REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JA62/10

Reportable

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA **First Appellant**

A KETLHOILWE

& 44 OTHERS **Second to Further Appellants**

and

ABANCEDISI LABOUR SERVICES CC **Respondent**

Heard: **15 November 2011**

Delivered: **20 July 2012**

Summary: Employees i.t.o. s198(2) of LRA removed from work by client against the will of labour broker who insists that employees are still employed – Whether removal of employees in such circumstances constituted dismissal i.t.o. s186(1).

JUDGMENT

NDLOVU JA

Introduction

[1] The issue in this appeal was whether a dismissal had occurred, as envisaged in section 186(1), read with section 187, 188 or 189 of the Labour Relations Act[1] (the LRA) where employees in terms of section 198(2) of the LRA were removed from the workplace by the client for whom they were placed to render their services and in circumstances where the labour broker, as the employer, affirmed that the employees concerned were, nonetheless, not dismissed but still employed by it.

[2] The appeal is against the judgment of the Labour Court (Molahlehi J) handed down on 25 March 2010 in terms of which the respondent's point *in limine* was upheld and the appellants' claim dismissed with costs. The appeal came before us with the leave of the Court *a quo*.

[3] The respondent, Abancedisi Labour Services CC, is a close corporation in terms of the Close Corporations Act[2] and carries on business as a temporary employment service or labour broker[3]. The second to further appellants (the employees) were formerly employed by the respondent. The employees were members of the first appellant, the National Union of Metal Workers Union or NUMSA (the union) which, as the employees' collective bargaining agent, facilitated the institution of this litigation in the interest of the employees, as its members.[4]

[4] The union sued the respondent in the Court *a quo* seeking an order compensating each one of the employees in the amount equivalent to 24 months' remuneration, which was based on legal issues formulated in the

1 Act 66 of 1995.
2 Act 69 of 1984
3 Section 198(1) of the LRA
4 Section 200 of the LRA. See also *National Union of Mineworkers v Hermic Exploration (Pty) Ltd* (2003) ILJ 787 (LAC) at paras 37-- 41; *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A) at 910.

statement of case, as amended, in the following terms:

> ’20. The termination of the union members’ contracts of employment at Kitsanker by the respondent, without a hearing, amounted to a dismissal in terms of the LRA.
>
> 21. The dismissal was automatically unfair in that the reason for the dismissal was that the union members sought to exercise a right protected by the LRA, namely the right to take advice from the union.
>
> 22. Alternatively the dismissal, ostensibly predicated on the respondent(’s) operational requirements and/or the operational requirements of the respondent(’s) client Kitsanker, was substantively unfair in that:
>
> 22.1 the dismissal was not for a fair reason as required by section 188(1)(a)(ii) of the LRA;
>
> 22.2 The union members were not selected for dismissal on the basis of fair and objective selection criteria as required by section 189(7) of the LRA.
>
> 22.3 The dismissal was procedurally unfair in that it was not preceded by the consultative process required by section 189(2), (3), (4) (5) and (6) of the LRA, or any process at all.’

[5] The point *in limine* raised by the respondent was that the employees were never dismissed by the respondent. As stated already, the Court *a quo* upheld the respondent’s technical defence and dismissed the appellants’ claim with costs. Notwithstanding the 24 months’ compensation claimed in the amended statement of case, the appellants’ counsel submitted that compensation in the amount equivalent to 12 months’ salaries would be just and equitable - apparently a similar concession also having been made in the Court *a quo* in that regard.

Background Facts

[6] Prior to February 2001, the employees were employed by Kitsanker (Pty) Ltd, a part of the mining division of Reinforcing Steel Holdings Group, carrying on the business of manufacturing roof bolts for soft and hard rock and situate in Rustenburg, having relocated from Lichtenburg on or about 4 August 2000. For operational reasons, the management of Kitsanker resolved to outsource the production unit of its business to a labour broker. Kitsanker then notified the workers of its decision and offered them voluntary retrenchment packages. After retrenchment, the workers would immediately be employed by the labour broker in the same positions that they previously occupied at Kitsanker and on the same salaries.

[7] Despite the union's emphatic opposition against Kitsanker's idea of outsourcing its production line, the employees went ahead and accepted their voluntary retrenchments with effect from 2 February 2001. In the meantime, Kitsanker concluded an agreement with the respondent, being the appointed labour broker, in terms of which the employees became the employees of the respondent with effect from 5 February 2001. The respondent, in turn, placed the workers back at the disposal of Kitsanker. However, from that stage onwards Kitsanker was no longer their employer but only acting in its capacity as the respondent's client.[5]

[8] Each of the employees concluded a 'limited duration contract of assignment' with the respondent, which embodied the general terms of the employment agreement (the contract) and an addendum to it known as 'assignment agreement' which specified, amongst others, each worker's placement, job category, rate of pay (schedule 'A'). The material terms of the contract and schedule 'A' were as follows:

> 'Limited Duration Contract of Assignment
>
> 1.2 The employee should understand that the employer, as a labour broker is dependent for its income on the assignment of contracts to it. The award of assignments to the employee will therefore depend on the availability of work, which is afforded

5 Section 198(2) of the LRA.

to the company by its clients, the duration of those contracts and upon company's assessment of employees' suitability to carry out the available assignments. There is accordingly no guarantee of work being given to employee, but it is obviously in the interest of the company to ensure that the employee is given as much appropriate work as the employee is able to reasonably perform.

1.3 In the event that a suitable assignment becomes available, the company will furnish to the employee an assignment agreement, substantially in the form of Schedule "A" to this agreement. This assignment agreement will stipulate the assignment position the employee will hold, the anticipated dates of the assignment, the name and address of the client with which the employee will be placed as well as the grade and rate of pay per hour the employee will receive for work done.

1.4 It is recorded that an assignment is available for the employee, to commence on Monday, 5 February 2001 at the premises of Kitsanker at Rustenburg.

2. Duration of agreement, position, pay hours of work and benefits

2.1 This contract shall commence on the commencement date the company has with its client, Kitsanker and shall continue until the completion of the last assignment for which the employee is employed in accordance with schedule "A", unless terminated earlier in accordance with this agreement.

2.1 The employee should not have any expectation of continued employment after the fixed period, even in the event that the employee is afforded various assignments from time to time. …

4. Termination of employment

4.2 Notwithstanding any other provision in this agreement, the company will be entitled to terminate this agreement and/or the employment of the employee summarily, if the employee:

4.2.4 disobeys any lawful order or direction of a superior or a manager of a client of the company;

4.4 In addition, the company shall be entitled to terminate this agreement in the event that the employee is unable to perform in terms of this agreement, for example, when a client requires an employee to be removed from site.

…

5.1 The employee acknowledges and agrees that the termination of the employee's employment at the expiry of the fixed period shall not constitute retrenchment and the employee will accordingly not be entitled to any retrenchment procedures or benefits at that time….'

'Assignment Agreement (Schedule "A")

The company and the candidate agree as follows:

1. The candidate will be placed as a labour H

2. The candidate will commence his assignment on 05/02/2001. The assignment will be until the client no longer requires the services of the candidate for whatever reason.

3. The candidate will be placed at the following client, Kitsanker.

The address being:

3 Ferro Street

Rustenburg.

The candidate will report at 08h00 on 05/02/2001 at the client's premises.

4. The candidate's remuneration will be R10.30 per hour, paid weekly in arrears and the candidate shall work the usual hours of the client being a total of 42 normal time hours per week, on a rotating shift system.

5. It is specifically agreed that the candidate will not be allowed to offer to work for the client on any basis whatsoever other than through the company. Any contravention of this clause will constitute an immediate breach of conduct between the company and the candidate and entitle the company to its usual placement fees, payable by the candidate and/or client.

6. It is also specifically agreed that the company will not be held liable for any damages or breakages of any nature whatsoever caused by the candidate, due to negligence or any other reason, at the premises of the client.

7 It is agreed that the limited duration contract of assignment should be read with this agreement and that both agreements will constitute the agreement between the parties.'

[9] On or about 20 June 2001, the employees signed grievance forms in which they demanded the immediate dismissal of one Mr Koos Mpopo, a former shop steward who was employed by the respondent as the payroll clerk or site agent, but whom the employees recognised as their supervisor. The employees listed a number of serious allegations of abuse and fraud against Mr Mpopo, including that he sometimes instructed the workers to work overtime but refused to authorise their overtime payments; he extorted money from certain workers on threat of dismissal if they did not pay and further that, in respect of one worker, he fraudulently recorded overtime (which was not worked) on the worker's behalf and then demanded from the worker to hand over to him the overtime money. When there was no prompt reaction from Kitsanker management to their demand, the employees staged a two-hour

work stoppage, which happened on an uncertain day between 21 June 2001 and 4 July 2001.

[10] In the meantime, Mr Mpopo was suspended pending a misconduct enquiry scheduled for 5 July 2001. However, he failed to attend the enquiry. Instead, he submitted his resignation from the respondent's employ. That was how the problem about Mr Mpopo got itself resolved.

[11] As a result of the incidence of the two-hour work stoppage on 20 June 2001, Kitsanker realised the necessity to plan for the future in terms of potential illegal or unprotected industrial actions by its workers. In this regard, Kitsanker drafted a code of conduct which would regulate the future conduct of all parties at Kitsanker. The draft was discussed with the respondent and was accepted by the respondent's managing member, Mr Etienne Van der Merscht. It was later presented to the representatives of the workers for their attention.

[12] It was then required, on 5 July 2001, that the code of conduct be signed by the representatives of Kitsanker and the respondent, as well as all workers individually. I propose to refer to the code of conduct in its entirety:

> 'KITSANKER CODE OF CONDUCT
>
> The Industrial Relations history at Kitsanker requires that a code of conduct, which will govern all the parties, be implemented. The purpose of this code is to regulate the practice that will be acceptable at Kitsanker and is applicable to Labour employed by Abancedisi, Abancedisi Labour Brokers and the Kitsanker Management.
>
> The conditions are as follows:
>
> Labour employed be Abancedisi
>
> 1. Employees understand that Abancedisi employs them and that their services are contracted out to Kitsanker.

2. Employees will work according to their contract with Abancedisi and will not deviate from this in any manner.

3. Any problems/queries that the employees may have regarding their conditions of employment will be addressed directly to Abancedisi.

4. Problems/queries that employees may have with Abancedisi will not impact on the contract conditions that Abancedisi agreed with Kitsanker. These conditions are contained in the employees' contract of employment.

5. The employees will operate and handle disputes in accordance with the Kitsanker Grievance Procedure and will not engage in illegal industrial action, (i.e. go-slow, work stoppages and refusal to work emergency overtime or normal overtime when requested).

6. Will conduct them(selves) in a professional manner and will contribute positively to the well-being of the company.

7. Will not approach or expect from the company to extend or grant any loans to Abancedisi staff.

<u>Abancedisi Labour Brokers</u>

1. Comply with the contract between Kitsanker and Abancedisi.

2. Manage its employees to such an extent that they will not engage in any action that will be detrimental to Kitsanker or its customers.

3. Apply procedures that will manage requests and complaints effective(ly) and speedily.

4. Be available to resolve disputes.

5. Provide employees that are willing to comply with the conditions applicable at the particular site and that comply with their contracts of employment.

6. Communicate to its employees that management will no longer tolerate the actions as set out in point 5 above.

Kitsanker Management

1. Will treat all employees with respect and dignity.

2. Provide the employees with timeous notice of overtime to be worked or any other action that may impact on their future employment.

3. Will not abuse the flexible working condition in the contract.

4. Will treat employees fairly.

5. Will comply with all conditions as set out in the agreement between the company and Abancedisi.

6. Will not involve itself in any matters related to the relationship between Abancedisi employees and Abancedisi Labour Brokers.

It is further agreed:

- That should the employees again embark upon illegal work stoppages/refusal to comply with contract conditions, the company will exercise its right to terminate the contract with immediate effect.

- That should the contract be terminated, all Abancedisi employees will immediately leave the premises and not move closer than 100 metres to any entrance to the company.

- The parties will work towards establishing a long-term relationship that will benefit all stakeholders.

All the parties accept the conditions and conduct as set out and they will advise their employees/colleagues accordingly.'

[13] Whilst some workers signed the code of conduct, the employees refused to do so. The employees alleged that they had asked for seven days within which to obtain advice from the union, which allegation was denied by the respondent. In any event, the employees were advised that on the following day, which was Friday, 6 July 2001, only those workers who had signed the code of conduct would be allowed entry into the work premises. Indeed, that is what happened. On 6 June 2001, those workers who had signed the code of conduct were allowed into the workplace but the employees were refused entry.

[14] On Monday, 9 July 2001, the same thing happened. The employees were refused entry to the site and they stood outside the gate until about 16:00 in the afternoon. On that day, they noticed that there were new people who had been employed to replace them. They were told to go away from Kitsanker precincts and that if they did not the police would be called to deal with them. They went to the union offices and reported what had happened.

[15] On 10 July 2001, the union's local organiser, Mr Tshoga, had a telephone discussion with Mr Van der Merscht during which the latter stated that he had tried to persuade Kitsanker management to allow the employees back to work but to no avail and further that, in any event, all the employees were still employed by the respondent and still on the respondent's payroll.

[16] Mr Tshoga confirmed the telephone conversation in his letter dated 11 July 2001 to the respondent in which he, however, rejected Mr Van der Merscht's contention that the employees were still employed by the respondent. He felt that the employees had been dismissed. As he put it in his evidence, '[t]hey then realised that they are now dismissed. In other words, it looks (like) they are dismissed.'[6] Subsequent communication between the union and the respondent could not resolve the impasse.

[17] On 23 July 2001, the union (acting on behalf of the employees) referred the dispute to the Metal and Engineering Industries Bargaining Council for

6 Record Vol 2 at 147.

conciliation. In terms of the referral, the dispute was characterised as:

> 'Operational Requirement – Failure of the Labour Broker Mr (??) the Company to consult over Retrenchment as per the Requirement of the Provisions of LRA."[7]

However, the conciliation process failed and the certificate of outcome to that effect was issued on 31 August 2001, describing the referred dispute as 'alleged unfair dismissal of A. Retlhoilwe and 44 others due to operational requirements.'[8] As a result, the union referred the matter to the Labour Court for adjudication.

The Proceedings in the Labour Court

[18] In his opening address in the Court *a quo,* Mr Orr, who appeared for the union and the employees, made it quite clear what the appellants' case was, when he stated, in part, as follows:

> '[O]n a proper construction of the contract between the individual applicants and the respondent and as a matter of principle, as a matter of law, we will be arguing that the dismissal occurs the moment the individuals are removed from the premises of the labour broker's clients. … That is the legal issue that Your Lordship will have to decide.'

[19] Indeed, at one stage during the cross examination of the appellants' witness, Mr *Orr* interjected and once again reaffirmed the appellants' case. The following exchange appears from the record:

> 'Q. … as I understand your case is that, well then the labour broker must place them elsewhere --- M'Lord Kitsanker, there was still an employment … [intervenes].
>
> MR ORR: No that is not our case, our case is that the moment the employees were removed from Kitsanker there was a dismissal and that is

7 Record, Vol 6 at 540.
8 Record, Vol 6 at 553.

very clearly our pleaded case. The issue of a labour broker placing people elsewhere goes to issues of mitigation of damages and our case as pleaded is, the moment these people were removed from Kitsanker and are not allowed to return to Kitsanker, there was a dismissal.'

[20] Mr Orr called Mr Tshoga to testify on the existence of the alleged dismissal. Indeed, the essence of Mr Tshoga's evidence[9] was that the dismissal occurred the moment the employees were removed from Kitsanker's premises. This contention was based on the appellants' interpretation of clause 2.1 of the contract. It was submitted on behalf of the appellants that the proper interpretation of clause 2.1 was that the contract would be terminated once Kitsanker no longer required the services of the employees.

[21] In analysing the evidence and the interpretation of the contract, read with schedule 'A' above, the learned Judge in the Court *a quo* had, in part, the following to say:

'26. However, the applicants contend that the respondent had delegated its power to dismiss its employees to Kitsanker and that the dismissal of its members occurred as a result of the exercise of that power. The applicant based its contention on its interpretation of the contract of employment (and) … relies mainly on the provisions of paragraph 2 of schedule 'A' … which provides that the assignment would be until the client, being Kitsanker in this instance, no longer requires the services of the employees. I do not agree with this interpretation because it is based on one aspect of the contract and does not take into account other provisions of the contract including those of schedule 'A' to the contract.

27. The reading of clauses 1.2 and 1.3 of the contract clearly envisaged the continuation of the relationship between the parties even after the conclusion of the assignment at Kitsanker. It is also clear from the reading of clause 1.3 that if a new assignment was secured such assignment would be regulated by terms very similar to those in schedule 'A'.'

9 Record, Vol 2 at 191 lines 8 to 13.

[22] The Court *a quo* accordingly found that the appellants failed to discharge the onus of proving the existence of their alleged dismissal. Consequently, the appellants' claim was dismissed with costs.

The Appeal

[23] The appellants relied on two grounds of appeal, namely:

23.1 That the Court *a quo* erred in finding that the expulsion of the employees from the Kitsanker premises, by Kitsanker, did not result in a termination of the employment contracts between the employees and the respondent. Based on the totality of the oral and documentary evidence, the Court a quo ought to have found that the expulsion terminated the contracts.

23.2 That the Court *a quo* erred in finding that the contractual relationships

which existed between the employees and the respondent, after the expulsion of the employees by Kitsanker, amounted to employment contracts, given that no wages were paid to the employees, no attempts were made by the respondent to place the employees at other assignments and the totality of the relationship between the respondent and the employees was that the employees remained 'on the books' of the respondent.

[24] Mr Eiujen, for the appellants, submitted that on the basis of the objective facts and the circumstances, taken in their entirety, no other conclusion could be reached than that the employees were dismissed from work on 6 July 2001. The assertion that they were not dismissed was merely the *say so* of Mr Van der Merscht which was not supported by objective facts. There was no evidence of any attempts by the respondent to re-place the employees somewhere else. The employees tendered their services to the respondent when they reported for work on 6 and 10 July 2001. Even after they were

refused entry to the premises, they remained at the gate until late in the afternoon.

[25] In further submission, Mr Eiujen pointed out that the proper route which the respondent ought to have taken in the circumstances that it found itself was to have embarked on the consultation process in terms of section 189 of the LRA with a view to possible retrenchment, which the respondent avoided doing.

[26] Mr West, for the respondent, submitted that the appellants' pleaded case was that the moment that the employees were removed from the Kitsanker premises the dismissal had then taken place. That was the appellants' case which the respondent was asked to answer in the Court *a quo.* He pointed out that it was apparent, however, from Mr Eiujen's submissions during argument that the appellants' case was then the one which sought to ask the Court to take even factors post 6 July 2001 cumulatively into consideration and then conclude that the appellants were dismissed. Be that as it may, Mr West submitted that there was no evidence that the employees were dismissed by the respondent in terms of the meaning of the word under the LRA. At most, it could be argued that they were placed on indefinite suspension.

Analysis and Evaluation

[27] It is trite that the appellants bear the onus to prove the existence of their alleged dismissal.[10] In the present instance, the appellants' pleaded case is that the moment the employees were removed from the workplace at Kitsanker on 6 July 2001 they were thereby dismissed. It is common cause that they were removed from the workplace not by their employer, the respondent, but by Kitsanker, their employer's client.

[28] The Court *a quo* was required to determine whether, on the interpretation of the employment contract and the evidence presented before the Court, it could be said that the appellants succeeded in demonstrating on a balance of

10 Section 192 of the LRA.

probabilities that the employees were dismissed by the respondent on 6 July 2001.

[29] Kitsanker expelled the employees from its premises, upon the employees having persistently refused to sign the code of conduct. In order to hold that, the respondent indeed dismissed the employees within the meaning of section 186(1), there must be a *nexus causa* between the conduct of the respondent and the expulsion of the employees. Indeed, it would be sufficient to constitute the *nexus causa* where a labour broker simply sits back and does nothing to protect the interests of its employees who are unfairly treated or exploited by the labour broker's client. In *Nape v INTCS Corporate Solutions (Pty) Ltd*,[11] (*per* Van Niekerk J), the Labour Court was concerned with the question of the right of a labour broker to rely on section 189 of the LRA to justify termination of an employment relationship after the client, for unfair reasons, insisted that an employee be removed from its premises. *In hoc casu* the labour broker, in terms of its contractual relationship with the client, was obliged to accede to the client's demands. The Court held that such agreement, which provided the client with the power to remove the employee from its premises for any reason whatsoever, was against public policy and an unlawful breach of the employee's right to fair labour practices in terms of the LRA. The Court held further that the labour broker was not powerless. It could resist the client's unlawful demand by undertaking the following:

29.1 The labour broker is entitled to approach a court to compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed.

29.2 The labour broker is also entitled to resist any attempt by the client to enforce a contractual provision which is against public policy.

11 (2010) 31 ILJ 2120 (LC); [2010] 8 BLLR 852 (LC) at para 77.

29.3 If the court were to reinstate an employee into the employ of the labour broker, the labour broker may enforce such an order against the client to give effect to the employee's rights to fair labour practices.

29.4 The labour broker could in such a case approach either the High Court or the Labour Court for appropriate relief.

[30] It would therefore appear, on the strength of the *Nape* decision, that a labour broker is entitled to resist any arbitrary or unlawful demand by the client to remove an employee from the work premises. However, the facts in *Nape* are distinguished from those in the present case, the principal distinction being that in the present instance the removal of the employees was, objectively speaking, not for an unfair reason. Kitsanker had learnt a lesson from the unprotected two-hour work stoppage which some workers, including the employees, had staged when they claimed that their demand for the immediate dismissal of Mr Mpopo was not taken seriously by the Kitsanker management. In my view, that demand was, after all, not a reasonable demand. In the first place, Mr Mpopo was employed by the respondent and not Kitsanker and, therefore, it was the responsibility of the respondent to discipline him. Then, when the workers submitted their grievances (against Mr Mpopo) to Kitsanker management, the latter was obliged to transmit the grievances to the respondent for the necessary action.

[31] Indeed, there is evidence that the respondent took immediate action against Mr Mpopo once the respondent received the grievances against him on or about 20 June 2001. It is not in dispute that Mr Mpopo was suspended pending a misconduct enquiry against him, scheduled for hearing on 5 July 2001. There is even a letter written by him on 27 July 2001[12] in which, amongst other things, he said:

'I've been told that I will get paid while on suspension, with a full payment,

12 Record Vol 6 at 548-552.

automatically the very same payment is cut off. No more payment, why? I am still surprise (sic) about this.'

It was therefore, in my view, disingenuous of Mr Mnisi, who testified on behalf of the employees in the Court *a quo,* to claim that he was not aware that, as at 5 July 2001, Mr Mpopo was already on suspension. According to the employees, Mr Mpopo was their supervisor. There was simply no way that he could be absent from work for some number of days without Mr Mnisi, a shop steward, being aware of such absence.

[32] Hence, the decision by Kitsanker to introduce the idea of the code of conduct was fair and reasonable, in the circumstances. Further, objectively considered from the point of view of the content thereof, the code of conduct was, in my view, a reasonable step to take in the interests of all parties. Mr Van der Merscht also accepted that the code of conduct was fair and reasonable. As he put it, 'I was of the opinion that there is basically nothing in this agreement that was not part of normal good practice'[13] and 'I tried to explain to them that there was nothing really in this agreement that would harm them …'.[14] It is clear, therefore, that had Mr Van der Merscht sought (on behalf of the respondent) to invoke the *Nape* remedies he would have done so against his own conscience and convictions. On this basis, the respondent should, in my view, be exonerated from any blame in not coming to the defence of the employees against their removal by Kitsanker from the work precincts.

[33] In terms of the contract, the award of assignment to every employee would 'depend on the availability of work, which is afforded to the company by its clients,… there is accordingly no guarantee of work being given to the employee.…'[15] Although the work at Kitsanker was not yet completed, it does appear, on the basis of what I have alluded to above, that the employees were the principal contributors to their expulsion from Kitsanker before the completion of their assignment. However, as the learned Judge in the Court *a quo* correctly found, the contract 'envisaged the continuation of the

13 Record Vol 3 at 263.
14 Record Vol 3 at 265.
15 Clause 1.2 of the contract.

relationship between the parties even after the conclusion of the assignment at Kitsanker.' and that '[i]t is also clear … that if a new assignment was secured such assignment would be regulated by terms very similar to those in schedule A'. This finding was in line with Mr Van der Merscht's testimony when he said:

> 'If Kitsanker would not allow them to go back, I would have to find them alternative employment and if I could not do that; then the workers had the option of resigning and then finding themselves work, or I would have to retrench them.'

[34] Although it appeared to be common cause that Mr Van der Merscht kept persuading Kitsanker to take the employees back, it seems clear to me, given that both the employees and Kitsanker were apparently steadfast on their stance – Kitsanker not being prepared to allow the employees back without them first signing the code of conduct, on the one hand, and the employees not being prepared to sign the code of conduct, on the other - that the respondent was virtually left with only the two options, namely, to find the employees other assignments elsewhere or, failing which, engage the section 189 consultation process toward their retrenchment. Obviously, finding them alternative assignments would not have been an overnight exercise. It would have naturally taken some time, particularly bearing in mind the large number of employees involved and the fact that this whole scenario was a sudden development which had taken the respondent by surprise and unprepared.

[35] Therefore, for the union to have referred the dispute on 23 July 2001, as it did, was, in the circumstances, too soon and premature. The respondent was not afforded a reasonable time to explore the two options referred to above. Indeed, it is strange that the employees were so impatient and could not afford to wait for the resolution of a dilemma of which they were the main creators. In any event, it seems to me that the employees were at liberty to sue the respondent for unfair labour practice based on their apparent indefinite suspension or, alternatively, they could resign and sue the respondent for constructive dismissal in terms of section 186(1)(f) of the LRA.

However, given the clear terms of the contract, including that the availability of work was not guaranteed, it is doubtful whether they would succeed through that route.

[36] Accordingly, I am of the view, on the facts of this case, that the removal of the employees, on 6 July 2001, from Kitsanker premises, by Kitsanker management, did not constitute a termination of the employees' employment contract with the respondent and, therefore, did not constitute a dismissal of the employees by the respondent within the meaning of section 186(1), read with section 187, 188 or 189 of the LRA. Indeed, notwithstanding the provisions of clause 4.4 of the contract, which entitled the respondent to terminate the contract upon Kitsanker having required an employee to be removed from site, the respondent did not do so in this particular instance. Therefore, the enquiry of whether or not certain terms of the contract (including clause 4.4) were contrary to public policy or had the effect of infringing upon the organisational rights of the employees, in that such terms might have amounted to the employees being required to contract themselves out of their rights against unfair dismissal, becomes irrelevant.[16] To my mind, therefore, the appeal should not be allowed.

[37] Concerning the issue of costs, it would appear to me, from the nature of this case, that the appellants' legal challenge of their expulsion from the workplace was not a frivolous and mischievous exercise on their part. They were entitled to put up the challenge against what they apparently *bona fide* perceived to be a violation of their organisational rights under the LRA and enshrined in the Constitution. On this basis, notwithstanding the respondent's success in the matter, the award of a costs order against the appellants was unfair and not in the interests of justice. In my view, there should have been no order as to costs. The same should be the case with respect to costs of the appeal.

The Order

[38] The following order is made:

16 Compare *Barkhuizen v Napier* 2007 [7] BCLR 691 (CC); *SA Post Office Ltd v Mampuele* (2010) 31 ILJ 2051 (LAC); *Mahlamu v CCMA and Others* (2011) 32 ILJ 1122 (LC)

1. The appeal is dismissed, save that the order of the Court *a quo* on the question of costs is set aside and substituted with the order that there shall be no order as to costs.

2. There is no order as to costs of the appeal.

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NDLOVU, JA

Judge of the Labour Appeal Court

Tlaletsi JA and Landman AJA concur in the judgment of Ndlovu JA

Appearances:

For the appellants	:	Mr M Eiujen
Instructed by	:	Cheadle Thompson and Haysom
For the respondent	:	Mr HP West
Instructed by	:	Lockette Attorneys