8 SEPTEMBER 2015

EMPLOYMENT ALERT

IN THIS **ISSUE**

JUDGMENT ON THE INTERPRETATION OF THE "DEEMING PROVISION": SOLE OR DUAL?

The Labour Court handed down judgment earlier today in a highly anticipated interpretation ruling relating to the recent amendments to the Labour Relations Act 66 of 1995 (LRA). More specifically, the judgment provides clarity on the interpretation of the "deeming provision" contained in s198A of the LRA. The judgment confirmed that the client does not become the sole employer, rather the court held that the TES continues to be the employer.

CDH
CLIFFE DEKKER HOFMEYR

JUDGMENT ON THE INTERPRETATION OF THE "DEEMING PROVISION": SOLE OR DUAL?

There is much debate as to whether the deeming provision means that the client of a TES becomes the sole employer or the dual employer of the TES employees.

The Labour Court handed down judgment earlier today in a highly anticipated interpretation ruling relating to the recent amendments to the Labour Relations Act 66 of 1995 (LRA). More specifically, the judgment provides clarity on the interpretation of the "deeming provision" contained in s198A of the LRA, which provides that the client of a temporary employment service (TES) is deemed to be the employer of the TES employees earning less than the earnings threshold (currently R205 433.30 per annum) who have been placed at the client for more than 3 months.

There is much debate as to whether the deeming provision means that the client of a TES becomes the sole employer or the dual employer of the TES employees. Prior to today's judgment, a number of decisions emanating from the CCMA and bargaining councils have declared the deeming provision to mean that the client becomes the sole employer of the TES employees after 3 months.

The court stated that the true issue for determination was whether the TES continues to be the employer of the TES employees (notwithstanding the application of deeming provision) and, therefore, is concurrently vested with the rights/obligations and powers/duties generated by the LRA.

In *Assign Services v CCMA and others* (JR 1230/15; 8 September 2015), the court was tasked with determining whether the commissioner had erred in his interpretation of the deeming provision. The commissioner, too, found that the deeming provision meant that the client of the TES became the sole employer of the TES employees earning less than the earnings threshold who had been placed at the client for more than 3 months.

The court stated that the true issue for determination was whether the TES continues to be the employer of the TES employees (notwithstanding the application of deeming provision) and, therefore, is concurrently vested with the rights/obligations and powers/duties generated by the LRA.

The court found that the TES continues to be the employer of the TES employees, even after the application of the deeming provision. There is no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the TES employees merely because the client acquires a parallel set of such rights and obligations. The deeming provision does not invalidate the contract of employment between the TES and TES employee or derogate from its terms.

The court further made the important finding that the deeming provision is expressly made only to operate for the purposes of the LRA and that it therefore serves to amplify or expand the protections afforded to employees and not to substitute the TES employee's protections *vis-à-vis* the TES with protections *vis-à-vis* the client.

The current legal position is that TES employees remain the employees of the TES and, by virtue of the deeming provision, can now assert their rights against the clients of the TES as well. The finding of the Labour Court therefore supports the "dual employer" approach and TES employees do not transfer to the client as the sole employer.

The Labour Court has clarified the interpretation of the deeming provision to the satisfaction of TES and their client's alike. However, this is likely not to be end of the debate around this very contentious amendment to the LRA.

Aadil Patel and Kirsten Caddy

CDH
CLIFFE DEKKER HOFMEYR

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.

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.

The main keynote speakers are Professor Alain Supiot, Doctor in Law at the Collège de France in Paris and Professor Sir Bob Hepple, Emeritus Master of Clare College at the University of Cambridge.

VIEW FULL PROGRAMME HERE > DOWNLOAD

CLICK HERE FOR MORE INFORMATION.

International Society for Labour & Social Security Law
21st WORLD CONGRESS
CAPE TOWN 2015
www.labourlawcongress2015.co.za
15 - 18 September 2015

2014
RANKED #1 BY DEALMAKERS FOR DEAL FLOW 6 YEARS IN A ROW
1st in M&A Deal Flow, 1st in M&A Deal Value, 1st in General Corporate Finance Deal Flow.
2013
1st in M&A Deal Flow, 1st in M&A Deal Value, 1st in Unlisted Deals - Deal Flow.
2012
1st in M&A Deal Flow, 1st in General Corporate Finance Deal Flow,1st in General Corporate Finance Deal Value, 1st in Unlisted Deals - Deal Flow.
2011
1st in M&A Deal Flow, 1st in M&A Deal Value, 1st in General Corporate Finance Deal Flow, Legal Advisor - Deal of the Year.
DealMakers

2013
HIGHEST RANKING
of Client Satisfaction amongst African Firms
Legal Week

WE SECURED THE BIG
5
We are the No.1 Law firm for client service excellence
FIVE YEARS IN A ROW
pmr africa

2014
#NO1DEALPARTNER
No. 1 LAW FIRM
by M&A DEAL COUNT in Africa and the Middle East
No. 1 AFRICAN LAW FIRM
by M&A DEAL VALUE with 9.2 Billion USD worth of deals
MERGERMARKET

CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

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

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2015 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2015 in Band 4: Employment.

Ranked In
CHAMBERS GLOBAL
2015
Leading Individual

PUTTING THE PIECES TOGETHER:
LABOUR LAW AMENDMENTS
CLICK HERE TO FIND OUT MORE.

CDH
CLIFFE DEKKER HOFMEYR

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

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@cdhlegal.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@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

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

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

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

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

Lauren Salt
Senior Associate
T +27 (0)11 562 1378
E lauren.salt@cdhlegal.com

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

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

Khanyisile Khanyile
Associate
T +27 (0)11 562 1586
E khanyisile.khanyile@cdhlegal.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@cdhlegal.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@cdhlegal.com

Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@cdhlegal.com

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