Constitutional Court seals the fate of labour brokers

In the case involving Assign Services (Pty) Ltd v NUMSA and others 2018 ZACC 22 the Constitutional Court settled the protracted battle over the interpretation of Section 198A(3)(b)(I) of the Labour Relations Act. The question considered is what happens once the deeming provisions, in terms of which a temporary employee is deemed to be a permanent employee, in the section takes effect.

The facts are briefly as follows. On the 1st of March 2015 Assign Services (Pty) Ltd, a labour broker, placed 22 workers with its client, Krost, on a full-time basis; i.e. more than three consecutive months. Each of the employees earned below the threshold of R205 433 00 per annum as per Section 198A of the Labour Relations Act. Some of the placed employees were members of NUMSA. This situation triggered Section 198A(3)(b) of the Labour Relations Act.

A dispute arose between Assign Services (Pty) Ltd, Krost and NUMSA about the interpretation of Section 198A(3)(b). Assign Services (Pty) Ltd contended that the section creates a "dual employer" relationship. Placed workers remain the employees of labour broker, Assign Services (Pty) Ltd, and at the same time they also need to be deemed employees of its client, Krost, for the purposes of the Labour Relations Act. On the other hand NUMSA argued that Krost becomes the only employer once Section 198A(3)(b) is activated.

The dispute was referred to the CCMA and the Commissioner decided in favour of NUMSA. The Labour Court set aside the decision of the CCMA. NUMSA was not happy with the outcome and it thus approached the Labour Appeal Court, which rejected the concept of dual employer relationships and decided that the client of the labour broker, in this case Krost, was the sole employer after three months of temporary work.

The matter ended in the Constitutional Court, which held that the labour broker is the employer during the first three months of the employment and that the client of the labour broker becomes the sole employer thereafter.

Justice Dlodlo held that "restriction of TES [temporary employment services] employment to genuine temporary work offers the clarity and precision needed by

the Labour Relations Act to realise the constitutional rights to fair labour practices as per section 23 of the Constitution".

He further emphasised that Section 198A(3) does not ban labour brokers, but merely regulates them.

The appeal by Assign Services (Pty) Ltd was thus dismissed and the decision by the Labour Appeal Court was confirmed.

Cachalia AJ dissented and confirmed the dual employer relationship. This is on the basis that it provides greater protection to the employees.

It is worth noting that the judgment only applies to employees:

1. earning below a threshold of R205 433.00 per annum and

2. employed for a period longer than three consecutive months.

In addition to the above, the dissenting judgment raises issues, which according to me are valid. We can expect more litigation.

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