ASSIGN SERVICES (PTY) LTD // NUMSA & OTHERS

IN RE:

OBSERVATIONS: IMPLICATIONS OF KEY FINDINGS IN THE CONSTITUTIONAL COURT'S JUDGMENT

MEMORANDUM

Dear Grant,

1. I confirm that I attended at the Constitutional Court this morning to note the judgement in this matter.

2. I was subsequently instructed to prepare a high level memorandum, on an expedited basis, detailing my preliminary observations on the Constitutional Court's findings and their practical implications.

3. This memorandum details those observations.[1]

OBSERVATIONS

4. It bears mentioning, at the outset, that the judgment consists of two parts: (i) a majority judgment penned by Dlodlo AJ (with various other members of the bench concurring); and (ii) a minority judgment penned by Cachalia AJ. This memorandum focuses on the majority judgment.

5. At issue in the matter was the proper interpretation of section 198A(3)(b) of the LRA,[2]

[1] This memorandum has not been prepared with the benefit of input from Senior Counsel. I understand that a detailed opinion on the judgment, or aspects of the judgment, may be sought from Senior Counsel in due course.

[2] The Labour Relations Act 66 of 1995.

which has widely become known as the "deeming provision".

6. More particularly, the controversy pertained to whether, under the LRA and after the deeming provision becomes operative, a situation of "sole employment" prevails (with the placed worker being employed by the client to the exclusion of the TES[3]), or whether situation of "dual employment" prevails (with the placed worker being employed concurrently by the client and the TES).

7. The majority of the Constitutional Court ultimately preferred the sole employer interpretation. To understand the implications of this, it is necessary to examine some of the key findings in the majority judgment which underpinned this conclusion.

8. In paragraph 1 of the majority judgment, the Constitutional Court framed the question as follows:

> *"The issue before us is 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?"*

9. To my mind, it is significant that the Constitutional Court used the words *"under the LRA"* and *"for the purposes of the LRA"* in this introductory paragraph – this (read with certain later findings to which I make reference below) makes it apparent that the succeeding findings are confined to the position only insofar as the LRA is concerned.

10. In paragraph 3 of the majority judgment, the Constitutional Court observed that the Legislature, in amending the LRA by way of the 2014 amendments,[4] *"stopped short of banning labour broking"*. This is an issue to which I revert further below.

11. After various introductory observations, the Constitutional Court proceeded to deal with an exercise that it termed *"[c]ontextual reading"*. Without exhaustively traversing

[3] Temporary employment service.

[4] This by way of the Labour Relations Amendment Act, 2014.

its findings in this regard here, the Constitutional Court found that a contextual analysis of the relevant statutory provisions was supportive of the sole employer construction.

12. As part of the exercise of *"[c]ontextual reading"*, the Constitutional Court made reference to section 198(4A), which makes provision, in the case of joint and several liability in terms of section 198(4) or deemed employment in terms of section 198A(3)(b), for an employee to enjoy an election to institute legal proceedings against the TES or the client or both, and to enforce an order or award made against the TES or the client against either of them.[5]

13. The Constitutional Court proceeded to state the following (with reference to section 198(4A)) at paragraph 61:

> *"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 a TES pre- and post-deeming as opposed to the general liability applicable in terms of section 200B."* (Own emphasis.)

14. This paragraph should be read with paragraphs 63 and 64 of the judgment, which read as follows:

---

[5] The section provides that *"[i]f the client of a [TES] 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 [TES] or the client or both the [TES] and the client;

(b) a labour inspector acting in terms of the [BCEA] may secure and enforce compliance against the [TES] or the client as if it were the employer, or both; and

(c) any order or award made against a [TES] or client in terms of this subsection may be enforced against either."

> *"In other words, before the 2014 Amendments, a claim had to be brought against the TES first. The client would be held liable by operation of law if the TES failed to comply with its obligations. Under section 198(4A), however, the client's liability ceases to be "default liability". The client is deemed the employer of the placed worker and can thus be sued directly in the CCMA or the Labour Court. In this way, section 198(4A) offers placed workers more protection than section 198(4)'s joint and several liability protection. It also allows an employee to sue a TES directly, despite it not being an employer.*
>
> *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. 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 will no longer meet the requirement in section 198(1) of remunerating the worker. The TES will then fall out of the relationship entirely."* (Own emphasis.)

15. In these passages, the Constitutional Court appears to have accepted that post-deeming, where the placed worker is deemed to be (solely) employed by the client for purposes of the LRA, the TES (i) may retain a role in the practicalities of the relationship (including continuing to remunerate workers[6] – and conceivably, perform other similar tasks); (ii) may maintain a contractual relationship with the employee (albeit that it is not an employment relationship under the LRA); (iii) may maintain a contractual relationship with the client; and (iv) may participate in litigation where the employee seeks to pursue a claim founded on the TES's joint and several liability.

16. Importantly, under the heading *"[t]riangular relationship"*, 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*

[6] This point is made again later in the judgment at paragraph 80.

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."

17. Accordingly, the Constitutional Court's conceptualisation of the nature of the (sole) employment relationship with the client post-deeming, appears to be in the nature of one only at statutory level – and ostensibly – one which does not necessarily do away with the relationship between the placed worker and the TES on any level other than the statutory level, and for any purposes other than for purposes of the LRA. This position appears to be consistent with the words *"under the LRA"* and *"for the purposes of the LRA"* in paragraph 1 of the judgment, and appears to be reinforced by the (later) reference to *"LRA rights"* in paragraph 81 of the judgment.

18. There also does not appear to be any indication that there is a change in the statutory attribution of responsibility or liability in relation to claims under the BCEA[7] and other statutes.[8]

19. As a concluding observation, I point out that the judgment appears (regrettably) to have left some areas of uncertainty behind.

20. For instance, it remains unclear – on my reading of the judgment – what becomes of the employee's accrued rights as against the TES if a client elects, at the point of deeming, to terminate its contractual relationship with the TES, causing the TES to fall out of the picture. The (majority) judgment does not state, for instance, that there is a transfer of rights and obligations as between the TES and the placed worker, to the client vis-à-vis the placed worker.

21. It is also not entirely clear from the (majority) judgment what the position is in relation to any common law contract of employment concluded between the placed worker and the TES – the judgment, as I read it, goes no further that determining the position only insofar as the LRA is concerned. It appears to be arguable (on the

[7] The Basic Conditions of Employment Act 75 of 1997.

[8] See section 82(1) of the BCEA, which replicates section 198(2) of the LRA. See also the definition of "employer" in section 1 of COIDA, which defines an employer as including a labour broker.

construction adopted in the majority judgment) that any common law contract of employment concluded between the placed worker and the TES endures and may give rise to enforceable employment-related contractual claims vis-à-vis the TES. It appears likely that this question (and others) flowing from the Constitutional Court's judgment will form the subject of future litigation.

22. I remain available to provide such further advice and assistance as may be required.

RIAZ ITZKIN

Chambers, Sandton

26 July 2018