

LEGAL REGULATION OF LABOUR OUTSOURCING AND TEMPORARY EMPLOYMENT SERVICES IN TANZANIA: LESSONS FROM SOUTH AFRICA

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Abstract

The growth and reliance on employment services (ES) is generally attributed to market forces demands, which requires an employer to focus on its core functions. Basically, ES provides the unemployed with information about job vacancies and employers with information about availability of prospective employees. The ES system comprises of national institutions, which are commonly referred to as public employment services (PES) and private agencies, which are referred to as private employment services (PrES). Currently, in many jurisdictions ES is provided in a form of Labour Outsourcing (LO) and Temporary Employment Services (TES). However, LO and TES are perceived with suspicion in Tanzania and South Africa. They are often criticized for compromising employees' rights and offering terms and conditions of employment, which are and widely claimed to be exploitative. In that context, this article provides an appraisal of the legal framework for the provision of LO and TES in Tanzania and recommends reforms based on experiences from South Africa.

Key words: *Labour outsourcing and Temporary Employment Services in Tanzania*

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1.0. INTRODUCTION

Employment services (ESs) are necessary services that bringing together prospective employers and job seekers. These services are claimed to exist since the 15th Century.¹ Historically, ESs are traced in ancient Greece, where a congregation of unemployed men (which were known as colonus) traditionally gathered in places popularly known as agora.² Unemployed men used to gather in the agora waiting for prospective employers. These forms of labour market arrangements in ancient Greece constitute the earliest forms of the labour market for the purpose of bringing together prospective employers and job seekers. This historical fact is also supported by the Bible in the parable of the vineyard which provides:

For the Kingdom of heaven is like a householder who went out early to hire labourers for his vineyard. And having agreed with the labourers for dinar a day, he sent them into his vineyard. Going out about the third hour, he saw others standing in the market place idle.³

Therefore, the main objective of ESs is to link the employer and unemployed. Further, ESs provide other services which are incidental to their main objective, including: to register job seekers, collect information about job openings, provide vocational and career guidance as well as job search workshops, conduct interviews, and collect and disseminate labour market information.⁴ It is important to appreciate that the idea of wage labour was firstly established by Germans through the

1 Martinez, T., *The Human Market Place: An Examination of Private Employment Agencies*, New York: Routledge, 2021 at p. 4.

2 Ibid.

3 Holy Bible. New Testament, St Mathew 20: 1-16.

4 Momburi, D.F., *A Critical Examination of the Provision and Regulation of Employment Services in Tanzania with Suggestion for Reforms*, Durban: University of Kwa-Zulu Natal, 2018 at p.6.

House and Poll Tax Ordinance, 1912. Later, the Hut and Poll Tax Ordinance No. 13 of 1922, was enacted by the British.⁵ These legislation sought to create a taxation regime, which in-turn forced native Africans to work in order to get money to pay tax.⁶ In 1923, the Master and Native Servants Ordinance, Cap 78 was enacted to facilitate and regulate the procurement of labour for capital and repatriation.⁷ However, ESs were brought to Tanzania (then known as Tanganyika) during British administration in 1945⁸. The Master and Native Servants (Recruitment) Ordinance, No. 6 of 1946 made provision for licensing of recruiters who were divided into two categories: private recruiters and professional recruiters.⁹ The idea was to establish labour exchange bureaus for the purpose of placing ex-military officers who served in the Second World War in available job openings.¹⁰ These labour exchange bureaus were introduced in Kigoma, Tukuyu, Songea, Dodoma, Tanga, and Morogoro. These areas were, at that time, active in commercial production of cash crops, hence a labour force was required.¹¹ However, during this time, job seekers used to queue daily at the labour exchange bureaus to give employers the opportunity to select the appropriate labourers that they required.¹²

The system of the labour exchange bureau was not appreciated after independence. Consequently, all labour exchange bureaus were shut in 1975 and the provision of employment services was abolished.¹³ The

5 Law Reform Commission of Tanzania, Report on the Labour Law, Dar es Salaam, Law Reform Commission of Tanzania, 2001, at p 7.

6 Ibid.

7 Ibid

8 Master and Native Servant (Recruitment) Ordinance, No. 6 1946 Cap 80.

9 Section 2

10 Tanzania Employment Services (Establishment) Order, 2008 (GN No. 189 of 2008) at p.1.

11 Id, at p. 3.

12 Ibid.

13 Establishment Order, above note 10 at P 4.

main reason was the introduction of socioeconomic system of socialism and self-reliance. The bureau arrangement was considered uneconomical since it entailed the workforce queuing for long hours to be placed in employment, while there were ample opportunities in rural areas where one could engage in agricultural activities.¹⁴ It is important to appreciate that the economy of Tanzania was by then solely based on small scale agriculture, hence the creation of formal employment was not forthcoming.¹⁵ However, the President's office made use of employment services for employing foreign experts and some local workforce to fill some of the highest ranked government job vacancies.¹⁶ The liberalization of the Tanzania economy in the mid 1980s and early 1990s through the Structural Adjustment Programme of 1986-1994, witnessed the government withdrawing from participating in economic activities. This state of affairs, among others, led to the re-introduction of employment services.¹⁷ As such, in 1998 the National Employment Promotion Service Act (NEPSA) Cap 246 was enacted. This law, among other things, makes provision for the establishment of a centralized PES and the introduction of the provision of employment services through Private Employment Services Agencies (PrEA).¹⁸

It is worth noting that, the National Employment Promotion Service (NEPS), which was *de jure* PES was not established. In its place it was established the Tanzania Employment Service Agency (TaEA) which was established by the Tanzania Employment Services Agency (TaESA) Establishment Order, 2008¹⁹, 2008, which was a *de facto* PES. TaESA (as an executive agency) was later dissolved and merged into the Prime

14 Ibid.

15 Establishment Order, above note 10 at p. 5.

16 Id, at p. 4.

17 Malyamkono T. L., & Bagachwa, M.S.D., *The Second Economy in Tanzania*, London: James Currey, 1990 at p. 109.

18 Sections 3 and 18 of the National Employment Promotion Service Act, Cap 246.

19 GN No. 189 of 2008.

Minister's Office, Labour, Youth, Employment and Persons with Disability (PMOLYEPD) as an independent unit.²⁰ It is worth noting that, it is not certain whether or not the dissolution of the TaESA as an executive agency was carried out by repealing the GN No. 189 of 2008 (the establishment order). Apart from that, ESs contribute to the realization of various economic benefits, which include: balancing labour demand for and supply; realizing fully utilization of the work force; making it easy to access job opportunities; expediting the process of procurement of labour; reducing the cost of procuring labour; saving time of employers and relieving the employers' from duty of recruitment, which is, in most cases is not related to their core functions; reducing time and costs for job seekers searching for job opportunities; disseminating labour market information which is key in the preparation of academic curriculum so as to produce products, which will meet the labour market demands.²¹

Through a *de-facto* PES (TaESA), it is estimated that, while operating as an executive agency, it has managed to link up about 8000 unemployed persons to employers from the period between 1998 and 2020.²² Unfortunately, data showing the number of job seekers connected to employment opportunities in Tanzania through PrES could not be found.²³ However, PrES in Tanzania are required to submit a quarterly performance report to the Commissioner for Labour.²⁴ Equally, it is not certain whether or not PrES comply with this legal requirement.

20 Amani, K. interview by author (22 July, 2022, TaESA, Dar es Salaam).

21 Bhorat, H., Cassim, A., & Yu. D. "Temporary Employment Services in South Africa: Assessing the Industry's Economic Impact," available at <http://www.apso.org.zimbabwe/document/research/TES> (accessed 1 June 2022).

22 Amani, K. interview by author (22 July, 2022, TaESA, Dar es Salaam).

23 Pursuant to Section 6(1) and 20(1) of the National Employment Promotion Act, Cap 246 the Labour Commissioner is responsible for the administration of the Act and registration of the PrES. Therefore, as regulator he is supposed to have performance report of the PrEA periodically.

24 Regulation 4 of the National Employment Service Promotion (Private Employment Promotion Agency) Regulations, 2014.

Nevertheless, ESs have significantly influenced the efficient functioning of the Tanzania's labour market. Equally, the Tanzania's legal framework recognizes and supports the provision of employment services through both public employment services (PES) and private employment services agencies (PrEA). However, these labour market intermediary services are not properly regulated. As such, prior to 28 January 2015, labour outsourcing (LO) and Temporary Employment Services (TES) were common practices and were practices that were preferred by foreign companies investing in Tanzania. These practices were prohibited by the Minister Responsible for Labour on allegations of not complying with tax requirements and for being exploitative to employees.²⁵

Reflecting the situation in South Africa, the provision of employment services in South Africa is governed by the Constitution of the Republic of South Africa Act No 108 of 1996, the Employment Services Act, 2014 (ESA) and Labour Relations Act, 1995 (LRA) as amended in 2014. These three Acts provide provisions for the administration of employment services through PES and PrEA. However, prior to the enactment of the Employment Services Act, the provision and regulation of employment services was governed by the Skills Development Act of 1998 (SDA).²⁶ During the period when the provision and regulation of employment services were governed by the SDA, the South African labour market was not settled.²⁷ Employees were faced with major problems such as insufficient protection against unfair termination and other work related rights, lack of job security, and low wages.²⁸ It is worthy to understand that employees who were employed by virtue of

25 Mwangonde . H., "Government Bans Use of Agents in Labour Relations in Companies" *The Citizen* (Dar es Salaam) 28 January 2014, available at <http://www.thecitizen.co.tz/News/national/Govet-bans-use-of-agents-in-labour-relatins-in-companies/1840392-2162914-vdlnuls/index.html> (accessed 15 December 2021).

26 The Skills Development Act No 97, which came into force on 2nd of February, 1999.

27 Van Eck, B. P.S., "Temporary Employment Services (Labour Brokers) in South Africa and Namibia", 2010, 3 *Potchefstroomse Elektroniese Regsblad* p.107.

28 *Ibid*.

the temporary employment services (TES) were the ones who were most affected.

Currently, the labour markets in both Tanzania and South Africa are more dynamic than was in the last two decades, in a way that the conventional employment services are now shifting towards flexible forms of employment services to complement traditional forms of employment. In this regard, most developed jurisdictions are now relying on TES and LO to provide employment services as opposed to the conventional employment service methods. In that context governments have started to appreciate the value of and impact on the provision of employment services through LO and TES in their labour markets. In this regard, this article examines the legal framework of Tanzania that regulates LO and TES. In some instances, reference is made to the South African legal framework for the provision and regulation of TES with a view to gauge the strengths and weaknesses. It is important to appreciate that, TES are widely applied in South Africa and the legal framework for regulation of TES has been greatly improved.

2.0. LABOUR OUTSOURCING

There is no legal definition of LO in the Tanzania's legal framework. However, LO is defined to refer to an employee being employed by an enterprise licensed to provide LO services (labour provider), who is then committed to work for another employer (labour outsourcing employer). Normally, under this arrangement, the outsourced employee is under the management and authority of the labour outsourcing employer.²⁹ Nevertheless, the relationship between the outsourced employee and the

²⁹ Nguyen, H., "Labour Outsourcing," available at <http://36mfjxla0yt0lki78v3bb46n15.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/14021-labour-outsourcing-149380-v3-HCMDMS.pdf> (accessed 25 November, 2020).

labour provider as an employer is maintained.³⁰ The labour provider remains bound by the country's labour legislation and may be liable for termination in unforeseen circumstances in relation to an outsourced employee.³¹

LO is a product of the decentralization and prioritization of activities in modern enterprises, where industries opt to abandon some activities not forming part of their key functions, which are then sub-contracted to outsourcing firms.³² Outsourcing firms are independent entities, supplying workers in many enterprises on different terms and conditions. They are sometimes referred to as “follow on” or “piggy back” enterprises that serve the parent enterprises.³³ Accordingly, outsourcing firms offer new employment opportunities, but their terms and conditions of employment do not match those offered by the parent enterprises.³⁴ This is partly one of the reasons why outsourcing firms are not well received as effective labour intermediaries in some jurisdictions.

Unlike the provision of general employment services, in some jurisdictions LO services are allowed in certain circumstances and purposes. In some jurisdictions, LO is only allowed in the following situations: i) to temporarily satisfy a sudden increase in the demand for labour in the labour market for a certain period of time; ii) to temporarily replace employees on maternity leave, those suffering from work-related accidents or occupational diseases, those performing citizenship

30 Ibid.

31 Deloitte “Labour Brokering and Outsourcing,” available at <https://www2.deloitte.com/content/dam/deloitte/za/Documents/process-and-operations/ZA-LABOUR%20BROKING%20outsourcing%20-%20FP.pdf> (accessed 28 November, 2020).

32 Van Eyck, K “Flexibilizing Employment,” available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_117689.pdf (accessed 20 March, 2021).

33 Id, at p. 11.

34 Id, at p. 12.

obligations or those entitled to a reduction in working hours; and iii) to meet the need for highly qualified or technically skilled employees.³⁵

In addition, LO services are prohibited from: i) replacing striking workers or those exercising their labour rights in the context of labour disputes; ii) replacing workers who have been made redundant; iii) procuring employees for the purpose of making them work in harsh living conditions unless they have been living in harsh conditions for 3 years; and iv) procuring employees for the purpose of heavy labour or jobs that involve continuous exposure to hazardous substances. LO offers services for functions that the end user would most likely be unable to effectively perform themselves due to the lack of skills. As these functions require specific skills, those hired by outsourcing service providers cannot easily be replaced.³⁶

Generally, outsourced employees must be provided with a written contract during the period in which the LO service is required. In some jurisdictions, an outsourced employee's contract cannot be extended when it expires. Similarly, in some jurisdictions where the contract of an outsourced employee has expired and the employee continues to work for the labour outsourcing employer, this employee will be deemed a permanent employee of the labour outsourcing employer.³⁷

Unlike in South Africa, where regulation of provision of employment services through TES is expressly and adequately provided.³⁸ In Tanzania, save for the general regulation of the employment services carried out by PrEA as so provided under the Tanzania National Employment Promotion Service (Private Employment Promotioin

35 Id, at p. 4.

36 Deloitte, Labour Brokering and Outsourcing, above note 31, at p. 1.

37 Nguyen, H. Labour Outsourcing, above note 29 above, at p. 4.

38 Section 198 of the South African Labour Relations Act, 1995

Agencies) Regulation, 2014, there are no specific provisions for regulation of employment services through LO or TES.

Indeed, the provision of employment services through LO and TES is new and technical area that requires special provisions for its regulation. However, the NEPSA, Cap 246 empowers the Minister responsible for employment to make Regulations, which would have, among other things, make provision for regulation of employment services through LO and TES.³⁹ Unfortunately, in 2014 the Minister enacted the National Employment Promotion Services (Private Employment Promotion Agency) Regulations, 2014 vide a GN No. 232 with no provisions governing regulation of LO and TES. Equally, the provisions of Section 6(1) makes the Commissioner of Labour responsible for total administration of the NEPSA, Cap 246. It is thus expected of the Labour Commissioner to employ his legal mandate vested in him by the NEPSA, Cap 246 to ensure proper functioning of LO and TES. Again, the Minister Responsible for labour and employment should consider issuing specific Regulations or amending the 2014 Regulations to capture the functioning LO and TES.

3.0. TEMPORARY EMPLOYMENT SERVICES

The term TES are not adequately captured in the Tanzania legal system. Accordingly, terms TES and LO may be used interchangeably as if they mean one and the same thing. However, borrowing a leaf from South Africa legal system TES is explicitly defined to mean any person who, for reward, procures for or provides to a client other person or who perform work for the client; and who are remunerated by the temporary employment service.⁴⁰ Therefore, TES provider is a private employment service that employs workers and makes them available to a third party,

³⁹ Section 33 of the National Employment Promotion Service Act, Cap 246.

⁴⁰ Section 198 of the Labour Relations Act, 1995 as amended by Act No. 6 of 2014.

who may be a natural or legal person (referred to below as a "user enterprise"). This third person (or entity) assigns these workers their tasks and supervises them.⁴¹ TES create a unique triangular form of employment, involving the supply of workers by one organization to another organization.⁴² Using a TES provider gives its clients the flexibility to increase or reduce the number of workers they employ, and relieves them of the responsibility of managing their employees for some of their secondary functions,⁴³ such as administering the payroll of employees placed with its clients, and deducting taxes and other lawful deductions from their salaries.⁴⁴

The contract of employment between the TES provider and employee is normally made on condition that the agreement continues for as long as the client requires the temporary services of the employee.⁴⁵ The legal relationship between clients, TES and employees varies from country to country. In some jurisdictions the client and TES are jointly and severally liable for violating the terms and conditions of the contract of employment between TES and the employee. In other jurisdictions the liability of clients in respect of the contract of employment between the employee and TES is restricted to matters that relate to collective bargaining and an arbitration award that regulates the terms and conditions of the contract.⁴⁶ Temporary employment services are more widely applied in South Africa than in Tanzania.

41 Article 1(b) of the Private Employment Agencies Convention No. 181 of 1997.

42 Eurofound, *Temporary Agency Work and Collective Bargaining in the EU*, Dublin European Foundation for Improvement of Living and Working Conditions (2008) at p.1.

43 *Ibid* at p.5.

44 Van Eck, B.P.S, *Temporary Employment Services (Labour Brokers) in South Africa and Namibia*, above note 27, at p. 107.

45 *Id*, at p.108.

46 *Id*, at p.109.

Furthermore, the client and TES may be jointly and severally liable if the TES provider's employee is deemed to be an employee of the client by virtue of Section 198 A (3) (b) of the LRA, 1995 as amended in 2014. Therefore, when the client and TES are jointly and severally liable, the employee is at liberty to institute proceedings against either or both, the labour inspector may secure or enforce compliance with the law by either or both, and an arbitration award may be enforced against either or both.⁴⁷In addition, the LRA prohibits the provision of TES unless the person providing them is duly registered. However, if an unregistered person has provided TES, any *bona fide* claim against that service will not be upheld.⁴⁸

TES normally serve the following purposes :i) to give the user enterprise the opportunity to select employees using temporary contracts as a probationary period; ii) to give the user enterprise the opportunity to make decisions on staffing levels during a period of uncertainty, such as during an acquisition and merger or restructuring; iii) it provides the user enterprise with more potential employees without being committed to hire any; iv) to enable the user enterprise to reduce the number of employees without incurring severance costs; and v) to save the user enterprise from the employment costs, when the wage of a temporary employee is lower than that of permanent employees, and when the user enterprise is not obliged to provide fringe benefits.⁴⁹

Therefore it is clear that an employee placed in employment by a TES is usually hired by a user enterprise for a short fixed term, unlike ordinary employment services, which will place an employee with an employer on a permanent contract. Consequently the terms and conditions of employment of TES are not the same as those of ordinary employment

47 Section 198(4A) of the LRA, 1995 as amended by Act No 6 of 2014.

48 Section 198 (4F) of the LRA, 1995 read together with Act No. 6 of 2014.

49 Van Eyck, K., Flexibilizing Employment, above note 32, at p. 12.

service, and so the concept of flexible forms of employment, which is the product of TES, is frequently misunderstood. In some jurisdictions, TES are considered to fuel the exploitation of employees and to create discrimination between employees placed in a user enterprise by a TES provider and its ordinary employees, with the result that the provision of employment services through TES. As earlier stated, TES are generally not well received.

4.0. TANZANIA'S EXPERIENCE

Prior to 28th January 2015, LO was a common practice that was preferred by foreign companies investing in Tanzania, but was prohibited by the Minister Responsible for Labour and employment.⁵⁰ Under the LO, it is common practice for the parent company contracting out some of its human resources and operations functions to an independent employment service provider, which then assumes control over them for a fee that covers operational costs, wages and commission. The Prohibition Order for LO was issued because it was alleged that: i) a private employment agency (PrEA) failed to submit PAYE taxes that were due to the Tanzania Revenue Authority for employees placed under LO arrangements; ii) it failed to remit monthly pension subscriptions to the social security fund in favour of employees placed under LO arrangements (denying many people their fundamental employment rights); iii) it discriminated against some of the employees by paying employees placed through LO less than those working with the parent company; and iv) it failed to issue employment contracts to employees under the LO arrangement.⁵¹

An analysis of the reasons advanced by the Minister responsible for labour and employment is critical. In assessing the validity of the

⁵⁰ Mwangonde, H., *Government Bans Use of Agents in Labour Relations in Companies*, above note 25, at p. 1.

⁵¹ *Ibid.*

allegations of tax evasion and the failure to subscribe to a pension fund, it is important to appreciate the fact that only submission of certificates of tax identification number (TIN) and value added tax (VAT) are one of the conditions precedent to registration.⁵² Accordingly, submission of tax clearance is not contemplated by the Regulations as a condition subsequent for renewal of registration. Therefore, automatically the Minister will not be in a position to know whether or not taxes due were paid or evaded. Further, these two allegations are by nature, allegations of criminal offenses, which are subject to penal sanctions as stipulated by the law.

Therefore, under normal circumstances, the Minister Responsible for labour and employment was bound to report those criminal activities to appropriate investigation organs to pursue an investigation. Surprisingly, the Minister responsible for labour and employment acted as both prosecutor and judge, which meant that offenders were convicted and punished without being heard. This amounted to the violation of the cardinal principle of natural justice. It is important to understand that, in the absence of clear legal frameworks for regulation of LO and TES, politicians will constantly make unfounded allegations which may negatively impact the growth of LO and TES.

PrES also allegedly violated fundamental employment rights of employees. It is important to understand that employees' rights are stipulated under labour legislation which are: the Employment and Labour Relations Act, 2004 and its Regulations as well as Labour Institutions Act, 2004 and its Regulations. For that reason, employees who feel that their rights are violated may seek and obtain appropriate remedies through legal processes, which may be pursued before the

⁵² Regulation 14 of the National Employment Promotion Service (Private Employment Promotion Agency) Regulations, 2014.

Commission for Mediation and Arbitration.⁵³ Again, this is a legal fact which was not taken into consideration by the Minister responsible for labour and employment.

Lastly, the final reason rest on the implementation of the Law of Contract Act, Cap 345, which recognize both oral and written contracts. Parties to a contract of employment are largely governed by the terms and conditions of the contract which are required to observe minimum labour standards stipulated by labour laws. Therefore, demanding all employment contracts to be written is a misconception of law. Notwithstanding these legal flaws, the Minister's unfounded decision was followed by the Labour Commissioner issuing a statement that ordered, among other things, cancellation all the licences that had previously been issued to PrEAs, and a fresh registration of all PrES on condition that LO was prohibited. Surprisingly, registered PrES continue with LO as their business portfolio and it has not been established whether or not the official ban issued by the Minister for labour and employment was lifted. It is important to appreciate that the official ban imposed by Minister was communicated to the public through the press and no official document, in terms of a Gazette, for example, was issued to that effect.

An analysis of the Tanzania experience above, shows that absence of the legal provisions for the regulation of employment services through LO and TES denied the Minister Responsible for Labour and employment a capacity to make an informed decision as well as that of demonstrating a supervisory capacity of his or her ministry. Since LO and TES are still relatively new employment service models, a proper mechanism for their regulation is very much needed. The Tanzania National Employment Promotion Service (Private Employment Promotioin Agencies)

⁵³ Employment and Labour Relations Act, 2008 and Labour Institutions Act, 2008.

Regulation, 2014 (GN No. 232 of 2014) appears to be less effective, hence cannot cope up with emerging labour market intermediary services such as LO and TES. The aforementioned Regulations, consist of 16 Regulations, which mainly provides the general provisions of the conventional operations and functions of the PrES. These address issue related to: their registration and certification; periodic submission of reports; cross border placement; and penalty for violation of the Regulations.

5.0. SOUTH AFRICA'S EXPERIENCE

As stated earlier, TES are common practice in South Africa. This model of ESs was very popular during the apartheid regime, during this time the native South Africans were legally bound to register with the labour bureau if they wished to work in urban areas.⁵⁴ Accordingly, TES were maintained after apartheid by virtue of Section 198 of the Labour Relations Act, 1995. The rationale behind this was to assist employers (clients) with a number of things, including: the recruitment of employees, management of employees' contracts, statutory deductions, such as taxes payable by employees and subscriptions to provident and pension funds. However, prior to amendment of the Labour Relations Act in 2014, workers under TES were outraged by what was considered as exploitative nature of the TES's set up as earlier mentioned.⁵⁵ Some of the issues, which were considered to be exploitative, include: the legal position that empowered the clients of TES provider (employers) to have the exclusive right to reject the services of the employees; further, employees of the TES had no *locus standi* before the Commission for Conciliation Mediation and Arbitration (CCMA) since the client of the TES was not regarded as an employer; furthermore, employees

54 Native Urban Areas Consolidation Act No. 25 of 1945.

55 Mostert, D., "The Constitutionality of the Contract of Labour Brokers in South Africa" LL. M Dissertation, North-West University South Africa, 2011 at p. 19.

under TES used to work long hours and were constantly underpaid, while TES and their clients escaped basic labour obligations and standards as a contract under TES allowed this.⁵⁶ Most of these employee grievances were supported by the findings of the the report of the Parliamentary Portfolio Committee on Labour in 2010.⁵⁷

Further, it was revealed that , TES used to mishandle their employees by dismissing them without following the proper procedure; replacing them for arbitrary reasons; keeping them employed without assigning them duties; moving them around to prevent them from forming unions; and paying them less than those employed directly by their client.⁵⁸ As a result, in 2012, the Congress of South African Trade Unions (COSATU) organized a nationwide strike pressing for the abolition of labour brokering because temporary employees were being exploited. Consequently, the Labour Relations Act, 1995 was amended in 2014 by Act No 6. The amendments improved conditions which were provided for by LRA, 1995. Most notable changes, include: setting a time limit for TES, to allow TES arrangement for a client for a period not exceeding three months, or as a substitute for an employee who is temporarily absent, and these duties are determined by collective agreement or sectoral determination, notice of which the Minister published in the gazette.⁵⁹ Accordingly, Section 198A protects the vulnerable low-earning, non-temporary worker placed through TES by ensuring that the arrangement involves genuine temporary work. Therefore, if an employee works for a period exceeding that stipulated by the law, the client will then be deemed to be the employer of this

56 Id, at p. 16.

57 Brand, H.E., "The Legal Framework for the Protection of Employees of Labour Brokers in South Africa" LL.M Dissertation, University of Cape Town, 2013 at p. 23.

58 Id, at p. 2.

59 Section 198A (1) of the LRA as amended by Act No. 6 of 2014.

temporary employee by virtue of Section 198 A (3) (b) of the LRA, 1995 as amended by Act No 6 of 2014.

However, the introduction of Section 198A(3) (b) did not cure all the controversy surrounding TES. For example, on 1 April, 2015, 22 temporary workers procured by Assign Services (Pty) Ltd became full-time employees of Krost Shelving and Racking (Pty) Ltd, because their placement exceeded three months. Controversy arose over how Section 198A (3) (b) (i) was interpreted. The National Union of Metal Workers of South Africa (NUMSA) stated that the law deems that the time in which workers are placed as temporary employees of Krost had lapsed. On the other hand, Assign Services regarded the placed workers as its employees for all purposes, and employees of Krost in accordance with the LRA, 1995 as amended in 2014. On appeal, the Labour Appeal Court of South Africa held that:-

Section 198A (3) (b) (i) was introduced to protect vulnerable employees from being abused by Temporary Employment Services (TES) and such protection was extended by other subsections of section 198A. The protection from unfair dismissal and unfair discrimination in Section 198A of the LRA should not be interpreted to support the contention that the employees are deemed to be employed by both TES and the client. Protection is a measure to ensure that these employees are not treated differently from those employed directly by the client. The purpose of this protection under Section 198A is to ensure that the employees are deemed to be fully integrated in the enterprise as employees of the client. The sole employer interpretation does not ban the provider of TES, but its purpose is to restrict TES to genuinely temporary employment. A TES provider remains the employer of the placed employee until the employee is deemed to be the

employee of the client. The plain language of Section 198A (3) b) of the LRA, correctly interpreted, unambiguously supports the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA being to protect the rights of the placed workers”⁶⁰

However, Assign Services challenged the decision of the Labour Appeal Court of South Africa before the Constitutional Court on 20 February, 2018.

The Constitutional Court of South Africa, on 26 July 2018 delivered judgment by holding that, the purpose of Section 198A must be contextualized with the right to fair labour practices pursuant to Article 23 of the South African Constitution as well as the purpose of the Labour Relations Act, 1995 as amended in 2014. Further, it went on to recognize Krost Shelving and Racking (Pty) Limited as employer for workers placed by TES.⁶¹

The decision of the Constitutional Court of South did, among other things, cemented the position of the LRA, 1995 as amended in 2014, which imposed a presumption of contractual relations between TES’s client and employee that was placed after the lapse of the time specified by the law. This is a new development in South African labour laws, for it presupposes an employment contract / relation by operation of the law. Apart from these developments, TES in South Africa are properly regulated as a result, it has managed to solve grievances of employees who once felt exploited by TES and other forms of modern employment services. In this vein, this experience serves as a lesson to stimulate proper regulation of these new labour market intermediary services LO

60 National Union of Metal Workers of Sout Africa V Assign Services (Pty) Ltd and Others [2017] 10 BLLR 1008.

61 Assign Services (Pty) Ltd and Others V National Union of Metal Workers of South Africa and Others [2018] ZACC

and TES in Tanzania. Equally, will help the Minister Responsible for labour and employment matters to benchmark while considering enactment of Regulations governing functioning of LO and TES.

6.0. PROSPECTS

It is indisputable fact that the Tanzania legal system accommodates new changes in the labour market demands. These changes may take a form of employment more flexible terms and conditions than it was used to be in the past. Conditions such as to the place of and type of work, working hours, tasks, benefits and wages have considerably changed as a result of the dynamism of labour market as well as invasion of Covid 19 pandemic. As such, flexible form of employment give employers the freedom to adjust the size and composition of their workforce, and employees the freedom to change jobs and gain experience.

On the basis of the experience of Tanzania and South Africa discussed above, LO and TES give employers the flexibility to organize their workforce in an effective manner, to employ more workers without incurring recruitment costs and to reduce their workforce without incurring severance costs. LO and TES serve as an alternative to general employment services, as these flexible work arrangements have huge economic benefits as earlier discussed.

Despite these two modern forms of employment service being widely criticized for being exploitative, yet their significance cannot be over emphasized. LO and TES have significantly reduced the cost of recruitment and relieved employers to focus on their core functions. This promotes professionalism and improve productivity. However, the setback remains is a lack of effective regulation of these modern employment service intermediary interventions. It is important to understand that, the ILO views the regulation of employment services as purely an obligation of its member states and assists in this by issuing

guidelines on appropriate models for the preparation of domestic regulatory frameworks.⁶²

The ILO suggests that the basis for a sound and effective domestic regulatory framework is to ensure that there are existing domestic laws and practices in force.⁶³ Instead of efficient existing laws and practices, the regulation of PrEA may be carried out through a system of licensing and certification. However, Convention 181 requires representatives of workers and employers to be consulted prior to the formulation of the said system.⁶⁴ A system of licensing and certification needs to be legitimate, objective, up to date, simple, clear, accessible, transparent, flexible, consistent, predictable, accountable, and subject to appeal.⁶⁵

If the above mentioned requirements are adhered to employment services will perform their functions more effectively and make a meaningful contribution to the labour market.⁶⁶ The ILO emphasized the legitimacy and objectivity of the aforementioned system, as it insists on having a system in place that protects the rights and freedoms of workers.⁶⁷ The regulatory framework should, by its intent and content, guarantee freedom of association, collective bargaining, and adequate protection of a minimum wage, working time, and other fair working conditions.⁶⁸ Moreover, it must guarantee social security benefits, access to training, and security from occupational accidents, proper

62 ILO, “Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement” Geneva: ILO, 2007 available at www.files.eth.ch/isn/46240/2007_Guide.pdf (accessed 21 September, 2020) at.p. 40.

63 *Id.*, at p. 40.

64 Article 3.

65 ILO, Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement, above note 63, at p. 41 .

66 *Ibid.*

67 Article 5 of the Convention 181.

68 Convention 181.

occupational health and safety measures, and compensation in the event of occupational accidents and diseases.⁶⁹

Furthermore, the system should facilitate maternity protection and benefits to workers as well as protection against insolvency.⁷⁰ The ILO also proposes that member states adopt a regulatory framework that prohibits PrEA from making workers available to a user enterprise during strikes. Ultimately, member states are required to publicize the regulatory framework and to circulate information about it to all role players and interested parties.⁷¹

Weighing the pros and cons of LO and TES, it is evident that a balance needs to be struck between new forms of employment services and workers' protection. The South African legal framework, for instance, has limited the application of TES to genuine temporary work for a period not exceeding three months,⁷² which gives employers the opportunity to use TES in genuinely temporary situations which are permitted by the law. Further, the Constitutional Court of South Africa has ruled that a client would eventually turn to be an employer if he venture to keep such employee beyond the time specified by the law. Unlike South Africa, the Tanzanian government took a rigid approach to protect workers by banning LO, leaving employers with no option in situations which require it. Therefore, it is high time to amend the National Employment Promotion Service Act, Cap 246 and its Regulations to accommodate functions of LO and TES.

69 ILO, Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement, above note 63, at p.32.

70 Article 12 of Convention 181.

71 ILO, Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement, above note 63, at p. 33.

72 Section 198A of Labour Relations Act, 1995 as amended in 2014.

7.0. CONCLUSION

As earlier stated, LO and TES are very important labour market intermediary services, as they ease the process of employment and help employers to focus on their core business. With advances in science and technology, employers are left with no option but to embrace these modern forms of employment services for their survival. Therefore, it is not only imperative to improve the laws governing TES and LO to address the practical challenges encountered in South Africa and Tanzania, but also to shape these laws so that the fundamental rights of workers are emphasized. Worth noting, employment services are labour market services which are involved in collecting and supplying the unemployed with information about job vacancies and the collecting and supplying of employers with information about the availability of prospective workers.⁷³

Therefore employment services are important labour market services, which help to improve the functioning of the labour market. Therefore the need to have efficient employment services, which is backed by the strong legal framework, is inevitable. The effectiveness of PES and PrEA can be judged through a performance appraisal which takes into account a number of factors, which include: the frequency of their usage, the quality of their services and physical and financial achievements. On the other hand, the effectiveness of the legal framework can be inferred or deduced from how it supports or facilitates the achievement of PES and PrEA objectives. Apart from this, a legal framework is also supposed to be compliant with the international labour standards as well as conforming to the domestic constitutional, stable, flexible, fair, viable and enforceable. Taking into account what has been stated above, it is still not settled whether or not the Tanzania legal frameworks facilitate PE and PrEA to meet their set objectives.

73 Hanks "English Dictionary" 2017 available at <http://www.collinsdictionary.com> (accessed 10 March, 2020).