

**CCMA****TELEFAX MESSAGE FROM
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION****National Office**

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FROM: Mayroon Dirksen

DATE: 13 September 2010

No of pages (incl. this page): 8

TO: Cidet No. 957 (Pty) Ltd

c/o Bowman Gilfillan
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TO: South African Municipal Workers Union

c/o Cheadle Thompson & Haysom Inc
SAM10601/R Danieles/G Jephson
Fax: 011 403 1764

TO: South African Local Government Bargaining Council

c/o Cordelia Mandla
Fax: 011 333 8091

TO: South African Road Passenger Bargaining Council

c/o The General Secretary
Fax: 011 834 6853

Dear all

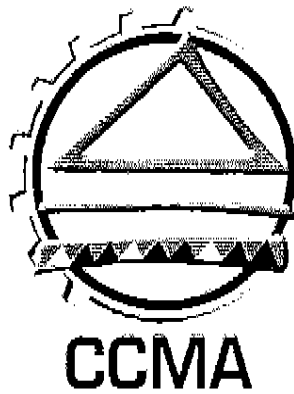
RE: DEMARCATION AWARD – CASE NUMBER HO1263-10

Attached herewith please find final approved award as well as support from NEDLAC in terms of s62(9) of the Labour Relations Act 66 of 1995.

Yours faithfully,



Mayroon Dirksen
Dispute Resolution Officer
CCMA National Office
Tel: (011) 377 6705



ARBITRATION AWARD

Case Number: HO1263-10
 Commissioner: Patrick Stone
 Date of Award: 01 Sep-2010

In the **ARBITRATION** between

CIDET NO.957 (PTY) LTD	Applicant
and	
SOUTH AFRICAN MUNICIPAL WORKERS UNION	First Respondent
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	Second Respondent.
and	
SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL	Third Respondent
and	
SOUTH AFRICAN BUS EMPLOYERS ASSOCIATION	Fourth Respondent

Union/Applicant's representative: Robin Carr
Union/Applicant's address: c/o Bowman Gilfillan
Telephone: (011) 669 9000/9504
Telefax: (011) 669 9001
E-mail: r.carr@bowman.co.za

1st Respondent's representative: Z M Navsa
Respondent's address: c/o Cheadle Thompson & Haysom
Telephone: (011) 403 1764
Telefax: (011) 331 1007/8
E-mail: thullalle.pule@samwu.org.za

1. DETAILS OF HEARING AND REPRESENTATION

The Hearing took place at the CCMA Head Office, Johannesburg, on 19/8/10. The second respondent did not attend the hearing; all other parties were legally represented.

2. ISSUE TO BE DECIDED

- 2.1 A Dispute exists between Clidet No.957 (Proprietary) Limited ("the Applicant") and South African Municipal Workers Union ("SAMWU") in regard to whether the business conducted by the Applicant falls within the registered scope of the South African Local Government Bargaining ("the SALGBC") or the registered scope of the South African Road Passenger Bargaining Council ("the SARPBC").
- 2.2 The South African Municipal Workers Union (SAMWU) (the first respondent) – contends that the services which the company provides in terms of the contract with the City of Johannesburg brings the company within the scope of the South African Local Government Bargaining Council (the second respondent). The company (the applicant) is a member of the South African Bus Employers Association (the fourth respondent) – which in turn is a member of the South African Road Passenger Bargaining Council (the third respondent) – and as such contends that its operations fell within the scope of the South African Road Passenger Bargaining Council.
- 2.3 The demarcation sought is that the Applicant "seeks a determination as to whether or not its services fall within the scope of the South African Local Government Bargaining Council or the South African Road Passenger Bargaining Council. The determination is required in order to resolve a dispute between the Applicant and SAMWU as to which bargaining council the business operations of the Applicant falls within.

3. BACKGROUND TO THE ISSUE

- 3.1 The applicant is a private company which carries on business as a bus operator providing bus services to the City of Johannesburg Metropolitan Municipality ("the City") as part of the Rea Vaya Bus Rapid Transport ("BRT") system in terms of a written agreement entered into on 28 August 2009.
- 3.2 The Rea Vaya system is established in line with the Public Transport Action Plan Phase 1 (2007 – 2010): Catalytic Integrated Rapid Public Transport Network Projects of the Department of Transport ("the PTAP"). The PTAP contains a main recommendation that:

"Bus contracts serving the four main metropolitan areas (initially) should be transferred as soon as feasible to the metropolitan transport authorities. The contracts should be entered into on a 'gross' basis, giving control of both the revenue and the route/network planning to the authority concerned. New contracts would require operators to engage fully with the metropolitan authorities' plans for integration of all road based public transport into a common network."

The transformation of informal mini-bus taxi operators into the mainstream public transport networks forms part of the PTAP.

- 3.3 The National Land Transport Authority Act, 5 of 2009 ("the NLTA") provides inter alia for the process of transformation and restructuring the national land transport system initiated by the National Land Transport Transition Act, 22 of 2000.

The NLTA defines "contracting authority" to mean the Department of Transport, a province or a municipality. Section 41 of the NLTA provides as follows:

- "(1) Contracting authorities may enter into negotiated contracts with operators in their areas, once only, with a view to-
- (a) Integrating services forming part of a integrated public transport networks on terms of their integrated transport plans;
 - (b) Promoting the economic empowerment of small business or of persons previously disadvantaged by unfair discrimination; or
 - (c) Facilitating the restructuring of a parastatal or municipal transport operator to discourage monopolies.
- (2) The negotiations envisaged by subsections (1) and (2) must where appropriate include operators in the area subject to interim contracts, subsidized service contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and non-contracted services.
- (3) A negotiated contract contemplated in subsection (1) and (2) shall be for a period of not longer than 12 years."

- 3.4 The contract negotiated between the City of Johannesburg and the applicant was negotiated within this legislative framework.

- 3.5 The registered scope of the SARPBAC (the third respondent) is the road passenger industry as set out in the annexure to the certificate. The annexure to the certificate states-

"Road Passenger Transport Trade in the Republic of South Africa excluding the sector and area for which the existing Bargaining Council for the Passengers Transportation Trade is registered, namely the Magisterial District of Durban constituted on 22 August 1967. 'Road Passenger Transport Trade' means the trade in which employers and their employees are associated for the purpose of conveying for reward on any public road any person by means of a power-driven vehicle (other than a vehicle in the possession and under the control of Transnet or a local authority) intended to carry more than 16 persons simultaneously including the driver of the vehicle and includes all operations incidental thereto or consequent thereto."

- 3.6 The scope of registration of the SALGBC (the second respondent) is the Local Government Undertaking in the Republic of South Africa.

"Local Government Undertaking" is defined in the SALGBC constitution to mean "the undertaking in which the employer and employees are associated for the institution, continuance or finalization of any act, scheme or activity undertaken by a Municipality and by municipal entities as established in terms of the Local Government: Municipal Systems Act, 32 of 2000."

4. SURVEY OF EVIDENCE AND ARGUMENT

4.1 The Applicant is a private company, all the shares in which are held by a trust and are to be transferred to the taxi operators who are affected by Phase 1A of the Rea Vaya BRT System who qualify to acquire the shares. The taxi operators who surrender their permits and whose taxi's (i.e. their existing business) are decommissioned fall within this group;

4.1.1 The City does not own shares in the Applicant;

4.1.2 The Applicant receives a fee for providing bus transport services to the City and while the buses used for the bus services are presently financed, the Applicant will acquire ownership of the bus fleet against full payment of the purchase price;

4.1.3 The Applicant is a bus operator contracted to provide bus services to the City in exchange for a fee. When the bus fleet is fully paid for in terms of the finance arrangements, the Applicant will be the owner of the buses and not the City. The Applicant will derive a commercial profit from its contractual; arrangements for the provision of providing bus services as a bus operator.

4.2 It was argued on behalf of the first respondent that-

4.2.1 The applicant is merely the vehicle through which the City of Johannesburg provides a service to the public.

4.2.2 The agreement between the Applicant and the City of Johannesburg falls within the meaning of a "service delivery agreement" in terms of Section 1 of the Local Government : Municipal Systems Act 32 of 2000, and that in terms of Section 81 of the Act, the City remains responsible for the service which it provides through the Applicant. It is evidence from the terms of the agreement that the City accepts this responsibility.

4.2.3 The terms of the Agreement provide for effective control by the City. As required by Section 81, the City regulates the provision of the service, monitors and assesses the implementation of the agreement, including the performance of the service provider, controls the setting and adjustment of tariffs by the service provider, and generally exercises its service authority so as to ensure uninterrupted delivery of the service.

4.2.4 It was agreed on behalf of the first respondent that the BOC agreement is a "scheme" or "activity" undertaken by a municipality as contemplated in the definition of 'Local Government Undertaking' and that the second respondent's registered scope is not limited to persons who are directly employed by local government. The term 'scheme' clearly covers any system, plan or method by which a municipality may provide a service. Whilst it was acknowledged that the service provided by the Applicant does relate to Road Passenger Transport, the third respondent certificate of registration specifically excludes vehicles which are under the control of a local authority and the agreement provides that the City entered into a Bus Acquisition Agreement with the Bus Manufacturing Company for the procurement of the Vehicles to be operated by the Applicant.

4.2.5 It was further argued on behalf of the first respondent that notwithstanding the clauses in the agreement between the Applicant and the City of Johannesburg that specify that the Applicant is the employer and not the City, this arbitration should consider the true meaning of employment and identify the City of Johannesburg as the employer given that the City regulates every aspect of their work, working hours, their uniforms etc. The City even prescribes the minimum requirements for employment as a driver, how they are trained, recruited, dismissed, retrenched etc.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

5.1 It was conceded by the first respondent that the Applicant cannot be defined as either a municipality or a municipal entity. I also agree with the first respondent that the agreement between the Applicant and the City of Johannesburg should be viewed in the context of the Local Government : Municipal Systems Act.32 of 2000 and in particular Section 76 (b) of the Act which on dealing with mechanisms for the provision of services reads-

"an external mechanism by entering into a service delivery agreement with-

- (i) a municipal entity;
- (ii) another municipality;
- (iii) an organ of state, including
- (aa) a water services committee established in terms of the Water Services Act, 1997 (Act 108 of 1997); Item (aa) substituted by Section 4- of Act 51 of 2002.)
- (bb) a licensed service provide registered or recognized in terms of national legislation; and
- (cc) a traditional authority;
- (iv) a community based organization or other non-governmental organization legally competent to enter into such an agreement, or
- (v) any other institution, entity or person legally competent to operate a business activity."

I can only conclude on the evidence before this arbitration that the Applicant falls within the definition as contained in Section 76 (b) (v).

5.2 With regard to the first respondent's arguments in respect of the control exercises by the City of Johannesburg I acknowledge the apparent contradictions in the agreement in question which in Clause 50 defines the Applicant as an "Independent Contractor" and yet in Clause 51 seeks to prevent the Applicant from operating any passenger transport service other than provided for in the agreement without the express written permission of the City. However, when viewing the agreement in context I find that-

5.2.1 The controls in question largely relate to the requirements of the Local Government : Municipal Systems Act.32 of 2000 in monitoring service levels provided together with the practical requirements necessary to bring sections of the informal taxi industry within the formal sector of road passenger transport services.

5.2.2 The temporary nature of the Agreement between the Applicant and the City of Johannesburg together with the wording of the agreement itself shows the clear intention of the parties that the Applicant be deemed the true employer with an intent in future to compete in the road passenger transport industry. I find no evidence to support an argument that in some way the agreement in question is designed to circumvent labour legislation. On the contrary the Applicant is a member of the fourth respondent who in turn, together with the third respondent is supporting a principal objective of the LRA in the promotion of sectoral bargaining. Indeed by operating within the scope of the third

respondent, the Applicant, at the termination of the agreement in question, will be operating on a level playing field with other bus operators in competing for tenders.

6. AWARD

The Applicant's activities fall within the scope of the South African Road Passenger Bargaining Council.



PAT STONE

Senior Commissioner

Johannesburg 01/09/10

APPROVED



NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

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13 September 2010

Ms N Khan
National Director: CCMA
26 Harrison Street
JOHANNESBURG
2001

Per Telefax: (011) 834 7386


Dear Ms Khan

RE: ARBITRATION AWARD: CIDET NO.957 (PTY) LTD AND SOUTH AFRICAN MUNICIPAL WORKERS, SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL, SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL AND SOUTH AFRICAN BUS EMPLOYERS ASSOCIATION : HO 1263-10

The above Demarcation Dispute was forwarded to Nedlac in terms of Section 62 (9) of the Labour Relations Act 66 of 1995.

After consideration, the standing committee would like to support the draft award issued by the Commissioner.

Kind Regards



H. MKHIZE
EXECUTIVE DIRECTOR

