

SOUTH AFRICA / JUDGMENT

# Nzingele v Pickitup (Pty) Ltd (JR1480/02) [2007] ZALCJHB 11 (18 September 2007)

[2007] ZALCJHB 11

## COURT

Labour Court Johannesburg

## BEFORE

R D Hendricks

## CASE / FILE NUMBER

JR1480/02

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IN

THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

CASE NO: JR 1480\02

In

the matter between:        POPPI  
                                      NZINGELE Applicant  
                                      and  
                                      PICKITUP  
                                      (Pty)  
                                      LTD Respondent

## JUDGMENT

HENDRICKS AJ

## Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (the Act) to review and set aside an arbitration award made under case no: GA 10115-01 dated 12 August 2002 by the Second Respondent under the auspices of the First Respondent.
- [2] The award sought to be reviewed is actually a ruling by the Second Respondent that the Fourth Respondent and not the Third Respondent was the employer of the Applicants. This application ought to have been made in terms of section 158 (1)
- (g) of the Act.

Factual

## background

- [3] The Third Respondent entered into a sale of business agreement with the City of Johannesburg Metropolitan Municipality (“the City”) during January 2001. In terms of this agreement, the waste management business of the City was transferred to the Third Respondent in terms of section 197 of the Act which means that all the waste management employees of the City were transferred to the Third Respondent.
- [4] The Fourth Respondent had an agreement with the predecessor of the City in terms of which they provided labour and trucks for the purpose of waste disposal. The Applicants were in the employ of the Fourth Respondent at that time.
- [5] The Applicants were not amongst the employees that the Third Respondent took over from the City. It is also contended by the Third Respondent that it never entered directly into any employment contract with any of the Applicants personally.
- [6] On the 29th January 2001 the Third Respondent per letter requested the Fourth Respondent to continue to provide services for a period of five months (until end of June 2001). At the end of June 2001, the services of the Applicants were terminated by the Fourth Respondent which resulted in the Applicants declaring a dispute of unfair dismissal which was referred to the First Respondent for conciliation.
- [7] In its referral form to the First Respondent, the Fourth Respondent was cited as the employer. The dispute remained unresolved. A request for arbitration was then launched with the First Respondent. In this application no mention was made of the employer party, but in the award, which was given by default, Third Respondent was ordered to reinstate the Applicants. As to how this happened one can only speculate.
- [8] Subsequently thereto, the Third Respondent applied for, and was granted, recession of this award. The matter was re-enrolled for arbitration on 05 August 2002. On 12 August 2002 a ruling was handed down by the Second Respondent stating that the Applicants were in the employ of the Fourth Respondent and not the Third Respondent. This is the ruling which the Applicants seek to review, hence this application.
- [9] Three grounds for review crystallizes from the Notice of Motion and founding affidavit namely:
  - (i) that the Second Respondent committed a gross irregularity by deciding the issue of the identity of the employer before the issue of jurisdiction of the CCMA (First Respondent) and therefore exceeded his powers;
  - (ii) that the Second Respondent committed a gross irregularity for not affording the parties the opportunity to lead evidence on the question who the employer of the Applicant was; and

(iii) that the finding that the Fourth Respondent, and not the Third Respondent was the employer of the Applicants is irrational.

I will now deal in seriatim with these three grounds of review.

Deciding the issue of the identity of the employer before the issue of jurisdiction of the CCMA (First Respondent)

[10] From the record of the proceeding at the CCMA it appears that there was consensus between the parties that the question as to who the employer of the Applicants was had to be decided at first. Though this does not necessarily clad the Second Respondent with the necessary jurisdiction, it was important to determine this issue at first because it would determine whether the dispute could be resolved by the CCMA or whether it should have been referred to the relevant Bargaining Council having jurisdiction.

[11] By deciding this issue at first, it was therefore not necessary for the Second Respondent to decide whether it had the necessary jurisdiction—it followed automatically. By deciding that the Fourth Respondent was the employer of the Applicants, the Second Respondent determined that it had the necessary jurisdiction to entertain the matter and it was therefore not necessary to have the matter referred to a bargaining council, what would have been the situation if the Third Respondent was found to be the Applicant's employer. The fact that the Second Respondent considered the question of the identity of the employer of the Applicants at first does not constitute an irregularity.

Denial of the opportunity to lead evidence on who the

Employer of the Applicants was

[12] It appears from the record that the Second Respondent had evidence in front of him relating to the relationship between the Applicants and the Third and Fourth Respondents respectively from which he could make a finding as to who the employer of the Applicants was. It also appears that the Applicants had the opportunity to lead evidence about the relationship between them and the Third and Fourth Respondents respectively and was never debarred from presenting such evidence.

Was the decision that Fourth Respondent and not Third

Respondent was the Applicant's employer irrational?

[13] The contention that this decision was irrational needs to be closely examined. Evidence was led at the CCMA that the Fourth Respondent was a labour broker company who employed the Applicants. This was testified to by the owner of the Fourth Respondent, Mr. Nhlaniki, who also stated that the salaries of the Applicants were paid by the Fourth Respondent. It is clear that the Fourth Respondent was the employer of the Applicants until their dismissal. Between the Third and Fourth Respondents was a contract in terms of which the Fourth Respondent would supply labour and trucks to the Third Respondent. The workers (employees) that Fourth Respondent supplied to the Third Respondent remained in the

employ of the Fourth Respondent though they worked under the supervision of the Third Respondent. The Third Respondent was therefore a client of the Fourth Respondent. There was no direct contractual relationship between the Applicants and the Third Respondent.

## Conclusion

[14] The Second Respondent considered the abovementioned evidence and came to the conclusion that the Fourth Respondent and not the Third Respondent was the employer of the Applicants. This finding cannot be faulted. It is also abundantly clear that this decision is rationally connected to the evidence that was placed in front of the Second Respondent. In my view, the Second Respondent did not commit any gross irregularity that can result in the award be set aside, neither did he exceed his powers that would warrant it to be reviewed.

There is no reason why costs should not follow result.

## Order

[15] Consequently, I make the following order:

1. The application for the review of the Second Respondent's award is dismissed.
2. The Applications are ordered to pay the costs of this application jointly and severally, the one paying, the others to be absolved.

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R D HENDRICKS AJ

Acting Judge of the Labour Court

Johannesburg

## Appearances

For the Applicant : Mr. Biyana

For the Respondent : Mr Brickhill

Date of hearing : 30 August 2007

Date of Judgment : 18 September 2007

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