IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

CASE NO: JS1284/01

In the matter between

NUMSA obo KETLHOILWE & 44 OTHERS **Applicant**

And

ABANCEDISI LABOUR BROKERS **Respondent**

Molahlehi J

Introduction

[1] The applicant, union representing its members seeks an order directing the respondent to compensate each one of them in the amount equivalent to 24 (twenty four) months remuneration. The claim is based on the statement of legal issues set out in the amended statement of case as follows:

"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 their union.

22 Alternatively the dismissal, ostensibly predicated on the respondent operational requirements and/or the operational requirements of the respondent 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.

23 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."

[2] The respondent has opposed the claim and raised a point *in limine,* regarding the existence of dismissal. The respondent has also

applied for condonation for the late filing of its response to the amended statement of claim of the applicant. Regard being had to the explanation tendered; I see no reason why the late filing of the respondent response should not be condoned.

Background facts

[3] The respondent, Abancedisi Labour Services CC is a close corporation incorporated in terms of the South African law and carries on a business of temporary employment services as envisaged in section 198 of the Labour Relations Act 66 of 1995 (the LRA).

[4] It is common cause that the second to further applicants, hereinafter referred to as "the employees" were employed by a company known as Kitsanker. At some point Kitsanker which is a company involved in the manufacturing of mining equipment relocated its plant from Litchtenburg to Rustenburg. It is also common cause that Kitsanker took a decision to outsource its production staff to a labour broker. In this respect it would appear

that Kitsanker attempted to involve the union in the consultation process regarding the retrenchment of the employees.

[5] The union was opposed to the outsourcing of the production staff to a labour broker and accordingly advised its members not sign the agreement with the labour broker. However, despite this advice the employees opted for retrenchment packages and signed agreements with the respondent, being the labour broker after Kitsanker completed its retrenchment process.

[6] The employees were subsequent to the conclusion of the contract of employment with the respondent placed at Kitsanker by the respondent.

[7] The respondent was managed by Mr Van der Mescht, who is alleged to have been the former employee of Kitsanker according to the applicants. Except for the change in the pay slips of the employees the terms and conditions of employment remained the same.

[8] Another development following the placement of the employees with Kitsanker is that Mr Koos Mpopo (Mpopo), a former shops steward and member of the union was appointed as a supervisor.

Thereafter tension arose between Mpopo and the employees because of his alleged abusive conduct. According to the employees several complaints were made about the attitude of Mpopo but nothing was done about them. It was as a result of this that the employees embarked on an industrial action on 20th June 2001 and demanded that Mpopo be dismissed.

[9] An investigation was conducted regarding the complaint against Mpopo and a decision taken that he should be disciplined. Instead of facing the disciplinary hearing Mpopo opted to resign. It would appear that after the resignation of Mpopo, the employees abandoned their industrial action and returned to work.

[10] It is apparent that as a result of the industrial action Kitsanker sought to introduce a code of conduct aimed at regulating the future conduct of the employees in relation to industrial action. In this regard Kitsanker presented the proposal to introduce the code of conduct to the representatives of the employees. The representatives of the employees refused to endorse the draft code of conduct and so did most of the employees. The employees refused to sign the code of conduct resulting in Kitsanker refusing

them access to the workplace. It was only those employees who signed the code of conduct who were allowed back at the work place. Those who did not sign the code of conduct were told on the 6th July 2001 that they would not be allowed into the workplace. The code of conduct which Kitsanker required the employees to sign was prefaced as follows:

"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 practices that will be acceptable at Kitsanker and is applicable to labour employed by Abancedisi Labour Brokers and the Kitsanker management.

[11]It is further stated in the same document 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 of the company. The parties will work towards establishing a long term relationship that will benefit all stakeholders".

[12]The case of the employees is that they were called to a meeting on the 5th July 2001 where they were informed that they would not be allowed to enter the workplace unless they signed the code of conduct. This meeting was according to them attended by Mr van der Mescht (van der Mescht) and Mr Nel (Nel) of Kitsanker. The following day, the 6th July 2001 only those employees who had signed the code of conduct were allowed to enter the workplace.

[13]On the 10th July 2001, Mr Choka (Choka), the first witness of the applicant contacted the respondent about the dismissal of the employees. At that stage Choka was the local organiser of the union. He confirmed the contents of the telephone conversation in the letter dated the 11th July 2001. The relevant parts of the letter read as follows:

"We confirm our telephonic conversation which took place on 10 July 2001 on the above matter.

"We record your position as follows:

1. *You are a labour broker at Kitsanker whereby you supply Kitsanker with labourers.*

2. *Kitsanker has terminated the contract some of your employees working at Kitsanker because the employees were involved illegal industrial action.*

3. The employees were employed on a limited duration contract as per the Metal Industry Main Agreement.

4. *You tried to persuade the Kitsanker management and Mr Nel in particular, not to terminate these employees contract and or to consider taking them back, unfortunately you failed.*

5 The employees are employed on a permanent basis as is with yourself and their contract of employment is terminated with Kitsanker not yourself."

[14]The respondent having failed to respond to the above letter, the applicants referred an unfair dismissal dispute to the bargaining council for conciliation. At the conciliation meeting which had been scheduled by the bargaining council the parties agreed to extend the life of the conciliation proceedings and arranged to have further bilateral discussions about the matter.

[15]Further to that agreement the parties met in Rustenburg at Orion Hotel. Choka testified during evidence in chief that at that meeting,

van der Merscht insisted that the employees were not dismissed by the respondent and that they are still under its payroll but he could not indicate whether those workers will be paid or not.

[16] During cross examination Choka conceded that as from 5th February 2001 the employees agreed through the shop stewards that they would be starting employment with the labour broker. He further conceded that as of that date the employment relationship was between the third respondent as a labour broker and the employees in terms of section 198 of the Labour Relations Act 66 of 1995 (the LRA).

Arguments and submissions

[17] Mr Orr for the applicant argued that the moment the employees were removed from Kitsanker a dismissal had occurred. In relation to the issue of the labour broker placing the employees at Kitsanker, Mr Orr strangely argued that the issue goes to the mitigation of damages. The real issue in determining, whether there was a dismissal or not has according to Mr Orr to be determined on the basis of the contract between the respondent and the individual applicants in this matter. In this respect Mr Orr

relied on paragraph 2.1 of the employment contract between the individual applicants and the respondent which reads as follows:

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

Paragraph 2 of schedule A to the contract of employment reads as follows:

"The candidate will commence his assignment on 5 February 2001 and the assignment will be until the client no longer requires the services of the candidate for whatever reason."

[18] Based on the above the applicants contended that the respondent had delegated the power to terminate the employment contract to Kitsanker and that termination of the employees happened on that basis.

[19] It was contended on behalf of the applicant that the interpretation of the clauses of the contract referred to above and the concessions made by van der Metsch during cross examination confirmed the contention that the respondent had delegated its power to dismiss

to Kitsanker. Those concessions are, in my view, not determinative of whether or not a dismissal occurred. I agree with counsel for the respondent that the issue before this Court should be determined by reading the contract of employment in its entirely.

[20]The essence of the applicants case is that their employment was terminated on the completion of the assignment at Kitsanker. This argument is unsustainable because in this instance the task at Kitsanker was still to be completed when they were prohibited from working because they refused to sign the code of conduct. They had been prevented from entering the workplace not because they had completed the assignment at Kitsanker but because they had refused to sign the code of conduct. It is apparent from the reading of the contract that envisaged various other assignments which the respondent was to secure in the future were envisaged. In this respect clause 1.2 of the contract reads as follows:

"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 to the company by its clients. The duration of those

contracts and upon the company's assessments of the employer's suitability to carry out the available assessments. There is accordingly no guarantee of work been given to the employee, but it is obviously in the interest of the company to ensure the employer is given as such appropriate work and their employees are able to reasonably perform."

[21] The above paragraph indicates that the parties envisaged an ongoing relationship beyond the assignment at Kitsanker. The assignment was accordingly not limited to Kitsanker assignments. This is particularly made clear by clause 1.3 of the contract of employment which states as follows:

"If the Kitsanker assignment comes to an end, there is another suitable assignment which becomes available. The company will furnish to the employee an assessment agreement, substantially in the form of schedule A to this agreement. So the parties state clearly that when the Kitsanker assignment comes to an end, then the new schedule A and the new assignment becomes available in the new schedule A setting out the terms of that assignment will be completed."

[22] Clause 1.3 goes further to spell out what schedule A is, in the following terms:

"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 in which the employee will be placed, as well as the grade and rate of pay per hour the employee will receive for work done."

Analysis

[23]It is trite that where the dismissal of an employee is placed in issue, as is the case in the present instance, the duty in terms of section 192 of LRA is on the employee to show that the dismissal has occurred.

[24]In the present instance it is important to note firstly that whilst there was some suggestion that the labour broking arrangement between the respondent and Kitsanker was a sham in that except for the change in indication in the pay slips of the employees after the retrenchment by Kitsanker nothing changed, this line of argument was pursued any further neither was not sufficient evidence adduced in this respect.

[25]The applicant does not dispute that the employment relationship was between the respondent and its members. It also does not dispute that the relationship between the respondent and Kitsanker

is that of a provider and receiver of temporary employment services. Section 198 (1), (2) and (3) of the LRA reads as follows:

"(1) in this section, 'temporary employment services' means any person who, for reward, procures for or provides to a client other persons –

(a) who render services to, or perform work for, the client; and

(b) who are remunerated by the temporary employment service.

(2) for the purposes of this Act, 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.

(3) despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person."

[26] The applicants accept that its members were employed by the respondent and were assigned to provide employment services to Kitsanker. However, the applicants contend that the respondent had delegated its power to dismiss its employees to Kintsanker and that the dismissal of its members occurred as result of the exercise of that power. The applicants based its contention on its

interpretation of the contract of employment of the employees read with schedule A attached thereto, including the concessions made by van der Mestch during his cross examination. The applicants relies mainly on the provisions of paragraph 2 of schedule A to the contract of employment which provides that the assignment would be until the client, being Kitsaker 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.

[28]I also do not agree with the interpretation given to clause 4.4 of the contract by the applicants. The applicants interpret that clause to be saying that termination of the assignment by Kitsanker leads

to automatic termination of the employment contract between its members and the respondent. The applicants interpretation of the automatic termination of the contract is derived mainly from the reading of the last part of clause 4.4. Clause 4.4 states that the applicants would be entitled to terminate the contract in the event the client being Kitsanker, no longer wants the employee for whatever reason. It seems the applicants argument is based largely on what is stated in that part of that clause which states: "*for example, when a client requires the employee to be removed from the site.*" I am unable to read anything in this clause that says removal from the site by Kitsanker means automatic termination of the employment contract of an employee with the respondent. The proper reading of this clause, in my view is that depending on the reason for the removal from the assignment, the respondent would be entitled to also terminate the employment contract.

[29]The above analysis is also in line with the understanding which the first witness of the applicant, Choka had. In his confirmation of the discussions the parties had on 10 July 2001, he does not dispute that the respondent was a labour broker and had assigned

its employees at Kitsanker. He does not dispute that van der Mescht informed him that he persuaded Kitsanker management not to terminate the assignment of the employees who refused to sign the code of conduct. There is also no indication anywhere in his confirmation of what was discussed that the refusal by Kitsanker to allow the employees back at the workplace amounted to an automatic dismissal by the respondent.

[30] Choka conceded during cross examination that the employees were still on the pay roll of the respondent even after Kitsanker refused to allow them back at the workplace. He did not seem to have a problem when informed that the respondent did not dismiss the employee. His problem it would appear was that the respondent did not guarantee payment of the salaries of the employees.

[31] In the light of the above analysis, I am of the view that the applicant has failed to discharge its duty of showing that the employees were dismissed by the respondent. Therefore the case of the applicant stands to fail.

[32]The above conclusion accordingly means that there is no need to deal with the allegation of automatically unfair dismissal or alternatively the alleged unfair dismissal due to operational reasons. It is however interesting to note that the case of the applicant in as far as the alleged automatic unfair dismissal is concerned, is not that they were dismissed for requesting to consult with their union but that they were refused the opportunity to consult with the union regarding the code of conduct.

[33]I see no reason in the circumstances of this case why in law and fairness costs should not follow the results.

[34] In the premises the applicants claim on behalf of its members is dismissed with costs.

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Molahlehi J

Date of judgment: 25th March 2010

Appearances

For the applicants: Adv R.C. Orr

Instructed by: Cheadle Thompson & Haysom Inc

For the respondent: Adv R.G.L. Stelzner

Instructed by: Van Dyk & Co