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TEMPORARY EMPLOYMENT SERVICES / LABOUR BROKERING IN SOUTH AFRICA: ONE EMPLOYER OR TWO?

The fairly recent amendments to section 198 of the Labour Relations Act (Act 66 of 1995) in South Africa, dealing with the regulation of non-standard work, are arguably some of the most contentious labour law developments in the country for some time. After much negotiation amongst government, labour and business, the final version of this section appears to seek to strike a balance between the competing considerations of labour flexibility and employment security.

In permitting employment through temporary service providers (labour brokers) to continue, rather than banning this outright, the legislature appears to have acknowledged the need for flexibility in the realm of employment. Similarly, work in terms of limited duration contracts and part-time work is regulated, rather than abolished. Measures are, however, introduced in order to ensure that non-standard employment is permitted only with reference to objective factors. The focus of the amendments is on preventing the abuse of workers considered to be "vulnerable", so that protection, in the form of enhanced employment security, is generally reserved for lower-income earners (those presently earning below the statutory threshold of R205 433,30). A key question that has recently been answered by the Labour Appeal Court is the identity of the employer in the context of labour brokering (temporary employment service provision) arrangements.

Section 198 governs employment through an intermediary (temporary employment service (TES) or so-called "labour broker" employment). Although the section has been amended to some extent, the key characteristic remains unchanged: a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person's employer. There remain certain instances where a TES and its client are jointly and severally liable in terms of this section. This is the case where a TES, in respect of any of its employees, contravenes:

- A collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
- A binding arbitration award that regulates terms and conditions of employment;
- The BCEA; or
- In terms of the amendments, a sectoral determination made in terms of the BCEA.

Should this be the case, or in instances where a client is deemed to be the employer of an employee in terms of section 198A (3)(b) (discussed, below), the following are the consequences:

- The employee may institute proceedings against either the TES or the client or both the TES and the client;
- A labour inspector acting in terms of the BCEA may secure a compliance order against the TES or the client, or both; and
- Any order or award made against a TES or client may be enforced against either.

Other pertinent amendments to section 198 include the requirement that a TES must provide an employee whose services have been procured for a client with written particulars of employment in compliance with section 29 of the BCEA. It goes without saying that an employee may not be employed by a TES on terms and conditions of employment which are not permitted by any employment law, or any sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services. The question of whether a TES employee is covered by a bargaining council agreement or sectoral determination must, following the amendments, be decided with reference to the sector and area in which the *client* is engaged.

Three new sections have been added immediately after these amendments to section 198, dealing with deemed employment in the TES context, fixed-term contracts and part-time employment respectively. For the most part, the focus is on extending protection for low-income earners (i.e. those earning under the threshold) on the basis that employment security is particularly important for this category of employee.

A "temporary service" is defined to mean work for a client by an employee:

- a) for a period not exceeding three months;
- b) as a substitute for an employee of the client who is temporarily absent; or
- c) 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.

An employee performing a temporary service for the client is the employee of the TES (in terms of s 198(2)). Once an employee is *not performing* a temporary service for the client (for example because the period of service has exceeded three months in circumstances where the employee is not a substitute for an employee who is temporarily absent), the employee is deemed to be the employee of *the client* and the client is deemed to be the employer (s 198A(3)(b)). Such a (deemed) employee must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment. A 'justifiable reason' includes that the different treatment is a result of the application of a system that takes into account:

- a) seniority, experience or length of service;
- b) merit;
- c) the quality or quantity of work performed; or
- d) any other criteria of a similar nature.

It must be remembered that various other consequences flowing from the s 198A deeming provision are referred to in s 198, as mentioned above, relating to instituting proceedings, compliance and enforcement.

An employee *not* performing a *temporary* service for the client (i.e. working for a period in excess of three months) is, subject to the provisions of s 198B, discussed below, employed on an *indefinite* basis by the *client*. Should the TES terminate the employee's service with the client (even at the instance of the client) *for the purpose of avoiding the operation of the deeming provision*, or because the employee exercised a right in terms of the LRA, this will amount to a dismissal.

The amendments have also influenced the exercise of organisational rights. If a trade union seeks to exercise these rights in respect of employees of a TES, it may seek to exercise them in a workplace of either the TES or one or more of the clients of the TES (s 21(12)).

Aspects of s 198A were considered by the Labour Court in the decision in *Assign Services (Pty) Ltd v CCMA*.¹ The court, in essence, concluded as follows:

- Labour broking involves a triangular relationship, and amounts to a commercial contract between the TES and the client, as well as a contract of employment between the TES and the placed worker, and an assignment by the TES of the placed worker to the client;
- Where a placed worker concludes a contract of employment with a TES and commences employment with it, the placed worker is afforded rights and protections vis-à-vis the TES, in terms of the LRA;
- Should the deeming provision be applicable, following the three-month period discussed above, there exist *two employment relationships*: the first involves a continuation of the relationship between the TES and the placed worker so that the statutory rights and protections afforded to the placed worker vis-à-vis the TES continues; the second involves a statutory relationship between the client and the TES for the purposes of the LRA alone;
- These two employment relationships operate on separate lines, with each employer having its own particular relationship with the placed worker. Significantly, in the view of Brasse J, the dismissal of a placed worker by the client will not result in the employment relationship between the placed worker and the TES terminating;
- Should the deeming provision be triggered, the TES continues to have the power of control over the placed worker (Because the source of the power of control is the contract of employment between the TES and the placed worker, which remains in existence). While the client can set tasks that the placed worker must perform, it does so in its capacity as an agent or representative of the TES, in whom such power originally vested and continues to vest;
- As such, and given the language of the deeming provision itself, the word "deemed" in s 198A(3)(b)(i) has the effect of augmenting (i.e. supplementing) the term "employer" so as to include the client, as opposed to substituting the client for the TES as the employer.

This decision was, however, recently over-turned by the Labour Appeal Court in *NUMSA v Assign Services and Others*.² The court confirmed that the purpose of introducing section 198A(3)(b)(i) was to protect vulnerable employees from being abused by TES and such protection was extended to other subsections of section 198A. According to the

1 [2015] 11 BLLR 1160 (LC); (2015) 36 ILJ 2853 (LC).

2 [2017] ZALAC 45.

judgment, and following a purposive approach, the protection against unfair dismissal and unfair discrimination in the context of section 198A of the LRA should not be interpreted in a manner to suggest that *both* the client and the TES employed the deemed employees. The LAC held that the plain language of s198A(3)(b) of the LRA, interpreted in context, unambiguously supported the sole employer interpretation and that this was in line with the purpose of the amendment and the primary object of the LRA and was designed to protect the rights of placed workers. The idea, in other words, was to treat affected employees as the client treated its “own” employees and to ensure full integration. It did not, however, follow, that TES were banned as a result of the “client as sole employer” interpretation. TES were simply restricted to genuine temporary employment and the TES remained the employer of the placed employee until the employee was deemed employee of the client (i.e. after a period of three months of employment for the client).³

The recent statutory developments in South Africa, in particular the amendment of section 198 of the LRA, demonstrate a deliberate attempt by the legislature to enhance the scope of protection of categories of vulnerable workers. This has been achieved by use of a “deeming” provision in the case of labour broker employees and employees on a fixed-term contract, in certain scenarios, and by the introduction of additional protection for part-time employees. The result is enhanced labour and social security protection for such employees, who typically must not be treated less favourably than other employees. The amendments pose fresh challenges for those employers who have traditionally relied on outsourced services (at least in respect of certain dimensions of their business), and those who have historically made use of fixed-term contracts as a tool to lower the salary bill of the organisation and to employ staff for a few months or a year (often without any benefits whatsoever), for example, before relying on the end date of the contract for justifying termination of employment. Now, even the label of being a “casual” or “temporary” worker may not hold water if a person is employed for more than three months (unless one of the listed grounds for exception applies). When coupled with the fairly broad manner in which the courts have read and understood the definition of “employee” in South African legislation, for example permitting even those operating in terms of unlawful contracts to enjoy recognition, the impact of the trend becomes even stronger.

Section 1 of the LRA promises to contribute to the advancement of economic development, social justice, labour peace and the democratisation of the workplace, and various sections of the Constitution (e.g. sections 10, 23 and 27) provide rights to dignity, fair labour practices and access to social security for “everyone”. Emphasising a purposive interpretation of labour and social security law (as evinced by the recent decision of the LAC in *Assign*, and also in a recent arbitration award suggesting that *Uber* drivers should enjoy employment protection⁴) should reinvigorate legal and jurisprudential developments in this area. Given the chronic poverty, unemployment and inequality experienced in the country, this would be a welcome development.

3 See paras 40-42. It is understood that the decision of the LAC is being appealed to the Constitutional Court.

4 *Uber SA v NUPSAW and SATAWU* (WECT 12537-16).