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EMPLOYMENT

RULING ON THE DEEMING PROVISION

The introduction of the amendments to s198 of the Labour Relations Act, No 66 of 1995, as amended ("LRA") *inter alia* seeks to address the exploitation of the so-called A-typical employees, which *inter alia* includes the employees of temporary employment services ("TES"). The exploitation includes a lack of protection for vulnerable employees, no job security and wage discrimination.

The interpretation of the amendments to the LRA, in particular s198A(3)(b)(i) ("**Deeming Provision**"), has led to two main approaches namely; the Sole Employer Approach and the Dual Employment Approach in respect of employees who earn below the threshold stipulated in the Basic Conditions of Employment Act, No 75 of 1997, and who perform work for a period exceeding three months.

In terms of the Sole Employer Approach, TES employees who are not performing temporary services for the client of the TES, become the employees of the client and the client becomes the only employer of the TES employees. This approach suggests that the employees are transferred to the client and that the TES is removed from the employment relationship.

In terms of the Dual Employment Approach, the Deeming Provision, read together with s198(4) and 198(4A) of the LRA, creates a dual employment relationship (for the purposes of instituting legal proceedings and executing same in certain instances only) and the employees therefore have two employers in this regard, the TES and the client.

These approaches were placed at the forefront of the National Bargaining Council for the Road Freight and Logistics Industry ("**NBCRFLI**") to establish the identity of the true employer of the TES employees.

The NBCRFLI ruled that employees who are not performing temporary services for the client of the TES, become the employees of the client only and any claim brought by the employees in terms of the LRA must be brought against the client. The NBCRFLI therefore favours the Sole Employer Approach.

The Ruling is subject to scrutiny due to the fact that it suggests that the TES is removed from the employment relationship, which *inter alia* infringes the TES's constitutional right to choose their profession freely. Nothing in the amendments to the LRA suggest a ban on TES. Other impractical implications arising from such an approach includes the fact that the joint and several liability, as well as the equality provisions in the LRA will become superfluous. This goes against the proximate reason for the amendments to the LRA.

In the premises, we intend to approach the Labour Court to have this Ruling reviewed.

Hugo Pienaar and Joloudi Badenhorst

CCMA RULING ON THE INTERPRETATION OF THE DEEMING PROVISION IN SECTION 198A OF THE LABOUR RELATIONS ACT

In a ruling handed down by the Commission for Conciliation, Mediation and Arbitration (CCMA) on 29 June 2015 - in the matter between *Assign Service (Pty) Ltd v Krost Services and Racking (Pty) Ltd and another* (ECEL1652-15) - the commissioner ruled on the interpretation of the deeming provision contained in s198A(3)(b) of the Labour Relations Act 66 of 1995 (LRA).

The various interpretations afforded to this provision have been hotly debated by employment law and human resources practitioners since the amendments to the LRA came into effect on 1 January 2015 and 1 April 2015. The debate centred on what the legislature intended when saying that a labour broker employee is deemed to be the employee of a client. Does the employee transfer from the labour broker to the client, with the client becoming the sole employer of the person, or does the provision create a dual employment relationship - with both the client and labour broker being the employers?

continued

Section 198A(3)(b) of the LRA provides that an employee of a temporary employment service (TES) not performing a temporary service (as defined) for the client:

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

(ii) subject to the provisions of s198B, employed on an indefinite basis by the client."

It was not in dispute that the above provision *inter alia* aims to protect lower income, vulnerable TES employees. The CCMA was tasked with determining which of the interpretations below provided the greatest protections to these employees:

- the "dual employment position", in terms of which the TES employees remain the employees of the TES for all purposes and are deemed also to be the employees of the client for the purposes of the LRA; or
- the "sole employer position", in terms of which, with effect from 1 April 2015, placed TES employees are deemed to be the employees of the client only, for the purposes of the LRA.

The CCMA found that the deeming provision contained in s198A(3)(b) of the LRA is interpreted to mean that the client becomes the **sole employer** of the placed TES employees for purposes of the LRA, provided that they earn below the earnings threshold determined pursuant to s6 of the Basic Conditions of Employment Act 75 of 1997 (currently R205 433.30 per annum) and they have been placed with the client for longer than 3 months.

The reasons for the interpretation advanced by the CCMA are, amongst others, the following:

- Section 198A(3)(b) is to be interpreted in a manner akin to how the law deals with adoption. A legal fiction is created in that the adoptive parent becomes the parent of the adopted child. The biological parent and the adoptive parent are not dual parents.
- A greater amount of confusion and uncertainty is created by the "dual employment position", for example, which employer is responsible for the discipline of the deemed employees? Which employer's disciplinary code applies? How does one deal with the issue of reinstatement?
- Section 198A does not apply in circumstances where the work performed by the TES employees for the client is of a genuinely temporary nature.
- The joint and several liability provision contained in s198(4A) does not refer to joint and several liability in terms of s198A(3)(b) but rather, only refers to joint and several liability in terms of s198(4). The mere fact that proceedings may be instituted, or awards enforced, against both the client and the TES does not axiomatically mean that the parties are dual employers. It is simply an issue relating to the parties' liability.
- Section 198A(3)(b)(ii) provides that TES employees not performing temporary services are, *"subject to the provisions of s198B, **employed on an indefinite basis by the client**"*.
- The memorandum of objects to the LRA amendments provides that, if TES employees "are not employed to perform temporary services, they are deemed for the purposes of the LRA to be the employees of the client and **not** the TES".

The impact of the CCMA's interpretation is that, once a client of a TES is deemed to be the sole employer of TES employees, those deemed employees must, for example, be included in any retrenchment procedure that the client may embark upon, be provided with terms and conditions of employment, by the client, that are no less favourable to those enjoyed by comparable indefinite employees of the client, will remain the employees of the client after the termination of the commercial agreement between the TES and the client and can institute any employment-related disputes against the client without having to join the TES to those proceedings.

The award is likely to be taken on review to the Labour Court. Accordingly, this is probably not the end of the "sole" versus "dual" employer debate. However, employers should be cognisant of the preliminary stance taken by the CCMA in dealing with the interpretation of the deeming provision. Whilst CCMA awards do not create legal precedent that must be followed by other commissioners, the ruling provides a glimpse in what may be the view on this issue at the statutory body.

Kirsten Caddy

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