THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 857/12
Reportable

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **First Appellant**

A KETLHOILWE AND OTHERS (LISTED IN ANNEXURE "A") **Second and Further Appellants**

and

ABANCEDISI LABOUR SERVICES **Respondent**

Neutral citation: *NUMSA v Abancedisi Labour Services* (857/12) [2013] ZASCA 143 (30 September 2013)

Coram: Maya, Malan, Shongwe, Pillay and Saldulker JJA

Heard: **12 September 2013**

Delivered: **30 September 2013**

Summary: **Labour Relations Act 66 of 1995 – temporary employment service agreement under s 198(2) – employment contract between labour broker and its client terminable when client no longer required the services of labour broker's employees for whatever reason – employees locked out from client's premises for refusing to sign code of conduct – labour broker's failure to reallocate work to employees and pay their wages thereafter tantamount to repudiation and a breach of their employment contract entitling them to cancel it – employees unfairly dismissed in terms of s 186(1)(a) read with s 188(1) of the Act – compensation of 12 months' remuneration calculated at their remuneration rate at date of dismissal ordered.**

ORDER

On appeal from: Labour Appeal Court, Johannesburg (Ndlovu, Tlaletsi and Landman JJA sitting as court of appeal):

1 The appeal succeeds with costs.

2 The order of the Labour Appeal Court is set aside and replaced with the following:

'1 The appeal succeeds with costs.

2 The order of the Labour Court is set aside and replaced with the following:

"(a) The second and further applicants' dismissal is unfair in terms of s 188(1) of the Labour Relations Act 66 of 1995.

(b) The respondent is ordered to pay the second and further applicants 12 months' compensation calculated at their rate of remuneration on the date of dismissal.

(c) The respondent is ordered to pay the costs of the application.'"

JUDGMENT

MAYA JA (MALAN, SHONGWE, PILLAY and SALDULKER JJA concurring):

[1] This matter, which has been pending for over a decade,[1] starkly illustrates how the provisions of s 198 of the Labour Relations Act 66 of 1995 (the Act)[2] may

[1] The appellants launched the court proceedings on 28 August 2001 following an unsuccessful conciliation process which commenced in July 2001.

[2] Section 198 provides:

'(1) In this section, "temporary employment service" 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 purposes of this Act, a person whose services have been procured for or provided to a client by a temporary

operate as a stratagem to avoid an employer's obligations and circumvent the protections afforded an employee under the labour legislation against unfair dismissal.

[2] The crisp issue on appeal is whether the second and further appellants (the employees)[3] were unfairly dismissed by the respondent, a temporary employment service provider or labour broker (Abancedisi), when they were (a) excluded from the premises of its client to which they were assigned and replaced with new workers; (b) thereafter not reassigned work elsewhere; and (c) not paid wages thereafter. The appeal is unopposed and Abancedisi has filed a notice to abide this court's decision.

[3] The background facts are mostly undisputed. The employees are members of the first appellant (NUMSA), a registered trade union. They are also former employees of Kitsanker (Pty) Ltd (Kitsanker), a division of Reinforcing Steel Holdings (Pty) Ltd (RSH). Kitsanker manufactures mining equipment. Towards the end of the second millennium, RSH resolved to relocate Kitsanker's operations from Lichtenburg to Rustenburg. It would further manage its weekly paid production staff, constituted by the employees, through a labour broker. Thus, in 1999, Abancedisi was formed specifically for this purpose. Its members were Mr Etienne van der Mescht, a former Human Resources Manager at one of RHS's divisions, Cape Town Iron & Steel (Pty) Ltd in Cape Town, and his wife Mrs Philippina van der Mescht.

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employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.'

[3]Some of the individual appellants (Messrs Petrus Moralo, Hedbid Mmelesi and Molefe Mosimanegape Wilson) are not listed in the proceedings although they have deposed to affidavits, and others who were initially listed (Messrs Constantine Mafethe and Sello Ben Mmitsi) withdrew at trial stage. Those currently involved in the proceedings are 46 in number and their names are recorded in Annexure "A" of this judgment.

[4] In execution of this process, during January 2001, RSH and Abancedisi concluded a contract in terms of which Abancedisi would provide its employees to Kitsanker to work for the latter. During February 2001, the employees, against NUMSA's advice, were voluntarily retrenched by Kitsanker and immediately re-employed by Abancedisi. The effect of this arrangement was that the employees were each required to sign a 'Limited Duration Contract of Assignment' (the employment contract) which rendered them employees of Abancedisi and placed their services at Kitsanker's disposal. Beyond this, nothing else changed. The location, terms and conditions of their employment remained precisely as before.

[5] During July 2001, the employees embarked upon a two-hour work stoppage at Kitsanker's premises. They complained about certain management practices and demanded the dismissal of their supervisor, Mr Koos Mpopo, for his alleged abuse of workers at the workplace. Consequently, Kitsanker required the employees to sign a code of conduct which was designed mainly to regulate industrial action on its premises and to avoid the responsibilities and effects of such action. The employees requested a week within which to consult NUMSA about the legal consequences of signing the document. However, Kitsanker's management gave them until the following morning to comply.

[6] On 6 July 2001, each employee was required to sign the code of conduct before entering the work premises. Those who refused to do so were refused entry. On 9 July 2001, the employees who refused to sign the code of conduct were refused entry again and were replaced with new workers. (These new workers were subsequently employed by Abancedisi.) Nevertheless, they remained at Kitsanker's gates despite this development and left the premises to report to NUMSA's offices only when Kitsanker's management threatened to have them removed by the police.

[7] Mr van der Mescht's entreaties to Kitsanker to take the excluded employees back, and to the employees to sign the code of conduct so that they could return to work, was met with intransigence from both sides. In subsequent communications with Mr Onismas Tshoga, the local union organiser, Mr van der Mescht confirmed that the employees who refused to sign the code of conduct would neither be permitted back to Kitsanker nor paid any wages since they were only paid for work performed. But his stance, which he maintained throughout the litigation, was that the employees were nevertheless not dismissed by Abancedisi as they remained on its payroll.

[8] On 23 July 2001, NUMSA referred a dispute to the Bargaining Council in terms of s 191 of the Act alleging an unfair dismissal of the employees by Abancedisi. On 6 August 2001, a meeting was held between the representatives of the appellants and Abancedisi. There, Mr van der Mescht reiterated that the employees' employment contracts with Abancedisi remained extant although they did not earn wages as they were not actually working. According to him, the employees had three options: to sign the code of conduct and return to Kitsanker; to be placed elsewhere if possible; or, if that failed, face retrenchment.

[9] Conciliation conducted by the bargaining council on 31 August 2001 failed. Thereafter Abancedisi, dismayingly, did not communicate with the employees again. On 28 November 2001 the employees took the matter to the Labour Court (the LC). Abancedisi opposed the proceedings. It raised only a point *in limine* that the referral of the dispute was premature because it had not dismissed the employees as they remained on its payroll. The matter went on trial and the evidence set out above was adduced by the respective parties. Afterwards, the LC

(Molahlehi J) found that a holistic consideration of the employment contract, particularly clauses 1.2 and 1.3 thereof, showed that it ‘envisaged the continuation of the relationship between [the employees and Abancedisi] even after the conclusion of the assignment at Kitsanker’. And in terms of clause 1.3 a new assignment, if secured, ‘would be regulated by terms very similar to those in schedule “A”’ of the contracts.[4] The LC then concluded that the appellants had failed to prove that Abancedisi dismissed the employees and dismissed their claim with costs.

[10] The employees’ appeal to the Labour Appeal Court (the LAC) succeeded only to the extent that the costs order awarded against them was found unfair and reversed. The LAC (Ndlovu, Tlaletsi JJA and Landman AJA concurring) reckoned that the employees ‘were the principal contributors to their expulsion from Kitsanker before the completion of their assignment’ as they refused to sign a reasonable and fair code of conduct, but that their employment relationship with Abancedisi nonetheless continued as the LC had found. The LAC accepted Abancedisi’s argument that the proceedings were premature and added that finding alternative employment or engaging a retrenchment process for the large contingent of workers ‘would not have been an overnight exercise’. In the LAC’s view, the employees’ situation amounted to an ‘indefinite suspension’. Thus, they could have contested the ‘suspension’ at the bargaining council as an unfair labour practice or resign and sue for constructive dismissal, options which interestingly, the court itself doubted would yield success. The appeal was then dismissed with no order as to costs.

[11] The nub of the appellants’ argument before us was that the evidence cumulatively established that the employees were dismissed by Abancedisi by the

[4] Schedule “A” set out the particulars of Abancedisi’s client to which an employee was assigned, the duration of the assignment, the work hours and remuneration.

time they referred their dispute to the bargaining council on 23 July 2001. It was argued further that by accepting the employer's mere say so that it had not dismissed the employees, rather than looking at the substance of the employment relationship between the parties, the Labour Courts permitted Abancedisi to escape the consequences of the unfair dismissal provisions of the Act.

[12] The starting point in the enquiry (whether or not the employees were unfairly dismissed) is a consideration of the parties' employment contract as it underlies their legal rights and obligations in the employment relationship.[5] The provisions of particular relevance here read:

'…

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 to the company by its clients, the duration of those contracts and upon the company's assessment of the employee's suitability to carry out the available assignments. There is accordingly no guarantee of work being given to the employee …

1.3 In the event that a suitable assignment becomes available, [Abancedisi] 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.

…

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.

2.2 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.'

[5] *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC) para 15; *SABroadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC); *Niselow v Liberty Life Insurance Association of South Africa Ltd* (1998) 19 ILJ 752 (LAC) at 754C.

Clause 2 of schedule "A" provides that the assignment would commence on 5 February 2001 and endure until Kitsanker no longer required the services of the employees for whatever reason.

[13] Central to both Labour Courts' conclusion was their common understanding of the 'assignment' referred to in clauses 2.1 and 2 of the employment contract and

schedule "A", respectively. According to the Courts, the term referred to the overall assignment between Abancedisi and Kitsanker which continued beyond the exclusion of the employees. But this interpretation has insuperable difficulties. First, it overlooks the agreed fact that the employment contract was conceived specifically for the Kitsanker project and made clear, in clause 2.2, that Abancedisi guaranteed no further work beyond that assignment. Indeed, Abancedisi made no effort whatsoever, and manifested an attitude that it had no obligation, to secure alternative work for the employees after their expulsion from Kitsanker. This is patent from Mr van der Mescht's cross-examination which proceeded as follows:

'[Y]ou never made an offer to them … you never wrote to the union and said … I know you guys have referred a dispute and so on, but you know … I can get people jobs at the following places, from the following people…

No, I did not specifically do that…

Did you go and explore if there were other vacancies? …

No … but the workers knew that we had premises in other areas … and that if someone said he would like to investigate the option of going to JE, I would explore that.'

[14] Yet more compelling is the plain language of the employment contract which, in clause 2.1, expressly refers to the 'last assignment *for which the employee is employed in accordance with schedule "A"*'. And schedule "A" in turn specifically refers to '*his* assignment' that will terminate when Kitsanker no longer requires his services for whatever reason. Clearly, that assignment ended when Kitsanker excluded the employees from its premises and filled their positions (ironically with new workers who would join Abancedisi's fold). This is how Mr van der Mescht himself explained the import of these contractual provisions when pressed under cross-examination: that the 'contract came to an end the moment Kitsanker said [to the employees] we do not want you anymore'.

[15] A refusal to allow an employee to do the work he was engaged to do may constitute a wrongful repudiation and a fundamental breach of the employment contract which vests the employee with an election to stand by the contract or to terminate it.[6] Here, Abancedisi did not just leave the employees to languish in idleness after their exclusion from Kitsanker. It also did not pay them any wages. Thereafter, nothing even slightly resembling the characteristics of an employment relationship remained between the parties beyond the illusory retention of the employees on Abancedisi's payroll upon which Mr van der Mescht harped. Whether or not Abancedisi intended to repudiate the employment contract, the effect of its conduct constituted a material breach of the employment contract that entitled the employees to cancel it.[7] To that end, the employees took a step that is sanctioned by the law and referred a dispute to the bargaining council.

[16] The LAC made a related finding that this action; ie the employees' referral, was made 'too soon' and was 'premature'. With respect, I do not agree. Section 191(1)(*b*) of LRA expressly requires this to be done in writing within 30 days of the date of the dismissal. Evidently, the employees did not blindly rush to the bargaining council. They were dismissed between 6 and 9 July and approached the bargaining council on 23 July 2001, two weeks already into the four week period envisaged by the legislature. This was after their union representative, Mr Tshoga, had communicated with Mr van der Mescht and ascertained Abancedisi's position. The LAC's view that their situation was akin to an 'indefinite suspension', with which I disagree as it is not supported by the evidence, and the courses the LAC considered should have been followed by the employees are, with respect, irrelevant.

[6] *Myers v Abramson* 1952 (3) SA 121 (C) at 123E-G; *Stewart Wrightson (Pty) Ltd v Thorpe* 1974 (4) SA 67 (D) at 78 E-79C; *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 951G-952A; *Info DB Computers v Newby & another* (1996) 17 ILJ 37 (W) at 35I-36F; *Everson v Moral Regeneration Movement* (2008) 29 ILJ 2941 (LC) para 12.

[7] *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 25H-26D.

[17] In deciding whether there was an unfair dismissal justifying the order sought by the employees, reference must first be had to s 186(1)(*a*) of the Act in terms of which the term dismissal means that ‘ an employer has terminated a contract of employment with or without notice’: ie the employer has engaged in an act which brings the contract of employment to an end in a manner recognised as valid by the law.[8] Section 192(2) of the Act places an onus on an employer, where the existence of a dismissal is established, to prove that it is fair. In terms of s 188(1), a dismissal that is not automatically unfair as the present one, is unfair if the employer fails to prove that the reason for dismissal is a fair reason; that it is related to the employee’s conduct or capacity; or that it is based on the employers’ operational requirements; and that it was effected in accordance with a fair procedure. Abancedisi, which, in addition to the conduct set out above, did not even bother to start retrenchment procedures (and this attitude in my view is consistent with an attitude that the employees were already dismissed) neither advanced a defence in its pleadings nor adduced any evidence at the trial to justify the dismissals. It dismally failed to discharge its onus.

[18] It is not necessary in this matter to pronounce on the other interesting debates that it potentially raises, such as whether an employment contract that contains an automatic termination clause as the present one conflicts with the employees’ right not to be unfairly dismissed under the Act and the Constitution and offends public policy. Suffice it to reiterate that it is well for labour brokers to bear in mind that the intention of the Act – which governs labour relations with the object, inter alia, to give effect to the employee rights contained in s 23 of the Constitution – is that employment may only be terminated upon the employee’s misconduct, incapacity or operational requirements and these reasons must meet the requirements of substantive and procedural fairness set out in the Act.

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[8] *National Union of Leather Workers v Barnard and Perry NNO* 2001 (4) SA 1261 (LAC) para 23.

[19] The employees do not seek reinstatement and asked only for 12 months' compensation. Due regard had to all the circumstances of this matter, they are indeed entitled to a substantial amount of compensation. The prayer falls squarely within the parameters of s 194 of the Act[9] and I see no reason why it should not be awarded.

[20] Accordingly, the following order is made:

1 The appeal succeeds with costs.

2 The order of the Labour Appeal Court is set aside and replaced with the following:

'1 The appeal succeeds with costs.

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"(a) The second and further applicants' dismissal is unfair in terms of s 188(1) of the Labour Relations Act 66 of 1995.

(b) The respondent is ordered to pay the second and further applicants 12 months' compensation calculated at their rate of remuneration on the date of dismissal.

(c) The respondent is ordered to pay the costs of the application.'"

MML Maya
Judge of Appeal

[9]In terms of s 194 of the Act, the compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employers' operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

APPEARANCES

For Appellant:	TMG Euijen
	Instructed by:
	Cheadle Thompson & Haysom Inc.; Johannesburg
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