REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Reportable

Case no: JR 1237/13

In the matter between:

KELLY INDUSTRIAL LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER ELRIDGE EDWARDS	**Second Respondent**
JAN SPOGTER	**Third Respondent**
BOOI SPOGTER	**Fourth Respondent**
RANDALL NEL	**Fifth Respondent**
NICOLAS VAN WYK	**Sixth Respondent**
JOHNNY VORSTER	**Seventh Respondent**
JACQUES JORS	**Eighth Respondent**
ISAK WILBACH	**Nineth Respondent**
RIAAN WELBACH	**Tenth Respondent**
WILLIAM KOOPMAN	**Eleventh Respondent**
GERALD SAULSE	**Twelveth Respondent**

Heard:17 December 2014

Delivered:21 January 2015

Summary: (Review application- termination of placement of employees of labour broker -whether constituted a dismissal- commissioner's finding correct)

JUDGMENT

VENTER, AJ

Introduction

[1] This matter is a good example of the precarious and vulnerable position of employees employed by labour brokers on temporary assignments or contracts and highlights the reason why this form of atypical employment is to be regulated and such employees are to be protected by the law, dispute resolution tribunals such as the first respondent and bargaining councils and the courts.

[2] The matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as commissioner of the first respondent. The application has been brought in terms of section 145 of the Labour Relations Act [1]("the LRA").

Background facts

[3] The applicant conducts business as a temporary employment service ("TES") placing persons on a so-called temporary basis at various sites of its clients.

[4] The common cause facts are that the applicant employed the third to twelfth respondents ("the respondents") on 1 June 2012 in terms of limited duration contracts ("the Contracts"). In terms of the Contracts, the respondents were

[1] Act No. 66 of 1995.

assigned in the capacity of general workers and performed these services at the Eskom Gamma-Kappa Transmission Line for KEC International Limited.

[5] On 25 March 2013, the respondents were informed in writing that their assignments at the Eskom Gamma-Kappa Transmission Line project would end and their last day at work would be the next day, 26 March 2013. The applicant paid the respondents two (2) weeks' remuneration in *lieu* of notice and accrued leave and provided the respondents with their UI-19 forms for purposes of claiming from the Unemployment Insurance Fund ("UIF").

[6] On 24 April 2013, the respondents referred an alleged unfair dismissal dispute ("the Dispute") to the first respondent claiming that they had been unfairly dismissed by the applicant as the project on which they had been employed had not come to an end.

[7] The Dispute came before the second respondent for arbitration. The applicant placed the dismissal of the respondents in dispute and the respondents thus bore the onus to prove that they had been dismissed by the applicant.

[8] The third and eighth respondents led evidence on behalf of the respondents. Schalk Andries Van Wyk ("Van Wyk"), an official from an Employers' Organisation, CTL Management Forum, led evidence on behalf of the applicant on the terms of the Contracts concluded between the applicant and the respondents and email correspondence between representatives of the applicant and its client, KEC International Limited.

[9] The respondents all concluded identical contracts and their circumstances were all identical to those of the third and eighth respondents who testified on their behalf.

[10] I feel it necessary to point out at this stage that Van Wyk had no personal knowledge of the facts giving rise to the conclusion and termination of the Contracts, was not involved at all in the negotiations leading up to the conclusion of the Contracts or the discussions regarding the termination thereof and was not the author or recipient of any of the emails exchanged between the representatives of the applicant and its client regarding the reason for the termination of the Contracts.

[11] The fact that Van Wyk lacked any personal knowledge of the facts of the matter was conceded by Van Wyk[2] and Van Wyk was aware of the risk that his evidence was hearsay and consisted largely of legal argument.[3] Despite being cautioned in this regard by the first respondent, the applicant failed to lead any further evidence by witnesses who had personal knowledge of the facts surrounding the conclusion and termination of the Contracts or the email exchange between the applicant's representatives and its client. Nor did the applicant address the first respondent as to the admission of the hearsay evidence of Van Wyk in terms of section 3 of the Law of Evidence Amendment Act[4].

[12] The second respondent, in a well-reasoned and comprehensive award, found that the respondents had discharged the onus of proving that they had been dismissed and concluded that the dismissals were both substantively and procedurally unfair for lack of a valid reason and fair procedure.

Grounds for review

[13] The applicant's grounds of review in the founding affidavit are simply that the second respondent committed gross misconduct in concluding that the respondents had been dismissed in that he ignored the fact that the applicant is a TES and that termination of the placement of employees on a temporary basis does not constitute a dismissal.

[14] The supplementary affidavit of the applicant is deposed to by Kenneth Bain ("Bain"), the Group Manager IR and HR Policy Development of the applicant. The majority of the facts and allegations relating to the facts surrounding the conclusion and termination of the Contracts contained in the supplementary affidavit were not placed into evidence before the second respondent.[5]

[15] The applicant submits in the supplementary affidavit that the agency agreements and/or the assignment agreements were *sui generis* employment

[2] Pages 168 - 169 of the record.

[3] Pages 179 - 180 of the record.

[4] Act 45 of 1988.

[5] Paragraphs 6, 7, 8, 9, 10, 11, 25, 28 and 31 of the supplementary affidavit contained at pages 131 - 144 of the pleadings.

contracts. The argument in the supplementary affidavit goes further and states that if the assignment agreement is considered a contact of employment its duration is defined by the project and expiry on completion of the project could not amount to a dismissal. If the agency agreement is regarded as a contract of employment it would establish a "*unique employment relationship*" which would be lawful where the principle of no work no pay would apply.

[16] It is important to mention at this juncture that the applicant draws a distinction between the Contracts, which it calls assignment agreements and an agency agreement. The so called agency agreement was not part of the record of the arbitration proceedings and there was no evidence that the respondents had in fact concluded any agency agreements with the applicant. I deal with this distinction and argument of the applicant further below.

[17] The applicant's grounds of review in the supplementary affidavit are that the second respondent failed to apply his mind to the facts before him and his award is one which a reasonable commissioner would not have arrived at.

The relevant test for review

[18] The question of whether or not the respondents were dismissed is a jurisdictional fact. The respondents were required to discharge the onus of establishing, on a balance of probabilities, that they were dismissed in order for the first respondent to have the necessary jurisdiction to entertain the Dispute.

[19] The Labour Appeal Court ("the LAC") in *Solid Doors (Pty) Ltd v Commissioner Theron and Others*[6] held that the question of whether an employee was dismissed is to be determined objectively. The LAC held that:

> 'Having established what the requirements are for a constructive dismissal, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that - even on review - must be established objectively. That is so because if there was no constructive dismissal- the CCMA would not

[6] (2004) 25 *ILJ* 2337 (LAC) at paras 29.

have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one – even on review- is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside'.

[20] The applicable test for review of an award of a commissioner of the CCMA where the dismissal was in dispute was set out by the LAC in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*[7] as follows:

> 'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.
>
> The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs No & others* (1994) 15 *ILJ* 801 (LAC) at 804 C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The Court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The Court further held that any conclusion to which the Industrial Court arrived on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually

[7] (2008) 29 *ILJ* 2218 (LAC) at paras 39 - 41.

has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In *Benicon's* case the Court said at 804C-D:

'In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless,so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit.'

In my view the same approach is applicable to the CCMA.

The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary'

[21] In *Hickman v Tsatsimpe NO and Others*[8] this Court held as follows:

'Section 145(2)(a)(ii) of the Labour Relations Act 66 of 1995 (the LRA) provides for the review of arbitration proceedings under the auspices of the Commission for Conciliation, Mediation and Arbitration (the commission/second respondent) on the grounds that a commissioner 'committed a gross irregularity in the conduct of the arbitration proceedings'.

The grounds of review as set out above can easily be compacted into the ground that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings.

However, the standard of review as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* which poses the question: 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach?' is not applicable in the context of an enquiry into whether constructive dismissal happened or not'.

[22] This test of review has been followed in numerous subsequent cases[9].

[8] (2012) 33 *ILJ* 1179 (LC) at paras 4 - 6.

[23] As the second respondent's finding is that the respondents were dismissed, which finding is a jurisdictional fact, the *Sidumo* test of whether the finding of the second respondent was one which no reasonable commissioner could arrive at on the evidence before him is not applicable.

[24] The applicant in setting out its grounds of review in the founding and supplementary affidavits appears to have misconstrued the correct test of review and has argued that the award is not an award a reasonable commissioner would have arrived at on the facts before him. This test is not applicable.

[25] The question I am required to determine is whether the second respondent was right or wrong in concluding as he did. Put differently whether the second respondent correctly found, based on the evidence before him that the respondents were dismissed. In determining this issue I am restricted to only consider the evidence on record that was before the second respondent when he arrived at his finding that the respondents were dismissed.

[26] In *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others*[10] this Court held as follows:

> 'In coming to the conclusion that he did – ie that the employee had been constructively dismissed – the arbitrator was, of course, confined to the evidence that the employee gave. The applicant was well aware of the date of arbitration and it was legally represented; why it chose to simply ignore its opportunity to be heard, boggles the mind. Nevertheless, this court now has to consider whether the arbitrator correctly found, based on the evidence before him, that the employee had been constructively dismissed and that it was unfair'.

[27] In considering the question of whether or not the respondents were dismissed I will have regard to the evidence that was before the second respondent. I will not consider the reasoning of the second respondent.[11]

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[9] See *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* (2012) 33 *ILJ* 363 (LC), *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others (*2012) 33 *ILJ* 738 (LC), *Trio Glass t/a The Glass Group v Molapo NO & others* (2013) 34 *ILJ* 2662 (LC), *Gubevu Security Group (Pty) Ltd v Ruggiero NO & others* (2012) 33 *ILJ* 1171 (LC) and Zeuna - Stärker Bop (Pty) Ltd v National Union of Metalworkers of SA (1999) 20 *ILJ* 108 (LAC).

[10] (2013) 34 *ILJ* 1272 (LC) at para 22.

The evidence before the second respondent and the applicant's argument

[28] The evidence of the respondents led by the third and eighth respondents was that they were employed in terms of the Contracts for the duration of the Eskom Gamma-Kappa Transmission Line Project and not for the duration of a particular assignment and had only heard of the term "*assignment*" at the arbitration proceedings.[12]

[29] Van Wyk's evidence consisted largely of hearsay and was in fact nothing more than legal argument. As such Van Wyk's evidence was of little if of no probative value to the second respondent. Due to the fact that the applicant failed to lead direct and relevant evidence by a person with personal knowledge of the facts and only relied on unreliable hearsay evidence, the respondents' version was unchallenged.

[30] The applicant's argument as presented by Van Wyk was that the assignments for which the respondents were placed at its client came to an end and the assignments thus terminated in terms of clause 3.3.1 of the Contract. Van Wyk stated that the respondents' assignments were terminated by means of a speedy but fair process.[13]

[31] Van Wyk further argued that the termination by the applicant's client of the particular portion of the project and the termination of the assignments in terms of clause 3.3.1 of the Contracts had no effect on the employment relationship between the applicant and the respondents which employment relationship continued on the agreed basis that the respondents would not

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[11] See also *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane and others* (2014) JOL 31668 (LC) where Snyman AJ held at paragraph 34 as follows: 'As stated above, the issue as to whether the first respondent was dismissed or not is an issue of jurisdiction and, therefore the onus was on the first respondent to prove that he had been dismissed, as the issue of dismissal was placed in dispute by the applicant. I shall have regard to the entire record of evidence, as it stands, including the documentary evidence and determine the issue of the existence of a dismissal de novo. I shall, accordingly, not consider the reasoning of the second respondent in his award, which I actually consider to be entirely inadequate and unacceptable and shall only refer to the same where it is in the interest of a complete and proper determination of this matter. I shall decide the issue of the dismissal of the first respondent for myself'.

[12] Pages 126, 128, 130, 132, 148, 149, 157 and 158 of the record.

[13] Pages 172-173 of the record.

receive any remuneration or benefits and there would be no expectation that they would immediately be placed on another assignment.[14]

[32] At the hearing of the application, Quentin Donaldson of the Employer's Organisation who appeared on behalf of the applicant persisted with this line of argument.

[33] Mr Donaldson argued that the arrangement between the applicant and the respondents is one of an agency agreement in terms of which the applicant agrees to seek temporary placements for potential candidates at their clients. Once the applicant finds a placement the applicant and the potential candidate conclude an assignment agreement which assignment agreement details the specific work the candidate is to perform.

[34] During argument Mr Donaldson agreed that this so called agency agreement was not presented at the arbitration proceedings and was not placed before the second respondent. The reason for this, Mr Donaldson argued, was that clause 1.5 of the Contract describes the agency agreement.

[35] It is unclear whether the so called agency agreement exists separately to the assignment agreements.

[36] Mr Donaldson further argued that the arrangement between the applicant and the potential candidate is essentially a lay off agreement in terms of which the candidates who are not working are not entitled to remuneration pending the placement of that candidate at another client, as the applicant cannot pay the candidates while looking for alternatives for them. Mr Donaldson argued that this is the applicant's business model as the applicant cannot operate if it pays candidates who are not working.

[37] This argument by Donaldson in effect means that the employment relationship of candidates such as the respondents whose assignments are terminated in terms of clauses 3.3.1, 3.3.2 or 3.3.3 of the Contracts is not terminated, but continues to exist in some form or another or is suspended pending the placement by the applicant of the candidates at another client on another project and in terms of another assignment agreement. Furthermore, during

[14] Page 173 of the record.

this period of so called suspended employment where the candidates are not working and while the applicant is attempting to find alternative placements for the candidates, the candidates are not entitled to remuneration and benefits and should not expect that another assignment will be entered into.

[38] Mr Donaldson made the astonishing submissions that if the respondents were not happy with this arrangement they could have cancelled the agency agreement if they did not want to linger without remuneration and benefits while the applicant attempts to find alternative placements. Mr Donaldson argued that the respondents were not forced to agree to this arrangement and in fact benefited from this business model of the applicant as if such business model did not exist, the respondents would not have been employed.

[39] Mr Donaldson's argument was that clauses 1.4 and 1.5 of the Contract survives the termination of the Contract as when the applicant finds alternative placements another assignment agreement is entered into. The argument was further that the project and the assignment are one and the same thing.

[40] As an alternative argument to the one of the relationship being one of agency or lay off, Mr Donaldson argued that there was no dismissal as the Contracts simply automatically terminated on the completion of the assignment for which the Contracts were concluded, the duration of which was determined by the client.

[41] The problem I have with this argument was that this was not the applicant's case at the arbitration. Van Wyk's argument was clear and that was that the termination of the portion of the project by the client, KEC International Limited, had no effect on the employment relationship and the respondents continue to be employees of the applicant unless they resign or leave the services of the applicant.

[42] On the issue of Van Wyk's evidence being hearsay evidence Mr Donaldson argued that Van Wyk's evidence, although hearsay, was largely evidence on the terms of the Contracts and the email exchange between representatives of the applicant and KEC International Limited and as the validity of the emails and Contracts was not challenged this evidence should be accepted. Mr

Donaldson conceded that the admission of Van Wyk's hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act by the second respondent, was not dealt with at the arbitration, however, he argued that the best evidence rule applied in that the applicant could not call the Key Accounts Manager to the arbitration and would not call the Managing Director to give evidence at the arbitration proceedings.

[43] Mr Donaldson's argument misses the point. While the validity of the Contracts may not have been challenged by the respondents, the terms and/or the interpretation thereof were. The respondents' case was that they were employed in terms of the Contracts for the duration of the project and not only for the duration of an assignment. The applicant's version was very different being that the respondents were employed in terms of so called "*agency or lay off*" agreements and that they were then assigned in terms of assignment agreements to provide services to its client for as long as its client needed their services.

[44] The problem with Mr Donaldson's argument is that the terms of the Contracts were in dispute and the applicant failed to lead any relevant direct evidence from a witness with personal knowledge of the negotiations and discussions surrounding the conclusion and termination of the Contracts. It was not enough for the applicant to simply rely on the written Contracts and Van Wyk's hearsay evidence to refute the evidence of the third and eighth respondents.

[45] Hearsay evidence is generally excluded as it is unreliable because the person who has personal knowledge of the facts does not himself tell the court or tribunal what he observed. The truth and accuracy of the allegations of the witness giving the hearsay evidence cannot be tested.

[46] The unreliability of Van Wyk's evidence was glaringly obvious when he was being cross-examined by one of the respondents on whether the applicant had stopped working in the area. Van Wyk's answer was that the applicant had stopped working in the area however, when pressed by one of the

respondents whose son was working for the applicant in the area, Van Wyk was unable to give a direct answer.[15]

[47] Mr Donaldson's argument that the best evidence rule should apply is misplaced. As I understand his argument, he wants this Court to admit Van Wyk's hearsay evidence on the basis that it was the best evidence available as the applicant could not call the Key Accounts Manager and would not call the Managing Director.

[48] This is simply not good enough. There was no evidence before the second respondent that the applicant could not call the person with personal knowledge of the facts surrounding the conclusion and termination of the Contracts to give evidence and that such person whose testimony would be direct, relevant and the best evidence was not available to testify.

[49] Hearsay is no longer regulated by the best evidence rule. Hearsay is regulated by the Law of Evidence Amendment Act which the applicant failed to deal with at all in the arbitration proceedings.

[50] In light of what I have set out above I will place no weight on Van Wyk's evidence as it was tendered to prove material facts and there was no direct relevant evidence before the second respondent to support it.

[51] The applicant attempts to remedy its failure to lead direct relevant evidence at the arbitration proceedings by leading this evidence in its supplementary affidavit in this application. This attempt by the applicant was too late. The applicant took the risk of only leading the evidence of Van Wyk at the arbitration proceedings and must now live with its decision not to call the Key Accounts Manager or Managing Director or any other person with direct personal knowledge of the facts leading up to the conclusion and subsequent termination of the Contracts which could have rebutted the version of the respondents.

Were the respondents dismissed?

[15] Page 186 of the record.

[52] I intend to deal with both arguments of the applicant in support of its submissions that the respondents' employment was not terminated. I will do so despite the fact that the one argument was not before the second respondent and I am required to determine the question of whether there was a dismissal *de novo*.

[53] The question to be determined is whether the second respondent correctly found on the evidence before him that the respondents were dismissed.

[54] Section 186 of the LRA defines a dismissal. Section 186(1)(a) states that:

> 'Dismissal means that -
>
> (a) an employer has terminated employment with or without notice'.

[55] The reliable, relevant and undisputed evidence that was before the second respondent was the unchallenged version of the respondents, the Contracts and the common cause facts.

[56] I have already set out the common cause facts and the respondents' version above and will not repeat same here.

[57] As the exact terms of the Contracts were in dispute, that is whether the respondents were employed for the duration of the project or were merely assigned to perform specific tasks on the project, I will deal with the relevant terms of the Contracts in some detail.

[58] The Contract is on the applicant's letterhead and is headed "Written Particulars of Employment*".* The Contract sets out the terms and conditions of the offer of employment.

[59] Clause 1 of the Contract provides as follows:

> '*1*.<u>THE NATURE OF THE CONTRACT</u>
>
> 1.1 It is agreed, understood and accepted by you that Kelly Industrial is in the business of providing assignees to clients who require the provision of certain skills on a limited term assignment basis ("the assignment").
>
> 1.2 You also agree and understand that your services are to be provided by Kelly Industrial to the client for a period/s decided upon by the client.

1.3 You guarantee that you are competent to carry out the duties and responsibilities of the assignment to the satisfaction of the client and Kelly Industrial.

1.4 You accept that upon termination of the assignment, as provided for in terms of clause 3.3 below and as provided for in terms of clause 3 below, you will not be entitled to remuneration or benefits until another assignment is commenced.

1.5 Kelly Industrial will, upon termination of the assignment, seek an alternative suitable assignment for you with another of Kelly Industrial's clients, upon mutually agreed terms and conditions in terms of another limited duration assignment. You agree that despite Kelly Industrial's undertaking to seek an alternative assignment for you, you have received no undertaking nor has any expectation been created that any other assignment will be entered into with another of Kelly Industrial's clients, upon the same or similar terms and conditions, or otherwise.

1.6 A probation period of four (4) months is applicable during which time Kelly Industrial in conjunction with the Client will ascertain your suitability and competence for the position'.

[60] Clause 3 of the Contract provides that:

'3. <u>COMMENCEMENT, DURATION AND TERMINATION OF EMPLOYMENT</u>

3.1 As it is difficult for the client to determine the duration of the Project with any certainty, your assignement with the client will commence effective I JUNE 2012 and continue until the Project is completed, unless terminated earlier in terms of clause 3.3 below.

3.2 You will be assigned in the capacity of General Worker (Job Title) or in such other capacity of a comparable status as Kelly Industrial may require, having regard to the needs and requirements of the assignment, the client and your ability and capacity to fulfil such requirements, You will perform these services on the ESKOM GAMMA-KAPPA TRANSMISSION

LINE FOR KEC International in Laingsburg in the Western Cape or at such other place as the client or Kelly Industrial may from time to time determine.

3.3 You will be assigned solely for the purpose of rendering services in the above capacity for the duration of your assignment. This assignment will terminate subject to the notice periods in clause 4, upon Kelly Industrial advising you that:

3.3.1 the Project for which the assignee has been assigned has been completed; or

3.3.2 the services of the assignee no longer being required due to early termination of the client's Project; or

3.3.3 the client has terminated its contract with Kelly Industrial; or

3.3.4 you have been dismissed for reasons of misconduct or incapacity following a disciplinary hearing

3.4 Kelly Industrial will advise you in writing upon the occurrence of any of the events referred to in clause 3.3 above.

3.5 It is specifically recorded that there is no expectation that your assignment will be renewed or extended after completion of the Project referred to in clause 3.1 above'.

[61] The Contract in my view contemplates a distinction between the "*assignment*" which is defined as the assignment of "*assignees to clients who require the provision of certain skills on a limited term assignment basis*" and the project, which is not defined in the Contract. Clause 3.1 clearly distinguishes between an assignment and a project. In terms of clause 3.1 the assignment will *'continue until the Project is completed'*.

[62] The Contract is not clear at all as to what the project is. As the term "*project*" is not clearly defined in the Contract it is necessary to consider the words in the Contract to determine what the project was. In my view clause 3.2 of the Contract defines the term "*project*" as the Eskom Gamma-Kappa Transmission Line. From a reading of this clause it is understandable that the respondents thought they were employed by the applicant for the duration of

the project, clause 3.1 clearly states this much. The words Eskom Gamma-Kappa Transmission Line are in caps and bold which in my view reinforces the interpretation that this was the project.

[63] The applicant itself appears to have regarded the Eskom Gamma-Kappa Transmission Line as the project as it calls it a project in the Notices of End of Assignment given to the respondents on 25 March 2013. It states as follows 'We wish to advise that your assignment at the Eskom Gamma-Kappa Transmission line project will be ending in terms of clause 3.3.1 of your Written Particulars of Employment'.[16]

[64] Mr Donaldson conceded at the hearing of the matter that clause 3.2 creates the impression that the respondents were employed on the Eskom Gamma-Kappa Transmission Line project.

[65] The Contract does not stipulate that the respondents were employed for the duration of only a portion of a particular phase of the Project, the so called "*assignment*" the applicant has contended for and further does not provide that the respondents' assignment would only be the mixing of concrete in the Merweville area, another contention of the applicant. In terms of the Contracts the respondents were employed to provide their services as general workers on the project. This is in my view the plain and literal meaning of the words in clause 3.2 of the Contracts. Clause 3.3.1 of the Contract does not refer to an assignment but a project.

[66] It is thus my view that the respondents were employed in terms of the Contracts on a limited duration basis which employment would automatically terminate on completion of the project as envisaged in clause 3.3.1 and not so called "*assignments*". The Contract or "*assignment agreement*" as the applicant calls it was without doubt an employment contract and could only be terminated in terms of clause 3.3 thereof.

[67] The applicant failed to place any evidence before the second respondent that the project was completed and that the Contracts terminated automatically in terms of clause 3.3.1 as a result. Mr Donaldson in fact conceded that at the

[16] Page 20 of the record.

time of the arbitration proceedings the project had not been completed. Accordingly, I am of the view that the Contracts did not automatically terminate on 31 March 2013 in terms of clause 3.3.1 and that by giving the respondents notice of termination of the Contracts on 25 March 2013, the applicant terminated the Contracts with notice and this was a dismissal as defined in section 186(1)(a) of the LRA.

The applicant's agency agreement argument

[68] This brings me to the applicant's argument and business model that upon termination of the assignment by the applicant the "*agency agreement*" comes into operation in terms of which the applicant undertakes to find alternative assignments and that pending these attempts by the applicant the respondents will not receive remuneration and benefits and should not expect that the applicant will enter into any other assignment with them.

[69] As this was the applicant's sole argument before the second respondent at the arbitration proceedings I feel that it is necessary for me to deal with it even though I have held that the respondents were dismissed.

[70] This was the crux of the applicant's case at the arbitration proceedings.

[71] This so called "*agency agreement*" contained at clauses 1.4 and 1.5 of the Contracts in effect places the respondents at the mercy of the applicant and not only offends the principle of security of employment but also goes against the very notion and definition of an employment relationship where an employer provides work to an employee who renders their services to the employer and is entitled to remuneration. The applicant's answer to this is that if the respondents did not want to linger at home with no pay while the applicant attempts to find alternative placements for them they could have resigned or cancelled the Contracts.

[72] It is this very mischief the amendments to the LRA seeks to address, the abusive practices associated with labour brokers. If the applicant's business model is to be condoned and accepted, it would go against the very values of providing employees with security of permanent employment and would perpetuate the abuse of employees by labour brokers.

[73] The applicant's case was that the respondents were not dismissed and remained employed pending the applicant finding alternative placements. However, the applicant led absolutely no evidence of the steps and attempts it made to find the respondents alternative work. The applicant appears to have expected the respondents to sit at home indefinitely at the back and call of the applicant, waiting for the applicant to find alternative placements for them, not receiving any remuneration and further not to expect that the applicant would in fact enter into another assignment agreement with them.

[74] In *National Union of Metalworkers of South Africa and others v Abancedisi Labour Services*[17] the employer, a TES, attempted to convince the Supreme Court of Appeal ("the SCA") that the employees who were excluded from the client's premises and told to go home without pay were not dismissed but were suspended indefinitely.

[75] In this case, the employees refused to sign a code of conduct and were excluded from the client's premises. The employees were not allowed back to work at the client and were not paid as they did not work. The limited duration contracts envisaged the continuation of the employment relationship after the conclusion of the assignment at the client and the employer thus argued that they were not dismissed.

[76] The SCA did not accept this argument by the employer and held as follows:

> '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. 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

[17] (2013) 12 BLLR 1185 (SCA).

cancel it. To that end, the employees took a step that is sanctioned by the law and referred a dispute to the bargaining council.

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.

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. 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.

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'.[18]

[77] In *casu*, the applicant informed the respondents on 25 March 2013 that the client no longer required their services and their last day at work would be 26 March 2013. The respondents were paid 2 weeks' notice, accrued leave and given their UI 19 forms. On 25 March 2013, the respondents were given written Notice of the End of Assignment.

[78] The written notice provides as follows:

> 'We wish to advise that your assignment at the Eskom Gamma-Kappa Transmission line project will be ending in terms of clause 3.3.1 of your Written Particulars of Employment. The client has advised that your part in the project has come to an end and it will be phasing out the remaining parts of the project. Your last day of work on the assignment will be 26 March 2013 and you will be paid two weeks' notice and any leave pay owing up to 09 April 2013.
>
> However, please note that this does not constitute a termination of the agency agreement between you and Kelly Industrial and in terms of clause 1.5. we would like to seek another suitable temporary assignment for you if you are available'.

[79] On 18 April 2013, Paxsal Payroll Outsourcing (Pty) Ltd, on behalf of the applicant informed the Department of Labour that the respondents worked for the applicant from 1 May 2012 to 31 March 2013. This letter was curiously not included in the paginated record of proceedings but formed part of the record filed by the first respondent with this Court in terms of the Notice of Filing in Compliance with Rule 7A(2)(b) and 7A(3).

[18] At paras 15 - 18.

[80] On 24 April 2013, and just before the expiry of the 30 day period in terms of section 191(1)(a) of the LRA to refer a dispute to the first respondent, the respondents referred the Dispute alleging the unfair dismissal.

[81] At the arbitration of the Dispute on 20 May 2013, the applicant did not lead any evidence of attempts it made or steps taken to find the respondents alternative placements. The applicant further failed to lead any evidence that it was not able to find such alternatives and that as a result has or would start a process to terminate the employment of the respondents for operational reasons. One would have expected the applicant to lead this evidence in light of its argument that the respondents were still employed.

[82] The fact that the applicant had not attempted to find alternative placements for the respondents subsequent to the termination of their Contracts or had not, in light of no alternatives being found, commenced a process to terminate the respondents' employment on the grounds of its operational requirements coupled with the fact that the respondents were paid notice, accrued leave, given UI19 forms and on 18 April 2013 the applicant informed the Department of Labour that the respondents had worked up to 31 March 2013, all indicate in my view that the respondents' employment was terminated by the applicant and the respondents were dismissed. The fact that the applicant had not looked for alternative placements, had not commenced a process to terminate the respondents' employment due to its operational reasons and the representation to the Department of Labour 18 days after the respondents were notified of termination of the assignments, all support the conclusion that the applicant itself considered that the respondents were no longer employed as at 31 March 2013.

[83] Mr Donaldson at the hearing of the matter argued that the fact that the applicant did not look for alternative placements for the respondents is not an indication of a dismissal as if the applicant had found alternative placements for the respondents in one year's time it would ratify the "*agency agreement*". This is an absurd argument and I will not consider it further.

[84] The Applicant in my view opportunistically attempted to avoid the consequences of dismissing the respondents unfairly by placing the dismissal

in dispute at the arbitration proceedings and arguing that, despite the termination of the Contracts, the employment relationship continued to exist. How could this possibly be the case where the applicant had not made any attempt at finding alternative placements and/or had not commenced a retrenchment process? What did the applicant expect the respondents to do? Remain employed, without work and without remuneration and not receive any severance pay in circumstances where no alternative placements could be found. This business model is in my view an attempt by the applicant to not only avoid the consequences of unfair dismissals but to also avoid having to retrench employees it cannot place at other clients.

[85] Contrary to Mr Donaldson's argument, this business model only benefits the applicant as employees like the respondents are left to linger at home not working and not earning an income, who are to remain available to the applicant and who are eventually forced into the position where they have to seek alternative employment with another employer to earn a living. I assume that should an employee take up employment with another employer during the period of so called "*suspended*" or *sui generis* employment in terms of the agency agreement, the applicant would opportunistically argue that such employee resigned, deserted or repudiated his employment contract with the applicant which continues to exist indefinitely pending the placement of the employee at another client. This is in my view an abuse and deliberate attempt to avoid not only its obligations as an employer but also the consequences of unfair dismissal of employees or termination on the grounds of its operational requirements.

[86] The evidence of the respondents as to the events of 25 March 2013 was that just before 17h00 they were called in one by one and told to sign a letter that they are no longer working. They were told that they would get 2 weeks' notice and 10 minutes later received the forms needed for UIF purposes.[19] They were told that they do not have to report for duty on 26 March 2013.[20]

[19] Pages 126 and 158 of the record.
[20] Page 129 of the record.

[87] If these facts do not amount to abusive practices and do not support the conclusion that the respondents were dismissed, I do not know what facts would. The dismissals were certainly speedy but not fair. It is these abusive practices which are to be eradicated in the workplace and employment sphere.

Conclusion

[88] Having regard to what I have set out above, the second respondent's finding that the respondents were dismissed was correct and is to be upheld.

[89] Accordingly, the following order is made:

89.1 The review application is dismissed.

89.2 There is no order as to costs.

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Venter AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant: Mr Q Donaldson from CTL Management Forum