THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR1230/15

In the matter between:

ASSIGN SERVICES (PTY) LTD	**Applicant**
And	
CCMA	**First Respondent**
COMMISSIONER A.C. OSMAN N.O.	**Second Respondent**
NUMSA	**Third Respondent**
KROST SHELVING & RACKING (PTY) LTD	**Fourth Respondent**

Heard: **3 September 2015**

Delivered: **8 September 2015**

Summary: The relationship created by the amendments to the LRA forcing labour brokers both operate subject to the provisions of the Act. The broker (TES) must comply with the Act if it takes any action regulated by the Act. The client must do so equally.

The decision of the CCMA, which concludes otherwise, is reviewed and set aside.

JUDGMENT

BRASSEY AJ:

Introduction

[1] In a stated case referred to it, the first respondent (the CCMA) was asked to pronounce on the proper construction of statutory innovations governing the relationship between a labour broker (a Temporary Employment Services (TES) as it is technically termed), the workers it engages and the client with whom they are placed. Pivotal to the innovations, which were introduced by ss 37 and 38 the Labour Relations Amendment Act 6 of 2014 and are located in ss 198 and 198A-D of the main Act (the LRA), is a deeming provision that, speaking broadly, makes a worker an employee of the client three months after placement. The issue that arises is whether the TES continues to have a relationship with the worker and, if so, whether the relationship remains one of employment. The controversy it has engendered is, I am told, profound, and the interests at stake doubtlessly run deep. This litigation, which is expected to go well beyond this Court, is designed to lay the dispute to rest but whether the means invoked are appropriate to the end is by no means obvious (as to this, see below).

[2] In the stated case, the stance adopted by the protagonist, a TES called Assign, is that 'the placed workers remain employees of Assign for all purposes, and are deemed to also be employees of Krost [the firm with which they are placed], for the purposes of the Act.' The response by NUMSA, the antagonist in the fray, is that the placed workers are deemed, for the purposes of the LRA, to be employees only of Krost. Krost, which is joined in the proceedings, takes part in the fray only to assert that it wants the issue to be resolved so it may know where it stands.

[3] NUMSA says in the stated case that its position can be characterized by the phrase ‘sole employment’. In fact, however, this is a very misleading way of describing its stance. In its heads of argument the union conceded that the contractual relationship between worker and TES remains in force and, when pressed, it accepted that there is nothing in the innovations that deprives them of rights and obligations embodied in their contract. Since the contractual bond is indubitably one of employment, its continuance must mean that, following the placement, two employment relationships are discernible that operate in tandem.

[4] In an effort to point up the contrast, Assign described its own position as one of ‘dual employment’, but this is, I think, every bit as misleading. The phrase suggests that the two sets of relationships – i.e. the ones the TES and the client separately have with the worker – are co-extensive in content when this is not in fact what the company contends. Assign makes no argument that the rights and obligations of the TES under its contract with the worker vest equally in the client following the placement. It simply contends that, once a placement occurs, the client becomes invested with the rights and obligations that, by operation of the LRA, cleave to an employer and, since the TES has in no sense been deprived of its status as employer, the two relationships now operate in parallel. In the words of Assign’s counsel, ‘where placed workers are deemed to be the employees of “the client”, their contracts of employment with the TES, nevertheless, remain in force.’

[5] Common to the contending positions is an acceptance that, since a placement under the current regime has no bearing on the contract between the TES and the worker, each party to the contract continues to be bound by the obligations and enjoy the rights with which, subject to the overriding statutory regime, they were vested upon entering the contract. Under neither position, moreover, is it suggested that the client, following a placement, becomes privy to the TES contract or otherwise becomes invested with the rights and obligations that are contained in the TES contract. The focus is solely on the statutory rights and obligations that inform the relationship governing an

employer's interaction with an employee under the LRA. Assign contends that these rights and obligation inhere equally in both the TES and the client, whereas NUMSA contends that they inhere only in the client.

[6] To the casual observer, each party seems by its stance to be favouring the interests of the other. Workers and their union, being the beneficiaries of the protections created by the statutory regime, seem better served by having two employers to call to account. By a parity of reasoning, a TES seems better favoured by a construction that serves to relieve them of the burdens the LRA imposes on employers in consequence of the placement. What this thinking overlooks, however, is that the provisions governing employers are not monolithically burdensome, but are coupled with powers and counterweighed by rights. By invoking *qua* employer these rights and exercising the powers, the TES can, so it seems to believe, relieve the client of its comparable burdens. The thinking seems to be that, as a member of the dual employer structure, it can suspend or dismiss the placed employee and this will produce a concomitant suspension of dismissal of the employee *qua* client. By these means it envisages that it can continue to provide a justification for the service that it offers the client and so warrant the charge it levies in the conduct of its labour broking business.

[7] Whether this would indeed be the result of a finding in favour of the TES is highly debatable. If the two relationships operate in parallel, then an exercise by the TES of its own powers and rights would, it seems more than likely, have an effect only on *its* bond with the placed worker. The bond between worker and client, operating as it does on separate lines, would remain unaffected. This obstacle, I hazard, could only be overcome by postulating a *single* employment relationship over which the TES and client have several (not joint) control over the continuance of the work, for only then could a decision by the TES have a legal bearing on the client's status as employer. Such a relationship, unitary in form but under bifurcated control is, it should by now be clear, most certainly not what Assign contends for in these proceedings

[8] Despite being so invited by me, neither party elected to explain the rationale underlying the TES position, so the remarks I have just made deserve only the attention that is typically given to speculation so rank. The hazards of such judicial musings, which are probably ever-present, become particularly acute when the issues are framed in such abstract terms and the terrain in which they arise is so politically charged. I would, I am sure, be better advised to concentrate on the issues as the parties have chosen to frame them, for they provide, in the words of Gerald Manley Hopkins, a 'comfort [that] serves in a whirlwind'. They are what the parties have asked me to consider and it is they, therefore, that should be the focus of my mind.

[9] For as long as it has been in force, the current LRA has embodied provisions regulating Temporary Employment Services, and they are what have been supplemented by the amendments. Section 198, the operative clause as now amended, begins by placing it beyond doubt that the TES, the employer of the placed worker at common law, is equally the employer 'for the purposes of this Act'. By reason of this clause, the TES becomes obliged to observe the provisions of the Act and instruments deriving their force from it. The obligation is reinforced by a clause making the client jointly and severally liable for breaches of the instruments and of the provisions contained in or in force under the Basic Conditions of Employment Act (the BCEA). Finally, the TES is expressly enjoined to comply with these requirements, the employment contract and the provisions of any other employment law and mechanisms are put in place for the enforcement of these duties.

[10] Section 198A, a section created by the amendments, starts by defining a temporary service as work provided by an employee earning below a prescribed threshold for a client over a period of less than three months, or as a replacement for a temporary absentee or in circumstances denoted by a designated statutory instrument. Subsection (3), the one at the heart of this dispute, then states as follows:

'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.'

[11] Above I have rehearsed the stances of the parties and, in particular, the concessions they have made. The first concession, I repeat, is that the provision makes the client the employer for the purposes of the Act and for no other purpose; in particular, the client is not drawn into the network of rights and obligations created by the contract between TES and worker. This concession is uncontroversial and was correctly made. The second is that the section does not serve to make the client the employer for any purpose other than the operation of the LRA. If this is equally uncontroversial between the parties, their respective concessions are properly made. Nothing in this deeming provision can be taken to invalidate the contract of employment between TES and worker or to derogate from its terms. They remain firmly in place. If the TES has, as sometimes happens, undertaken to provide the placed worker with training, it must provide the training; if, less plausibly, the TES has contractually accepted that the worker need not report for work before 9 am, he or she cannot be forced to arrive at the client's clock-in time of eight; if the worker has agreed to a covenant in restraint of trade, then the covenant must (subject to the usual scrutiny for unlawfulness) be observed; and so on.

[12] So (and once again I repeat) the only issue, on the stated case at any rate, is whether the TES continues to be an employer of the worker and, by reason of this fact, is concurrently vested with the statutory rights/obligations and powers/duties that the Act generates. I see no reason why this should not be

so. There seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the worker because the client has acquired a parallel set of such rights and obligations. The worker, in contracting with the TES, became entitled to the statutory protections that automatically resulted from his or her engagement and there seem to be no public policy considerations, such as pertain under the LRA's transfer of business provisions (s 197), why he or she should be expected to sacrifice them on the fact that the TES has found a placement with a client, especially when (as is normally so) the designation of the client is within the sole discretion of the TES.

[13] Two practical examples suffice to show how this construction might work in practice. They are conjectural only, since they have not been made the subject of argument before me.

- Under the Act, a worker's engagement cannot be terminated in the absence of a fair procedure and good substantive cause. The client, obliged by s 198A(3)(b) to treat the worker as engaged for an indefinite period, cannot bring the services to an end without heeding these requirements. The same is true of the TES: obliged by the contract of employment to keep the worker in its service (albeit, no doubt, intermittently in a limbo in which, when no work is done, no wage is paid), the TES cannot terminate the relationship without observing the self-same statutory requirements.

- Under the Act, workers are subject to a headcount in order to determine levels of union representativeness for the purposes of collective bargaining and organizational rights. In the industry or area in which each employer operates, the worker will be counted once and his or her presence will go to make up the numbers in each case. This double-counting no doubt creates something of an anomaly, but this seems to be an inescapable consequence of the broad-brush way in which the new provisions have been drafted.

[14] Much of the argument in the proceedings was focussed on the meaning of the word 'deemed'. High authority was cited – *S v Rosenthal* 1980 (1) SA 65 (A) at 75G-76A - for the proposition that, by using the word, the legislature makes a circumstance notionally true that might not, or would not, actually be true. The effect of its use, we are told, is either to substitute the deemed for the actual or to augment the actual with the deemed. Depending on the intent underlying the provision, moreover, the substitution or augmentation may be legally irrefutable or just rebuttably presumptive. Intriguing as this analysis is, I am not sure whether in this case it does much more than remind us to look at the deeming provision as a whole and place it within the matrix, legal and social, in which it was enacted. Here the reminder is salutary, for we see from the provision itself that the deeming clause is expressly made to operate only for the purposes of the Act. But if we feel driven to pigeon-hole the effect of the word here, we can say that it serves to create an augmentation, not a substitution, and that it produces this result decisively and so irrefutably.

[15] The construction I favour by my finding seems to be consonant with the general architecture of the new provisions. It explains why the legislature has injected so much energy into upgrading the joint and several liability provisions of the pre-existing s 198. They continue to have important consequences for the TES, and thus potentially the client, even after the temporary service has lapsed. It explains the singular language of s 198(4A)(b), which empowers the enforcement of the BCEA 'against the temporary employment service or the client as if it were the employer' – the provision is necessitated by the fact that the deeming provision: since the deeming provision with which we are concerned operates only for the purposes of the LRA, the BCEA would not be enforceable against the client *qua* 'employer' in the absence of this clause. Finally, it explains why s 198(4E) subjects the contract between the TES and the client to scrutiny to determine whether it impermissibly generates an obligation to flout the statutory and contractual protections that clothe the worker.

[16] The scope and exigibility of these protections will, I expect, give rise to considerable litigation in the future. I take but one example. Suppose the contracts concluded by the TES with the worker on the one hand and the client on the other embody a clause obliging the worker to stop working for the client if the TES so directs. If the clause were invoked to circumvent the client's duty to observe the fair dismissal requirements of the Act, the transfer would certainly constitute a dismissal since s 198A(4) deems a termination by a TES of an employee's service with the client to be a dismissal by the client if its object is to avoid the operation of the deeming provision (ie subs 3(b), the one at the heart of this dispute). Would the dismissal be unfair, however, or could the client plead that it had no alternative but to submit to the contractually-sanctioned decision to terminate taken by the TES? The matter, one conceives, might well turn on whether the client asked for the worker to be withdrawn from its workplace. It would, after all, be hard to condemn the client for unfair conduct were the decision made unilaterally by the TES in order to promote its own interests – say, by transferring the worker to a more lucrative placement.

[17] Beneath these examples is a deeper conundrum. A contract of employment is one in which one person (the employee) subjects his or her productive capacity to the behests of another (the employer). To exploit this capacity, the employer must instruct the employee on the work to be performed and, if untenable conflicts are to be avoided, the source of this control, whether individual or collective, must always be unitary. 'No man can serve two masters', says the Bible, and with this the law concurs. When a TES concludes a contract of employment, it becomes the source of control and, as we have discovered, it retains this power notwithstanding the enactment of the new statutory provisions. If, as typically happens, the client sets the tasks that the worker must perform, it does so not in its own right but as a person deputed to exercise, as agent or representative, a power that originally vested, and ultimately continues to vest, in the TES. If the TES, whether at the request of the client or otherwise, terminates its relationship of employment with the worker, the source of the power of control is gone and the objects of

the employment relationship become impossible to achieve. Unless the client concludes a fresh contract with the worker, its relationship must come to an end by operation of the principles of supervening impossibility of performance or, better put, frustration of substratum tacitly agreed to be necessary for the continuance of the relationship. The situation is equivalent in legal terms to the one that arises when an employer dies or is placed in liquidation. Whether this result entails an exercise of managerial discretion that must be subject to the imperatives of the fair dismissal regime is highly debatable, but the result is the same: the worker must go. If the employee has an unfair dismissal claim, it is against the TES alone.

[18] If this is true, one wonders whether the drafters of the amendments have realized their ambitions. Time and further litigation will tell. In this case to consider these matters is to succumb, once more, to the meretricious lure of gratuitous speculation and this is culpably to travel beyond my judicial remit.

[19] The fault, it must be said, is not all mine. In a case such as this, framed as it is to consider a point of legal construction, speculation is all but inevitable, for it is by such means that the lawyer generates hypothetical scenarios by which to test interpretative conclusions provisionally entertained. That the court is confronted by the siren-song of unwise speculation says much about the legitimacy of this case. The general rule is that a court will decline to entertain a suit that entails no concrete dispute between the parties. It is of little or no moment that one or both sides have a keen interest in the determination and would like to regulate their dealings by reference to it. The principle, which is deeply embedded in our jurisprudence, was expressed thus by Innes CJ in *Geldenhuys and Neethling v Beuthin* 1918 AD 426:

> 'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely because

the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.'

[20] The passage was cited with approval as recently as this year: see *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Co SARL* 2015 (1) SA 345 (SCA) at para 38, in which the court declined to construe an agreement in order to declare a dispute arbitrable.

[21] The rule is a salutary one, not just because it is not the function of a court to dispense legal advice, but also because making decisions on abstract questions of law is a task of considerable complexity that is pregnant with the potential for error. If this issue was being entertained by this court sitting as a court of first instance, its proper response would, I believe, have been to decline to consider it. The CCMA commissioner should, in my view, have responded in the same way. State time and money should not have been expended in a process that really entails the giving of legal advice. Be this as it may, I refrain from making this a basis for reviewing the commissioner's award, however, since the point, being raised only by me, is not one he has been invited to deal with. This is a deficiency that, I appreciate, might have been cured by referring the question back to him for consideration, but I have been discouraged from taking this step and countenancing the concomitant delay by the fact that this matter comes before me as a matter of urgency.

[22] In the referral, the commissioner held that Krost, the client, was deemed to be the 'sole employer' of the placed employees. In coming to this conclusion I have found that he erred. The error is one of law but, even so, it is by no means axiomatic that I can set aside his decision on review. Until 1992, errors of law were said to provide a basis for common law review only if they went to jurisdiction, but in *Hira and another v Booysen and another* 1992 (4) SA 69 (A) the court enlarged the test. Included in the criteria for review are the following elements:

- ‘Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

- ‘Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.’

[23] The point of law upon which the commissioner pronounced in this case can scarcely be regarded as one entrusted exclusively to his discretion. On the contrary, it is far from obvious that he had any jurisdiction to decide a question that, if judicially cognizable at all, should properly have been placed before a superior court, the Labour Court specifically, for a decision at first instance. I appreciate that s 198D(1) makes provision for the determination by the arbitral bodies of disputes engendered by the new provisions, but, so far as is here relevant, they must be disputes ‘arising out of’ their interpretation, not ones concerning the interpretation per se. But this point is not taken by either party and we are where we are. I must consider whether, despite the strenuous submissions to the contrary by NUMSA’s counsel, a proper basis for review is laid by the error of law that I have discerned in the commissioner’s award. In consider that it has, for the decision by the commissioner falls squarely within the framework of legitimate review articulated in the passages from Hira cited above. These principles find echo in the judgment of Murphy JA in Head of the Department of Education v Mofokeng & others [2015] 1 BLLR 50 (LAC), in which he states that ‘if but for an error or irregularity a different outcome would

have resulted, it will ex hypothesi be material to the determination of the dispute.'

[24] In making this finding, I must emphasize, I have not overlooked the fact that, under s 145 of the LRA, the grounds of review are narrower than the comprehensive powers of review that prevail at common law or under the Promotion of Administrative Justice Act 3 of 2000. On this issue I take the decision in *Irvin & Johnson v CCMA & others* [2006] 7 BLLR 613 (LAC) at para 49 to be controlling.

[25] One further issue engages my attention. It is one that I can, indeed must, raise *mero motu*. I can find nothing on the papers to suggest that the workers placed with Krost by Assign were invited to join in the proceedings. Given the tenor of the commissioner's award, which focuses specifically on them, they should have been given the opportunity to be heard since their interests were indubitably implicated in the award. As I propose by my order to do no more than restore the *status quo ante*, no harm has resulted, but if the parties elect to take this matter beyond further, they will certainly want to consider the point I have made here.

Conclusion

[26] In the Notice of Motion, Assign prays for an order that, upon a proper construction of the deeming provision, placed employees are 'employed dually' for the purposes of the LRA. For reasons I have already given, the expression is a fertile source of confusion and, even were I willing to make an order on an issue framed in such abstract terms, I should want it to be far more precise than this. In my view, therefore, it is highly undesirable to make an order substi

[27] The parties are agreed that no order for costs should be made in these proceedings.

[28] I make the following order:

1. The arbitration award issued by the second respondent on 29 June 2015 under case number ECEL 1652-15 is reviewed and set aside.
2. There will be no order as to costs.

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Brassey AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Adv. A Myburgh SC, Adv. G Fourie, Adv. R Itzkin
Instructed by:	Kirchmanns Inc.
For the Third Respondent:	Adv. JG Van der Riet SC
Instructed by:	Ruth Edmonds Attorneys