



Legal update

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Case law update – Labour related matters

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

A. Summary

1. **Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others (2018) ZACC 22 (26 July 2018) – Temporary employees deemed to be employees of a client after three months.**

- The purpose of section 198A(3)(b) of the LRA is to protect placed employees by promoting the certainty of employment. Part of this protection requires that the placed employees are fully integrated into the workplace as employees of the client after three months. The employees automatically become employed on the same terms and conditions of similar employees with the same employment benefits, the same prospects for internal growth and the same job security that follows.
- On FundsAtWork, an employee who meets the eligibility criteria in the employer's special rules must become a member of the Fund. His membership of the Fund will start on the date on which he fulfils the membership criteria set out in the special rules. So, if the participating employer states that all its employees must become members of the Fund, a temporary employee will qualify for membership of the Fund after three months' service with that employer

2. **Coetzee v Zeitz Mocca Foundation Trust and Another (2018) ZALCCT 20 (14 June 2018) – Employer can choose whether or not to accept an employee's immediate resignation**

- Resignation is a one sided act. When an employee gives the required notice, the employment contract ends at the end of the notice period. When the employee leaves his employment without giving the required notice period, the employee breaches or breaks the employment contract. The employer may hold the employee to the contract and get a court order requiring the employee to serve the notice period. The employer can also choose to accept the employee's cancellation of the contract and claim damages.
- A member who withdraws from the Fund becomes entitled to a withdrawal benefit. A member withdraws if he leaves the Fund before his normal retirement date because of his resignation or his dismissal. The employer has to notify the Fund of the member's withdrawal. The Fund will begin processing a member's withdrawal after receiving a withdrawal notification from the participating employer and the member.

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B. Case law

1. Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others (2018) ZACC 22 (26 July 2018) – Temporary employees deemed to be employees of a client

Assign Services (Pty) Ltd (Assign) was a temporary employment services (TES) provider. In April 2015, it placed 22 employees (placed employees) with Krost Shelving & Racking (Pty) Ltd (Krost). Some of the placed employees were members of the National Union of Metalworkers of South Africa (NUMSA). The placed employees worked at Krost for more than three consecutive months. Section 198A(3)(b) of the Labour Relations Act (LRA) provides that an employee who earns less than an amount set by the Minister of Labour (currently R205 433.30 p.a.) and is employed through a TES by a client for more than three months is deemed to be employed by that client.

Assign believed that the effect of section 198A(3)(b) was that the placed employees became employees of both Krost and Assign. Assign called this the “dual employer” interpretation of the section. NUMSA on the other hand was of the opinion that Krost became the only employer of the placed employees when section 198A(3)(b) was triggered. According to NUMSA, this was the “sole employer” interpretation of the section.

Assign referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA Commissioner found that when section 198A(3)(b) is triggered, the client becomes the sole employer. Assign appealed to the Labour Court, which set aside the CCMA’s decision. The Court found that the TES retains control in the employment relationship. The client is only an employer for purposes of the LRA, while the employment contract between the TES and the employee continues. NUMSA appealed the matter to the Labour Appeal Court, which in turn found that the sole employer interpretation best protects the rights of the employees. It found that only people that perform a truly temporary service should be employed by a TES. An employee who has worked at the client for longer than three months is no longer performing a temporary service and the client becomes the sole employer.

Assign appealed to the Constitutional Court (CC). The CC found that the purpose of section 198A(3)(b) is to protect placed employees by promoting the certainty of employment. Part of this protection requires that the placed employees are fully integrated into the workplace as employees of the client after three months. The employees automatically become employed on the same terms and conditions of similar employees with the same employment benefits, the same prospects for internal growth and the same job security that follows.

The CC rejected Assign’s argument that a TES may continue with the employment relationship with a placed employee. The CC found that the TES only managed certain functions for a fee and these functions do not relate to the work of the placed employee. The TES is responsible for paying and managing the human resources part of employment. The day-to-day management, work allocations and performance assessment in most circumstances are conducted by the client. The client is responsible for the employees’ working conditions because they are placed at the client’s premises. The client can also discontinue the employee’s services. The CC concluded that the sole employer interpretation best protected the placed employees.

The appeal was dismissed.

Approach adopted by the FundsAtWork Umbrella Funds

An employee who meets the eligibility criteria in the participating employer’s special rules must become a member of the Fund. His membership of the Fund will start on the date on which he fulfils the membership criteria set out in the special rules. So, if the participating employer states that all its employees must become members of the Fund, a temporary employee will qualify for membership of the Fund after three months’ service with that employer.

2. Coetzee v Zeitz Mocca Foundation Trust and Another (2018) ZALCCT 20 (14 June 2018) – Employer can choose whether or not to accept an employee’s immediate resignation

Mr Coetzee was employed as the Executive Director and Head Curator of the Zeitz Museum of Contemporary Art Africa. At a meeting on 15 May 2018, the board of trustees invited him to make written representations by no later than 29 May 2018 about claims of serious misconduct that were made against him. The next day at a meeting Mr Coetzee offered his immediate resignation.

Mr Coetzee applied to the High Court for an interdict preventing the board of trustees from continuing with the disciplinary proceedings. He argued that he had resigned with immediate effect and the board of trustees didn’t have the right to continue with the disciplinary proceedings. The board of trustees argued that they had not agreed that Mr Coetzee’s resignation was with immediate effect and did not waive the right to the notice period. Mr Coetzee had been told that he would still have to serve at least 4 weeks’ notice.

When an employee gives the required notice, the employment contract ends at the end of the notice period. When the employee leaves his employment without given the required notice, the employee breaches or breaks the employment contract. The employer may hold the employee to the contract and get a court order requiring him to serve the notice period. The employer can also choose to accept the employee’s cancellation of the contract and claim damages. When an employee resigns, he does not have the right to withdraw a valid and lawful resignation once he has given it to the employer, unless the employer agrees to withdraw the resignation.

The Court found that in the present case, Mr Coetzee could not prove that his resignation had been accepted as an immediate one. He still had to serve the notice period which would have come to an end on 22 June 2018. The employer was entitled to continue with the disciplinary proceedings.

Approach adopted by the FundsAtWork Umbrella Funds

A member who withdraws from the Fund becomes entitled to a withdrawal benefit. A member withdraws if he leaves the Fund before his normal retirement date because of his resignation or his dismissal. The employer has to notify the Fund of the member’s withdrawal. The Fund will begin processing a member’s withdrawal after receiving a withdrawal notification from the participating employer and the member.

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