CONSEQUENCES OF THE JUDGEMENT OF THE CONSTITUTIONAL COURT IN *ASSIGN SERVICES (PTY) LIMITED v NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA AND OTHERS* [2018] ZACC 22, TO TEMPORARY EMPLOYMENT SERVICES

1. On 26 July 2018 the Constitutional Court handed down judgment in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22 ('Assign Services') concerning the provisions of Section 198A of the Labour Relations Act (the 'LRA'). This provision of the LRA specifically deals with temporary employment services ('TES'), and employees placed by such TES employers with their clients.

2. The Court in *Assign Services* held that in the case of TES employees, there may exist two mutually exclusive deemed employment relationships. On the one hand, there is a deemed employment relationship between the TES employer and its employees, in terms of Section 198(2) of the LRA. On the other hand, there is a deemed employment relationship between the client of the TES employer and the employees of the TES that render work for the client, in terms of Section 198A(3)(b) of the LRA. These two deemed employment relationships cannot exist together. It is therefore critical to determine which Section applies in a particular case.

3. The answer to this question as to which deemed employment relationship applies, lies in Section 198A(3) itself. Section 198A(3)(a) provides that an employee that performs what is called a 'temporary service' to a client is still deemed to be the employee of the TES employer in terms of Section 198(2). But an employee that does not perform a 'temporary service' is deemed to be the employee of the client of the TES employer in terms of Section 198A(3)(b).

4. 'Temporary service', as said, is specifically defined. First, it only applies to those employees earning less than the BCEA threshold (R205 433.30 per annum). 'Temporary service' is also then defined as work being done for a client by the employee for a period not exceeding one of the following:

   - The actual period of substitution for a temporary absent employee; or
   - A period of not more than 3 (three) months; or
   - A period determined in a collective agreement with a trade union.

What this means is that as soon as any of the aforesaid prescribed periods are exceeded, the 'service' is no longer a 'temporary service'.

5. The Court in *Assign Services* then dealt with the implications that arise when the 'services' are no longer 'temporary services'. The Court held that in terms of Section 198A(3)(b), a deemed employment relationship then by law comes into existence between the client for who the work is done for, and the employee. As described by the Court – '*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.*'

6. The TES employer then falls completely out of the picture insofar as the employment relationship is concerned. Also, the deemed employment relationship between the client and the employee is a permanent one, and the employee must have the same terms and conditions of employment of other comparable permanent employees of the client.

7. If the client attempts to circumvent these provisions by artificially limiting employee's employment periods to the periods defined in Section 198A(3), for example by rotating employees from TES service providers or the service providers themselves, that will be considered to be a dismissal of the employees concerned by the client.

8. This in effect means the end of any possibility that a company can have a temporary workforce procured through TES service providers, where employees earn less that the BCEA threshold, that lasts longer than 3 (three) months. As the Court said in *Assign Services*, only 'genuine' temporary employment services is now permitted by the LRA, which is either the well know "temp" industry of replacement of temporary absent employees, or three months, unless a union agrees to a longer period.

9. The Court in *Assign Services* also made it clear that if the TES service provider remains in the relationship after the deemed employment relationship with the client has come into existence, it would merely be as a payroll or administration facilitator (service). In this context, an employee can still institute proceedings against the TES in terms of Section 198(4A) for as long as any contract between the employee and the TES service provider exists, despite the TES not being the employer.

10. The TES service provider can however extract itself from the relationship by terminating the contract it has with its client. But where it remains in the relationship, it is not the employer, but can be held liable for the payment of a salary and benefits to the employee.

11. Based on the aforesaid judgment in *Assign Services*, any employer that uses the services of TES service providers must immediately conduct the following exercise:

- First ascertain which of the employees provided by the TES service providers earn below the BCEA threshold of R 205 433.30.

- For those employees that earn more than this threshold, the *status quo* will remain and those employees will remain deemed employees of the TES service providers.

- For those employees that earn less than this threshold, all TES employees that have longer than 3 (three) months' periods of working at the employer, are by law already permanent employees of the employer, and must be immediately treated accordingly. Any difference in conditions of employment must be adjusted to match those of the other permanent employees of the employer.

12. It is further advisable that going forward, an employer that seeks to utilize a temporary workforce rather use the fixed term contract provisions under Section 198B of the LRA. That however means that the employer must employ these employees directly.