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Can the real employer please stand up?

By Hugo Pienaar

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Debate has continued to rage about who the real employer is and whether a situation of dual employment exists, despite new labour legislation, aimed at providing more job security for 'non-standard' employees.

The CCMA arbitration in Assign Services v Krost Shelving and Racking and National Union of Metal Workers of South Africa (NUMSA), resulted in a finding that the client was the sole employer of the labour broker employee.

This award was taken on review in the Labour Court, and Brassey AJ determined that a labour broker remains the employer of the employee, despite the client of the Temporary Employment Service (TES) becoming the deemed employer in terms of section 198A of the amendments to the Labour Relations Act, No. 66 of 1995.

In his judgment, he essentially dealt with three issues:

1. The status of TES as an employer;
2. Whether the matter was too academic to merit the time and attention of the Court; and
3. That there was no proper joinder of the parties to these proceedings.

In the recent Application for Leave to Appeal, Brassey specifically referred to the non-joinder of parties and stated that no effort was made to traverse that particular point, which was in his mind the most consequential.

In this regard, he raised his concern that there was no evidence that the employees governed by the CCMA award, have been joined or are otherwise represented by trade unions. Brassey stated that the order made by the CCMA supposed that the CCMA had jurisdiction in the first place, which was premature and bad in law.

Furthermore, the award of the arbitrator could be reviewed and set aside on such ground alone.
Brassey furthermore remained of the view that the matter was academic within the contemplation of the law and that despite the fact that the matter is of interest to the public, the dispute had no concrete application.

Lastly, he noted that the interpretation of section 198A, and particularly the status of the TES as an employer, is an issue that is potentially a basis for granting leave to appeal, and that a higher court should desirably pronounce on that.

Despite his view of the status of the TES, he dismissed the Application for Leave to Appeal primarily based on the non-joinder of the relevant parties.

It is now up to the Applicants in this matter to petition the Judge President for leave to appeal. Until this judgment is set aside the position remains that the TES remains the employer, for purposes of the LRA, despite the deeming provisions in section 198A of the amendments.

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