IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 96/15

In the matter between:

NUMSA	**Appellant**
and	
ASSIGN SERVICES	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER A.C. OSMAN, *NO*	**Third Respondent**
KROST SHELVING & RACKING (PTY) LTD	**Fourth Respondent**
CASUAL WORKERS ADVICE OFFICE (CWAO)	**First *amicus curiae***
CONFEDERATION OF ASSOCIATIONS IN THE PRIVATE EMPLOYMENT SECTOR (CAPES)	**Second *amicus curiae***

Heard: **14 December 2016**

Delivered: **10 July 2017**

Summary: Interpretation of section 198A(3)(b)(i) of the LRA – the status of the employment relationship when employees are deemed to be employees of the client in terms of section 198A(3)(b)(i) – whether the labour broker remains the employer of the workers placed with a client notwithstanding the triggering of section 198A(3)(b)(i) – court called upon to decide whether the triggering of section 198A(3)(b)(i) giving rise to either a dual or sole employment relationship.

Held that:

Section 198A(3)(b)(i) was introduced to protect the vulnerable employees from being abused by Temporary Employment Services (TES) and such protection was extended to other subsections of section 198A. The protection against unfair dismissal and unfair discrimination in the context of s198A of the LRA should not be interpreted to support the contention that the deemed employees are employed by both the TES and client. The protection is a measure to ensure that these employees are not treated differently from the employees employed directly by the client. The purpose of these protections in the context of s198A is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client. The sole employer interpretation does not ban the TES. Its purpose is to restrict the TES to genuine temporary employment. The TES remains the employer of the placed employee until the employee is deemed the employee of the client. The plain language of s198A(3)(b) of the LRA, interpreted in context unambiguously supports the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers. The Labour Court misdirected itself in its interpretation of s198A(3)(b) of the LRA. Appeal upheld. Labour Court's judgment set aside.

Coram: Waglay JP, Tlaletsi DJP and Phatshoane AJA

DRAFT JUDGMENT

TLALETSI DJP

Introduction

[1] The controversy in this appeal has to do with the proper interpretation and effect of section 198A(3)(b)(i) of the Labour Relations Act, 66 of 1995 (LRA), introduced by the 2014 amendment to the LRA. The relevant s198A(3) provides as follows:

> 'For the purpose of this Act, an employee-

(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or

(b) not performing such temporary service for the client is—

(i) deemed to be the employee of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.'[1]

[2] The matter was referred in terms of s198D(1)[2] and was placed before the Commission for Conciliation Mediation and Arbitration (CCMA) by way of a stated case detailing common cause facts and the issue for determination.

[3] The first respondent is Assign Services (Pty) Ltd (Assign), a temporary employment service (TES), as defined in s198 (1) of the LRA and is a member of the Confederation of Associations in the Private Employment Sector (CAPES).

[4] The second respondent is Krost Shelving & Racking (Pty) Ltd (Krost), a company duly registered in accordance with South African company laws.

[5] The appellant is the National Union of Metal Workers of South Africa (NUMSA), a registered trade union in terms of the LRA.

Background.

[6] The agreed or common cause facts are recorded as follows in the stated case:

The business of Krost and the placement of workers by Assign

(a) Krost offers storage solutions. This entails manufacturing steel racking, shelving, mezzanine floors and lockers. While Krost does carry some

[1] Labour Relations Amendment Act 6 of 2014- Sections 37 and 38.
[2] S 198D(1) provides that any dispute arising from the interpretation or application of sections 198A, 198B, and 198C may be referred to the Commission or Bargaining Council with jurisdiction for conciliation and if not resolved, to arbitration

stock, it generally quotes and works on projects. Accordingly, the product manufactured by it is generally customised.

(b) Krost employs 40 salaried employees and approximately 90 wage staff who work in the factory. Krost manages and pays its own employees.

(c) Assign supplies labour to Krost. The number of placed workers fluctuated from between 22 and 40 at any given time, with fluctuation being dependent on the nature of the projects awarded to Krost.

(d) As at 01 April 2015, 22 placed workers ("the placed workers") had been supplied by Assign to Krost for a period in excess of three months on a full-time basis, and their placement predated 01 January 2015.

(e) The placed workers fall within the scope of application of section 198A(3)(b), and are not affected by any of the exclusions listed in section 198A(1) or (2).

(f) As at present, the placed workers continue to be assigned by Assign to Krost, and, subject to the outcome of this matter, the TES arrangement between Assign and Krost is likely to continue in the foreseeable future.

(g) The placed workers work shoulder to shoulder with Krost's workforce. Krost manages the placed workers on a day-to-day basis. Assign is responsible for disciplining them.

(h) Of Krost's 90 wage staff in the factory, about 80% are NUMSA's members. Several of the placed workers are also members of NUMSA.

(i) Often Krost's management will meet with NUMSA's representatives together with workers placed by Assign who are NUMSA's members. Occasionally, representatives from Assign's management will be called to attend meetings together with NUMSA. This is normally when collective issues such as wages are discussed.

(j) There is pay parity between Krost's wage staff and the placed workers.

(k) Krost has, however, received feedback that the placed workers are inclined towards asserting a right to being employed exclusively by Krost, which obviously has the potential for labour unrest (in the absence of the issue being determined by the CCMA).

[7] The controversial question is who becomes the employer of the placed workers when a period of three months referred to s198A(3)(b) of the LRA kicks in.

[8] Assign's contention has been that the correct interpretation of s198A(3)(b), which is also referred to as the deeming provision, should be that workers placed by it at Krost remain employees of Assign for all purposes, and are deemed to also be employees of Krost for the purposes of the LRA. This situation is referred to as the "dual employment" position.

[9] NUMSA, on the other hand, contended that in terms of the deeming provision, the placed workers are with effect from 01 April 2015, deemed to be employees of Krost only for purposes of the LRA. This position is referred to as the "sole employment" position.

[10] However, Krost's position was not to support any of the two positions taken by the respective parties but to abide by the ruling of the Commissioner.

The award.

[11] The Commissioner concluded that s198A(3)(b) should be interpreted that "deemed" means that the client (Krost) becomes the sole employer of the placed workers for purposes of the LRA once the threshold of the three-month period elapsed. The Commissioner was satisfied that his interpretation is the one that will provide greater protection for the vulnerable class of employees identified by s198A(3)(b).

[12] The Commissioner reasoned further that the deeming provision in s198A(3)(b) should be interpreted akin to how the law deals with the concept of "adoption":

'*In the case of adoption, a legal fiction is also created, in that, for purposes of the law, the adoptive parent is regarded as the parent of the adopted child. In this regard the best interest of the child is considered to be in the scenario where the adoptive parent is afforded full right in terms of guardianship and/all obligations in terms of parenting and upbringing of the adopted child.*

The law does not regard a biological parent and the adoptive parent as dual parents, as doing so would lead to uncertainty and confusion.

Equally in the case at hand there are a number of problems that could arise in the 'dual employment' interpretation, for example, who would be responsible for the disciplining of the placed workers and who's [sic] disciplinary code would be applicable, that of the TES or that of the Client? Furthermore, how would 're-instatement' occur if there is dual employment? Clearly this would lead to greater uncertainty and confusion for the vulnerable employees the Act is seeking to afford greater protection to.'

[13] And that:

'*Furthermore, the fact that the employee may institute proceedings against either the (TES) or the Client or both the TES and the client in terms of S198 (4)(a) and that any order or award made against a (TES) or client in terms of this subsection may be enforced against either, does not in its plain reading make the TES a dual employer. The purpose for instituting proceedings is to determine liability and the fact that one may institute proceedings against either the TES or the client, or both and enforce an order or award against either, does not necessarily create dual employment. In the amended LRA, in sections relating to organisational rights and picketing, the sections allow for the citing of a third party controlling access to the workplace eg. (landlord), and the enforcing of awards against such parties. This however does not render the third party concerned to be a dual employer of the employees of the actual employer.'*

[14] The Commissioner referred to the memorandum of objects accompanying the first version of the Labour Relations Amended Bill and held *inter alia*, that if the placed workers are not employed to perform temporary services, they are deemed to be employees of the client and not the TES.

The Labour Court

[15] Assign sought to review the award of the Commissioner on the basis that the Commissioner committed a material error of law and a gross irregularity; that the award is unreasonable (as an erroneous interpretation of a statute cannot be reasonable), and on the grounds of unlawfulness in that the material error of law in interpreting s198(A)(3)(b) by the Commissioner infringed s 3(1) of the Constitution of the Republic of South Africa which guarantees the right to lawful, reasonable and procedurally fair administrative action that suffuses s145(2) of the LRA.

[16] The Labour Court was satisfied that the award of the Commissioner was susceptible to being set aside on the basis that the Commissioner had committed a material error of law in reaching the conclusion that he did. The Labour Court reasoned, among others, that:

16.1 nothing in the deeming provision can be taken to invalidate the contract of employment between TES and workers or derogate from its terms and they remain firmly in place.

16.2 there seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the placed workers because the client has acquired a dual set of such rights and obligations. That the employment relationship between TES and the placed workers on the one hand and the employment relationship created by s198A(3)(b) of the LRA on the other, operate in parallel.

16.3 section 198(2) of the LRA placed beyond doubt that a TES, the employer of placed workers at common law, is equally the employer for the purposes of the LRA,

16.4 that the contractual relationship between TES and placed workers, is “indubitably one of employment”.

16.5 that placement as contemplated in s198 of the LRA has no bearing on the contract between TES and placed workers and therefore both parties continue to be bound by their contractual rights and obligations before placement.

[17] The Labour Court decided to neither substitute nor refer the award back to the CCMA because it was of the view that the dispute before it was academic and that the Commissioner ought to have declined to entertain the matter.

[18] The Labour Court *mero motu* raised a further point to the effect that all the workers placed with Krost by Assign should have been joined in the matter in order to give them an opportunity to be heard. This fact alone, the Labour Court held, constituted a ground for reviewing and setting aside of the Commissioner's award.

The Appeal

[19] In this Court, the Casual Workers Advice Office (CWAO) applied and was admitted as first *Amicus curiae* in terms of rule 7(1) of the Rules for the Conduct of Proceedings in the Labour Court. Similarly, the Confederation of Associations in the Private Employment (CAPES) also applied and was admitted as second *Amicus curiae.*

The Parties' submissions

[20] Mr van der Riet SC,[3] who appeared on behalf of NUMSA made the following submissions: that the Labour Court erred in holding that the Commissioner committed an error of law in finding that Assign continued to be the employer of the placed workers after 01 April 2015. The finding of the Commissioner that once s198A (3)(b) of the LRA is triggered, the client is the only employer of the placed workers for purposes of the LRA was correct. He submitted that the Labour Court misunderstood the purpose of s189(2) of the LRA. The

[3] Mr van der Riet relied on many of the arguments advanced by Paul Benjamin in his article: "Restructuring triangular employment: the interpretation of section 198A of the Labour Relations Act (2016) 37 ILJ 28. He mentioned that the author was the advisor to the Department of Labour in the drafting process that led to the amendment of section 198 and the insertion of sections 198A-D of the LRA in 2014. What matters the most though for us to interpret is the final text passed by the legislature. The article provides a useful analysis of the judgment of the Labour Court which is the subject of this appeal.

subsection, he contended, does not seek to affirm the common law, but to create a legal fiction in order to identify one of the parties as the employer of a placed worker under the LRA because the conventional test of employment, both at common law and statutorily, are inadequate in the circumstances of triangular employment and accordingly leave placed workers without protection.

[21] Mr van der Riet contended further that the Labour Court erred in finding that the contractual relationship between the TES and the placed workers is always an employment relationship. He submitted that it is clear from the provisions of s198 and s 198A of the LRA that a TES can operate without concluding a contract of employment with the workers it places as employees.

[22] Counsel submitted that in any event, s145 of the LRA does not allow an award to be reviewed and set aside on the basis of an error of law as contemplated in the common law. He submitted that the award of the commissioner is not one that no reasonable arbitrator could not reach.

[23] In the finding by the court *a quo* that the dispute was academic, Mr van der Riet submitted that NUMSA's refusal to agree that Assign continued to be the employer of the placed workers after 01 April 2015 created a concrete dispute between the parties which was not academic.

[24] Regarding the issue of joinder, counsel submitted that the court *a quo* erred in finding that placed workers who were not members of NUMSA, constituted a ground of review, because those workers who are not members of NUMSA do not have a direct and substantial interest in the outcome of the case. Counsel contended that this is not a matter where the award made by the commissioner will be a "*brutum fulmen"* because some persons who will have to cooperate in carrying it into effect will not be bound by it.

[25] Ms S Harvey, for CWAO, mainly supported the submissions made on behalf of NUMSA. She submitted that the parallel/dual employer interpretation of the s198A of the LRA is not supported by the plain language of the provision read in context and that the sole employer interpretation is the one giving effect to the purpose of the amendments and to constitutional rights. Counsel further

submitted that the fundamental error of the court *a quo* lay in its failure to appreciate that the employment relationship between the placed workers and the client arises by operation of law, independent of the terms of any contract between the placed workers and the labour broker, or the placed workers and the client.

[26] Mr Myburgh SC, on behalf of the first respondent, summarised his submission thus: the court *a quo* correctly found that the commissioner's interpretation of the deeming provision was wrong, and thus constituted a reviewable error of law; that in line with the court *a quo*'s construction, correctly construed, the effect of the deeming provision is to leave the bond between the TES and the placed workers intact, whilst creating an augmentation by introducing the client as an employer vis-à-vis the placed workers for the purposes of the LRA. Regarding the non-joinder and academic issues, counsel conceded, correctly in my view, that for the purposes of the appeal, nothing turns on the court *a quo*'s remarks. The parties in the court *a quo* accepted that the dispute was not academic and never raised nor pursued the non-joinder point. I need not say anything more about the non-joinder and the academic issues raised *mero motu* by the court *a quo*. The two issues are of no assistance in the interpretation inquiry to be embarked upon in this appeal.

[27] Mr Myburgh appeared on behalf of CAPES as well. He indicated that CAPES supports the submissions made on behalf of the first respondent. In addition, counsel submitted that in interpreting the deeming provision, it is necessary for the Basic Conditions of Employment Act, 75 of 1997 (BCEA), in terms of which the TES is and remains the employer of all placed workers, to be reconciled with the LRA in so far as the dispensation of the TES's post-deeming is concerned; that the only manner in which the LRA and the BCEA can be reconciled post-deeming is through the TES being a parallel employer for the purposes of the LRA when deeming provision takes effect. Regarding the Private Employment Agencies Convention,1997 (no 181) relied on by CWAO, counsel submitted that even though the said convention has not been ratified by the Republic of South Africa and is therefore not part of the

Republic's international law obligations, the parallel employment construction is not in any way in conflict with the provisions of the convention.

Analysis.

[28] The issue in this appeal concerns the interpretation of s198A (3)(b) of the LRA. Before embarking on the process of interpretation it is necessary to restate the applicable principles of interpretation of legislation. The starting point is s39(2) of the Constitution of the Republic of South Africa. The relevant part of s39(2) provides that:

> '(1) When interpreting the Bill of Rights, a court, tribunal or forum-
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[29] Section 3 of the LRA reads:

> 'Any person applying this Act must interpret its provisions-
>
> (a) to give effect to its primary objects;
>
> (b) in compliance with the Constitution; and
>
> (c) in compliance with the public international law obligations of the Republic.'

[30] Section 1 of the LRA states that the purpose of the LRA is to advance economic development, social justice, labour peace and the democratisation

of the workplace by fulfilling the primary objects of the LRA. The primary objects of the LRA are:

> '(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote-
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;
>
> (iii) employee participation in decision-making in the workplace; and
>
> (iv) the effective resolution of labour disputes'

[31] It is trite that a purposive approach to interpretation of legislation is imperative. The Supreme Court of Appeal[4] held that:

> 'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to

[4] *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

> which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document'.[5] [Footnotes omitted]

[32] An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.[6]

[33] The relevant provisions section198 reads:

> '198. Temporary Employment Services
>
> (1) In this section, 'temporary employment services' means any person who, for reward, procures for or provides to a client other persons -
>
> (a) who perform work for the client; and
>
> (b) who are remunerated by the temporary employment service.
>
> (2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the

[5] At para 18.

[6] *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 25; *Democratic Nursing Organisation of South Africa obo Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at para 21-22; *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593(LAC) at para 30.

employee of that temporary employment service, and the temporary employment service is that person‘s employer.

(3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.

(4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes -

(a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;

(b) a binding arbitration award that regulates terms and conditions of employment;

(c) the Basic Conditions of Employment Act; or

(d) a sectoral determination made in terms of the Basic Conditions of Employment Act.

(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)(b)—

(a) the employee may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;

(b) a labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and

(c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.

(4B) (a) A temporary employment service must provide an employee whose service is procured for or provided to a client with written particulars of

employment that comply with section 29 of the Basic Conditions of Employment Act, when the employee commences employment.

(b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to a person whose services were procured for or provided to a client by a temporary employment service in terms of subsection 198(1) prior to the commencement of the Labour Relations Act, 2014.

(4C) An employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services.

(4D) The issue of whether an employee of a temporary employment service is covered by a bargaining council agreement or sectoral determination, must be determined by reference to the sector and area in which the client is engaged.'

[34] Section 198A reads:

'Application of section 198 to employees earning below earnings threshold

(1) In this section, a 'temporary service' means 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, in accordance with the provisions of subsections (6) to (8).

(2) This section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.

(3) For the purposes of this Act, an employee—

(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or

(b) not performing such temporary service for the client is—

(i) deemed to be the employee of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

(4) The termination by the temporary employment services of an employee‘s service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3)(b) or because the employee exercised a right in terms of this Act, is a dismissal.

(5) An employee deemed to be an employee of the client in terms of subsection (3)(b) 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.

(6) The Minister must by notice in the Government Gazette invite representations from the public on which categories of work should be deemed to be temporary service by notice issued by the Minister in terms of subsection (1)(c).

(7) The Minister must consult with NEDLAC before publishing a notice or a provision in a sectoral determination contemplated in subsection (1)(c).

(8) If there is conflict between a collective agreement concluded in a bargaining council, a sectoral determination or a notice by the Minister contemplated in subsection (1)(c)—

(a) the collective agreement takes precedence over a sectoral determination or notice; and

(b) the notice takes precedence over the sectoral determination.

(9) Employees contemplated in this section, whose services were procured for or provided to a client by a temporary employment service in terms of section 198(1) before the commencement of the Labour Relations Amendment Act, 2014, acquire the rights contemplated in subsections (3), (4) and (5) with effect from three months after the commencement of the Labour Relations Amendment Act, 2014.'

[35] It is significant to note that subsection (1) gives special meaning to the term "*temporary service"* to mean 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 an employee who falls into 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, in accordance with the provisions of subsections (6) to (8).

[36] What s189A(1) does is to place emphasis on the nature of the service as defined and not on the person rendering the service or the recipient of the service *per se* to determine who the employer of the placed worker is. What it therefore means is that a placed worker other than the employee referred to in ss(2), earning in excess of the threshold prescribed by the Minister in terms of s6(3) of the BCEA, who does work for a client of the TES for a period exceeding three months; who is not working as a substitute for an employee of the client; or does not fall into a category of work and for any period determined in a collective agreement referred to in ss (1)(c), is not rendering a temporary service for the purposes of s198(A) and therefore not an employee of a TES. Put differently, a service by a placed worker which does not fall within the category defined above and which is in excess of a three month period is not a "temporary service" for the purposes of s198A(1) of the LRA.

[37] In order to ascertain who the employer of the placed worker in that position for the purposes of the LRA is, one is enjoined to resort to the provisions of s198A (3)(b). Such a worker is therefore deemed to be the employee of the client and the client deemed to be the employer of the worker. Furthermore, a worker in this situation is, subject to the provisions of s198B, employed by the client of the TES on an indefinite basis.

[38] The sole employer interpretation is consonant with the main thrust of the amendments to s198 and 198A outlined in the Explanatory Memorandum accompanying the LRA Amendment Bill as tabled in 2012 in Parliament, which is among others:

> 'Section 198 has been amended, and a new section and further provisions introduced into the LRA, in order to address more effectively certain problems and abusive practices associated with temporary employment services (TESs), or what are more commonly referred to as "labour brokers". 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.'

[39] The measures introduced to protect the vulnerable employees referred to in the memorandum includes further provisions of s198A. Section 198A(4) protects the employee deemed the employee of the client against termination of his or her services by either the TES or the client to avoid the operation of subsection (3)(b) or the services were terminated because the employee exercised a right in terms of the LRA by declaring such termination a dismissal. Subsection (5) further protects the employee against unfair discrimination by the client by treating him or her on the whole, less favourably than an employee of the client, performing the same or similar work. The deemed employer would be required to justify the differentiation in treatment if that takes place.

[40] The protection against unfair dismissal and unfair discrimination in the context of s198A of the LRA should not be interpreted to support the contention that the deemed employees are employed by both the TES and client. The protection is a measure to ensure that these employees are not treated differently from the employees employed directly by the client. The purpose of these protections in the context of s198A is to ensure that the deemed employees are fully integrated into the enterprise as employees of the client. The protection provided for takes into account the fact that the contractual relationship between the client and the placed worker does not come about through a negotiated agreement or through the normal recruitment processes of the client. The employment relationship is created by a statutory deeming clause. Hence the placed workers become employed by the client for an indefinite period and on the same terms and condition to the employees of the client performing the same or similar work. The dual or parallel employer interpretation is therefore not consonant with the context of s198A and the purpose of the amendments.

[41] The fact that in terms of s198(4A) the deemed employee may institute proceedings against either the TES or the client or both, or that in terms of the BCEA the labour inspector may secure and enforce compliance against the TES or client as if it were the employer or both, and that any order or award made against a TES or client in terms of the subsection may be enforced against either, is a measure to reinforce protection of lower-paid workers and to restrict the TESs to employing employees only for work of a temporary work as defined in s198A of the LRA. The joint and several liability provisions have the potential to discourage the TESs from being further involved in the administrative arrangements regarding employees placed with a client for a period in excess of three months.

[42] The sole employer interpretation does not, in my view, ban the TESs. It however, regulates the TESs by restricting the TESs 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 until the employee is deemed the employee of the client. The TES will be responsible

for its statutory obligations regarding the placed workers for as long as the deeming provision has not kicked in. This interpretation reconciles the perceived conflict between s198(2) and 198A(3)(b) referred to in s198(4A) of the LRA.

[43] It is correct to observe that there is no provision in the LRA Amendment Act of 2014 to the effect that the contract of employment is transferred from the TES to the client as is the case in instances of s197 transfers. There is also no provision to the effect that the client steps into the shoes of the TES after the three-month period. Provisions to this effect would have contributed to the interpretation that the purpose of the amendment was to have a sole employer relationship on the expiration of the three-month period. However, there is also no provision in the amendments to the LRA that the TES and the client become joint employers on the expiration of the three-month period. Neither do the amendments stipulate that the client is added as an employer. The purpose of the deeming provision is not to transfer the contract of employment between the TES and the placed worker to the client, but to create a statutory employment relationship between the client and the placed worker. Bearing in mind that the purpose of the amendment was to have the temporary employment service restricted to one of “true temporary service” as defined in s198A of the LRA, the intention must have been to upgrade the temporary service to the standard employment and free the vulnerable worker from atypical employment by the TES. It would make no sense to retain 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 would be the employer only in theory and an unwarranted “middle-man” adding no value to the employment relationship.

[44] The TES may continue, for example to be the party paying the salary of the deemed employee for several reasons. Should the TES fail to pay the salary in compliance with the existing practice, the client’s employee retains the right to institute proceedings against either the TES or the client or both in terms of s198(4A(a) of the LRA. This, however, does not elevate the TES to being an

employer. Similarly, should the TES cease to pay the salary of the employee of the client, the joint liability burden will also cease.

[45] It is important to appreciate that 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. The dismissal of the worker by the TES has no bearing on the employment relationship created by operation of law between the placed worker and the client.

[46] The plain language of s198A(3)(b) of the LRA, interpreted in context unambiguously supports the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers. In light of the view I take of this matter, it is not necessary to consider the evidence submitted by the *Amicus Curiae*. The evidence relates to the disputes between labour brokers and placed workers as well as the arbitration awards in resolving some of the disputes. The said evidence was not placed before commissioner and the court *a quo* and does not, with respect, contribute to the proper interpretation of s198A(3)(b) of the LRA.

[47] In conclusion, the Labour Court misdirected itself in its interpretation of s198 A(3)(b) of the LRA. On both tests the award of the commissioner is not susceptible to review. The outcome is reasonable and is a correct one. The commissioner likened the adoption scenario to s 198 A(3)(b). The comparison is an incorrect one. As it was submitted on behalf of Assign, s 242 of the Children's Act expressly provides that an adoption order serves to terminate all parental responsibilities and rights of the natural parents and confer them on the adoptive parents. This is, in my view, a process related error in the reasoning by the commissioner which is immaterial and does not have a bearing on the outcome of the award.

[48] The appeal should therefore succeed. This matter raised an important question to be decided by this Court and involved the rights of workers guaranteed by the Constitution and the LRA. It is in my view in accordance with the requirements of the law and fairness that each party carry its costs.

[48] In the result, it is ordered as follow:

(a) The appeal succeeds and the order of the Labour Court is set aside and replaced with the following:

"The Review application is dismissed."

Tlaletsi DJP

Waglay JP and Phatshoane AJA concur in the judgment of Tlaletsi DJP

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