

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICABRAAMFONTEINCASE NO: D238/08DATE: 2009-03-16

In the matter between

LENNY NAIDU & OTHERS

Appellant

And

SOUTH AFRICAN BUREAU OF STANDARDS

Respondent

J U D G M E N T

INTRODUCTION

PILLAY, J: The first applicant is Lenny Naidu who was employed as an auditor with SABS. In this application Naidu purported to represent 13 of the employees under a power of attorney. SABS objected. Mr Seery, counsel for Naidu conceded that Naidu could not act on behalf of the others and that they were not properly before court.

The Respondent is South African Bureau of Standards, SABS, a corporate entity established in terms of the Standards Act No. 29 of 1993.

THE ORDER SOUGHT

Naidu sought an order in the following terms:

- “ 1. *Declaring that the respondent’s variation of the applicants’ remuneration structure so as to effect changes to the vehicle allowances paid to the applicants in terms of their conditions of service constitutes a unilateral variation of the employment*

contract concluded between the applicants and the respondent.

2. *Directing the respondent to reinstate the vehicle allowance scheme to which the applicants were party in the form of which such scheme existed as at 1 November 2007...*"

THE BACKGROUND

On 1 June 2005 SABS implemented a vehicle allowance scheme.

In terms of this scheme it provided two types of vehicle allowances for two categories of employees. Employees in post level 8 to 18 received a tool of trade vehicle allowance. These employees needed a vehicle as a tool of their trade to enable them to perform their duties. Employees in post level 1 – 6 received vehicle allowances as part of their total cost to company remuneration package. Salary adjustment thenceforth was based on the total cost to company package which included the vehicle allowance as a tool of trade.¹

SABS reimbursed employees who received a tool of trade allowance for official kilometres travelled at 75 cents per kilometre for a sedan. Those who received a vehicle allowance that was not a tool of trade allowance were reimbursed at a rate of R1.30 per kilometre.²

The applicant received a tool of trade allowance. The amount of the allowance was R56 000 per annum.

In 2007 SABS realised that its vehicle allowance scheme fell foul of the Income Tax Act No. 58 of 1962 (the ITA). It informed the workforce as follows:³

“5.1 Tool of trade. A decision has been taken by Exco with regard to Tool of Trade that as of 1 July 2007 the below mentioned will apply:

¹ page 34 of Pleadings Bundle

² page 36 of Pleadings Bundle.

³ page 91-92 of Pleadings Bundle

- *Tool of Trade will no longer apply to new appointments with immediate effect.*
- *The Tool of Trade portion of salary will not be increased during the July 2007 increase.*
- *R2.46 per kilometre will apply to everyone.*
- *Those who already have a tool of trade will have a choice of converting immediately, lose R56 400 and receive R18 000 tax requirement or wait until end of sale agreement and Tool of Trade cease.*
- *Auditors/Inspectors will have an agreement that upon completion of their training they will receive the Tool of Trade amount will receive it if they complete in by end of June”*

The tool of trade allowance did not qualify as a vehicle allowance because it amounted to more than the actual expenses for travelling.

The definition of “remuneration” included:

“CA. 60% of the amount of any allowance or advance in respect of transport expenses referred to in Section 8(1)(b) other than any such allowance or advance contemplated in Section 8(1)(b)(iii) which is based on the actual distance travelled by the recipient and which is calculated at a rate per kilometre which does not exceed the appropriate rate per kilometre fixed by the Minister of Finance under Section 8(1)(b)(iii).”

Section 8(1)(a)(i): *There shall be included in the taxable of any person (hereinafter referred to as a recipient) for any year of assessment any amount which has been paid or granted during that year by his or her principle as an allowance or an advance excluding any portion of any allowance or advance actually expended by that recipient-*

aa. on travelling on business as contemplated in paragraph b

b. for purposes of paragraph a.1.(aa)....

(iii) where such allowance or advance is based on the actual distance travelled by the

recipient in using a motor vehicle on business (excluding the set private travelling) or such actual distance as proved to the satisfaction of the commissioner to have been travelled by the recipient, the amount expended by the recipient on such business travelling shall, unless the contrary appears, to be deemed to be an amount determined on such actual distance at the rate per kilometre fixed by the Minister of Finance by notice in the Gazette for the category of vehicle used. ”

To synchronise its motor vehicle allowance policy with the ITA the SABS proposed two options:⁴

1. Option A – Of the current package, R30 000 per annum will be converted to a fixed cost travel allowance and the balance, R26 400, will be considered as being incorporated in their “cost to company”. In addition they will receive a R1 per kilometre variable cost reimbursable allowance for business travel. The R30 000 per annum will remain fixed for the remainder of their current five year vehicle cycle (employees will need to provide evidence of their cycle). Salary increases and bonus calculations applicable in July 2007 will be done as in 2006. In future R30 000 will be excluded from their “cost to company” package in these calculations.
 2. Option B – The current package will be reduced by R30 000 per annum and be replaced by an all in reimbursable allowance of R2.46 per kilometre for business travel. Salary increases and bonus calculations applicable in July 2007 will be done as in 2006. In future they will be based on the then “cost to company” package.
- Subsequently it put Option C on the table.

Naidu’s before and after restructuring table is extracted as follows: ⁵

	Before	After B	After C
<i>Average kilometre travelled</i>	800	800	800

⁴ page 73 of Pleadings Bundle

⁵ pages 82, 82(a) of Pleadings Bundle.

<i>Prior rate per kilometre</i>	<i>R1</i>	<i>R2.46</i>	<i>R2.46</i>
<i>Amount received variable compensation</i>	<i>R800</i>	<i>R1 968</i>	<i>R1 968</i>
<i>Amount received fixed allowance</i>	<i>R4 700</i>	<i>R2 200</i>	<i>R3 532</i>
<i>Total amount received</i>	<i>R5 500</i>	<i>R4 168</i>	<i>R5 500</i>
<i>Difference between new and old</i>		<i>R1 332</i>	

THE ISSUES IN DISPUTE

Naidu contested the changes to the vehicle allowance on two grounds:

Reduction of remuneration and benefits

Naidu accepted that SABS had to deduct taxes from his remuneration in accordance with the ITA. However, he disputed that the restructuring entitled SABS to reduce his remuneration and benefits. If SABS needed to restructure, and Naidu did not concede this, SABS did not have to restructure in a way that reduced Naidu's remuneration, salary increases and pensionable amount.

By reducing the allowance by R30 000 the SABS reduced Naidu's remuneration, his prospects of increasing his remuneration in future and his pensionable amount.⁶ For this reason Naidu rejected Option A. Under Option B Naidu's average vehicle costs would have been his average kilometres of 860 kilometres per month at R2.46 per kilometre amounting to R1 255.60 per month. Annually, this estimated to R15 067.20. With the reduction of his package by R30 000 Naidu stood to lose R14 932.80 per month. Under Option C SABS increased the fixed vehicle allowance so that when this allowance is added to the actual travelling expense calculated at R2.46 per kilometre it would equate to R30 000. Naidu rejected Option C because his remuneration would drop if he travelled less kilometres. So Mr Seery submitted for Naidu

⁶ page 19 and 20 of Pleadings Bundle

The starting point of the inquiry is to establish whether SABS had to restructure the remuneration package of its employees. SABS bears the onus of proving that the purpose of its restructuring was to comply with the ITA regarding the vehicle allowance. Naidu did not dispute the composition of the existing package, the average mileage he travelled, the amount of the fixed allowance before and after the restructuring and, most of all, that the tool of trade allowance exceeded the actual travelling expenses. The allowance was not based on the “expected business related expenditure” stipulated in paragraph 3.1 of SARS interpretation note 14 issue 2.

The clear purpose of the definition of “remuneration” is to prevent income being passed off under the guise of a travelling allowance. This purpose and how it is achieved is explained in SARS’s interpretation note 14 issue 2. The definition of “remuneration” read with section 8 of the ITA permits an allowance for actual travelling expenses. Payments, additional to actual expenses, are treated as gross income. An allowance is a business expense of the employer. An allowance an employer pays to an employee is something additional to ordinary wages. Allowances that exceed the anticipated business expenses will result in SARS treating the excessive portion as normal remuneration or as gross income or as being subject to normal PAYE. SARS holds employers liable for under-deduction of PAYE plus interest and penalties.

The Court finds that SABS had to restructure its vehicle allowance to conform with the definition of remuneration read with section 8. Restructuring the vehicle allowance inevitably meant changing the contract of employment. Not to have done so would have rendered the contract fraudulent, illegal and therefore unenforceable. To grant a *status quo* order that Naidu seeks in the second prayer of his notice of motion would be to give effect to an illegality. In addition to its common law responsibilities as an employer, as a statutory body SABS incurs liability under the

Public Finance Management Act No. 1 of 1999 and the Public Service Act of 1994

proclamation 103 of 1994.

Naidu bears the onus of proving essential facts to justify the relief he claims. To succeed in claiming any relief, Naidu has to prove the prejudice or harm he suffers as a result of the restructuring. Did the restructuring reduce Naidu's remuneration? For as long as the allowance is based on mileage actually travelled it follows that the allowance will decrease as the mileage decreases. Equally it can increase if the mileage increases. The restructuring also impacted on SABS with the cost to company fluctuating with every increase and decrease in the mileage.

10 On the calculations Naidu presented, his total old and new amounts remained the same at R5 500 per month if he exercised Option C. On the face of it, Naidu appears not to suffer any reduction in his remuneration. If he exercised Option B the difference between the old and new allowance was R1 332. On the face of it, Naidu appears to suffer a reduction in remuneration. Much depends on the taxes levied on each option.

Option C might be less favourable once the tax is assessed. Option B might be more favourable once the tax is assessed.

Mr Smithers for SABS contended that Option A would have served Naidu's interest best. Naidu has not proffered a similar calculation for Option A. Naidu has not discharged the onus of proving how each option prejudices him in this instance insofar
20 as his remuneration will be reduced in respect of each option nor has he advanced any facts from which the Court can find that his pensionable amount will be reduced.

However, assuming in favour of Naidu, that his pensionable remuneration will be reduced and that for future salary increases he will be negotiating from a lower base, what Naidu hopes to achieve in obtaining a *status quo* order is an opportunity to bargain further for increases in remuneration. That Naidu can do without a *status quo* order.

The Court is not convinced that Naidu suffers any prejudice by the restructuring. If

he is prejudiced in that his remuneration is reduced, he has an alternative appropriate remedy of continuing the bargaining for a better deal. There is no evidence that SABS sees the obligation to restructure as an opportunity to profit at the expense of Naidu and other employees.

Was the restructuring unilateral?

10 Naidu's employment was in terms of a letter of appointment,⁷ read with the standard conditions of service. Contrary to Mr Seery's submissions, the terms of the letter of appointment are mutable. For instance, Naidu's package and travel allowance has increased since 2006. The standard terms and conditions expressly reserves for the Council of the SABS the right to amend its rules "after consultation and negotiation with the staff".

20 The letter of appointment merely confers on Naidu the right to a vehicle allowance as part of his remuneration package. It does not prescribe how the package should be structured. It invites Naidu to structure his remuneration package. Once Naidu structured his package, his letter of appointment did not bar him from restructuring it. Any suggestion that the letter of appointment is immutable would run counter to the letter and spirit of contracts of employment, which must be sufficiently flexible to respond to fluctuating market conditions.

Naidu did not dispute that SABS consulted and negotiated with its staff; however, he denied that it did so in good faith because it presented its decision to restructure as a *fait accompli* at the very first meeting with the staff. Furthermore, he contended that SABS had to reach an agreement in restructuring otherwise its implementation of the restructuring would be unilateral.

According to Thesaurus "unilateral" means "one-sided; independent". Insofar as

⁷ page 29 of Pleadings Bundle

SABS implemented the restructuring without Naidu and his union's agreement, it was one-sided; however, its decision was not independent in the sense of being made freely or autonomously. Its decision to restructure was compelled by law. In that sense, SABS's decision to restructure the vehicle allowance was not unilateral. Compliance with the law rendered the decision to restructure a *fait accompli*. What the restructured scheme would be was subjected to negotiation and consultation.

SABS could hardly raise as a defence against non-compliance with the ITA that it was negotiating until it reached agreement with its staff. It had to act decisively as soon as possible lest it incurred interest and penalties for itself. Having taken the decision to restructure SABS did not close its mind to suggestions from the staff. SABS repeatedly invited the staff to "restructure their allowances according to the needs and within the permissible legal constraints".⁸

Naidu has proffered no evidence that it responded to this invitation at all. It cannot protest, therefore, that the decision was a *fait accompli*, that it was unilateral or that the consultations were in bad faith. Naidu's first order prayed for a declarator must also fail.

In the circumstances, the application is dismissed with costs.

Pillay D, J

Edited: 26 March 2009-03-26

APPEARANCES:

For Applicant: Adv T Seery instructed by Henwood Britter & Caney

For Respondent: Adv M D C Smithers

⁸ page 57 Pleadings Bundle