CONSTITUTIONAL COURT OF SOUTH AFRICA

Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others

CCT 194/17

Date of hearing: 22 February 2018
Date of judgment: 26 July 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 26 July 2018 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Labour Appeal Court (LAC). The case concerned the interpretation of section 198A(3)(b) of the Labour Relations Act 66 of 1995 (LRA) and whether this deeming provision resulted in a "sole employment" relationship between a placed worker and a client or a "dual employment" relationship between a Temporary Employment Service (TES), a placed worker and a client. The LAC set aside the order of the Labour Court and held that a placed worker who has worked for a period in excess of three months is no longer performing a temporary service and the client, as opposed to the TES, becomes the sole employer of the worker by virtue of section 198A(3)(b) of the LRA.

In 2015, Assign Services, a TES, placed 22 workers with Krost Shelving and Racking (Pty) Limited (Krost), a number of whom were members of the National Union of Metalworkers of South Africa (NUMSA). The placed workers provided services to Krost for a period exceeding three months and on a full time basis. Assign Services' view was that section 198A(3)(b) created a dual employer relationship, while NUMSA contended that a sole employer relationship resulted from the section. The Commission for Conciliation, Mediation and Arbitration (CCMA) supported NUMSA's sole employer interpretation.

In the Labour Court it was held that a proper reading of the section could not support the sole employer interpretation. It instead held that section 198A(3)(b) created a dual

employment relationship, in which both the TES and the client have rights and obligations in respect of the workers. In an appeal, by NUMSA, to the LAC it was found that the sole employer interpretation best protected the rights of placed workers and promoted the purpose of the LRA.

Writing for the majority of the Constitutional Court, Dlodlo AJ (Zondo DCJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring) held that the purpose of section 198A must be contextualised within the right to fair labour practices in section 23 of the Constitution and the purpose of the LRA as a whole. The majority found that, on an interpretation of sections 198(2) and 198A(3)(b), for the first three months the TES is the employer and then subsequent to that time lapse the client becomes the sole employer. The majority found that the language used by the legislature in section 198A(3)(b) of the LRA is plain and that when the language is interpreted in the context, it supports the sole employer interpretation.

In the result, the Constitutional Court granted leave to appeal but dismissed the appeal with costs.

In a dissenting judgment, Cachalia AJ found that the dual employer interpretation was correct, as the language of the LRA does not expressly state that the TES would cease to be the employer after three months. The drafters of section 198A(3)(b) could have expressly stated this to be the position but did not. Cachalia AJ concluded that the dual employer interpretation provided greater protection for lower paid workers, in line with the purpose of section 198A(3)(b) and for these reasons would have upheld the appeal.