

13 MARCH 2017

EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

IN THIS ISSUE

CDH ADDS TO ITS GROWING EMPLOYMENT PRACTICES IN CAPE TOWN AND JOHANNESBURG

Cliffe Dekker Hofmeyr (CDH) is thrilled to announce three new key appointments in our fast-growing Employment practices in Johannesburg and Cape Town.

AT LAST, THE MANAGED SERVICE PROVIDER (MSP) MODEL GAINS TRACTION

In a recent arbitration award (the Award) in *K Sefole & 102 Others v Bidvest TMS and Nampak Glass*, the CCMA Senior Commissioner found that the relationship between Bidvest and Nampak did not amount to a temporary employment service (TES) for the purposes of s198A of the Labour Relations Act (LRA).



[CLICK HERE](#) to view our NEW Employment Strike Guideline

CDH ADDS TO ITS GROWING EMPLOYMENT PRACTICES IN CAPE TOWN AND JOHANNESBURG

NEW APPOINTMENTS



JOSE JORGE
New Director | Employment



THABANG RAPULENG
New Director | Employment

Cliffe Dekker Hofmeyr (CDH) is thrilled to announce three new key appointments in our fast-growing Employment practices in Johannesburg and Cape Town.

"Our national employment practice has a strong reputation for delivering solutions-based advice and supporting clients in the day-to-day management of their people legal issues and risks. There is however a growing need for advising on wide-ranging employment issues in the Cape and with the addition of Director Jose Jorge, we now have one of the regions largest dedicated employment practices to service this fast growing hub for businesses," says Director and Regional Practice Head for Employment Law, Cape Town, Gillian Lumb.

Jose has nearly 20 years of experience in the employment field. He assists local and international companies conducting business in South Africa and advises clients on all aspects of employment law. He services a number of corporate clients in various sectors especially the retail, petroleum and energy sectors.

Jose's brings as part of his team Steven Adams, who joins the firm as an Associate in the Cape Town Employment practice.

In another key appointment, Thabang Rapuleng, who has experience in the field of employment law both as a practicing attorney and in house legal counsel, becomes a Director in the firm's Employment practice in Johannesburg. He brings a wealth of experience in industrial relations in South Africa, Botswana, Mozambique, Zambia, Zimbabwe and Tanzania.

We are delighted to welcome Jose, Thabang and Steven to our dynamic team and we are confident that their knowledge and breadth of experience will enhance our employment offering.

AT LAST, THE MANAGED SERVICE PROVIDER (MSP) MODEL GAINS TRACTION

This dispute was first entertained, incorrectly so, by the National Bargaining Council for the Chemical Industry (NBCCI) which had no jurisdiction over Bidvest.

A dispute arose about whether that transfer amounted to an s197 transfer of part of Unitrans' business to Bidvest as a going concern. Both the Labour Court and LAC determined that the events triggered an s197 transfer.

The issue

In a recent arbitration award (the Award) in *K Sefole & 102 Others v Bidvest TMS and Nampak Glass*, the CCMA Senior Commissioner found that the relationship between Bidvest and Nampak did not amount to a temporary employment service (TES) for the purposes of s198A of the Labour Relations Act (LRA). The Applicants are employed by Bidvest but claimed that the service provided by Bidvest to Nampak was not a temporary one as it had exceeded a duration of three months. They earned under the Ministerial earnings threshold and asserted that they should be treated as the "deemed" employees of Nampak and employed by it on an indefinite basis by it.

This dispute was first entertained, incorrectly so, by the National Bargaining Council for the Chemical Industry (NBCCI) which had no jurisdiction over Bidvest. The NBCCI found that the relationship between Bidvest and Nampak was a TES. An urgent application before the Labour Court sought to suspend the operation of the NBCCI decision pending a review to set it aside. The urgent relief was granted and the matter, by agreement between the parties, was referred to the CCMA for a Senior Commissioner to determine the dispute afresh.

The Facts

Bidvest provided a specialised warehousing service to Nampak in terms of a detailed service level agreement (SLA) which had been concluded between them. The core business of Nampak Glass is the manufacture of glass products. Once these products are ready to be released for despatch, Bidvest's employees are responsible for palletizing and packaging the products ready for distribution to Nampak's customers.

In a decision of the Labour Court, which was confirmed on appeal by the Labour Appeal Court (LAC), Bidvest commenced its operations at Nampak and took over the

warehousing functions from Unitrans. A dispute arose about whether that transfer amounted to an s197 transfer of part of Unitrans' business to Bidvest as a going concern. Both the Labour Court and LAC determined that the events triggered an s197 transfer.

The Labour Court found that:

"... the warehousing service provided by (Bidvest) to Nampak constituted an economic entity ... or ... an organised grouping of resources"

The Labour Appeal Court found that:

"... the service that was provided was that of warehousing. ... The warehouse operation services constituted a discreet business" (the facts demonstrate) ... "that the service ... constitutes a business sufficiently demarcated to justify the conclusion that when this business was taken over (by Bidvest) ... there was a transfer of a business as a going concern."

The Applicants, in the face of this binding precedent, claimed that a TES relationship existed because:

- Nampak staff sometimes gave direct instructions to them.

AT LAST, THE MANAGED SERVICE PROVIDER (MSP) MODEL GAINS TRACTION

CONTINUED

The Commissioner correctly found that the SLA was not a sham as there was no evidence led suggesting the contrary.



- The details of how Bidvest conducts its business at Nampak's warehouse is contractually stipulated in the SLA and the standard operating procedures (SOPs) compiled, so they claimed, by Nampak with the result that Bidvest's service was controlled directly by Nampak.
- They use the forklift trucks leased by Nampak.
- They make use of Nampak's JDE software system which is an enterprise resource planning tool aimed at successful inventory control and invoicing.
- The SOPs were not drawn up by Nampak. Although the Applicants asserted that the SOPs carried Nampak's logo's, it was Bidvest's warehouse manager who personally drafted and prepared them. Those Applicants who testified conceded that they were handed the SOPs and were required to sign for them by Bidvest.
- The Applicants argued that because the SLA indicates what "must" be done to satisfy Nampak's requirements, this amounted to instructions issued by Nampak to them. However, in the evidence, none of the Applicants had even seen the SLA.

The Evidence

The Applicants claimed that all those factors demonstrated that they were an integral part of Nampak's operations which smacked of a TES arrangement, but the evidence led indicated differently:

- Nampak's staff rarely gave instructions to any of the Applicants as Bidvest had its own supervisory team at the warehouse to direct and control the carrying out of the Applicant's duties. None of the Applicants who testified stated or even suggested that they did not report directly to Bidvest's warehouse manager and its team of supervisors on a daily basis. There was unrefuted evidence that Nampak's supervisor only gave direct instructions to an Applicant if it was to avert a health and safety hazard.
- Bidvest made use of its own administrative, financial reporting, payroll, disciplinary processes, induction training and it managed the Applicants.

The Findings

The Commissioner correctly found that the SLA was not a sham as there was no evidence led suggesting the contrary. The Commissioner found, in line with recent LAC decision in *Enforce Security Group v Fikile & Others* (unreported: DA/24/15), that on the facts the SLA was based on "proper economic and commercial considerations". The Commissioner reasoned that that is so because "Nampak had outsourced part of its operation to warehousing specialists" rather than attempting those functions itself.

Conclusion

The Commissioner found that no TES relationship was in existence and s198A had no application on the facts presented. There is room in our law for the recognition of a genuine outsource of services to an MSP, and this does not invoke the protections afforded to those eligible employees contemplated by the LRA.

Fiona Leppan

Employment STRIKE GUIDELINE

Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

 [CLICK HERE TO FIND OUT MORE](#)

CHAMBERS GLOBAL 2014 - 2016 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 - 2016 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2016 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2016 in Band 3: Employment.



Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



Cliffe Dekker Hofmeyr

BAND 2
Employment

The
**LEGAL
500**

2009-2016

Ranked Cliffe Dekker Hofmeyr

**TIER 2
FOR LABOUR AND
EMPLOYMENT**

DealMakers®

2016 1ST BY M&A DEAL
FLOW FOR THE
8TH YEAR IN A ROW.

2016 1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
3rd by General Corporate Finance Deal Value.

2015 1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.

2014 1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by General Corporate Finance Deal Flow.

2013 1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by Unlisted Deals - Deal Flow.

7 YEARS
in a row

CDH has been named South Africa's number one large law firm in the PMR Africa Excellence Awards for the seventh year in a row.



OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com



Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Steven Adams
Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com



Samantha Bonato
Associate
T +27 (0)11 562 1134
E samantha.bonato@cdhlegal.com



Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com



Anelisa Mkeme
Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com



Prinoleen Naidoo
Associate
T +27 (0)11 562 1829
E prinoleen.naidoo@cdhlegal.com



Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1556/MAR

