26 JULY 2018

EMPLOYMENT ALERT

IN THIS **ISSUE**

GROUND-BREAKING JUDGMENT

CONSTITUTIONAL COURT DETERMINES THE FATE OF LABOUR BROKERS

The deeming provision in s198A(3)(b)(i) of the Labour Relations Act (LRA) provides that an employee of a Temporary Employment Service (TES) not performing a temporary service for the client is *"deemed to be the employee of that client and the client is deemed to be the employer; ..."*

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CONSTITUTIONAL COURT DETERMINES THE FATE OF LABOUR BROKERS

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The Labour Court arrived at this conclusion on the basis that the rights and obligations between the TES and the employees had vested in them by virtue of concluding the employment contracts.

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This section has been considerably debated. The debate centres on what the legislature intended by introducing the deeming provision. Two main schools of thought emerged from this debate. The first was that once the deeming provision kicks in, the client of the TES becomes the sole employer of the employees, meaning that the TES employees are effectively "transferred" to the client. The second school of thought was that a dual employment relationship arose with both the TES and client as employers.

CCMA

In a ruling handed down by the CCMA on 29 June 2015, the commissioner ruled on the interpretation of the deeming provision. The facts were briefly that the trade union, The National Union of Metalworkers of South Africa (NUMSA), argued that the employees, who fell below the threshold, had come to be exclusively employed by the client, Krost Shelving and Racking (Pty) Ltd after the three-month period. The TES, Assign Services, argued that the employees in question remained its employees but for the purposes of the LRA, there was a dual employment relationship. The CCMA found that the deeming provision should be interpreted to mean that the client becomes the sole employer of the placed TES employees for purposes of the LRA. The CCMA was taken on review to the Labour Court.

Labour Court

At the Labour Court (*Assign Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2015] 11 BLLR 1160 (LC)), Brassey AJ found that nothing in the LRA deprived employees of their rights and obligations under their contracts with the TES, therefore the contractual relationship between the employees and the TES remained in force. The Labour Court rejected the argument that s198A(3)(b)(i) creates a sole employment relationship between the client and the placed employees. According to the Labour Court, the deeming provision augmented the employment contract between the TES and its employees and added the client as the party against whom the employees could claim their rights in terms of the LRA. Accordingly, it was not a substitution of the old employer (the TES), with a new employer, the client.

The Labour Court arrived at this conclusion on the basis that the rights and obligations between the TES and the employees had vested in them by virtue of concluding the employment contracts. The client did not become vested with those rights and obligations. The TES remained the employer of the assigned employees and the joint and several liability provisions of the LRA confirmed this. If the TES terminated the contract, the source of control was gone

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The LAC found that the sole employer interpretation did not ban the operations of a TES.

and the relationship with the client ended by operation of law. The client did not become the sole employer. The Labour Court concluded that the two employment relationships were discernible that operated in tandem.

Labour Appeal Court

The matter was taken on appeal to the Labour Appeal Court (LAC). The LAC interpreted the deeming provision and came to an entirely different conclusion to that of the Labour Court. The LAC essentially held that the TES is the employer of the placed employee until the employee is deemed to be the employee of the client and that once the deeming provision kicks in (ie after three months), the client becomes the statutory employer of the TES employee. The TES employees are deemed to be permanent employees of the client.

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. The purpose of the protection offered by the amendments is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client.

According to the LAC, the sole employer interpretation was in line with the explanatory memorandum accompanying the LRA Amendment Bill, tabled in 2012 and supported by the plain language of s189A(3)(b) of the LRA, interpreted in context.

The LAC also held that the joint and several liability provisions, according to the LAC, also have the potential to discourage the TES from being further involved in the administrative arrangements regarding employees placed with a client for a period in excess of three months.

The LAC found that the sole employer interpretation did not ban the operations of a TES. It, however, regulated the TES by restricting it to genuine temporary employment arrangements in line with the purpose of the amendments to the LRA.

The matter has now been brought before the Constitutional Court for the final word on the matter.

Constitutional Court

Today, the Constitutional Court (the court) handed down its long awaited judgment in this matter. The Court dismissed Assign's Appeal and upheld the LAC decision. The majority of the court held that for the first three months of employment, the TES is the employer of the placed worker, thereafter the client becomes the "sole" employer.

In a single dissenting judgment, Cachalia AJ held that the "dual" employer interpretation applied and found that this interpretation provides greater protection for the placed employees.

The majority held that the s198A must be contextualised within the right to fair labour practices in s23 of the Constitution and the purpose of the LRA as a whole.

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This 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.

According to the court, a TES's liability only lasts as long as its relationship with the client and while it (rather than the client) continues to remunerate the worker. Upon the triggering of s198A(3)(b) and the client elects to remunerate the employee directly, the TES will then fall out of the employment relationship entirely.

Conclusion

Whilst the court does not ban labour broking in its entirety; it aims to ensure that the provision of temporary services is truly temporary. Part of this protection entails that placed employees are fully integrated into the workplace as employees of the client after the three-month period. The employee automatically becomes employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows.

According to the court, all that is required for the TES to constitute a statutory employer in terms of s198 of the LRA and is effectively to place workers with clients for a fee and remunerates those workers. Essentially the TES occupies the role of a pay roll administrator. The court has concluded that this will not constitute a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility falls on the client as employer within the same triangular employment relationship.

This 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.

It is worth noting that this judgment only applies to employees earning below the threshold and employed for a period longer than three months. However, given the unresolved issues raised in the dissenting judgment, we can expect more litigation.

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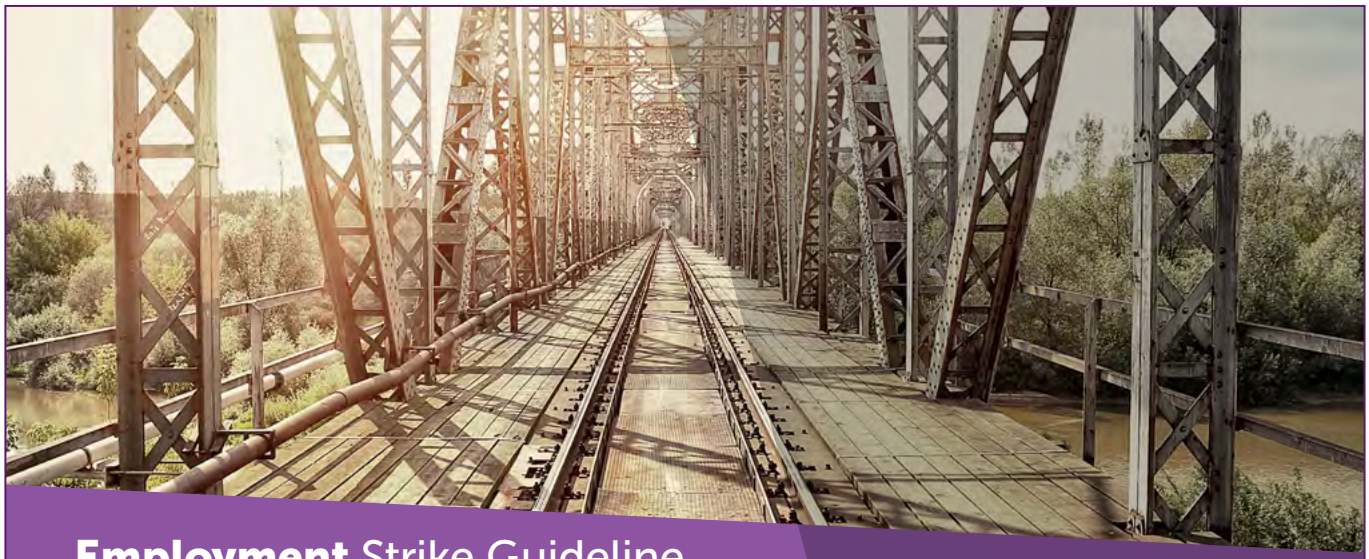

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