OF INTEREST

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J1453/00

DATE OF HEARING: 2002-09-19

DATE OF JUDGMENT: 2002-09-19

In the matter between

CONSTRUCTION & ALLIED WORKERS UNION Applicant

and

GRINAKER CIVIL ENGINEERING Respondent

J U D G M E N T

PILLAY J: My ruling on the second point *in limine* is as follows:

I am required to determine whether the respondent is the employer.

The evidence for the respondent is: It joined forces with another company Moolman Brothers Construction (Pty) Ltd, to form a joint venture. Together, they successfully tendered for a construction-mining project. The Respondent and Moolman Brothers Construction (Pty) Ltd each contributed

variously to this joint venture. They each seconded employees to the joint venture. The joint venture also employed its own workers. However, as an entity with a limited purpose and existence, it had no infrastructure to manage the workforce. The arrangement was therefore that the salaried staff it engaged would be administered by the respondent, and the hourly paid employees would be administered by Moolman Brothers Construction (Pty) Ltd.

The distinction in the employment of the three categories of employees was further manifest from their work wear. The respondent's employees wore red overalls. The employees of the joint venture wore blue and the employees of Moolman Brothers Construction (Pty) Ltd wore green overalls.

When the second applicant was engaged, Mr Burger, the plant manager of the respondent and its representative of the joint venture, interviewed the second applicant and informed him that he was employed by the joint venture but that his remuneration and benefits would be administered by the respondent. He further informed him that his salary would be paid by the respondent.

The evidence in court was that the salary paid by the respondent on behalf of the joint venture was recovered from the joint venture.

It was the joint venture that terminated the second applicant's services.

That was the case for the respondent.

The second applicant's case is that the respondent is his employer because it paid his salary and contributed towards his medical aid and provident fund benefits. It wrote to him periodically informing him about increases in his salary. He participated in activities like staying in hotels with the respondent's employees, which could only have occurred if he were its employee. The IRP that was submitted to the South African Revenue Services on his behalf by the respondent reflected the respondent as the employer. He denies that he was advised in the interview with Mr Burger that the respondent would merely administer his salary and benefits, and that he was in fact employed by the joint venture.

He acknowledged that employees involved in the joint venture projects wore blue and green overalls but denied the red overalls were worn on the joint venture plant.

The following facts are decisive of the issue:

Firstly, in paragraph 11 of the second applicant's affidavit, he states that Mr Rheighardt had told him that he would be approached by Wonderwater Mine management, that is, the management of the joint venture, about a permanent job and that he should in the circumstances be alert. He then attended, and was interviewed by Mr Burger. A contract was signed. It is common cause that the document appearing as Annexure O to the second applicant's bundle B in the application to declare, was signed by Mr Burger and the second applicant, and is headed “Wonderwaters Strip Mine Joint Venture”.

Secondly, the second applicant testified that he received a letter on 12 August 1996, that is, before his engagement by the joint venture, confirming that he was appointed as a welder in the joint venture. That letter is signed by Mr Burger, on the respondent's letterhead and refers to the joint venture as "our Wonderwater Mine". Mr Burger's explanation for this letter was that the second applicant requested it possibly for purposes of securing accommodation. He was never cross-examined on this issue. In any event, the plain meaning of the wording of that letter is not inconsistent with the respondent's evidence. The joint venture was a project of the respondent. As such, the respondent was entitled to refer to it as “our Wonderwater Mine”. The signing of the contract signalled that the second applicant was aware from the outset that the joint venture was his employer.

Thirdly: The joint venture meets the common law requirements for the establishment of a partnership for a particular purpose. It is an entity that can therefore employ the second applicant. (See: Young and Bradford, quoted by Henning in 1996 21 (2) TRW 68 at 70; Pezzutto v Dreyer 1992 (3) SA 379 (A) at 390 A-F).

Fourthly: The fact that the second applicant was aware of the identity of the true employer, is further evidenced by his referral of a dispute to the CCMA, relating to allegations of discrimination and victimization. In that dispute, the joint venture is cited as the employer. It was resolved by a settlement agreement being signed by Mr Burger on behalf of the joint venture.

Fifthly: The second applicant's salary increases were determined by the joint venture. This was also not disputed during cross-examination. If the increases were the same as that of the respondent's employees, then Mr Du Toit testified that this was pure coincidence.

Lastly: The contract of employment was created and terminated by the same entity, that is, the joint venture.

The joint venture ceased to exist about November 1999 shortly after the

second applicant's retrenchment. This dispute was referred for conciliation on 6 December 1999. The probabilities are that by that stage the second applicant became alive to the possibility that the joint venture would not be able to meet any claim as it no longer existed at all or in that form. For whatever reason, the second applicant chose to cite the respondent as the employer, it is not supported by all the facts that have been presented to me.

I am satisfied that, in substance, the joint venture is the employer. It is not merely a question of form or a scam, as suggested by Ms Tshabalala for the applicant. For instance, whether the second applicant might have been able to qualify for providend fund and medical aid benefits if he was not brought into the books of the respondent is doubtful as these schemes take some time to establish. Therefore the incorporation or the administration of the second applicant's services through the respondent's books was also for the second applicant's benefit. In fact, it was for the mutual benefit of the parties.

In all these circumstances my ruling is that I find that the respondent was not the employer of the second applicant.

In determining the issue of costs, I note the following: The second applicant was aware from the outset who the true employer was. He was confronted with the situation that on his dismissal the employer did not exist. The

communications that he received on the respondent's letterhead was primarily the basis on which he hoped to hold the respondent responsible for his claim. The fact that the respondent had an interest in the joint venture and should therefore be held liable is not the case that was made out. However, the claim was not pursued frivolously or vexatiously. There was a bona fide belief that the respondent could be held responsible for his claim.

In the circumstances, I order the second applicant to pay 75% of the respondent's costs.

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JUDGE D PILLAY