The Constitutional Court, TES and sustainable workforce solutions

A consideration of the NUMSA | Assign Services matter and the way forward for stakeholders

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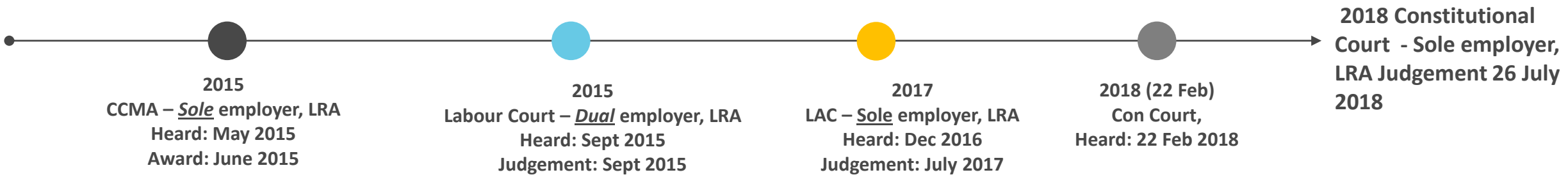
What motivates the dispute

1. Legal interpretation: yes, but why?
2. Political considerations: absolutely.
3. Business / economic considerations: only if misunderstood.



What is all the noise about?

The National Union of Metalworkers of South Africa (NUMSA) welcomes the decision of the Constitutional Court on a judgement which strengthens the rights of temporary workers.
BACKGROUND
The case concerned the interpretation of section 198A(3)(b) of the Labour Relations Act 66 of 1995 (LRA) and whether this deeming provision resulted in a "sole employment" relationship between a placed worker and a client or a "dual employment" relationship between a Temporary Employment Service (TES), a placed worker and a client. The Labour Appeals Court set aside the order of the Labour Court and held that a placed worker who has worked for a period in excess of three months is no longer performing a temporary service and the client, as opposed to the TES, becomes the sole employer of the worker by virtue of section 198A(3)(b) of the LRA.
In the Labour Court it was held that a proper reading of the section could not support the sole employer interpretation. It instead held that section 198A(3)(b) created a dual employment relationship, in which both the TES and the client have rights and obligations in respect of the workers. In an appeal, by NUMSA, to the Labour Appeals Court it was found that the sole employer interpretation best protected the rights of placed workers and promoted the purpose of the LRA.

The Constitutional court upheld the decision of the Labour Court and this and dismissed the application made by Assign Services with costs.

WHAT DOES THIS MEAN FOR ORDINARY WORKERS?

This means that casual workers who earn R205 000 per annum and less, who are employed by labour brokers, are eligible to **become permanent employees of the main employer** after 3 months. **Labour brokers can no longer abuse these contracts and extend them beyond the 3-month stipulation** given in the Labour Relations Act.

This is a major victory for casual and temporary workers who are abused by Labour brokers. We view this as the first step in ending the Labour brokering system in South Africa. Our experience with labour brokers is that they are extremely abusive and expose workers to low wages and terrible working conditions. We hope this decision will be the death knell of the entire industry and, as NUMSA, we will continue to fight for a total ban on Labour brokers. We call on all casual workers to unite behind NUMSA so we can ensure their rights in the workplace.
Aluta continua!

Myth #1: there is no remedy in respect of "permanence"

Myth #2: there is no 3 month limit on FTC's via TES

Court process and key findings

2015
CCMA – *Sole* employer, LRA
Heard: May 2015
Award: June 2015

2015
Labour Court – *Dual* employer, LRA
Heard: Sept 2015
Judgement: Sept 2015

2017
LAC – Sole employer, LRA
Heard: Dec 2016
Judgement: July 2017

2018 (22 Feb)
Con Court
Heard: 22 Feb 2018

Constitutional Court - Sole employer for LRA
Judgement 26 July 2018

Constitutional Court Judgement | Legal Principles and … *Quotes*

No permanent status after 3 months
(198B expressly allows for FTC's beyond 12 months and termination pay beyond 24 months)

No s197 transfer of employment from TES to client after 3 months
(s82 of the BCEA provides for the TES to be the employer and employment contracting party)

Client is the sole employer for the LRA only
(and even so both the TES and client can be jointly or severally liable for LRA contraventions)

Triangular relationship continues as long as commercial agreement is in place and TES remunerates assignees

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 (para 61)

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 (para 64)

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

The clause to be interpreted: s198A(3)(b)

The clause central to the way forward: s198(4A)

s198(4A)
If the client of a temporary employment service 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)-

- the employee may institute proceedings against **either** the temporary employment service or the client **or both** the temporary employment service and the client;
- a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service **or** the client, as if it were the employer, **or both; and**
- any order or award made against a temporary employment service **or** client in terms of this subsection may be enforced against **either**.

OTHER ACTS

This Judgment only deals with the LRA

Definition of “employer”

TES Sole	SDLA	Schedule 4 part 2, definition of employer … labour broker
TES sole / Dual	EEA	For purposes of Chapter III of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where that person's employment with the client is of indefinite duration or for a period of three months or longer (s57)
TES Sole	BCEA	A person whose services have been procured for, or provided to, a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer (s82(1))
TES Sole	COID / UIF	**"employer"** means any person … a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker (s1, COIDA) **“employer”** means employer as defined in paragraph 1 of the Fourth Schedule to the Income Tax Act
TES Sole	PAYE	Schedule 4 part 2, Employers to deduct tax … labour broker
TES Sole / Dual	LRA	For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer (s198(2)) If the client of a temporary employment service 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) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client (s198(4A)

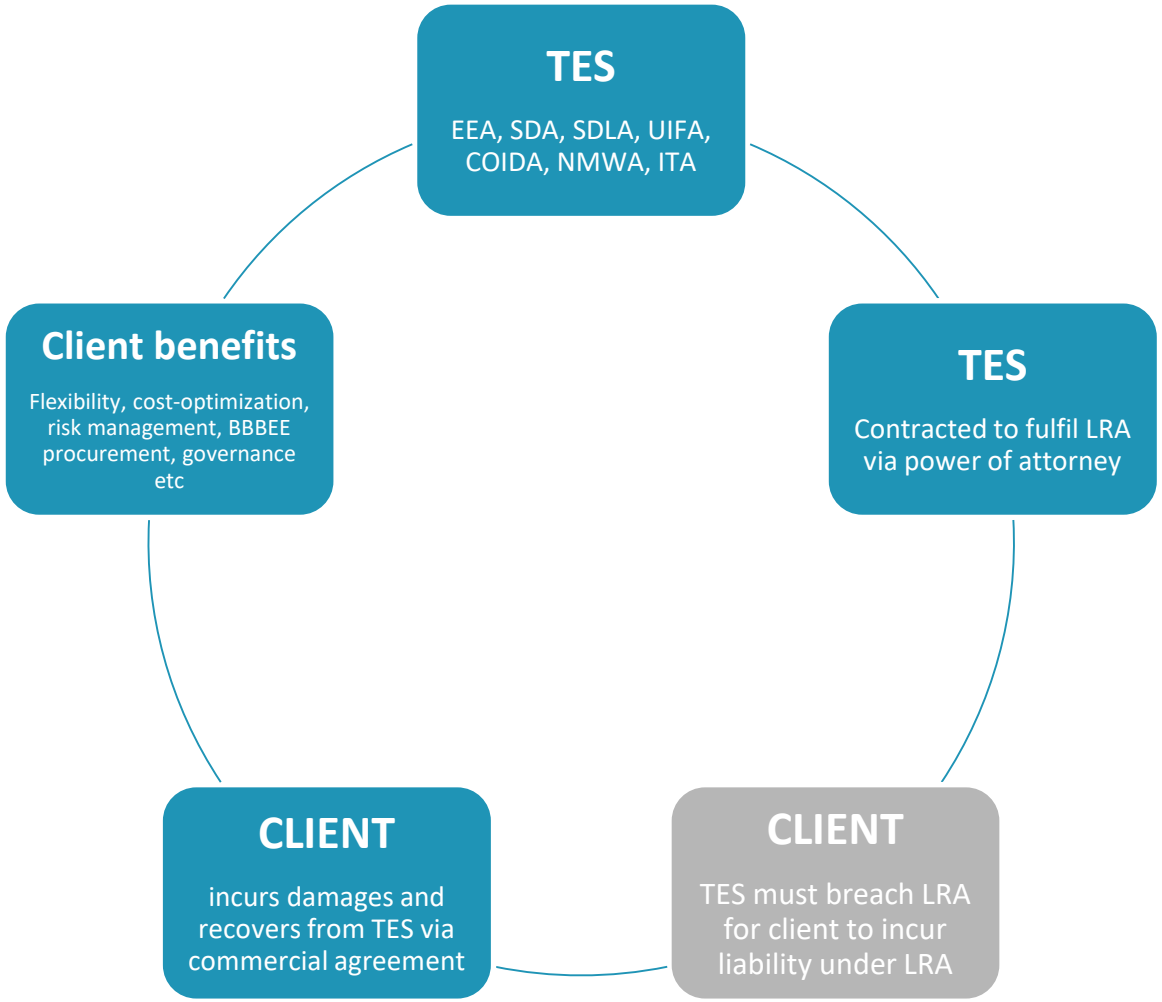
Constitutional Court outcome

The client is the sole employer for purposes of the LRA

Carry on as before

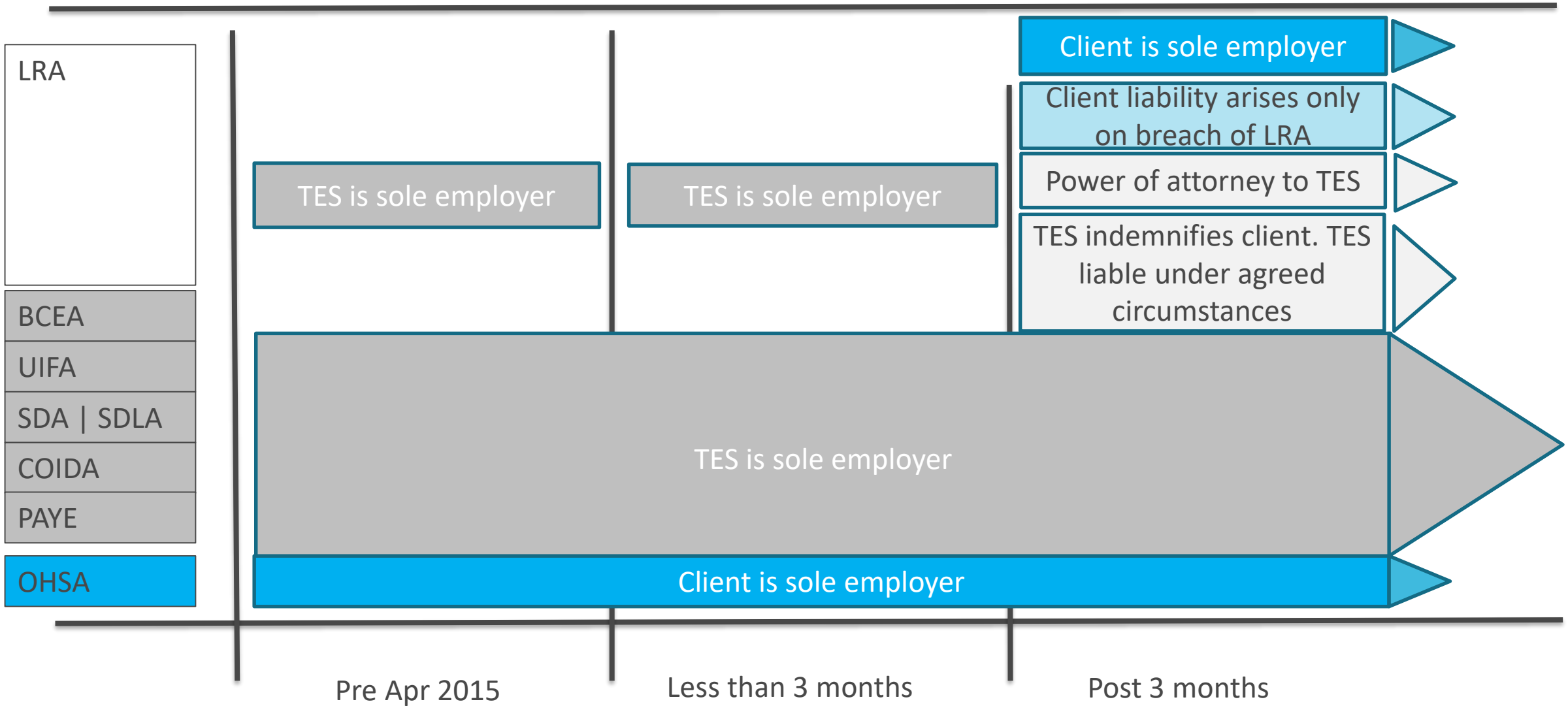
- TES indemnifies client
- Client gives TES power of attorney
- Still use TES under **current terms** for –R205K and +3m assignees and absenteeism
- Still use TES for –R205K and +3m assignees as well as +R205K assignees, **BUT** sign a power of attorney for TES to be agent under the LRA
- Consider workforce solutions businesses that can provide **blended operating models**

Practical impact of The SOLE employer for LRA purposes



- ✓ The contract of employment between the TES and the assignee originates under the BCEA and remains intact after 3 months
- ✓ The commercial agreement remains intact after 3 months
- ✓ There is no right to permanent status (no live dispute)
- ✓ Breach s198(4A) TES can still be liable
- ✓ In the event of there being an appropriate SLA and power of attorney in place, TES runs with the matter

THE SOLE EMPLOYER FOR THE LRA



Unpacking the Assign Services matter

Relevant Sections in the LRA

Section 198

198(1) In this sections `temporary employment service' means any person who, for reward, procures for or provides to a client other persons –

- **(a) who perform work for the client; and**
- **(b) who are remunerated by the temporary employment service.**

- **198(2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.**
- **198(3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.**
- **198(4) Joint and several liability**
- **198(4A) Extended Joint and Several Liability**

Section 198 continued

198A(3) For the purpose of this Act, an employee –

- **(b) not performing such temporary service for the client is –**

  (i) deemed to be the employee of that client and the client is deemed to be the employer

  (ii) subject to the provisions of 198B, employed on an indefinite basis by the client.

Note

1. Only for employees earning below R205433 per annum
2. Legitimate fixed term contracts are still permissible

198A(5) An 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.

Note

1. This has always been the risk area. This was implemented on 1 January 2015
2. LAC case in Woolworths

Matters arising from the Constitutional Court (CC)

Both the LAC and CC judgments also makes it clear that the applicants cannot get the relief that they seek, namely a transfer to the client.

The relevant paragraphs from the CC judgment are:-

- ***[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***

- Comment: Creates liability for the TES as long as the TES is still in the picture. Is this not parallel?

Matters arising from the Constitutional Court (CC)

- ***[63] 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.***

Comment: The industry have always argued for greater protection. The paragraph made it clear if the TES can be sued and an award made against them they have to be allowed to participate in CCMA and LC hearings.

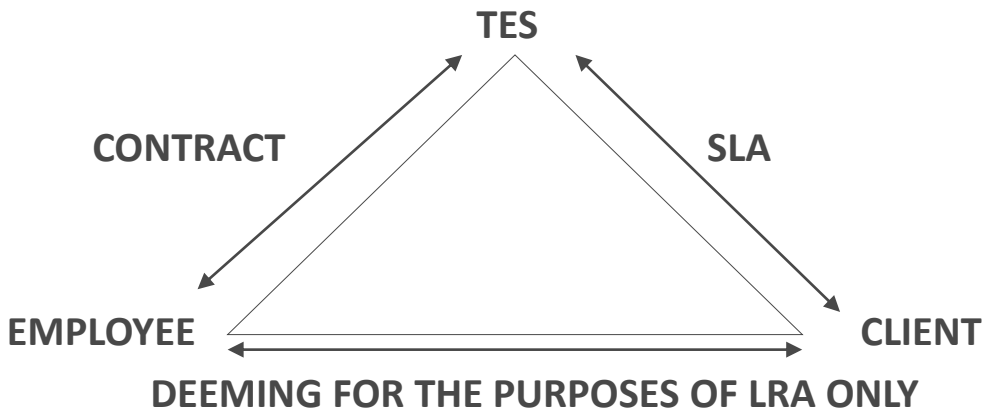
- ***[64] A TES's liability only lasts as long as its relationship with the client and while it (rather than the client) continues to remunerate the worker. Nothing in law prevents the client and the TES from terminating their contractual relationship upon the triggering of section 198A(3)(b), with the 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.***

Comment: Why would you take the risk and the liability of termination. For the employee here there is risk as the client would have to sign a contract with the new employee that might be more disadvantageous than his current TES contract

Matters arising from the Constitutional Court (CC)

- *[75] ….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.*

Comment: The important paragraph that this relationship continues



What others are saying

Consequences of joint and several liability clauses

- The Court was persuaded that the sole employer interpretation is not hampered by section 198(4A) (joint and several liability)
- This section regulates liability for the period where a placed employee is employed by the TES.
- 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

If SLA is cancelled between TES and client

- 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
- NOTE: No section 197 transfer

CDH
CLIFFE DEKKER HOFMEYR

What others are saying

NUMSA vs Assign Service – The ConCourt

- Employees can refer disputes in terms of the LRA against TES and client for as long as TES remunerates the employees
- Sole employer interpretation offers more protection to employees – dual employer interpretation creates uncertainty

NORTON ROSE FULBRIGHT

BUSA press release 27 July 2018

1. Section 198A of the LRA **does not apply** to TES employees who earn in excess of the earnings threshold (currently R205 433.30 per annum).

2. The deeming provision contained in s 198A (3) (b) (i) of the LRA is only triggered if the TES employee is **not** performing a temporary service. A temporary service means work for a client by an employee:

- For a period not exceeding 3 months;

- As a substitute for an employee of a client who is temporarily absent; or

- In a category of work 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.

3. If a placed employee is performing a temporary service (as defined above), the TES will, for as long as the placed employee performs a temporary service, remain the employer in terms of the LRA.

4. The deeming provision provided for in s 198A (3) (b) (i) of the LRA is limited to the **LRA only**. If the s 198A deeming provision is triggered, it does not mean, by way of example, that the client also becomes the employer for the purposes of the BCEA, SDL and COIDA.

5. If a placed employee is deemed to be an employee of the client, he/she 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 (this has been in place since 1 January 2015).

BUSA press release 27 July 2018

6. If s 198A(3) (b) (i) of the LRA is triggered, the client of the TES becomes the sole employer of the placed employee. **This is for the purposes of the LRA only**.

7. According to the Constitutional Court, there will be what is referred to as a triangular relationship. There is no "*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*."

8. Even with the sole employer interpretation, "*a placed employee will retain the right to claim against a TES through section 198(4A) to the extent that they are still remunerated by the TES. The employee is largely protected against the TES regardless of whether the claim is made against an employer. But this liability relates only to claims brought by the employee. The protections afforded by the sole employer interpretation go beyond this. They give employees certainty and security of employment."*

BUSA
BUSINESS UNITY SOUTH AFRICA

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For the purposes of the **LRA** the client is the sole employer of assignees assigned for more than 3 months and who earn less than R205 433 per annum

Important:
- LRA only
- No permanent status after 3 months
- No transfer of employment from TES to client
- Equal treatment always been in
- SLA's and SOP's crucial

R205 433

❑ TES is the sole employer
❑ Minimum wages and terms of employment apply
❑ TES is liable for all labour laws, with exception of OHSA
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❑ Only for LRA client is sole employer
❑ Equal treatment applies (from 01 April 2015)
❑ Assignee can litigate against either TES or client as long as there is a commercial relationship between client and TES and TES remunerates assignees
❑ TES is liable for all other labour laws, with exception of OHSA

+3 months

Some learnings

On the sole interpretation the TES liability definitely still kicks in under section 198(4A)

Your service level agreement is key

Client wants to know TES is legally there for breaches

The TES has to have representation before the Bargaining Council and the Commission for Conciliation, Mediation and Arbitration

The TES model is still fine,
much ado about nothing.
Does it really matter who the LRA employer is?

Alternative models should be considered but for business reasons only?

Workforce Model Return on Investment (ROI) - sheet example

TES or Contracting/Outsourcing

Value Chain Element	Costing description	Saving to organisation	Cost to organisation
Resourcing cost (advertise, screen, verification etc)	Credit, criminal, ID, reference costs		
Work readiness and integration	Training provided		
Education, training and development	Courses or qualifications		
Learnerships that would be required by organisation in the case of direct employment	5% of organisation headcount x learnership cost		
Persons with disabilities that would be required by the organisation in the case of direct employment	2% of organisation headcount plus related costs		
Payroll administration and related	Cost per payslip PM or PW		
HR staff capacity to general staff ratio	1: 100 – 1:150 x cost of HR resource		
Labour relations case and dispute management	R1800 per matter pm or R200 pp in employment pm		
Equalisation costs on current OD structure and profiles	Relative costs of provider vs organisation based on different operating models		
On-site management capacity that would be required in the case of direct employment	Cost of provider's site management and service delivery resources		
In the case of TES, the 6% on-cost for skills development spend under BBBEE codes	6% x total payroll burden of the individuals in question		
Cost of money based on debtors days	10%		
Service provider's service fee	TBD		
TOTALS			

QUESTIONS?

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THANK YOU!

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