

IN THE MATTER BETWEEN:

MASTER WHEELS VERVOER B.K.

Applicant / Appellant

and

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT & LOGISTICS INDUSTRY**

Respondent / Council

and

In the matter between:

P.J. FOUCHÉ VERVOER

Applicant / Council

and

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT & LOGISTICS INDUSTRY**

Respondent / Council

RULING OF THE INDEPENDENT BODY

- 1 On 22 September 2011 appeal hearings were held in both of the above matters. The appellants were represented by Mr. E. Bischoff. Present for the

leave pay and holiday bonus payments directly to its employees rather than to the council.

- 4 The legislative history to this matter is that the holiday pay bonus fund clause of the main agreement was amended by agreement between the parties to the council signed on 12 February 2007⁴ so as to include a new provision for exemption, contained in clause 21(12)(a), which read as follows:

"(12) Exemption

- (a) For a 1 (one) year trial period, the Exemptions Committee, assisted by a person with financial expertise and who is acceptable to the Executive committee as defined in the Council Constitution, shall grant an employer a 1 (one) year exemption to pay holiday bonuses direct to its employees in the event that:*
- (i) the employer provides, on a annual basis, a guarantee from a banking institution that the employer has the funding available to cover the accrued holiday bonus liability failing which the bank will make good the liability; or*
 - (ii) the employer provides a certificate from its auditors that it has made adequate provision in its accounts to cover the accrued holiday bonus liability; and*
 - (iii) the employer had conducted its business for at least 3 (three) years; and*
 - (aa) the employer has an acceptable record of payment compliance to the Council; and*
 - (ab) the Exemptions Committee is satisfied that the employer is financially stable; and*
 - (ac) the Exemptions Committee is satisfied that the employer has consulted appropriately with its employees on the direct payment.*
- (b) Any employer who is granted exemption to pay holiday bonus pay directly to employees shall do so on or before 15 December."*⁵

⁴ GN R. 559 GG 6 July 2007, clause 11 of the Amendment of Main Collective Agreement

⁵ This clause appears in the main collective agreement dated 21 April 2009.

8 It is important to understand that prior to the introduction of clause 21(12)(a)⁸ applications for exemption from the provisions of the council's collective agreements were governed by the provisions of clause 4 of the Exemptions and Dispute Resolution Collective Agreement of the council.⁹ Clause 4(3) of that Dispute Resolution Agreement sets out the requirements for an exemption application as follows:

"(3) Applications shall comply with the following requirements

- (a) Be fully motivated.*
- (b) Be accompanied by relevant supporting data and financial information.*
- (c) Applications that affect employees' conditions of service shall not be considered unless the employees or their representatives have been properly consulted and their views fully recorded in an accompanying document.*
- (d) If the nature of the relief sought dictates, the application shall be accompanied by a plan reflecting the objectives and strategies to be adopted to rectify the situation giving rise to the application and indicating a time frame for the plan.*
- (e) Indicate the period for which exemption is required."*

9 Clause 4(8) of the Dispute Resolution Agreement then proceeds to set out the relevant factors which the Exemptions Body and Independent Body are required to take into consideration. Those factors may include, but shall not be limited to, the following criteria:

- (a) the applicant's past record of compliance with the provisions of council's Collective Agreement and Exemption Certificates;*
- (b) any special circumstances that exists;*
- (c) any precedent that might be set;*

⁸ And prior to the later the amendment which extended the exemption provision to the leave pay under clause 19

⁹ Signed on 14 August 2007 and referred to herein as the "Dispute Resolution Agreement".

laid out in that section are met. (For present purposes in the remainder of this ruling reference will be made to clause 21(12) only, but the identical arguments prevail in relation to clause 19.)

- 11 The facts relied on by the applicant in the present matter are that on two previous occasions the company applied for and obtained exemptions from its obligations to contribute to the leave pay fund and the holiday bonus fund. The first such exemption was granted on 29 January 2010 for the period 1 January 2010 to 31 October 2010. This exemption was granted on the basis that the company had met the requirements of clause 21(12)(a). The second exemption from both the holiday pay bonus and leave pay provisions was granted on 31 January 2011 for the period up to 28 February 2011. This exemption was similarly granted on the basis that the company had met the requirements of clause 21(12)(a).

- 12 The provision whereby an exemption could be obtained under clause 21(12)(a) ceased to apply upon the expiry of the period of operation of the main agreement, which was on 28 February 2011. Thereafter, and at a time when the exemption provisions of clauses 21 and 19 no longer applied, the company made a further application for exemption, which is the subject of the present appeal. That exemption application was once again an application to permit the company not to have to contribute to the council's leave pay and the holiday pay bonus funds and was sought for the twelve month period 1 March 2011 to 29 February 2012. The application was that the company pay the annual leave pay and holiday pay bonus directly to its employees when due and that it be exempt from making such payments in advance to the council's fund, from

Resolution Agreement and is no longer governed by clause 21(12)(a). This interpretation of the application of the provisions of the main agreement is correct. Indeed Mr. Bischoff in argument before the Independent Body accepted that this was the effect of the changes to the main agreement.

- 14 The Exemptions Body went on to find that in circumstances where the employer's application for exemption was premised "*on improving administrative efficiency and to align it with the operational reality of its business*", that this did not constitute a special circumstance and that for this reason, and also because there was no indication that the majority of employees of the applicant company supported the exemption application, that the clause 4 criteria had not been satisfied and that the exemption ought to be refused.
- 15 The applicant's appeal against the decision of the Exemptions Body reflects its acceptance that clause 21(12)(a) of the collective agreement had been deleted.¹² Applicant therefore based its appeal, as in its application before the Exemption Body, "*on improving administrative efficiency and to align it with the operational reality of its business*".¹³ The company's appeal documents go further and in addition to point out that the company had been granted an exemption for a previous period.¹⁴ The company further states that the application was handed in before the new amendments to the main agreement

¹² in paragraph 5.6

¹³ Paragraph 6.5 of the appeal

¹⁴ Paragraph 6.6 of the appeal

to those criteria that we now turn our attention as clause 21(12)(a) is quite simply no longer of application.

Evaluation of the merits of the exemption applied for

18 Clause 4(8) enjoins this tribunal (as well as the Exemptions Body), in considering an application for exemption to take into consideration all relevant factors which may include, but which are not limited to the criteria listed in subparagraphs 8(a) to (f) of that clause. Clearly, the tribunal is not limited to a consideration of the listed criteria.

19 The first three criteria are the applicant's past record of compliance with the provisions of the council's collective agreements; any special circumstances that may exist; and any precedent that might be set. Thereafter follow the criteria of "*the interests of the industry*", "*the interests of employees*" and "*the interests of employers*", each of which is broken down into various sub categories of criteria which are listed and as fully set out above in this ruling. The approach to applying these criteria was considered previously by the Independent Body in the case of *M4 Carriers & Accounting and National Bargaining Council for the Road Freight Industry*¹⁸ and reference will be made below to that approach. It would be unwise to attempt to rank those criteria in terms of their importance or precedence in determining whether an exemption should be granted or not. That is not the way that the clause is formulated.

¹⁸ The published report of that case reported at (2003) 24 ILJ 1042 (BCA) is not the final signed award by the Independent Body but is an earlier draft of the final judgement and should therefore be approached with caution

40. The *Shorter Oxford English dictionary* (3rd edition) defines the word "special" as "of such a kind as to exceed or excel in some way that which is usual or common; exceptional in character, quality or degree" "marked off from others of the kind by some distinguishing qualities or features; having a distinct or individual character".
41. In the ***NUTW v Industrial Council for Clothing Industry*** case the Industrial Court considered a number of previous cases in which the courts had interpreted the phrase "special circumstances". These cases included ***R v Botha 1952 (4) SA 713 (O)***, ***Federated Employees' Insurance v Magubane 1981 (2) SA 710 (A) at 719***; ***Coetzer v Santam Versekeringsmaatskappy 1976 (2) SA 806 (T) 810*** and ***Webster v Santam Insurance 1977 (2) (SA) 874 (A) at 881***. The ***Webster*** case and the ***Coetzer*** case both collected and considered a number of previous authorities which interpreted this phrase. Both those cases concerned the interpretation of a section of the compulsory Motor Vehicle Insurance Act, 1972 in which the court had to decide whether there were special circumstances which had interrupted the running of prescription. The context in which those cases were decided renders such decisions not of much assistance. What can and should be gleaned from those decisions is the principle that the phrase "special circumstances" is very wide and comprehensive and that, like the courts, this tribunal should not seek to lay down any exhaustive definition of those words. This is in line with the previously expressed view of this tribunal that the expression is not capable of any hard and fast definition. A second principle to be gleaned from those decisions is that the meaning of the phrase "special circumstances" must be considered in the context of the relevant legislation and with due regard to the policies of the legislature expressed in the applicable legislation. The legislative context within which the phrase "special circumstances" occurs must be taken into account. Indeed the Industrial Court in the ***National Union of Textile Workers v Industrial Council for Clothing Industry*** case (at page 335 C) stated that "special circumstance within the context of the Act may be *sui generis* in order to further the objects of the Act". The case law as to what

- 22 It is not appropriate to seek to circumscribe the precise parameters of the meaning of the term "special circumstances" in all circumstances.²² It is probably fair to observe that the more common instance in which an exemption will be granted is where a temporary exemption is sought and is found to be warranted, motivated by a temporary inability to comply and in order to permit the employer to recuperate from its financial ills and that once the financial health of the employer has been restored the temporary exemption will fall away. That is not the situation in the present appeal.
- 23 The crux of the notion of "special circumstances" is that an applicant must show that the situation is such that it distinguishes it from the run-of-the-mill situation in which all or a great many other employers in the industry will find themselves. What is being applied for is an exemption. The very notion of an exemption suggests something which departs from the usual arrangements laid down by the collective agreement.
- 24 The essence of the company's contention is that because it has previously secured exemptions from the requirement to pay leave pay and holiday bonus payments to the council, this constitutes in and of itself "special circumstances" such as to warrant the further grant of an exemption for an additional year.
- 25 The first point to be noted is that the previous exemptions were granted on a different basis which, in consequence of agreed amendments to the main collective agreement, is no longer a basis on which exemptions can be granted.

²²Unreported decision of the Independent Body in *Fleet Street Logistics v NBCRFI* dated 26 January 2010

upon which this situation constitutes special circumstances, even for one further year of exemption.

26 In conclusion on the question of special circumstances, it cannot we think be said that the evidence establishes a situation which distinguishes the company from the type of situation that many employers in the industry will find themselves.

27 The next criterion to consider is whether any precedent might be set by the grant of an exemption to the applicant.²³ This element was not expressly addressed by the company in its appeal papers or in its oral submissions. To grant an exemption in the case of the applicant's situation would undoubtedly create a precedent for other employers who similarly previously obtained an exemption under the experimental regime created by the insertion of clause 21(12)(a).

28 The interests of the industry²⁴ may be dealt with briefly. The granting of an exemption to the applicant would constitute an unfair advantage being granted to the applicant and would therefore constitute unfair competition in relation to other employers similarly placed in the same industry. An exemption of the nature sought would generally serve to undermine collective bargaining in that the agreed provision of holiday bonus payments and leave pay payments having to be made to the council is a process which has been determined by

²³ Clause 4(8)(c)


²⁴ Clause 4(8)(d)

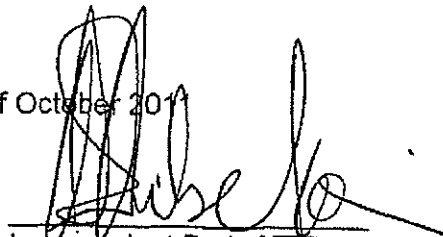
- 32 In regard to the issue of the future relationship with the employees' trade union, it does not appear that the employees of the company are unionised and no relevant submissions were made in this regard.
- 33 In relation to operational requirements what has been stated above in regard to there being no factual basis for the allegation that the company's operational requirements will be enhanced applies equally to this criterion.
- 34 The exemption application of P. A. Fouche Vervoer is no different from that of Master Wheels Vervoer on the material facts²⁶ and the same considerations and reasoning set out above also applies in that case, with the same result.
- 35 In conclusion, and having considered both company's appeals in the light of the evidence and arguments presented, and having weighed the factors as discussed above, we rule as follows in both of the above cases:

35.1 The appeal against the refusal of the application for exemption is dismissed.

35.2 No order is made as to costs.

DATED at JOHANNESBURG on this the 11th day of October 2011


Independent Body Member
D. M. Antrobus SC


Independent Body Member
L.T. Sibeko SC

²⁶ Save for the number of employees, as noted above