

IN THE EXEMPTION APPLICATION OF:-

HLEKA BUSINESS ENTERPRISES CC

Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT INDUSTRY (Council)

Respondent

DECISION

This matter appeared on the agenda of the Exemptions meeting held on the 15th September 2008.

Present on this day were:-

- | | | | |
|----|--------------------|---|--|
| 1. | Adv. R. Rawat | - | Chairperson of the Exemption's Body |
| 2. | Mr. Y. Nagdee | - | Member of the Exemption's Body |
| 3. | Mr. T. Short | } | Road Freight Employers Association
(RFEA) |
| 4. | Mr. G. van Niekerk | | |
| 5. | Mr. P. Mndaweni | - | National Bargaining Council for the
Road Freight Industry (Council) |
| 6. | Mr. A. Ramakgolo | } | South African Transport & Allied Workers
Union (SATAWU) |
| 7. | Mr. J. Gamede | | |

This was an application for exemption from the Sick Pay Fund, Leave Pay and Wellness Fund of the NBCRFI (Council).

The only reason that can be gleaned in the Application for Exemption is:-

"The reason for this request is that I have spoken to my employees that this deduction be paid directly to them to increase their taken (sic) income."

The Applicant was advised to be present at this meeting of the 15th September 2008 but elected not to be. No reason was forthcoming regarding the Applicant's non appearance.

After the first set down of the matter in August 2008 the following ruling was issued:-

"In this matter, Mr. Paul Mndaweni, the Committee Secretary of the National Bargaining Council for the Road Freight Industry (Council) indicated that the representative of the Applicant had been present but could not wait any longer due to other commitments. It was therefore requested that the matter be postponed sine die.

The representatives of the unions present, i.e. South African Transport & Allied Workers Union (SATAWU) and Motor Transport Worker Union (MTWU), took the opportunity to indicate its opposition to the application.

The Council is therefore advised to inform the Applicant of the view of the unions so as to enable the Applicant to be fully prepared when it next appears before the Exemptions Body."

The Exemptions Body is guided by Clause 4 of the Exemptions and Dispute Resolution Agreement which are:-

- (a)** *The Applicant's past record (if applicable) of compliance with the provisions of Council's Collective Agreements 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;*
 - (iii)** *potential for labour unrest*
 - (iv)** *increased employment.*
- (e)** *the interests of employees' as regards:-*
 - (i)** *exploitation;*
 - (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."*

The Applicant's response to the issue of Collective Bargaining is indicative of a very shallow understanding of the concept of Collective Bargaining.

In the reported decision of:-

Milltrans vs NBCRFI

the National Bargaining Council for the Road Freight Industry (Council) opposed the application on the grounds of principle and practicality. The grounds it submitted were the following:-

1. *The National Bargaining Council for the Road Freight Industry is the product of Centralized Collective Bargaining as contemplated in section 3 of the Labour Relations Act 66 of 1995 ("LRA") and economies of scale, uniformity of benefits and contribution rates, and cost and penalty-free transferability result from uniform national enforcement of the provisions of the scheme.*
2. *Exemptions are, in terms of section 32(3)(e) of the Labour Relations Act, No. 66 of 1995 (the Act), intended to accommodate permitted non-compliance with the agreement on criteria which the enforcing Bargaining Council is entitled and obliged to specify.*
3. *The criteria are designed to accommodate motivated temporary non-compliance, against certain assurances*

given by the Applicant and designed to protect the industry, interest parties, the Bargaining Council's statutory function and the institution of Centralized Collective Bargaining.

4. *These requirements require a structured reasoning process in terms of which the values of collective bargaining and uniform enforcement are required to be upheld in the manner contemplated in section 3 and 28(1)(b) of the Act.*
5. *The Council contends for a two-stage reasoning process comprising an enquiry into:-*
 - 5.1 *special circumstances and precedents;*
 - 5.2 *a balancing of interests as between the industry, employees, and employer.*
6. *On this reasoning process, mere consensus between employers and employees is insufficient as it amounts to second-tier bargaining and "contracting out". It is not in itself a "Special Circumstance".*
7. *As the Council sets minimum conditions, more favourable arrangements are, generally speaking, not the subject matter of Exemption. Voluntary second-tier bargaining leading to more favourable conditions does not fall within the scope of the exemptions process.*
8. *The membership of the Council's Funds are an exception to the minimum standards argument in that membership of the Funds is compulsory in terms of the agreements. Compulsory membership is accordingly not a "minimum condition", but an actual requirement aimed at achieving the Fund objectives.*
9. *Special circumstances accordingly need to be shown in respect of this actual requirement."*

Administrative Burden is by no means a reason to detract from ones obligation in terms of being a player in the Industry and as such party to the Main Collective Agreement.

The preamble to the Labour Relations Act (1995) sets out the objectives of the new Act and they, inter alia, include:-

"To promote and facilitate collective bargaining at the workplace and sectoral level".

Section 1 of the Act, which sets out the purpose of the Act, states in:

1(c) to provide a framework within which employees and their trade unions, employers' and employers' organizations can collectively bargaining to determine

wages, terms and conditions of employment and other matters of mutual interest; and

1(d) the purpose is "to promote:-

(i) orderly collective bargaining;

(ii) collective bargaining at sectorial level".

Therefore the State has clearly endorsed the principle of centralized collective bargaining and to this end the old system of Industrial Councils was perpetuated under the new Act, in the form of Bargaining Councils. The powers and functions of Bargaining councils include at section 28(1)(g) of the Labour Relations Act (1995):

"to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members."

The Parties to this Council negotiated the formation of an industry provident fund in 1991 and the agreement was approved by the Minister of Labour and promulgated in terms of the Labour Relations Act 1956 on the 20th December 1991. The fund commenced operations on the 1 January 1992 and has operated very successfully since then.

With the advent the new Labour Relations Act on the 11 November 1996, the implementation of collective agreements required that the Minister of Labour specifically extend the agreements to non-parties in terms of section 32, providing criteria relating to representivity of the parties to the agreement are met.

The essence of the LRA appears to be quite clear in regard to its directions relating to Bargaining Councils and the concept of Collective Bargaining. It is to create a "framework" within which employees and their trade unions, employers and employers organizations can collectively Bargain to determine wages, terms and conditions of employment and other matters of mutual interest. The Act speaks further of Orderly Bargaining and Collective Bargaining at Sectoral Level. The principle of Centralized Collective Bargaining is a paramount and primary objective of the LRA. The power of Collective Bargaining has become so evident in our South African approach that the three social partners at the helm of the all developments in Labour Relations involve Labour, Business and Government.

Such a system, by its very nature, thrives on the united force, compliance and adherence by all members of the Industry.

In the premises, the Exemptions Body can find no compelling reasons to grant any exemption in this matter from the Main Collective Agreement.

The application for exemption is refused.

DATED THE 8th DAY OF October 2008 AT BRAAMFONTEIN, JOHANNESBURG.



ADV. R. RAWAT
Chairperson of the
Exemption Body



MR. Y. NAGDEE
I agree