IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: JS55/06

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

Applicant

and

MATJHABENG LOCAL MUNICIPALITY

Respondent

JUDGMENT

FRANCIS J

Introduction

1. The applicant is the South African Municipal Workers Union (SAMWU) that brought an application in this Court on behalf of its members for an order that the provision of transport to the affected employees to and from work by the respondent is a term and condition of their employment. It is also seeking an order in terms of section 77A(e) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) that the respondent provides transport to and from work for the affected employees and an order that the respondent pay compensation and/or damages to the affected employees after the respondent had withdrawn the transport for the period September 2003 to date of payment of such compensation.

2. The application was opposed by the respondent on the basis that the provision of transport to the affected employees was gratuitous and was an effort on its part to alleviate the employees' transportation difficulties. It did not constitute their conditions of employment

and it was an arrangement to enable the employees to perform their duties. It admitted that with effect from 30 September 2003 it terminated the provision of transport to its employees but denied that it did so unilaterally and unlawfully. It denied that the employees suffered any damages.

3. At the commencement of the proceedings this Court ordered that quantum be separated from the merits.

Who are the affected employees

4. The parties reached an agreement about the handing in of statements by the witnesses. The list of such employees and those who testified in court are listed as annexure “AAA”.

Admissions made by the parties

5. The parties agreed that the membership issue has been resolved. A1 - 28 are stop orders of the employees with their deductions. They concluded the following agreement:

 5.1 The respondent admitted that the SAMWU stop order list, as at July 2006, found in bundle A1 is what it purports to be and is, furthermore accurate;

 5.2 The respondent admitted that the persons listed in annexure A to this document are members of SAMWU at all material times;

6. The following agreement was reached regarding the presentation of evidence:

 6.1 The written statements in bundle B will be made available to this Court;

 6.2 The respondent admitted the correctness of the following information contained in the statements:

(a) The dates of appointment of the employees and the fact that they remained employees of the respondent as at September 2003;

(b) That the workers commenced using the transport from the dates indicated in the statements;

(c) That the workers continued to use the transport until it was withdrawn, in September 2003 (unless otherwise indicated in the statements).

6.3 The admissions in paragraph 6.2 above were made subject to the right of the respondent to withdraw an admission if it was found to be incorrect prior to the conclusion of the presentation of the evidence in this case. In the event of such withdrawal, both parties will be free to lead evidence on the issue.

6.4. The evidence of the deponents to the statements in bundle B regarding the communications to them by employees of the respondent as to the availability of transport, the dates of those communications and identities of the relevant employees, shall be admissible. The weight to be attached to this evidence shall be as if it had been given orally and as if it had been subjected to similar cross-examination to that of those witnesses who testified in relation to similar issues. The weight of this evidence will also be assessed in conjunction with all the documentary evidence before the Court.

The evidence led

7. The applicant called fifteen witnesses to testify at the proceedings. In addition to that 145 statements were by agreement handed into court. It is not necessary to repeat the evidence in any great detail. Two of the employees commenced employment with the old

Welkom City Council (Welkom) in 1971 and 1973 respectively. They were living in Thabong township. Welkom started to provide its employees with free transport from 1975 onwards. Since 1975 the employees who were employed were told by a Mr Rathaba and their supervisors that transport would be made available to them from the Rathaba hostel in Thabong township to their workplaces and back. The transport was free and they were not told how long it would be provided for. They were shown which trucks to use as transport and started using the transport until it was terminated in 2003. Those employees who had found accommodation in Welkom town stopped using the transport that was provided. One such employee was Thembalethu Jackson Mfutwana. He was given a vehicle to drive. He transported workers from home to work and back. The white employees of Welkom were provided with transport namely, vans to commute to and from work. In October 1993 the employees requested the respondent to increase the areas of pick up points and provide them with covered mode of transport since the trucks were open. Thabong township had expanded. New pick up points were identified and the respondent agreed to extend the pick up points. Transport was also extended to one area outside Thabong called Bronville. The respondent admitted that new routes were added. The new routes were used up to 2003 when the transport was terminated.

8. Those employees who were employed by the Thabong City Council (Thabong) were not provided with transport. Free transport was only provided to them in 1994 after Thabong and Welkom were disestablished and the Welkom Transitional Council (Welkom TLC) was established in September 1994. The employees in terms of clause 6(a) retained their conditions of service and remuneration. The old Bronville, Thabong and Welkom municipalities formed part of the Welkom TLC. The transport remained as it was. On 28

September 2000 the Welkom TLC that was established on 30 September 1994 was disestablished and was replaced with the Matjhabeng Local Municipality and became the new employer of the employees. Their existing terms and conditions remained the same up to 2003. The respondent produced the document at Page 232 which dealt with the transport of personnel. It is an extract from a Mayoral Committee (Mayco) meeting held on 2 December 2002. It reads that:

"The transporting of personnel to and from home and their workplace was a practice started many years ago in Welkom due to lack of public transport at the time. In the meantime the taxi industry has filled the gap and the problem no longer exists. However the transporting of personnel has continued at a cost of more than R800.000 per annum to the Council in overtime of drivers and running costs of vehicles. There is presently misuse of the transportation to areas not previously catered for and transporting of non Council personnel. There is also discontent amongst personnel who are not transported as they feel they are being deprived of a fringe benefit. Personnel from all other towns except Welkom do not receive transport. Personnel receiving the fringe benefit are not being taxed on it. Considering that the justification for providing transport to and from home has expired, that costs are high and that the Council has a financial crisis, it is proposed that transport of personnel to and from home should cease."

Page 233 records that *"Transport of personnel from Welkom is a vested right that had been ongoing for approximately twenty to thirty years."*

9. The applicant's witnesses testified that when the respondent decided to remove the transport in 2003 it did not consult or discuss it with the unions. They were at a Local Labour Forum (LLF) meeting on 5 August 2003 where they were given a document

stating that the respondent had taken a decision on the question of transport. They had not reached an agreement with the respondent about the termination of the transport. The employees had been notified by the respondent when they received their August 2003 salaries that at the end of September 2003 that there would not be any transport. SAMWU drafted a memorandum signed on 18 August 2003 demanding that transport be retained since it was a benefit. This was rejected by the respondent and SAMWU was informed that Mayco had at its meeting of 16 July 2003 resolved to terminate the transport by 30 September 2003 and that the employees would be notified. SAMWU declared a dispute and referred it to the Bargaining Council for conciliation on 15 December 2003. It stated that 'the employer had unilaterally withdrawn transport which formed part of the workers' contract of employment'. They said that it formed part of their contract of employment because of what they were told when they started working for the respondent that transport would be provided. They were not told that a time would come when the transport would be terminated. When the transport was withdrawn in 2003 they were not paid any allowances. Transport was provided for black employees who were living in Thabong but were working in different departments like Parks etc. The free transport was only provided to employees of Welkom. At that time Virginia and Odendaalsrus were not part of Welkom. Matjhabeng consists of Ventersburg, Odendaalsrus, Henneman, Alan Ridge, Welkom and Virginia. This transport was only provided for Welkom. The respondent was talking about alternative transport and not the trucks that they were using. He did not agree that the justification for the transport had expired.

10. The following agreement was reached between the parties which did not necessitate the

calling of Monnelwa. Monnelwa attended the meeting on 20 August 1994 as referred to at page 171 in his capacity as a shop steward. The shop stewards present at the meeting tabled several requests from workers including a request for the extension of pick up points and routes and that busses be provided instead of trucks. SAMWU on occasion subsequent to the meeting of 20 October 2004 also proposed as alternatives that protection should be provided for the employees who made use of official transport and all workers who did not make use of official transport be paid a transport allowance. The Welkom TLC decision is that the status quo to be maintained and that the relevant heads of department be authorised in conjunction with the Town Clerk to amend pick up points according to the needs of the department and the workers in their departments who currently made use of official transport.

11. The respondent called Benjamin Alfred Montshioa as its only witness. It is not necessary to deal with his evidence in any great detail since he did not have any personal knowledge about the agreement reached between the employees and the respondent and its predeccessors. He was elected as a ward councillor in 2000 and was appointed to serve on the mayoral committee (Mayco). He is responsible for the local economic development and special planning. He became aware of the practice inherited from the previous dispensation about transport to employees in grade 16 to 19 and in particular free transport to employees residing in Thabong township. Management was asked to investigate this issue and to report to Mayco about the costs and why only one unit of the respondent had enjoyed this benefit. The transporting costs were excessive. A report

was presented to Mayco. It was found that the reason for the benefit was no longer necessary and it was not affordable to the respondent. He was not sure whether he should call the provision of transport a benefit but it was transport. The transport was initially provided due to the high absenteeism and the persistent late coming and the poor transport system that existed in Thabong. A report came through that the transport had improved and it was no longer necessary to provide transport. (This evidence should be treated with caution since the authors of the report were not called as witnesses). Some other units of the respondent raised this about why only employees residing in Thabong were receiving this benefit. Management recommended that transport cease and that it should be referred to the LLF for consultations. Mayco took notice of management's intention and it was referred to the LLF for consultations. He asked SALGA to provide an opinion about the issue of transportation. After Mayco had received all the reports and advice from SALGA, resolved that the transport should cease from 30 September 2003 and all affected employees be notified. The decision to terminate it was taken on 16 July 2003. He is not a member of the LLF and did not take part in the consultation. When they commissioned the report, they had expected human resources to advise the politicians about the legal implications about providing transport. The advice from SALGA was that it was not a legal obligation to continue to provide transportation. Councillors are not involved in the recruitment of employees. During cross examination he said that he was not certain whether the termination was done unilaterally. He said that he could not agree that the benefit was removed without consent and they were worse off because it was taken to the LLF and the union was involved in it. He agreed that Mayco had already in December 2002 raised why only employees in Thabong were being provided with council transport. The executive manager of human resources made a

recommendation to Mayco that the transporting to personnel to and from work should be considered to cease and if this is the case it may be referred to the LLF for consultation. The said recommendation came before Mayco on 16 July 2003 and it resolved that it be terminated by 30 September 2003. In May 2003 Mayco took a decision and it was referred to management for a report. They could not take a decision without a report. They received the report before 16 July 2003 and a decision was taken on 16 July 2003. The report stated that the transport should cease and if it ceased it must be referred to the LLF for consultation. On 16 July 2003 it was resolved it should be terminated by 30 September 2003 and the employees had to be notified accordingly. He was not sure when it was sent to the LLF for consultations. He agreed that the minute of the LLF meeting of 5 August 2003 records that the matter was referred and the labour component be granted an opportunity to consult its members about the matter. He did not recall whether the views of the employees as reflected in the memorandum of 18 August 2003 came to Mayco's attention but said that it was discussed. After Mayco had resolved that transport be terminated it was taken to the LLF for consultations. He agreed that he did not know what reasons were given to the employees for transport. He agreed that he understood that they could remove it because it was no legal right. He was asked that it they were told that it was a term of the contract whether he would not unilaterally terminated it and negotiate it. He said that they would have looked at how they could minimise the costs and whether it was in proportion to the number of employees to be transported and they would have abolished the abuse of it. He agreed that he studied the report when it was put before Mayco. It was put to him that page 233 reflects that a head of department of parks, sports and recreation reflects that 'transport of personnel in Welkom is a vested right that has been ongoing for approximately twenty to thirty years and was asked if he

did not investigate it. He said that it was a comment from the head of department in the respondent and that statement contradicted the legal opinion from SALGA and SALGA'S opinion far outweighed what the head of department said.

12. After the first respondent had testified the matter stood down to ascertain the whereabout of the second witness. The court was advised at 11h30 that the witness was still in Welkom and would be in court at 14h00. At 14h00 the court was informed that the witness Eric Tegwane, was not willing to come to court and would no longer be called. The matter was postponed to 29 November 2010 after an affidavit was handed in stating that the respondent's witness a Mr Moolman who underwent a heart surgery operation and would not be available for six weeks. Costs were reserved.

13. The respondent closed its case without calling Moolman.

Analysis of the evidence and arguments raised

14. Most of the applicant's members before this Court reside in Thabong township and are employees of the respondent. They were all employed at different periods by the respondent. The respondent, the Matjhabeng Municipality, came into existence on 28 September 2000, pursuant to a merger of municipalities. One of the disestablished entities replaced by the respondent was the Welkom Transitional Local Council (the TLC), which had been established on 30 September 1994. As was required of it by section 8(e) of the Free State Province Provincial Gazette of 28 September 2007, the respondent became the employer of the Welkom TLC employers on the same terms and conditions (including remuneration) applicable to them as employees of the disestablished municipality which

previously employed them.

15. It is common cause that the Welkom TLC's black employees of its predecessor, the municipal council of Welkom (Welkom) had, for many years enjoyed free transport to and from work in their employer's vehicles. The free transport was provided in 1975. Before that there was no free transport. Those employees who were employed by the Thabong Town Council before 1994 were not provided with free transport. They received free transport from 1994 onwards. From the date of its establishment, the respondent continued to provide such free transport, until the end of September 2003, when it unilaterally terminated the provision of the transport. The present proceedings were brought in response to the aforementioned termination. The applicant acts on behalf of the group of its members who on the applicant's version were contractually entitled to continue to receive the transport which was unilaterally withdrawn. The respondent admitted the existence of the practice of providing free transport alleged by the applicant but disputes that the affected employees had a contractual right to the transport.

16. The crux of the matter is whether the affected employees had a contractual right to the transport which had for many years, been provided to them by the respondent and its predecessors. A further issue is whether, even if the employees were not contractually entitled to the transport, the respondent was nonetheless legally obliged to continue to furnish the transport until a collective agreement was reached permitting termination. This depends on the meaning and effect of clause 8(e) of the Provincial Gazette.

17. The respondent had opposed the application on the basis that the provision of transport to

the affected employees was gratuitous and was an effort on its part to alleviate the employees' transportation difficulties. Further that it did not constitute their conditions of employment and it was an arrangement to enable the employees to perform their duties and denied that it had terminated it unilaterally. However the respondent conceded in its heads of arguments that the practice of providing free transport utilising its own vehicles started as early as the 1970s until 30 September 2003 when it was terminated. It conceded too that this termination was taken by Mayco on 16 July 2003 without full consultation with the applicant or the employees on the strength of the legal opinion received by Mr Lerata from SALGA on 21 November 2002. The respondent contended that what remained to be determined was whether the practice became a term of service. It said that it did not.

18. It was further contended that the applicant, upon whom the onus rests to show that the provision of transport was a term of service in each of the employee's contract of service has failed to establish that the employees were told that the free transport forms part of their remuneration or salary. The applicant pleaded that this was not stated at the time of employment. The applicant has failed to prove that the practice applied to all employees.

19. The respondent did not call any witnesses who were present when the affected employees were employed. It did not call any witnesses to support its pleaded defence that the provision was transport was gratuitous and was an effort on its part to alleviate the transportation difficulties of the employees. Its only witness testified that the decision to terminate the transportation was taken by Mayco and was then referred to the LLF but he was not present at the said meeting. It had relied on the advice given by SALGA.

20. It is clear from the evidence that the practice of providing free transport to and from work was first introduced by Welkom in 1975. Two of the individual employees (Elphas Ngqambuza and Alfred Hanyaza) testified that they were first provided with free transport by Welkom in 1975. They were employed in 1972 and 1973 and the transport was cancelled in 2003 which is some 28 years. Their uncontradicted evidence is that in 1975 they and a large group of employees were called by their then supervisors to a meeting where they were informed that the free transport would henceforth be available for them. From that time until the time that the transport was cancelled, they used it on a daily basis. The memorandum of December 2002 by one of the respondent's department's manager states that:

"Transport of personnel in Welkom is a vested right that has been ongoing for approximately 20 to 30 years".

21. Welkom attended to the formalities of engaging new employees in a central human resources office. The evidence of Themba Mfutwana, Jafta Lithabe, Mlutami Sidukwana and others to the effect that, when they were employed in the early to mid 1980's, one Mr Rathabe worked in that office and attended to the requisite formalities regarding their employment. Whilst doing so, he told them that the free transport would be made available to them to and from work and that further details could be obtained from their supervisors. The details were subsequently furnished by their supervisors. Employees employed at a later date as testified to by James Motaung and Daniel Mana, said that they were told nothing in the human resources office about their terms and conditions of employment and not even their salaries. They were left to find out from their future

supervisors and colleagues what their work would be and what wages and other benefits they would receive. They were, however, told at their first meeting with their supervisors that free transport to and from work would be provided for them. All those who were initially employed by Welkom became employees of the TLC with effect from 30 September 1994 in terms of Provincial Gazette of 30 September 1994. At the same time the Thabong (Thabong) was dissolved and its employees also became employees of the Welkom TLC.

22. The former employees of Thabong had worked within Thabong township which is close to their residence. In terms of clause 6(a) of the Provincial Gazette of 30 September 1994, they were entitled to retain their conditions of service, which would have included the venue of their workplace. However, the evidence of Mzuvukile Jotheni, Zolile Chiya and Lenos Dzambe shows that they and about 100 others, were told by managers or supervisors representing the TLC, particularly Mr L Grobbelaar, Mr P Bezuidenhout and Mr A Ferreira that they were required to move to new workplaces a considerable distance away within the area of the disestablished Welkom Municipality. However, they were told simultaneously that free transport would be provided to them to and from their new workplaces, in the manner previously provided by Welkom. A further small number of individual applicants were first employed sometime after the establishment of the TLC, though before the establishment of the respondent. The evidence shows that, as with many of the ex-Welkom employees, they were told by their supervisors at their first meetings with them that free transport would be made available to them. All the applicant’s witnesses testified that, when they were told that the free transport would be made available to them, they were not told that this was terminable at the discretion of the employer or was ‘gratuitous’ or anything of the like. They were simply told that the

transport would be made available to them and it was clear that this was to be free of charge.

23. All the applicant's witnesses who gave evidence testified, that an oral undertaking was given to them that free transport would be made available to and from work. The statements in bundle 'B' all contain similar evidence. In terms of paragraph 4 of the "Agreement regarding the presentation of evidence referred to above:

"The evidence of the deponents to statements in bundle "B" regarding the communications to them by employees of the Respondent as to the availability of transport, the dates of these communications and the identities of the relevant employees, shall be admissible. The weight to be attached to this evidence shall be as if it had been given orally and as it had been subjected to similar cross-examination to that of those witnesses who testified in relation to similar issues. The weight of this evidence will be assessed in conjunction with all the documentary evidence before the Court."

24. The witnesses who testified orally in every instance testified about the oral undertakings given to them, including the names of those who gave the undertakings. It was not put to them that their evidence was false, nor has any evidence been led to contradict their versions as to what they were told, by whom and when. Not one of the persons alleged to have given the oral undertakings were called to testify. The evidence of those employees who testified orally must be accepted. It follows that their evidence about the undertakings of free transport to and from work contained in the statements in bundle 'B' is accepted. Every affected employee received an oral undertaking, at the time that the transport was first made available to them that free transport to and from work would be

made available.

25. It is clear from the uncontested evidence that the affected employees were first made aware of the free transport facility after they were told about it by a representative of a predecessor of the respondent. The representative was either an employee in the human resources office or a supervisor/manager or both. The representatives told the employees that the transport would be made available, where it was obtained, where it would go to, and expressly or by implication that the transport would be furnished free of charge. They said nothing similarly that this was to be a gratuitous benefit that could be unilaterally removed by the employer at any time. In the majority of cases the representative concerned gave the relevant undertaking at the time that the employee was in the process of being taken into employment or was first reporting for duty.

26. There were some cases, however, where the transport was only made available to the employee after he had already become an employee. The primary example of this is former Thabong employees, who were told that they were required to move to a new workplace but were simultaneously told that transport would be furnished. There were also a few employees who worked for Welkom before the free transport was first introduced. In their cases they were told that the undertaking was given at the time that the transport facility was first made available.

27. The oral statements in all the above cases made by the respondent's representatives constituted an offer, which was accepted by the conduct of the employees in making use of the offered facility, thereby giving rise to a contractual right. The relevant contractual

term came into existence whether or not the respondent's representatives subjectively intended to create a contractual obligation. Whilst such a subjective intention must have existed, the authorities show that such an intention will be imputed wherever the other party has reasonable grounds for believing that this was the intention. On the facts of this case, the employees had such a ground for so believing.

28. In *Coop and Others v SA Broadcasting Corporation and Others* (2004) 25 ILJ (W), the Court held that an employer's longstanding practice of subsidising post retirement medical aid had become a term of employee's contracts of employment, although it was not expressly provided for in their written contracts. The employees' evidence as summarised by Blieden J at 1961 C) that:

".... they required the subsidy as a condition of service. They were never told this in so many words, but it was made clear to them that the medical scheme was a subsidised one and they understood that it would remain so as it has up to now".

Save in one an unexplained document (by which the Court was not impressed) the employer had not informed the employees that the subsidy could be altered or removed by it unilaterally. The Court said the following at 1962 F:

"At no stage, other than the unexplained document to which a reference has already been made, did the SABC give retirees notice that the subsidy was either to them or indeed to the employees of the SABC was a gratuity and not a condition of service".

The Court then held as follows at 1963 G:

"In a case such as the present one, when the SABC and the Plaintiffs are unable to produce any evidence as to whether there was or was not a condition of service promised by the SABC as to the payment of a post retirement subsidy to the medical scheme, the

provisions of the doctrine of quasi-mutual at assent are apposite

This doctrine imports an objective approach to the conclusion of a contract, it has its origin in English law, in the well-known rule in ***Freeman v Cooke*** *1848 (2) EX 654 at 663 where the passage of Blackburn J in* **Smith v Hugues** *1871 LR6 (QB) 597 at 607 is quoted:*

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's items.'

This principle was applied by the Appellate Division in ***I Pieters and Co v Solomon*** *1911 AD 121 at 130 per De Villiers CJ as follows:*

'If the course of dealing with the Defendant was such as reasonably to lead him to believe that they intended to pay him the full amount of his claim, the Plaintiff unexpressed intention to pay the lesser sum cannot avail them.'"

29. The 'objective approach' of this doctrine renders legally irrelevant any undisclosed *reservatio mentalis* in terms of which the employer (or its representative) does not 'intend' the benefit to become contractually enforceable. The employee's reasonable understanding arising from the employer's conduct becomes contractually binding.

30. The Court went on in the *SABC* case to consider an argument advanced on behalf of the employer against the applicability of this doctrine on the basis that no reasonable person could have believed that the SABC was binding itself by its practice of subsidising post-

retirement medical aid. It dismissed the argument and held at 1964 G that the contentions on behalf of the SABC:

".... display a cynical attitude by it towards its pensioners. Payment of the subsidies post-retirement is just as much as quid pro quo for pensioners as is for other employees..."

The Court went on to hold at 1966 A, that the post retirement medical aid subsidy:

" ... was not a gratuity and could never be regarded as such".

31. I agree with the applicant's contentions that the applicant's case is stronger than that in the *SABC* case because, unlike in that case, in this case the affected employees were expressly told they would be furnished with the free transport. This makes the reasonableness of their belief that free transport was one of their contractual benefits all the more obvious.

32. In my view, any statement made on behalf of an employer at or about the time of the conclusion of an employment contract about a benefit to be made available, must be construed as giving rise to a contractual obligation, unless the employer makes it clear at the time that this was not the case. The essence of an employment contract is a 'wage - work' bargain. In return for the 'wage' to be received, the employee is obliged to do the 'work'. The free transport undertaking given to the employees constituted part of its 'wage' offer, which the employee accepted by taking up the employment.

33. In *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd* (1997) 18 ILJ 374 (LC) Revelas J recognised that employer-provided

transport generally forms part of the 'wage' element of the employment contract when she held as follows (at 378A):

"Any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in the basic terms and conditions of employment and cannot effected unilaterally. The use of a motor vehicle by an employee granted by the employer is in my view a quid pro quo for the work rendered and is a form of remuneration. It is in fact part of the employee's salary, albeit on a somewhat different basis. One can well imagine that the motor vehicle benefit scheme offered by the Respondent was and still is a serious consideration for several prospective employees when deciding whether or not to take up employment with the Respondent company. Any changes to this benefit have the result that the employee's salary or remuneration package is potentially or in fact affected and therefore constitutes a change to the employee's terms and conditions of employment."

34. This passage accords with what any employee would reasonably understand when informed of an employer's offer to make available a valuable benefit, such as free transport to and from work. Statements made by the employer's representative to the employee at the time for the conclusion of the employment relationship about benefits which the employee will receive must therefore be taken to be express terms of the employment contract in relation to the 'wage' element thereof, unless the employer makes it clear that the benefit is gratuitous and subject to removal at the discretion of the employer.

35. The position is analogous to the situation in which benefits are set out in an employer's

handbook or similar document. Wallis "*Labour and Employment Law*" refers at para 45 to such documents, including those dealing with *'transport* benefits'. The learned author comments:

"Various views can be taken of such documents. At the one end of spectrum they can be incorporated by reference in individual contracts of employment or by virtue of the invariable custom and practice of the business they can be taken as tacitly incorporated into those individual contracts. In that event unless the employer reserves the right to amend, vary or remove such benefits they can only be altered or removed by agreement between the employer and employee. At the other end of the spectrum the terms of such a document may make it clear that the benefits referred to therein are gratuitous and subject to removal at any time."

36. Where employees were told at the time that they were employed that they would be furnished with the free transport, the right to use this facility became a term of the contract. The same conclusion applies in respect of employees who were only told on some occasions subsequent to the commencement of their employment that the employer was willing to make free transport available to them. The transport was a valuable benefit and, since nothing was said at the time reserving the employer's right to withdraw the transport unilaterally, the employees were entitled to regard this valuable new benefit as part of their contractual rights, just as they would regard a unilaterally offered wage increase. This is particularly obvious in the case of the former employees of Thabong. They became employees of the Welkom TLC pursuant to clause 6(a) of Proclamation 42 of 1994 (bundle A, page 64 C) which provided for their transfer to the TLC "with the retention of the conditions of service (including remuneration) which then applied".

Those conditions of service included the location of their existing workplaces in the Thabong township. They were told after the amalgamation that they were required to move to new workplaces in Welkom, a considerable distance away from their homes; but at the time that they were told this, they were also told that they would be provided with free transport to and from their new workplaces. By their conduct, the employees accepted this offer to amend their contracts. It could hardly be suggested that the provision of free transport in these circumstances was gratuitous and did not become a term of their contracts as the same time that their contractual workplace was altered. The transport was clearly part of the *quid pro quo* for the alteration of the term as to the location of the workplace.

37. The TLC and SAMWU agreed upon an expansion of the routes and the introduction of new pick up points. Shop stewards requested improvements to the existing transport arrangements including an expansion of the routes and the introduction of new pick up points. The question was carefully considered by various managers and committees. Consideration was given by the TLC to withdrawing the transport and offering a transport allowance in its place which supports the applicant's contention that the existing benefit was a right for which compensation would have to be offered if it was withdrawn. Ultimately it was decided not to offer a transport allowance. Instead the TLC's council resolved on 26 October 1995 to maintain the status quo but to amend the pick up points according to the needs of the Department and workers in their departments who currently made use of the official transport. The uncontroverted evidence of amongst other Mfutwana and Lithabe showed that what followed was a joint exercise between the union and managers, in which agreement was reached on considerably extended routes and the

introduction of new pick up points. The union's membership was canvassed for their views and the union's consent to the agreement was signed, it is clear that the details of the new transport arrangements were the product of an agreement between the employer and the union. All of this indicates that the transport arrangements were not gratuitous.

38. The application stands to be granted. Both parties sought costs against the other although they do have an ongoing relationship. There is no reason why costs should not follow the result.

39. In the circumstances I make the following order:

39.1 It is declared that the provision of transport to the affected employees listed in "AAA", from work, by the respondent is a term and condition of their employment.

39.2 The respondent is ordered to provide transport to and from work for the affected employees, within one month of this order.

39.3 The respondent is to pay the costs of the proceedings which includes the costs of senior counsel.

39.4 The registrar is to allocate a date of hearing in respect of the question of compensation and/or damages.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	A FREUND SC INSTRUCTED BY CHEADLE THOMPSON & HAYSOM INC
FOR THE RESPONDENT	:	G MALINDI SC WITH S E MOTLOUNG INSTRUCTED BY MOROKA ATTORNEYS
DATE OF HEARING	:	23 - 25 AUGUST, 29 NOVEMBER 2010
DATE OF JUDGMENT	:	10 DECEMBER 2010