IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NUMBER: JR514-08

IN THE MATTER BETWEEN:

SOUTH AFRICAN REVENUE SERVICES	**APPLICANT**
v	
COMMISSION FOR CONCILIATION, MEDIATION,	
AND ARBITRATION	**1ST RESPONDENT**
PIETER VENTER NO	**2ND RESPONDENT**
COBUS PRETORIUS	**3RD RESPONDENT**
RONELL FOURIE	**4TH RESPONDENT**

JUDGMENT

AC BASSON, J

[1] This is a review of an arbitration award in terms of which the withdrawal of the 3rd and 4th respondents' travel allowance was held to be an unfair labour practice. The applicant (the South African Revenue Services) was ordered to implement the travel allowance in respect of the 3rd and 4th respondents (hereinafter referred to as "the respondents"). The two respondents (Mr. Cobus Pretorius and Ms. Ronell Fourie) in this matter received a travel allowance for a period of some 10 months before the decision to withdraw the allowance was taken. In brief it was the 2nd respondent's (hereinafter referred to as "the commissioner") conclusion that the applicant is estopped from relying on the fact that the General Manager did not (in fact) approve the applications for a travel allowance. (I will return to the facts in more detail hereinbelow.)

Application for condonation for the late filing of the review application

[2] The applicant filed an application for condonation for the failure to launch the review application within the prescribed time limits. The condonation application is not opposed. It appears from the founding affidavit that the review application is 6 days out of time. I have considered the length of the delay and the explanation therefore. The explanation tendered is reasonable. I have also considered the prospects of success and possible prejudice to the respondents. I am satisfied that a case has been made out for condonation. In the event condonation is granted.

Jurisdiction

[3] During argument before this court the applicant raised a jurisdictional point in terms of which it was argued that the CCMA did not have the necessary jurisdiction to hear the unfair labour practice dispute. The point was raised that the travel allowance received by the respondents was not a "*benefit*" as contemplated by the unfair labour practice definition and consequently the CCMA did not have the necessary jurisdiction to hear the dispute.

[4] It is unfortunate that this issue was not properly raised on the papers, nor was the issue fully canvassed in argument before this court. The record of the proceedings before the CCMA is also not helpful. What is, however, clear from the opening statement before the CCMA is the fact that the jurisdiction of the CCMA was not challenged. The commissioner also does not deal with the issue of jurisdiction in his award. In fact, he accepted, without discussion, that a travel allowance is regarded as a "benefit" with reference to *Schoeman & Another v Samsung Electronics (Pty) Ltd* (1997) 18 *ILJ* 1098 (LC).

[5] Because the issue of whether or not a travel allowance is a "*benefit*" was not properly canvassed, this court is not in a position to decide the jurisdictional issue on the papers as they stand before this court. I have, however, decided to review and set aside the award for other reasons and I have decided to refer the matter back to the CCMA for a *de novo* hearing. This does not mean that the jurisdictional point may not be raised at the commencement of the rehearing. Should the parties be of the view

that this is an issue that needs to be raised, they should do so when the matter is re-enrolled at the CCMA.

Record of the proceedings

[6] Before I turn to an exposition of the facts, brief reference must be made to the fact that the respondents have raised the point that the record is incomplete. The record reflects the opening statement and the full evidence of both witnesses. What is not contained in the record is the closing arguments of the parties. I must point out that the respondents are not particularly helpful in pointing out to the Court *what* is not contained in the record. As already pointed out, the evidence of both the witnesses who testified before the commissioner and to which reference is made in the award is contained in the record. Insofar as the award does not refer to any other evidence not included in the record, I can find no reason to conclude that the record (except for the absence of the closing arguments) that the record is incomplete. I have thus proceeded on the basis that the record is sufficiently complete for this court to consider the review.

Brief outline of the relevant facts

[7] The two respondents are employed as auditors on salary level 4B by the applicant at its Welkom offices.

[8] On or about mid June 2006 the respondents applied for a travel allowance in terms of the Agreement on Travel Allowance for Field Workers

(concluded between the South African Revenue services (SARS) and the Public Service Association (PSA) and National Education, Health and Allied Workers Union (NEHAWU)). (I will refer to this agreement simply as "the agreement".)

[9] This agreement provides in clause [2] that –

> *"the organization [SARS] will always make available pool cars for business-related travel. Alternatively employees can elect to use their private cars in the execution of field work/audits. Where employees elect to use their own vehicles for this purpose, they will be reimbursed by means of a travel allowance."*

[10] The relevant clause in the agreement relied upon in respect of the procedure to claim a travel allowance is clause 5.5 : It provides as follows:

> "*All employees in grades 1 to 4B will use the available pool cars for all field work. However, should employees in the aforementioned grades who met the requirements of spending 50% + 1% of their working time doing field audits/work elect to utilize their private motor vehicles to conduct field work/audits, they can voluntarily apply for the payment of the travel allowance and it will become payable once applications have been approved by the* ***General manger or his/her designate****."*

Clause 5.6 further provides that:

> *"All voluntarily applications for payment of the travel allowance will be* ***subject to the approval of the appropriate General Manager***

> ***or his/ her designate****. Considerations for approval/no-approval of applications will be effected within 30 working days after applications have been received by General Managers or his/her designate. Such approval shall not be unreasonably withheld."*[1]

[11] The respondents' applications for the travel allowance were signed by their acting team leader (Gideon van der Westhuizen ("Van der Westhuizen") and sent to Jean van Staden ("Van Staden") who is the Human Resources Consultant to the Free State and Western Cape Enforcement. On 23 June 2006 Van Staden sent the application forms to Fanie Groenewald ("Groenewald") who is the Regional Human Resources Manager Enforcement for the Free State and Western Cape for consideration. On 24 June 2006 Van Staden sent an e-mail to Van der Westhuizen in terms of which Van der Westhuizen was advised that the applications must be approved by both the Enforcement Centre Manager and the Human Resources Manager and then ultimately by the General Manager and that same cannot be signed off at team leader level. The 3rd and 4th respondents then completed another set of applications and sent them together for approval by the relevant managers.

[12] According to the applicant, the respondents' applications were subsequently processed on the applicant's head office computer programme in terms of a so-called "*people soft*" computer programme used to capture employee's personal information *without* the approval of

[1] My emphasis.

the General Manager and/or his/her designate. As a result, according to the applicant, the respondents *erroneously* received monthly payments of travel allowances in the sum of R 3000.00 (which were included in their total remuneration packages) with effect from *July 2006* until *31 March 2007* due to the fact that their applications were never received and approved by the General Manager and/or his or her designate in terms of the aforementioned agreement.

[13] On *28 August 2006* the applicant issued an internal communiqué to all employees on the *"Revised Policy on Travel Allowance for Field Workers*" in line with the collective agreement signed on *30 June 2006*. In terms of the revised policy employees in grades 1 to 4B doing field work *must* use the applicant's pool vehicles. Where such employees meet all the qualifying criteria the General Manager may for specific business reasons consider such employee for the travel allowance but this will be done strictly at the sole discretion of the General Manager concerned. The relevant section of the revised policy reads as follows:

> *"All employees in grades 5 and 6 who are engaged in field work and who meet all the qualifying criteria and who voluntarily elect to use their own vehicles to conduct SARS business will be eligible to receive a travel allowance of R 3000 per month before tax. The allowance is to be regarded as a tool of trade as it is intended to enhance the work performance of individuals who qualify and elect to use their private vehicles for business purposes."*

[14] According to the applicant, it became aware of the erroneous payment of the travel allowance during February 2007. Following this discovery, the applicant dispatched a letter to the respondents in terms of which they were informed that the applications for field work allowance were processed on "people soft" without the approval of the General Manager. They were informed that the payments will be stopped with effect from 1 April 2007 until such a time their applications for payment has been considered by the General Manager: Enforcement and Risk and possibly approved. The two respondents were advised to use the pool cars for all field work as amplified and required by the "*Revised Policy*". The respondents were thus given a month's notice of termination of the allowance.

[15] The 3rd Respondent (Pretorius) could not deny that his application was not approved by the General Manager. He could also not say who signed the application. He was, however, of the view that that he was entitled to the allowance:

> "*According to me once again I will not agree to that because I feel we were entitled to the application. The point is we have never seen or anything, we do not have an idea who signed it. The only time we saw it was when we sent it through to Bloemfontein*." Pretorius was then asked in cross-examination: *"Mr PRETORIUS will you further agree with me that if the employer pays money to*

any employee erroneously it is fair for that employer to stop that payment?"

Pretorius did not, however, dispute the right of the employer to stop payment. He answered as follows:

"*It – I mean every case is different. I mean you cannot generalize according – I thing you cannot generalize so you must go and have a look at any – every specific situation and in this situation I do not agree with it*."

Pretorius also confirmed in his evidence that they only applied once for the car allowance and that they never re-applied. The 4th respondent did not testify but it was confirmed that her evidence would have been exactly the same as that of Pretorius.

[16] The travel allowances were subsequently reconsidered and on 2 March 2007 the applicant addressed a letter to the respondents in terms of which they were advised that the travel allowances were disapproved by the office of the General Manager due to financial reasons. In the same letter the respondents were advised to utilize the pool cars for all field work. In March 2007 the respondents lodged a formal grievance with the applicant against the withdrawal of the travel allowance.

[17] Ms. Linder (hereinafter referred to as "Linder", the Human Resources Consultant in the Free State) testified that an applicant's application had to be accompanied by a driver's license and that there had to be proof of a car that is insured and that the car is either in the name of the applicant or

the spouse's name. In cross-examination Linder also confirmed that ownership of a car was one of the pre-requisites for applying for a car allowance:

> *"As I said earlier they had to submit a copy of their driver's license and motor vehicle ownership and a copy of the ID and applications, physical applications."*

It was not disputed that an applicant had to own his own vehicle when applying for the travel allowance. This is clear from the question posed to Linder in cross-examination:

> *"Let me ease this question for you and I will try and assist you. I understand that at the end of the day it must be approved but that is not part of the criteria to qualify. In terms of the qualifying criteria, the 50% plus 1% and the making use of your own vehicles, did the applicant comply with these criteria?"*

Linder responded in the affirmative.

[18] Linder also testified that the (travel allowance) application had to go through a lengthy process starting with the Business Area Manager for recommendation, then to the regional HR manager for recommendation and then to the Enforcement Centre Manager and ultimately to the General Manager. She testified as follows:

> *"Okay, it is quite a long process. The applicant will apply, the application needs to consist out of an application form and there needs to be proof of a car that is insured and the car is on either*

the person's name or spouse's name or anything to that effect. From there it will go to the business area manager for recommendation."

She also testified that it took a long time before the Applicant actually realized that they had made a mistake. She confirmed that the general manager did not approve the application.

Referral of unfair labour practice dispute to the CCMA

[19] On 23 March 2007 the respondents lodged a formal grievance against the anticipated withdrawal of the travel allowance. The dispute was eventually referred to the CCMA. The dispute was not resolved and the respondents subsequently referred an alleged unfair practice dispute to the CCMA for conciliation and arbitration.

[20] The commissioner was required to determine whether the withdrawal of the travel allowance and the subsequent failure by the applicant to continue to pay the allowance constituted an unfair labour practice in terms of the Labour Relations Act, 66 of 1995 (hereinafter referred to as "the LRA").

[21] The evidence of the respondents (both employed as auditors on the salary level 4B) was that they both qualified for the allowance as they performed more than 50% of their duties in the field.

[22] Although the allowances were stopped the respondents were not instructed to pay back any amount because it was acknowledged that they had used their own private vehicles during the relevant period.

The review

[23] The commissioner concluded, without discussing what the requirements of the doctrine of estoppel are, that the applicant is estopped from relying on the fact that the General Manager did not approve the application:

> *"5.6.5 I am therefore satisfied that the doctrine of estoppel may firstly apply in the labour context and that it is relevant and applicable in this matter. The Respondent made representations that the allowance was approved and they continued to pay the allowance for a period of 9 months. The Applicants acted on this and purchased vehicles. They are clearly prejudiced and should not be blamed for the oversight.*
>
> *5.6.6 I am therefore of the opinion that the Respondent should be estopped from relying on this fact that the appropriate GM did not approve the two applications. I also wish to emphasize that this matter is unique and should not be interpreted as a general approval of allowances."*

[24] The applicant's primary ground for review is centered on whether the invocation of the doctrine of estoppel in the present matter was

reasonable having regard to all the evidence and material that were placed before the CCMA.

The principle of estoppel

[25] The principle of estoppel has been held to be applicable in the legal field of labour relations. The Appellate Division (as it then was) confirmed in *Chamber of Mines of SA v NUM* 1987 (1) SA 668 (A) that there was no reason for concluding that the principle of estoppel by election or waiver based as it is on considerations of elementary fairness, should be regarded as a trespasser in the legal field of labour relations. The essence of this doctrine is that if a person has an election, the person is allowed a reasonable time within which to make that election and must make an election. The person may change his or her mind about the election but not if an injustice is done to another.

[26] In *Maluti Transport Corporation Ltd v MRTAWU & Others* (1999) 9 BLLR 887 (LAC) the Labour Appeal Court referred with approval to the decision in the Chamber of Mines case and confirmed that the principle of estoppel is based on elementary principles of fairness. The court also confirmed that it did not agree with the submission that once an election has been made it cannot be undone. Where fairness dictates it and it causes no injustice to the other party, a party can change its mind. It further held that there are two requirements for a fair renunciation or retraction of an earlier decision: (1) Where good reason exists for the change; and (2) the other

party is given timeous notice of the change so as to prevent that party from being prejudiced thereby. *See also SA Broadcasting Corp v Coop & Others* (2006) 27 ILJ 502 (SCA) where the court said the following about this doctrine:

> *"[63] The plaintiffs in a replication relied on estoppel, otherwise described as ostensible authority. A person who has not authorized another to conclude a juristic act on his or her behalf may in appropriate circumstances be estopped from denying that he or she had authorized the other so to act. The effect of a successful reliance on estoppel is that the person who has been estopped is liable as though he or she had authorized the other to act.*
>
> *[64] The essentials of estoppel can briefly be stated as follows: The person relying on estoppel will have to show that he or she was misled by the person whom it is sought to hold liable as principal to believe that the person who acted on the latter's behalf had authority to conclude the act, that the belief was reasonable and that the representee acted on that belief to his or her prejudice."*

Application to the present facts

[27] Although I accept that the doctrine of estoppel is relevant and applicable in the labour law field, I am of the view that, in this particular matter, the

application of the doctrine was misplaced and in fact not applicable for the following reasons:

(i) Firstly, no mention whatsoever was made in the opening statement by Mr. Van Aswegen, the legal representative on behalf of the respondents to the effect that the respondents (the two applicants before the CCMA) intended relying on the doctrine of estoppel. In his evidence Pretorius also made no mention of the fact that he bought the car because he was *mislead* into thinking that he will be able to pay the installments on his car. Pretorius merely stated in his evidence that he bought a car as a result of the travel allowance to use for business purposes. It was also never put to the applicant's witness that the respondents were *mislead* by the applicant and that it was this representation that led them to believe that they would then be able to purchase cars with the travel allowance. In fact, as I will indicate hereinbelow, the respondent suffered no prejudice as a result of the withdrawal of the travel allowance and any prejudice that may have resulted from the withdrawal of the travel allowance was entirely of their own doing. The respondents are still able to do their field work without having to find themselves out of pocket. Instead of using their own cars, they must now use the pools cars.

(ii) Secondly, the travel allowance is intended to assist employees who use their own private cars when doing field work on behalf of their

employer. It is clearly the intention of the travel allowance policy to ensure that employees who elect to use their own cars and not the pool cars (when they do field work) do not find themselves out of pocket in respect of travel expenses. The revised policy on travel allowance for field workers is clear in respect of the purpose of the travel allowance. "*The allowance is to be regarded as a tool of trade as it is intended to enhance the work performance of individuals who qualify and elect to use their private vehicles for business purposes".* It is clearly not the intention of the policy to pay the employees a travel allowance so that they can use the money to purchase cars. Put differently, the travel allowance was not intended as a subsidy for the installments on the car of an employee who decides to use his or her own car and not the pool car. If an employee decides to use the travel allowance for other purposes, for example, to subsidize the installments on their cars, they can therefore hardly claim that they are "*prejudice*" if the travel allowance is withdrawn and then rely on estoppel to reinstate the travel allowance. Clause 2 of the agreement also specifically refers to the fact that the travel allowance is intended to assist employees who use "*their private cars*" for field work (see paragraph [9] *supra.*) Clause 5.5 of the same agreement also refers to employees who "*elect to utilize their private motor vehicles to conduct field work/audits*".

> These clauses clearly presuppose that an employee already has a private motor vehicle when applying for the travel allowance. This was also the uncontested evidence of Linder.

[28] The commissioner therefore clearly misconceived the evidence placed before him in deciding (seemingly *mero motu*) that the doctrine of estoppel was relevant and applicable in this particular matter. Clearly the respondents did not suffer any "*prejudice"* (as contemplated by the doctrine of estoppel) as a result of the withdrawal of the travel allowance. As already pointed out, the respondents are still able to do their field work without having to find themselves out of pocket for any expenses incurred as a result of having to travel as they are entitled to use pool cars. The *"prejudice*" therefore suffered as a result of the withdrawal of the travel allowance is entirely of their own doing and not as a result of any misleading conduct on the part of the applicant.

[29] The commissioner also arrived at two conflicting conclusions: On the one hand the commissioner was of the view that the principle of estoppel was applicable and consequently reinstated the travel allowance. On the other hand, however, the commissioner was also of the view that the reasons advanced by the applicant for refusing to reinstate the travel allowance were reasonable because the applicant had provided a reasonable explanation - namely financial considerations - for the refusal to reinstate the allowance. The commissioner was also of the view that financial

constraints would be a factor to consider in deciding whether or not to reinstate the allowance. However, despite the finding that the applicant had provided a reasonable explanation for refusing to reinstate the allowance and despite the fact that the commissioner was of the view that it would *not* be unreasonable to turn down any application due to financial reasons, he nevertheless proceeded to order that the travel allowance be reinstated.

[30] I am therefore of the view that the award must be reviewed and set aside. The award of the commissioner is simply not reasonable.[2] A reading of the award and an objective assessment of the circumstances clearly indicates that the commissioner failed to apply his mind to the totality of the evidence that was placed before him and that he misconceived the applicability of the doctrine of estoppel. I am further of the view that the matter must be referred back to the CCMA for a hearing *de novo* before a different commissioner. I have decided not to make an order as to costs.

[31] In the event the following order is made:

1. The Application for condonation for the late filing of the review application is granted.
2. The arbitration award under case number FS2007-07 is reviewed and set aside.

[2] See in this regard *Sidumo v Rustenburg Platinum Mines and Others* (2007) 28 *ILJ* 2405 (CC).

3. The matter is referred back to the CCMA for a hearing *de novo* before a different commissioner.
4. There is no order as to costs.

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AC BASSON, J

14 April 2010

For the applicant:

Adv M Ramotlou: Instructed by Maserumule Inc**.**

For the respondent:

Adv S Grobler: Instructed by Peyper Attorneys Inc.