EMPLOYMENT

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A CAUSE FOR DISPUTE: THE AMENDED SECTION 198

The amendments to the Labour Relations Act, 66 of 1995 are expected to give rise to an influx of litigation due to the new provisions such as those providing for equal pay claims, Temporary Employment Services' employee claims and claims arising from fixed term contracts.

Section 198 in particular raises a number of questions as to how the dispute resolution process will be affected by the amendments. Section 198(4A)(a) provides that an employee may institute proceedings against the temporary employment service (TES), the client of the TES or both where there is joint liability or where the employee is deemed to be an employee of the client of the TES. The employee thus has a choice. Section 198(4A)(c) further provides that any order or award made against one may be enforced against the TES, the client of the TES or both. This may seem easy enough to implement but practically it could become a nightmare for a TES's client.

Section 198(4A) (a) is easy enough to deal with; in the event that a claim is brought solely against the TES's client, the client may request that the TES be joined to the proceedings as an interested party. Such a joinder application would not suffice as a defence but would assist in bringing all potentially liable parties before the court or arbitration, thus mitigating some of the risk to the client.

A TES client is well advised to obtain an undertaking or indemnity from the TES which protects them against any adverse order. The TES should also be contractually bound to notify the client of any claim brought against the TES which may the client. This would provide the client with the option to partake in the proceedings and thus potentially have an effect on the outcome.

A more complex question is posed by s198(4A)(c). This section appears to envisage that a TES employee could approach a client with an award or order with only the TES's name on it and enforce such order or award against the client, which marks a statutory departure from the common law position.

In the case of *Ngema & Others v Screenex Wire Waring Manufacturers (2013) 34 ILJ 1470 (LAC)* the Labour Appeal Court (LAC) explored the substitution of the new employer in the place of an order granted against the old employer in the context of a s197 transfer. The LAC quoted the case of *Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA)* at paragraph 9 which stated, "it is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest." The LAC went on to state that, "there is no express exclusion in the LRA that an interested party, such as second respondent, should not be afforded an opportunity to be heard in a matter where it has a direct and substantial interest." This was the common law position which precluded a TES employee from enforcing an order or award against a client unless such client had been joined as a party to the proceedings.

The amendments contained in s198(4A)(c) now deviate from the common law position. While under the common law it is inconceivable that an order or award may be enforced against a client of a TES if only the TES is cited in the proceedings and on the order, under the statutory amendments this is possible. In the event that an order or an award is given against a TES, in obtaining the warrant the TES employee could conceivably, by virtue of the section, submit an affidavit requesting that both the TES and the client be cited for purposes of execution. One can envisage a number of factual disputes being raised as to whether a TES employee may enforce an order or award which cites only the TES against the TES's client. This is particularly in light of the current stance in the common law as amended by the LRA and the fact that the client need not be a party to the proceedings to be liable.

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THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm. How do we continue to give effect to the basic objectives of labour and social security law under these conditions, and how best might those objectives be secured? These and other questions will inform our order of business.

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