Case law update – Labour matters

This update discusses several recent determinations / judgements relating to labour matters that have an impact on retirement funds, and where applicable sets out the position adopted by the MMI Sponsor Funds.

A. Summary

1. NUMSA v Assign Services and others (Case number: JA96/15) (LAC)

- When an employee works for a client through a temporary employment service for longer than three months, that employee is deemed to be the employee of the client in terms of section 198A of the Labour Relations Act (LRA).
- The General Rules of the FundsAtWork Umbrella Funds provide that an employee who meets the membership requirements set out the Special Rules of the participating employer must become a member of the Fund. If a worker becomes an employee of the employer because of section 198A and meets the membership requirements he must become a member of the Fund.

2. Gordon v JP Morgan Equities SA (Pty) Limited and others (2017) JOL 38130 (LC)

- The employee was dismissed during her gardening leave. Her dismissal was unfair because the information she sent to her husband while she was on gardening leave was not confidential and was freely available.
- When an employee is placed on gardening leave, she is still an employee of the participating employer and a member of the Fund. Both the participating employer and the employee must continue to make contributions to the Fund during the gardening leave at the rate set out in the participating employer's Special Rules.

3. SVA Security (Pty) Ltd v Makro Ltd, a Division of Massmart (Case number: J720/17) (LAC)

- The cancellation of a service contract and the appointment of a new service provider do not mean a transfer of business in terms of section 197 of the Labour Relations Act has taken place. The service provider whose contract has been cancelled loses the contract but keeps its business and is free to offer the same service to other clients.
- Rule 11.2 of the General Rules of the FundsAtWork Umbrella Funds deal with section 197 transfers. This is discussed in more detail in Legal update 8-2010.

B. Case law

1. NUMSA v Assign Services and others (Case number: JA96/15): Labour Appeal Court

Assign Services (Pty) Ltd (Assign), a temporary employment service company, placed 22 workers with Krost Shelving and Racking (Pty) Ltd (Krost) for more than three months on a full time basis. Section 198A of the LRA provides that if an employee earning below the prescribed threshold (currently R205 433 p.a.) provides a temporary service to a client for longer than three months, that employee is deemed to be the employee of the client and the client is deemed to be the employer. The question was once section 198A was triggered, whether Krost became the only (sole) employer at the end of the three month period or whether Krost and Assign were both (dual) employers of the workers.

The dispute was referred to the CCMA. The Commissioner found that when section198A is triggered, the client, in this case Krost, becomes the sole employer of the placed workers for purposes of the LRA. The Commissioner was of the view that it would lead to fewer uncertainties regarding various responsibilities of employees. Assign applied to the Labour Court (LC) to have the award of the Commissioner set aside on the basis that the Commissioner had not correctly interpreted the provisions of the LRA. The LC set aside the Commissioner's award and found that both Assign and Krost were deemed to be dual employers.

NUMSA, which represented some of the placed workers, appealed the decision of the LC to the Labour Appeal Court (LAC). It argued that the LC incorrectly set aside the Commissioner's award and that the Commissioner's finding that once section 198A is triggered the client is the sole employer for purposes of the LRA, was in fact correct.

The LAC found that the purpose of the provisions of the LRA were to extend protection to workers employed by a temporary employment service (TES). This did not mean that the legislature intended a dual employment relationship for discrimination and unfair dismissal claims. Section 198A is a way of ensuring that the workers are treated the same as workers employed by the client, and that their services are genuinely temporary services.

The TES is the employer for so long as the employee performs genuine temporary employment services (i.e. for not longer than three months). Once the period is longer than three months, section 198A is triggered. When that happens, the client becomes the sole employer of the worker.

The LAC went on to state that it did not mean that the TES cannot pay salaries. Likewise, the fact that the TES continues to pay the workers' salaries did not mean that the TES became the employer.

The appeal was successful and the order of the LC was set aside and was replaced with an order dismissing the application for review of the CCMA award.

Approach adopted by the FundsAtWork Umbrella Funds

The General Rules of the FundsAtWork Umbrella Funds provide that an employee who meets the membership requirements set out the Special Rules of the participating employer must become a member of the Fund. If a worker becomes an employee of the employer because of section 198A and meets the membership requirements, he must become a member of the Fund.

2. Gordon v JP Morgan Equities SA (Pty) Limited and others (2017) JOL 38130 (LC): Labour Court – Review of arbitration award

Ms Gordon worked at JP Morgan as an equity strategist for more than 20 years. In June 2013 she resigned and was placed on gardening leave. Gardening leave is when an employee is not required to report for duty during her notice period but is still entitled to her full benefits.

During her gardening leave, Ms Gordon e-mailed spreadsheets and equity reports from JP Morgan to her husband's home e-mail account. The spreadsheets and equity reports which according to JP Morgan, contained information and research reports that were confidential. JP Morgan disciplined Ms Gordon and dismissed her 10 days before her gardening leave was over. Ms Gordon referred an unfair dismissal dispute to the CCMA for arbitration. Ms Gordon was dismissed during her gardening leave so she would not have been able to ask to be reinstated if the Commissioner found her dismissal to be unfair. She would have been able to ask for compensation for the remaining period of her gardening leave if her dismissal was found to be unfair but she did not do so. She wanted to clear her name.

The Commissioner found that Ms Gordon's dismissal was substantively fair but was procedurally unfair. Ms Gordon then approached the Labour Court (LC) to review and set aside the arbitration award. She relied on several grounds which included that the Commissioner fell asleep during the arbitration hearing which denied her a fair hearing and that the Commissioner ignored material facts.

On review, the LC found that the Commissioner falling asleep during arbitration proceedings was irregular and was a ground for reviewing the arbitration award. While the Commissioner had fallen asleep it appeared from the record of the proceedings that she had nodded off for not more than a few seconds. The LC found that the brief lapse did not deny Ms Gordon a fair hearing.

The LC also found that the information that Ms Gordon sent to her husband was publicly available. This was confirmed by the witness for JP Morgan. The formulas in the spreadsheets were standard, taught at university or could be found through Google. This made the reason for Ms Gordon's dismissal unfair.

The Commissioner's arbitration award was set aside and replaced with a finding that Ms Gordon's dismissal was both substantively and procedurally unfair.

Approach adopted by FundsAtWork Umbrella Funds

When an employee is placed on gardening leave, she is still an employee of the participating employer and a member of the Fund. Both the participating employer and the employee must continue to make contributions to the Fund during the period of gardening leave at the rate set out in the participating employer's Special Rules.

3. SVA Security (Pty) Ltd v Makro Ltd, a Division of Massmart (Case number: J720/17): Labour Court – Requirements for a transfer in terms of section 197 of the LRA

SVA Security (Pty) Ltd (SVA) had a contract with Makro Ltd (Makro) to provide security services to Makro. In December 2016 Makro invited SVA and other security contractors to bid or re-tender for guarding contracts. In January 2017 Makro told SVA that it awarded the contract to Fidelity and that Fidelity would take over all security responsibilities throughout all the Makro stores nationally from 1 April 2017.

Fidelity wrote to SVA confirming its appointment and invited SVA employees that already worked at the various Makro stores to apply for jobs with Fidelity. SVA was of the view that the contract between Makro and Fidelity was in fact a transfer in terms of section 197 of the Labour Relations Act (section 197 transfer). A section 197 transfer is an automatic transfer of contracts of employment from the transferring employer (previous employer) to the acquiring employer (new employer). This takes place when the whole or part of any business, trade, undertaking or service is transferred from the previous employer to the new employer as a going concern. Fidelity disputed this and SVA applied to the LC for an order declaring that the contract between Fidelity and Makro was a section 197 transfer and the employment contracts of the affected employees had been automatically transferred to Fidelity.

The LC found that for a section 197 to take place, the following three requirements must be met: (a) a transfer; (b) of a business (the whole or a part of the business); and (c) as a going concern. The LC referred to the earlier Constitutional Court judgment of *NEHAWU v University of Cape Town 2003 (2) BCLR 154* in which the court found that the substance and not the form of the transaction must be looked

at. Several factors will be relevant, which include: (i) the transfer of assets; (ii) whether the employees are taken over by the new employer; (iii) whether customers are transferred; and (iv) whether the same business is carried on by the new employer. The court pointed out that this is not a closed list and all the factors need to be considered together.

SVA argued that Fidelity would be providing an identical service to Makro to what it provided at the same premises, such as managing staff and providing the required security. The LC rejected this argument and found that SVA had not shown that there had been a transfer of equipment, intellectual property or assets from it to Fidelity to enable Fidelity to provide its services to Makro. All that had taken place was the cancellation of the contract with SVA. Fidelity only took over the service and not the business. Fidelity would use its own equipment, assets and resources to provide the services. Fidelity would continue to service the contract with Marko without any assets or equipment being taken over from SVA.

The LC went on to confirm Fidelity's point that the cancellation of a service contract and the appointment of a new service provider does not necessarily constitute a section 197 transfer. The Constitutional Court in *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others 2012 (2)BCLR 117 (CC)* stated that the cancellation of a service contract and the awarding of it to a third party does not in itself mean a transfer has taken place. The service provider whose contract has been cancelled loses the contract but keeps its business and is free to offer the same service to other clients. To show that a transfer took place, there must be certain components of the business that are passed on to the new employer. This may be assets or the taking over of workers. Taking over the workers may be because they have particular skills and expertise needed to provide the service or the new employer may not have the workforce to do the work. Section 197 protects the new employer from negative consequences if the workers refuse the offer of employment.

The LC found that there were no components of SVA's business with Makro that were passed on to Fidelity. Only the services of a contract were taken over and not SVA's business. SVA was free to continue with its business and provide similar services to other potential clients. Section 197 is for the protection of employees where there is a genuine transfer. In this case there was no transfer.

The LC dismissed the application.

Approach adopted by FundsAtWork Umbrella Funds

Rule 11.2 of the General Rules of the FundsAtWork Umbrella Funds deal with section 197 transfers. This is discussed in more detail in Legal update 8-2010.

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