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Protecting the employees of temporary employment services:

Recent decisions

by P.A.K. le Roux

Although the employees of temporary employment services (TES) do, in theory at least, enjoy protection against unfair dismissal, there are two important factors that have contributed to this protection being diminished.

Who is the employer?

The first is the question of who should be regarded as the employer of individuals supplied to clients by a TES. In terms of contract principles this will usually be the TES. This is confirmed by section 198(2) of the Labour Relations Act, 66 of 1995 ("LRA"). It provides that, for the purposes of the LRA –

> *"...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."*

Section 82 of the Basic Conditions of Employment Act, 75 of 1997 contains a similar provision.

Some commentators have argued that often this view does not reflect reality and that, in many cases, the real employment relationship exists between the client and the person assigned to the client by the TES (hereafter referred to as "the worker'). The worker usually works at the client's premises, often performing the same duties as the client's employees and working under the supervision of the client's supervisory staff. In theory at least, it would not matter who is regarded as the employer as long as the worker has an employer against whom he could exercise his rights. The problem is that in many cases it may be difficult to hold the TES liable. Often, the TES is a small employer who has little contact with its employees, has few assets, and has no permanent office. In this case it may be tempting to try to hold the (usually larger) client liable for unfair dismissal. This is one consideration that led to the drafters

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of our labour legislation deciding to hold the client jointly liable for the actions of the TES in certain circumstances.

But can this be achieved in the absence of such legislation?

Holding the client liable

The first Labour Court decision to really deal with this issue was that in **NAPE v INTCS Corporate Solutions (Pty) Ltd** [2010] 8 BLLR 853 (LC). The worker in this matter had been assigned to work for a client by his employer, a TES. Whilst working at the client's premises the worker had forwarded an offensive email to another person. The client then exercised a contractual right that it had in terms of its commercial contract with the TES to require the TES to withdraw the worker and to supply another employee. The TES held a disciplinary enquiry but the chairperson found that dismissal was not an appropriate sanction – a final written warning was imposed. When the client still refused to make use of the worker's services the TES dismissed the worker on the basis of its operational requirements. The worker had performed specialised functions for the client and the TES could not place him with another client. The worker challenged the fairness of his dismissal in the Labour Court.

The Court accepted that this had been a genuine labour broking relationship and not a sham and accepted that the TES was in reality and in law the employer of the worker. It also pointed out that in this type of situation the client was the party with the greatest bargaining power. However, the argument that the TES had been entitled to dismiss on the basis of its operational requirements was rejected. The reasons for this were twofold. The first was that the contractual provision in terms of which the employer was entitled to require the TES to withdraw the worker was contrary to public policy and invalid. The second was that the TES could have sought legal relief against the client. (See the discussion in **CLL** Vol 19 no 11 p105.)

In the **Nape** decision the Court was not prepared to find that the worker was employed by the client and found other ways to assist the worker (and, in effect, the TES) – this would have required the client to utilise the services of the worker assigned to it by the TES.

The client as employer

The possibility of a more far-reaching approach, namely that the worker could be regarded as being employed by the client was explored in a number of awards and Labour Court decisions involving a Mr Dyokhwe, a TES trading under the name Adecco Recruitment Services (Pty) Ltd (Adecco) and a client, namely Mondi Packaging. This culminated in the decision of the Labour Court in **Dyokwe v de Kock NO & others** (Unreported C418/11 21 June 2012). The Court summarised the facts as follows –

- Mr Dyokhwe, was initially employed by Mondi Packaging during the course of 2000 in terms of a fixed term contract for three months. His employment continued until December 2002 in terms of a number of fixed term contracts.
- On 9 December 2002 Dyokhwe was given a letter by Mondi Packaging in which he was informed that his latest contract would expire on 20 December 2002.
- Despite this letter he continued to work for Mondi Packaging after 20 December 2002. The Court accepted that he became a permanent employee until the termination of his employment on 30 June 2003.
- On 7 July 2003, he was informed by his erstwhile manager that he should report to "sign a form". After initially failing to do so, and after again being contacted by his erstwhile manager he did report to what turned out to be the offices of Adecco. There he signed what purported to be a fixed term contract of employment - although no termination date was inserted into the contract. The contract stated that he would be placed at Mondi Packaging and that he would report to his previous supervisor.
- After signing the Adecco contract, Dyokhwe continued working at the same place in the same position and reporting to the same supervisor and manager as before. However, he received a payslip from Adecco and his hourly rate was reduced

from R12,56 to R10,00 per hour. He complained about the reduction in salary but on the advice of the CCMA, he did not take the matter further.

- He continued to work at Mondi Packaging for another five and a half years until 5 January 2009, when his supervisor told him that his employment had been terminated, without any notice or other procedure.
- He was told to go to Adecco. He did so, and the person to whom he spoke at Adecco told him they did not have work for him as he was too old. He then referred an unfair dismissal dispute to the CCMA.

In **Dyokhwe v Adecco Recruitment Services (Pty) Ltd** (2009) 30 ILJ 2989 (CCMA) the arbitrator found that Mondi Packaging had been Dyokhwe's true employer - this after Mondi Packaging had been joined as a party to the arbitration proceedings. This decision was taken on review and, in **Mondi Packaging South Africa (Pty) Ltd v Harvey & Others** (2011) 32 ILJ 1161 (LC) the award was set aside on the basis that Mondi Packaging had not been provided with an opportunity to state a case during the course of the arbitration proceedings.

> *"As is apparent from the aforegoing synopsis of the events at the arbitration, Mondi was not a party to the proceedings when the third respondent testified and was not present when he did so. Moreover, although the Commissioner had joined Mondi as a party to the proceedings, there is no indication on the record of the proceedings before her that it was afforded the rights which a party to the dispute was entitled to. It is not apparent from the record that Mondi was apprised of the evidence which the third respondent had given, that it was afforded an opportunity to cross-examine the third respondent, or that it was informed of the consequences attendant upon a failure to cross-examine the third respondent. Mondi was not offered an opportunity of leading its own witnesses and was not asked which witnesses, if any, it wanted to call. There is also no indication that it was afforded an opportunity to present any argument to the Commissioner as to why it ought not to be found to have been the employer of the third respondent. The fact that Mondi was effectively denied these rights clearly constitutes an irregularity in the proceedings before the Commissioner."*

The matter was referred back to the CCMA for a new hearing. The second commissioner found that Mondi Packaging was not the employer. In effect, the commissioner took the view that Dyokhwe knew that he was entering into a contract of employment with Adecco - this despite the fact that he was illiterate and did not understand the written terms of the contract.

The Commissioner was not convinced that Dyokhwe had been misled when he signed the contract with Adecco. He stated that:

> *"It is simply unacceptable for an employee, who at worst case scenario knew that he signed a contract of employment with a new employer (in this case a temporary employment service) in July 2003 and that he would henceforth be employed by this new employer, to continue to work until 2009/2010 and then only to challenge the validity of the contract of employment when he was allegedly dismissed."*

The Commissioner also took into account the provisions of s 198(2) of the LRA and noted that Adecco had at no stage tried to avoid its responsibilities as employer.

This time it was Dyokhwe that took the matter on review.

Interpreting and applying s 189

In deciding the matter , Steenkamp J accepted that the starting point of a consideration of these issues must be s 198(2) itself and the fact that it explicitly states the worker is the employee of the TES. He pointed out, however, that the provision should be interpreted in the light of the provisions of s 3 of the LRA. This section requires that the Courts must adopt a construction of s 198 that complies with the Constitution and public international law and which gives effect to the LRA's primary objects.

Also of importance is s 39(2) of the Constitution, which requires that courts interpreting legislation must seek to promote the spirit, purport and objects of the Bill of Rights.

Steenkamp J then went on to refer to the decision of the Constitutional Court in NEHAWU v UCT 2003 (3) SA 1 (CC) in which it was held that one of the core purposes of the LRA and of s 23 of the Constitution is to safeguard workers' employment security, especially the right not to be unfairly dismissed. This means that s 198 must be interpreted strictly in order to protect workers governed by this section.

He also referred to the decision of the Namibian Supreme Court in **Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others** [2011] 1 BLLR 15 (NmS) in which the need to strike a balance between the interests of employers to enjoy flexible working practices and the interests of employees not to be treated as 'mere commodities' was emphasised. It was also emphasised that workers in TES arrangements are the weakest and most vulnerable party in the triangular relationship between worker, the TES and client.

The result of the above was, according to Steenkamp J, that the Courts must ensure that alleged TES arrangements meet all the requirements of s 198 and must not regard these arrangements as being presumptively valid on face value as soon as a signed contract is put up by an employer.

> *"In the instant case it is common cause that the employee was being paid by the TES, Adecco, from July 2003; yet I must approach the true nature of the relationship, in circumstances where the workplace and the nature of the employee's remained the same for almost nine years, conscious of the obligation to combat disguised employment relationships and to examine the substance rather than the form of the relationship."*

The Court then made an important point, often forgotten or ignored by South African employers, namely that s 198 was enacted to regulate the use of TES' and the workers they supply **on a temporary basis.** However, the use of workers supplied by TES's often become permanent. He referred to an article by Paul Benjamin ("To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia" published in Malherbe and Sloth-Nielsen (eds), *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (Juta 2012 189-209) in which the point is made that the approach of "deeming" the TES to be the employer of the worker supplied to the client loses its rationale when the use of the worker by the client is of a permanent nature. In this situation the employee often has a closer relationship with the client than the TES.

Grounds for review

Steenkamp J then went on to consider the various grounds of review raised by Dyokhwe. The first ground dealt with the finding that the commissioner had made to the effect that Mondi Packaging had dismissed Dyokhwe. He found that this finding was not supported by the evidence. He also found that the commissioner erred in not finding that the arrangement in this case was a sham - it was in fact "*in fraudem legis*".

Although s 189(3) does create a "fiction" or "presumption" that the TES is the employer of the worker it supplies to a client, this presumption is rebuttable if evidence is lead to establish a different arrangement. This had been the case here.

It was also found that the contract entered into between Dyokhwe and Adecco was void by reason of certain misrepresentations made to Dyokhwe at the time that he entered into a contract with Adecco, in particular the statement that nothing would change if he signed a contract with Adecco.

Steenkamp J also found that the commissioner had erred in finding that the contract between Dyokhwe and Adecco was not void because it was contrary to public policy. The following excerpt sets out the Court's views.

> *"[70] The applicant submitted that it would be contrary to public policy to enforce the agreement signed by Adecco and the applicant. There was extreme inequality of bargaining power between the applicant and Adecco. This was exacerbated by his illiteracy and inability to read and understand the document. Neither was it explained to him. In Barkhuizen v Napier Cameron JA held that inequality of bargaining power may be a factor in declining to enforce a contract on the basis of public policy. And in*

this case, Adecco and Mondi exploited the applicant's illiteracy and vulnerability to induce him to sign the contract.

[71]As Craig Bosch has pointed out, whether contracts such as this one are contrary to public policy must be decided on a case-by-case basis in the light of the evidence presented in each case.

[72]On the clear evidence of the circumstances in which the contract in this case was signed, it would be contrary to public policy to enforce the Adecco contract. But is a contrary conclusion so unreasonable that no other reasonable decision-maker could have come to that conclusion?

[73]I am of the view that it is, given the specific circumstances of this case."

(Note: the case of **Barkhuizen v Napier** is reported at 2007 (5) SA 323 (CC). The reference to Craig Bosch is to an article written by him entitled "Contract as a barrier to 'dismissal': "The plight of the labour broker's employee" (2008) 29 *ILJ* 813.)

Finally, the Court addressed the issue of the wording of s189 itself. The Court pointed out that s 189 envisages that the TES "procures" a worker for the client. In this case this had not occurred.

"[75] The New Shorter Oxford English Dictionary describes the verb "to procure" as: "Obtain, esp. by care or with effort; gain, acquire, get."

[76] In the case before the arbitrator and before this court, Adecco neither "procured" nor provided the applicant to perform work for Mondi. The applicant had been working for Mondi for more than two years before he signed a contract with Adecco. If anything, Mondi "provided" the applicant to Adecco; and then, in a swift sleight of hand, the applicant returned to Mondi to continue his work as before, yet Adecco and Mondi wish to perpetuate the fiction that he had now been "procured" or "provided" by Adecco."

The result of the above was that the commissioner's ruling that Adecco was Dyokhwe's employer was set aside and replaced with a ruling that Mondi Packaging was his true employer at the time of his dismissal. The merits of the unfair dismissal dispute will presumably be dealt with in a subsequent arbitration or the matter will be settled.

Automatic terminations of employment

It is not unusual for the commercial agreement between the client and the TES to provide that the client has the right to inform the TES that it no longer needs to make use of a worker assigned to it or, for various reasons, no longer wants to make use of the services of a particular worker. The result is that the TES may find itself with a worker that is surplus to its requirements, or with a worker that, because of allegations of poor work performance made by the client, it no longer wishes to employ. Although dismissal in both these circumstances may be justified on the basis of misconduct , operational requirements or incapacity, the TES may not be willing to go through the time-consuming process of an operational requirement dismissal or be unable to prove misconduct or incapacity because the client is not prepared to assist.

Faced with these problems many TES's have utilised the contractual mechanism of an automatic termination of employment. They have inserted provisions in their standard contracts of employment which provide that the contract will terminate automatically in certain circumstances, usually when the client indicates that it no longer needs or wants to utilise the services of a worker, or when the contract between the client and the TES expires. The result of such automatic terminations would be that there is no dismissal the fairness of which can be challenged.

Although the decision in **Sindane v Prestige Cleaning Services** (2010) 31 ILJ 733 (LC) accepted that automatic termination clauses could be utilised, at least in the circumstances where the client no longer needed the services of the worker, a different approach was adopted in **Mahlamu v CCMA & Others** (2011) 32 ILJ 1122 (LC). In this decision the Court held that this type of automatic termination provision contravenes s 5(2)(b) of the LRA, which provides, *inter alia* that no person may do anything that prevents an employee from exercising a right granted in terms of the LRA (in this case the right not to be unfairly dismissed. In addition, s 5(4) provides that a contractual

provision which directly or indirectly limits the right granted in terms of this section is void unless permitted in terms of the LRA itself.

> *"[21] These passages are clear authority for the fact that the parties to an employment contract cannot contract out of the protection against unfair dismissal according to the employee, whether through the device of "automatic termination" provisions or otherwise.*
> *[22] In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of s188 of the LRA, is precisely the mischief that s 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion of s5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act."*

The difficulty in this regard is that the LRA does permit the use of fixed term contracts –this is evident from s 186(1)(b) which states that the expiry of a fixed term contract will only constitute a dismissal if the employee had a reasonable expectation of the contract being renewed on the same or similar terms and this expectation is not fulfilled. When will fixed term contracts therefore be permitted and when will this not be the case?

It is perhaps for this reason that the Court was careful not to state this principle too widely and went on to qualify the above statement in the following terms –

> *"[23] This is not to say that there is a "dismissal" for the purposes of s186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. This is what I understand the Ratio of Sindane (supra) to be – that ordinarily, there is no dismissal when the agreed and anticipated event materialises (to use the example in Sindane, the completion of a project or a building project), subject to the employee's right in terms of s186(1)(b) to contend that a dismissal has occurred where the employer fails or refuses to renew a fixed-term contract and an employee reasonably expected the employer to renew the contract. In other words, if parties to an employment contract agree that the employee will be engaged for a fixed term, the end of the term being defined by the happening of a specific event, there is no conversion of a right not to be unfairly dismissed into a conditional right. Without wishing to identify all of the events the occurrence of which might have the effect of unacceptably converting a substantive right into a conditional one, it seems to me that these might include, for example, a defined act of misconduct or incapacity or, as in the present instance, a decision by a third party that has the consequence of a termination of the employment."*

The implications of this qualification still need to be teased out.

Both the **Sindane** and the **Mahlamu** decisions did not deal with the termination of contracts of employees of TES's. The employees were employed by contractors providing security and cleaning services to a client.

However, it seemed clear that the same principle would apply to employees of a TES and this has been confirmed in the recent decision in **Adecco Recruitment Services (Pty) Ltd v Moshela & Others** (Unreported JR 3161/11 19 June 2012). However, in this decision it appears to have been accepted that a clause that envisaged the automatic termination of employment on the completion of a specific task or project would not fall foul of s5 of the LRA. For recent arbitration awards dealing with the issue see **Mahesu v Red Alert TSS (Pty) Ltd** [2011]

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"In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of s188 of the LRA, is precisely the mischief that s 5 of the Act prohibits."

Mahlamu v CCMA & Others

12 BALR 1306 (CCMA), **Mayo and Another v Global Cleaning Services (Pty) Ltd** [2011] 10 BALR 1051 (CCMA) and **Nkosi v Fidelity Security Services (Pty) Ltd** [2012] 4 BALR 432 (CCMA).

Comment

The above decisions show a clear determination on the part of the Labour Court to provide, as far as is possible, employees of TES' with effective protection against unfair dismissal.

Steenkamp J's approach is of special importance. To some extent it reflects the view adopted by the proposed amendments to the LRA, namely that the legitimate use of workers supplied by a TES is limited to the situation where the worker will be supplied to a client for a relatively short period of time for specific purposes.

Where the period of assignment becomes excessive the use of the TES' services becomes unacceptable – presumably because the use is not linked to considerations of flexibility and to meet short term needs, but is seen as a way of avoiding the costs of employment attached to the utilisation of permanent employees.

Steenkamp J's comments regarding the fact that Dyokhwe was an illiterate and a vulnerable employee is also arguably reflect the approach adopted by the proposed amendments in that they will not apply to workers who earn above the earnings threshold set in s 6 of the Basic Conditions of Employment, 75 of 1997.

Even without the amendments, and if Steenkamp J's approach is followed, clients who make use of unskilled workers supplied by a TES for a lengthy period of time run the risk that they will be deemed to be the employer of the of the worker supplied by the TES. The risk will be even greater if the worker was originally employed by the client and transferred to the TES at a later stage. Here there is no "procuring" of the worker by the TES.

The same will apply to the practice in terms of which a client does its own recruiting but then, instead of employing the job applicant itself, refers the successful applicant to a TES who then employs the applicant and assigns the applicant to the client.

What is interesting is that Steenkamp J was not called upon to consider whether, in that case, there were, in fact, possibly two employers, i.e the client and the TES.

The view as expounded in the **Mhalamu** and **Moshela** decisions that TES cannot necessarily rely on the expiry of a fixed term contract needs clarification. If an "ordinary" employer can utilize fixed term contracts why not a TES? Both decisions seem to recognize that a TES can utilise such a contract provided that the automatic termination is linked to an agreed and anticipated event.

For example, if the worker has been assigned to the client to work on a specified project or where the worker's contract refers to a specified period. However, automatic terminations linked to the client's "whim" will not be regarded as valid. Here the employee will be regarded as having been dismissed and the TES will have to justify the dismissal.

It is not clear why the TES cannot rely on an automatic expiry clause in the situation where the client no longer needs the services of the worker due to changed operational circumstances. ■

PAK le Roux

Polygraphs and employment decisions

Misconduct and operational requirements

by Carl Mischke

Despite all evidence (and experience) to the contrary, some employers still rely on polygraphs – relatively limited machines that, as the Labour Court pointed out in its most comprehensive judgment dealing with polygraphs (**FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River** [2010] 9 BLLR 903 (LC)), do little more than record changes in the subject's body: heart rate, rate of respiration, blood pressure and the like. In effect, polygraphs are minor versions of the Richter-scale used to measure the impact of earthquakes: the information produced is an abstract measurement; how much damage has been done is not part of the measurement. So too, the results of a polygraph examination need to be interpreted by a suitably qualified and experienced examiner. And this re-introduces the human element into what many hope (and many mistakenly believe) is a purely objective, empirical test. Limited as it is, the polygraph does not say anything about the honesty or otherwise of the person being examined – it simply records the subject's physiological reactions. The basic premise is, of course, that a sensitive recording device will be able to record the physiological effect on the subject if he or she is not telling the truth.

Employers have been using polygraphs in dealing with misconduct cases for many years – and CCMA commissioners know only too well by now to treat these tests, the interpretation of the data and the conclusion to which the data leads, with considerable caution. Even though evidence obtained this way may not be rejected out of hand, it is likely that a commissioner will attach little weight to the results, focusing more on the experience and qualifications of the examiner.

The use of polygraphs have also come under the spotlight in another context, namely where the employer seeks to justify the dismissal of an employee on the ground that the employee has failed a polygraph test or has refused to undergo a polygraph test. In these circumstances employers have sought to justify dismissals on the grounds of their operational requirements, with mixed success. For example, in **South African Transport &Allied Workers Union & Others v Khulani Fidelity Services (Pty) Ltd** (2011) 32 ILJ 130 (LAC) the failure of employees to pass a polygraph test was held to justify dismissal on the grounds of the employer's operational requirements based on the specific needs of the employer in that case. In **National Union of Mineworkers & Others v Coin Security Group (Pty) Ltd t/a Protea Coin Group** (2011) 32 ILJ 137 (LC) the Court reluctantly accepted that it was bound by the **Khulani Fidelity Services** decision but, on the facts, still found the dismissals based on the fact that the employees had failed a polygraph test, unfair. See the discussion of these decisions in **CLL** vol 20 no 11 p109.

There have also been decisions where the question whether the refusal to undergo a polygraph test can constitute misconduct was considered. In **Blignaut v The Core Computer Business (Pty) Ltd** [2011] 6 BALR 642 (CCMA) the dismissal of an employee because he had failed to undergo a polygraph test was held to be fair on the basis that the employee's contract of employment required the employee to undergo such testing. However, in **SATAWU obo Mashiane v Swissport South Africa (Pty) Ltd** [2010] 10 BALR 1121 (CCMA) , the dismissal of an employee for such a refusal was regarded as unfair because the employer had failed to establish that there was a tacit term in the contract of employment that required the employee to undergo such a test. In the recent decision in **Nyathi v Special Investigating Unit** [2011] 12 BLLR 1211 (LC) the Labour Court that a refusal to undergo a polygraph test required in terms of a contract of employment constituted a breach of contract but left open the question whether the dismissal would be unfair.

Now it seems that at least one employer has taken one step further: using a polygraph to eliminate

candidates in a contested process of promotion. In **Sedibeng District Municipality v SA Local Government Bargaining Council & Others** [2012] 9 BLLR 923 (LC) the employees agreed to undergo competency tests and polygraph tests. The fact that these tests would be used was not mentioned in the advertisement, but the employer took the view that the results of a polygraph test were reasonable and fair criteria to take into account in reaching a decision who to appoint and who not to appoint. The employees' counter-argument was that their "failure to pass" the polygraph test was the sole reason for the employer's not appointing them.

The evidence showed that the employees had a point: the results of the polygraph test were given more weight than the outcome of the interviews: the test was meant to be an indication of the applicants' honesty and integrity. The arbitrator came to the conclusion that the employer had acted unfairly – focusing on the fact that the testing was not mentioned in the advertisement. This finding was upheld on review. ■

Carl Mischke

Joinder in the context of labour law

by Kirsty Simpson

It is trite that a third party should be joined in legal proceedings if that third party has a "*direct and substantial interest*" in the subject-matter of the proceedings, or if the order cannot be carried out without affecting or prejudicing the third party. Further, the party to be joined must not have consented to or undertaken to be bound by any judgment in the matter.

The requirement of joinder arises because a forum is not permitted to make a decision that prejudices the rights of those who are not before it. That is, all interested parties must be given the opportunity to be heard before a decision is made. This is important to ensure that all interested parties will be bound by the judgment granted and that the matter will be *res judicata*.

A "*direct and substantial interest*" is an interest in the right that is the subject-matter of the litigation and not merely a financial interest (**State Information Technology Agency (Pty) Ltd v Swanevelder & Others** [2009] 7 BLLR 715 (LC)). Put differently, the question is whether the third party has a legal interest in the subject matter, which interest may be prejudicially affected by a judgment in the proceedings (**BHP Billiton Energy Coal South Africa Ltd v CCMA & Others** [2009] 7 BLLR 643 (LC)).

There is no need to join a party who has elected to abide by the decision of the Court (**Selea & Others v Rand Water** [2000] 11 BLLR 1355 (LC)). However, where a party knows of the proceedings and does not intervene, his mere non-intervention does not render the judgment resulting from the proceedings binding on him (**PSA v Department of Justice & Others** [2004] 2 BLLR 118 (LAC)). It is therefore advisable to formally join a third party to proceedings in which he has an interest, as opposed to merely advising him of such proceedings.

Rule 22 of the Labour Court Rules provides that a Court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.

Similarly, rule 26 of the CCMA Rules provides that the CCMA or a commissioner may join any number of persons as parties in proceedings, if their right to relief depends on substantially the same question of law or fact. A commissioner may also make an order joining any person as a party in the proceedings, if the party to be joined has a substantial interest in the subject matter of the proceedings.

In terms of rule 26 of the CCMA Rules, joinder in the CCMA can take place at the instance of a party to the proceedings, at the instance of the commissioner or on application by a third party intervening in the

proceedings. However, commissioners have a duty to raise the issue of non-joinder where the parties have not done so (**State Information Technology Agency (Pty) Ltd v Swanevelder & Others** [2009] 7 BLLR 715 (LC)). Failure by a commissioner to raise the non-joinder issue renders any CCMA award rendered as a result reviewable, even if the parties to the proceedings did not raise the issue of joinder.

Does a third party need to be joined where no relief is sought against that party? For example, in an unfair labour practice dispute relating to promotion, do successful appointees need to be joined where the aggrieved party does not ask for the setting aside of the appointment of the successful appointees?

In **PSA v Department of Justice & Others** [2004] 2 BLLR 118 (LAC), the Labour Appeal Court stated that the decision as to whether a party ought to be joined is not based solely on the question of the relief sought.

The Court stated that a party must be joined if a factual finding in the case would adversely affect their rights or interests, even if no relief is sought against them. The Court concluded that if there was a risk that a finding would be made that the successful appointees were not suitable for the positions to which they had been appointed, they ought to be joined regardless of the relief sought. The Court stated that this is the case because the appointees' reputations would thereby be tarnished.

However, in **Gordon v Department of Health, Kwazulu-Natal** 2008 (6) SA 522 (SCA), the Supreme Court of Appeal stated that the order or judgment sought is relevant to the question of whether a party has a direct and substantial interest in the subject-matter of any proceedings. The Court stated that a successful appointee whose suitability for a post is indirectly challenged by an unsuccessful employee but where the relief sought is compensation, has no legal interest in a matter. It is only where the successful appointee's appointment is sought to be set aside that a legal interest arises and that the appointee must be joined. See also **Minister of Safety & Security & Another v Govender** [2012] 1 BLLR 55 (LC).

The CCMA Rules provide that the joinder of a party to proceedings does not affect any steps already taken in the proceedings, subject to any directions being given by the commissioner as to the further procedure in the proceedings. The result is that a party can be joined to arbitration proceedings without being required to submit to conciliation proceedings.

This principle has now been confirmed in that a party may be joined to Labour Court proceedings at any stage, even if that party did not participate in the conciliation meeting (**National Union of Metalworkers of South Africa obo its members v Steinmuller Africa (Pty) Ltd & Others** [2012] 7 BLLR 733 (LC)).

On the other hand, one cannot seek to avoid procedural requirements through joinder. The case of **SACCAWU obo Members v Entertainment Logistics Service (A division of Gallo Africa Ltd)** [2011] 2 BLLR 206 (LC) involved the application for joinder of certain union members to a referral to the Labour Court. The Court found that by attempting to join the members and thus their disputes to the matter before the Labour Court, the employees were trying to avoid the procedural requirements of the Labour Relations Act and the consequences of their failure to timeously refer the disputes to the Labour Court. The joinder was not permitted.

The Court also noted that one cannot seek to pursue, through joinder of a new defendant, a claim that has prescribed against that defendant. Accordingly, the rules and due process cannot be bypassed through joinder.

The lesson is that litigating parties ought to consider carefully who ought to be joined to proceedings that they institute. The failure to join the necessary parties may render any resultant decision reviewable or appealable. Certainly, any award or judgment granted without the necessary parties being joined will not be binding on those parties. ■

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