PUBLIC INTEREST CONSIDERATIONS, EMPLOYMENT AND TEMPORARY EMPLOYMENT SERVICES

By Ahmore Burger-Smidt, Director and Zaryl Bhero, Associate

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INTRODUCTION

The effect of a merger on employment is one of the four public interest considerations which must be deliberated on by the Competition Commission (**"Commission"**) as well as the Competition Tribunal (**"Tribunal"**) when determining whether or not a merger can or cannot be justified on public interest grounds [1]. The final Guidelines on the assessment of public interest provisions in merger regulation (**"Guidelines"**) provide guidance on how the effect of a merger on employment must be considered.

It is most relevant that the Guidelines require the following:

> the merging parties must disclose all potential retrenchments, whether they are due to the merger or operational requirements;

> the Commission must allow the merging parties an opportunity to substantiate the likely positive effects of the merger on employment, which justify the approval of the merger; and

> if there are any negative effects on employment, then there must be a determination on whether the negative effects can be justified, which may lead to the approval of the merger with or without conditions.

LABOUR RELATIONS ACT

The considerations on the effect of a merger on employment cannot be viewed in complete isolation of the employment laws of South Africa. In particular, section 198A(3)(b) of the Labour Relations Act 66 of 1995 (**"LRA"**) must be considered. The section relates to *"Temporary Employment Services"* (**"TES"**), the third party providers of which are commonly referred to as labour brokers.

Section 198A(3)(b) provides that an employee who is not performing a temporary service [2] for a client who contracted with a TES provider for the provision of TES's, is deemed to be the employee of that

1 Section 12A(3) of the Competition Act 89 of 1998

2 Section 198A(1) defines a temporary service as:
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 service 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).

client and the client is deemed to be the employer, on an indefinite basis. This is subject to the provisions of section 198B of the LRA, which permits employment on a fixed-term contract in specific circumstances. It is important to note that section 198A(3)(b) is only applicable to employees who earn below the earnings threshold, which is R205 433.30 per annum.

In the recent case of ***NUMSA v Assign Services*** [3], the Labour Appeal Court (**"LAC"**) ruled on the correct interpretation to be afforded to section 198A(3)(b). The Court found that upon the expiry of a three months period, an employment relationship is statutorily created between a client and the TES employee. Therefore, the TES employees become solely employed by the client for an indefinite period and on the same terms and conditions as the employees of the client performing the same or similar work.

In making this conclusion the LAC made it clear that the object of section 198A(3)(b) was to upgrade TES employees to standard employment and free vulnerable employees from atypical employment by the TES. The LAC stated the following:

> "The plain language of s 198A(3)(b) of the LRA, interpreted in context unambiguously supports the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers."

The decision of the LAC has been appealed to the Constitutional Court. Irrespective of the Constitutional Court outcome pending, the Director of the Commission for Conciliation, Mediation and Arbitration (**"CCMA"**) has issued his own directive, directing all Commissioners of the CCMA to apply the LAC decision.

TES CONSIDERATIONS IN MERGER NOTIFICATIONS

Generally, the impact of a merger on employees placed at a merging firm by a TES provider, i.e. temporary staff, was not considered to be a significant factor as they were considered to be employees of the TES provider. However, in light of the above interpretation of section 198A(3)(b), the potential negative or positive impact a merger may have on temporary employees has become an important aspect to be considered by merging parties.

The time period limitation of three months placed on TES means that firms should contemplate TES when notifying the Commission of the potential impact of a merger on employment. For example, if a target firm has engaged TES for a period of five months (i.e. a period longer that three months), in respect of employees earning less than R205 433.30 per annum, such employees could be deemed to be permanent employees of the target firm. Therefore, if the merging parties do not wish to engage the services of these employees post the merger, they cannot merely terminate the service level agreement with the TES provider on the basis that the latter is the employer. These employees are deemed to be employees of the target firm, based on the LAC decision and any possible retrenchments or dismissals of such employees will need to be carefully considered.

On the other hand, in the event that there are TES employees which are engaged for three months or less by the target firm, it would be advantageous for the acquiring firm if it can extend the tenure of such TES and thereby create employment. Such outcome would have a positive impact on the public interest in terms of merger proceedings.

CONCLUSION

In light of the above, it is prudent that in considering merger notifications, the merging parties address and take into consideration the TES the target firm may have engaged. It is imperative that merging parties succinctly and upfront deal with the TES during merger proceedings and engage with this issue, as it will prevent time delays and wasted costs, if not done and questions arise during the merger investigation process.

3 NUMSA v Assign Services and Others JA96/15) [2017] ZALAC 44

CONTACT THE AUTHORS

AHMORE BURGER-SMIDT

Title: Director, Werksmans Advisory Services (Pty) Ltd.
Office: Johannesburg
Direct line: +27 (0)11 535 8462
Fax: +27 (0)11 535 8762
Email: aburgersmidt@werksmans.com

Click here for her profile.

ZARYL BHERO

Title: Associate
Office: Johannesburg
Direct line: +27 (0)11 535 8362
Fax: +27 (0)11 535 8681
Email: zbhero@werksmans.com

Click here for her profile.

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