

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN

CASE NO: D760/08

Not Reportable

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

and

IMATU

FIRST RESPONDENT

COMMISSIONER JABULANI NGWANE

SECOND RESPONDENT

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

THIRD RESPONDENT

MAJOZI, THAMBIRAN & 5 OTHERS

FOURTH & FURTHER

RESPONDENTS

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JUDGMENT

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Conradie AJ

1. In this matter the Applicant seeks, *inter alia*, to review and set aside an arbitration award handed down by the Second Respondent under Case Number EMD02 0807 and EMD 10836.
  
2. At the heart of the matter is a collective agreement known as the Subsidised Locomotion Scheme for the City of Durban.

3. The scheme deals with the payment of “Locomotion Allowances” to employees. According to the scheme its objects are to provide for the following:

“1. Guidelines, conditions and limitations in terms of which the scheme is to run.

2. The basis of compensation and Scheme Benefits. “

4. Clause 3 of the scheme provides as follows:

“3. SCHEME STIPULATIONS

In respect of new entrants into the SCHEME, it is the responsibility of the EXECUTIVE DIRECTOR, with due regard to the SCHEME stipulations, to determine to what extent PRIVATE TRANSPORT shall be utilised for Municipal purposes where Municipal Transport is in his opinion inappropriate or unavailable. Other aspects which should be considered include:-

Distance travelled

Frequency of use

Duration of trips

Urgency of usage requiring standby vehicle at all times.

Hours of duty

(Bargaining Forum 1995-08-22)”

5. In the matter before me the Fourth and Further Respondents applied to the Applicant to participate in the Locomotion Scheme. It is

common cause that they were unsuccessful in their application and further that no reasons were given to them by the Applicant for rejecting their applications.

6. The Fourth and Further Respondents were unhappy with the Applicant's decision and after unsuccessfully attempting to address the situation internally they referred an unfair labour practice dispute to the Third Respondent.
7. The Third Respondent appointed the Second Respondent to arbitrate the matter.
8. It appears that there was agreement between the parties to the arbitration that they would submit documentary evidence to the Second Respondent in order for him to peruse and issue an award. As a result of this approach the Second Respondent states in his award that "no *viva voce* evidence was led."
9. It also appears from paragraphs 4.2 to 4.5 of the Award that some kind of argument was presented at the arbitration but the extent of this is not clear from the affidavits submitted by the parties or from the record.

10. In his arbitration award the Second Respondent identified the issues to be decided as follows:

“2. ISSUE TO BE DECIDED:

2.1 Whether the applicants were entitled to a Locomotion Allowance in accordance with the Re-imbursive motor vehicle scheme.

2.2. Whether the respondent committed unfair labour practice by denying the applicants the access to the scheme which other employees at the same level as the applicants had access to.”

11. In his award under “ANALYSIS OF EVIDENCE AND ARGUMENTS” the Second Respondent states as follows:

“5.1. It is trite that a benefit to an employee accrues ex lege or ex contractu.

5.2. In this matter it was common cause that there was a Collective Agreement which the Locomotion policy was part thereof.

5.3. The employees, whom it was not in dispute that enjoyed Locomotion Allowance had the regulation of their benefits flowing from the same Collective Agreement which the applicants were also party to.

5.4. In this manner, the respondent’s actions had the effect of treating the applicants arbitrarily by perpetrating differential treatment on its employees.

5.5. It is logical to conclude that a legitimate expectation is created by an employer when some employees performing the same or similar tasks have a benefit that is tied to post extended to them.

5.6. Those employees who did not enjoy the benefit yet would legitimately expect the employer to extend the same benefit to them at a given time.

5.7. Going by the parties Collective Agreement and the Locomotion Scheme, the evidence and arguments I find that the applicants are entitled to the Locomotion Allowance in accordance with the Scheme.

5.8. In conclusion, based on the evidence and arguments presented before me, I find that the respondent in this dispute committed an unfair labour practice by arbitrarily denying the applicants access to the Locomotion Scheme which other employees of the same standing and performing duties equivalent or similar to those performed by the applicants were allowed access to the same Scheme.” (sic)

12. The above is the sum total of the Second Respondent’s reasoning in the matter.
13. Mr Maeso, who appeared on behalf of the Applicant submitted that the issue of legitimate expectation has no place in a dispute such as the one which the Second Respondent had to determine. This on the basis that the fact that other employees may also be receiving the

allowance was not the test for determining whether the Fourth and Further Respondents should also have received it. Rather what was required was that the Second Respondent had to determine whether the Fourth and Further Respondents qualified for the allowance, but notwithstanding this, were denied access to it by the unfair conduct of the employer.

14. Mr Seery who appeared on behalf of the First and Fourth and Further Respondents argued that although it was not apparent from the record that the Second Respondent considered whether or not the Fourth and Further Respondents qualified in terms of the allowance, it is dealt with in the answering affidavit at paragraphs 16 and 17. He submitted that this should be accepted as what happened at the arbitration insofar as there is doubt as to whether or not this important evidence was led, particularly as the Applicant had not disputed this in a replying affidavit as none was filed.
15. Even if this version of what was before the Second Respondent, as put up in the answering affidavit, must be accepted on the basis of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), this in itself does not explain why this critical reasoning was not dealt with in his award.

16. I agree with Mr Maeso that what was required in order for the Fourth and Further Respondents to be successful at the arbitration was that they had shown that they had met the criteria for qualification in terms of the scheme, but notwithstanding this they were not entitled to participate in it as a result of the unfair conduct of the employer. The latter could then possibly be illustrated by the Fourth and Further Respondents referring to the fact that other employees who similarly qualified and held the same or similar posts received the “benefit.” I use the term “benefit” loosely in that I have not decided whether this allowance is in fact a benefit or a condition of service as alluded to by Mr Maeso. However given the approach that I take to this matter I do not have to determine this issue.
17. I thus conclude that there is insufficient to no reasons advanced as to how the Second Respondent reached the conclusion that he did. Not only are such reasons normally required, even if brief, but in the circumstances of this case necessary to show that the Applicant had in fact committed an unfair labour practice. The Second Respondent committed a reviewable irregularity in this regard and in doing so came to a conclusion that no reasonable decision-maker could in this regard.

18. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that no order as to costs should be made.

19. In the circumstances, I make the following order:

1. The arbitration award issued under case number EMD 020807 and EMD 010836 is reviewed and set aside.
2. The matter is to be referred back to the Third Respondent for consideration by a Commissioner other than the Second Respondent.
3. No order as to costs.

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Conradie AJ

Date of Hearing: 8 December 2009

Date of Judgment: 9 December 2009

Appearances:

For the Applicant: Mr Maeso – Shepstone and Wylie

For the Respondent: Adv T Seery – instructed by Shanta Reddy Attorneys