

## **FIDUCIARY DUTIES IN THE ABSENCE OF AN EMPLOYMENT CONTRACT: SOME FINANCIAL IMPLICATIONS!**

Does someone who works for a client via a labour broker owe the client a fiduciary duty?

In *Volvo (SA) (Pty) Ltd v Yssel [2009] ZASCA 82* this was essentially the question the LAC was called upon to answer. After commencing operations during 2000 Volvo required the services of a manager for its information technology division. After being introduced to Yssel, Volvo decided to offer him the position. Yssel, however, did not want to enter into direct employment with Volvo and requested to be appointed via a labour broker he was already familiar with. Volvo reluctantly accepted this arrangement and the effect of this arrangement was that, upon receipt of monthly invoices, Volvo would pay the labour broker a fee for the services of Yssel, who in turn was responsible for remunerating Yssel. By 2004 there were six other personnel in Yssel's department, all of whom were employed via labour brokers. Yssel informed the HR manager of Volvo that some of the personnel were unhappy with their current labour brokers and that he could arrange for all the personnel to be transferred to his labour broker at no extra cost to Volvo. Volvo and the personnel agreed to this and Yssel made the necessary arrangements. Volvo had no direct contact with the labour broker and at all times dealt through Yssel who acted as, what he termed, a "facilitator" or "intermediary" between Volvo and the labour broker. The labour broker would send invoices to Yssel each month for the services of the personnel after which Yssel would submit them for payment to Volvo. However, unbeknown to Volvo and the personnel, about 40% of each monthly payment that was being made by Volvo ended up in Yssel's own pocket. Subsequently it emerged that he had an arrangement with the labour broker to be paid a commission for personnel he transferred to the broker and further that he had requested the labour broker not to disclose this arrangement to either Volvo or the other personnel.

After Volvo found out about this arrangement, and while still in the process of drafting Yssel's suspension letter, Yssel resigned. For Yssel this might have been the easy way out and the end of the matter. However, unfortunately for Yssel, Volvo had quite

a different view of the situation: it sued Yssel in the High Court for payment of an amount of R775 107.00, being the commission he had received from the labour broker. Volvo claimed that Yssel had earned those amounts in breach of a fiduciary duty he had owed to Volvo to act in its best interests and not his own. Yssel argued that he never stood in any fiduciary relationship towards Volvo, mainly because he had no contractual relationship with Volvo. The LAC held that while certain relationships were clearly recognisable as encompassing fiduciary duties, there was no closed list of such relationships. Although contractual duties owed between parties would assist in identifying whether the relationship was one of trust, contractual privity was not indispensable to such relationships. The LAC referred to the matter of *Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168* where it was held that: *“Where one man stand to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship”*.

Yssel occupied the most senior position in his department and as such the LAC held that it was exactly because of that position, rather than the nature of the contractual relationship (or perhaps lack thereof) between him and Volvo, that defined what Volvo could expect of him. In the words of the LAC: *“He had not been brought in to its offices so as to provide him with an opportunity to hawk his own wares but had been brought there in the interests of Volvo”*. The LAC had no doubt that Yssel was in a position of trust when he engaged himself in the way he did and as such he was not entitled to allow his own interests to prevail over those of Volvo. In the result Yssel was ordered to pay Volvo the sum of R775 107 together with the costs of Volvo’s application.

So what is to be learned from this case? There is presently a lot of debate out there regarding the future of labour brokers, and a lot of support for the argument that labour broking should be banned altogether. Although this debate has been fuelled by considerations different to what transpired in the present matter, those opposed to labour broking might argue that the circumstances in this matter is a further example of where the involvement of labour brokers could lead to potential difficulties. However, what could be learnt from this case is that (i) companies who use intermediaries such as Yssel should put their arrangements with the intermediary and his/her principal in writing and clearly demarcate the rights and responsibilities of the intermediary;(ii) employees and intermediaries like Yssel likewise should understand

what the fiduciary duties are that they have towards their employer or client, as the case may be; and, significantly, (iii) that a contractual relationship (e.g. between employer and employee) is not a prerequisite for the establishment of a trust relationship and fiduciary duties towards another.

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*November 2009*