

IN THE EXEMPTION APPLICATION OF:-

LSC STAFFING SOLUTIONS

Applicant

and

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT AND LOGISTICS INDUSTRY (Council)**

Respondent

DECISION

1. The Applicant applied for exemption not to contribute to the Leave Pay Fund, Sick Leave Fund and Holiday Pay Bonus Fund.
2. The matter appeared on the Agenda of the Exemptions Body meeting held on the 16th April 2012.
3. The following were present:-
 - 3.1 Mr Y. Nagdee - Chairperson of the Exemptions Body
 - 3.2 Ms R. Manning - Member of the Exemptions Body
 - 3.3 Mr G. Wessels - Member of the Exemptions Body
 - 3.4 Mr E. Kock - Senior Agent of NBCRFLI
 - 3.5 Mr P. Mndaweni - Committee Secretary of NBCFRLI

- 3.6 Mr Redfern - Applicant's Attorneys from Redfern
- Findaly
- 3.7 Mr P. Meyer - CEO of the Applicant

4. APPLICANT'S SUBMISSIONS

The Applicant submitted, inter alia, as follows:

"An exemption is applied for from paying over the Holiday Bonus, Leave Pay and Sick fund, to the Council. The Applicant seeks to pay this money directly to its employees.

This application is made in terms of Clause 4 of the Exemptions and Dispute Resolution Collective Agreement.

APPLICANT'S PAST RECORD:

The Applicant has been registered with Council since 1999 and is in good standing there with. See attached Letter of Good Standing (Labeled Annexure 2).

SPECIAL CIRCUMSTANCES:

The Applicant is owned by a listed entity through imperial Holdings and has the cash flow and financial stability to ensure that correct provisions are kept in terms of leave (annual and sick) and bonus accruals. Furthermore the Applicant has a state of the art payroll system that is able to properly track said leave balances and bonus accruals and ensure that these are paid out timeously and correctly. (See attached letter from our Auditors labeled Annexure 1). LSC Staffing Solutions (Pty) Ltd is a large enterprise turning over in the

region of R170,000,000 per annum and paying approximately 4000 employees per month. See attached audited financials for the 12 month period to end February 2010 and the 16 month period to end June 2011 marked Annexure 8 and 9 respectively. Please note, our financial year end changed to end June, hence the 16 month period referred to in the second set of audited financials.

Being part of a listed entity we are fully compliant with the new Companies Act. Compliance obviously forms a major part of our annual audit and the fact that our audits have always been unqualified bears testimony thereto.

We are a member in good standing with the Association for Personnel Service Organisations (APSO) who further ensure compliance with the relevant employment legislation and have audited us in this regard. An audit which we passed unconditionally (See Annexure 3). We have also successfully been through audits by the Department of Labour; a requirement of the biannual renewal of our Employment Service for Gain certificate. We have a strong commitment to ethics and integrity within the organization and are also fully compliant from both a SARS and Compensation Commission perspective. See attached Letters of Good Standing labelled Annexure 4 and 5 respectively).

The Applicant understands that in order to constitute special circumstances it 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.

In the Applicant's case many staff work across various clients and various industries thus whilst they will be entitled to statutory benefits, at times depending on the industry they are allocated to, payment and administration may lie with the Council or the Applicant.

It is submitted that this is a special circumstance, uncommon to most employers in the Road Freight Industry.

The Applicant realises that applications for exemptions are not granted in circumstances where the employer is attempting to improve administrative efficiency. However, it is respectfully submitted that in the Applicant's case, it is attempting to ensure that all leave pay, holiday pay bonus and sick leave payments are captured correctly and accurately and to ensure that the employees are not paid piecemeal or through a part-payment system dependent on whether the employer or the Council makes the payment. This goes further than ensuring administrative efficiency.

For these provisions to sometimes be paid to and administered by the Council and other times by the Employer, creates frustration from an employee and operational perspective. Should a staff member work for a client not in the Road Freight and Logistics Industry, their leave will accumulate with the employer, but when they then work, often within the same week, for another client in the Road Freight and Logistics Industry, this leave will accumulate with the Council. As mentioned this creates a lot of confusion and frustration for the employee. He/she may embark on one period of leave or sick leave and be required to apply to be paid out by the Council for certain days and the Employer for others. This frustration and confusion could lead to industrial unrest.

This also leads to inefficiencies in the leave process and unnecessary travelling, cost and delay on the part of the employee. It is indeed a cumbersome for staff to have to apply to numerous parties for their leave pay.

The same would be applicable to the accumulation of Holiday Bonus Pay. Again we provide for holiday bonuses for hours worked at many different sites/clients, again across a number of different industries. Whilst we are able to accumulate these amounts based on different payroll bonus accrual actions, it is again very cumbersome from an employee perspective to receive part payment on a specific date from the Employer and part payment on another date from the Council. Likewise should the employee wish to query said payment or obtain clarity as to the calculation thereof, it may prove very difficult. This has led to problems in the past when the company was threatened with industrial action due to a misunderstanding and mistrust of said process and their part payment by Council and part payment by the Employer.

Whilst we have endeavoured to communicate the above to employees in the past it has proved incredibly difficult as they view LSC Staffing Solutions as the Employer regardless of what site/client they are working at or within which industry they are working.

The Applicant is also attempting to alleviate the confusion created by part-payments and different methods of calculation, as and when the employees work across the Applicant's range of clients in different industries. The Applicant needs to communicate to employees every time they work across different industries as to why they receive payments from the Employer and others the Council. This creates confusion and dissatisfaction amongst the staff members concerned. It is also very difficult from an operational perspective to try and have these discussions with each and every staff member and constantly remind them thereof. This leads to both operational issues from a company perspective and motivational issues from a staff perspective.

It also needs to be noted that of the 4000 employees paid per month, a relatively small percentage, 2.5%, would be working in the Logistics and warehousing Industry, further complicating the issue. The Applicant realises that this factor in isolation is not sufficient to warrant an exemption, however, when taken into consideration along with the other factors presented above, it is compelling. The Applicant engages a small percentage of its workforce in the Road Freight Industry, and not on a permanent basis, but as and when demand is created. Currently, affected staff have been consulted on this matter; see signed forms attached and labelled Annexure 11.

In addition, being a registered Temporary Employment Service many staff are classified as temporary employees as per the Council's Collective Agreements and this creates further complexity as certain employees would be entitled to receive these payments directly from the Applicant.

The Applicant is seeking a departure from the usual arrangement laid down, and does not do so lightly.

ANY PRECEDENT THAT MIGHT BE SET:

No precedent will be set, as all exemption applications are subject to individual application and review of Applicant specific criteria/circumstances.

It is submitted that the Applicant's circumstances are quite unique in that it is involved in various other industries, in addition to the Road Freight Industry and most notably that employees are transferred between industries during the month to work for different clients. This is not the case for every member of the NBCRFLI.

UNFAIR COMPETITION:

The Council submits that unfair competition may be created where an Applicant could benefit from interest on monies not paid over to Council. It is submitted that in the Applicant's case, it forms a very small percentage of the Council members and that in light of the circumstances, this is a justifiable cost of granting an exemption.

COLLECTIVE BARGAINING:

The Applicant recognises that the Bargaining Council agreement is a process of collective bargaining and that in being a participant in the Road Freight Industry means acceptance of a payment process agreed upon by the industry as a whole. However, in making application for exemption the Applicant is not seeking to undermine this process but rather to make full use of it for the benefit of its employees.

It is exactly the Collective Bargaining process that provides for this application. The interests should therefore not be adversely affected.

POTENTIAL FOR LABOUR UNREST:

The criteria for this application have been agreed to by all parties to Council in the negotiations. Moreover, the details of this application have been discussed with employees, proof of which is attached (Annexure 11). The direct payment of these benefits will reduce the potential for labour unrest due to more certainty and clarity on the part of the employee.

There have been instances of labour unrest in the past due to the different payment dates and 'co-payment' of Council and the Applicant.

In addition, being a registered Temporary Employment Service many staff can be classified as temporary employees as per Council's Collective Agreements and this creates further complexity, as many employees would be entitled to receive these payments directly from the Applicant. To communicate to employees as to why and when they will receive payments from the employer and when they will receive such from Council is difficult and creates confusion and potential unhappiness.

INCREASED EMPLOYMENT:

Not applicable.

EXPLOITATION:

None. In fact, direct administration of the Holiday Bonus and annual and sick leave will result in payments being processed in time as and when the employee takes leave or qualifies for the Bonus. Likewise the certainty and clarity as to what monies are due to the employee, and from whom, will ensure that the employee is better able to manage the benefits due to him/her.

JOB PRESERVATION:

Not applicable.

SOUND CONDITIONS OF EMPLOYMENTS:

Again, more certainty leads to the employee being better able to ensure that they receive the benefits they are entitled to.

POSSIBLE BENEFITS:

See other sub clauses of this section as well as point 6.1 (b). In addition the Company will no longer need to extend loans to employees whilst they are awaiting a payment from the Council as the Applicant will be able to pay said monies when due directly to the employee. Furthermore the employee will not have to spend time away from the workplace (or home) and money on transport to follow up on payment due directly from the Council as this will be administered from his place of work.

Clarity in terms of benefits due will also ensure a more motivated employee who is more easily able to remain abreast of the likes of leave balances and bonus payments due.

There is also no risk of insolvency which would impact on monies paid to employees, as indicated in the financial statements as attached hereto.

HEALTH AND SAFETY:

Not applicable.

INFRINGEMENT OF BASIC RIGHTS:

Not applicable.”

5. COUNCIL'S SUBMISSIONS

- 5.1 The Council submitted that the Applicant met its obligations in terms of Council's Collective Agreements;

- 5.2 It expressed concern about a precedent in relation to other TES Companies;
- 5.3 The Applicant is a subsidiary to TFD Network;
- 5.4 There is a need for education by the Council and Applicant in respect of confusion in respect of Council's administration which is not real.

6. **APPLICANT'S FURTHER SUBMISSIONS**

The Applicant in further submissions in a letter dated the 24th April 2012 sated as follows:

"I refer to the exemption hearing of 16 April 2012, at which time LSC was requested to submit the names and signatures of employees who supported the exemption and who are currently working within the Bargaining Council.

Since we appeared in the Bargaining Council Exemption Committee, the number of employees supplied into the Bargaining Council for Road Freight has reduced to ± 60 employees. In the course of the 1 week since then we had opportunity to obtain 40 signatures.

We attach hereto the names of 40 employees who are currently working within the Road Fright Industry and all of whom support the application.

Kindly forward these lists of signatures to the exemptions committee."

7. ANALYSIS

7.1 The Exemptions Body is required to consider the application in terms of the criteria set out under clause 4(8) of the Dispute Resolution Agreement. The tribunal is not limited to a consideration of the listed criteria. The first three criteria are the Applicant's past record of compliance with the provisions of Council's collective agreements; any special circumstances that exist; and any precedent that might be set. Thereafter 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.

7.2 PAST RECORD

If regard is had to the Applicant's past record, it is clear that Applicant is compliant with Council's agreements and is meeting its obligations.

7.3 SPECIAL CIRCUMSTANCES

7.3.1 In terms of special circumstances the Applicant sets out in detail the special circumstances.

7.3.2 In the Appeal Body decision of **Fleet Street Logistics CC and the National Bargaining Council for the Road Freight Industry** (26th January 2010) the Appeal Body states as follows on special circumstances:

"To qualify for an exemption an Applicant must be in a situation which is somehow exceptional and not merely run-of-the-mill. However, proof that the Applicant is in an exceptional situation

does not in and of itself warrant the granting of an exemption. The exceptional situation of the Applicant must constitute circumstances which are of a nature and type which warrant the granting of an exemption. In short, special circumstances must not only exist to differentiate an Applicant from others, but such special circumstances must be of a nature which merits exceptional treatment. In judging whether the special situation of Applicant does indeed merit exceptional treatment in this case, one must be fair to the interests of the three parties involved, namely employer, employee and the industry; mindful of special circumstances and the possible setting of precedent and the fact that Applicant has a good record of compliance."

- 7.3.3 The Appeal Body went on to state that the correct approach as canvassed in the cases referred to is that the Appellant has to show special circumstances and that this factor is not to be elevated above the others and is merely a factor to be weighed along with all the others.
- 7.3.4 The Applicant was at pains to point out that a very small percentage of its 4000 employees, i.e. ± 100 fell into the Road Freight Industry. It also alluded to the fact that its business growth is in the Hospitality Industry. In further information provided the figure has reduced to ± 60 employees in the Road Freight Industry.
- 7.3.5 It pointed out that its employees in the transport sector fluctuates dramatically and regularly in terms of the same employees not being in the Road Freight Industry.

7.3.6 If regard be had to the current application, the exemption is premised on the fact that some 2% of its employees are employed in the sector. The application has the support of its employees and the Exemptions Body is satisfied that the Applicant has a strong cash flow to meet its leave pay and holiday bonus obligations. The Exemptions Body has been swayed by the fact that only 2% of the Applicant's employees are in the Road Freight and Logistics Industry. This does not mean a yardstick has been set for the granting of the application. Each Applicant still has to meet the criteria set out in Clause 4. The Exemptions Body has also taken into account that the Exemption sought is for a period of some 10 months.

7.4 **ANY PRECEDENT THAT MAY BE SET**

7.4.1 It is submitted any precedent will not be set as its circumstances are unique.

7.4.2 The Exemptions Body is of the view that due to small percentage of employees affected by the application a precedent will not be set.

7.5 **INTERESTS OF EMPLOYEES AND CONSULTATION WITH TRADE UNIONS**

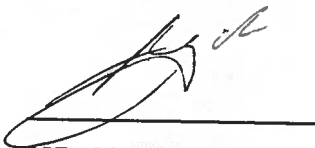
The Applicant has consulted with its employees and they support the application.

8. **DECISION**

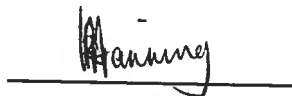
8.1 Based on the evidence presented, the Exemptions Body is satisfied the Applicant has met the requirements for the granting of the application. However Council will be required to monitor the Applicant's operation on a 3 months basis to determine if the number of employees on its books in the Road Freight and Logistics Industry increases drastically in which case the application can be enrolled for reconsideration.

8.2 The Applicant is granted an exemption for a period of 10 months from 1st May 2012 to the 28th February 2013 in respect of the Leave Pay Fund, Sick Leave Fund and Holiday Pay Bonus Fund.

DATED THE 9 DAY OF 1797 2012 AT BRAAMFONTEIN, JOHANNESBURG.



MR. Y. NAGDEE
Chairperson of the
Exemption Body



MRS R. MANNING
Member of the
Exemption Body
I agree



MR G. WESSELS
Member of the
Exemption Body
I agree