

RULING ON RECUSAL AND INTERPRETATION OF s198(3)(b)(i)

Commissioner : Suria van Wyk
Case Reference No.: FSRFBC34922
Date of ruling: 24 June 2015

In the matter between:

Refilwe Esau Mphirime _____ **Employee party**

and

Value Logistics Ltd / BDM Staffing (Pty) Ltd _____ **Employer party**

Ruling on Condonation for the late filing of the application for Recusal

1. In terms of section 136(3)-(4) of the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) any party to a dispute who wants to object to the arbitration also being conducted by the commissioner who had attempted to resolve the dispute through conciliation may do so by filing an objection in that regard with the Commission within seven days after the date on which the commissioner's certificate was issued, and must satisfy the Commission that a copy of the objection has been served on all the other parties to the dispute. When the Commission receives an objection it must appoint another commissioner to resolve the dispute by arbitration.
2. Despite the fact that parties at conciliation indicated that they would not object to me being the arbitrating commissioner, no proof that such an objection was ever filed with the CCMA was contained in the documents. The notice of set down from NBCRFLI was served on the parties on 22 April 2015 and no proof that such an objection was ever filed with the NBCRFLI was contained in the documents.

3. An objection filed in terms of section 136(3) of the LRA has to be directed to the forum, i.e. the Commission or the Bargaining Council and is not an application that is brought before a presiding commissioner.
4. The application for recusal filed by BDM Staffing (Pty) Ltd, was not an objection in terms of section 136(3), but was an application for recusal and condonation in terms of the NBCRFLI Dispute Resolution Rules.
5. Rule 11 of the NBCRFLI Dispute Resolution Rules which deals with condonation states that this rule applies to any referral document or application delivered outside of the applicable time period prescribed in the Act or these rules. The LRA sets no time limits for the filing of a recusal application.
6. An application must further be brought in terms of Rule 33 which states that this rule applies to any—
 - (a) application for condonation, joinder, substitution, variation or rescission;
 - (b) application in a jurisdictional dispute;
 - (c) other preliminary or interlocutory application.
7. An application for recusal does not fall within the ambit of rule 33. There are no time limits set on when an application for recusal must be filed and therefore no condonation is required.
8. It is further acknowledged that BDM Staffing (Pty) Ltd indicated during the arbitration held on 25 May 2015 that an application for recusal will be filed in conjunction with the Heads of Argument on the interpretation of section 198A(3)(b)(i).

Ruling on the Application for Recusal:

9. BDM Staffing (Pty) Ltd lodged an application for my recusal in the said matter together with the Heads of Argument on the interpretation of section 198A(3)(b)(i). The application for recusal is denied on the following grounds:
 - 2.1. Bias is defined in the Oxford Dictionary as an inclination or prejudice for or against one person or group, especially in a way considered to be unfair. The Constitutional Court

have acknowledged that in considering an application for recusal the court presumes that officers are impartial and that absolute neutrality is not entirely possible. The test furthermore involves the question whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the presiding officer will not bring an impartial mind to bear on the adjudication of the case.¹

- 2.2. At conciliation, as Commissioner I had the duty to determine first and foremost whether the CCMA had the jurisdiction to deal with the matter. Being a panelist of the NBCRFLI, I immediately enquired into the issue of jurisdiction when it became apparent that Mr RE Mphirime worked at Value Logistics Ltd. I further had the responsibility to ensure that the correct employer or employers were cited and notified to attend proceedings. The Labour Relations Amendment Act, 6 of 2014 came into force on 1 January 2015 and the transitional period lapsed on 31 March 2015. The applicant's employment started on 30 June 2014 ended on 2 April 2015 and this implied that section 198A of the Labour Relations Act, 66 of 1995 (hereinafter referred to as the LRA) would have to be considered.
- 2.3. I had a duty to join Value Logistics Ltd as a second respondent to the dispute as they have an interest in the outcome of the dispute. Joining a party to a dispute creates no liability; it only ensures that the party joined will have an opportunity to state their case at the proceedings. The CCMA Rules² gives the power to a Commissioner to make an order, on own accord, to join any person as a party in the proceedings if the party to be joined had a substantial interest in the subject matter of the proceedings. It can therefore not be argued that by joining Value Logistics Ltd I acted in a manner that showed bias.
- 2.4. The further claim that I have a preconceived notion of the interpretation of section 198A(3)(b)(i) is clearly not based on the discussions during the conciliation. From the Heads of Argument it was quite apparent that BDM Staffing (Pty) Ltd has a preconceived notion that because of the CCMA Road Shows and training provided to Commissioners that the Commissioners accredited to hear section 198 matters have

¹ President of the Republic of South Africa and others v South African Rugby Football Union and others 1999(7) BCLR 725 (CC); SACCAWU and another v Irvin & Johnson Ltd Seafoods Division Fish Processing [2000] JOL 7073 CC; NEHAWU v Department of Health (Free State) 2014 JDR 1541 (LC).

² CCMA Rules, rule 26(2) and 26(3).

been coached to interpret the amendments in a certain way. Therefore irrespective of what was said in the conciliation, this application for recusal would have been lodged.

- 2.5. It is a condition of accreditation of all Councils that only Commissioners and panelists who have been trained on section 198 may hear these matters. If the above was regarded to be a valid ground for recusal the resultant effect would be that all Commissioners accredited to hear section 198 matters would have to recuse themselves. The legislator have given the CCMA and the accredited Bargaining Councils the power to preside over these matters and therefore I will execute my duties as Commissioner accredited to hear the section 198 matters, independently and fairly.
- 2.6. In any conciliation the facts of the matter are discussed and views are tested in an attempt to resolve a dispute. In the absence of such discussions conciliation would not be possible. In no way did my actions or comments during the conciliation indicate that I would not have an impartial mind that is open to persuasion.³ There were no in depth discussions and arguments regarding the interpretation of section 198 at the conciliation as I did not have the jurisdiction to deal with the matter and this was indicated to the parties present. The duration of the whole process of conciliation was 30 minutes.
- 2.7. I furthermore find it interesting that BDM Staffing (Pty) Ltd in their arguments failed to acknowledge the fact that after the conciliation I indicated to them that there are a limited number of Commissioners currently accredited to deal with section 198 matters and that they should indicate if they would have a problem if I preside over the matter at NBCRFLI. To this both parties which included, Miss Zandile Evelyn Molefe indicated that they would not have a problem if I preside over the matter at NBCRFLI.
- 2.8. Once the proceedings were adjourned Miss Zandile Evelyn Molefe left the venue, the applicant on own accord remained in the venue and required a confirmation on what the process forward would be despite it being dealt with during the proceedings. I again explained to Mr RE Mphirime that the matter would be transferred to the NBCRFLI, that he had to refer the matter for arbitration at the NBCRFLI and that he would need the

³ President of the Republic of South Africa and others v South African Rugby Football Union and others 1999(7) BCLR 725 (CC).

certificate to do that. Furthermore that he did not have to wait for the written ruling on jurisdiction before he could refer the matter for arbitration at NBCRFLI. At no stage did Miss Zandile Evelyn Molefe attempt to enquire as to why the applicant remained behind or request to be part of the conversation despite her knowing that a real possibility existed that I could be the presiding officer at the NBCRFLI.

- 2.9. I would furthermore like to place on record that I did not request NBCRFLI to do the matter, but that the NBCRFLI approached me and asked if I would preside over the matter. Based solely on the consent given by the parties at conciliation I acceded to their request.
- 2.10. The NBCRFLI notice of set down was served on the parties on 22 April 2015. This notice stated that I was appointed as Commissioner for the matter. I fail to understand why BDM Staffing (Pty) Ltd did not immediately lodge an application for recusal if they truly felt that during the conciliation I acted in a manner that showed bias.
- 2.11. On record, during the initial stages of arbitration at the NBCRFLI I indicated to the parties that I am open to consider their arguments as I have not sided with any of the current legal opinions. I further indicated to the parties that the legal opinions are only opinions and that they do not bind me. As an independent decision maker I apply my own mind and I cannot be instructed by either the NBCRFLI or the CCMA to follow a certain approach unless it is binding on me in terms of a court judgment.
- 2.12. To further show my willingness to objectively and fairly consider the respective arguments, parties were given an opportunity to address me on the issue in writing. Parties were given two weeks to finalize their Heads of Argument. If I had a preconceived notion of the interpretation of section 198, I would have immediately proceeded with verbal arguments on the interpretation.

Ruling on the Interpretation of section 198 and section 198A of the Labour Relations Act, 66 of 1995:

3. The Labour Relations Amendment Act, 6 of 2014 came into effect on 1 January 2015. In the interpretation of section 198A(3)(b)(i) the particular section cannot be interpreted in isolation and therefore this ruling would consist of an interpretation of the amended section 198 and section 198A of the LRA holistically.
4. In interpreting the provisions of any enactment one is obliged to apply the so-called golden rule of construction. In *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 804B the court stated that the plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.⁴
5. In *UWCASU & others v University of the Western Cape* [2002] 5 BLLR 487 (LC) the court also referred to the 'golden rule' for interpretation in that the language of a document must be given its ordinary and grammatical meaning, unless it would lead to an absurdity, repugnance or inconsistency with the rest of the document.
6. The court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 BPLR 135 (SCA) stated that 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

⁴ Also see *Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 ILJ 1262 LAC; *Dempsey v Home & Property* (1995) 16 ILJ 378 LAC.

ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

7. Section 3 of the LRA states that any person applying the LRA must interpret the 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.

8. The purpose⁵ 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, which are-
 - (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;
 - (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.

Section 198 of the Labour Relations Act, 66 of 1995

9. Section 198 of the LRA applies to all employees irrespective of their income. Section 198(1) of the LRA defines a TES to mean any person who for reward, procures for or provides to a client other persons who performs work for the client and is remunerated by the temporary employment service.

⁵ Section 1, Labour Relations Act 66 of 1995.

10. The legislator acknowledges the existence of this unique triangular relationship and stipulates that for the purposes of the LRA the person whose services have been procured is the employee of the TES and the TES is that person's employer.⁶ The TES is therefore the duty-bearer when it comes to the duties and obligations towards and employee for purposes of the LRA.
11. In terms of section 198(4) the TES and the client are jointly and severally liable if the TES, 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 75 of 1997 (hereinafter referred to as the BCEA);
 - (d) a sectoral determination made in terms of BCEA.
12. In my interpretation, section 198(4) speaks to the duties and obligations of the TES for purposes of the BCEA and non compliance to sectoral determinations, collective agreements and awards that relate to terms and conditions of employment. The legislator set very specific boundaries to the joint and several liability, it is not universal but it is limited to the issues stipulated in section 198(4)(a) - (d).
13. Section 198(4) was not amended to include 'dismissal' or 'contraventions of the LRA' as a ground for which the client would be held jointly and severally liable and therefore the liability created in terms of section 198(4) remains limited to listed grounds and nothing else.
14. The Labour Relations Amendment Act, 6 of 2014 introduced section 198(4A) - (4E)⁷ into to the legislation. It should be reiterated that one section cannot be interpreted in isolation.
15. Section 198(4A) stipulates that 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)-

⁶ Section 198(2) – 198(3) of the Labour Relations Act, 66 of 1995.

⁷ Since section 198(4F) is not in force it is excluded from the analysis.

- (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.

16. My interpretation of this section is that it deals with the liability of the client in two situations:

16.1. The liability of the client created in section 198(4) which amounts to the joint and several liability. The interpretation of this section creates no problems as section 198(4A)(a) - (c) unpacks the consequences and recourse of the joint and several liability in the instance where there is a contravention by the TES of the BCEA, sectoral determinations, collective agreements and awards that regulate terms and conditions of employment.

16.2. The liability created in section 198A(3)(b) where the client is deemed to be the employer of the employee for purposes of the LRA. This however creates some confusion because one automatically wants to assume that the employee can now institute a claim jointly and severally for his dismissal, however the joint and several liability in section 198(4) is not extended to a claim for unfair dismissal under the LRA.

17. In trying to understand the purpose of this particular section, guidance is sought from the Memorandum of Objects, Labour Relations Bill 2012. The Memorandum states that: "*Section 198 continues to apply to all employees. It retains the general provisions that a TES is the employer of persons whom it employs and pays to work for a client, and that a TES and its client are jointly and severally liable for specified contraventions of employment laws.*"

18. From this it is clear that the joint and several liability of the TES and the client is limited to the specified grounds in section 198(4) only. This joint and several liability is also mirrored in section 82(3) of the BCEA which states that the client and the TES is jointly and severally liable in the event that the TES contravenes any provisions of the the BCEA or a sectoral determination.

19. The Memorandum further states that: *“An employee bringing a claim for which a TES and client are jointly and severally liable may institute proceedings against either the TES or the client or both and may enforce any order or award made against the TES or client against either of them.”*
20. The Memorandum makes no provision for enforcing all kinds of awards against either the TES or the client. It is limited to claims for joint and several liability. This is confirmed in the wording of section 198(4A)(c) which states: *“any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either”*. When considered holistically the entire subsection 4 deals with issues related to the BCEA and terms and conditions of service.
21. In my opinion the interpretation of section 198(4A)(a) should be that despite the fact that the client at some point may become the deemed employer for purposes of the LRA, that the triggering of the deeming provision would not exempt the TES or the client from the joint and several liability created in terms of section 198(4). The joint and several liability created in terms of section 198(4) stays intact.
22. Joint and several liability in itself is however not indicative of dual employment, for example in terms of section 197(8)-(9), the old employer and the new employer is held jointly and severally liable where the old employer is clearly not the employer anymore.

Section 198A of the Labour Relations Act, 66 of 1995

23. According to the Memorandum of Objects, Labour Relations Bill 2012, 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 (TES), 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. The new section 198A introduces key additional protections for more vulnerable workers. It applies only to employees who earn on or below the threshold⁸ prescribed in terms of section 6(3) of the BCEA.

24. In section 198A the legislator still acknowledges the unique triangular relationship between the TES, the client and the employee. The focus however now shifts to provide additional protection for vulnerable workers. To better understand the problems and abusive practices associated with TES's and how vulnerable employees' Constitutional rights have been infringed as a result of the misuse of the triangular relationship, a few recent cases will be cited.

24.1. In *SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*⁹ a recent case handed down by the Labour Court on 17 April 2015 the Labour Court dealt with the issue of automatic termination of an employment contract where a client cancels a contract with the TES. The court held (in interpreting section 198(4C)) that the Act now provides that in any proceedings brought by an employee, the Labour Court or an arbitrator may determine whether a provision in an employment contract or a contract between the temporary employment service and a client complies with subsection 4C and make an appropriate order or award. It can no longer be debatable that, following this legislative directive, labour brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment contract and undermines the employee's rights to fair labour practices is now prohibited and statutorily invalid.

24.2. In *Kelly Industial Ltd v CCMA and others*¹⁰, a judgement handed down by the Labour Court on 21 January 2015, the judge noted that this matter was a good example of the precarious and vulnerable position of employees employed by labour brokers on temporary assignments or contracts. It highlighted the reason why this form of atypical employment is to be regulated and such employees are to be protected by the law. The applicant's argued that it was their business model that upon termination of the

⁸ Section 198(2) of the Labour Relations Act, 66 of 1995.

⁹ Case no: JS 879/10.

¹⁰ Case no: JR 1237/13.

assignment by the applicant the "agency agreement" comes into operation in terms of which the applicant undertakes to find alternative assignments and that pending these attempts by the applicant the respondents will not receive remuneration and benefits and should not expect that the applicant will enter into any other assignment with them. The court held that this so called "agency agreement" in effect places the respondents at the mercy of the applicant and not only offends the principle of security of employment but also goes against the very notion and definition of an employment relationship where an employer provides work to an employee who renders their services to the employer and is entitled to remuneration. The applicant's answer to this was that if the respondents did not want to linger at home with no pay while the applicant attempts to find alternative placements for them they could have resigned or cancelled the contracts. It is this very mischief the amendments to the LRA seeks to address, the abusive practices associated with labour brokers. If the applicant's business model is to be condoned and accepted, it would go against the very values of providing employees with security of permanent employment and would perpetuate the abuse of employees by labour brokers.

- 24.3. In the case of *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) the employee's contract was terminated because the employer's client no longer required his services. The employer argued that the employment contract allowed for automatic termination on these very grounds and that the termination did not constitute a dismissal. The Court disagreed and struck down the employment contract's provision as it clashed with and was overruled by the provisions of section 189 of the LRA that requires a retrenchment process in circumstances where employers are unable to provide work for the employee. The court noted that, although the relationship between the broker and its client was lawful, it did not follow that all the terms of the contract which governed that relationship were also lawful. A contractual provision that enables a labour broker to withdraw an employee placed with a client, the court held, is contrary to public policy and in breach of the employee's Constitutional right to fair labour practices. The court noted that, in spite of legislative approval of labour broking services, labour-brokers and their clients are not at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whim and fancies of the client. The client of a labour-broker has a legal duty to do

nothing to undermine an employee's rights to fair labour practices, unless the limitation is justified by national legislation. The court added that, in applying the right not to be unfairly dismissed, it is not bound by contractual limitations created by the parties and may not perpetuate wrongs exercised by private parties who wield great bargaining power. The court noted that it is not bound by contractual limitations created by parties through an agreement that conflicts with the fundamental rights of workers. It concluded that any clause in a contract between a labour-broker and a client which allows a client to undermine the right not to be unfairly dismissed is against public policy and unenforceable.

- 24.4. In *NUMSA and others v Abancedisi Labour Services* (2013) 12 BLLR 1185 (SCA) the employer, a TES, attempted to convince the Supreme Court of Appeal that the employees who were excluded from the client's premises and told to go home without pay were not dismissed but were suspended indefinitely. In this case, the employees refused to sign a code of conduct and were excluded from the client's premises. The employees were not allowed back to work at the client and were not paid as they did not work. The limited duration contracts envisaged the continuation of the employment relationship after the conclusion of the assignment at the client and the employer thus argued that they were not dismissed. The SCA did not accept this argument by the employer and held as follows: 'A refusal to allow an employee to do the work he was engaged to do may constitute a wrongful repudiation and a fundamental breach of the employment contract which vests the employee with an election to stand by the contract or to terminate it. Here, Abancedisi did not just leave the employees to languish in idleness after their exclusion from Kitsankar. It also did not pay them any wages. Thereafter, nothing even slightly resembling the characteristics of an employment relationship remained between the parties beyond the illusory retention of the employees on Abancedisi's payroll.....Suffice it to reiterate that it is well for labour brokers to bear in mind that the intention of the Act – which governs labour relations with the object, inter alia, to give effect to the employee rights contained in s 23 of the Constitution – is that employment may only be terminated upon the employee's misconduct, incapacity or operational requirements and these reasons must meet the requirements of substantive and procedural fairness set out in the Act.

25. Section 198A(1) describes a temporary service as 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).
26. The Memorandum of Objectives clearly stipulate that: *“Employees in this category are employees of the TES for the purposes of the LRA only if they are employed to perform genuinely temporary work, defined in the new section as “temporary services”.*
27. The above is effectively mirrored in section 198A(3)(a) which states: For the purposes of this Act, an employee 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).
28. Therefore as long as the employee is performing genuinely temporary work the duties and obligations as described in section 198(2) and (4) will apply i.e. the TES is the employer for the purposes of the LRA and there will be joint and several liability for the TES and client where there is any contravention by the TES of the BCEA, sectoral determinations, collective agreements and awards that regulate terms and conditions of employment.
29. The Memorandum of Objectives further stipulate that: *“If they are not employed to perform temporary services, they are deemed for the purposes of the LRA to be employees of the client and not the TES.”* The footnote in the Memorandum of Objectives indicate that for ‘*purposes of the LRA*’ includes for purposes of freedom of association, organisational rights, collective bargaining, strikes and lock-outs, workplace forums, trade unions and employers’ organisations, dispute resolution, unfair dismissals and unfair labour practices.
30. Section 198A(3)(b) states that for the purposes of the LRA an employee-
- (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.

31. According to the Oxford Dictionary Thesaurus the word 'deem' means to consider in a specific way, and in Duhaime's Law Dictionary it is described as: *"To accept a document or an event as conclusive of a certain status in the absence of evidence or facts which would normally be required to prove that status."*
32. When words are given their normal grammatical meaning, this means that even in the absence of evidence thereto that an employer-employee relationship between the client and the employee exists (i.e. no evidence exists of a transfer of the employee), the client is now regarded as the employer for purposes of the LRA.
33. The wording of the Act does however not imply that the employee has been transferred to the client, nor does it indicate that the triangular relationship now automatically dissolved.
34. The key question to be answered is not what happens to the triangular relationship and whether or not there is a transfer of an employee. The crux of the interpretation lies in the question as to who is responsible for the duties and obligations in terms of the LRA. The wording in the LRA in this regard is clear and unambiguous. Once the employee is not performing such temporary service anymore, the client is deemed to be the employer in terms of the LRA. The client therefore bears the responsibility to ensure that duties and obligations towards the employee in terms of the LRA are met.
35. The legislator did not create joint and several liability for the TES and the client for purposes of the LRA. The only joint and several liability referred to in the LRA is in section 198(4)¹¹ and section 197(8) – (9).¹² If the legislator had intended for the TES and the client to be jointly and severally liable for the purposes of the LRA, such liability would have been expressly created.
36. In the light of the purpose of the amendments which is to address more effectively certain problems and abusive practices associated with a TES, the interpretation of the Act in this way

¹¹ Joint and several liability for contravention of the BCEA, sectoral determinations, collective agreements and awards that regulate terms and conditions of employment.

effectively stops the abusive practices. When considered objectively the abusive practices are a direct result of the triangular relationship in which the client is exempted from all the responsibility in terms of the LRA.

37. It therefore follows that should the amendments be interpreted to mean joint and several liability for the purposes of the LRA, the abusive practices would not be addressed.
38. Awarding the client the duties and obligations as employer for purposes of the LRA also ensures that the Constitutional rights of the employees as well as their rights in terms of the LRA are protected and enforced.
39. This interpretation can also not be said to have absurd consequences and to prove this, the interpretation will be applied to the case law examples above:

39.1. *SATAWU obo Dube and 2 others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*¹³: If the client carried the duties and obligations as employer for purposes of the LRA, it would have had to follow the section 189 procedures as prescribed in the LRA. The responsibility to ensure that the dismissal for operational requirements was fair would have been that of the client. Subsequently the rights of the employees not to be unfairly dismissed would have been protected. It would not have been possible for the TES to hide behind the shield of a commercial contract to circumvent legislative protections against unfair dismissal.

39.2. *Kelly Industrial Ltd v CCMA and others*¹⁴: If the client carried the duties and obligations as employer for purposes of the LRA, it would have had the responsibility to ensure that when an employee was no longer required for operational reasons, that the proper process was followed to terminate contracts of employment. This would not necessarily have prevented a retrenchment, but would have protected employees from being removed from an assignment at the whim of a client which in return provides employment security. The employees would have furthermore been protected from the

¹² Joint and several liability of the old and new employer in the event of retrenchments or liquidation of the new employer within 12 months from the transfer of the business or in the event of a claim concerning any term or condition of employment that arose prior to the transfer.

¹³ Case no: JS 879/10

¹⁴ Case no: JR 1237/13

abusive practices associated with labour brokers that go against the very values of providing employees with security of permanent employment.

- 39.3. *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC): If the client carried the duties and obligations as employer for purposes of the LRA, the employee should have been retrenched when the client no longer required his services. Again, this would not necessarily have prevented a retrenchment but would have protected the employee from being removed from an assignment at the whim of a client. This in return provides employment security because there cannot be a contractual provision that enables a labour broker to withdraw an employee placed with a client, as this is contrary to public policy and in breach of the employee's Constitutional right to fair labour practices. Deeming the client to be the employer effectively prevents that contractual relationships are structured in a way that would effectively treat employees as commodities to be passed on and traded at the whim and fancies of the client.
- 39.4. *NUMSA and others v Abancedisi Labour Services* (2013) 12 BLLR 1185 (SCA): If the client carried the duties and obligations as employer for purposes of the LRA, it would have been the responsibility of the client to ensure that the employees were charged for an appropriate form of misconduct before being dismissed or excluded from the clients premises. Alternatively if they were suspended it should have been on full pay. This would have resulted in the employees' rights in terms of the LRA to be protected as well as their rights contained in section 23 of the Constitution, that employment may only be terminated upon the employee's misconduct, incapacity or operational requirements and these reasons must meet the requirements of substantive and procedural fairness set out in the Act.
40. The correct interpretation in my view of s198A(3)(b)(i) is therefore that the client is awarded the duties and obligations for the purposes of the LRA when the employee is not performing a temporary service and therefore any claim brought in terms of the LRA must be brought against the duty-bearer, which is the client.
41. Although the NBCRFLI Main Collective Agreement regulates employment by TES's, none of the provisions in the Agreement relates to the issue covered in s198A of the LRA.

Brief response to arguments presented

42. Commissioners are tasked with the administering and enforcement of Employment Law Statutes. When a dispute is referred in terms of the LRA, the duty of a Commissioner is to determine who bears the duties and obligations towards an employee and to ensure proper enforcement of those duties and obligations. Commissioners are not mandated to make any ruling on the material aspects governing the commercial relationship between the TES and the client.
43. In response to the arguments placed before me I would like to state that I do not support either of the presented approaches exclusively.
44. Nothing in the wording of the amendments suggests that a transfer akin to section 197 of the LRA occurs. I also do not interpret the deeming provision to mean that the triangular relationship between the TES and the client dissolves and that the commercial relationship comes to an end. In the absence of wording that would suggest that the triangular relationship comes to an end or that a transfer takes place, such a consequence cannot be assumed.
45. The legislator created neither joint and several liability nor dual employment for purposes of the LRA. The issue of dual employment was argued around joint and several liability, however joint and several liability in itself is not indicative of a dual employment relationship.
46. It is however clear through case law that the legislator will not tolerate the attempts of a client to circumvent their legal duties and obligations by making use of employees provided by a TES. In the amendments there is a definite shift when it comes to the duties and obligations in terms of the LRA and this is driven by the legislator through the legislation.
47. What happens to the commercial relationship between the TES and the client after the shift in liability will ultimately have to be negotiated between the relevant parties in terms of their business agreement. What is however clear from the recent case law is that if the terms of the new agreement infringes upon the rights of employees, it will not be binding and the courts will reject such agreements.¹⁵

¹⁵ *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC): The court noted that, in spite of legislative approval of labour broking services, labour-brokers and their clients are not at liberty to structure their contractual relationships in a way

Conclusion

48. The legislator acknowledges the unique triangular relationship between the TES, the client and the employee in section 198 of the LRA. Nothing in the amendments however suggests that a transfer of the employee has taken place or that the triangular relationship acknowledged in section 198 dissolves.
49. The legislator awarded the duties and obligations in terms of the LRA to the TES only while the employee provides a temporary service as defined in section 198A(1). Once the employee no longer performs a temporary service, the client is deemed to be the employer and duty-bearer for purposes of the LRA.
50. The argument of BDM Staffing (Pty) Ltd that Value Logistics Ltd did not have to be joined to the proceedings is rejected. There is no joint and several liability for purposes of the LRA and subsequently only one of them will be liable.
51. Mr RE Mphirime was employed by BDM Staffing (Pty) Ltd on a fixed term contract from 30 June 2014 – 30 June 2015. He was placed at Value Truck Rental as a checker and he was earning below the threshold. His contract was terminated on 2 April 2015 after receiving one week's notice. The transitional period for the amendments lapsed on 31 March 2015. Mr RE Mphirime was employed for more than three months, he did not substitute an employee of the client who was temporarily absent and he was not employed in a category which is determined to be a temporary service by in terms of the NBCFRFLI Collective Agreement.
52. Therefore the deeming provision in terms of section 198A(3)(b)(i) of the LRA will be triggered and Value Logistics Ltd is deemed to be the employer of Mr RE Mphirime for purposes of the LRA. Subsequently BDM Staffing (Pty) Ltd has no right or obligation to defend this matter.

that would effectively treat employees as commodities to be passed on and traded at the whim and fancies of the client. The client of a labour-broker has a legal duty to do nothing to undermine an employee's rights to fair labour practices, unless the limitation is justified by national legislation. The court added that, in applying the right not to be unfairly dismissed, it is not bound by contractual limitations created by the parties and may not 'perpetuate wrongs exercised by private parties who wield great bargaining power. The court noted that it is not bound by contractual limitations created by parties through an agreement that conflicts with the fundamental rights of workers.

53. Value Logistics Ltd as deemed employer will bear the onus to prove at arbitration that the termination of Mr RE Mphirimi's contract was fair in terms of section 188 of the LRA.
54. NBCRFLI is instructed to set the matter down for arbitration as soon as possible.

Signed and dated at Bloemfontein on 24 June 2015.



NBCRFI Arbitrator: Suria van Wyk