



Arbitration Award Rendered

Case Number: ECEL1652-15
Commissioner: Abdool Carrim Osman
Date of Award: 26-Jun-2015

In the **ARBITRATION** between

Assign Services (Pty) Limited

(Applicant)

and

Krost Shelving & Racking (Pty) Ltd

(First Respondent)

National Union of Metal Workers of South Africa (NUMSA)

(Second Respondent)

Applicant's representative: Advocate Anton Myburgh and Adv Greg Fourie (Instructed by Kirchmanns Inc)

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1) **DETAILS OF HEARING AND REPRESENTATION**

- 1.1) The arbitration hearing in this matter concerning the interpretation of the deeming provision provided for in **Sec 198 A (3) (b) of the Labour Relations Act 66 of 1995** (as amended) (LRA) was held at the CCMA Head office – 28 Harrison Street, Johannesburg on the **22nd May 2015** at **9 am**.
- 1.2) **The Applicant, Assign Services (PTY) Ltd, (Assign)**, a Temporary Employment Service as defined in section 213 of the Labour Relations Act, was represented by **Advocate ANTON MYBURGH SC** and **Advocate GREG FOURIE**, duly instructed by **Kirchmanns Incorporated Attorneys**.
- 1.3) **The First Respondent, Krost Shelving and Racking (PTY) Ltd, (Krost)**, a company duly registered in accordance with the company laws of South Africa, was not present at the hearing, however prior to the hearing the first respondent signed a formal notice in terms of which it waives its right to participate in the CCMA proceedings and commits to abide by the CCMA ruling / award. This is also confirmed in the stated case of which Krost is a signatory.
- 1.4) **The Second Respondent, THE NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA)**, a registered trade union, was represented by **Advocate J G VAN DER RIET SC** duly instructed by **Ruth Edmonds Attorneys**.
- 1.5) I am indebted to all the representatives for their professionalism and assistance in this matter.
- 1.6) The Arbitration Proceedings were conducted in English and was digitally recorded.

- 1.7) Both lead counsel exchanged written heads of argument, while Advocate Van Der Riet also submitted supplementary heads of argument on the day of the hearing. All these together with the signed Stated Case should be read as if specifically incorporated in this award

2. BACKGROUND TO THE DISPUTE

- 2.1) The parties submitted a signed Stated Case dated 22nd May 2015, wherein the background to the dispute is detailed and facts that are common cause are set out in terms of the signed Stated Case.
- 2.2) Krost the client and first respondent in this matter, a company offering storage solutions, employs 40 salaried employees and approximately 90 wage staff. In addition Assign, the applicant in this matter, supplies labour to Krost in the region of 22 – 40 workers at any one time, depending on projects awarded to Krost.
- 2.3) It is specifically recorded by the parties that as of 1 April 2015, 22 placed workers had been supplied by Assign to Krost for a period in excess of three months on a full time basis, and that their placement predated 1 January 2015 (the date when the amendments to the Labour Relations Act became effective). The placed workers fall within the scope of the application of **Section 198 A (3) (b) of the LRA** and are not affected by any exclusions listed in **Sections 198 A (1) or (2) of the LRA**. Krost disciplines its permanent employees while Assign is responsible for disciplining the placed employees. Several of the placed employees are members of the second respondent.

2.4) In terms of the signed Stated Case, the parties have referred this dispute to the CCMA in terms of **Section 198 D (1) of the LRA**, which allows the CCMA to determine disputes about the interpretation or application of **Section 198 A of the LRA, as amended**.

2.5) After the 22nd May 2015 (the hearing date), it became apparent that the applicant is an accredited labour broker within the Metal and Engineering Industries Bargaining Council (MEIBC). In addition, the first respondent is a registered employer under the MEIBC and the second respondent is also a party to the MEIBC. I addressed correspondence to the attorneys for the applicant and the second respondent, requesting them to address me in this regard and received their joint reply on the 18th June 2015, indicating that they are in agreement that the CCMA management should confirm my appointment as commissioner as contemplated in **Section 147 (2) (a) (ii) of the LRA**, in other words the CCMA should assume jurisdiction to deal with this matter.

2.6) In terms of **Sec 147 (2) (a)** : " if at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute are parties to a council, the Commission may--

- (i) refer the dispute to the council for resolution, or
- (ii) appoint a commissioner or, if one has been appointed, confirm the appointment of the commissioner, to resolve the dispute in terms of this Act.

In the Labour Appeal Court Case of **Nehawu obo Kgekwan v Department of Development Planning and Local Government (2015) 36 ILJ 1247 (LAC)**, the LAC held that **Sec 147 of the LRA** makes provision for the performance of dispute resolution functions by the CCMA in exceptional circumstances, in order to avoid delays that might otherwise be caused by

jurisdictional disputes. The section accordingly, confers a choice on the CCMA whether to resolve a dispute that has been erroneously referred to it or whether to redirect it to the proper forum.

2.7) In the Labour Appeal Court Case of **Happy Qibe / Joy Global Africa (PTY) Ltd v CCMA and others (case no. JA 119 / 13)** , Acting Judge F Kathree – Setiloane, agreeing with the judgement in the Kgekwane case cited above, held that **Sec 147 (2) and (3)** of the LRA properly interpreted means that : " if at any stage after a dispute is referred to the CCMA, it becomes apparent to the CCMA or it's delegate (or the commissioner hearing the matter), that the parties to the dispute are parties to a bargaining council, it is then for the CCMA or it's delegate (and not the commissioner hearing the matter where this is ascertained) to determine whether to refer the matter to the bargaining council or to appoint a commissioner to determine the dispute or if one has already been appointed, to confirm his / her appointment.

2.8) In the matter at hand in compliance with the two Labour Appeal Court Judgments referred to above, I referred the matter to management of the CCMA and was duly appointed to proceed with the matter in an e-mail to me dated 18th June 2015 from the National Senior Commissioner – Legal Services.

3. ISSUES TO DETERMINE

3.1) I am required to determine the correct interpretation of **Section 198 A (3) (b) of the LRA ("the deeming provision")**

- 3.2) The applicant is of the view that the consequences of the deeming provision are that the placed workers remain employees of the applicant, for all purposes and are deemed to also be employees of the first respondent for purposes of the LRA. This position is referred to herein as the “**dual employment**” position.
- 3.3) The second respondent is of the view that, the placed workers, with effect from 1 April 2015, are deemed to be employees of the first respondent only, for purposes of the LRA. This position is referred to herein as the “**sole employment**” position.

4. SURVEY OF ARGUMENTS

- 4.1) Advocate Myburgh SC arguing on behalf of the applicant (Assign) and thus in favour of the “dual employment” position, submitted that : The leading judgment on the meaning of “deemed”, **S v Rosenthal 1980 (1) SA 65 A**, held that (“The expression “deemed” has no technical or uniform connotation. It’s precise meaning and especially it’s effect, must be ascertained from it’s context and the ordinary commons of construction”. He further referred to the case of **R v Haffeejee and another 1945 AD 345**, where the court held that in determining the meaning of “deemed”, the court must examine “the aim, scope and object of the legislative enactment in order to determine the sense of it’s provisions.” Counsel for the applicant accordingly argued that the word “deemed” does not have a uniform meaning, it’s meaning and especially it’s effect, depends on the context in which it is used in a statute and the purpose of the statutory provision, for purposes of this matter, it being **Sections 198 and 198 A of the LRA**.
- 4.2) Advocate Van der Riet SC, arguing for the second respondent NUMSA, also made reference to **S v Rosenthal 1980 (1) SA 65 A** and to **R v County Council of Norfolk 65 (1891) QB division**,

where he submitted that the court indicated that the word "deem" is often used in legislation in a "very loose sense", and thus could easily be submitted with the word "is." According to him the Pocket Oxford Dictionary defines the verb "deem" as "regard as being." Thus he argued that, the use of the word deemed in **Sec 198 (3) (b) (i)** creates a legal fiction, in other words a legal rule that in the circumstances specified in **Sec 198 (3) (b) (i)** the client is the employer of the placed workers, irrespective of what the situation would have been if the legal rule had not being been enacted by the legislative provision.

- 4.3) Both Learned Counsel, dealt with **Sec 198**, specifically **Sec 198 (4A)** and **Sec 198 A**, in furthering their arguments of "dual employment" and "sole employment" respectively.
- 4.4) Counsel for the applicant argued that from an overall contextual perspective, there is nothing in **Sec 198 or 198 A** which reflects a decision by the legislature to impose a ban on Temporary Employment Services, whether as a consequence of the deeming provision taking effect or otherwise. He further argued that **Sec 198 and Sec 198 A** have to be read holistically and not in isolation. Thus he argued that while it is clear that for the first three months the TES is the employer, after the elapse of the three month period, the deeming provision does not serve to terminate the commercial agreement between the TES and the client, nor does it serve to terminate the contractual employment relationship between the TES and the placed workers, it in effect creates greater protection for the placed workers by making both the TES and the client dual employers. He further emphasized his point by submitting that the deemed workers after the three month period has elapsed, are in terms of **Sec 198 A** entitled to pay parity *visa vis* comparable employees of the client, whereas this benefit is not afforded to ordinary placed workers that are not yet "deemed."

4.5) In respect of **Sec 198 (4A)** counsel for the applicant argued that in terms of this section the TES and the client are jointly and severally liable for breaches of the LRA and BCEA and therefore such liability on the part of the TES can only arise on the basis of a dual employer scenario. This argument is emphasized by reference to the view of **Craig Bosch**, in an article written in 2013 on the proposed amendments to the LRA (2013) 34 ILJ 1631 where the learned author writes that "once the client has been deemed to be the employer of the TES's employees, the client is in effect added as an employer party and the employees are given an election as to who to hold liable for infringements.

4.6) A further argument in favour of "dual employment" submitted by the applicant was that **Sec 198 (4A) (a)** allows employees to institute proceedings against either the TES or the client, or both and they may enforce any order or award made against the TES or client, against either of them.

4.7) Counsel for the second respondent, in responding to the submissions on **Sec 198 (4A)** favouring the dual employment argument submitted that **Section 198 (4A)** does not create any new liabilities for any of the parties concerned, in that the section merely provides for an opportunity for an employee to institute proceedings against a party that is liable. He further argued that this section applies to all employees placed by a TES and not only "deemed employees". Counsel for the second respondent further argued that **Sec 198 (4A)** does not refer to joint and several liability in terms of **Section 198 A (3) (b) (i)** but rather in terms of **Sec 198 (4)**. He further argued that while **Sec 198 A (3) (b) (i)** does not expressly mention that the client becomes the employer, the wording of **Section 198 A (3) (b) (ii)**, supports the sole employment argument, when it reads "subject to the provision of **Sec 198 B**, employed on an indefinite basis by the client".

- 4.8) It was also argued by Advocate Van der Riet SC that in relation to the pay parity provision created in terms of **Sec 198 A (5)**, the legislature actually intends to create better employment conditions for the placed workers than those enjoyed by them under the TES and therefore a simple transfer of employment in terms of **Sec 197 of the LRA** would not suffice.

5. ANALYSIS OF ARGUMENTS

- 5.1) **Sec 3 (a) of the Labour Relations Act** as amended reads as follows: "Any person applying the Act must interpret its provisions to give effect to it's primary objects".
- 5.2) In **Chirwa v Transnet 2008 (4) SA 367 CC**, the Constitutional Court held that, "where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA".
- 5.3) Both counsel agreed that in order to correctly interpret the effect and application of the deeming provision in terms of **Sec 198 A (3) (b) (i) of the LRA** as amended, one needs to consider the explanatory memorandum (memorandum of objects) of the 2014 LRA Amendments. It is to this document that I therefore turn to first.
- 5.4) In terms of the memorandum of objects **Sec 198** has been amended 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 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.

- 5.5) As per the Memorandum of Objects **Sec 198** continues to apply to all employees. It retains the general provisions that a TES is the employer of a person whom it employs and pays to work for a client, and that the TES and its clients are jointly and severally liable for specified contraventions of employment laws.
- 5.6) As per the Memorandum of the Objects, **Sec 198A** introduces key additional protections for more vulnerable workers. These protections apply to employees who earn below the threshold prescribed in terms of section 6(3) of the BCEA. It further states that employees in this category are employees of the TES for the purpose of the LRA only if they are employed to perform genuinely temporary work, defined in the new section as "temporary services". If they are not employed to perform "temporary services", they are deemed for the purpose of the LRA to be ~~employees of the client and not the TES.~~
- 5.7) The Memorandum of object further goes on to explain the additional protections afforded to vulnerable employees by **Sec 198 A** in relation to "termination to avoid deeming" and "pay parity" of deemed employees to comparable employees of the client.
- 5.8) Having considered the Memorandum of Objects it is clear to me that while I accept that determining the correct interpretation of the deeming clause is not an easy task, given that both counsel argued their respective positions very eloquently and extremely persuasively and furthermore that either interpretation will have drastic consequences not only for the parties in this matter but for many other interested parties in the TES Industry as a whole, I am convinced that

the correct interpretation is the one that will provide greater protection for the vulnerable class of employees identified by **Sec 198A of the LRA**

5.9) Section 198 of the LRA reads as follows:

- (1) In this section, 'temporary employment service' means any person who, for reward, provides to a client other persons-
- (a) who perform work for the client; and
[Para. (a) substituted by s. 37 (a) of Act 6 of 2014.]
 - (b) who are remunerated by the temporary employment service.
- (2) 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) Despite subsections (1) and (2), a person who is an independent contractor is not an *employee* of a temporary employment service, nor is the temporary employment service the employer of that person.
- (4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its *employees*, contravenes –

- (a) a collective agreement concluded in a bargaining council that regulates terms and condition of employment;
- (b) a binding arbitration award that regulates terms and conditions of employment;
- (c) the Basic Condition of Employment Act; or
- (d) a sectoral determination made in terms of the Basic Conditions of Employment Act.

[Para. (d) substituted by s. 37(b) of Act 6 of 2014.]

(4A) 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)–

- (a) the *employee* may institute proceedings against either the temporary employment service or the client or both the temporary employment service and 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.

[Sub-s. (4A) inserted by s. 37 (c) of Act 6 of 2014.]

- (4B) (a) A temporary employment service must provide an employee whose service is procured for or provided to a client with written particulars of employment that comply with section 29 of the *Basic Conditions of Employment Act*, when the employee commences employment.
- (b) Paragraph (a) applies, three months after the commencement of the Labour Relation Amendment Act, 2014, to a person who's service were procured for or provided to a client by a temporary employment services in terms of subsection 198 (1) prior to the commencement of the Labour Relations Act, 2014.

[Sub-s. (4B) inserted by s. 37 (c) of Act 6 of 2014.]

(4C) An employee may not be employed by a temporary employment service 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 whom the employee renders services.

[Sub-s. (4C) inserted by s. 37 (c) of Act 6 of 2014.]

(4D) The issue of whether an employee of a temporary employment service is covered by a bargaining council agreement or sectoral determination must be determined by reference to the sector and area in which the client is engaged.

[Sub-s. (4D) inserted by s. 37 (c) of Act 6 of 2014.]

(4E) In any proceedings brought by an employee, the Labour Court or an arbitrator may—

- (a) determine whether a provision in an employment contract or a contract between a temporary employment service and a client complies with subsection (4C); and
- (b) make an appropriate order or award.

[Sub-s. (4E) inserted by s. 37 (c) of Act 6 of 2014.]

(4F) No person must perform the functions of a temporary employment service unless it is registered in the terms of any applicable legislation, and the fact that a temporary employment service is not registered will not constitute a defence to any claim instituted in terms of this section or 198A.

[Sub-s. (4F) inserted by s. 37 (c) of Act 6 of 2014.]

(5) Two or more *bargaining councils* may agree to bind the following persons, if they fall within the combined registered scope of those *bargaining councils*, to a collective agreement concluded in any one of them—

- (a) a temporary employment service;
- (b) a person employed by a temporary employment service and
- (c) a temporary employment service's client.

~~(6) An agreement concluded in terms of subsection (5) is binding only if the collective agreement has been extended to non-parties within the registered scope of the bargaining council.~~

(7) Two or more *bargaining councils* may agree to bind the following persons, who fall within their combined registered scope, to a collective agreement—

- (a) a temporary employment service;
- (b) a person employed by a temporary employment service; and
- (c) a temporary employment service's client.

(8) An agreement concluded in terms of subsection (7) is binding only if—

- (a) each of the contracting *bargaining councils* has requested the Minister to extend the agreement to non-parties falling within its registered scope;
- (b) the Minister is satisfied that the terms of the agreement are not substantially more onerous than those prevailing in the corresponding collective agreements concluded in the *bargaining councils*; and
- (c) the Minister, by notice in the Government Gazette, has extended the agreement as requested by all the *bargaining councils* that are parties to this agreement.

5.10) Section 198 A reads as follows:

- (1) In this section, a 'temporary service' means 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 services 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).
- (2) This section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of sections 6 (3) of the *Basic Conditions of Employment Act*.
- (3) For the purposes of this Act, an employee—
- (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary services in terms of section 198 (2); or
 - (b) not performing such temporary services 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.
- (4) The termination by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsections (3) (b) or because the employee exercised a right in terms of this Act, is a dismissal.
- (5) An employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favorably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.
- (6) The Minister must by notice in the Government Gazette invite representations from the public on which categories of work should be deemed to be temporary services by notice issued by the Minister in terms of subsection (1) (c).
- (7) The Minister must consult with NEDLAC before publishing a notice or a provision in a sectoral determination contemplated in subsection (1) (c).
- (8) If there is conflict between a collective agreement concluded in a bargaining council, a sectoral determination or a notice by the Minister contemplated in subsection (1) (c)—
- (a) the collective agreement takes precedence over a sectoral determination or notice; and
 - (b) the notice takes precedence over the sectoral determination.
- (9) Employees contemplated in this section, whose services were procured for or provided to a client by a temporary employment service in terms of section 198 (1) before the commencement of the Labour Relations Amendment Act, 2014, acquire the right contemplated in subsection (3), (4) and (5) with effect from three months after the commencement of the Labour Relations Amendment Act, 2014.

[S. 198A inserted by s. 38 of Act 6 of 2014.]

5.11) The applicant argues that the "dual employer" interpretation provides greater protection for vulnerable employees envisioned in **Sec 198A** than the protection that would be afforded to them

if the client is regarded as the "sole employer", after the period of three months have elapsed. This view is echoed by other learned authors, **Cowen and Grogen** referred to in the applicant's heads of argument and particularly **Craig Bosch**, quoted above.

The second responded on the other hand argues that a "dual employer" interpretation will create confusion, uncertainty and prejudice for the vulnerable employees envisioned by **Section 198A of the LRA**. In this regard **Professor Paul Benjamin** in his article "to regulate or to ban" indicates that there is evidence from studies of arbitration awards and sociological research, that employees are often not aware whether they are employed by an agency or by the business where they work. "Arbitration awards show that employees who are dismissed refer cases against the enterprise they consider to be their employer only to be met with the defence that the legal employer is an agency who recruited them or to whom they were transferred". According to the learned Professor, the deeming approach seeks to clarify the issue of who the employer is in triangular employment relationships. However its rationale breaks down once the employee's placement with a firm is no longer temporary and the employee has a closer relationship with the client than the agency. Professor Benjamin further argues that this is an entirely artificial construction and (one that gives rise to immense scope for abuse), to make an agency the employer of an employee working on an ongoing or indefinite basis for a client merely because the employee's pay is routed through the agency. He further argues that more recent judgments of the Labour Court have adopted a more purposive approach to the construction of **Sec 198 of the LRA** and have fashioned remedies that give a measure of employment security to employees placed by Labour Brokers, by acting from the premise that **Sec 198** was not intended to deprive employees of protection against Unfair Labour Practices including Unfair Dismissal.

- 5.12) In my opinion the deeming provision in **Sec 198A (3)(b)** should be interpreted akin to how the law deals with the concept of "adoption". In the case of "adoption" a legal fiction is also created, in

that, for purposes of the law, the adoptive parent is regarded as the parent of the adopted child. In this regard the best interest of the child is considered to be in the scenario where the adoptive parent is afforded full rights in terms of guardianship and/all obligations in terms of parenting and upbringing of the adopted child. The law does not regard a biological parent and the adoptive parent as dual parents, as doing so would lead to uncertainty and confusion.

5.13) Equally in the case at hand there are a number of problems that could arise in the "dual employment" interpretation, for example, who would be responsible for the disciplining of the placed workers and who's disciplinary code would be applicable, that of the TES or that of the client? Furthermore how would "re-instatement" occur if there is dual employment? Clearly this would lead to greater uncertainty and confusion for the vulnerable employees the Act is seeking to afford greater protection too.

5.14) The very nature of a TES is that it places workers with a client for a temporary period. Hence **Sec 198A** does not apply in cases where the nature of the work is of a genuinely temporary nature.
(Sec 198A(1))

5.15) I am in agreement with counsel for the second respondent that **Sec 198(4A)** does not make reference to joint and several liability in terms of **Sec 198A (3) (b) (i)**, but that the joint and several liability only refers to **Sec 198 (4)** and the reading of the above-mentioned sections cannot therefore support the arguments for dual employment.

5.16) Furthermore, the fact that the employee may institute proceedings against either the (TES) or the client or both the TES and the client in terms of **Sec 198(4A) (a)** and that any order or award made against a (TES) or client in terms of this subsection may be enforced against either, does not on it's plain reading make the TES a dual employer. The purpose for instituting proceedings is

to determine liability and the fact that one may institute proceedings against either the TES or the client, or both and enforce an order or award against either, does not necessarily create dual employment. In the amended LRA, in sections relating to organisational rights and picketing, the sections allow for the citing of a third party controlling access to the workplace eg. (landlord), and the enforcing of awards against such third parties. This however does not render the third party concerned to be a dual employer of the employees of the actual employer.

- 5.17) Indeed, the legislature did not decide to ban Labour brokers but chose to strictly regulate the industry. In doing so it chose to afford greater protection to vulnerable employees who earn below the threshold, set in **Sec 6(3) of the BCEA**, by virtue of the deeming provision and other subsections in **Sec 198A**. This means that as far as those employees earning above the threshold are concerned, **Sec 198A** does not apply to them and the triangular relationship, between the TES, the client and the placed worker continues, subject to the provisions of **Sec 198 of the LRA**. With regard to those placed workers who fall within the ambit of **Sec 198A** of the LRA, the commercial relationship between the TES and the client may continue, however for purposes of the LRA the client is deemed to be the sole employer after the three months period has elapsed.

- 5.18) The applicant argued that if the legislature wanted the client to be the sole employer after the three months period had elapsed, it would have categorically said so. This is so, however the same argument can be used to suggest that if the Legislature wanted the position after the three months have elapsed, to be one of dual employment, it would have categorically also have said so.

- 5.19) In this regard while **Sec 198A (3) (b) (i)** does neither, **Sec 198A (3) b (ii)** clearly states: "subject to the provisions of sec 198B, is employed on an indefinite basis by the client".

5.20) Furthermore the memorandum of objects referred to in paragraph 5.6 above states "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".

5.21) Based on the above considerations and having considered all the submissions and arguments made by the parties, I find that the correct interpretation of **Sec 198A (3)(b)** of the LRA is that after the three months have elapsed, the client becomes the sole employer of the placed workers who are earning below the BCEA threshold.

6. AWARD RULING

6.1 **Sec 198A (3)(b)** is interpreted to mean that "deemed" means that the client becomes the sole employer of the placed workers for purposes of the LRA, provided that they earn below the threshold and that the three months period has elapsed.

6.2 Accordingly in the case at hand, with effect from 1 April 2015 the placed workers supplied by Assign Services (Pty) Ltd (Applicant) to Krost Shelving & Racking (Pty) Ltd (First Respondent) who earn below the threshold in terms of **Sec 6 (3) of BCEA** and who have been placed for a period in excess of three months on a full time basis, are deemed to be the employees of the first respondent on an indefinite basis for purposes of the LRA and the first respondent is deemed to be their sole employer for purposes of the LRA. Furthermore parity between the deemed employees and other indefinite employees of the client should apply as per **Sec 189(A) (5) of the LRA** as amended.

6.3 As neither party made any submissions relating to costs, I make no order as to costs.

Signature: _____

Commissioner: **Abdool Carrim Osman**

[Faint, illegible handwritten text]