The Free Press.

Williamson, O., Wachter, M. and Harris, J. (1975) 'Understanding the employment relation: The analysis of idiosyncratic exchange', *The Bell Journal of Economics*, pp.250-278.

Wilthagen, T. and Tros, F. (2004) 'The concept of 'flexicurity': A new approach to regulating employment and labour markets', *Transfer: European Review of Labour and Research*,10(2), pp.166-186.

Witt, M. and Jackson, G. (2016) 'Varieties of Capitalism and Institutional Comparative Advantage: A Test and Reinterpretation', *Journal of International Business Studies*, 47(1), pp.778-806.

Witt, M. and Redding, G. (2013) 'Asian Business Systems: Institutional Comparison, Clusters and Implications for Varieties of Capitalism and Business Systems Theory', *Socio-Economic Review*, 11(1), pp.265-300.

Witt, M., Kabbach de Castro, L., Amaeshi, K., Mahroum, S., Bohle, D. and Saez, L. (2018) 'Mapping the business systems of 61 major economies: a taxonomy and implications for varieties of capitalism and business systems research', *Socio-Economic Review*, 16(1), pp.5-38.

Wolcott, H. (2001) *Writing up qualitative research*. 2nd edn. Thousand Oaks CA: Sage.

Wolpe, H (1972) 'Capitalism and cheap labour-power in South Africa: From segregation to apartheid', *Economy and Society*, 1(4), pp.425-456.

Wood and Mahabir (2001) 'South Africa's Workplace Forum system: A stillborn experiment in the democratisation of work?' *Industrial Relations Journal*, 32(3), pp. 230-243.

Wood, G. and Brewster, C. (2007) Introduction: comprehending industrial relations in Africa. In Wood, G. and Brewster, C. (eds.), *Industrial relations in Africa*, pp.1-14.

Wood, G. and Frynas, J. (2006) 'The institutional basis of economic failure: Anatomy of the segmented business system', *Socio-Economic Review*, 4(2), pp.239-277.

Wood, G. and Harcourt, M. (1998) 'The rise of South African trade unions', *Labor Studies Journal*, 23 (1), p. 74-92.

Woods, P. (1999) *Successful Writing for Qualitative Researcher.* London: Routledge.

Workman-Davies, B and Vatalidis, A. (2015) *Labour Brokers and their clients are both employers of assigned employees in all respects.* Werksmans Attorneys [Online] Available at: https://www.werksmans.com/legal-briefs-view/labour-brokers-and-their-clients-are-both-employers-of-assigned-employees-in-all-respects/ (Accessed on 4 May 2018).

Wright, C. and Kaine, S. (2015) 'Supply chains, production networks and the employment relationship', *Journal of Industrial Relations*, 57(4), pp.483-501.

Wright, C., Wood, A., Trevor, J., McLaughlin, C., Huang, W., Harney, B., Geelan, T., Colfer, B., Chang, C. and Brown, W. (2019) 'Towards a new web of rules: An international review of institutional experimentation to strengthen employment protections', *Employee Relations: The International Journal*, 41(2), pp.313-330.

Wynn, M. (2013) 'Power politics and precariousness: the regulation of temporary agency work in the European Union', in Fudge, J and Strauss, K. (eds.) *Temporary Work, Agencies and Unfree Labour*. London: Routledge, pp. 64-85.

Yeung, H. (1997) 'Critical realism and realist research in human geography: A method or a philosophy in search of a method?', *Progress in Human Geography*, 21(1), pp.51-74.

Yin, R. (1994) *Case study research: Design and methods*. 2nd edn. Thousand Oaks CA: Sage.

Yin, R. (2003). *Case study research: Design and methods*. 3rd edn. Thousand Oaks, CA: Sage.

Yin, R. (2014) *Case study research: Design and methods*. 5th edn. Thousand Oaks CA: Sage.
Zekic, N. (2016) 'Job Security or Employment Security: What's in a Name?', *European Labour Law Journal*, 7(4), pp548-75.

Zhang, M., Bartram, T., McNeil, N., and Dowling, P. (2015) 'Towards a research agenda on the sustainable and socially responsible management of agency workers through a flexicurity model of HRM', *Journal of Business Ethics*, 127, pp.513–523.

Appendix 1: *Interview participants' details*

Interview Number	Interview Date	Location	Company	Position
1	13 June 2017	Johannesburg	Auditing firm: one of the top five auditing companies	Partner
2	27 June 2017	Johannesburg	Law firm: one of the top five law firms in South Africa	Partner - Employment Law
3	30 June 2017	Johannesburg	Large employment services group, including temporary employment services.	Head of Department
4	4 July 2017	Johannesburg	Law firm: one of the top five law firms in South Africa	Director - Employment Law Department
5	11 July 2017	Johannesburg	Employment services group, including temporary employment services.	Executive, HR
6	13 July 2017	Johannesburg	Law firm: one of the top five law firms in South Africa	Senior Associate - Employment Law
7	20 July 2017	Johannesburg	Law firm in Johannesburg	Senior attorney for the strategic litigation unit
8	1 August 2017	Johannesburg	Large national trade union in South Africa.	General Secretary
9	3 August 2017	Johannesburg	A registered, non-profit, voluntary organisation.	Director
10	11 August 2017	Johannesburg	International employment services group, including temporary employment services. One of the largest in South Africa	Managing Director
11	17 August 2017	Johannesburg	Confederation of business organisations.	Senior director level
12	24 August 2017	Johannesburg	Large trade union in South Africa.	Specialist Division Manager

13	1 September 2017	Johannesburg	An industry association in South Africa	Director
14	7 September 2017	Johannesburg	A labour law, Human Resources and Industrial Relations consultancy.	Chief Executive officer (CEO)
15	12 Sept 2017	Johannesburg	Large TES firm in South Africa.	CEO
16	19 Sep 2017	Cape Town	One of the largest retailers in South Africa (top 4).	Head of HR
17	21 Sep 2017	Pretoria	An international labour organisation	Director
18	6 October 2017	Port Elizabeth	A dispute resolution body.	Senior operations employee
19	13 Oct 2017	Johannesburg	Many years of experience working for relevant government departments.	Director level
20	17 Oct 2017	Cape Town	Cape Town Bar	Advocate at the Cape Town Bar
21	20 Oct 2017	Johannesburg	A trade union federation in South Africa.	Spokesperson
22	22 October 2017	Pretoria	A South African Government department	Director
23	23 October 2017	Johannesburg	Johannesburg Bar Labour Court	Advocate of the Johannesburg Bar Acting judge of the Labour Court
24	23 October 2017	Pretoria	An attorneys' firm specialising in South African labour law	Attorney
25	25 Oct 2017	Johannesburg	Leading international business law and litigation firm.	Partner

26	26 Oct 2017	Johannesburg	Large trade union in South Africa	Head of Legal
27	3 Nov 2017	Pretoria	Bargaining Council Association	Manager
28	3 Nov 2017	Johannesburg	Law firm: one of the top five law firms in South Africa	Associate (Attorney)
29	8 Nov 2017	Johannesburg	Law firm specialising in labour law	Director Acting Judge of the Labour Court
30	21 Nov 2017	Johannesburg	Staffing Confederation	Director
31	11 Jan 2018	Johannesburg	A labour law, Human Resources and Industrial Relations consultancy.	Director
32	19 Jan 2018	Johannesburg	A staffing solutions business, including temporary employment services	COO
33	14 & 15 Feb 2018	Johannesburg	Large law firm known for their expertise in labour law	Director Acting judge of the Labour Court

Appendix 2: *Interview invitation letters for participants*

Kingston University London

Faculty of Business

T: +44 (0)208 417 9000
F: +44 (0)208 417 5026
www.kingston.ac.uk

Kingston Hill
Kingston-upon-Thames
Surrey KT2 7LB
UK

Date

Dear

PhD interview invitation (*for participants other than union participants*)

I am studying for the degree of Doctor of Philosophy in the Faculty of Business and Law at Kingston University London. I have read your online profile and I believe that you would add considerable value to my thesis on labour brokers in South Africa.

The main unit of analysis of the research is temporary agency or labour broker working in South Africa. More specifically, the research aims to evaluate the character, impact, regulatory framework and social/institutional context of temporary agency working in South Africa. One of the primary objectives is to find out how temporary agency working in South Africa is influenced by the interplay between the pressures of the economy (the driving trends); the norms of the ILO (decent work); the local actors and their institutional structures (trade unions and employer organisations). I have attached a letter of recommendation from my supervisors that provides further details of the study.

Would it be possible to conduct a telephonic interview with you for approximately 20-30 minutes, at a time and date that suits you, on either a Tuesday, Thursday or Friday? The following are the types of questions that I would like to ask but essentially, I would like to know what is of interest to you regarding labour brokering in South Africa.

1. What would you say are the key trends in use of labour brokers?
2. What are the general perceptions of labour brokering and how are these changing?

3. What would you say is the impact of the legal framework and government policies on labour brokering?
4. Do you believe there is a place for labour brokers in the South African labour market?
5. What are your thoughts about labour brokers and the ILO concept of 'decent work'?
6. I am also particularly interested in information about the differences in labour brokering in different sectors and occupational groups.

As it is part of an academic thesis, you and your firm may remain anonymous and I will send you a confidentiality undertaking prior to the interview.

I look forward to your response.

Yours sincerely

Ronelle Barreto

Contact details:

Researcher's contact details:

Phone: XXXX

Email: XXXXX

Deans' contact details:

Email: R.Tuninga@kingston.ac.uk

Phone: 0044 (0) 208 417 5228

Office: KH 1021, Kenry House, Kingston Hill

Kingston University London

Faculty of Business

T: +44 (0)208 417 9000
F: +44 (0)208 417 5026
www.kingston.ac.uk

Kingston Hill
Kingston-upon-Thames
Surrey KT2 7LB
UK

Date

Dear

PhD interview invitation (*union participants*)

By way of introduction, I am studying for the degree of Doctor of Philosophy in the Faculty of Business and Law at Kingston University London. A previous interview participant recommended you as they believed that you would add considerable value to my thesis on labour brokers in South Africa.

In order to provide a brief summary of my research, the main unit of analysis is labour broker working in South Africa. More specifically, the research aims to evaluate the character, impact, regulatory framework and social/institutional context of labour broker working in South Africa. One of the primary objectives is to find out how labour broker working in South Africa is influenced by the interplay between the pressures of the economy (the driving trends); the norms of the ILO (decent work); the local actors and their institutional structures (trade unions and employer organisations). In this regard, I have attached a letter of recommendation from my supervisors that provides further details of the study.

Would it be possible to conduct a telephonic interview with you for approximately 20-30 minutes, at a time and date that suits you, on either a Tuesday, Thursday or Friday? The following are the types of questions that I would like to ask but essentially, I would like to know what is of interest to you regarding labour brokering in South Africa.

1. What would you say are the key trends in use of labour brokers?
2. What are the general perceptions of labour brokering and are these changing?

3. What are your thoughts about the Government's policies on labour brokering and what are the key causes or influences of these policies?
4. What are your thoughts about the labour movement's response to these policies?
5. Do you see union policies concerning labour broker workers changing in the future, and if so how?
6. What are your thoughts about labour brokers and the ILO concept of 'decent work'?
7. I am also particularly interested in information about the differences in labour brokering in different sectors and occupational groups.

As it is part of an academic thesis, you and the union may remain anonymous and I will send you a confidentiality undertaking prior to the interview.

I look forward to your response.

Yours sincerely

Ronelle Barreto

Contact details:

Researcher's contact details:

Phone: XXXXX

Email: XXXXXX

Deans' contact details:

Email: R.Tuninga@kingston.ac.uk

Phone: 0044 (0) 208 417 5228

Office: KH KH 1021, Kenry House, Kingston Hill

Appendix 3: *Written consent to participate in a research study*

Kingston University London

Faculty of Business

T: +44 (0)208 417 9000
F: +44 (0)208 417 5026
www.kingston.ac.uk

Kingston Hill
Kingston-upon-Thames
Surrey KT2 7LB
UK

WRITTEN CONSENT TO PARTICIPATE IN A RESEARCH STUDY

Statement by (name of participant)

- I confirm that I have read and understood the information sheet/letter of invitation for this study. I have been informed of the purpose of taking part.

  Title of Study: **Temporary employment services work in South Africa**

- I understand what my involvement will entail and any questions have been answered to my satisfaction.
- I understand that my participation is entirely voluntary, and that I can withdraw at any time without prejudice.
- I understand that all information obtained will be confidential.
- I agree that research data gathered for the study may be published and stored before and after the examination process, provided that I cannot be identified as a subject.
- Contact information has been provided should I (a) wish to seek further information from the investigator at any time for purposes of clarification (b) wish to make a complaint.

Participant's Signature---------- Date ----------

Statement by Ronelle Barreto (researcher)

- I have explained this project and the implications of participation without bias and I believe that the consent is informed and that the participant understands the implications of participation.

Ronelle Barreto (researcher)

Appendix 4: *Contents page for the Framework Document*

SOUTH AFRICAN TEMPORARY AGENCY WORK: FRAMEWORK DOCUMENT

Contents

D. The context of temporary agency work

- **a. The unemployment context**
- **b. The context of the lack of social security**
- **c. The context of a youth based industry**
- **d. The South African demographic context**
- **e. The context of the tax structure**
- **f. The context of a minimum wage**

E. The ILO framework for temporary agency workers

- **a. General ILO context**
- **b. The ILO Convention 181**
- **c. The ILO concept of 'Decent Work'**
- **d. The Decent Work Country Program (DWCP)**
- **e. The ILO and the future of work**

F. The national legal framework for temporary agency workers

- **a. The historical legislation governing temporary agency work**
- **b. Protection of employees earning below the threshold of R205 433.30 per annum**
- **c. Protection of employees earning above the threshold of R205 433.30 per annum**
- **d. Where does the employment relationship reside within the triangular arrangement?**
- **e. The 'deeming' provisions**
- **f. 'Equal treatment' provisions**
- **g. Organisational rights provisions**
- **h. Provisions regarding the registration of labour brokers**

G. Problems with the interpretation and implementation of the amendments

- **a. General difficulties with the implementation and interpretation of the law**
- **b. Section 197 - transfer of a business as a going concern**
- **c. Section 189 - 'retrenchments' or redundancies**
- **d. Difficulties with dismissal disputes**

H. Problems with the enforcement of legislation

I. **Responses to the new legislative amendments**
    1. **The history of the drafting of the new amendments**
    2. **The nature of litigation after the amendments**
    3. **The response of temporary employment agencies or 'labour brokers' to the new amendments**
    4. **The response of clients of the temporary employment agencies, to the new amendments**
    5. **The response of temporary employment agency workers to the new amendments**

J. **The exploitation of temporary agency workers**
    a. **Historical exploitation**
    b. **Current exploitation, fear and abuse**

K. **The union response to temporary agency work**
    a. **Historical union responses**
    b. **Current union responses**
    c. **Alternatives to unionisation**

L. **Supply chain management and the temporary agency worker**

M. **Bargaining councils, collective and sectoral agreements**

N. **Difficulties experienced in trying to speak to labour broker workers**

Appendix 5: *Extract of the Framework Document*

A. The growth and importance of temporary agency work

However, if we look at why is it that labour brokers continue to flourish it is largely because part of the workforce is made up of individuals who may not be able to be directly employed by a company (Int1.p2. par2).

You know the Labour Relations Act was amended and the amended version was promulgated in January 2015 (Int3. P29. Par2). And subsequent to that there has been a number of changes but some of the changes are very sector specific, so you know I don't know if you want to maybe differentiate between what we would call industrial services (Int3. p29. Par4). In our industry certainly from the [Company name] point of view we've got industrial services which places your traditional blue-collar workers, anything from a general worker through to potentially an engineer. Then we have what we call support services which is your white-collar temporary employment services or temporary work agency. And that would be your bank tellers your call centre agents and the like (Int3. pp29-30. Par8). And then the third and final classification that we use is what we call professional services. And professional services relate to your IT on practice you know your java programmers your systems analysts your developers etc. (Int3. p30. Par10).

[paragraphs deleted]

RB: Okay has the [*deleted*] noticed particular trends in the industry? (Int17.p255. Par.25). The industry has continued to increase the number of people it takes on (Int17.p255. Par.26). So, it has – I don't have the empirical figures – but it definitely is a much it started probably at the [00:07:13] of the labour market, but it is now one of the key players in the market for sure. That continues to be contested, unfortunately is also true, (Int17.pp255-256. Par.28). And that the industry itself is striving to move towards better regulation. And I have gone to meetings and discussed with some of the representatives of the industry particularly on how the industry can provide a better image and a cleaner image of itself. The reality is that it is now a key factor in the labour market (Int17.p256. Par.30). RB: And at these meetings what has been discussed in terms of that image and how to improve it? (Int17.p256. Par.31). If they had to fit with the issue of the triangular relationship, how to handle it. Because you can't improve the image unless you

deal with the substantive issues, the difficult issues particularly for organised labour on the table (Int17.p256. Par.32).

The labour broker industry I think it is quite a substantive, well I won't call it a job creator, there is a debate about whether or not it creates jobs, or you know what the status is. But it's been a substantive industry in the labour market in South Africa for some time, and to a certain degree they had been seen as institutions that affectively supply cheap labour. Now that is not my view, but that is the general impression a lot of times from society […] (Int18.p265. Par.12).

[deleted paragraphs]

Yes, look I think we've seen an enormous growth in the industry from roundabout 2000 roughly and it does play I think a significant role in the labour market. I think since the amendments were introduced to Section 198 in 2015, it is a little bit unclear how the industry will be developing into the future. So, I think we are in a bit of a transition period and it is a bit difficult to know exactly what the future holds, but it is still a big significant industry. And what the amendments did in 2015 was not to really undermine the operation of the industry, but more to regulate its way of operating. And the real effects of that we'll have to see in time what impact that has on the industry (Int22.p364. Par.18). RB: So, you would say that there is a place for the industry in the labour market? (Int22.p364. Par.19). I do think so, I think that what is important to recognise is, that the industry is quite a diverse one, there are a number of well-established temporary employment service companies that do follow the regulatory model that's in place in law, do provide certain benefits for the employees that they place. But I'm afraid the industry combines very sort of low end, more informal operations, where there have been a significant number of abuses associated with labour brokering and temporary placement. And that's really where I think as government, we have been aiming the policy to have maximum affect to try and regulate those who do not provide properly for the employees that are placed on a temporary basis.

[deleted paragraphs]

Appendix 6: *Kingston University application form for ethical review (RE4) for research involving human participants*

PLEASE REFER TO THE RE4 GUIDANCE NOTES AND SUPPLEMENTARY FORMS WHEN COMPLETING THIS APPLICATION

APPLICATION FORM FOR ETHICAL REVIEW RE4

FOR RESEARCH INVOLVING HUMAN PARTICIPANTS

SECTION A

Is this an application for a 'block release agreement':	Yes		No **X**	

If *yes*, please specify the name of the group/cohort and note who will be responsible for ethical oversight of projects in this area (the block release holder); this will usually be the module leader, supervisor or head of subject. This RE4 form should present a project *typical* to this group/cohort.

Project title:

Temporary agency working in South Africa

Name of the lead applicant:

Name (Title / first name / surname):	Mrs. Ronelle Barreto
Position held:	PhD student
Department/School/Faculty:	Kingston University Business School
Telephone:	DELETED
Email address:	DELETED

Name of co-applicants:

Name (Title / first name / surname):	
Position held:	
Department/School/Faculty:	
Telephone:	
Email address:	

Name (Title / first name / surname):	
Position held:	
Department/School/Faculty:	
Telephone:	
Email address:	

Name (Title / first name / surname):	
Position held:	
Department/School/Faculty:	
Telephone:	
Email address:	

Is the project:					
	Student research	Yes	**X**	No	
	KU Staff research	Yes		No	
	Research on KU premises	Yes		No	**X**

If it is STUDENT research:

Course title	PhD Business Research and Business Management
Supervisor/DoS	

	Dr. Enda Hannon

<u>SECTION B</u> ***(Complete this section if another ethics committee has already granted approval for the project. Otherwise, proceed to Section C)***

Committee that granted approval	
Date of approval	

Please attach evidence that the project has been fully approved (usually an approval letter). The original application should be retained on file in the Faculty for inspection where necessary. The Faculty Research Ethics Committee (FREC) may require further information or clarification from you and you should not embark on the project until you receive notification from the FREC that recognition of the approval has been granted. You should proceed directly to Section D of this form and submit this as a fast-track application.

SECTION C Provide a brief project description (max. 150 words). This should be written for a lay audience

The proposed research aims to combine data from different sources, with the main unit of analysis being temporary agency working in South Africa. More specifically, the proposed research aims to evaluate temporary agency working in South Africa as a whole, in order to obtain the best possible understanding of the character, impact, regulatory framework and social/institutional context of temporary agency working in South Africa. In this regard, internal comparison across sectors, and in different geographical locations, may facilitate deeper understanding of agency working in South Africa.

The objective of the proposed research is to answer the following questions:

4. **What is the current position in terms of the experiences of the agency worker in South Africa?**
5. **What is the regulatory framework for temporary agency working in South Africa?**
6. **How is agency working in South Africa influenced by the prevailing social institutional context?**
7. **How is agency working in South Africa influenced by the norms and practices of the International Labour Organisation (ILO)?**
8. **How is agency working in South Africa influenced by the interplay between the pressures of the economy (the driving trends); the norms of the ILO (decent work); the local actors and their institutional structures (trade unions, employer organisations)?**

Estimate duration of the project (months)	48 months
State the source of funding	Kingston University PhD studentship

Yes		No	**X**

Is it collaborative research?

If YES, name of the collaborator institutions:

1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	

Briefly describe the procedures to be used which involve human participants

It is anticipated that temporary agency workers and other key informants will be interviewed. These interviews will be guided conversations, facilitated by a checklist of topics and questions to be covered. The specific application of this approach will differ according to the type and purpose of the interview. As a result, the interviews will not be restricted by ascribing too many predetermined categories to the interview schedule. The aim will be to draw out a range of relevant themes, including unexpected ones. The researcher will use in-depth, semi-structured interviews which are common in qualitative research. The in-depth nature of the interviews lies in the intention of the interviewer to uncover details of the interviewee's experience. It is anticipated that the interviews will be on a one-to-one basis.

Summarise the data sources to be used in the project

Temporary agency workers, key informants and experts in the field will be interviewed. The interviews will, where possible, be recorded and transcribed. The researcher will take hand written notes during the interviews. Documents may also be used for contextual information about events that cannot be directly observed, or to question information from other sources. It is difficult to anticipate at this stage what documents will be accessible to the researcher. However, the following are examples of some of the documents that may be relevant and available: pro forma terms and conditions of engagement, any union documentation, contractual documents and other documents that may provide information regarding any benefits that they may receive, may be of interest. News clippings and other articles appearing in mass media or in community newspapers may also provide a source of information for the case study.

Storage, access and disposal of data

Describe what research data will be stored, where, for what period of time, the measures that will be put in place to ensure security of the data, who will have access to the data, and the method and timing of disposal of the data.

Interviews with participants will be recorded and the audio files together with the transcripts of the interviews will be stored. It is anticipated that the raw data will be stored until after the examination process as the examiners may need to have access to the data. The following data protection principles will be followed:

- Personal information such as names and contact information will be stored separately from the research data such as audio recordings and transcripts. This will be achieved by giving the participants a serial number and a pseudonym which will be assigned for the research.
- The electronic files or any documents linking serial numbers and pseudonyms to participants will be kept in a separate location from the research data.
- The paper documents and electronic files will be stored in a lockable cabinet or on pass-word protected electronic device. Only the members of the research team or the examiners, will have access to these documents.
- If data is shared with others, such as supervisors or examiners, these will be securely transferred. Pseudonyms will be used from the outset when emailing data.

Consent will be obtained from the participants to store the data, concurrently with their consent to participate in the research. At the end of the interview, once they have knowledge of what the data entails, they will be verbally requested to agree that the data can be stored. This revised, verbal consent will form part of the interview material and will be recorded and transcribed.

Risk Assessment Questionnaire: Does the proposed research involve any of the following?

		YES	N
0.	The use of human biological material?		X
1.	Children or young people under 18 years of age?		X
1.a	If YES, have you complied with the requirements of the DBS?		

2.	People with an intellectual or mental impairment, temporary or permanent?		X
3.	People highly dependent on medical care, e.g., emergency care, intensive care, neonatal intensive care, terminally ill, or unconscious?		X
4.	Prisoners, illegal immigrants or financially destitute?		X
5.	Women who are known to be pregnant?		X
6.	Will people from a specific ethnic, cultural or indigenous group be targeted in the proposed research, or is there potential that they may be targeted?		X
7.	Assisted reproductive technology?		X
8.	Human genetic research?		X
9.	Epidemiology research?		X
10.	Stem cell research?		X
11.	Use of environmentally toxic chemicals?		X
12.	Use of ionizing radiation?		X
13.	Ingestion of potentially harmful or harmful dose of foods, fluids or drugs?		X
14.	Contravention of social/cultural boundaries?		X
15.	Involves use of data without prior consent?		X
16.	Involves bodily contact?		X

17.	Compromising professional boundaries between participants and researchers?		X
18.	Deception of participants, concealment or covert observation?		X
19.	Will this research significantly affect the health* outcomes or health services of subjects or communities?		X
20.	Is there a significant risk of enduring physical and/or psychological harm/distress to participants?		X
21.	Does your research raise any issues of personal safety for you or other researchers involved? (especially if taking place outside working hours or off KU premises)		X
22.	Will the research be conducted without written informed consent being obtained from the participants except where tacit consent is given by completing a questionnaire?		X
23.	Will financial/in kind payments (other than reasonable expenses and compensation for time) be offered to participants? (Indicate in the proposal how much and on what basis)		X
24.	Is there a potential danger to participants in case of accidental unauthorised access to data?		X

[**Note** *health is defined as not just the physical well-being of the individual but also the social, emotional and cultural well-being of the whole community].

<u>SECTION D</u> ***(To be signed by all applicants)***
Declaration to be signed by the applicant(s) and the supervisor (in the case of a student):

- I confirm that the research will be undertaken in accordance with the Kingston University *Guidance and procedures for undertaking research involving human participants.*

- I will undertake to report formally to the relevant Faculty Research Ethics Committee for continuing review approval where required.

- I shall ensure that any changes in approved research protocols or membership of the research team are reported promptly for approval by the relevant Faculty Research Ethics Committee.

- I shall ensure that the research study complies with the law and University policy on Health and Safety.

- I confirm that the research study is compliant with the requirements of the Disclosure and Barring Service where applicable.

- I am satisfied that the research study is compliant with the Data Protection Act 1998, and that necessary arrangements have been, or will be made with regard to the storage and processing of participants' personal information and generally, to ensure confidentiality of such data supplied and generated in the course of the research.
  (Further advice may be sought from the Data Protection Officer, University Secretary's Office)

- I shall ensure that the research is undertaken in accordance with the University's Single Equality Scheme.

- I will ensure that all adverse or unforeseen problems arising from the research project are reported immediately to the Chair of the relevant Faculty Research Ethics Committee.

- I will undertake to provide notification when the study is complete and if it fails to start or is abandoned;

- (For supervisors, *if the applicant is a student)* I have met and advised the student on the ethical aspects of the study design, and am satisfied that it complies with the current professional (*where relevant),* departmental and University guidelines. I accept responsibility for the conduct of this research and the maintenance of any consent documents as required by this Committee.

- I understand that failure to provide accurate information can invalidate ethical approval.

Is this an application for fast-track ethical approval? (Fast track is **only** available for projects either pre-approved by another ethics committee, or where you have accurately indicated 'No' to every question on the Risk Assessment Questionnaire – Pg4)	**Yes**	**X**	**No**	

Please sign and date	*Signature*	*Date*
Lead applicant		
Co-applicant		

Co-applicant		
Co-applicant		
Supervisor		23/3/17

NOTE

If this is a block release application and/or you have answered YES to any of the questions in the Risk Assessment, you must complete a full application for ethical approval and provide the information outlined in the checklist below. Your project proposal should show that there are adequate controls in place to address the issues raised in your Risk Assessment.

If you have answered NO to all of the questions in the Risk Assessment you may submit the form to your Faculty Ethics Administrator as a fast-track application. You must append your participant information sheet. The Faculty Research Ethics Committee (FREC) may require further information or clarification from you and you should not embark on the project until you receive notification from your Faculty that recognition of the approval has been granted.

CHECKLIST ***(Where a full application for ethical approval is required)***

Please complete the checklist and attach it to your full application for ethical approval:

Before submitting this application, please check that you have done the following: (*N/A = not applicable)*	**Applicant**			*Committee use only*		
	Yes	**No**	**N/A**	**Yes**	**No**	**N/A**

All questions have been answered	**X**					
All applicants have signed the application form	**X**					
The research proposal is attached	**X**					
Informed Consent Form is attached	**X**					
Participant Information Sheets are attached	**X**					
All letters, advertisements, posters or other recruitment material to be used are attached	**X**					
All surveys, questionnaires, interview/focus group schedules, data sheets, etc, to be used in collecting data are attached	**X**					
Reference list attached, where applicable	**X**					