IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No: J 2426/06

In the matter between:

SOUTH AFRICAN MUNICIPAL

WORKER'S UNION **APPLICANT**

and

CITY OF JOHANNESBURG **RESPONDENT**

JUDGMENT

MOLAHLEHI AJ

INTRODUCTION

[1] On the return day of the rule nisi granted to interdict the alleged unlawful deductions and compelling the respondent to pay the "locomotive allowance" the respondent sought a cost order against the applicant. The court order was sought pursuant to the withdrawal of the application to confirm the interim order by the applicant.

Background facts

[2] The applicant, South African Municipal Workers Union (SAMWU) sought and obtained an interim interdict against the respondent, Johannesburg Municipal Police Department (JMPD). The *rule nisi* which was granted in favour of the applicant called upon the respondent to refrain from deducting money from the remuneration of members of the applicant employed as Chief Superintendents, without obtaining their consent or a court order. The respondent was further ordered to reinstate the payment of R6 835.00 locomotion allowance to the Chief Superintendent with cost.

[3] The JMPD is a police force of the City of Johannesburg, established in terms of the s12(1) of the South African Police Services Act 68 of 1995. The JMPD employs about 3 400 employees, 1 400 of whom are uniformed members. The uniformed division consists of two units, the Enforcement Officers and Metro Police Officers. Most of the affected members involved in this case are employed as uniformed Metro Police officers, at the rank of the Superintendent.

[4] During September 2001, the JMPD advertised positions of the Chief Superintends at an all-inclusive salary of R218 000.00 to R305 000.00. According to the respondent the affected members who were appointed following the advertisement were employed on an all-inclusive salary which gave them the latitude to structure it to include the locomotion allowance, if a member so wished.

[5] The reason for providing vehicles to the employees at the rank of the Superintendents and below was due to the fact that they are regarded as tools of trade. There are however other employees who are at the rank of Superintendents who are not provided with vehicles because they do not need them as tools of trade.

[6] After their appointments, those of the Chief Superintendents, who previously had vehicles, which was provided to by the respondents were required to return them. It is apparent that the Chief Superintendents were not satisfied that the all-inclusive salary meant that they would not be entitled to the locomotion allowance. Subsequently, the affected members lodged a grievance concerning this issue. The grievance hearing was held at the end of

2002. The submissions made during the hearing were submitted to the City Manager.

[7] It would appear that after considering the submissions Mr. Moloi, the city manager, addressed a letter to the Chief of the JMPD, Mr. Ncobo wherein he issued a ruling concerning how the grievance should be resolved. This communication which was apparently intended for the consumption of Mr. Ncobo landed in the hands of the applicants. Mr. Ncobo contacted Mr. Moloi who he believed was incorrectly advised, and explained to him the true state of affairs concerning the matter. A meeting was subsequently, arranged between the members and the respondent's management team. At this meeting, which was held during March 2003, Mr. Moloi furnished the meeting with what was referred to as the final ruling on the matter.

[8] Subsequent to this ruling, a dispute concerning an unfair labour practice was declared with the South African Local Government Bargaining Council (SALGBC). An arbitration award issued by the SALGBC favoured the applicants and ordered the respondent to reinstate the payment of the locomotion allowance to the members. The respondent successfully reviewed and had the arbitration award set-aside by the Labour Court. However,

following the outcome of the review, the respondent embarked on a process of restructuring the salaries of its employees. The restructuring resulted in another dispute which the applicants referred to the SALGBC.

[9] The arbitrator found in favour of the applicants. The respondent again took the award on review. The review proceedings were abandoned by agreement between the parties as the record went missing. The parties then embarked on a negotiation process which ended with an agreement. For the purpose of this matter, the relevant clause is 8 (eight) provides:

> *"The city pays in full and final settlement of the dispute an amount of R 5.8 million (five million eight hundred thousand Rand) including previous payments; and the Chief Superintendents will be placed at a salary package of R290, 000 per annum effective from 1 March 2006 (which translates to R24 166.66); and further that no additional allowance in respect of the disputed locomotion allowance shall be considered or paid to the said category of employees."*

[10] The settlement agreement, unfortunately, did not bring an end to the dispute as would ordinarily have been expected. A certain Sanet Hankcock of Human Resources department refused to stop payment of the locomotion allowance in the "absence of clear instructions." The Director: Labour

Relations, who apparently submitted the agreement to Hanckock, had to approach the city manager to confirm the meaning of the settlement agreement in relation to the locomotion allowance. The locomotion allowance was paid in from March 2006, a period of more than six months. The instruction from the city manager that locomotion allowance should be not paid, was received in October 2006.

Respondent's contention

[11] Mr. Kennedy, for the respondent argued that the general principle in relation to the withdrawal of litigation is that the party withdrawing the litigation is in law liable for costs. He further argued that there were no compelling reasons why the applicant should not be ordered to pay the cost, in particular taking into account that there was no explanation for the withdrawal at that late stage in the litigation process.

[12] Mr. Hans van der Riet for the applicants on the other hand contended that each party should be ordered to pay its own costs. The applicants were according to him compelled to approach the court on an urgent bases to defend what they regarded as their rights. Had the respondent replied to the applicant's letter of the 1st December 2006, wherein an undertaking was

sought that no deduction would be effected, by the respondent from the applicant's salaries, this application would not have been filed according to the applicant. It was further argued on behalf of the applicant that the principles of equity should be applied in considering, whether or not to grant cost in favor of the applicant.

Evaluation

[13] Rule 13 of the Rules of the Labour Court provides that a party who has initiated proceedings and wants to withdraw the matter must deliver a notice of withdrawal as soon as possible. This rule does not require the party that intends withdrawing to tender costs. The other party does however have the option of applying for costs if it so wishes.

[14] In the High Court the issue of withdrawal is governed by rule 41(1)(a) which provides that a person instituting any proceedings may at any time before the matter is set down, and after that by consent of the parties or the leave of the court, withdraw such proceedings. The withdrawing party is required to file the notice of withdrawal which may embody consent to pay the cost. If there is no consent to cost, the other party is entitled to apply for costs.

[15] After considering the provisions of s162(1)(a)(vii) of the Labour Relations Act 66 of 1995, Zondo AJ, as he then was, in the case of *Callgaurd Security Service (PTY) Ltd v Transport & General Workers Union & Others* (1997) 18 ILJ 380 (LC) said:

> *"It seems to me that what the Act has decreed is that whether or not this court should or should not make an order of costs in a particular matter depends on the 'requirements of the law and fairness'. In my view it is therefore important to appreciate that consideration should be given not only to the requirements of the law in disregard of the requirements of fairness nor should consideration be given only to the requirements of fairness in disregard to the requirements of the law."*

[16] In the *Callguard Security case* (supra), the court pointed out that the same approach was adopted by the Appeal Division under the old Labour Relations Act of 1956, in the case of *NUM v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A). Recently in *Van Den Berg v SA Police Service* (2005) 26 ILJ 1717 (LC), Murphy AJ held that he was not persuaded that the principle expressed in *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC), that where actions are withdrawn or settled on the merits and the parties are unable to agree on costs the costs should be awarded to the

successful party. The court found that there is no requirement that a party withdrawing a matter should tender costs.

[17] It is therefore clear that where the court is faced with having to decide the issue of costs where an action is withdrawn and the parties are unable to agree on costs the consideration of law and fairness should apply equally. In this regard relevant provisions of s162 of the Labour Relations Act 66 of 1995 read as follows:

> *"(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-*
>
> *(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and*
>
> *(b) the conduct of the parties-*
>
> *(i) in proceeding with or defending the matter before the Court; and*
>
> *(ii) during the proceedings before the Court."*

[18] I now turn to the facts of this case. The respondent argued correctly, in my view, that in the first place there was no basis for the applicant to have filed the urgent application and secondly to persist in seeking its confirmation only to withdraw it at such a late stage in the proceedings.

[19] This matter had a long history of engagement between the parties. There were two arbitration awards, lengthy deliberations and an agreement which the applicant signed. The applicant based its urgent application in the main on clause 8 of the agreement. In the context of the history of this matter the most important part of the agreement is the last part of clause 8 which reads as follows:

> *"... and no further additional allowance in respect of the disputed locomotion allowance shall be considered or paid to the said category of employees."*

[20] The full text of this clause as quoted above was quoted also in full in the founding affidavit of the applicant and paragraph 5 (five) of the applicant's attorneys letter dated 1st December 2006. More importantly, clause 8(a) stated that the agreement "*constituted a full and final and binding agreement.*" It was further agreed that the agreement superseded the

arbitration award. It is evidently clear that the award dealt specifically with the issue of the disputed locomotion allowance. In fact the arbitrator at paragraph 8.2 of his award stated:

> "*The Respondent is accordingly ordered to pay the twenty nine (29) Applicants (Chief Superintendents) the Six Thousand Rand (R6 000-00) per month locomotion allowance retrospectively...*"

[21] It is difficult to comprehend how that the agreement expressly or for that matter impliedly entitled the applicants to contest the payment of the locomotion allowance based on the agreement itself. It would seem to me that (notwithstanding the letter of 1 December 2006) the reasonable approach that the applicants should have adopted was to have engaged with the respondent and sought clarity regarding the deductions. Had they adopted this approach they in all probabilities would have come to understand that, they were not entitled to the locomotive allowances and that those who received them were paid in error and accordingly the deductions were not in contravention of the Basic Conditions of Employment Act. The other approach which the applicant could have adopted is that of applying its mind and studying the agreement properly to understand its import. This could, in

my view have avoided this unnecessary application which was instituted without regard to its implications on the interest of the respondent.

[22] Accordingly, in my view, there was no basis for the urgent application, for pursuing it to the level of seeking its confirmation and then withdrawing it at the last moment. Therefore the applicant is in both law and fairness obliged to pay the costs incurred by the respondent in defending the case.

Order

[23] In the premises the applicants are ordered to pay the cost of the respondent on the party and party scale.

MOLAHLEHI AJ

DATE OF HEARING: 22 JANUARY 2007
DATE OF JUDGMENT: 29 JUNE 2007

APPEARANCES

FOR THE APPLICANT:	H VAN DER RIET SC
INSTRUCTED BY:	CHEADLE THOMPSON & HAYSOM
FOR THE RESPONDENT:	ADV P KENNEDY SC
INSTRUCTED BY:	BOWMAN GILFILLAN INC