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EMPLOYMENT ALERT

NEWS FLASH

IN THIS **ISSUE**

NUMSA VS ASSIGN SERVICES: THE LAC WEIGHS IN ON THE DEEMING PROVISION

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A temporary service is defined as work for a client by an employee for a period not exceeding three months or as a substitute for an employee of the client who is temporarily absent or in a category of work.

The unique triangular relationship created by a Temporary Employment Service (TES), an employee rendering services and the client of the TES, and deeming provision has seen intense scrutiny in the matter of NUMSA and Assign Services. The Labour Appeal Court (LAC) yesterday found that, for the purposes of the Labour Relations Act, No 66 of 1995 (LRA), once the deeming provision kicks in, the TES falls out of the picture and the client is the sole employer.

The deeming provision in s198A(3)(b)(i) of the LRA has led to heated debate and caused much controversy. It has a profound effect on the manner in which a TES is able to render its services, the employees rendering the services to clients of the TES, and any value that a client may extract from using the services of a TES. In terms of s198A(5) an employee deemed to be an employee of the client must be treated on the whole no less favourably than an employee of the client performing the same or similar work.

On 1 January 2015, the amendments to s198 of the LRA became effective. The most controversial of these amendments is the deeming provision: in terms of in s198A(3)(b)(i) an employee engaged by a TES (more commonly known as a labour broker) to render services at a client, who does not perform a temporary service for the client, is deemed to be an employee of that client and the client is deemed to be the employer (the deeming provision).

A temporary service is defined as work for a client by an employee for a period not exceeding three months or as a substitute for an employee of the client who is temporarily absent or in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister.

The meaning and effect of the deeming provision was first considered by the CCMA in the matter of NUMSA v Assign Services (Pty) Ltd and Krost Shelving and Racking (Pty) Ltd.

Assign, a TES, supplies labour to Krost, a business offering storage solutions. The number of workers supplied by Assign fluctuates but on 1 April 2015, three months after the amendments became effective, 22 of the placed workers at Krost had worked on a full-time basis with Krost's own employees. NUMSA, representing some of these workers, contended that on 1 April 2015, the placed workers had for the purposes of the LRA, become exclusively employed by Krost in terms of the deeming provision (the single employer interpretation).

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The LAC found that the sole employer interpretation was in keeping with the explanatory memorandum accompanying the LRA Amendment Bill, tabled in 2012.

Assign contended that the deeming provision meant simply that the placed workers remained employees of Assign for all purposes and for the purposes of the LRA are deemed also to be employees of Krost (the dual or parallel employment interpretation).

Krost stayed out of this fight.

The CCMA Commissioner agreed with NUMSA's interpretation. He found that the term "deemed" meant that Krost became the sole employer of the placed workers once the three-month threshold had elapsed.

Assign took the CCMA award on review. The Labour Court supported the dual or parallel employer interpretation and reviewed the Commissioner's decision. The Labour Court found that s198(2) of the LRA placed beyond doubt that a TES was the employer of the placed workers for the purposes of the LRA. Nothing in the deeming provision invalidated the contract of employment between the TES and the placed workers. There was no reason why the TES should be relieved of its statutory duties and obligations towards the placed workers. In effect, the client and the TES had acquired a dual set of rights and obligations. These operated in parallel.

NUMSA appealed the decision. The Labour Appeal Court yesterday handed down its judgment. In a detailed analysis, the LAC considered closely the meaning of the term ''temporary service''. It found that s198A(1) which deals with the definition of a temporary service placed emphasis on the nature of the services and not the person rendering the service or the recipient of the service, to determine who the employer of the placed worker is. The court found that a placed worker, earning under the earnings threshold, who does not render a temporary service is not an employee of the TES, but in terms of s198A(3)(b)(i) this worker is deemed to be the employee of the client and the client is deemed to be the employer of the worker.

The LAC found that the sole employer interpretation was in keeping with the explanatory memorandum accompanying the LRA Amendment Bill, tabled in 2012. The memorandum records that:

> ''The amendments further regulate the employment of persons by a TES in a way that seeks to balance important Constitutional rights. The main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant 'temporary work', and to introduce various further measures to protect workers employed in this way."

The LAC rejected the dual or parallel employer interpretation. It found that the protection against unfair dismissal and unfair discrimination in the context of s198A of the LRA did not support this interpretation but rather that this protection is a measure to ensure that the placed employees are not treated differently from the employees employed directly by the client. The purpose of these protections, the court found, is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client. The employment relationship between a client and the placed employee is created by a statutory deeming clause. Hence, the court found, the placed workers become employed by the client for an indefinite period and on the same terms and conditions to the employees of the client performing the same or similar work.

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Cliffe Dekker Hofmeyr will be hosting a seminar in Johannesburg and Cape Town this Friday, 14 July 2017, to discuss the implications of the Assign Judgment.

The LAC found that the sole employer interpretation did not ban the operations of a TES. It, however, regulated the TES by restricting it to genuine temporary employment arrangements in line with the purpose of the amendments to the LRA. The TES remains the employer of the placed employee and is responsible for its statutory obligations only until the employee is deemed the employee of the client.

The court concluded that the intention of the amendment was to upgrade temporary service to standard employment and free vulnerable workers from atypical employment by the TES. It found that there was no sense in retaining the TES in the employment equation for an indefinite period if the client has assumed all the responsibilities that the TES had before the expiration of the three-month period. The TES was the employer only in theory and an unwarranted ''middle man'' adding no value to the employment relationship.

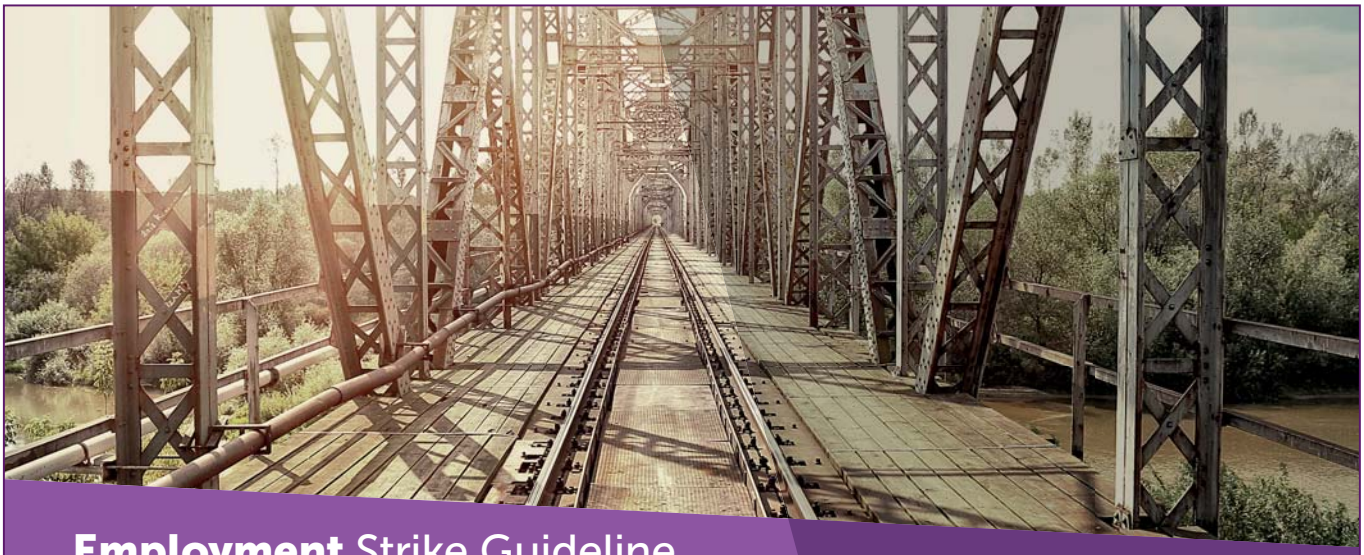
In terms of this judgment, the employment relationship between the placed worker and the client arises by operation of law, independent of the terms of any contract between the placed worker and the TES.

Considering the profound effect of this judgment on the TES sector, Assign Services is likely Appeal to the Constitutional Court. An appeal would have the effect of staying the LAC Judgment. From the time of the lodging of the appeal until the finalisation of the appeal, the law would remain as per the Assign Labour Court Judgment (per Brassey AJ).

Cliffe Dekker Hofmeyr will be hosting a seminar in Johannesburg and Cape Town this Friday, 14 July 2017, to discuss the implications of the Assign Judgment. Please contact Themba Xapa on jhbevents@cdhlegal.com should you wish to attend the seminar.

Jose Jorge

CDH
CLIFFE DEKKER HOFMEYR



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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

Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@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

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

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

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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.

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

CDH
CLIFFE DEKKER HOFMEYR