BEFORE THE INDEPENDENT BODY OF THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY

IN THE MATTER BETWEEN:

TSB Sugar RSA Limited Transport Division Applicant / Appellant

and

National Bargaining Council for the Road Freight Logistics Industry Respondent / Council

---

RULING OF THE INDEPENDENT BODY

---

1 On 12 July 2012 an appeal hearing was held in the above matter. The appellant company ("TSB") was represented at the hearing by Mr Boda, instructed by Norton Rose Attorneys. The Council was represented by Mr Orr, instructed by Moodie and Robertson Attorneys.

2 Appellant commenced trading under the name TSB Sugar Transport Division on 1 July 2007. Appellant originally applied[1] on 7 October 2011, to be exempt from its obligations under the Main Collective Agreement to contribute to the

---

[1]The Application was in the name of Nkomazi Cane Carriers (Pty) Ltd which has since been sold to TSB.

Council's leave pay fund and holiday bonus fund[2], but only appealed against the decision of the Exemptions Body to refuse the exemption application in relation to the holiday bonus. The appellant desires to make the required holiday bonus payments directly to its employees rather than through the Council, in accordance with the system applicable in terms of clause 30 of the Main Agreement. The exemption is sought for a period of two years.

3 Applications for exemption from the provisions of the Council's collective agreements are governed by the provisions of clause 4 of the Exemptions and Dispute Resolution Collective Agreement of the Council.[3] Clause 4(3) of that Dispute Resolution Agreement sets out the requirements for an exemption application and clause 4(8) 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 exist;*

(c) *any precedent that might be set;*

(d) *the interests of the industry as regards –*

(i) *unfair competition;*

(ii) *collective bargaining;*

(ii) *potential for labour unrest;*

(i) *increased employment;*

(e) *the interest of employees' as regards –*

(i) *exploitation;*

---

[2] Clause 30 of the Main Agreement.
[3] Signed on 14 August 2007and referred to herein as the "Dispute Resolution Agreement".

(ii) job preservation;
(iii) sound conditions of employment
(iv) possible financial benefits;
(v) health and safety;
(vi) infringement of basic rights

(f) the interests of the employer as regards –
(i) financial stability;
(ii) impact of productivity;
(iii) future relationship with employees' trade union;
(iv) operational requirements."

4 It is worth noting at this juncture that for a period of some years the provisions in clause 30 of the Main Agreement which require that holiday bonus payments be made each month to the Council were amended such that an exemption could be obtained on a different basis.[4] Under that regime an employer had merely to comply with the requirements of clause 21(12)(a) of the then Main Agreement and an exemption could be obtained as a matter of right if certain stipulated and well defined conditions as laid out in that section were met.[5]

The Facts

5 TSB is a company which has been in operation since 1965. The company is a member of the employers' organisation. It employs some 3200 employees of whom approximately 324 are employed in the Transport Division and fall within the purview of the respondent Council and are therefore affected by the

---

[4] Under clause 21(12)(a) of the Main Agreement.
[5] Clause 21(12)(a) of the then Main Agreement (which for a brief period laid down different criteria for exemption) no longer applies. For the legislative history of this amendment see the ruling of the Independent Body in the matter between *Master Wheels Vervoer B.K. V NBCRFLI* dated 11 October 2011.

provisions of the Main Agreement. It is in relation to these employees that this exemption application is brought. The affected employees are involved in loading and transporting sugarcane from farms to the sugar mills and in transporting manufactured product between the mills and the market. Insofar as outside clients' goods are transported, the company charges a fee for this service.

6 All the affected employees were previously employees of Nkomazi Cane Carriers and were transferred to TSB pursuant to section 197 of the Labour Relations Act ("the LRA") when the business of that company was taken over as a going concern. The effect of section 197 is that absent a written agreement between the two companies TSB was automatically substituted in the place of Nkomazi Cane Carriers in respect of all contracts of employment which existed immediately before the date of transfer.[6] There is no evidence of any written agreement in this case.

7 In terms of their conditions of employment with Nkomazi Cane Carriers the affected employees qualified for an annual bonus to the value of 10% of their basic pay, which bonus accumulated monthly. It was a condition of employment that such employees could choose to receive the payment of the bonus on one of three bases, namely: (i) a monthly payment of that bonus on a *pro rata* basis; or (ii) payment on an *ad hoc* basis; or (iii) an annual payment of the bonus. Nkomazi Cane Carriers was a subsidiary of TSB.

---

[6] section 197(2)(a) of the LRA

8 Even before the section 197 transfer the system in place was that the applicant company's payroll functions were managed centrally by TSB Sugar RSA Ltd on its SAP system. The applicant confirmed that it had made adequate provision in its accounts to cover the accrued holiday pay bonus liabilities and it produced a tax clearance certificate from SARS confirming that it was in good standing as a taxpayer. It is not disputed that the affected employees see themselves as part of the larger company, TSB, and not as a separate Transport Department governed separately by the rules of the Bargaining Council.

9 The system agreed upon in the Main Agreement in respect of the holiday bonus is that the employer is obliged to make a monthly payment to the Council in respect of each employee. These accumulated monthly payments are paid back to the employer each year towards the end of November.

10 In 2011, the applicant company did not receive back from the Council all the accumulated amounts which had been paid over to the Council during the course of the year. This required the company's payroll administrators to conduct a reconciliation for the entire year for submission to the Council. The applicant alleges, and this is not disputed, that the Council incorrectly stated that the company had paid over less than it should have. An arbitration to resolve this dispute commenced and was set down for hearing but withdrawn following the Local Agent for the Council having taken the matter up with the Council.

11 The applicant contends that it would be advantageous to both the company and the affected employees to align the payroll process for all employees within the company, including those employees who fall within the ambit of the Council.

This would permit a uniform application of the conditions of employment in an administratively straightforward manner and would eliminate any possibility of labour unrest arising as a result of a different bonus payment process being applied to employees within the Transport Division. Although minimal, there would also be a beneficial effect in terms of company cash flow in respect of the contributions if these did not have to be transferred to the Council on a monthly basis during the year.

12 The company applied to be exempt from its obligations to contribute monthly to the Council's holiday bonus fund for a two year period from 1 November 2011 to 31 October 2013. (The recordal by the Exemptions Body in its decision that the exemption applied for was for a period of one year appears to be erroneous.)

13 The exemption application was heard by the Exemptions Body on 21 November 2011 and again 16 January 2012, after the applicant was afforded an opportunity to supplement its application.

14 An award was handed down on 7 February 2012 in which the Exemptions Body found that at national level SATAWU opposed any exemption from the obligation to make holiday bonus fund contributions and considered that a precedent would be set if the exemption were to be granted and that this would adversely affect collective bargaining. The Exemptions Body further concluded that no special circumstances have been shown to exist and the application for exemption was refused.

Evaluation of the merits of the exemption applied for

15 The broad issue before this Independent Body is whether the exemption application satisfies the criteria laid down in clause 4(8) of the Dispute Resolution Agreement. We turn to consider those criteria.

16 In considering an exemption application this tribunal is enjoined by clause 4(8) to take into consideration *all relevant factors* which may include, but which are not limited to the criteria listed in sub-paragraphs 8(a) to (f) of that clause. Clearly, the list of factors set out in these sub-paragraphs is not intended to be exhaustive so that the tribunal is required to consider the listed factors which are relevant to the exemption under consideration, but is not limited to a consideration of the listed criteria only.

17 The approach adopted by this tribunal has previously been set out as follows. The first three criteria in clause 4(8) 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 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[7] and reference will be made below to that approach. It would be unwise to attempt to rank the 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. The applicant in the present appeal addressed only a few of the listed criteria and we turn to consider those arguments.

18 The first relevant criterion is the applicant's past record of compliance with the provisions of the Council's collective agreements.[8] It is common cause that the company has a good record of compliance. Related to this is the fact that TSB was previously in May 1999 granted an exemption in regard to holiday pay bonus fund contributions. That exemption was not based on the criteria under clause 4 of the Dispute Resolution Agreement but was based on the provisions of a clause in the Main Agreement which, as pointed out above, no longer applies. It is nevertheless relevant that an exemption, albeit on a different basis, was historically granted in that the company's administrative processes for payment of the bonus would previously have been geared to deal with processing the bonus according to the company's bonus payment system. Insofar as that exemption is no longer applicable, the company would necessarily require an alternative to its administrative processes. Of course it must be borne in mind that this reversion to the earlier holiday bonus scheme is pursuant to the Main Agreement having been amended through *collective*

---

[7] 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.
[8] Clause 8(a).

bargaining which removed the basis on which the previous exemption was obtained.

19 The next criterion to consider is whether any "special circumstances" exist.[9] This tribunal previously considered in some detail the question of what constitutes special circumstances and in that regard has stated the following:[10]

"39. "Special circumstances" are not defined in the Dispute Resolution Agreement. This tribunal has previously expressed the view that this expression is not capable of any hard and fast definition. In ***Rex v Botha 1952 (4) SA 713 (O) at 713*** *it was held that in construing the words "special circumstances" regard must first of all be had to the contrasting general circumstances in order to determine whether the particular circumstances under consideration are special or not. Though this comment was made in the context of a criminal case, and is therefore not directly applicable, the general approach to construing and understanding the meaning of the words "special circumstances" is, I believe, apposite. The* ***RAM International Transport*** *case referred to above adopted a similar approach.*

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*

---

[9] Clause 8(b).
[10] Unreported decision of the Independent Body in *Rocket Trading 133 CC t/a Govendor's Transport v the National Bargaining Council for the Road Freight Industry* dated 12 November 2004, at paragraphs 39 to 44.

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 Versekeringsmaatskaappy 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 constitutes "special circumstances" was not argued in detail before us and accordingly the aforegoing survey and comments suffice for the purposes of this appeal.*

42. *In my view it is not appropriate to grant an exemption merely because to do so would enhance the profitability or efficiency of an enterprise. On that test, many employers would no doubt qualify for an exemption. To this extent, I am in agreement with the views of arbitrator Hutchinson in*

the case of ***Armstrong Interiors v Furniture, Bedding and Upholstery Industry Bargaining Council*** *(2001) 22 ILJ 552 (BCA).*

43. *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.*

44. *I am mindful too of the dangers referred to by arbitrator Hutchinson who commented as follows in the* ***Armstrong Interiors*** *case:*

> *"The adoption of a generalised and abstract approach does not adequately lend itself to a proper investigation into the specific merits of any particular individual case. Taken to its logical conclusion, if one maintained such an approach, it is unlikely that any exemptions, even deserving ones, would succeed. Hence, the net would be cast too wide by the adherence to a fixed and rigid formula". (at p 555 J)"*

20 This tribunal has previously stated that it is not appropriate to seek to circumscribe the precise parameters of the meaning of the term "special

circumstances".[11] 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 however is not the situation or issue in the present appeal as there is no suggestion of financial inability. The applicant's case is based, *inter alia,* on arguments of administrative inconvenience and possible labour unrest that may be occasioned by the fact that the 324 affected employees are administered differently under a payroll system common to the remaining 2876 employees in the company, this situation having arisen at least in part because of the history of the section 197 transfer of the business.

21 It is apposite to consider at this juncture two arguments raised by the applicant which impact on the question of special circumstances.

21.1 The first argument is that the appellant criticises the decision of the Exemptions Body for having relied on the fact that at national level SATAWU opposes exemptions from the agreed holiday bonus system. In a certain sense it is of course true in that SATAWU opposes exemptions as it has concluded the Main Agreement in terms of which employers are required to make payments in terms of the holiday bonus system as envisaged in clause 30. In that sense the union has agreed

---

[11]Unreported decision of the Independent Body in *Fleet Street Logistics v NBCRFI* dated 26 January 2010.

to certain laid down requirements which are contrary to what will prevail if this exemption application is granted. However, both the LRA and the collective agreements in the Bargaining Council provide for applications for exemption to be made. Each such application must of course be considered in relation to the particular facts on which it is based so that the national approach of the union, while not irrelevant, has little impact in that it can never take into account the particular circumstances of a specific exemption application.

21.2 Secondly, in relation to the criteria of special circumstances the appellant argues that "*the purpose of sectorial collective agreements is not to deprive employers and workers from agreeing to more beneficial terms and conditions at plant level*". Whilst that may be true stated in the negative in this fashion, this does not address the full picture. We are not here dealing with a plant level negotiation. The Main Agreement which governs this term of the affected employees' employment is concluded centrally at national level. It is therefore fallacious to argue that the Exemptions Body ignored this stated purpose when it sought to apply the exemption criteria laid down.

22 The evidence is that at local level SATAWU, which is the majority union, supports this exemption application. There was no objection from the union at any other level. The local support was shown in the form of signed minutes of meetings held between management and shop stewards in June and July 2011. From this it appears that the circumstances under which the exemption application was made were presented and discussed with employee

representatives and, in the later meeting, a decision was taken that the shop stewards on behalf of union members agreed to the current system of holiday pay and desire to keep this in place. On the face of it therefore the representatives of the affected employees are in support of this exemption application and this fact was accepted by the Council in argument.

23 The nature of the Council system of holiday bonus payments is that all employees in the industry are guaranteed a thirteenth cheque equal to 4.33 weeks of their annual basic earnings, which amount is paid out in December. The employers in the industry are all required to make payments in respect of this fund on a pro rata basis monthly. The Council's holiday pay bonus fund scheme pays to employees 8.33% (i.e. 4.33 weeks per month) of their basic salary. The Council concedes that the bonus paid by TSB is more generous to the affected employees than that required under the Council's holiday bonus scheme. The company's standard conditions grant employees a bonus of 10% of their basic salary. This bonus accumulates monthly and employees are entitled to access this benefit on one of three bases set out above. Thus not only does the amount paid out pursuant to the company's scheme exceed the Council bonus pay-out but in addition employees have a choice as to when they can access their bonus.

24 As already indicated the majority of the company's employees do not fall under the jurisdiction of the Council and are not subject to the Main Agreement. The evidence shows that it would be administratively more convenient for the appellant to apply a uniform system of administration of the bonus system to all its employees.

25 A relevant aspect which was not argued before us but which has previously been considered by this tribunal is the fact that if an employer were to go insolvent during the course of the year, employees would not be at risk of losing the amounts paid to the Council pursuant to the holiday pay scheme which would not fall to be dealt with according to the rules of the law of insolvency because these monies would be in the hands of the Council. The affected employees would if the applicant were to go insolvent, nevertheless be guaranteed payment of this holiday bonus, regardless of the insolvency of their employer.

26 It was argued for the appellant that because the affected employees would in the absence of an exemption, be dealt with on a less favourable and different basis from their fellow employees in respect of the bonus, this constituted discrimination against those employees and may lead to industrial unrest. It is true, as was pointed out on behalf of the Council, that there was no evidence that if an exemption is not granted that labour unrest will result or is likely to result. By its very nature this argument will usually be somewhat speculative as the concern is hypothetical and relates to what may occur in the future. Nevertheless, particularly where the majority of employees receive a bonus calculated on the basis of 10% of their basic salary as opposed to the lower percentage applicable in terms of the Council scheme, there is a situation which, by its nature, could generate dissatisfaction which, in turn, is of such a nature that labour unrest could possibly result therefrom.

27 The next criterion to consider is whether any precedent might be set by the grant of an exemption to the applicant.[12] The company contends that no precedent will be set and, in apparent support of this contention, points out that the criteria for exemption are clear.[13] We do not see how the clarity of the criteria means that nor precedent might be set.

28 The criteria of whether or not the grant of an exemption might set a precedent should the exemption sought be granted was taken into account by the Exemptions Body which viewed this as having an adverse effect on collective bargaining. That of course is true, but similarly to what is indicated in the final paragraph in the above quote dealing with special circumstances, a generalised and abstract approach to this issue would, if taken to its logical conclusion, mean that virtually no exemption could ever succeed. It is of course true that every exemption, in a sense, creates a precedent in that by its very nature the exemption granted is contrary to the requirements of the Main Agreement from which the employer is to be exempt.

29 For TSB, it is submitted that the test previously adopted that special circumstances require that an applicant for exemption must show that the situation distinguishes that applicant from the run-of-the-mill situation in which all or a great many other employers in the industry will find themselves is satisfied in this case. The Council submits that no special circumstances have been shown and that an unfortunate precedent will be created if an exemption is granted. On the evidence tendered in this case there is very little to indicate

---

[12] Clause 4(8)(c)
[13] paragraph 6.1 (c) of its application

what the position of other employers in the industry may be. It does appear to us, however, that there is a certain convergence of circumstances in this matter which we think does establish special circumstances on the particular facts of this case. This situation has, in part, arisen as a result of the affected employees having been subsumed into the TSB workforce pursuant to a section 197 takeover of the business as a going concern. The fact is that the conditions of the TSB bonus scheme are more favourable towards the affected employees than those of the Council's scheme in that the monetary amount of the bonus is higher and the employees access to the bonus is more flexible. It is moreover administratively convenient for the employer to deal with all employees under a single scheme which has previously been implemented and found to be workable and less cumbersome than the implementation the Council's scheme with which the applicant has had problems in the past. This situation must also be viewed in light of the fact that the exemption application enjoys union support at plant level and that the appellant's record of compliance with the Council in good. The contrary factors such as the effect of a grant of an exemption on collective bargaining and the extent of the precedent thereby created are, when weighed up together, insufficient to warrant the refusal of an exemption.

30 The appellant handed up a document which contains a series of summaries of exemption application decisions. Numerous of these decisions do not relate to the holiday bonus pay issue and to that extent are distinguishable. Most are decisions of the Exemptions Body and a number were decisions taken under the different legislative regime already referred to which the parties to the collective agreement have now moved away from. Those decisions are

accordingly of little assistance. Each exemption application is to be considered in its own context and on the basis of the particular facts on which the exemption is sought. Accordingly, we do not consider the summaries of these various other exemption applications to be of particular assistance as each of those decisions will have been made on its own particular facts and many for the reasons set out above are readily distinguishable.

31 For the Council, it was argued that there is no evidence of special circumstances which warrant an exemption. It is true that special circumstances must be of such a nature that an exemption is warranted. We are required to weigh up all the factual circumstances and make a value judgment of what broadly speaking are the interests of the employer, the interests of the employees, including the affected employees and the interests of the industry. These factors must be viewed against the policy choices reflected in the empowering statute, namely the LRA, which are broadly to advance economic development, social justice, labour peace and the democratisation of the workplace.[14]

32 In the present case, it is our view that it would be in the interests of the applicant employer that an exemption be granted. The exemption will lead to a more streamlined administration of the bonus, and eradicate the differentiation between the affected employees and the balance of the workforce which will reduce the opportunity for friction and possible labour unrest and result in a uniform system which suits the employer's operational requirements. There

---

[14] Section 1 of the LRA

does not appear to be any adverse impact on the relationship between the company and the majority trade union, at least not at local level.

33 As regards the interests of the industry, whilst the applicant company will be dealt with differently from other employers if an exemption is granted, this does not appear, on the face of it, to be a significant factor as regards unfair competition as the employer will be paying a premium in the sense that the cost of the holiday bonus to the company is higher than the cost of payments which must be made to the Council under the Council's scheme. The issue of the conflict with collective bargaining has already been considered and, in our view, there is no obvious potential for labour unrest in the industry that would arise as a consequence of this exemption. The criterion of increased employment under this head appears to be a neutral factor.

34 In regard to the interests of the employees, it appears that they would benefit financially and have more coherent and, therefore, arguably sounder conditions of employment. The criteria of health and safety and the infringement of basic rights appear to be neutral factors.

35 In conclusion, and weighing all these factors in the balance, we consider that a case has been made out that in all the circumstances special circumstances have been established of such a nature as to warrant an exemption and that an exemption ought to be granted for the period for which it has been sought. Having considered the evidence and arguments presented, and having weighed the factors as discussed above, the appeal therefore succeeds.

THE RULING

36 The appellant is exempt from the requirements of section 30 of the Main Agreement to make monthly holiday bonus payments to the Council for the period from 1 November 2011 to 30 October 2013 on condition that it provides the affected employees with a company bonus payment calculated on the basis of 10% of basic pay and payable in accordance with the same remuneration system applicable to the company's other employees.

37 No order is made as to costs.

DATED at JOHANNESBURG on this the 10th day of August 2012

PP

Independent Body Member
D. M. Antrobus SC

Independent Body Member
L.T. Sibeko SC