CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 194/17

In the matter between:

ASSIGN SERVICES (PTY) LIMITED	Applicant
and	
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
ABDOOL CARRIM OSMAN N.O.	Third Respondent
KROST SHELVING & RACKING (PTY) LIMITED	Fourth Respondent
and	
CASUAL WORKERS ADVICE OFFICE	Amicus Curiae

Neutral citation:	*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22
Coram:	Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J
Judgments:	Dlodlo AJ (majority): [1] to [85] Cachalia AJ (dissenting): [86] to [109]
Heard on:	22 February 2018

Decided on: 26 July 2018

Summary: Labour Relations Act 66 of 1995 — section 198A(3)(b) — temporary employment services — placed workers deemed employees of the client — section supports the sole employer interpretation

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

JUDGMENT

DLODLO AJ (Zondo DCJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring):

Introduction

[1] This application for leave to appeal against a judgment of the Labour Appeal Court enjoins this Court to finally determine the correct interpretation of section 198A(3)(b) of the Labour Relations Act[1] (LRA). Section 198A(3)(b) provides that an employee who earns less than the stipulated threshold and is contracted through a temporary employment service (TES) to a client for more than three months is deemed to be employed by that client.[2] The issue before us is what

[1] 66 of 1995.

[2] Section 198A(3)(b) provides:

happens to the employment relationship under the LRA between the placed employee and the TES once this deeming provision kicks in. In particular, does section 198A(3)(b) give rise to a dual employment relationship where a placed employee is deemed to be employed by both the TES and the client? Or does it create a sole employment relationship between the employee and the client for the purposes of the LRA?

[2] Statistics South Africa reports that the unemployment rate is 26.7% and that figure excludes more than two million discouraged work-seekers.[3] Behind this number lies the legacy of systematic deprivation of opportunities for black South Africans and within it is the undeniable skew of racial inequality. This dire state of affairs is coupled with a history of very poor working conditions and pay for black employees.

[3] The Legislature has stopped short of banning labour broking but it has enacted several amendments to the LRA to give security to marginalised workers and to regulate the industry. Section 198A is one such amendment. The dispute we are called upon to resolve is which interpretation of section 198A(3)(b) is correct.

Parties

[4] The applicant in this case, Assign Services (Pty) Limited (Assign Services/Assign), is a registered TES as defined in section 198 of the LRA and also duly registered in accordance with South African company laws. Assign

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"For the purposes of this Act, an employee—

. . .

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

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

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

[3] Statistics South Africa *Statistical Release P0211, Quarterly Labour Force Survey Q4: 2017* (13 February 2018).

recruits, places, manages and pays employees who are placed with client companies including the fourth respondent.

[5] The first respondent is the National Union of Metalworkers of South Africa (NUMSA), which is a registered trade union. NUMSA opposes Assign Services' application for leave to appeal the Labour Appeal Court judgment.

[6] The second respondent is the Commission for Conciliation, Mediation and Arbitration (CCMA), which was approached by the applicant and first respondent to provide an interpretation to section 198A(3)(b) of the LRA. The CCMA is a statutory body established in terms of the LRA.

[7] The third respondent is Commissioner Abdool Carrim Osman, the commissioner appointed by the CCMA to determine the dispute that gave rise to the application.

[8] The fourth respondent is Krost Shelving and Racking (Pty) Limited (Krost), a company offering storage solutions, duly registered in accordance with South African company laws. Krost is the client with whom Assign Services placed its workers in terms of section 198 of the LRA. It has not participated in the proceedings and it gave notice it will abide by the interpretation of the CCMA and the decisions of subsequent courts.

[9] The Casual Workers Advice Office (CWAO) has been admitted as amicus curiae. CWAO is a non-profit, independent advice office that focuses on the rights of employees undertaking precarious work. It professes knowledge of the lived experiences of employees placed by TESs with clients and asserts a substantial interest in these proceedings on this basis.

Background

[10] The TES or "labour broker" was legislatively determined to be the true employer of placed employees through a 1983 amendment[4] to the old Labour Relations Act of 1956.[5] The legislature at the time created a legal fiction by which the placed employees were "deemed" to be employed by the broker. This provision, though with different construction, was carried through to section 198(2) of the 1995 LRA. Then, in 2014, the LRA was amended to introduce several protections for employees in precarious employment.[6] These included section 198A, which came into operation on 1 January 2015.

[11] Section 198A regulates "temporary service" employment, which is limited to a period not exceeding three months.[7] Section 198A(3)(b) explicitly provides another "deeming provision". It states that an employee not performing a temporary service for a client is deemed to be an indefinitely employed employee of that client and the client is deemed to be the employer.

[12] Krost employs 40 salaried employees and approximately 90 wage staff. Assign Services supplies labour to Krost in the region of 22 to 40 workers at any one time, depending on the projects awarded to Krost, to supplement Krost's salaried employees.

[13] On 1 April 2015, Assign Services placed 22 workers with Krost. The workers rendered services at Krost on a full time basis for a period in excess of three consecutive months. This continued employment, post the three-month period of a temporary employment service, triggered section 198A(3)(b) of the LRA. Several of the placed employees are members of NUMSA.

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[4] Labour Relations Amendment Act 2 of 1983.

[5] 28 of 1956. See Theron "Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship" (2005) 26 *ILJ* 618 at 623.

[6] Labour Relations Amendment Act 6 of 2014 (2014 Amendments).

[7] Section 198A(1)(a) of the LRA.

[14] A dispute arose between Assign Services, Krost and NUMSA regarding the interpretation and effect of section 198A(3)(b). Assign was of the view that the consequences of the deeming provision were that the placed workers remained their employees for all purposes but were also deemed to be Krost's employees for purposes of the LRA. Assign termed this the "dual employer" interpretation of section 198A(3)(b). NUMSA disagreed. Its view was that Krost became the only employer of the placed workers when section 198A(3)(b) was triggered. NUMSA termed this the "sole employer" interpretation.

[15] On 23 April 2015 Assign Services referred the dispute as a stated case for arbitration to the CCMA in terms of section 198D of the LRA.[8]

Litigation history

CCMA

[16] The CCMA heard the dispute on 22 May 2015. Much of the argument centred on the meaning of the word "deemed" and whether it supported a sole or dual employer interpretation. I will come back to this later when I consider the correct textual interpretation of section 198A(3)(b).

[17] Assign argued that there is nothing in sections 198 and 198A that reflects a decision by the Legislature to impose a ban on TESs, whether as a consequence of the deeming provision taking effect or not. They asserted that, while it is clear that for the first three months the TES is the only employer, once the three-month period lapses the deeming provision does not terminate the commercial agreement between the client and the TES. It also does not terminate the contractual employment relationship

[8] Section 198D(1) states:

> "Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the [CCMA] or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration."

between the TES and the placed workers. Assign asserted that the dual employer interpretation provides greater protection for placed workers.

[18] NUMSA argued that a dual employer interpretation creates confusion and uncertainty, and prejudices vulnerable employees.

[19] The CCMA Commissioner who presided over the matter issued an award to the effect that the triggering of section 198A(3)(b) resulted in the client becoming the sole employer for the purposes of the LRA. In reaching his decision, the Commissioner attempted to interpret section 198A(3)(b) to give effect to its primary objects.

[20] The Commissioner was of the view that the dual employer interpretation would bring about a number of problems, such as confusion relating to the disciplining of placed workers and which of the parties' disciplinary codes would be applicable. There could also be difficulties regarding the re-instatement of placed workers under the dual employer interpretation that would lead to greater uncertainty and confusion for the vulnerable employees to whom the LRA aims to afford greater protection.

Labour Court

[21] Assign sought to have the CCMA arbitration award reviewed and set aside, contending that the Commissioner committed material errors of law in his interpretation. It contended that section 198A should be read together with section 198(2), which provides that "a person whose services have been procured for or provided to a client by a temporary service is the employee of that temporary employment service, and the temporary employment service is that person's employer" for the purposes of the LRA. Assign views this as the controlling provision which persists despite the legal fiction created by section 198A.

[22] NUMSA asserted that both sections 198(2) and 198A create legal fictions and, once section 198A(3)(b) is triggered, section 198(2) no longer has any application to the affected employees. The two provisions are mutually exclusive.

[23] The Labour Court (per Brassey AJ) held that the CCMA Commissioner had committed a material error of law.[9] It considered the contract of employment between the TES and the employee to be the "source of control" in the employment relationship. The TES therefore retains control despite any new statutory relationship between the employee and the client.[10] The client is only an employer for the purposes of the LRA, while the common law contract between the TES and the employee remains "firmly in place".[11] The Labour Court held that the rights of employees are therefore best protected by the dual employer interpretation. It reviewed and set aside the Commissioner's decision.

[24] NUMSA applied for leave to appeal the judgment of the Labour Court to the Labour Appeal Court. It refused leave to appeal.

Labour Appeal Court

[25] The Labour Appeal Court granted NUMSA leave to appeal directly to it. On 2 March 2016, NUMSA brought its notice to appeal against the Labour Court's judgment. The CWAO and Confederation of Associations in the Private Employment Sector (CAPES) were admitted as amici curiae.

[26] CWAO supported NUMSA's submissions and contended that the dual employer interpretation is not supported by the plain language of section 198A(3)(b) read in context. The relationship between the placed employees and the client companies came about by operation of law and independently of any common law

[9] *Assign Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (2015) 36 ILJ 2853 (LC) (Labour Court judgment).

[10] Id at para 17.

[11] Id at para 11.

contract with the TES.[12] The sole employer interpretation gives effect to the purpose of the amendments and to the constitutional rights of workers in section 23 of the Constitution.

[27] CAPES supported Assign's submissions and contended that the LRA should also be read together and reconciled with the Basic Conditions of Employment Act[13] (BCEA), in terms of which the TES is and remains the employer of all placed employees.[14] The only way in which the LRA and BCEA could be reconciled post-deeming is through the dual employer interpretation.

[28] The Labour Appeal Court held that the sole employer interpretation best protected the rights of placed employees, and promoted the purpose and objects of the LRA and the 2014 Amendments. It considered the definition of "temporary service" in section 198A(1) and held that only persons performing a truly temporary service should be employed by a TES.[15] A placed employee who has worked for a period in excess of three months is no longer performing a temporary service and the client becomes the sole employer by virtue of section 198A(3)(b).

In this Court

Assign's submissions

[29] Assign Services applied for leave to appeal to this Court. It contended that the Labour Appeal Court decision was "tantamount to a ban on labour broking" and noted the serious implications of this for the whole South African labour market. Assign contended that the Labour Appeal Court did not properly consider the language of the deeming provision and focused on the purpose of the provision to the exclusion of

[12] *National Union of Metalworkers of SA v Assign Services* [2017] ZALAC 44; (2017) ILJ 1978 (LAC) (Labour Appeal Court judgment) at para 25.

[13] 75 of 1997.

[14] Section 82(1) of the BCEA.

[15] Labour Appeal Court judgment above n 12 at para 36.

other necessary considerations. Because the word "deemed" is inherently ambiguous, it argued, it must be considered in its statutory context. The Labour Appeal Court failed to properly consider section 198A(3)(b) in the context of the rest of sections 198 and 198A.

[30] First, the LRA still allows a TES to offer employment services after the three-month cut-off. Second, section 198(2) was not amended with the insertion of section 198A. This means that the TES must remain an employer for purposes of the LRA. Third, employees' rights are no better protected by the sole employer interpretation. They would in fact lose the protection of several provisions of the LRA, including section 198(4) which mandates joint and several liability for certain contraventions by a TES "in respect of any of its employees" and section 198(4A). Last, employees would be vulnerable to abuse by a TES if common law employment agreements continued to exist between placed employees and a TES unregulated by the LRA. Meanwhile, a placed employee will be transferred to a new employer without the placed employee's consent and "forced" into new employment relationships on terms to which they have not agreed. Assign contends that the only plausible interpretation is of a dual employment relationship.

NUMSA's submissions

[31] NUMSA persists in its submission that sections 198 and 198A create two separate deeming provisions that cannot operate simultaneously. It submits that this interpretation does not ban TESs. Rather, it regulates them in respect of only lower paid placed employees in employment for more than three months. Placed employees earning above the BCEA threshold can continue to be employed through TESs without restraint. The deeming provision only alters the contract between the placed worker and the TES; it does not affect the contract between the TES and the client. The TES may continue to perform services relating to the employee to the extent that they do not purport to employ them.

[32] NUMSA disputes Assign's characterisation of the employment relationship between a TES and an employee. It contends that the TES does not ordinarily "employ" an employee before it places them with its clients. The contractual relationship only becomes an employment relationship when the employee is placed and remunerated. The TES becomes the statutory employer of the worker once they are placed.[16] The common law contract between the TES and the placed employee usually contains the terms and conditions of employment of the employee once they are placed with a client. These are a single set of terms and conditions of employment that will shift with the statutory responsibility when it moves from the TES to the client. The conditions can only change in favour of the employee to align with other employees in similar positions.[17]

[33] The absurdities that Assign reads into sections 198A(4) and (5) and 198(4A) stand to give additional protection to placed employees and apply only where a TES continues to provide some service to a client outside of acting as an employer.

Amicus' submissions

[34] CWAO was admitted as amicus in this Court. Their application details practical experience working with temporary workers employed through TESs. They note a number of difficulties arising from a dual employment relationship that prejudice placed employees.

[35] First, a TES is empowered to continuously move a placed worker, reduce their wages and change their job descriptions. This self-evidently manifests employment insecurity. Second, placed workers cannot demand equal pay from client employers and are financially discriminated against. Third, placed workers have difficulty enforcing LRA claims against employers. An employee dismissed by a client will usually be retrenched by a TES because there is no longer work for them. As a result,

[16] In terms of the deeming provision in section 198 of the LRA.

[17] Pursuant to section 198A(5).

the employee's claim against the client would be to the CCMA, but their claim against the TES would have to be taken directly to the Labour Court. There would be different claims, different employers and different fora arising from the same set of facts. Fourth, placed workers are unable to meaningfully participate in collective bargaining. The terms of their employment are agreed to between the TES and the client before they are placed and they are usually too vulnerable to raise grievances through strikes. Even if the strike is protected as against the client employer, it is unlikely to be protected as against the TES.

[36] CWAO agrees with NUMSA's interpretation that the two deeming provisions cannot operate simultaneously. They describe the section 198A(3)(b) deeming provision as "reversing the fiction" created in section 198(2) for low earners performing ongoing work.

Jurisdiction

[37] The LRA gives effect to the right to fair labour practices in section 23 of the Constitution. Its interpretation is a constitutional issue.[18] This Court therefore has jurisdiction to hear the matter in terms of section 167(3)(b)(i) of the Constitution, as the matter concerns the interpretation of the LRA.

Leave to appeal

[38] Further, the point we are asked to consider is the correct interpretation of section 198A(3)(b)(i) of the LRA. This has profound implications for the ability of TESs to provide a service offering post-deeming. Assign may well be right that it is tantamount to a ban on labour broking after the lapse of the three-month period. A significant portion of the country's workforce is employed through TESs. In its

[18] See *National Union of Metalworkers of SA v Intervalve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) at para 25; *Food and Allied Workers Union v Ngcobo N.O.* [2013] ZACC 36; 2014 (1) SA 32 (CC); 2013 (12) BCLR 1343 (CC) at para 24; and *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 14.

papers before the Labour Appeal Court, CAPES stated that its members place more than 700 000 workers on a daily basis. The controversy underlying this application, therefore, has serious implications for the South African labour market and the continued role of TESs therein, the rights of TESs, the rights of their clients and the rights of the hundreds of thousands of employees engaged through TESs on a daily basis.[19]

[39] Assign bears reasonable prospects of success. The correct interpretation of section 198A(3)(b) is widely disputed, as attested to by the conflicting judgments of the Labour Court and the Labour Appeal Court. It is in the interests of justice for leave to appeal to be granted.

[40] CWAO filed their written submissions two days late due to delays in receiving this Court's directions. The delay was not excessive and no prejudice resulted. Condonation is therefore granted.

The appeal

Interpreting section 198A of the LRA

[41] It is trite that legislation is to be interpreted textually, contextually and purposively. In *NEHAWU*, this Court held:

> "The declared purpose of the LRA 'is to advance economic development, social justice, labour peace and the democratisation of the workplace'. This is to be achieved by fulfilling its primary objects, which includes giving effect to section 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution

[19] See Botes "Answer to the Questions? A Critical Analysis of the Amendments to the Labour Relations Act 66 of 1995 with Regard to Labour Brokers" (2014) *SA Merc LJ* 110 at 113, which states that the use of TESs benefits the South African labour market because it provides some relief to the unemployment crisis in the country. Furthermore, the temporary nature of the particular employment allows a measure of flexibility in the labour market, which could benefit the South African economy as a whole.

and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution."[20] (Footnotes omitted.)

[42] The purpose of section 198A must be contextualised within the right to fair labour practices in section 23 of the Constitution[21] and the purpose of the LRA as a whole. This is set out at section 1 of the LRA as follows:

"The purpose of this Act is to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objects of this Act, 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

[20] *NEHAWU* above n 18 at para 41.

[21] Section 23(1) and (2) of the Constitution provides:

"(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike."

(iv) the effective resolution of labour disputes."

[43] Every provision of the LRA must therefore be read to create clear and precise parameters through which both employers and employees can meaningfully participate in labour relations. Section 198A(3)(b), on the face of it, lacks this clarity.[22]

[44] Section 198(2) reads: "[A] person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer". It is immaterial, for the purposes of section 198(2), whether an employee and TES enter into an employment contract. Once the employee provides a service to the TES's client, they automatically become the TES's employee.

[45] Under both the 1956 LRA and the 1995 LRA (before the 2014 Amendments), the TES was expressly designated as employer for purposes of the LRA.[23] Section 198A(3)(b) applies a different regime to employees who have provided a service for more than three months if they fall below a specified earning threshold. But section 198A(3)(b) does not proclaim that an employee "is" the client's employee. Rather, the employee is "deemed to be" the client's employee. This disjunction does not in itself mean that "deemed to be" is lesser than "is" and both sections are, in their true senses, "deeming provisions".

[46] Our labour legislation historically tended towards express allocations of employment law obligations to a single employer in both the 1956 and 1995 LRA, but

[22] See fn 2 above for the full text of the subsection.

[23] Section 1(3)(a) of the 1956 LRA as amended reads:

> "For the purposes of any provision of this Act or any applicable agreement . . . the [TES] concerned shall be deemed to be the employer of such workers, any service rendered to the client or work performed for him shall be deemed to have been rendered to or performed for the [TES], and the workers concerned shall be deemed in respect of such service or work to be the employees of the [TES]."

this is no longer the case. Section 200B(2) explicitly recognises that there may be more than one "employer" for the purposes of liability. Currently, the client is expressly designated the employer for the purposes of the Occupational Health and Safety Act[24] (OHSA). The TES is excluded from the definition of "employer" in section 1 of the OHSA.[25] Meanwhile, the TES is expressly designated the employer for the purposes of the BCEA.[26]

[47] Moreover, sections 198A(3)(b) and 198(2) do not expressly refer to each other or indicate how they ought to relate. Neither section is made "subject to" the other, nor is there explicit mention that the two sections can operate simultaneously.

[48] In Assign's submission, this disjunction is indicative of a second employer. It does not create a situation where the employee as a matter of fact becomes employed by only the client. NUMSA's position is that both section 198A(3)(b) and section 198(2) are deeming provisions. They are triggered by different events and can only operate separately in these distinct circumstances.

[49] To discern its true meaning, therefore, section 198A(3)(b) must be read in its context and in the light of its constitutional purpose.

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[24] 85 of 1993.

[25] Section 1 of the OHSA reads:

> "'[E]mployer' means . . . any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him, but excludes a labour broker as defined in section 1(1) of the Labour Relations Act, 1956 (Act No. 28 of 1956)."

[26] Section 82(1) and (3) of the BCEA reads:

> "(1) 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 employee of that temporary employment service, and the temporary employment service is that person's employer.
>
> . . .
>
> (3) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that client, does not comply with this Act or a sectoral determination."

Contextual reading

[50] First I will deal with the disjunction caused by the use of the word "deemed". Much was made of this before the CCMA in particular. NUMSA argued on the basis of *County Council of Norfolk*[27] and the word's Oxford dictionary definition ("regard as being") that "deemed" could easily be substituted with "is". Assign relied on *Rosenthal*[28] and *Haffejee*[29] to support their argument that the word has no meaning outside of its context[30] and in this context it creates a different relationship from "is" in section 198(2). My view is that nothing turns on this. It should not cause controversy in the interpretation process in section 198A(3). Both sections create statutory employment relationships and whether one persists in parallel to the other does not depend on how we read "deemed".

[51] Second I consider section 198A(3)(b) within section 198A(3). Section 198A(3) deals with who an employer is for an employee performing a temporary employment service and an employee not performing a temporary employment service. It begins at subsection 198A(3)(a) by defining a temporary employee as being "the employee of the [TES] in terms of section 198(2)". It then creates an alternative to this in subsection 198A(3)(b). If the employee is not performing temporary services, they are "deemed to be the employee of that client". The subsections are divided by an "or" and only subsection 198A(3)(a) is "in terms of section 198(2)". The use of "or" mandates a choice. It is a strong indication towards an interpretation that either the TES or the client are employers in terms of section 198A(3).

[52] This interpretation is further strengthened by the textual placement of section 198A(3). Section 198A is headed: "Application of section 198 to employees

[27] *R v County Council of Norfolk* (1891) 65 LT 222.

[28] *S v Rosenthal* 1980 (1) SA 65 (A).

[29] *S v Haffejee* 1945 AD 345.

[30] Id at 352-3.

earning below earnings threshold". Section 198A tells us how section 198 applies to marginal employees in precarious working relationships and restricts its application to truly temporary employment. It begins by defining a "temporary service" as "work for a client by an employee" as a substitute for a temporarily absent employee, through a collective agreement, or any employment "for a period not exceeding three months".[31] It goes on to specify that the section applies only to employees earning below the threshold set by the Minister in terms of the BCEA.[32]

[53] Next, it defines the employer for the categories of employment regulated in this section. Here, section 198A(3)(b) becomes the operative clause determining the identity of the employer for employees earning below the threshold. Then, once an employee becomes employed by the client by operation of section 198A(3)(b), the employee must, in terms of subsection (5), "be treated not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment". This would obviously apply only in the event that the terms and conditions of the employment applicable to the placed worker are less favourable than those applicable to the employees of the client. Last, to prevent the client from attempting to avoid the operation of section 198A(3)(b), the legislature added subsection (4). This states that if a TES or client terminates an employee's assignment to avoid the operation of section 198A(3)(b), that termination will be considered a dismissal and the usual remedies available through the LRA will apply.[33]

[54] A plain reading of section 198A(3)(b) clearly distinguishes between employees employed by the TES for temporary work and those deemed to be employed by the TES's client where the work is not temporary. Interpreting this section to mean that the client becomes "one of the employers" strains the language used. If the

[31] Section 198A(1).

[32] Section 198A(2).

[33] See Botes above n 19 at 129-30 for a discussion on section 198A(4) of the LRA.

Legislature intended the client to become a joint or co-employer together with the TES, it could easily have provided for the client to "also" be the employer.

[55] On Assign's interpretation, however, this would create an absurdity. They contend that a placed employee must be an employee of the TES because they fit the definition under section 213 of the LRA. Section 213 provides that "employee" means—

> "(a) any person, excluding an independent contractor, who works for another person . . . and who receives, or is entitled to receive, any remuneration; and
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer."

A placed worker could not be a TES employee under section 213 and simultaneously not a TES employee under section 198A(3)(b). But the usual TES employment relationship is not covered by section 213. If it were, there would be no need for the employment relationship to be deemed to exist in section 198(2).

[56] Assign, rightly, made little of the section 213 argument before us at the hearing. Their counsel seemed to concede that there may be doubt as to whether a placed employee would ordinarily be "employed" by the TES for the purposes of section 213. In response, counsel for CWAO strongly asserted that "sitting on the books of a TES does not make you an employee". In my view, this must be correct.

[57] Section 198(4) and (4A) of the LRA, however, occasions some difficulty. Section 198(4) reads as follows:

> "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 [BCEA]; or

(d) a sectoral determination made in terms of the [BCEA]."

[58] This section regulates liability for the period where a placed employee is employed by the TES. Section 198(4) creates a substantive and statutory form of joint and several liability – which does not equate to joint or dual employment but rather creates a statutory accessory liability for the client in the circumstances set out in the section – where the TES carries principal liability as employer in terms of the LRA. Section 198(4A) adds to this that—

"[i]f the client of a [TES] is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of the employee in terms of section 198A(3)(b)—

(a) the employee may institute proceedings against either the [TES] or the client or both the [TES] and the client;

(b) a labour inspector acting in terms of the [BCEA] may secure and enforce compliance against the [TES] or the client as if it were the employer, or both; and

(c) any order or award made against a [TES] or client in terms of this subsection may be enforced against either."

[59] Counsel for Assign submitted that section 198(4A) "[f]acilitates the enforcement of the employees' rights *as employment rights* as against the TES . . . and the client". (Emphasis added.) If the sole employer interpretation is preferred, he continued, the section would recognise only one employer but would still introduce mechanisms to allow employees to enforce obligations against both the TES and the client.

[60] CWAO's counsel contended that the second part of section 198(4A) merely permits a placed employee to bring or enforce a claim against either the TES or the client. It does not make the TES liable for claims outside of section 198(4). In a

sense, all section 198(4A) provides is a practical solution to placed employees being barred from instituting proceedings if they proceed against the incorrect party.

[61] I am persuaded that the sole employer interpretation is not hampered by section 198(4A). The section does not purport to determine who an employer may be from time to time. It provides that, while the client is the deemed employer, the employee may still claim against the TES as long as there is still a contract between the TES and the employee. This is eminently sensible considering that the TES may still be remunerating that employee. The view is buttressed by section 200B, which provides very broad general liability for employers. Section 198(4) and (4A) seems to carve out specific areas of liability for a TES pre- and post-deeming as opposed to the general liability applicable in terms of section 200B.

[62] It is likely that subsection (4A) was introduced to provide recourse directly against the client for contraventions in terms of section 198(4) without first having to institute proceedings against the TES. Paul Benjamin explained the pre-amendment position as follows:

> "The consequence of joint and several liability is that if a labour broker fails to pay amounts owing to its employees, the client for whom the employees worked is liable to make those payments. This liability arises regardless of whether the client has paid the TES or not. In theory, the introduction of this form of joint and several liability transfers the risk of the labour broker defaulting on its obligations from the employee to the client. However, the client's liability is a default liability; the client cannot be sued directly in the [CCMA] or Labour Court . . . because it is not an employer."[34]

[63] In other words, before the 2014 Amendments, a claim had to be brought against the TES first. The client would be held liable by operation of law if the TES failed to comply with its obligations. Under section 198(4A), however, the client's liability ceases to be "default liability". The client is deemed the employer of the

[34] Benjamin "Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa" (2010) 32 *ILJ* 845 at 850.

placed worker and can thus be sued directly in the CCMA or the Labour Court. In this way, section 198(4A) offers placed workers more protection than section 198(4)'s joint and several liability protection. It also allows an employee to sue a TES directly, despite it not being an employer.

[64] A TES's liability only lasts as long as its relationship with the client and while it (rather than the client) continues to remunerate the worker. Nothing in law prevents the client and the TES from terminating their contractual relationship upon the triggering of section 198A(3)(b), with the client opting to remunerate the placed employees directly. If this happens, the TES that placed the worker will cease to be a TES in respect of that worker because it will no longer meet the requirement in section 198(1) of remunerating the worker. The TES will then fall out of the relationship entirely.

Purposive approach

[65] As I have already mentioned, the 2014 Amendments were effected in the wake of persistent, widespread protests against labour broking. In negotiations leading to the amendment, one trade union conglomerate famously insisted that the then six-month limit on temporary employment should be reduced to zero months.[35] The amendment that materialised did not ban labour broking. Instead, it aimed "to provide greater protection for workers placed in temporary employment services".[36] There appear to be two offshoots of this purpose: the first is to protect marginal workers in temporary employment; and the second is for temporary services to be truly temporary.

[35] Craven "COSATU's response to FMF and DA on labour brokers" *COSATU Press Statements* (7 June 2013) available at http://www.cosatu.org.za/show.php?ID=7428.

[36] Preamble to the 2014 Amendments.

[66] We have some insight to the purpose of the legislation through the explanatory memorandum to the 2012 Bill.[37] This does not speak to the Act in its final form and should be treated with caution, but it gives some credence to the two-fold purpose described above. It describes the "main thrust" of the new provisions introduced in sections 198 and 198A as aiming 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".[38] (Emphasis added.)

[67] The restriction of TES employment to genuine temporary work affords the clarity and precision needed by the LRA to realise the constitutional rights to fair labour practices and meaningfully to participate in trade union activity.

[68] The restrictions are sufficiently circumscribed in the language of the LRA to give effect to this purpose. By adding sections 198A and D, the legislature identified the parameters of "temporary services" and detailed the protection afforded to placed employees.[39]

[69] Part of this protection entails that placed employees are fully integrated into the workplace as employees of the client after the three-month period. The contractual relationship between the client and the placed employee does not come into existence through negotiated agreement or through the normal recruitment processes used by the client. The employee automatically becomes employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows.

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[37] Which would become the 2014 Amendments.

[38] See Department of Labour "Memorandum of Objects/Labour Relations Amendment Bill, 2012" (2012) available at http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf.

[39] Section 198A focuses on labour broker employees of the TES. Section 198B provides for employees involved in fixed-term contracts. Section 198C protects part-time employees. Section 198D contains general provisions applicable to sections 198A-C.

[70] The purpose of the section 198A amendments is clear. It exists to fill a gap in accountability between client companies and employees who are placed with them.[40]

Triangular relationship

[71] One of the main difficulties raised by Assign is: what happens to the contract between the TES and the placed employee if they are no longer the employer? Assign points out that a TES may continue in an employment relationship with a placed employee after the three-month period by virtue of their common law and residual legislative functions, even if the TES is no longer deemed to be the employer through section 198A(3)(b). This, they say, may lead to an employee losing the protections of the LRA in ongoing relationships with a TES.

[72] Ancillary to this is a second argument, that an employee contracts with a TES on very favourable terms and that all these benefits may be lost on transfer to a client company. Counsel relied, in part, on section 198(4C) of the LRA in support of this. Section 198(4C) precludes employment by a TES "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".

[73] In evaluating these arguments, it is necessary first to consider the "triangular" nature of the TES/client/placed employee relationship. The triangular relationship exists to split the functions of the employer between the TES and the client for a fee. However, the functions for which the TES is responsible seldom relate to the actual

[40] See Botes above n 19 at 129-30, which provides:

> "It has come to light that clients have been exploiting TESs in an attempt to avoid restrictive labour laws by keeping labour broker employees on their staff for years at a time, performing work of permanent nature but with terms less favourable than permanent employees. It was a way to cut costs and to sidestep various employer responsibilities."

work of the employee.[41] Their primary responsibilities are to pay and manage the human resources component of employment, while the day-to-day management, work allocations and performance assessment in most circumstances are conducted by the client only. The client is also responsible for the employees' working conditions because employees are placed on the client's premises. Importantly, the client also has the power to discontinue the employee's services.[42] In a sense, the TES is merely the third party that delivers the employee to the client. The employee does not contribute to the business of the TES except as a commodity. And, on a practical level, the contract between a TES and a placed worker seldom constitutes an employment contract.

[74] In *Lad Brokers,*[43] the Labour Appeal Court held that the common law does not necessarily regard the TES as the employer of the placed workers.[44] In truth, a TES can operate without concluding contracts of employment with the workers it places.[45] All that is required for the TES to constitute a statutory employer in terms of section 198 of the LRA is that it places workers with clients for a fee and remunerates those workers. Of course, this is less onerous than the test for establishing conventional employment either at common law or in terms of the relevant definitions. It is therefore incorrect to contend that a TES is usually in an employment relationship with workers it places with clients.

[75] This also makes it difficult to accept Assign's argument that the sole employer interpretation forces employees into a new employment relationship, without their consent, on terms of employment to which they have not agreed. Section 198(2) gives rise to a statutory employment contract between the TES and the placed worker,

[41] See Botes above n 19 at 120.

[42] Id.

[43] *Lad Brokers (Pty) Ltd v Mandla* [2001] ZALAC 9; (2002) 6 SA 43 (LAC) (*Lad Brokers*).

[44] Interestingly, the same is true of the common law in the United Kingdom. See Benjamin "Restructuring Triangular Employment: The Interpretation of Section 198A of the Labour Relations Act" (2016) 327 *ILJ* 28 at 37.

[45] Id at 33.

which is altered in the event that section 198A(3)(b) is triggered. This is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship. The triangular relationship then continues for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers.

[76] In this scenario, there is no question of an infringement of the placed employee's right to choose their trade or profession. The point is that the employee continues to perform work in the position into which they were placed. This does not prejudice the worker or infringe their right in any manner.

[77] Assign's strongest argument is not that TESs offer equal or better terms of employment than client companies, but rather that the placed employees' constitutional and LRA rights are better protected by a dual employer interpretation. I now turn to deal with this argument.

Does a dual employer interpretation offer greater protection?

[78] Assign argues that having two employers against whom an employee can equally claim provides greater protection to the vulnerable workers in these circumstances. This poses the question: what is so wrong with having two employers? I accept that not every dual employer relationship will prejudice employees, but I do not accept this to be the case for the TES/client/placed employee triangular relationship.

[79] The first reason for this is that, before the 2014 Amendments, the TES existed to obfuscate. Its purpose was to protect the client from consequences of employment relationships and to relieve them from having to concern themselves with the human resources needs of people working for them.[46] The TES is incentivised to offer lower

[46] Theron above n 5 at 626 goes so far as to say:

prices in order to be awarded the client's contract, necessarily translating to lower wages for placed employees.[47] This is now circumscribed by the LRA but, while triangular relationships exist, companies may and do contract out of their employment obligations in respect of placed employees. Retaining the TES as employer may have the effect of frustrating the purpose of these amendments.

[80] Second, the placed employee retains the right to claim against a TES through section 198(4A) to the extent that they are still remunerated by the TES. The employee is largely protected against the TES regardless of whether the claim is made against an employer. But this liability relates only to claims brought by the employee. The protections afforded by the sole employer interpretation go beyond this. They give employees certainty and security of employment.

[81] The promotion of certainty in employment is not, as contended by counsel for Assign, to patronise placed employees. The absence of certainty threatens employees' ability to exercise their LRA rights. CWAO set out a number of practical difficulties arising from this uncertainty. They include: complying with two sets of terms and conditions and two disciplinary codes which may characterise misconduct and poor performance differently;[48] ascertaining which employer dismissed the employee, which should reinstate them, whether reinstatement applies to both or only one employer; and which LRA procedure applies to a dismissal.

[82] Another difficulty raised by CWAO is the practicality of embarking on strike action, which is afforded constitutional protection in section 23(2)(c) of the Constitution.[49] They contend that a matter of mutual interest between the employee

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> "[T]here is much anecdotal and other evidence to support the proposition that labour broking, along with other forms of externalization, is motivated by a desire to avoid labour legislation. . . . [And] to avoid unfair dismissal proceedings, coupled with a desire to reduce wage levels for workers performing non-core functions, or lesser-skilled workers."

[47] Id at 629.

[48] Id at 630 and 641.

[49] See fn 21 above.

and TES may be different from a matter of mutual interest between the employee and the client company. As a result, a strike may be protected as against one employer but not the other, rendering the employee vulnerable to dismissal. I am persuaded by these arguments that the sole employer interpretation best protects the rights of placed workers.

Conclusion

[83] Regard being had to the language employed in section 198A(3)(b) read with sections 198 and 198A, the following is discernible:

(a) Section 198 deals with the general position with regard to TESs, while section 198(2) is a deeming provision creating a statutory employment contract between the TES and a temporarily placed employee.

(b) Section 198A deals with the application of section 198 to a specific category of workers, being marginal employees employed below the BCEA threshold.

(c) Section 198A(3)(a) provides that, when vulnerable employees are performing a temporary service as defined, they are deemed to be employees of the TES as contemplated in section 198(2).

(d) Section 198A(3)(b)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client.

(e) The deeming provisions in sections 198(2) and 198A(3)(b)(i) cannot operate at the same time.

(f) When marginal employees are not performing a temporary service as defined, then section 198A(3)(b)(ii) replaces section 198(2) as the operative deeming clause for the purposes of determining the identity of the employer.

[84] As stated above, the language used by the Legislature in section 198A(3)(b) of the LRA is plain. And, when interpreted in context, it supports the sole employer interpretation. It certainly is also in line with the purpose of the 2014 Amendments,

the primary object of the LRA, and the right to fair labour practices in section 23 of the Constitution.

Order

[85] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

CACHALIA AJ:

[86] I have had the benefit of reading the judgment of Dlodlo AJ (first judgment) and regret that I am unable to agree that on a proper interpretation of section 198A(3)(b) of the LRA, the client replaces the TES as the employer. I would hold that both continue jointly as employers of the workers. The factual background and litigation history of the dispute has been set out in some detail in the first judgment and needs no repetition. I gladly adopt them.

The nature of the dispute

[87] The dispute between the parties arises as follows: sections 198 and 198A regulate labour brokers, who render temporary employment services. Section 198(1) defines a TES as a person who, for reward, procures for or provides to a client, the services of workers whom it remunerates. The LRA treats the TES as the employer of the employees placed with its clients. That is so firstly because section 213 says so, and secondly, because section 198(2) classifies them as such.[50]

[88] Section 198A was introduced in 2015 to provide additional protection to vulnerable lower paid employees, who continue working for a client beyond three months. Section 198A(3)(b) provides that these employees are "deemed" to be

[50] See [55] and [21].

employees of that client, who in turn is deemed to be their employer. The issue is whether this deeming provision has the effect of making the client an employer *in addition* to the TES or *in substitution* for the TES as the employer. In the industry the debate is characterised as being over the sole employer interpretation or dual employer interpretation.

[89] Assign, the labour broker, contends for the dual employer interpretation whilst NUMSA, the trade union, argues for the sole employer interpretation. Intuitively, one may be tempted to think that because a union is more likely to advance the interests of vulnerable workers than labour brokers would be, then the union's interpretation must be correct. This is more so because unions have waged a consistent battle to curb labour broking. Conversely, because there has been reported abuse of vulnerable employees by labour brokers, one's instinct is that their interpretation may be wrong.

[90] But statutory interpretation eschews any intuitive responses. It is an objective exercise that requires, instead, a proper analysis of the language, context and purpose of the relevant provision. In addition, and where appropriate, its alignment with other statutes and constitutional implications of the meaning attributed to it must be part of the equation.

The language

[91] The TES usually engages the worker under a common law employment contract. The applicant refers to this as an innominate contract, and for present purposes I accept this nomenclature. Sections 213 and 198(2) render these workers employees of the TES, with the full protection of the LRA. Section 198A was enacted to give vulnerable employees additional protection, which is the section's primary purpose. Section 198A(3)(b) does so by "deeming" the client to be their employees' employer indefinitely after three months has elapsed. This is common ground between the parties.

[92] Deeming provisions are often used in statutes to give the subject-matter a meaning not ordinarily associated with it. What section 198A(3)(b) does, therefore, is to recognise that the TES is ordinarily the employer as stipulated in section 198(2) but that the client is also regarded as the employer after the three month period has elapsed. If the object was to make the client the sole employer after the effluxion of this period, section 198A(3)(b)(i), instead of the deeming provision, could have been drafted quite simply to read-

> "(3) For the purposes of *this Act* an employee—
>
> . . .
>
> (b) not performing such temporary service for the client. . .—
>
> (i) ceases to be the employee of the temporary employment service and is deemed to be the employee of the client."

[93] Alternatively, section 198A(3)(b) could equally easily have been drafted to override or qualify the worker's status as an employee of the TES in terms of sections 213 and 198(2). The choice of language used – or rather, not used – in the section is therefore consistent with the dual employer meaning. But I accept that, read in isolation, this may not be conclusive. As the first judgment observes, another plausible interpretation is that the section distinguishes between employees employed by the TES and those deemed to be employees of the client,[51] which also tends to support the sole employer model. It is therefore necessary to also examine whether the contextual indications point in either direction.

[51] At [54]:

> "If the legislature intended the client to become a joint or co-employer together with the TES, it could easily have provided for the client to 'also' be the employer."

Purpose and context

[94] Sections 198(4) and 198(4A), which the first judgment freely admits creates some difficulty for the sole employer model,[52] are critical in this analysis.[53] Section 198(4) renders the TES and the client jointly and severally liable for certain TES contraventions "in respect of any of its employees". Under the dual employer interpretation, the vulnerable employees continue to enjoy this provision's protection. But under the sole employer interpretation, they lose it when they pass the three-month mark because they cease to be employees of the TES under the deeming provision. This is plainly at odds with the purpose of giving placed employees additional protection.

[95] Section 198(4A), was introduced at the same time as section 198A and cross-refers to the deeming provision. It says expressly that if a client "is deemed to be the employer" of an employee in terms of section 198(A)(3)(b), certain employer duties may be enforced against either or both the TES and the client. In other words, the employee may sue either or both. A labour inspector may enforce compliance with the BCEA. An order or award made against the one is enforceable against the other.

[96] The applicant contends, in my view persuasively, that these provisions proceed from the premise that, if the deeming provision is triggered, that is, if the client is deemed to be the employer in terms of section 198A(3)(b), both the client and the TES are deemed to be the employers of the workers. It is only on this basis that the section may render the duties of an employer enforceable against both the TES and the client. This gives the employees added protection by allowing them to enforce their employment rights against two employers. The section makes no sense otherwise.

[52] See [57].

[53] See [57]-[61].

[97] The first judgment, however, asserts that section 198(4) creates a "substantive and statutory form of joint and several liability",[54] which does not equate to joint or dual employment, but is merely a statutory accessory liability for the client.

[98] But this is not so. Section 198(4) does not create an accessory liability – akin to a suretyship obligation – for the client. It says explicitly that the TES and client are jointly and severally liable *in solidum* (in the whole), which means that the worker can sue either or both. Put differently, the worker has a right of action against either or both and they have a corresponding joint obligation towards the worker. This is why the section, as the applicant correctly contends, renders the duties of an employer enforceable against both the TES and the client.

[99] In the same vein section 198(4A) creates substantive rights for vulnerable employees against both the TES and the client. It recognises that they assume joint obligations towards the employees as employers. This is why any order or award made against a TES or a client may be enforced against either.[55] There can be no other reason for imposing liability upon both. Once the section is understood in this way, there is no room for attempting to explain away the difficulty posed by its language, as the first judgment does, as merely conferring "a practical solution to placed employees being barred from instituting proceedings if they proceed against the incorrect party".[56] On the sole employer interpretation, liability is imposed upon the TES without it having any obligations, as an employer, towards the employees. This cannot be. It follows that section 198(4A) supports the dual employer interpretation.

[54] See [58].

[55] Section 198(4A)(c) of the LRA.

[56] See [60].

Adverse consequences of sole employer interpretation

[100] On the sole employer interpretation the deeming provision has the following consequences: the worker ceases to be an employee of the TES for purposes of the LRA; the employment contract between the worker and the TES remains, but without the additional benefits the LRA confers upon workers; and the worker is involuntarily transferred to a client who becomes her employer without her accrued employment rights – such as accrued leave, annual bonus and pension from the TES to the client.

[101] In addition, the employee does not have a contract of employment with her new employer, the client. Her only protection is that she is deemed to be employed by the client on an indefinite basis in terms of section 198A(3)(b)(ii), and that she cannot be treated less favourably than an employee performing the same or similar work under section 198A(5).

[102] These provisions are of little comfort to employees transferred to a client who has no employees performing the same or similar work, which means that there is no baseline for the determination of an employee's terms of employment. On the other hand the TES may have agreed conditions of employment with the employee that are more generous than those applying to the same or similar work for the client, in which case the employee is likely to suffer an involuntary downgrade of the terms of her new employment with the client.

[103] Another obvious consequence of the single employer model is that employees will be left more vulnerable in the event of a client's liquidation. The employee will, in that event, not be able to look to the TES to be protected from the consequences of a loss of employment.

[104] These adverse consequences of the sole employer interpretation are all antithetical to the primary purpose of the enactment of section 198A(3)(b), which is to give protection to vulnerable employees, in addition to the protection already enjoyed as employees of the TES. Instead, the sole employer interpretation unavoidably

places vulnerable employees in an even weaker position in some instances. Neither NUMSA, nor the amicus curiae, who support the sole employer interpretation, have advanced cogent reasons to demonstrate that their interpretation grants additional or better protection than the dual employer interpretation. The sole employer interpretation is therefore clearly wrong.

[105] This conclusion is fortified by the fact that there are no transitional provisions that cater for the transfer of the employee from the employ of the TES to the client in section 198A. Nor is there any language in the section saying that the workers are deemed to be transferred to the client after three months. The unavoidable inference is that the section does not envisage a transfer. The lawmaker intended both employment relationships to continue in tandem. It did not enact any transitional arrangements because none were necessary.

Alignment with the BCEA

[106] It is apparent that the lawmaker has aligned the provisions of the LRA and the BCEA so that they work together. Section 1 of the BCEA defines an "employee" and a "temporary employment service" in the same terms as the LRA. Section 82(1) of the BCEA is identical to section 198(2) of the LRA. The two statutes are therefore perfectly aligned to reflect that the TES is "employer" of its employees placed with the client. The dual employment interpretation is consistent with this alignment. When the deeming provision is triggered, the TES remains the employer under both the BCEA and the LRA, except for the limited purpose of section 198A(3)(b) of the LRA, where the client is also deemed to be the employer of the employee.

[107] The sole employer interpretation disturbs this alignment. Once the deeming provision is triggered, the client is the only employer for purposes of the LRA while the TES remains the employer for purposes of the BCEA. The sole employer interpretation thus offends the principle that where statutes cover the same terrain, they should, unless the difference is clear and unambiguous, be construed in a manner

that is consistent.[57] The Labour Appeal Court has endorsed this principle.[58] It has also applied the rule specifically to interpret the BCEA and the LRA harmoniously.[59]

Constitutional implications

[108] Having analysed the purpose, language and context of the deeming provision, and having also considered its alignment with the relevant sections in the BCEA, there is no room for any ambiguity – the dual employer interpretation is the only interpretation that can reasonably be ascribed to it. But to the extent that the section is arguably reasonably open to the alternative sole employer interpretation, this is also inconsistent with the Constitution. It forces the employees into a new relationship without their consent and on terms of employment to which they have not agreed. This brings the deeming provision into conflict with the employees' rights to fair labour practices in section 23(1) and to choose their trade, occupation or profession freely in section 22 of the Constitution. And, as this Court has made clear, where a statute is capable of being reasonably read in a manner that is consistent or not in conflict with the Constitution, that is the interpretation that must be given.[60] The sole employer interpretation therefore falls to be rejected for this reason as well.

Conclusion

[109] For all these reasons I conclude that the dual employer interpretation is the correct one. The deeming provision creates a statutory employment relationship between the employee and the client. But it does so *in addition* to the existing employment relationship between the employee and the TES and not in *substitution* thereof. I would accordingly uphold the appeal.

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[57] *Petz Products v Commercial Electrical Contractors* 1990 (4) SA 196 (C); [1990] 3 All SA 452 (C) at 204H quoted with approval in *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA) at para 19.

[58] *Amcu v Buffalo Coal Dundee* [2016] ZALAC 18; (2016) 37 ILJ 2035 (LAC) at para 43.

[59] *Ekurhuleni Metropolitan Municipality v SAMWU* [2014] ZALAC 61; (2015) 36 ILJ 624 (LAC) at para 30.

[60] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* [2016] ZACC 32; 2016 (6) SA 596 (CC); 2016 (12) BCLR 1535 (CC) at para 135.

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