IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case No. J 519/97

In the matter between:

Alpha Limited t/a Alpha Limited Lime	Applicant
AND	
South African Workers Union	1st Respondent
Building Allied Mining & Construction	
Workers Union	2nd Respondent

JUDGMENT

MLAMBO J.

1. The Applicant had for some time prior to 1992 maintained a practice where its foremen enjoyed the usage of bakkies for personal and official purposes. It was accepted and must have been approved by the applicant that the foreman traveled with artisans as and when the latter so desired. This occurred in the mornings and afternoons to and from work. It also occurred during lunch time breaks when the foreman drove to their homes to have their meals and then return to work.

2. Sometime towards the end of 1991 and the beginning of 1992 the Applicant took the bakkies away from the foremen. The Applicant assisted the foremen to purchase their own vehicles before it took the bakkies away from them. The artisans who had till then traveled with the foremen in the bakkies started using them for standby duties. During a meeting on 03 March 1992 between representatives of the Applicant and the First Respondent (Sawu) (at the time known as Yster and Staal) the following was minuted in relation to the usage of the bakkies by the artisans:

"Daar is tans 'n hele klomp bakkies wat 'n groot koste faktor is. Daar is nou 'n 16 sitplek kombi gekoop wat vir bystand gebruik sal word

en alle
bakkies salop perseel bly.

Ambagsmanne sal in die oggende en middae met kombis gehaal en
weggeneem word. Met etenstyd sal ambagsmanne nog met bakkies kan
huistoe gaan."

3. The artisans then in keeping with the "arrangement" referred to above started to use the bakkies to go to their homes for lunch. I use the term "arrangement" advisedly since the parties are at loggerheads on the true interpretation of that "arrangement". No problems are mentioned relating to the usage of the bakkies by the artisans until September 1993. On 15 September 1993 a meeting took place between representatives of the Applicant and those of the Second Respondent (BAMCWU). The issue discussed at that meeting centred around a complaint by BAMCWU that employees apparently wanted the same lunch time arrangement as that of the artisans. The minute of that meeting reflects the following:

"**UNION:** **Workers feel that they do not have the same privilege as the artisans. Artisans go home in the bakkies, but MA's cannot go home for lunch. Feel this is discriminatory.**

"MGMT: **Will investigate and report back."**

4. A number of meetings followed between the Applicant and Sawu as well as BAMCWU during the period 1993 to 1997 in a bid to resolve the lunchtime transport issue. At some stage during this period it was agreed that three bakkies per residential area be availed for lunch time transport purposes. The idea was that three bakkies would serve the traditionally black residential area, three bakkies for the so-called coloured area and three bakkies for the white settlement.

5. This arrangement did not prove to be the solution everyone had hoped for. Apparently the bakkies were not available at lunch time to attend to normal breakdowns. It appears that there were other problems such as accidents caused with the bakkies, overloading and a general deterioration of safety standards. Despite Sawu's denial is appears that there is merit in the Applicant's version to the effect that the bakkies allocated per residential area were hopelessly inadequate. It appears that not all employees who wished to use the bakkies could do so either because there was no space available or because they were shown off the bakkies. The applicant also had a problem relating to the operational costs involved in this arrangement.

6. The Applicant tried to renegotiate the arrangement with BAMCWU and Sawu. This didn't help as BAMCWU was happy with the equal distribution of the bakkies whereas Sawu wanted additional vehicles or wanted the previous arrangement to prevail whereby only artisans were entitled to lunch time transport. Sawu's alternative was that all the bakkies by withdrawn and a shorter lunch time be introduced. Eventually it was agreed that a referendum be held amongst all affected employees regarding the proposal to shorten the lunch time. A majority of employees voted against shortening of the lunch hour.

7. In view of the referendum results and in view of problems and costs involved in the lunchtime transport arrangement the Applicant wanted to withdraw the bakkies completely. This prompted Sawu to lodge a dispute with the Commission for Conciliation Mediation and Arbitration on 22 January 1997. The nature of the dispute is described as the Applicant's decision to stop the lunch time transport which was allocated to artisans on job level PG 11 on 3 March 1992. Sawu described the result sought as conciliation as follows:

"1. The original arrangement as on 03 March 1992, that is nine bakkies available as lunch time transport only for artisans on a PG 11 job level.

2. Or a 20 min lunch hour, where the days work, will be stopped 20 minutes earlier, as than usual, a financial compensation will be negotiated for artisans because of the lost of lunch time transport."

8. The CCMA was unable to resolve the dispute and issued a certificate as envisaged in section 135(5)(a), stating that the dispute was unresolved. The certificate also records that the dispute related to the unilateral change to terms and conditions of employment. Sawu however did not prosecute the dispute further. On 12 May 1997 the Applicant referred the dispute to the CCMA. The nature of that dispute is described as:

"The unfair insistence by Sawu and certain Sawu members that the company should continue granting artisans at the company a privilege that cannot be justified on operational grounds. Such insistence and the contention that it is an irrevocable condition of employment on the part of Sawu and certain Sawu members is discriminatory and has the effect

that the company would, in breach of the provisions of the Act, be promoting unfair discrimination on the basis of status and/or job category."

The Applicant stated that the result required at conciliation was "to be able to stop a discriminatory practice." This dispute could also not be resolved by the CCMA and it was then referred to this court for adjudication.

9. In its statement of claim the Applicant seeks the following relief:

"28.1 Declaring that the provision of transport to an exclusive group of employees constitutes unfair discrimination and an unfair labour practice;
28.2 Permitting the Applicant to withdraw the privilege without further ado.
28.3 Costs of suit as against first respondent."

The Applicant in a sense, also requests the court to fund that the provision of lunch time transport to a specific group of employees (artisans) is a privilege and not a condition of employment. Sawu takes issue with the Applicant's stance. It denies that the provision of lunch time transport to artisans is discriminatory and insists in its response to the statement of claim, that the provision of lunch time transport to artisans is a condition of employment which cannot be changed unilaterally.

Condition of employment or privilege

10. The Applicant's contention is that the provision of lunch time transport to Sawu's members is a privilege and not a condition of employment as contended on behalf of Sawu. Sawu's stance is based on an allegation that at a meeting with the Applicant on 3 March 1992 it was agreed that its members in the Engineering Department (artisans) would be entitled to use bakkies as lunch time transport.

11. Terms and conditions of employment are determined by the parties themselves and by legislation. Legislation such as the Basic Conditions of Employment Act no 75 of 1997 sets minimum terms and conditions of employment such as working hours, meal intervals, overtime, work on Sundays and public holidays, annual and sick leaves etc. Parties can and always agree on other or better conditions on the negotiating table. It is a norm that terms and conditions of employment are agreed and regulated through collective bargaining. In a unionized environment such as in the present matter those terms and conditions of employment agreed between the parties are set out in a collective agreement between the union and the employer. Terms and conditions of employment agreed collectively are in most instances an improvement on and/or additional to standard ones usually set out in a letter of appointment or employment contract. Terms and conditions of employment found in a collective agreement are normally negotiated and agreed periodically, usually annually. Annual collective bargaining negotiation meetings are specially called for that purpose. I cannot however exclude the possibility that on occasion, terms and conditions of employment can be negotiated and agreed at monthly meeting. Monthly meetings are there to discuss operational issues that arise form time to time.

12. The term “privilege” is described in the New Shorter Oxford English Dictionary as “prerogative”; “a right, advantage, or immunity granted to or enjoyed by a person or class of people”; “a special right”. A privilege or “vooreeg” in Afrikaans, is something that need not be negotiated nor is it established by statute. Its withdrawal cannot give rise to any claim such as in the case of a term or condition of employment.

13. It is common cause in this matter that the lunch time transport issue was dealt with for the first time, between Sawu and the Applicant at a monthly meeting on 3 March 1992. This issue did not find its way into the agenda of that meeting via a demand by Sawu. It became an issue simply because artisans had become accustomed to using the transport with foremen. When the Applicant rearranged the foreman’s transport it became necessary to formalize the artisans situation. It appears that the Applicant agreed to allow artisans to continue enjoying that “benefit” rather than withdraw it.

14. In my view the meeting of 3 March 1992 cannot be regarded as a negotiating meeting where terms and conditions were the subject matter. It was a normal monthly meeting between Sawu and the Applicant which was used sometimes to discuss problems. The lunch time transport had become a problem with had to be resolved. The fact that the Applicant agreed to let the artisans continue enjoying the lunch time transport did not give rise to a condition of employment. This was a simple extension of a privilege or benefit that was hitherto enjoyed formally by foremen.

15. The only justification for extending this benefit to artisans is that they had indirectly been enjoying it with the foremen. This was the only factor taken into account when the agreement was reached in March 1992. it is therefore incorrect to regard the lunch time benefit as a condition of employment. It is simply not a condition of employment because a new employee graded on the same grade as artisans but doing other work cannot claim entitlement thereto.

16. The background relating to this benefit also demonstrates that it is not a condition of employment. It is common cause that when BAMCWU's members started complaining about the lunch time transport it was agreed to allocate three vehicles per residential area. This also gave rise to other problems as the three vehicles allocated to the black residential area were hopelessly inadequate. The reasoning being the agreement to allocate three bakkies per residential area was to equalize the enjoyment of a benefit. A Bamcwu member cannot claim this benefit as a condition of employment simply because three vehicles were availed. This is the only basis on which Sawu's members claim it because it arose that way. It is equally not open to Sawu's members to claim it as a condition of employment simply because it gave rise to no rights or entitlement. It did not come about as a result of collective bargaining nor was it a conditions of employment at the time of engagement of the artisans.

17. Sawu's about turn in the case also reinforces my view on the matter. Throughout Sawu made out a case that the lunch time transport was a condition of employment of its members who were artisans. This appears in the dispute Sawu declared but did not pursue. This is also apparent from the statement of defence in this matter. It was in evidence that Sawu suggested that all employees were entitled to use the bakkies at lunch time. This fillies in the face of the transport arrangement being a condition of employment to which only Sawu members who were artisans are entitled to. Sawu's evidence in this regard confirms the view that it is a benefit or privilege presently enjoyed by an exclusive group as opposed to all.

Discrimination

18. The Applicant contends that the extension of the lunch time transport is unfairly discriminatory as it is enjoyed by an "exclusive" group of employees.

Andre Van Niekerk in "**Current Labour Law 1995"** at page 77 says:

"To discriminate is to fail to treat fellow human beings as individuals. It is to assign to them characteristics which are generalized assumptions about groups of people (Bourn & Whitmore *Race and Sex Discrimination*). The point is well illustrated by *Hurley v Mustoe* [1981] ICR 490, where the

employer took the attitude, one commonly encountered, that mothers with small children are unreliable. The court held that the employer's attitude contravened the provisions of the Sex Discrimination Act. The import of the case is not that employers should recruit women irrespective of their reliability – rather, employers must assess all candidates on the grounds of their own potential reliability. The relevant factor is reliability, not sex or motherhood (Bourn & Whitmore 45)."

He further states at page 78 that:

"It is important to appreciate that it is not necessary to show any intention to discriminate for direct discrimination to be established. A good example is provided by the case of R v *Birmingham City Council ex parte* EOC [1989] IRLR 172 (HL). In that case the City Council had acquired a school which provided more places for boys than girls in the local grammar school, but raised as a defence its lack of intention to place girls at a disadvantage. The House of Lords said the following:

'There is discrimination under the statute if there is less favourable treatment on grounds of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as the remedies are concerned….is not a necessary condition of liability: it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on grounds of sex.. In the present case, whatever may have been the intention or motive of the Council, nevertheless it is because of their sex that the girls in question receive less favourable treatment that the boys and are the subject of discrimination under the Act of 1975.'

19. The issue was also considered by Seady AJ in **Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others (1998) 19 ILJ 285 (LC).** She also makes the point that to establish direct discrimination it is not necessary to show any intention to discriminate. Unfair discrimination is outlawed by section 9(3) of the Constitution Act no 108 of 1996 and in the LRA by item 2(1)(a). As to what constitute unfair discrimination has been a subject of a number of Constitutional court decisions. In **Harksen v Lane NO & Others 1998 (1) SA 300** Goldstone J said at page 323H that the determining factor regarding unfairness (of the discrimination) is the impact of the discrimination of the victim. **Du Toit and others "The Labour Relations Act of 1995 2nd edition** state at page 432:

"An intention to discriminate need to be proved for discrimination to be established. In respect of the forms of discrimination listed in item 2(1)(a), a complaint does not need to prove that such discrimination is arbitrary but only that it was unfair in the circumstances. As regards forms of discrimination other than those listed it will be necessary to prove that they were arbitrary also.

The Act does not define "unfair" or "arbitrary". It is trite that discrimination, in the sense of differentiation, is not necessarily unfair. If it were, we would have no differential tax rates, no social security legislation and no state housing. "Unfair" in this context appears to refer to the effect of the discrimination of the employee. "Arbitrary" by contrast, implies a test whether the reason for the discrimination is sufficiently related to the protectable interests of the employer."

<u>The enquiry in the present case</u>

20. There can be no doubt that the provision of lunch time transport to an exclusive group of employees in itself is discriminatory. It is discriminatory because it seeks to differentiate the employees of the Applicant. It is common cause that this privilege was only enjoyed by Sawu members who wee artisans. The situation changed when the employees who had no access thereto started complaining. The decision to provide three bakkies per residential area was doomed to fail. Fro starters it did not take account of the number of employees per residential area. In fact it is clear from the evidence led that the three bakkies provided for the traditionally black residential area were disproportionate to the number of employees who stayed there. This means that the white and coloured employees who were significantly lesser, comparatively, had better enjoyment of the privilege. That arrangement can also be labeled as discriminatory on this basis alone.

21. To the extent that it might be so that other employees have utilized the lunch time transport has no effect on the situation. The fact remains that as long as Sawu members claim the privilege as theirs only gives them control over the bakkies. It means that other employees can only enjoy the benefit as and when Sawu members allow them to. It does not assist Sawu therefore that other employees might have access to the bakkies occasionally.

22. The question remains whether such discriminatory practice is unfair and therefore outlawed. In my view the provision of lunch time transport to Sawu members only is arbitrary. It is arbitrary because it cannot be justified on any basis. It is arbitrary because it takes no account of the grading of employees. Employees on the same grade as artisans in other departments who might which to have access thereto are

denied such access. I accept the Applicant's evidence that other employees have complained that they were shown off the bakkies when they tried to use them. It is not difficult to fathom that Sawu members having control of the bakkies would deny access to the bakkies to others wishing to use them. After all Sawu and its members defended the practice with conviction claiming it as theirs only until of course when Muller and Bezuidenhout took the stand.

23. I therefore find that the provision of lunch time transport to artisans only, being an exclusive group, discriminates unfairly against other employees and is therefore outlawed. Even if my finding was that the practice is not discriminatory because other employees might have access to the bakkies, I cannot see how the Applicant can, fairly, be expected to continue with it. The Applicant has demonstrated, satisfactorily, that operationally the practice cannot be sustained. The Applicant can simply not be expected to maintain a privilege that is an operational nightmare. After all is said and done it appears justified for the Applicant to withdraw the privilege.

24. The order of the court is therefore"

1. The provision of lunch time transport as a privilege to artisans as an exclusive group of employees constitutes unfair discrimination.
2. The Applicant is ordered to withdraw the privilege.
3. Sawu is ordered to pay the Applicant's legal costs.

MLAMBO J.

Date of judgment: 16 March 1999

For the Applicant: S.C. Pretorius instructed by Webber Wentzel Bowens.

For the Respondent: Mr. H. Haykock instructed by Tim du Toit & Co.