

EMPLOYMENT ALERT

14 October 2013

NUMSA V ABANCEDISI LABOUR SERVICES [2013] ZASCA 143 (30 SEPTEMBER 2013)

The Supreme Court of Appeal recently took to task a Temporary Employment Service (TES) for leaving its employees' employment in abeyance (similar to a lay-off or time-off until production increases) for over 10 years.

During 2001, Kitsanker (Pty) Ltd (Kitsanker) concluded an agreement with Abancedisi Labour Services (Abancedisi) whereby the latter would provide the former with employees. Staff employed directly by Kitsanker at the time agreed to the termination of their employment by Kitsanker and were immediately employed by Abancedisi on limited duration employment contracts. Their services were placed at Kitsanker's disposal by their new employer, Abancedisi, but the location and other terms and conditions of employment remained unchanged.

After a work stoppage in July 2001, Kitsanker required employees to sign a code of conduct to regulate industrial action. Kitsanker refused to allow any employee onto its premises who did not sign the code of conduct. This included employees provided by Abancedisi. Upon enquiry from National Union of Metalworkers of South Africa (NUMSA), Abancedisi confirmed Kitsanker's position. It stated further that its employees would not be paid any wages since they were only remunerated for work performed.

The employees referred an unfair dismissal dispute to the Bargaining Council. Abancedisi argued that the employees had not been dismissed but in fact remained on their payroll. Thereafter, the dispute was referred to the Labour Court (LAC) where the same point *in limine* was raised and upheld.

On appeal to the LAC, although the cost order was found to be unfair and reversed, the LAC maintained the view that the employment relationship had continued and that the employees' situation had merely amounted to an indefinite suspension.

continued

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The employees then appealed to the Supreme Court of Appeal (SCA). In respect of the employment contract, the SCA found that it was specifically linked to the Kitsanker project. As Abancedisi did not secure alternative work for the employees after the expulsion of employees by Kitsanker, and Kitsanker filled the employees' posts, the contracts of employment of the Abancedisi employees had been terminated.

The SCA further found that Abancedisi had not paid the employees any wages, and there was nothing "... *even slightly resembling the characteristics of an employment relationship remaining between the parties beyond the illusory retention of employees on Abancedisi's payroll*". The effect of Abancedisi's conduct was that there was material breach of the employment contract that entitled the employees to cancel it.

The LAC's view that the employees were on an indefinite suspension was found to be unsupported by the evidence. The SCA held that the dismissal was unfair, awarded the employees twelve months' compensation and costs.

This judgment brings further focus to the envisaged amendments to the Labour Relations Act, No 66 of 1995. In terms of s198A(3)(a) and (b) of the Labour Relations Amendments Bill (LRAB), an employee who performs a temporary service and who is the employee of the TES in terms of s198 (2), or is not performing such temporary services for the client, is deemed to be the employee of that client and the client is deemed to be the employer.

In terms of s198(4A) of the LRAB, the client of a TES is jointly and severally liable with the TES for various employee claims (in terms of the current s198(4) of the LRA or if they are deemed to be the employer in terms of s198A(3)(b)). The employee may then institute proceedings against either the TES or the client, or both. In addition, in terms of s198(4A)(c) any order or award that is made against a TES or client may be enforced against either.

It appears likely that aggrieved employees will bring their claims against the client of the TES where the client is either in a position to satisfy a judgment debt or more willing to settle claims by the employees. Post the implementation of the legislative amendments, TES Clients with perceived deep pockets may find themselves embroiled in litigation that they can presently avoid.

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