IN THE LABOUR COURT OF SOUTH AFIRCA
HELD AT BRAAMFONTEIN

Case No: J 1509/04
Date delivered: 23/02/07

In the matter between:

ALL MAN LABOUR SERVICES CC Applicant

and

THE SERVICES SECTOR EDUCATION AND TRAINING AUTHORITY ("SETA") Respondent

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JUDGMENT

REVELAS J:

[1] The business of applicant is the outsourcing of maintenance services. It is registered in the services sector as an employer with the respondent, a so-called SETA, (Seta 23, to be precise) established in terms of section 9 of the Skills Development Act, 97 of 1998 ("The Act"). The applicant is obliged to pay skills development levies under the Act to the respondent, a sector education and training authority (SETA), which operates in the services sector in which the applicant employer is a participant. The levies in question are payable in terms of the Skills Development Levies Act, 9 of 1999 ("The SDLA"), and are levies paid annually to the South African Revenue Services.

[2] The respondent allocates grants to employers who qualify for such grants in terms of the Act and its Regulations, the relevant portions of which are cited and discussed in this judgment. The respondent has introduced a quality assurance policy and certain criteria (which its constitution entitles it to do) which sets certain requirements to qualify for a grant. These are not contained in the Act or its Regulations. In terms of the respondent's policy, before an employer can become entitled to a grant envisaged by the Act and its

Regulations, the respondent requires that each application for a grant be subject to *inter alia* the following: Confirmation that the training and that an employer provides to its employees is performed either by an accredited training provider or that the training provider was in the process of obtaining accreditation at the time of the training. Recognised accreditation is in terms of any Education and Training Quality Assurance Body, in turn accredited by the South African Qualifications Authority Act 58 of 1995. Accreditation by the respondent itself, whilst sufficient, is not a prerequisite. Where training is purchased from an external training provider (which is the case in this matter) the respondent restricts payment of the grant to the lesser of the amount actually spent on training, or 45% of the total skills levy paid by the employer over the relevant period. Accordingly the respondent, it pays Rand for Rand the moneys spent on training subject to a maximum of 45% of the levy paid by an employer. If the employer training is conducted by the employer itself and it is accredited (or in the process of becoming that) an employer may ascribe a real monetary value to the costs of the training conducted, and will be entitled to receive a grant accordingly. Briefly the two additional criteria are: That repayment of the grant will be commensurate with the amount actually spent on training, and secondly, reimbursement in relation to training will only be made so long as the trainers are accredited.

[3] A dispute has arisen between the parties concerning the under payment by the respondent, to the applicant of a grant payable under Regulation 6 of the Act. The relevant regulation (6(2)(b)) requires a SETA to pay to qualifying employers 45% of the total levies paid by of them in terms of the SDLA. The applicant's case is that the respondent has not paid to it the full amount of the 45% grant to which it is entitled to in terms of the regulation for the year ending on 31 March 2003, the amount in question being R45 004,14 as per the amended notice of motion.

[4] The applicant seeks a declarator to the effect that the respondent's above policy, and criteria are *ultra vires* the regulations under the Act, and an order

requiring the respondent SETA to pay to it the full amount of the grant provided for in Regulation 6(2)(b).

[5] The respondent has paid the applicant certain moneys but has declined to pay the full amount claimed by the applicant and has advanced mainly two reasons for doing so, which reasons are set out in a letter written to the applicant's attorney. They are: Firstly, that the amount claimed by the applicant does not represent the amount actually spent during the year in question. (The respondent regards the applicant's claim in this regard as a belief that it is entitled to some form of gratuity which is unrelated to the actual provisions of any skills training).

[6] The second reason advanced by the respondent is that the amount claimed by the applicant is in respect of trainers who are neither accredited nor in the process of being accredited by the respondent (a SETA), nor by the South African Qualifications Authority. (The respondent submits in this regard that the applicant believes it can claim monies for training provided by a person who need not have accredited expertise). The two reasons for the refusal to pay the amount claimed are part of the respondent's quality assurance policy and criteria which the respondent formulated and implemented in November 2000. The respondent says was mainly implemented to prevent abuse and fraud.

[7] I will firstly deal with the relevant legislation and then with the question whether or not the regulations, by implication, permit the respondent to introduce additional criteria without any express or patent authority to do so. The respondent proposed that I should find that the introduction of criteria is permissible, than any adverse order I make as to the validity of the Regulations should be suspended for eighteen months in terms of section 172 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

<u>The Legislation</u>

[8] Section 31(1) of the Act confers upon this court exclusive jurisdiction **"in respect of all matters arising from this Act."**

[9] The purposes of the Act are contained in section 2 thereof. They are broadly, to develop skills of the South African Work Force to improve the quality of life of workers, improve productivity in the workplace, and to ensure the quality of education and training in the work-place.

[10] Section 3 of the SDLA imposes an obligation on any employer to pay a skills development levy as from a certain date. The amount in question is 1% of the employer's payroll. Section 7(4) of the SDLA requires the employer to pay the levy by a certain date to the Commissioner for the South African Service, (established by the South African Revenue Service Act, 1997 (Act 34 of 1997) who then effectively pays it to the Department of Labour, but via the National Revenue Fund (Section 8(1) of the SDLA). Within fourteen days of receipt of the prescribed notice, the Director General of Labour is to allocate payments from employers so that 20% is paid over to the National Skills Fund 80% of the levies (plus interest and penalties) is payable to the SETA who then has to deal with it as provided for in the Act.

[11] The Director General of Labour has to be satisfied that the SETA has complied in the prescribed manner with section 10(1)(a)(b)(g)(ii)(h)(ii) of the Act. (Section 8(3) of the SDLA)

[12] The effect of the overall statutory scheme is that the applicant as employer, is obliged to pay an annual skills development levy, equivalent to 1% of its pay roll to the South African Revenue Services who then, after retaining 2% of such a levy, (to defray costs) including interest an penalties, pays the balance of 98% to the Department of Labour, who in form pays over 80% to the relevant SETA, and retains 18% for the National Skills Fund.

[13] Section 10 of the Act pertains the functions of a SETA, and the payment of grants. It reads as follows:

"**(1) A SETA must-**

(a) develop a sector skills plan within the framework of the national skills development strategy;

(b) implements its sector skills plan by-

(i) establishing learnerships;

(ii) approving workplace skills plans;

(iii) <u>allocating grants in the prescribed manner to employers, education and training providers and workers; and</u>

(iv) monitoring education and training in the sector;

(c) promote learnerships by-

(i) identifying workplaces for practical work experience;

(ii) supporting the development of learning materials;

(iii) improving the facilitation of learning; and

(iv) assisting in the conclusion of learnership agreements;

(d) register learnership agreements;

(e) **within a week from its establishment, apply to the South African Qualifications Authority for accreditation as a body contemplated in section 5 (1) (*a*) (ii) (*bb*) and must, within 18 months from the date of that application, be so accredited;**

(f) **when required to do so contemplated in section 7(1) of the Skills Development Levies Act, collect the skills development levies, and must disburse the levies, allocated to it in terms of section 8 (3) (*b*) and 9 (*b*), in its sector;**

[Para. *(f)* substituted by s. 23 of Act 9 of 1999.]

(g) liaise with the National Skills Authority on-

(i) the national skills development policy;

(ii) the national skills development strategy; and

(iii) its sector skills plan;

(h) report to the Director-General on-

(i) its income and expenditure; and

(ii) the implementation of its sector skills plan;

(i) **liaise with the employment services of the Department and any education body established under any law regulating education in the Republic to improve information-**

(i) about employment opportunities; and

(ii) between education and training providers and the labour market;

(j) appoint staff necessary for the performance of its functions; and

(k) perform any other duties imposed by this Act or the Skills Development Levies Act or consistent with the purposes of this Act.

[Para. (k) substituted by s. 23 of Act 9 of 1999.]

(2) A SETA has-

(a) all such powers as are necessary to enable it to perform its duties refereed to in subsection (1); and

(b) the other powers conferred on the SETA by this Act or the Skills Development Levies Act.

[Para. (b) substituted by s. 23 of Act 9 of 1999.]

(3) **A SETA must perform its function in accordance with this Act the Skills Development Levies Act and its constitution.**

[Sub-s. (3) substituted by s. 23 of Act 9 of 1999.]" (emphasis added)

[14] Section 36 of the Act permits the Minister, after consultation with the National Skills Authority, to make regulations, *inter alia* to any matter which **"may or must be prescribed under this Act."** The Skills Development Regulations were promulgated in Government Gazette 22398 of 22 June 2001 ("the Regulations") and since Regulation 6 of the Act is of particular relevance to this application, the portions that deal with the allocation of grants by a SETA to an employer, should be cited:

"(1) A SETA must allocate a mandatory grant to an employer if-

(a) the employer has submitted an application for a grant in the form prescribed in Annexure A to these Regulations; or

(b) the employer has submitted an application for a grant in the form prescribed in Annexure B to these Regulations.

(2) The mandatory grant to be paid by the SETA in terms of-

(a) subregulation (1) (a), must be equivalent to 15 per cent of the total levies paid by the employer in terms of section 3 (1) of the Skills

Development Levis Act during each year; and

(b) subregulation (1) (b), must be equivalent to 50 per cent for the 2001/2 financial year and 45 per cent for the 2002/3 financial year of the total levies paid by the employer in terms of section 3 (1) of the Skills Development Levies Act.

(3) A SETA may of any surplus moneys determine and allocate discretionary grants to-

(a) an employer if the employer has submitted an application for a discretionary grant in the form prescribed in Annexure C to these Regulations; and

(b) education and training providers and workers if the education and training providers and workers concerned have submitted an application for a discretionary grant in the form prescribed in Annexure D to these Regulations." (emphasis added)

[15] Section 14(3) of the Act stipulates how the monies are to be spent. It reads: "The monies received by a SETA may only be used in the prescribed manner and to –

(a) fund the performance of its functions; and

(b) pay for its administration within the prescribed limit."

[16] Sections 14(4) (5) and (6) of the Act require SETA'S to furnish the Minister of Finance statements of income and expenditure, maintain high accounting standards including audits and reporting to the Minister.

[17] The applicant submits that the aforesaid provisions of the Act to support its contention that a SETA is not at large to spend moneys as it deems fit. I do not understand the respondent to argue that it is. In this regard it is also important to note the provisions of section 10(1)(c) of the Act which requires accreditation. The Skills Development Regulations also, as one would expect them to, impose limitations on a SETA'S administrative costs, which is set at 12,5% of the moneys received (Regulation 3). Regulation 4 requires a SETA to use all monies received in terms of the Act (the 80%) to administer the activities of the SETA and to pay grants which is pertinent to the application

before me. Here it is necessary to quote directly from the Regulations Guidelines:

"Claiming grants: general information

2 Employers who are up-to-date with the payment of the skills levy can claim skills grants from their SETA. Their SETA is the one to which employers pay their levies.

3 Each SETA will decide the dates by which applications for grants must be made. They will let employers know about these arrangements. Employers may also approach their SETA for information.

4 Training providers and workers may also seek grants from a SETA. These grants may be given to projects, programmes and research activities if they support the implementation of the sector skills plan that each SETA has developed. Each SETA will publish details about the grants and how to apply for them.

Grants

5 There are six types of grants that an employer might claim.

These are:

- **a workplace skills grant;**
- **a workplace skills implementation grant;**
- **a grant towards the costs of learnerships and learner allowances;**
- **a grant towards the costs of skills programmes;**
- **a grant towards the costs of providing apprenticeship training; and**
- **a grant towards a programme, project or research activity that helps the relevant SETA to implement its sector skills plan.**

6 ***The first two grants for the submission of a workplace skills plan, and for a subsequent implementation report on the training provided-MUST be paid by the relevant SETA, as long as an employer submits the application correctly on time, as assessed by the appropriate SETA. The Regulations refer to these as mandatory grants.***

7 The workplace skills planning grant is fixed as a percentage of the levies paid by an employer. An employer who makes an application on time and in the proper way will receive 15 per cent of the total of the levies s/he had

paid. Similarly the workplace skills implementation report will be, in 2001/2, 50 per cent of the total levies paid and in 2002/3, 45 per cent of the total levies paid.

8 The other grants are discretionary and a SETA MAY pay these. It will decide the grants it will pay on the basis of the contribution that the skills development activities being proposed will contribute to the implementation of the SETA's sector skills plan. For example, there may be a number of requests for grants to support learnerships. If a choice has to b made between a number of different applications for such grants, the SETA will make its decisions ion the basis of the priorities set out in its sector skills plan.

9 Each SETA will determine the amounts of all the other grants. Applications for these grants MUST be made and approved by the SETA before any training or other activity starts." (emphasis added)

[18] Employers are entitled to a grant, upon their submission of an application for a grant, as prescribed in annexure A and B of the Regulations. Two types of grants can be applied for in terms of the two annexures, depending on the quantum. (Regulation 6(1)(a) and 6(1)(b)). The latter regulation pertains to a situation such as the one in question. The applicant points out that in this matter the financial year involved is 2002/2003. Consequently the applicable and fixed percentage is set at 45%, and since in terms of the regulations the grants provided for in Regulation 6(2) are mandatory, that is what must be paid out. In support of its argument, that there can be no other requirement than this, the applicant relies on the distinction where a fixed amount must be paid in the case of a mandatory grant, but an unspecific amount can be paid out in terms of discretionary grants payable in terms of Regulation 6(3), which is payable in accordance with the SETA'S own assessment of the situation.

[19] Employers who are up to date with their levy payments can claim a grant from the appropriate SETA if they submit a report each year on the implementation of their work place skills plan before the date stipulated by the SETA. The form of this report is annexure B to the regulations, but a SETA is able to modify this to take into account sector differences.

The Introduction of the Policy

[20] The applicant's case is that once it has lodged a proper application for a grant on time, to the SETA, it must be paid the full grant and the SETA is not empowered to pay anything less or impose any conditions on the payments thereof, since it has met the one criteria, which is the only one required. This argument the applicant sums up as follows: **"in terms of the SDA, the Regulations are exhaustive of the circumstances in which and criteria according to which, grants will be paid."**

[21] The next question is whether the introduction of a policy with criteria not expressly set out in the Act, is permissible. For purposes of this application the applicant concedes two fundamental legal propositions which support the respondent's case. The first is that in the performance of its functions, a statutory functionary is entitled to adopt a policy which fleshes out and gives guidance concerning the manner in which it will fulfil its functions. The second is that statutory powers can be accorded to a statutory body, not only expressly, but by implication. The applicant has qualified the aforesaid by submitting a two-fold argument. It argues that a policy may not be adopted if the policy is not permitted by the Act or the Regulations. The further argument is that the policy must be consistent with the Act and the Regulations, and the policy and criteria in question are not, hence the policy has no application in the payment of mandatory grants.

[22] The applicant argues further that on a proper interpretation of the Act and its regulations, the grants in question are to be paid in the manner prescribed by regulation, and that is by the Minister, and not in a manner prescribed by the SETA itself. It argues that should I find that the SETA indeed has the power to prescribe how these grants are to be paid out and impose extra conditions, those conditions that were imposed are at variance with the clear wording of the Act and may not be implied.

[23] The applicant contend, that its interpretation of the Act and its regulations, namely that where the single condition has been complied with, the employer is entitled to a grant, is buttressed by the clear distinction between mandatory and discretionary grants, the latter being provided on a different basis under regulation 6(3).

[24] The purpose of the Regulation 6(1)(b) grant is to compel the submission of a report on implementation of the work place skills plan. The applicant has submitted that the effect of adopting the respondent's two extra conditions would be to change the regulations fundamentally. It argues that the respondent's policy of requiring actual spending of the actual amount of the grant and requiring training only by way of accredited trainers, imposes substantive new extra conditions which are not set out anywhere in the regulation, and if the policy in question were to be enforced, as the SETA in the present case seeks to do, it would mean that the respondent could in effect refuse to pay what is a mandatory grant, or it can only pay part of a specific amount which is fixed by regulation, upon conditions which it has itself imposed, but which the Minister has not even saw fit to do. The applicant submits there is no basis in law for the imposition of new conditions.

[25] The respondent referred me to *Baxter Administrative Law* as quoted(with emphasis) by the SCA in *GNA Automation CC and Another v Provincial Tender Board, Eastern Cape and Another 1998(3)SA 45 SCA at 51H* where the following is said:

> **"Powers may be presumed to have been impliedly conferred because they constitute a *logical* or *necessary* consequence of the powers which have been expressly confirmed because they are reasonably required in order to exercise the powers expressly confirmed or because they are *ancillary* or *incidental* to those expressly confirmed."**

[26] The applicant submitted that respondent's case fits in with none of the pigeon holes or categories above. It proposes that they contradict the single condition which the Minister has deemed fit to impose, and it cannot be that the SETA

can set conditions which are then used to deny an employer a grant, on a basis never contemplated by the Minister himself in circumstances where the Minister is given the sole right to set those conditions.

[27] The respondent has also referred me to Hoexter: *The New Constitutional and Administrative Law* volume 2 where the learned author remarked: "**Just as the power to make omelettes must necessarily include a power to break eggs, so the power to build a dam may include power to remove slit or perhaps to expropriate property."** The applicant argued that whereas one can see the force of the implication to be necessary in the above example, one cannot do so in the present case, because the language of the Act is clear and unambiguous and it is not an ancillary matter as meant in the omelette argument since the regulations prescribe the very issue which is in question.

[28] The issue of the breadth of the expressed powers, is also mentioned by Hoexter. In this regard she says that a court will be more inclined to find or implied power, where the express power is of a broad discretionary nature. The applicant submits that the express power in this case, is of a narrow circumscribed nature.

[29] The next citation I was referred to (from Hoexter) was the following question: "**whether the context of the provisions as a whole, the Act and what the purposes for which it was enacted, may indicate whether there are further powers reasonably incidental to the express authority which has been given"** and it was said that "**there is a very strong argument in favour of implying a power if the main purpose of the statute cannot be achieved without it, or if it is necessary to the proper functioning of an administrative body."** The applicant contends that the purpose of the Act can be achieved without the imposition of the additional conditions.

[30] The applicant argues that if the Minister wanted to add more criteria, in addition to those which do exist in the Act, it would merely be a matter of saying so. The applicant also disputes that the respondent's fear that the absence of criteria would render the skills development levy/grant system

vulnerable to abuse and fraud, is valid. The applicant suggests that fraud and abuse is sufficiently dealt with by section 33 and 34 of the Act. The former makes it an offence to knowingly furnish false information and the latter provides a penalty for such an offence.

[31] The "one criterion" argument of the applicant, that the additional criteria sets are impermissible by the Act and therefore unlawful, is not sustainable if one has regard to the Act as a whole. Whereas the wording of Regulation 6 and the guidelines to the Regulations are in the form of a double imperative, that relates to procedure and format. The Act is fraught with provisions, limitations and imperatives relating to the payment and managing of funds. It has to be, given the fact that employer's moneys are channelled through various hands for various purposes. If the format criterion on its own, is not capable of achieving the desired aim, namely of proper training of the workforce, additional criteria making the system more workable, must be permissible. It is far more practical to compel an employer to additional criteria, than attempting to punish an employer who has already received payment of a grant, which it is not entitled to, because it filled in incorrect facts about its training on its application form or its training is wanting in some way.

[32] There is no suggestion that the applicant incorrectly filled in the form. Counsel for the respondent during argument clearly stated that there is no false information in these forms and accepts everything said in them as the truth. Despite the truth of what even a hypothetical employer might say, it begs the question of whether or not it is permissible to impose a criteria which requires an employer to actually provide training before obtaining a refund and that training has to be provided by trainers who are accredited or in the process of being accredited. If the criteria were absent, clearly the system could be open to abuse, such as that the workplace would not be educated, skills would not be imparted and people with no or inadequate qualifications could be allowed

to provide training in circumstances in which the purposes of the Act are manifestly defeated.

[33] Baxter Administrative Law (1984) at 416 identifies three principles governing the circumstances in which a public authority may apply policies or standards. They may do so where:

> **"(i) This will not totally preclude the exercise of discretion;**
>
> **(ii) The policies, standards or precedents are compatible with the enabling legislation; and**
>
> **(iii) They are disclosed to the person affected by the decision before the decision is reached."**

Baxter elaborates on each of these three rules:

> In relation to the first rule, he emphasis that **'the decision-maker must always be open to persuasion that it is inappropriate to apply the policy in a given case."** In other words, no policy or guideline can ever be treated as inflexible.

With regard to the rule of disclosure, Baxter considers that such is dictated by the requirements of natural justice.

See also: **Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC) at para 33 and**

Bato tar Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at paras 55-57

In relation to the second rule, Baxter observes that **"the decision-maker cannot adopt <u>any policy</u> that takes his fancy: It must be one which is compatible with the empowering legislation and one which is neither irrelevant to the decision nor improper given the purposes of the legislation"**

[34] The applicant has not taken issue with the law upon which the respondent relies. It took issue with the application of the doctrines in the context of this particular case. The applicant has not sought to review the policy or criteria. It can also not be remotely said to be irrelevant to the decision or improper

given the purposes of the legislation. The respondent has submitted that without the criteria the purposes of the legislation in question would be defeated. That has to be correct.

[35] The respondent has a duty in terms of the Act to ensure quality training. If that cannot be achieved by invoking the Act and Regulations as they stand, the respondent must have implied powers to set standards if the Act does not provide them. It is not logical that the payment of a large amount of money can be dependant solely upon the timeous submission of a mere form. It would not be unreasonable, in such circumstances to introduce criteria to achieve the purpose of the Act.

[36] The imposition of the policy flows from the fact that the respondent is a public entity for purposes of the Public Finance Management Act, Act 1 of 1999, in particular section 50 thereof which stipulates that an accounting authority for a public entity must exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity; act with fidelity, honesty, integrity and in the best interests of the public entity in managing its affairs. Section 51(1) of the same Act requires **"effective, efficient and transparent systems of financial and risk management and internal controls"** and tasks the SETA to **"prevent irregular expenditure fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity."** The SETA'S own constitution requires it to **"formulate the general policy of the SETA"** and to make rules relating to **"final matters."**

[37] The quality assurance criteria enable the respondent to fulfil its functions properly, as required by the legislative framework against which it operates and to serve the purposes of the Act. The criteria are reasonable and without them there can hardly be effective and efficient quality control of trainers. One must not take a narrow view of ancillary powers, but a reasonable view,

applying all the aforesaid principles, and particularly the fact that the statute under discussion, says itself, that it has to be interpreted in a manner which advances its purposes.

[38] The application can therefore not succeed and is accordingly dismissed with costs, such costs to include the costs of two counsel.

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E Revelas
Judge of the Labour Court of South Africa

On behalf of the Applicant: Adv AE Franklin SC with him, Adv RG Beaton

Instructed by: Hofmeyr Herbstein & Gihwala Inc

On behalf of the Respondent: Adv GJ Marcus SC, with him Adv TC Tiedemann

Instructed by: Sonnenberg Hoffman Galombik