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TEMPORARY EMPLOYMENT SERVICES GUIDELINE



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Temporary employment services and the law

Temporary employment services (TES) are commonly referred to as labour brokers, in South Africa.

TES are regulated mainly by the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA).

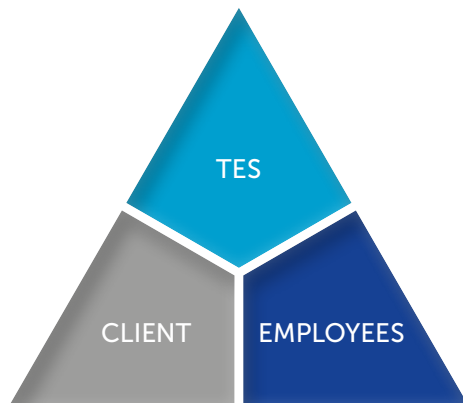
Amendments to the LRA, which came into effect in January 2015, affect sections 198 and 198A of the act, and brought about changes to the way a relationship between a TES, its employees and its clients is regulated.

Some of the amendments and their interpretations have been tested in the courts and the outcomes of the interpretations have significant consequences on employers in South Africa.

What is a temporary employment service?

The LRA defines a TES as:

" ... any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client and who are remunerated by the temporary employment service."



Must a TES register?

A TES must register to conduct business, but the fact that it is not registered is not a defence to any claim instituted in terms of section 198A of the LRA, which is discussed below. The effective date of this requirement is yet to be proclaimed.

Does the LRA differentiate between TES employees?

The LRA contains general provisions that apply to a TES and all of its employees, and specific provisions that apply to the TES and its employees earning below the prescribed BCEA threshold. With effect from 1 March 2021, the Minister of Employment and Labour has increased the annual earnings threshold to R211,596.30 per annum. This represents an increase of R6,163 from the previous amount of R205,433.30, which had been in effect since 1 July 2014.

Section 198A of the LRA applies only to employees earning below the threshold. These employees are often considered to be vulnerable employees and are afforded additional protections in terms of section 198A.

What Are Temporary Services?

The term "*temporary services*" is defined in the LRA as:

- Services limited to a fixed time period of not more than three months
- Where the employee is a substitute for a temporarily absent employee of another employer (i.e the client of the TES)
- Where a collective agreement or sectoral determination designated a particular work category as a temporary service, or designated the maximum temporary period

Why is it important to distinguish between a TES and an independent contractor or service provider?

A person who is an independent contractor or service provider is not an employee of a client and is not a TES.

The employees of the independent contractor or service provider cannot claim that a TES relationship exists between the company outsourcing the work and the independent contractor or service provider rendering the service.

The employees of an independent contractor or service provider cannot be deemed employees of the company outsourcing the work, even after the expiry of the three-month period.

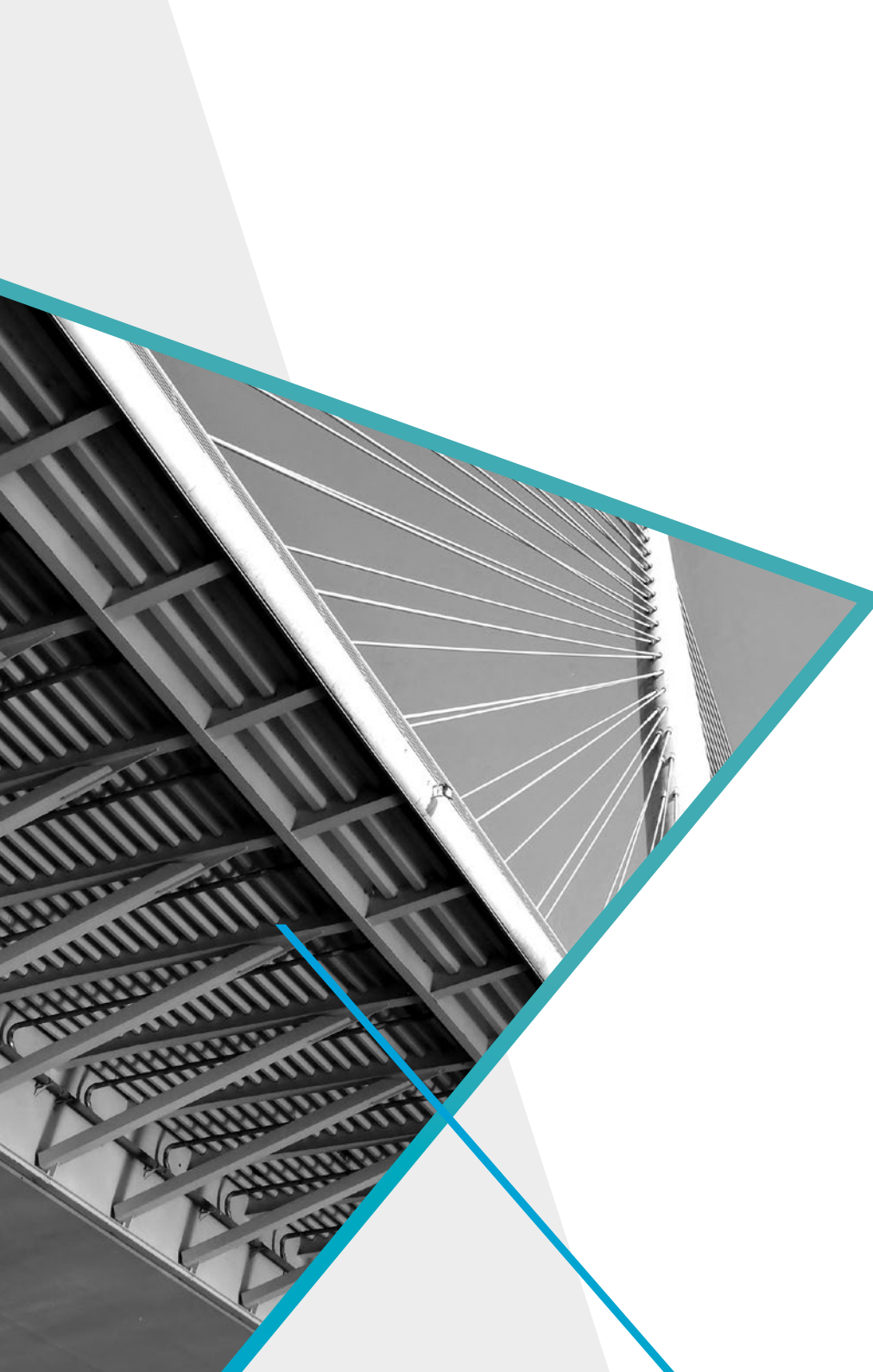
In *Victor and others v Chep South Africa (Pty) Ltd [2021] 1 BLLR 53 (LAC)*, the employees were employed, by Contracta Force Corporate Solutions (Pty) Limited (C-Force), to repair wooden pallets for the client. A service level agreement (SLA) was in place which indicated that C-Force was a service provider. At the CCMA, the commissioner scrutinising the SLA, the nature of the relationship between the parties, the degree of control, who directs the work to be performed by the employees and who had the right to discipline the employees found that the true nature of the relationship was a TES relationship.

A review of the Commissioner's findings was referred to the Labour Court (LC). At the LC, it was found that the commissioner erred and in fact no TES relationship existed. On appeal, the Labour Appeal Court (LAC) found the LC's approach too restrictive and agreed with the commissioner. It held that the first question in deciding if a company is a TES in terms of section 198(1) of the LRA is whether it has provided other persons to a client for reward, where employees are brought to the client by a third party to perform work at its premises, this would normally be at least an indication that the employees were procured to work for the client especially, if the client retains overarching control over the work process and can determine whether the employee continues to perform his or her work at all.

Secondly, whether the provider procured the employees for reward. The LAC found that there is no reason why the reward payment to a TES cannot be calculated by reference to tasks or products. All that section 198(1) of the LRA requires is that employees be provided to a client for reward and that the employee be remunerated by the provider. The method for computing the reward payable, by the client to the provider, is not alone a sufficient basis to exclude the provider from the TES category. The substance of the arrangement is more definitive than the form.

The LAC further held that the factors in deciding if procured to "perform work for the client" are the following: questions of control and integration, including the manner in which the employees work, the authority to which they are subjected, the degree they are integrated into the functioning of the organisation and the provision of the tools of the trade and work equipment.





What is an independent contractor?

An independent contractor renders the service itself and does not provide labour to another.

An independent contractor is a person or entity undertaking to perform a specific service or task and on completion of the task or production of the result, its client pays the independent contractor for the result or product.

There is no employment (or even co-employment) relationship between the client and the independent contractor or any relationship between the employees of the independent contractor and the client.

What does joint and several liability mean?

The TES and its client are jointly and severally liable if the TES contravenes a collective agreement it concluded with its employees in a bargaining council that regulates terms and conditions of employment or a binding arbitration award regulating terms and conditions of employment, the BCEA and/or a sectoral determination made in terms of the BCEA.

The employee may institute proceedings against the TES, the client of the TES, or both, where there is joint and several liability or where the employee (earning below the threshold) is deemed to be an employee of the client of the TES.

In addition, an employee may enforce an order or award made against the TES or the client against either party.

Who is responsible for the remuneration and employment contracts of the TES employee?

The TES must provide the employee with written particulars of employment that comply with section 29 of the BCEA when the employee commences employment. If the TES fails to remunerate its employees placed with a client, the failure constitutes a breach of the BCEA, and the TES and its client are jointly and severally liable for payment of remuneration. After a three-month period of employment with the client, the TES and the client may elect to re-evaluate their commercial arrangement.

Who enforces the provisions relating to temporary employment?

The Department of Labour may intervene.

A bargaining council which has jurisdiction over the client may enforce the provisions of an agreement concluded in the bargaining council relating to temporary employment.

The employees may seek relief in the Commission for Conciliation, Mediation and Arbitration (CCMA).

What is “deemed employment”?

The LRA amendments [specifically section 198A(3)(b)] introduced the concept of “deemed employment” in instances where TES employees, who earn below the threshold, do not perform a temporary service as defined in the LRA (i.e where the TES employee is assigned to the client for longer than three-months, not as a substitute for a temporarily absent employee of the client, nor assigned to a particular work category designated by a collective agreement or sectoral determination as a temporary service).

In such circumstances, the employee is “deemed to be the employee of that client and the client is deemed to be the employer.” Unless the provisions in the LRA relating to fixed-term contracts in respect of employees

earning below the threshold applies, the employees will be deemed to be employed on an indefinite basis by the client. In other words, the TES will no longer be considered to be the employer of the employee at the expiry of the three-month period.

What is the effect of the deeming provision?

In *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (CCT194/17) [2018] ZACC 22 (26 July 2018)* (Assign Services), the Constitutional Court considered the deeming provision created in section 198A(3)(b) of the LRA. The court confirmed that there are two competing interpretations of the deeming provision as follows:

- Sole employer interpretation: once the deeming provision applies, the client becomes the sole employer of the employee(s)
- Dual employer interpretation: once the deeming provision applies, the TES and the client are dual employers of the employee(s)

The Constitutional Court held that the sole employer interpretation of the deeming provision is the correct interpretation. This interpretation ensures that the provision of temporary services is in fact temporary. After the expiry of the three-month period, the client becomes the sole employer of the

employee(s). The client is then under an obligation to ensure that the employee(s) are fully integrated into the workplace.

The effect of the deeming provision is therefore as follows:

- The TES is considered to be the employer of the placed employee until the employee is deemed to be the employee of the client. At that point the TES ceases to be considered as the employer of the placed employee
- Once the deeming provision kicks in the client becomes the sole employer of the employee
- The employee is deemed, subject to the provisions of the LRA relating to fixed-term contracts for employees earning below the threshold, to be the permanent employee of the client

It is important to note that the judgment applies to TES employees earning below the BCEA earnings threshold, i.e lower-paid employees. The judgment does not apply to “substitute” employees or fixed-term contract employees. However, TES employees who are employed on a fixed-term basis are covered by the judgment.

The judgment applies retrospectively – i.e three months after the commencement of the Labour Relations Amendment Act 6 of 2014 (the LRAA). The LRAA came into force on 1 January 2015. Therefore, TES employees assigned to a client on 1 January 2015 are deemed employees of that client with effect 1 April 2015. At this stage, it is presumed that the deeming provision will be triggered by three continuous and consecutive months of work by the TES employee.

In *Food and Allied Workers Union obo Mkhalihi and others/Kempston Employment Solutions and another [2020] 3 BALR 240 (CCMA)*, the employees sought an order declaring that they were permanent employees of the client and not the TES, given that they had been working (at the client) for longer than three months. The client alleged that the CCMA lacked jurisdiction in determining that the employees were in fact employees of the client. The Commissioner cited Assign Services and following the sole employer interpretation found that the employees had been working for longer than three months, at the client, through the TES and having considered section 198A(3)(b) found that the employees were in fact employed by the client and thereby concluded the jurisdictional point raised by the client.

What is the position in respect of employees earning above the earnings threshold?

Both TES employees and fixed-term contract employees who earn above the earnings threshold fall outside of the scope of the deeming provision and are thus unaffected by it.

Is there a ban on labour broking?

No. The intention of the amendments to the LRA was not to ban labour broking. The Assign Services judgment also does not ban labour broking. Read together, the amendments and the judgment is to protect lower-paid workers and to ensure that temporary services are truly temporary in nature.

What conduct would amount to avoiding the deeming provision?

Termination of the assignment of TES employees to a client, whether at the instance of the TES or the client, to avoid the deeming provision or because the employee exercised a right in terms of the LRA, will constitute a dismissal. This will particularly be the case where the client elects to terminate the employment of the TES employees immediately after expiry of the three-month period.

May a client request that tes employees apply for permanent posts after the deeming provision applies?

Once the client becomes the employer, by operation of law, there is no basis for the employees (earning below the threshold) to apply for their own positions that have been accorded to them by operation of law in terms of the deeming provision.

Conduct, such as subjecting deemed employees to job interviews for their own positions at the client, will be viewed as an ill-disguised attempt to undermine the status of the applicants as employees of the client.

Is there a transfer of employment from the TES to the client?

Once the deeming provision applies, there is no transfer of employment. The Assign Services judgment expressly finds that there is no transfer to a new employment relationship once section 198A(3)(b) is triggered. Once the deeming provision applies, the deemed employees will automatically become the employees of the client.

What is the meaning of “no less favourable treatment”?

In terms of section 198A(5), an employee (earning below the threshold) is deemed to be an employee of the client and must be treated on the whole no less favourably than an actual employee of the client performing the same or similar work, unless the distinction is justifiable. This means that the client must treat the deemed employee on the whole not less favourably than its employees performing the same or similar work from the date upon which the employee becomes a deemed employee.

The Assign Services judgment states that once the deeming provision applies:

“The employee automatically becomes employed on the same terms and conditions of similar employees with the same benefits, the same prospects of internal growth and the same job security that follows.”

This part of the judgment differs slightly from the wording used in section 198A(5). The judgment suggests that deemed employees need to be employed on the same terms and conditions as permanent employees performing the same of similar work. This is different to deemed employees being employed on terms and conditions that are “on the whole not less favourable” to permanent employees of the client. Included within terms and conditions of employment is remuneration and benefits (such as medical aid, bonuses, provident funds and any other benefit) that are granted to permanent employees by the client.

May a TES employ employees on any conditions of employment?

A TES may not employ any employee (above and below the threshold) on terms and conditions contrary to the various employment laws and collective agreements applicable to the client with whom the TES places the employee.

Section 6(1) of the Employment Equity Act 55 of 1998 (EEA) prohibits unfair discrimination against an employee on any of the grounds contained in this section. The reason for different treatment may, therefore, not be one that is prohibited in terms of section 6(1) of the EEA as it would constitute unfair discrimination. A justifiable reason for different treatment for purposes of the EEA may include:

- seniority
- experience or length of service
- merit
- the quality or quantity of work performed
- any other criteria of a similar nature

In *Makaepaya and others/National Brands Ltd t/a Snackworks and another* [2019] 11 BALR 1209 (CCMA) - the issue before the commissioner was whether the client was complying with section 198A(5) of the LRA when the deemed employees were not provided with guaranteed 44 hours of work per week and were not paid a guaranteed basic salary equal to their

fellow colleagues. The Commissioner noted that section 198(5) provides that "deemed" employees must be treated no less favourably than the client's permanent employees doing the same or similar work. The only reference to employees working fewer hours than comparable fulltime employees was in section 198C, which deals with parttime employees.

Section 198A makes no reference to hours of work. Reliance should have been had on section 198D(2) of the LRA, which sets out justifiable reasons for employing employees for longer than three months on fixed term contracts. A justifiable reason includes that the different treatment is a result of the application of a system that takes into account: (a) Seniority, experience or length of service; (b) Merit; (c) The quantity or quality of work performed; or (d) any other criteria of a similar nature, and such reason is not prohibited by section 6(1) of the EEA.

The commissioner held that the client had engaged the TES to provide employees when needed, with no guarantee of minimum working hours. To order the client to employ the "deemed" employees for a guaranteed 44 hours a week would be contrary to the purpose of the arrangement between the parties and would amount to writing a contract for the employees.



Who is entitled to discipline the employee in light of the deeming provisions?

In *General Industrial Workers Union of South Africa obo Hlophe/Little Green Beverages (Pty) Ltd t/a The Beverage Company and another [2020] 3 BALR 248 (CCMA)*, the employee was dismissed by the TES and not the client (for threatening violence against a fellow employee). The employee contended that the dismissal was unfair, given the triggering of the deeming provision in terms of section 198A(3)(b) of the LRA and was therefore, to be disciplined by the client itself.

The CCMA commissioner agreed citing that the Constitutional Court has adopted the interpretation that the triggering of section 198A(3)(b) resulted in, *inter alia* - "a change in the statutory attribution of responsibility which will now fall on the client as an employer within the triangular relationship". The mere fact, therefore, that the TES still paid the employee's salary merely indicated that the TES was to act as a payroll administrator on behalf of the client and not as an employer. The commissioner found that the client should have disciplined the employee and that the disciplinary hearing was fatally defective. The employee was retrospectively reinstated and received back pay.

Is a TES entitled to participate in an unfair dismissal arbitration once the deeming provision comes into effect?

In *Khumalo & another and Adcorp Blu, a division of Workforce Solutions (Pty) Ltd & another (2019) 40 ILJ 1910 (CCMA)* the CCMA held that once section 198A(3)(b) is triggered, the client is the employer of the deemed employees irrespective of the continued triangular relationship. The only party to the dispute, is then, the client and the TES could no longer be considered the employer of the placed employees, in respect of, unfair labour practice and unfair dismissal disputes. Accordingly the TES lacks *locus standi* to be a party to the dispute before the CCMA.

Who bears the onus to reinstate a tes employee after an unfair dismissal?

In the case of an unfair dismissal, where the client is the deemed employer of the TES employee, the client must reinstate the employee into employment with the client.

If the employee is not a deemed employee, the TES must reinstate its employee.



Can an employee enforce an award against a client that was not cited as a party to the dispute in which the award was made in favour of the deemed employee?

A deemed employee can enforce such order or award against the client, the TES, or both. The employee therefore, has a choice. However, they should cite both the TES and client.

A client should obtain a suitable undertaking or indemnity from the TES against any adverse order that may impact the client. It is advisable that the TES, by agreement, should notify the client of any claim brought against the TES that may affect the client, thus allowing the client the option to participate in the proceedings.

In the event that a claim is brought solely against the client, the client may request that the TES be joined as an interested party. However, the client may only do so if there is still a contractual relationship between the client and the TES.

When will a TES relationship not exist?

If a company decides to outsource the work or service to an independent contractor or service provider, there is no TES relationship in existence.

Provided that there is a genuine outsourcing arrangement in place, the employees of the independent contractor or service provider may not claim a TES relationship with the client as their employer.

A TES triangular relationship may cease to exist where the TES and/or the client elect to terminate the commercial agreement between them.

Is the TES entitled to a commercial relationship with the client when the client is the sole employee

In *African Meat Industry & Allied Trade Union on behalf of Members and National Brands Ltd t/a Snackworks & another (2019) 40 ILJ 1894 (CCMA)* - the dispute was whether the TES could administer the payroll in relation to the deemed employees. The commissioner concluded that nothing in the wording of the LRA or the court's finding, in Assign Services, prevented the TES from continuing its commercial relationship with the client, or from continuing to play the same role that it had played before the deeming provision came into effect. The court's references to the triangular relationship clearly envisaged the possibility of an ongoing relationship between the parties. This therefore, meant that the client was not prevented from continuing to utilise the service of the TES to pay the deemed employees, to administer its payroll and to provide human resources functions. The fact that it performed this service did not detract from the client's status as their employer or its obligations under the LRA.

What is outsourcing?

Outsourcing is the strategic use of outside resources such as an independent contractor or a service provider which, independently from the client, perform activities or services required by the client. Outsourcing does not amount to a TES.

How does one establish if it is a relationship with a TES or an independent contractor?

A TES provides employees to the client to render services to the client. An independent contractor renders a service to the client.

The terms of an outsourcing agreement that covers specific work or services, how the parties are described in the agreement and other relevant terms of the agreement are indicative of an independent contractor arrangement.

If a fee is paid for the provision of a specialised service/task, it is indicative of an independent contractor arrangement while if the fee is paid for the provision of specific employees, it is indicative of a TES arrangement.

The relevance of some other factors are:

| Employees of a TES | Employees of a service provider |
|--|--|
| Provide labour directly to the client | Provide labour to the service provider or outsource company |
| Subject to the client's control and supervision | Subject to the service provider or outsource company's control and supervision |
| The TES or the client monitors individual employee's performance | The client monitors the service provider's performance against the service level agreement |

The fact that the work is performed at the premises of the client is not in itself evidence of a TES relationship, as sometimes for operational necessity, work may have to be rendered on the premises of the client and not at the outsourced company's premises.



Are automatic termination clauses between a TES and its employees valid?

There are many instances in which an employee's continued employment is dependent upon the operational requirements of a client of the TES.

A typical clause in an employment contract of a TES employee may provide that the TES employee's employment automatically terminates if the contract between the TES and its client comes to an end. This would amount to an automatic termination clause.

There are occasions when such clauses are, however, invalid. Advice should be sought around the inclusion of these in order to determine their validity.

What is the general rule in respect of automatic termination clauses?

Our courts do not permit parties to contract out of the protections in the LRA against unfair dismissal through an automatic termination clause or otherwise.

When is an automatic termination clause valid?

A TES must demonstrate, as must any other employer, that there was "a justifiable reason" for a fixed-term contract, as contemplated by section 198B(3)(b) of the LRA, between the TES and its employee and that the fixed-term contract expired upon a fixed date or specified event. If the TES employer discharges that onus in reliance on the expiry of a fixed-term contract with its employee, the TES's reliance on an automatic termination clause should succeed.

The following are relevant considerations for determining if there is a valid and justifiable fixed-term contract:

- The precise wording of the clause and the context of the entire agreement
- Whether the client or the employer unfairly used the clause to target a particular employee
- Whether the event that triggers the termination of the agreement between the TES and its client is based on proper economic and commercial considerations
- Whether the TES intended the clause to circumvent the TES's fair dismissal obligations

There are some instances where an automatic termination clause that provides for the termination of the contract of employment on termination of the contract between the TES employer and the client have been held to be valid:

- Where the TES employer played no role in the client's decision to terminate its contract with the TES

- Where the underlying cause of the termination is one for which employers typically dismiss employees. In this determination, one should have regard to the real reason for termination and not the form only
- Fixed-term contracts terminating on events other than the unilateral exercise of a client's will are usually in the clear

May a TES retrench its employees?

The TES may terminate the contract of an employee for operational requirements when the client terminates the contract between the TES and the client. The TES must, however, comply with the requirements in terms of section 189.

Once the deeming provision applies, the TES will not be permitted to retrench the deemed employees. The client may elect to retrench deemed employees. However, the client must comply with the requirements in terms of section 189. Severance pay will be calculated from the date upon which the TES employee was deemed to be the employee of the client.

The client must ensure that it does not retrench employees purely, on the basis of the deeming provision. Such action will amount to a contravention of section 198A(4) and, in all likelihood, constitutes an unfair dismissal.

Organisational rights and TES employees

A trade union is entitled to seek organisational rights in the workplace of an employer and a commissioner must consider the composition of the workforce at the workplace including employees of an independent contractor or TES.

The union may seek organisational rights in respect of the TES employees either at the workplace of the TES or that of the TES and one or more of its clients.

Each individual site of a client of a TES constitutes a workplace for the purposes of section 21 of the LRA in which a union may exercise organisational rights.

Once the deeming provision applies, deemed employees will be permitted to join the union(s) and participate in union activities at the workplace of the employer.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2023 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2023* recommended the South African practice in Tier 1, and our Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of the Employment Law team, and the Joint Sector Head of the Government & State-Owned Entities sector.

Chambers Global 2015–2023 ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2023* recommended Aadil as a leading individual for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2023 recommended **Anli Bezuidenhout** for employment.

Jose Jorge is the Head of the Consumer Goods, Services & Retail sector, and a director in our Employment Law practice. *The Legal 500 EMEA 2020–2023* recommended Jose for employment.

Fiona Leppan is the Joint Head of the Mining & Minerals sector, and a director in our Employment Law practice. *Chambers Global 2018–2023* ranked her in Band 2 for employment. *The Legal 500 EMEA 2022–2023* recommend Fiona for mining. *The Legal 500 EMEA 2019–2023* recommended her as a leading individual for employment, and recommended her from 2012–2018.

Chambers Global 2020–2023 ranked **Gillian Lumb** in Band 3 for employment. *The Legal 500 EMEA 2020–2023* recommended her for employment.

Chambers Global 2021–2023 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2023* recommended him for employment.

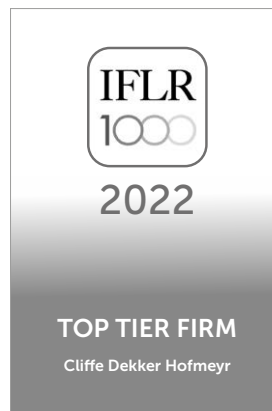
The Legal 500 EMEA 2023 recommended **Phetheni Nkuna** for employment.

The Legal 500 EMEA 2022 recommended **Desmond Odhiambo** for dispute resolution.

Hugo Pienaar is the Head of the Infrastructure, Logistics, and Transport sector, and a director in our Employment Law practice. *Chambers Global 2014–2023* ranked Hugo in Band 2 for employment. *The Legal 500 EMEA 2014–2023* recommended him for employment.

The Legal 500 EMEA 2023 recommended **Thabang Rapuleng** for employment.

The Legal 500 EMEA 2022–2023 recommended **Njeri Wagacha** for employment. *The Legal 500 EMEA 2023* recommends Njeri for corporate, commercial/M&A.



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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