IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO C966/2008

In the matter between:

THEWATERSKLOOF MUNICIPALITY Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (WESTERN CAPE DIVISION) First Respondent

ARBITRATOR ADV C DE KOCK N.O. Second Respondent

IMATU on behalf of A J D HENN Third Respondent

JUDGMENT

TIP AJ:

1. As at the date of his dismissal on 2 October 2007 Mr Henn was employed by the applicant as its Manager: Health Services. He had been in service with the Municipality for some 22 years. The events giving rise to his dismissal had their origins in a difference between himself and the applicant concerning the application of a transport allowance scheme. After his dismissal Henn referred a dispute to the first respondent, the SALGBC. An arbitration was conducted before the second respondent who held that the dismissal was substantively and ordered that Henn should be retrospectively reinstated with full back pay. The applicant was

dissatisfied with this outcome and instituted the present review proceedings.

2. Before turning to a consideration of the issues in this review it will be useful for me to set out a chronological outline of the events:

2.1. On 20 October 2004 Henn entered into a contract with the Municipality in terms of its transport allowance scheme for essential users, which provided that he would receive a fixed monthly allowance of R3,500 in return for which he was to use his own vehicle for official trips within the municipal area.

2.2. After a while Henn formed the view that fuel and maintenance increases were such as to place the cost to him of using his own vehicle well above the level of the allowance. On 2 August 2006 he accordingly gave notice that he would leave the scheme on 1 February 2007 unless the Municipality saw fit to increase the allowance. He gave notice that an official vehicle was to be available for him as from 1 February 2007.

2.3. IMATU wrote to the Municipality on Henn's behalf on 23 January 2007 alleging an unfair labour practice in that Henn was not being paid R3,500 per month in accordance with an Executive Mayoral Committee resolution (which was adopted on 1 December 2004). This resolution stated that the essential transport scheme would be allocated in this way: all managers would receive R3,500 per month; all officials who carried out duties throughout the municipal area would receive R3,500 per month; all other officials who qualified would receive R3,000 per month. Although the letter cites the detail of the resolution it did not identify precisely what the complaint was.

2.4. The Municipality responded on 26 January 2007 but that letter is not in the record. Nonetheless, clarity in respect of IMATU's demand is apparent from its letter of 27 January 2007, where it is said that

Henn was to receive his allowance on the same unqualified basis as other managers whereas he, it was alleged, had to furnish a log sheet.

2.5. The latter allegation seems not to have been correct and in a letter from the Municipality of 7 February 2007 it was stated that Henn currently received a fixed monthly transport allowance and was not required to submit log sheets. On the face of it, it may be noted, the writer of this letter was not mindful of the fact that Henn was by 7 February 2007 no longer a member of the scheme. By the same token, the letter does not in any way lend itself to the interpretation that Henn's allowance status had been altered and that it was now a form of "perk".

2.6. 1 February 2007 did not bring an official car for Henn's use. To some extent he made use of his own vehicle during that month, as agreed with Mr Venter, the Director: Technical Services. On 12 March 2007 he put in a claim form.

2.7. Meanwhile, the Municipality included the amount of R3,500 in his salary payment for February. According to Henn, he became aware of this only on 14 March 2007 when his wife drew his attention to it. Mrs Henn also worked at the Municipality. She took receipt of his payslips and managed all the household finances.

2.8. The R3,500 appeared on the payslip against the entry "ESSEN. VERVOER" which evidently stands for "Essensiëlevervoer", that being the allowance which Henn had been receiving since his entry into the scheme in October 2004. It would appear that both Mr and Mrs Henn understood it in that way. Mrs Henn reported it to him on 14 March in those terms and, as Henn himself put it in his evidence-in-chief when asked whether he had received a transport allowance after 1 February 2007: "*Ja, daar is 'n vervoertoelae aan my oorbetaal, foutiewelik aan my oorbetaal, alhoewel die werkgewer*

geweet het dat ek uitgetree het uit die skema uit." It is also clear from the evidence that it had been their joint expectation that their income would be reduced after 1 February 2007 as a result of Henn's decision to withdraw from the scheme.

2.9. On the same day, 14 March 2007, Henn wrote to the Municipality referring to the fact that he had withdrawn from the essential transport scheme on 30 January 2007 and then stating: "*Ek bedank u egter vir die "perk"- voordeel wat vanaf 1 Februarie 2007 ingevolge UBK besluit 278/2004 aan my uitbetaal word.*" The reference to 'UBK' is a reference to the Mayco decision of 1 December 2004, mentioned above.

2.10. Venter responded to this letter on 20 March 2007. He made a number of points, including the statement that the R3,500 which Henn had been receiving was paid in accordance with the 'UBK' decision and the observation that consideration was being given to an increase in the allowance. He directly addressed Henn's view that he should receive the R3,500 as a "perk" without having to use his own vehicle for official duties, this because there were some officials who received the allowance but used their vehicles for less than 300km on official use. Venter provided some comments on this aspect and on the operation of the scheme in general, on the strength of which he made it clear that there was no "perk" scheme and that all officials who received the allowance had to use their vehicles for official purposes. The letter concluded with this specific statement: "*Weens 'n misverstand het u egter nog steeds die bedrag van R3 500 vir Februarie ontvang, en sal die bedrag derhalwe van u verhaal word.*"

2.11. This letter could have left Henn in no doubt that, as far as the employer was concerned: (i) there was no "perk" scheme in existence; (ii) Henn was not being discriminated against in terms of the scheme because there were other managers who received the

same monthly allowance but used their vehicles for less distance on official duties; (iii) the payment to him of R3,500 for February 2007 had been made in error; and (iv) that amount had to be repaid to the Municipality.

2.12. A further letter was addressed to Henn on 23 March 2007 in similar terms from Mr Fisher, the Chief Personnel Officer, which reviewed the position, noted that Henn had received the allowance for February and March 2007 and requested him to make the necessary arrangements with the salaries section for these amounts to be repaid.

2.13. At around the same time, some disagreements arose between Henn and Venter concerning travel for official purposes and the use of his vehicle. These came to form part of the disciplinary environment but, that aside, the details thereof do not fall for my adjudication.

2.14. The Municipality again paid Henn an allowance of R3,500 for March, similarly reflected on his payslip dated 25 March 2007 as being the essential transport allowance. It also paid him an amount of R251.12 for travel, that being the claim for travel outside the municipal area as lodged by him for February. His claim for travel within the area was not paid.

2.15. As with the February payment of R3,500 Henn did not refund the March amount. Instead, he spent it. His testimony on this is best left to speak for itself:

> "*Ja. Mnr Henn, toe kom Maartmaand en u ontvang weer 'n toelae, en op daai stadium weet u u moes die toelaag nie ontvang het nie. Wat maak jy toe met daai toelae? Gee jy hom toe uit?*
>
> *--- Dit was by my salaris inbetaal, foutiewelik meneer.*

Ja maar u weet nou mos u moet dit nie ontvang nie. Gee u dit toe uit?

--- Ja."

2.16. On 29 March 2007 Henn signed a document authorising the Municipality to deduct an amount of R10 per month in respect of his indebtedness for the transport allowance payments to him. There is evidence that it was the practice of the Municipality to negotiate repayment terms with employees and Henn conveyed to it that his expectation was that there should be such negotiation with him. That notwithstanding, the applicant has in these proceedings described the tender of R10 as derisory, fairly so in my view. At that rate, it would take about 58 years to liquidate the debt of R7,000.

2.17. In any event, in an internal memorandum, Fisher recommended to Venter that a meeting with Henn should be arranged in order to discuss the matter. Such meeting took place on 22 May 2007 as summarised in a memorandum to Henn of the following day, where it was recorded that: (i) Henn would reconsider whether he would participate in the scheme; (ii) he owed the Municipality R7,000 which he had offered to repay at the rate of R10 per month; (iii) by accepting the erroneous payments while knowing that he wasn't entitled to them he had not acted in the best interests of the Municipality; (iv) this could be seen as unlawful appropriation of Council funds; (v) certain provisions of the Municipal Finance Management Act had been contravened; (vi) since the payment of the R7,000 was hence unauthorised expenditure it should be repaid within 48 hours *alternatively* Henn could rejoin the scheme and set off that amount by using his vehicle without further payment for a period of two months; and (vii) Henn should inform the Municipality of his intentions within 48 hours failing which summons would be issued and disciplinary action would be considered.

2.18. It is apparent from this record that Henn did not at any stage suggest that he could do better than R10 per month. According to him, he wasn't given an opportunity to do so. That is a piece of evidence which does not strike me as inherently plausible and I should have thought that a man in his position could surely have tabled an improved offer for discussion, had he wanted to do so. It seems that he had no such wish, as emerges from a letter of 24 May 2007 written by IMATU on his behalf.

2.19. The effect of this letter was *inter alia* as follows: (i) Henn's complaint that although all managers received the allowance of R3,500 they did not all travel the minimum total kilometres per month; (ii) it was therefore contended that this amount was paid to them as a benefit rather than as part of the Essential Transport Scheme; (iii) Henn was therefore entitled to this monthly allowance without any obligation to comply with any of the requirements of the scheme; (iv) it was hence denied that Henn had received any unauthorised payments and stated that any action to recover such amounts would be vigorously resisted; and (v) there was no basis for the threat of disciplinary action. Perhaps somewhat revealingly, the letter did not go so far as to demand that Henn should be paid R3,500 for April 2007 and likewise for future months. The letter also did not intimate that a dispute would be declared in respect of the manner in which the allowance scheme was being implemented. Given its tenor, there was of course no proposal that Henn should undertake repayments at a more realistic level than R10 per month.

3. All considered, it could have as no surprise to Henn that the Municipality then proceeded with disciplinary action. A charge sheet was drawn up, dated 7 June 2007, containing six alleged offences. He was found guilty of: (i) charges 1 and 5 which broadly related to the failure to carry out instructions, for which he was sentenced to a period of suspension without pay for 10 days; (ii) charge 3 relates to Henn's claim for travel during February, despite his receipt of the R3,500 allowance, for which he

was summarily dismissed; and (iii) charge 6 relating to the unlawful appropriation of the R7,000, for which he was summarily dismissed.

4. Incidentally, in respect of the period of suspension, the applicant submitted that it was for 10 months and not 10 days. That submission is based on a patent error in the chairperson's findings on sanction. Those findings also recite the relevant portions of the applicable disciplinary code, paragraph 7.5.8.4 of which makes it plain that the maximum period of any such suspension is 10 days. Likewise, the disciplinary outcomes notification to Henn of 2 October 2007 stipulates 10 days and not 10 months.

5. In the course of the referral of the dispute to arbitration, the parties agreed that only the following two charges were required to be determined by the arbitrator. These are in the following terms:

   5.1. "U het na bewering nie met die nodige eerlikheid en integriteit opgetree nie deurdat u op 12 Maart 2007 'n eisvorm vir reiskoste vir die tydperk 1 Februarie 2007 tot 25 Februarie 2007 ten opsigte van ritte binne die TWK regsgebied voltooi het welwetende dat u reeds 'n vervoertoelaag vir gemelde tydperk ontvang."

   5.2. "U het 'n bedrag van R7 000-00 wederregtelik vir uself toegeëien deurdat u gedurende Augustus 2006 u deelname in die essensiële vervoerskema opgesê het en sodanige toelaag vir u persoonlike gewin aangewend nadat dit foutiewelik vir Februarie en Maart aan u betaal was."

6. The first of these charges turns on the question whether the employer established that Henn was aware on 12 March 2007 that he had received a transport allowance for the month of February. In determining this question the arbitrator accepted the evidence of Mr and Mrs Henn that she dealt with the finances and in particular that she routinely took receipt of her husband's payslips. Their evidence is further that she did not look

at the content of the February payslip until 14 March 2007, being the day on which Henn wrote to the Municipality to thank it for paying him the "perk" allowance. That letter was written after Henn had been informed by his wife that the transport allowance had been paid to him despite his resignation from the scheme.

7. The arbitrator also had regard to the fact that Henn had been entirely candid about the fact that he was putting in a claim for the use of his vehicle during February, this being something for which he had along the way obtained the approval of Venter. It is apparent from the evidence also that both Mr and Mrs Henn had approached their financial planning on the basis that the allowance of R3,500 per month would no longer be paid after 1 February 2007. Viewed overall, there is no reason to doubt this evidence and, likewise, no reason to believe that Henn had expected that his salary for February would still include that allowance.

8. In the course of the arbitration the Municipality attacked the credibility of especially Mrs Henn along the lines that she must surely have looked at the payslip well before 14 March 2007. Neither Mr nor Mrs Henn wavered on their evidence in this respect and the employer's efforts ultimately fell to be treated as speculative and argumentative, with no evidential support.

9. The arbitrator hence concluded that Henn had not been aware until 14 March 2007 of the payment to him in February of the allowance amount and that he was accordingly fully entitled to submit a claim form on 12 March 2007 for his February vehicle use. This conclusion contains no affront to the evidence placed before the arbitrator and I see no good grounds for it to be reviewed and set aside. The finding that Henn is not guilty of the first charge is therefore upheld.

10. As to the second charge, the arbitrator's approach was a good deal less satisfactory. He took as his departure point the fact that the Municipality had in error made two undue allowance payments for February and

March 2007 and classified these payments as the factual cause for all that followed. As he put it, if the Municipality had not made these errors then none of the subsequent problems would have arisen, Henn would never have had that money and his dismissal would not have taken place. In other words, he located the culpability within the Municipality's administrative incompetence and, conversely, held that Henn's conduct was to be exonerated as a result thereof. This approach on the part of the arbitrator is in my judgment fundamentally unsound. The true root of the problem is not that the Municipality made erroneous payments but that Henn made the election, in effect, to retain them. The distortion in the arbitrator's reasoning that was associated with this view is reflected for instance in the terms of his recital of the issue before him, in paragraph [51] of the award:

> "*The second and last issue that needs to be determined is whether the applicant's refusal to repay the R7 000-00 within 48 hours, or alternatively his refusal to rejoin the scheme and then to travel for two months without receiving an allowance constituted a fair reason for his dismissal. It needs to be kept in mind, in determining this question, that the respondent was solely responsible for creating the situation that led to the applicant having to repay monies to the respondent.*"

11. In formulating the issue in this way the arbitrator strayed from the content of the charge to the terms of the meeting of 22 May 2007 as recorded in the memorandum of the following day. Whilst it is no doubt so that Henn could have avoided disciplinary action by reacting in an appropriate way within the 48 hour ultimatum period conveyed to him at that meeting, the terms of that ultimatum did not constitute the charge which the arbitrator was obliged to determine. Rather, the key question posed through the second charge was whether or not Henn had unlawfully appropriated the amount of R7,000 for his own use.

12. Had the arbitrator set about addressing that question, certain elements of the evidence which he had received should have been given greater weight and others, such as the fact of administrative error, ought to have received less. In the context of a review, as distinct from an appeal, the

issue before me is whether, in so doing, the arbitrator produced an unreasonable and unjustifiable award.

13. I have outlined the relevant facts above. On his own evidence, Henn knew that there was not a "perk" scheme. If there had been any uncertainty before, which is my view not the case, the employer's position was made unmistakably clear on 20 March 2007. Despite that, Henn kept and spent the payment to him made on 25 March 2007. In simple terms, he appropriated monies for his own use to which he knew he was not entitled. That brought him directly within the language of the second charge. He should either have repaid the monies promptly or, at the very least, put forward a serious repayment proposal.

14. This perspective was clearly understood by the arbitrator but he nevertheless found that Henn should be exculpated, on a basis so slender as to amount to a failure to have proper regard to the relevant evidence. As an illustration of this, the following passage appears in paragraph [55] of the award:

> "*I must state that the applicant knew that he was not entitled to the monies, yet he used the monies. His actions in this regard could possibly have been construed as misappropriation of monies to which he was not entitled to and which were paid to him in error. It however appears from the evidence that incorrect payments to employees are not uncommon and neither is it uncommon for the respondent to then engage these employees into negotiations to repay the monies on a monthly basis. ... It is therefore my finding that, although the applicant ought not to have used the R7 000-00 in question, the fact that he did so was not a dismissible offence.*"

15. The arbitrator went on in similar vein in paragraph [57]:

> "*I also do not believe that it was necessary to discipline the applicant, especially based on the fact that the respondent was the sole cause of the incorrect payment of the allowances. The respondent could further have prevented the March 2007 payment, but instead continued with its poor administrative functions and allowed yet another incorrect payment to go through and in the process, causing the respondent further harm. This obviously also unnecessarily exposed the applicant to another amount of money being deposited into his account*."

16. The arbitrator's notion that Henn was "*exposed*" to another payment into his account is a troubling one. The evidence quite clearly establishes that there was nothing hapless about Henn's conduct. He did not inadvertently spend the March payment of R3,500 but did so in the full knowledge that this was another mistake and that he was not lawfully entitled to the use of that money. The arbitrator's persistent theme that Henn was really blameless because the fault lay entirely with the Municipality is not sustainable.

17. The arbitrator sought further support for his approach in the evidence that it was not uncommon or even the usual practice that the Municipality would negotiate suitable repayment terms with its employees in instances where there had been mistaken overpayments to them. This evidence was couched in the most general way and nothing was placed before the arbitrator to the effect that this was the practice even where an employee had deliberately used money in the knowledge that it was not due and would have to be repaid. In a case of that kind the true inquiry would be into the conduct of the employee. Misappropriation remains precisely that despite the possibility that repayment terms might be negotiated.

18. It is also plain from the award that the arbitrator thought it to be a factor in favour of Henn that the Municipality was in a position to institute a civil action against him in order to recover the R7,000 and that this was likely to result in the imposition of reasonable monthly terms. In this, too, the arbitrator in my view ignored the true question before him, being whether Henn had unlawfully appropriated the money. Moreover, the arbitrator should have had regard to the fact that litigation is costly and that the Municipality would have had to expend public money in order to retrieve funds which Henn had wittingly retained.

19. Submissions were made to me by both parties as to whether Henn had acted dishonestly. I do not consider that to be an essential element of the charge as formulated. It is nonetheless appropriate that I should deal briefly with it. In my judgment Henn's conduct cannot meaningfully be

said to have been moved by dishonesty. There was nothing furtive in his actions. Although there may be scope for some debate as to his precise motives in respect of his letter of 14 March 2007, the objective fact is that he immediately communicated to his employer that he had received the February allowance payment notwithstanding that he had resigned from the scheme. The claim he put in for February was done pursuant to full engagement with his superior Venter. Nothing was done by him which was not known to the Municipality and, in particular, there can be no suggestion that Henn at any time contemplated that he could "get away with" the payments which had been made to him. Accordingly, the facts before me are different from those in *Africa and Public Servants Association* (2003) 24 ILJ 1153 (CCMA). There was also no *animo furandi* on the part of Henn, unlike the case of *S v Graham* 1975 (3) SA 569 (AD) at 573F-H.

20. Reverting to the award, a striking feature of it is that the arbitrator's reasoning frequently and rather confusingly migrates backwards and forwards between issues relating to guilt and those that bear on sanction. Ultimately, though, he held as follows in paragraph [60] of the award:

> "*I therefore find that, although the applicant is guilty of using the R7 000-00 when he knew that he was not entitled thereto, the sanction of dismissal was not an appropriate sanction under the circumstances.*"

21. Although he did not expressly state it, I infer from this that the arbitrator had concluded that Henn was guilty on the second charge. If that is what the arbitrator intended, I uphold it since I am decidedly of the view that such guilt was indeed established on the record of the arbitration proceedings. If that is not what the arbitrator intended, then I review and vary his conclusion accordingly. Either way, I declare that Henn is guilty on the second charge.

22. The arbitrator then proceeded to set out his award in paragraph [61], the relevant portion of which is as follows:

> "*The dismissal of the applicant was substantively unfair in that the sanction of dismissal was not an appropriate sanction under the circumstances. I am unable to make a finding as to what would have constituted a fair sanction other than to state that, had there been negotiations with the applicant, there might well not have been a need for any sanction whatsoever.*"

23. From this passage it again appears that the arbitrator had concluded that Henn was guilty, but that he should not have been dismissed. That being so, he was obliged to make a finding on what the appropriate sanction was to be. By choosing not to do so, he failed to discharge a primary duty of an arbitrator, which is to fully determine the dispute referred to him. The order of reinstatement, it is to be noted, dealt with remedy and not with sanction.

24. The omission of the arbitrator to fully deal with the sanction issue has the unfortunate consequence that the parties were not in a position to pertinently direct submissions to the suitability of the sanction as determined by him. By the same token, this Court does not have the benefit of such submissions. Taking into account also that the reasoning for my conclusion that Henn is guilty on the second charge is in material respects not the same as that of the arbitrator, it is my view that the parties should be afforded a fresh opportunity to place written submissions before me in respect of sanction. I express that view on the basis that it would be convenient for me to deal with that issue. The parties are nevertheless at liberty to submit that such issue should instead be remitted to the Bargaining Council.

25. An order in respect of the costs of this review will be dealt with once the further submissions of the parties have been received. Such submissions may revisit that question also.

26. I make the following order:

    1 The determination by the second respondent that Mr A J D Henn is not guilty of the first charge is upheld.

2 The second respondent's award in respect of the second charge is reviewed and varied to the extent necessary and it is declared that Mr A J D Henn is guilty of the second charge.

3 The parties are to deliver such further submissions as they may wish to make in respect of the issues of the sanction and costs, the applicant to do so on or before 26 March 2010 and the third respondent on or before 1 April 2010.

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K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	27 JANUARY 2010
DATE OF JUDGMENT:	12 MARCH 2010
FOR APPLICANT:	ADV C S KAHANOVITZ SC instructed by Herold Gie Attorneys
FOR THIRD RESPONDENT:	MS E HARTZENBERG of IMATU