IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN REPORTABLE

CASE NO: **D761/08 & D381/09**

In the matter between:

ETHEKWINI MUNICIPALITY Applicant

and

M. CHETTY First Respondent

IMATU Second Respondent

BONISILE KOJANE N.O. Third Respondent

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL Fourth Respondent

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JUDGMENT

CONRADIE AJ

INTRODUCTION

1. This judgment deals with two applications. The one is a review application in terms of section 145 of the Labour Relations Act 66 of 1995 (LRA) in terms of which the Applicant seeks to review an award of the Third Respondent.. The other is an application by the First and

Second Respondents in terms of section 158(1)(c) of the LRA to make the award an order of court.

2. The underlying dispute relates to the refusal by the Applicant (the Municipality) to allow the First Respondent (Chetty) to participate in a motor vehicle scheme. The Third Respondent (the Arbitrator) determined that the Municipality had committed an unfair labour practice by so doing and ordered that Chetty be allowed to participate in the scheme.

THE MOTOR VEHICLE SCHEME

3. The motor vehicle allowance scheme is contained in a collective agreement known as the Durban Metropolitan Council and North Central and South Central Local Council Rules of the Reimbursive Motor Vehicle Scheme 1999 (the Motor Vehicle Scheme).

4. The Motor Vehicle Scheme aims to regulate the use of an employee's own vehicle for purposes of the Municipality's work in circumstances where the Municipality's transport is inappropriate or unavailable.

5. In considering an application to participate in the Motor Vehicle Scheme the Municipality will consider factors such as the frequency of use, duration of the trips and urgency of usage as well as the hours of duty.

6. Resorting to the situation where employees use their private vehicles for work purposes is, however, something which the Municipality only considers as a last resort as it has a large number of its own vehicles for use by its employees in the course and scope of their duties.

CHETTY'S APPLICATION

7. Chetty was appointed to the position of Superintendent: Ottawa Water Waste Depot on 8 October 2005.

8. Chetty applied to participate in the Motor Vehicle Scheme. From the information submitted in support of his application it appears that he was required to be on call in order to assist with mechanical breakdowns and safety related problems at any time on a twenty four hour basis. It was also confirmed by his line managers that Chetty:

    8.1. was responsible for supervising a gang of mechanical artisans in the maintenance of mechanical equipment at the Municipality's 76 waste water pump stations and 6 waste water treatment works;

8.2. was required to undertake regular inspections of mechanical installations that covered a large geographical area;

8.3. provided assistance to artisans after hours;

8.4. attended to site meetings and inspections of mechanical equipment at various mechanical contractors' workshops;

8.5. liaised with employees from the works branch and systems branch;

8.6. attended various safety meetings.

9. The following information was also submitted in support of Chetty's application:

9.1. the previous incumbent of the post enjoyed a motor vehicle allowance;

9.2. his job required him to be available on short notice and also for emergency call outs after normal working hours;

9.3. should a Municipality vehicle be available to him he may not be in a position to respond to emergencies which could affect the process of waste water pumping and treatment increasing the risk of pollution to the environment.

10. Chetty submitted his application to the Head of the Water Sanitation Unit, a Mr. Macleod. Macleod, however, did not decide the application but referred it to the management services and organizational development unit which in turn forwarded it to the locomotion sub-committee which turned down Chetty's application.

11. Chetty was of the view that in terms of the collective agreement the sub-committee does not have authority to make this decision as it's decision making power is limited to appeals against decisions by the Executive Director / Head of the Unit. As there was no decision by the Head of the Unit the sub-committee did not have the authority to make the decision refusing the award of the vehicle allowance.

12. Chetty was also unhappy with the decision because other superintendents in the same department as him received the reimbursive allowance. He could not see any distinction between their jobs and his and therefore regarded the decision not to pay him the allowance as inequitable. A further anomaly according to Chetty was that those superintendents who received allowances were on a lower grade than what he was.

13. As a result of his unhappiness with the outcome he referred a dispute to the Fourth Respondent and an award was subsequently issued by the Arbitrator in the following terms.

13.1. "Based on the evidence and argument presented at this arbitration, the applicant is entitled to a locomotion allowance in accordance with the scheme.

13.2. The Respondent's refusal to grant the applicant locomotion allowance constitutes an unfair labour practice.

13.3. The Respondent is ordered to grant the applicant locomotion allowance effective from 1st of June 2007.

13.4. There is no order as to costs".

14. In her award, after briefly summarising the respective parties arguments, the Arbitrator dealt with the evidence and arguments as follows

"Survey of Evidence and Argument

"The memorandum dated the 7th of May 2003 circular no. 16 of 2003 issued by a municipal manager is in contravention with the collective agreement and it seeks to unilaterally alter the collective agreement by conferring powers to the Departmental Sub-Committee to approve or disapprove locomotive allowance applications which is in contradiction with Clause 3.1 which vests the power in the hands of the head of the department. Clause 2.2 provides that a scheme may be amended only by agreement duly negotiated at the Bargaining Council. The employer failed to do that: instead he issued a memorandum, which was unilaterally altering the terms of that collective agreement. The Head of the Department cannot unilaterally introduce changes that affect the accessing of the locomotive benefit because he waived that right when he entered into that collective agreement.

Section 23(1)(c) of the LRA provides that a collective agreement binds the members of a registered trade union and the employers who are members of a registered employer's organization that are party to the collective agreement if the collective agreement regulates terms and conditions of employment or the conduct of the employees in relation to their employers. It is common cause that 2001 Constitution of SALGBC is a collective agreement and is binding upon all parties to the agreement. Section 24 of the Act provides for a mechanism for the resolution of disputes arising out of a collective agreement. The respondent was open to invoke these provisions if they found the policy to be cumbersome.

My understanding of the policy is that the Sub-Committee only features appeal on instances where the employee is not satisfied with the decision of the Head of the

department he may then refer the matter to the Sub-Committee for internal resolution which is provided for in Clause 9 of the Locomotive Scheme." (sic)

15. The above is the extent of the Arbitrator's reasoning in the matter. It is clear that the Arbitrator only deals with the issues of who was the competent person or body to determine an application for the motor vehicle allowance and that if the Municipality was unhappy with the way that the agreement worked it could have invoked the dispute resolution mechanisms contained in the collective agreement.

16. Nowhere in the Arbitrator's award is the issue of the alleged unfair labour practice dealt with at all other than the statement under the "Award" section that *"the Respondent's refusal to grant the Applicant locomotion allowance constitutes an unfair labour practice."* She also did not deal with whether or not Chetty in fact complied with all the requirements in terms of the scheme and as such she was also not in a position to find that he should have received the motor vehicle allowance.

17. The Arbitrators failure to deal with the essence of the dispute before her amounts to a gross irregularity and in the circumstances the Arbitrator reached a decision which a reasonable decision maker could not have reached. The application to review and set aside the award must therefore succeed.

18. As far as the section 158 application is concerned this must obviously fail on the basis that the award is set aside.

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

20. In the circumstances I make the following order:

    20.1. The award issued under case number EMD 030802 is reviewed and set aside.

    20.2. The matter is referred back to the Fourth Respondent for determination by a commissioner other than the Third Respondent.

    20.3. No order as to costs.

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Conradie AJ

Date of hearing	7 December 2009
Appearance for Applicant	Mr M Maeso of Shepstone & Wyle
Appearance for First and Second Respondent	S Reddy of Shanta Reddy Attorneys
Date of judgment	5 February 2010