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DOES A LABOUR BROKER EMPLOYEE PLACED WITH A CLIENT LONGER THAN 3 MONTHS BECOME THE CLIENT'S EMPLOYEE?

In 2015, Assign Services (Pty) Ltd, being a registered Temporary Employment Service (TES) or otherwise known as a Labour Broker, placed 22 (twenty-two) to 40 (forty) employees with Kroft Shelving and Racking (Pty) Limited (herein after referred to as the Client), depending on the projects awarded to the Client.

A number of the employees employed by Assign Services provided services to the Client for a period exceeding 3 (three) months and on a full-time basis. This continued employment, after a period of 3 (three) months, is what triggered the so-called "deeming provision" (section 198A(3(b) of the LRA and resulted in a dispute regarding the interpretation and effect of section 198A(3)(b).

Assign Services was of the view that the employees placed at the Client, remained their employees for all purposes but were also deemed to be the Client's employees for the purposes of the LRA. This was termed the "duel employer relationship". NUMA, who represented their members in this matter, disagreed and was of the view that the Client became the only employer. This was termed the "sole employer relationship".

The dispute that arose had been adjudicated by the CCMA, the Labour Court and the Labour Appeal Court where after lead to appeal to the Constitutional Court was granted and the Constitutional Court had to finally determine the correct interpretation of section 198A(3)(b).

The question before the Constitutional Court was "what happens to the employment relationship under the LRA between the placed employee and the TES once this deeming provision kicks in. In particular, does section 198A(3)(b) give rise to a dual employment relationship where a placed employee is deemed to be employed by both the TES and the client? Or does it create a sole employment relationship between the employee and the client for the purposes of the LRA."

On 26 July 2018, the Constitutional Court handed down its judgment in the matter CCT 194/17: Assign Services (Pty) Ltd v National Union of Metal workers of South Africa and Others. The majority judgment penned by Dollo AJ (with various other members of the bench concurring) found that, on an interpretation of sections 198(2) and 198A(3)(b), for the first three months the TES is the employer and then subsequent to that time lapse the client becomes the sole employer for the purposes of the Labour Relations Act. The majority found that the language used by the legislature in section 198A(3)(b) of the LRA is plain and that when the language is interpreted in that context, it supports the sole employer interpretation.

So, what does this actually mean? Well for most Labour Brokers and their clients, it means business as usual although there appears to be some confusion as to the practical implication that this judgment may potentially have on Labour Brokers and the clients who utilise the services of Labour Brokers/Temporary Employment Services (TES) providers. Whilst many questions remain unanswered and will likely be the subject of future litigation, The Constitutional Court held as follows at paragraph 75:

> "This also makes it difficult to accept Assign's argument that the sole employer interpretation forces employees into a new employment relationship, without their consent, on terms of employment to which they have not agreed. Section 198(2) gives rise to a statutory employment contract between the TES and the placed worker, which is altered in the event that section 198A(3)(b) is triggered. This is 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. The triangular relationship then continues for as long as the commercial contract between the TES and the

client remains in force and requires the TES to remunerate the workers."

In other words, for the purposes of the LRA, an employee performing a temporary service as contemplated in section 198A(1) for the client is the employee of the TES. A Temporary service is defined as follows in terms of section 198A (1):

"work for a client by an employee—

(a) for a period not exceeding three months;

(b) as a substitute for an employee of the client who is temporarily absent; or

(c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

However, in the event that an employee of the TES is not performing a temporary service for the client, as defined in section 198(A)(1), the employee, for the purposes of the LRA only, is the employee of that client and the client is considered to be the employer; and subject to the provisions of section 198B, employed on an indefinite basis by the client. Furthermore, a 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.

Now therefore, the triangular relationship between the TES, the Client and the placed employee continues for as long as the commercial contract between the TES and the client remains in force however, the client is no longer protected from the consequences of employment relationships and cannot contract out of their employment obligations in respect of placed employees. The sole employer interpretation adopted by the Constitutional Court therefore gives employees certainty in as far as it relates to exercising their rights in terms of the LRA is concerned. For example, ascertaining which employer dismissed the employee, which employer should reinstatement them, which procedure applies to a dismissal, etc.

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