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CONSTITUTIONAL COURT JUDGEMENT:

Earlier today, the Constitutional Court handed down its judgment in the matter, *CCT 194/17: Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*.

Whilst the judgement was expected by the industry, it does not negate the important role that Temporary Employment Services (TES) will continue to play in workforce management and enabling skills development and employment in the economy.

At paragraph 75 of the judgment it is importantly confirmed that the Temporary Employment Service (TES) remains and that there is not a transfer of the employment relationship but rather a continuation of the triangular relationship between the TES and the client.

Our preliminary view of the judgement is as follows:

We believe that the interpretation gives more clarity than the Labour Appeal Court judgement and expands upon issues not dealt with in that judgement. This case is about a limited interpretation of whether there are two employers or one, for the purposes of the Labour Relations Act only. Affected employees are those who earn below the BCEA threshold (currently R205 433 per annum) and who are placed for longer than three-months.

This judgement does not relate to equal treatment on remuneration and benefits as this was already dealt with in the LRA amendments effective 1 April 2015.

It also does not deal with whether employees are permanent or not after three months as this would be determined by the type of contract. For the industry the critical paragraph in the judgement is paragraph 75 which reads:

> *"Section 198(2) gives rise to a statutory employment contract between the TES and the placed worker, which is altered in the event that section 198A(3)(b) is triggered. This is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship. The triangular relationship then continues for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers."*

The judgement clearly indicates that the TES and client relationship continues beyond three months, and we believe that for legitimate TES providers where the provisions of the LRA amendments have already been implemented, this judgement doesn't affect their ability to operate at law.

Further clarity is gained from paragraph 61 that implies that employees could have a claim on both the TES and the client. The paragraph reads:

> *"I am persuaded that the sole employer interpretation is not hampered by section 198(4A). The section does not purport to determine who an employer may be from time to time. It provides that, while the client is the deemed employer, the employee may still claim against the TES as*

long as there is still a contract between the TES and the employee. This is eminently sensible considering that the TES may still be remunerating that employee. The view is buttressed by section 200B, which provides very broad general liability for employers. Section 198(4) and (4A) seems to carve out specific areas of liability for a TES pre- and post-deeming as opposed to the general liability applicable in terms of section 200B."

In terms of paragraph 63 of the judgement, our understanding of the provisions of the LRA amendments is confirmed. The LRA amendments provide additional protection to those employees under the threshold(R205 433) who work longer then three months in that, in the event of a breach of the LRA, they could take action against either the client or the TES.

The rapidly changing economic, social and political environment demands that business is adaptable and places pressure on individuals to improve their skill sets to meet the 4th industrial revolutionary changes in the market. The TES industry has been proven to be a primary driver of skills development and an essential labour market enabler to ensure the long-term employability of individuals.

We believe that this industry will continue to play a major part in the success of the SA economy and labour market in managing the demands of globalisation, competitiveness, the 4th industrial revolution and the effective transition of individuals into employment.

Should you have any queries relating to this matter or require context to the case, please do not hesitate to contact Assign's Attorney of Record, Craig Kirchmann of Kirchmanns Incorporated on 043 721 0963 or ckirchmann@kirchmannsinc.co.za.

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ABOUT CAPES

The Confederation of Associations in the Private Employment Sector (CAPES) is an umbrella body, formed in 2002, when the need for a unified voice for the South African staffing industry became apparent. CAPES was created specifically to act as the lobbying organisation for the four primary staffing associations, who represent thousands of SME staffing businesses, and several of South Africa's largest corporate staffing companies.