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

In the matter between:

FLEET STREET LOGOSTICS CC Appellant

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY Respondent/The Council

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RULING OF THE INDEPENDENT BODY

Introduction

1 An appeal hearing of the Independent Body was held on 17 November 2009 at Road Freight House, Braamfontein in this matter. Presiding were D.M. Antrobus SC and Ms. M. Chenia. Advocate C. Nel appeared for the appellant together with Ms. Lockwood the HR manager of the appellant. Mr. C. Beckenstrater of Moodie and Robertson attorneys appeared for the Council assisted by Mr. E. Kock of the Council.

2 Following initial discussions between the parties and the tribunal during the hearing, the matter was approached on the basis that all the documentary

evidence presented to the Exemptions Body was handed up, together with a transcript of the Exemptions Body meeting held on 21 July 2009 and that this tribunal would consider the merits of the entire dispute *de novo.* Accordingly, Ms Nel for the appellant accepted that it was unnecessary to address the numerous procedurals issues raised in the appellant's appeal notice, save for two preliminary issues which were argued. Following a brief adjournment in The documents presented to the Exemptions Body were by agreement assembled into a bundle[1] which was presented to the Independent Body, the parties proceeded to make their submissions and address their arguments to the tribunal.

Preliminary issues: Jurisdiction and Scope of Application

3 In opening Ms Nel referred to two closely related aspects which she raised as preliminary issues. The first may be described as the "jurisdictional issue" and the second as the "scope of application issue". As more fully discussed below, these preliminary issues in my view ultimately both boiled down to the question of whether the appellant falls within the scope of the application of the Provident Fund Agreement. Ms Nel began by seeking to distinguish the previous decision of this Independent Body in *Xinergistics Management Services (Pty) Ltd v National Bargaining Council for the Road Freight Industry.*[2] In the *Xinergistics* case the appellant claimed *in limine* that the Independent

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[1] Annexures "SF1" – "SF3"

[2] (2004) 25 ILJ 1804 (BCA)

Body lacked jurisdiction to decide the exemption application in that case.[3] The Independent Body there considered the general scheme of and the scope of application of the Provident Fund Agreement against the background of the Labour Relations Act ("the LRA"). Also considered were the separate and distinct procedures laid down in clauses 4 and 5 of the Dispute Resolution Agreement which deal respectively with (i) exemption applications before the Exemptions Body and the Independent Body; and (ii) disputes before an arbitrator concerning the interpretation or application of the various collective agreements of the bargaining council, including the Provident Fund Agreement.[4] In the *Xinergeristics* matter this tribunal commented that the inconsistent conduct of the appellant in persisting with its appeal against the refusal of an exemption while simultaneously contending that the Independent Body lacked jurisdiction could well be properly construed as constituting a withdrawal by the appellant of its appeal against the decision to refuse the exemption.[5] The tribunal however proceeded to dispose of that case by first considering the condonation application and decided to refuse to grant condonation. To that extent, the considerations by the tribunal in the *Xinergeristics* case can arguably be regarded as *obiter dicta* because that matter was disposed of by refusing condonation and the considerations regarding the question of lack of jurisdiction were not determinative of the ruling which was ultimately made in that case.

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[3] at paragraph 4 of the judgement

[4] at paragraphs 4-20 of the judgement

[5] at paragraph 20 of the judgement

4 As I have already indicated, at the outset of her submissions Ms Nel for the appellant sought to distinguish the *Xinergeristics* case by contending that the answer to the inconsistency which arose in that case - and which similarly arises in the present case insofar as the appellant contends that the Independent Body lacks jurisdiction and yet persists in the appeal against the refusal to grant an exemption - is to be found in the principle that a statutory tribunal with no inherent powers can *de facto* enquire into its own jurisdiction for the purpose of deciding whether or not to exercise its adjudicatory function, even though such a decision can never confer jurisdiction upon the tribunal which in law it does not possess: see *Minister of Public Works v Haffajee N.O.*[6] That decision distinguished the situation where a tribunal's jurisdiction is challenged in the sense that the tribunal's very right to exist is disputed. The Appellate Division there held that in such an instance there is no requirement to first obtain a ruling on jurisdiction from the tribunal before seeking relief in a court of law. Ms Nel submits that in the present case the appellant makes no challenge to the existence of the collective agreements and the Independent Body. The argument is that the tribunal is therefore able to make a *de facto* finding in relation to its jurisdiction in order to determine whether it should proceed to consider the appeal brought before it or not. It is argued that in the present case the challenge is not to the existence of the Independent Body, but rather the challenge is to the *scope* of the particular collective agreement which is in dispute, namely the Provident Fund Agreement, the contention being that on the facts of the present case and on a proper interpretation of that

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[6] 1996 (3) SA 745 AD at page 751.

agreement the appellant does not fall within its scope. It is further made clear by the appellant that there has never been a challenge to the validity of any of the relevant the collective agreements either the Dispute Resolution Agreement or the Provident Fund Agreement or the Main Agreement itself. It is therefore contended that the Independent Body can decide the question of whether as a matter of interpretation the appellant does not fall within the scope of the Provident Fund Agreement.

5 In reply the appellant's argument shifted somewhat as it was argued that this was not a jurisdictional challenge (despite the earlier arguments aimed at distinguishing the *Xinergistics* case which did concern a jurisdictional challenge) and it was contended that at all times the appellant has accepted that it is bound by the Main Agreement and that the only issue is whether the appellant falls within or is excluded from the scope of application of the Provident Fund Agreement. The appellant's argument as articulated in reply is that there is no dispute about the enforceability of the Provident Fund Agreement but that there is a question of fact to be determined, namely whether or not the employer/appellant falls within the scope of the Provident Fund Agreement and accordingly whether it is required to apply for an exemption.

6 In support of the *in limine* argument reliance is also placed on the provisions of the Council's Provident Fund Rules[7] ("the rules"). In this regard reference is made to clause 2 of the rules which deals with membership. This clause reads as follows:

> "*2.1 The Fund shall be open to the employees of employers who are party to the Bargaining Council for the Road Freight and Logistics Industry and to all members who are members of trade unions who are employed in the road freight industry.*
>
> *2.2 The Fund shall also be open to employees of employers who fall within the registered scope of the Council agreements as extended to non-parties.*
>
> *2.3 The Fund is compulsory for employees of members of the Bargaining Council for the Road Freight and Logistics Industry who have not established funds of trade union members who choose to transfer their benefits from the employee fund to the Fund and to members referred to in rule 2.2.*" (emphasis added).

7 It is argued for the appellant that clauses 2.1 and 2.2 have the effect of making membership of the Council fund available to employees employed by companies in the position of the appellant. This is correct in that both these clauses are permissive. Clause 2.3 is different however in that it refers to this being *compulsory*. It is the appellant's contention therefore that the members of the Council fund consist of those members who may join voluntarily together with those who are parties to the collective agreement. Throughout the rules reference to a "*non-party*" means a non-party in terms of the Main Agreement,

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[7] The Rules Governing the Road Freight and Logistics Industry Provident Fund dated 2 April 2008 which were registered with the Registrar of Pensions on 27 November 2008

in other words a party to whom the agreement has been extended by ministerial notice. The appellant is such a non-party. It is submitted by the appellant that the only way to read clause 2.3 is if the employee is an employee of an employer which is a "member" of the Council (as opposed to a non-party to which the Main Agreement has been extended) and in addition the employee is not a member of another fund, then that employee is required to be a member of the industry fund. So the argument goes that if you are an employer which is a non-party, such as the appellant is, and your employees are members of another fund, then the industry fund is not compulsory in regard to you. This so it is argued is the only sensible way to read clause 2.3 in the light of clause 2.2. It is therefore contended that the appellant is not bound by the collective agreement and is not subject to the rules.

8 The appellant's argument based on the interpretation of the rules is not easy to follow and fails to make any reference to the wider context. What it completely fails to do is to have regard to the import of the rules read as a whole. If one has regard to paragraph 4(a) of the preamble to the rules it appears that the previous rules, the 2004 rules, were amended to accommodate membership of other occupational retirement funds "*approved for the purpose by the bargaining council*". The rules then proceed to define an "*Associated Fund*" as *"an occupational retirement fund ..... which the Council has approved as a fund to which an Eligible Employee may belong in place of this one.*" Although the definitions of an "Associated Fund" and an "Eligible Employee" as contained in the rules are not entirely clear and may be somewhat circular in their

reasoning[8] the overall meaning of the rules construed as a whole seems to be that all bargaining unit employees (which the appellant's employees are), must either be members of the industry fund or members of an associated fund which is by definition a fund other than the industry fund but which has been *approved* by the Council. There is no evidence that the FundsAtWork Provident Fund of which the appellant's employees are members has been approved by the Council. Given the Council's opposition to the exemption sought, it is safe to assume that the FundsAtWork Provident Fund is not an Associated Fund. In my view the interpretation which the appellant seeks to place on clause 2.3 of the rules is untenable having regard to the context of this clause in the rules viewed as a whole. The provisions of the Provident Fund Agreement itself in regard to Associated Funds strengthen and confirm my view in this regard. This argument based on the narrow interpretation of clause 2 of the rules accordingly does not support the appellant's contentions.

9 I turn now to deal with the central question in regard to the issue of the scope of application of the Provident Fund Agreement[9] which turns on the effect of the exemption clause which appears at clause 1(3) and which reads in relevant part as follows under the heading "*Scope of Application*":

> "*Notwithstanding the provisions of sub-clause (1), but subject to clause 6(1)(h) the provisions of this Agreement shall not apply to –*
> *(a) ....*
> *(b) an employer, the majority of whose Bargaining Unit Employees –*

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[8] The tribunal was not referred any provision in the rules which refers to an "Associated Fund", even though this term is defined in the rules

[9] Government Notice R. 612 of 1 July 2005 in Government Gazette 1 July 2005 No. 27713 at page 15

(i) *do not belong to a trade union or trade unions;*

(ii) *belong to an Occupational Retirement Fund to which the employer contributes;*

(iii) *were not bound by the provisions of the Provident Fund Collective Agreement as it was worded prior to the coming into operation of this Agreement by virtue of the operation of clause 1(3) of Government Notice No. R. 921 of 24 July 1998, as amended as extended from time to time;*

(iv) *have not agreed with the employer to be bound by the provisions of this Agreement, for so long as all of these exclusions continue to apply to the employer, if any of these exclusions cease to apply to the employer, the Mandatory terms of this Agreement will apply to the employer and his Bargaining Unit Employees from the date on which the exclusion cease* (sic) *to apply.*"

10 It is common cause that the requirements set out in sub-paragraphs (b) (i), (ii) and (iv) in the above cited provision apply to the appellant and its employees who fit within these descriptions. The issue of whether the appellant falls within the exemption clause therefore turns on the interpretation of clause 1(3)(b)(iii).

11 The first issue in interpreting this clause is the reference to sub-clause 3 being "*subject to clause 6(1)(h)*". The difficulty with this portion of the provision is that the sub-clauses in clause 6(1) are not enumerated alphabetically but bear Roman numerals so there is consequently no such clause as 6(1)(h) in the agreement. Government Notice R. 612 in terms of which this collective agreement was promulgated is in Afrikaans but refers to "*die Engelse Bylae...*" which is the Provident Fund Agreement. There is therefore apparently no Afrikaans version of the provision which may be referred to in order to resolve

this difficulty of the reference to a non-existent clause. For the appellant it is submitted that in the absence of such a clause, this reference must be read as *pro non scripto*. This to my mind is probably the correct approach. The letter "h" is the eighth letter in the alphabet which might suggest that sub–clause (viii) is the clause to which the drafters meant to refer. Clause 6(1)(viii) deals with temporary membership of the Council Fund in the event of an employee not being eligible for membership of the Employer Fund during a waiting period. If regard is had to the content of that sub-clause it is therefore possible that this is the clause which is meant to be referred to, but this remains conjecture. In my view the phrase *"subject to clause 6(1)(h)"* is a cross-reference the meaning of which remains speculative as it is not possible to sensibly ascribe a meaning to it. Where any provision in a statute is "meaningless" in the sense that no meaning can sensibly be ascribed to it, then a court or tribunal cannot be asked to give it meaning, that being the task of the legislature, see *R v Garlick.*[10] Clause 1(3) must therefore be read as though the phrase "*subject to clause 6(1)(h)"* is not present.

12 The appellant accepts that clause 1(3) is a narrowing down clause but contends that the effect of this clause is that the Provident Fund Agreement does not apply to an employer where the majority of bargaining unit employees do not belong to the trade union and were bound by the provisions of the Provident Fund Agreement as it was worded prior to the coming into operation of the present agreement. The appellant's contention is that the Council's

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[10] 1951 CPD 182 at 183

interpretation of this clause is too narrow and that the Provident Fund Agreement does not apply to the appellant. There was some dispute over whether this argument was formally raised before the Exemptions Body inside the formal hearing or whether it was only raised outside of the formal meeting. I accept for purposes of the argument before this tribunal that this issue was properly raised before the Exemptions Body, as that issue it seems to me is resolved by the parties' agreement that the dispute before this tribunal be approached as though this is a *de novo* hearing rather than strictly an appeal.

13 Mr. Beckenstrater for the Council sought to distinguish the cases relied upon regarding a tribunal making a ruling as to its own authority and jurisdiction as being cases where a *respondent* contends that there is no jurisdiction and that for purposes of making that determination the tribunal can investigate and decide on the question although this can never be a definitive ruling. The present situation is distinguishable, so the Council contends, because in the present case it is an *applicant* which is contending that the tribunal has no jurisdiction and yet, at the same time, is asking that the Independent Body grant it an exemption. It is contended therefore that where application is made in an exemption process for an exemption one is by definition thereby accepting the jurisdiction of the tribunal, in this case the Independent Body, to make such an exemption ruling. If the attitude of the employer is that it denies that it is subject to the jurisdiction of the collective agreements for purposes of the issue in dispute, then its remedy is to fight that issue through the arbitration enforcement process which is provided for in the Dispute Resolution Collective Agreement. It is therefore contended on behalf of the Council that the

Independent Body has no power at all to grant this determination which should be dealt with in terms of clause 5(1) of the Dispute Resolution Agreement which clause deals with all other types of disputes other than exemption applications. For the Council it is contended that the distinction between these two processes is of importance because the arbitration process is designed to tackle and resolve disputes of fact and disputes regarding the application and interpretation of the various collective agreements whereas the Exemptions Body (and the appeal process to the Independent Body) is designed only to hear exemption applications.

14 For the Council reliance is placed on the *Xinergeristics* case to which I shall refer more fully below. It is contended for the Council that clause 1(3)(b) of the Provident Fund Agreement is an exclusionary clause (as distinct from an exemption application or exemption clause) and is a clause which simply limits the scope of the application of that collective agreement. It is contended for the Council that all four of the factors listed in sub-clause 1(3)(b) must be met as is clear from the final sentence of clause 1(3)(b)(iv). In this regard it is not disputed that the applicant falls within each of the requirements in sub-clauses (i), (ii), and (iv), but it is contended for the Council that what the appellant's argument amounts to is that if it falls within the 1998 agreement referred to in sub-clause (b)(iii), then that is the only relevant factor of the various factors listed in clause 1(3)(b) for purposes of determining the applicability of the exclusions, whereas on a proper interpretation all the requirements in each of the sub-clauses (i) to (iv) must be met.

15 It is submitted for the Council that this contention ignores the wording in sub-clause (iii) "*by virtue of the operation of clause 1(3)*" of the 1998 agreement. According to the Council, although this may be inelegantly expressed, what this wording means properly interpreted is that if the majority of an employer's bargaining unit employees were excluded under the old provident fund agreement that exclusion will remain in place. It is submitted that this 2005 agreement[11] deals with and accommodates trade union provident funds and that the exclusion in clause 1(3) is in fact a narrowing down of the previous clauses which were themselves exclusions. Therefore from the Council's point of view the interpretation that any new employer that does not have a majority union but which does have its own provident fund would therefore be excluded is not the true and preferred interpretation because it is in conflict with the aim of the Main Agreement which it is submitted supports the Council's interpretation of this clause.

16 The Council also referred the tribunal to clause 6 of the Provident Fund Agreement which it contends goes a long way to interpreting the Provident Fund Agreement. Clause 6 deals with membership of the three types of funds provided for in the Provident Fund Agreement, namely the "Bargaining Council Fund", an "Associate Fund" or an "Employer Fund" generically referred to in the agreement as "Occupational Retirement Funds". In particular clauses 6(1)(i) and (ii) read together were referred to by the Council in argument. The first of these two provisions provides that any bargaining unit employee who is a

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[11] signed on the 30 September 2004 and published in Government Notice No. R 612 on 1 July 2005

member of a trade union which has established an Associate Fund must belong to that Associate Fund. The second of these provisions requires that any bargaining unit employee who is not a member of a trade union which has established an Associate Fund must belong to the Bargaining Council Fund. It is submitted that read together these form some of the main operative provisions of the Provident Fund Agreement and provide in effect that bargaining unit employees who do not belong to an Associate Fund automatically belong to the Bargaining Council Fund.

17 We were also referred to clause 6(4) which sets out the steps which trade union parties to the Main Agreement and employers are required to take to procure the necessary amendments to the rules of the relevant Associate Fund or Employer Fund as the case may be *"to give effect to the principal purpose of this Agreement which is to procure that Bargaining Unit Employees shall belong to either the Bargaining Council Fund or an Associate Fund."* This provision expressly states the principal purpose of the Provident Fund Agreement and constitutes strong support for the submissions made by the Council in argument as to the interpretation which is to be placed on clause 1(3)(b)(iii).

18 What emerges from a consideration of the meaning of clause 1(3)(b)(iii) read together with clause 6 as discussed above is that what the Provident Fund Agreement envisages is that bargaining unit employees will primarily and in the first instance belong either to the Bargaining Council Fund or to an Associate Fund. An Associate Fund is a fund which is established by a party to the Council and which has been approved by the Council. Such approval is

required in terms of clause 5(3) of the Provident Fund agreement where the Associate Fund is required to *"demonstrate to the satisfaction of the Council"* that it complies with certain requirements, namely the conditions set out in clause 5 (2).

19 It is also urged upon the tribunal by the Council that in relation to the interpretation of the collective agreements including the Provident Fund Agreement we should be guided by section 3 of the LRA read with section 1(d) which requires that in interpreting the LRA one has to give effect to its primary objects one of which is to promote collective bargaining at *sectoral level*. This approach it is contended applies equally to interpretation of the Provident Fund Agreement and favours the Council's interpretation over that of the appellant whose interpretation will have the effect that it excludes new non-parties. This effect it is submitted cannot be ignored merely because it suites the appellant. It is correct I think that we should be guided by this approach to the interpretation of the LRA when interpreting the Provident Fund Agreement. To permit the appellant's employees to join the FundsAtWork Fund in the absence of it being an Associated Fund (i.e. an approved fund) simply because the employees themselves have agreed to that fund and may prefer it to the industry fund amounts to collective bargaining at enterprise level and not at sectoral or industry level and is therefore contrary to this object of the LRA.

20 It is argued for the Council that the appellant's reference to the interpretation of the provisions of the rules of the Provident Fund does not assist. It is contended that it is the Main Agreement and its notice of extension to non-

parties which determines the Council's scope and which in turn determines the Independent Body's jurisdiction. This is correct in my view. In any event, the interpretation which the appellant seeks to place on the rules - and particularly clause 2 thereof – is to be rejected as discussed above.

21 Under previous Provident Fund Agreements[12] there were exclusions for different geographical areas. Also excluded were the employees of those employers where provident funds were in the process of being negotiated at the relevant time.[13] This is encapsulated in clause 1(3)(d) of the Provident Fund Agreement in Notice No. R 921 of Government Gazette No 19056 dated 24 July 1998 which is the relevant exclusionary clause and which reads as follows:

> *"Notwithstanding the provisions of subclause (1), the provisions of this Agreement shall not apply to-*
>
> *(d) an employer who, prior to the publication of Government Notice No. R 3146 of 20 December 1991, did not have an existing pension or provident fund registered with the Registrar of Pension Funds covering employees for whom minimum wages are prescribed in the Main Agreement, but who, before 1 January 1991, commenced negotiations for the establishment*

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[12] i.e. the Collective Provident Fund Agreement signed on 31 March 2004 which was the agreement prior to the current Provident Fund Agreement signed on 30 September 2004 which was extended to non-parties in terms of Government Notice R. 612 of 1 July 2005.

[13] See for example: clause 1(3)(d) of the Provident Fund Agreement in Notice No. R921 of Government Gazette No 19056 dated 24 July 1998. See also: clause 1(3)(c) of the Collective Provident Fund Agreement signed on 31 March 2004.

of a pension or provident fund for employees covered by the Main Agreement."

22 This, exemption, so the Council submits, does not simply follow as a simple exclusion but in addition what is required before the exclusion applies is (i) that the fund which was being negotiated for was in fact established within a year; and (ii) that the employer and its employees became members of that fund. It is therefore not a simple exclusion based merely on the fact that negotiations were in process at the relevant time. It is not clear to me what express provision the Council relies on from which the requirement arises that the negotiations had to bear fruit in the form of the establishment of a fund within a year before the exclusion applied. However, it is probable that this provision cannot have been construed as a total exclusion merely because negotiations had commenced before the appointed date and that some kind of requirement of the nature contemplated by the Council is implied.

23 It is significant that the provisions contained in clause 1(3)(d) are caste in the past tense. In other words the only circumstance in which this exception applies is where as a fact before the appointed date of 1 January 1991 the relevant negotiations for the establishment of a provident fund had already commenced for employees covered by the Main Agreement. On the facts of the present case the appellant close corporation only came into existence on or around 1 April 2007. It is clear therefore that on the appellant's own version of the facts its negotiations for the establishment of the FundsAtWork Provident Fund commenced after the stipulated date of 1 January 1991 because the date of commencement of the appellants' business was at a later date. It does not

therefore avail the appellant to seek to rely on the fact that at the time at which it first applied for the exemption in July 2008[14] the Provident Fund Agreement had not been extended to non-parties such as the appellant and that its employees were therefore not classed as "*employees covered by the Main Agreement*" as referred to in clause 1(3)(d).[15] The reason for this is that the question which arises from this provision is whether the appellant was excluded *"by virtue of the operation of"* that clause, which can only have occurred in circumstances where the employer's fund is a fund for which the negotiations for the establishment of which began prior to 1 January 1991. This factual circumstance cannot have exited in the case of the appellant, quite regardless of the further requirements contended for by the Council that the negotiations must have resulted in the establishment of the fund in question. In the appellant's case the negotiations for the establishment of its fund can only have occurred long after the stipulated cut-off date. Clearly the appellant cannot comply with and fall within the ambit of this exclusionary requirement. The general position is governed by the terms of the collective agreement and it is for the appellant to establish that it falls within the ambit of this exclusionary clause. In my view the appellant has failed to show that it falls within this exclusion from the scope of application of the Provident Fund Agreement. In my view the Provident Fund Agreement does apply to the appellant.

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[14] The application was re-submitted on 21 August 2008

[15] This is quite apart from the fact that the Provident Fund, as has been found above, had been extended to non-parties.

24 In my view the present dispute raises no issue about the power of the Independent Body to *de facto* decide whether it has the jurisdiction to grant or refuse exemption applications brought before it on appeal. There is no question of the Independent Body determining the ambit of its own jurisdiction as a matter of law. This clearly it is not empowered to do. On the other hand, the Independent Body is duty bound to enquire into and decide whether it has the jurisdiction to grant or refuse an exemption application in any particular instance of appeal brought before it. It is as well at this juncture to consider the statutory powers of the Independent Body as laid down in section 32(3)(e) of the LRA which provides in relevant part that:

> *"A collective agreement may not be extended* [to non-parties] *unless the Minister is satisfied that provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, any appeal brought against - (i) the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement; (ii) the withdrawal of such an exemption by the bargaining council."*

25 It is immediately evident that that unlike a court of law the Independent Body has no inherent powers and that its powers are extremely circumscribed. Indeed there are only two circumstances in which the Independent Body established as envisaged in this section of the LRA can decide appeals before it. Both circumstances relate to exemptions from the otherwise generally applicable collective agreement. The first circumstance is where the Bargaining Council has refused a non-party's application for exemption from the provisions of the collective agreement. The second is where the Bargaining

Council has withdrawn a previous exemption granted from compliance with the collective agreement.

26 The difficulty which the appellant in the present case faces is precisely the problem discussed *obiter* in the *Xinergistics* case. It is unhelpful for the appellant to argue as it does that the present case is somehow different from the *Xinergistics* case because it concerns the scope of application of the Provident Fund Agreement. Not only must the appellant decide whether it is appealing against the Council's refusal to grant it an exemption from the Provident Fund Agreement, in which case by definition the point of departure of the appellant is that it accepts that it is bound by such agreement, but moreover, if the appellant's contentions are sound insofar as it contends that it is not bound by the Provident Fund Agreement, then the Independent Body by definition is not empowered to rule that the appellant should or should not be exempt from that agreement.[16] The only logical and coherent approach in law for a party in the position of the appellant is for that party to itself make the election and decide whether or not it considers itself to be bound by the collective agreement which is the Provident Fund Agreement. Where, as in the case of Street Fleet Logistics CC, a party's position is that it denies that it is bound by the provisions of the Provident Fund Agreement because it falls

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[16] If the appellant is correct that clause 1(3)(b) of the Provident Fund Agreement properly interpreted means that the provisions of that agreement have no application to the appellant, then the Council (as represented by the Exemptions Body) was never empowered to either grant or refuse the exemption and the Independent Body is similarly not empowered to grant an exemption, in which event the appeal must fail for want of authority on the part of the Independent Body to grant such an exemption.

outside of the ambit of that agreement there is no basis on which such party can apply for an exemption from its provisions which by definition assumes an acceptance in the first instance that the provisions for which the exemption is sought do indeed apply. Rather, if it is to be consistent, that party must adopt the attitude that it is not bound by the collective agreement and simply refuse to comply with its provisions. If the Council refuses to accept this attitude and contends that the party is subject to the provisions of the Provident Fund Agreement one of two courses of action may follow. Either the employer party can itself refer a dispute to arbitration in terms of clause 5 of the Exemptions and Dispute Resolution Collective Agreement which provides a process for resolution of disputes about the application of the Council's collective agreements,[17] or the Council itself may institute enforcement proceedings in terms of clause 5 in which case the scope and applicability of the Provident Fund Agreement will necessarily arise in the course of determining whether the employer party is excluded from the Provident Fund Agreement. The contradictory nature of the type of approach adopted by the appellant in the present case whereby on the one hand it has applied for an exemption from the Provident Fund Agreement and on the other contends that it falls outside of the provisions of that agreement was fully discussed in the *Xinergistics* case, albeit *obiter,* and applies equally in the present matter.

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[17] Clause 5(1)(b) reads: *"Any person may refer a dispute about the interpretation, application or enforcement of the Council's Collective Agreements to the Council who may require an agent/designated agent to investigate the dispute."*

27 Appellant apparently made an election to accept that it falls within the scope of the agreement when it took the step of applying for a permanent exemption using the exemption process provided for in clause 4 of the Dispute Resolution Collective Agreement. When the inconsistency of this approach with the argument that the appellant falls outside of the scope of the agreement was pointed out to the appellant's representatives – most recently in argument at the appeal hearing – the appellant did not withdraw its exemption application but instead persisted in seeking the exemption. An application for an exemption is a voluntary process on the part of the applicant. Consequently, to apply for an exemption from a collective agreement such as the Provident Fund Agreement and yet to simultaneously contend that such agreement does not apply to it because it is exempt from the scope of application of that agreement is unavoidably contradictory. Despite this inconsistency of approach the Independent Body can nevertheless proceed to decide the appeal against the refusal of the exemption applied for before the Exemptions Body because, as I have already found, the Provident Fund Agreement does in fact apply to the appellant. I therefore consider below the merits of the exemption application.

28 Before considering the merits of the exemption application it is necessary to consider the appellant's argument that the periods of operation and extension to non-parties of the Provident Fund Agreement are relevant to and impact on the question of whether the appellant's employees are obliged to join the Council's provident fund. The appellant contends that for the periods 28 February 2006 to 9 July 2007 and again from 31 August 2007 to 1 March 2009 the Provident Fund Agreement was not extended to non-parties. What the

appellant fails to take into account are Government Notices No. R 155 of 23 February 2007[18] and No. R 766 of 24 August 2007[19] in terms of which Government Notice No. R 612 of 1 July 2005 which extended the Council's Provident Fund Agreement to non-parties was made applicable for the periods 1 March 2007 to 31 August 2007 and 1 September 2007 to 28 February 2009 respectively. At the stage when the appellant commenced its business on 1 April 2007 the Council's Provident Fund Agreement had therefore been extended and was applicable to non-parties. The appellant's argument that it concluded the employment contracts with its employees during a period of non-application of the Provident Fund Agreement to non-parties and on that basis the appellant required its employees to become members of the FundsAtWork Provident Fund and not the Council's Provident Fund is therefore an argument which cannot be sustained. The Provident Fund Agreement was at all material times extended to non-parties. It is also relevant to bear in mind that the relief which the appellant seeks is not merely a temporary exemption but is a permanent exemption. The question of the applicability of the Provident Fund Agreement accordingly relates not only to a past period of time and any past failure to comply with the provisions of that collective agreement but also relates to a future period of time.

29 As discussed above the Provident Fund Agreement was extended to non-parties at all material times and applied to the appellant which was not

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[18] Government Gazette No. 29659 dated 23 February 2007 at page 5

[19] Government Gazette No. 30184 dated 24 August 2007 at page 54

excluded by the provisions of clause 1(3)(b). The appellant is therefore bound by the Provident Fund Agreement.

The merits

30 I turn now to the question of whether the permanent exemption sought by the appellant should be granted. The Council's notice of intention to oppose succinctly summarises the matters placed in issue on the merits of the dispute by pleading (i) that it does not accept the appellant's contention that its existing provident fund has superior benefits; (ii) that in any event neither the existence of superior provident fund benefits nor employee agreement with the exemption application constitute valid grounds for the granting of an exemption; and (iii) that in any event the exemption sought cannot and should not be granted permanently.[20]

31 The appellant first applied for an exemption in July 2008. In March 2009 the appellant received a Notice of Arbitration from the Council in respect of two unpaid invoices. Exemption Body hearings were thereafter held at which Mr Tony Yeo, the Momentum Provident Fund Administrator, presented a comparison of the benefits provided by the Momentum FundsAtWork Fund with those benefits provided by the Council's Fund. The appellant contends that the FundsAtWork Fund provides superior benefits and service delivery to the

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[20] paragraphs 5, 6 and 7 of A11 being the Councils Notice of Intention to Oppose and Summary of Submissions dated 17 April 2009

benefits and delivery provided by the Council's Fund. In addition the appellant provided a resolution signed by all affected employees which indicates their desire to remain on their current fund, namely the FundsAtWork Fund.[21] In addition the appellant supplied three testimonials setting out the periods within which payments had been made by of its fund following the death of an employee who in each case was a member of the FundsAtWork Fund.[22] These periods it is argued indicate an expeditious claim payout procedure implemented by the appellant's fund. These documents were attached to the original application for exemption.

32 Document SF2 handed up by the appellant is a table of comparison of benefits between the two funds about which Mr. Yeo testified before the Exemptions Body. Document SF3 is a copy of Information Circular 14 from the Council's Fund dated 30 September 2009 setting out its funeral and temporary disability cover. In summary, it is the appellant's contention that the evidence of Mr Yeo read together with the table of comparative benefits illustrates that there are 23 instances in which the Momentum FundsAtWork Fund is superior to the benefits offered by the Council's Fund and that the administrative service offered by the latter fund is poor whereas Momentum processes claims expeditiously.

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[21] Annexure B1

[22] Annexure B2

33 In considering these submissions by the appellant an appropriate starting point is the 2003 unreported decision of *RAM International Transport (Pty) Ltd v The National Bargaining Council for the Road Freight Industry*[23] in which the Independent Body considered the approach to be adopted in an application for exemption by a non-party to whom the provisions of the then applicable provident fund agreement had been extended. The applicant in that case - with the unanimous support of the affected employees - contended that for the same monthly provident fund contributions it could by contributing to a fund other than the Council's industry fund achieve a substantial difference in the amount invested on behalf of each employee each month which would ultimately increase the return on investment provided by the alternative fund. The applicant there contended that the benefit amounted to a "*significantly better benefit*" to employees in the order of a "*25% better benefit*".[24] The permanent exemption applied for in the present case is fundamentally similar to that sought in the *RAM International Transport* case and reference is made to the factors there considered and in particular the discussion at paragraphs 20 to 30 concerning the approach to be adopted under the LRA in evaluating and deciding exemption applications of this nature. It is not necessary to repeat those considerations in this judgement save to say that the approach there adopted remains sound and is endorsed as the proper approach to be adopted in exemption applications of this nature.

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[23] Unreported appeal award of the Independent Body dated 11 August 2003. This decision upheld for different reasons the reported decision of the Exemptions Body in *RAM International Transport (Pty) Ltd v The National Bargaining Council for the Road Freight Industry* (2002) 23 ILJ 1936 (BCA)

34 The appellant in the present case argued that the *RAM International Transport* decision is to be distinguished from the present case because in this instance there are significantly better benefits in respect of disability benefits, education benefits (which are absent from the Council's fund); funeral benefits (where the Council's fund benefit is on a sliding scale); and that the administration of the employer's alternative FundsAtWork fund (underwritten as it is by Momentum) is vastly superior to that of the Council fund. Ms Nel dealt in some detail with the benefits which she maintains are better and relies heavily on the disability benefit where the FundsAtWork fund has a 75% payment on temporary disability, and if the disability turns into a permanent disability, there is then an ongoing payment together with a payment of the member's pension fund contributions. These benefits it is argued are vastly superior to the benefits available to employees who are members of the Council's fund who in similar circumstances obtain a lump sum payment and no ongoing payment over the years and whose contributions are not covered if the disability is or becomes permanent. The Council's response to this contention is in part that the basis of such a disability payment is entirely different and that it difficult to make a direct comparison of the benefits of the respective funds.

35 Clause 4(8) of the current Dispute Resolution Agreement[25] enjoins this tribunal (as well as the Exemptions Body) to take into consideration all relevant factors which may include, but which are not limited to the criteria listed in

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[24] unreported judgement (supra) at para 12

[25] Signed on the 14th of August 2007

subparagraphs 8(a) to (f) of that agreement. Clearly, 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 the Council's collective agreements; any special circumstances that 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. The approach to applying these criteria was considered previously by the Independent Body in the case of *M4 Carriers & Accounting and National Bargaining Counsel for the Road Freight Industry.* 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. It is for that reason apposite to set out in full the portion of the signed version of the judgement which is relevant.

> *"14. The argument on behalf of the Council was that in the absence of the Applicant establishing special circumstances it is unnecessary to consider the question of comparative benefits and unnecessary to consider the question of an adverse precedent being set, because these are matters which logically are secondary to the establishment of special circumstances of some kind. The crux of the notion of "special circumstances" is that an applicant must show that the situation is such that it distinguishes them from the run-of-the-mill situation in which all or a great many other employers in the industry will find themselves. It may be so that in most instances for an employer to succeed in establishing sufficient grounds for the granting of exemption it must establish special circumstances and that in the absence of proving this the exemption tribunal will find it unnecessary to consider issues such as whether better benefits are paid to the applicant's employees or whether an adverse*

precedent may be established in the industry. However, as set out above, clause 4(6) of the Dispute Resolution Agreement stipulates a long list of criteria which should be considered. In our view 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. The collective agreement requires that this Independent Body take into consideration all relevant factors, which may include the listed criteria but which are not limited to those criteria. 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. However, to elevate the requirement of "special circumstances" to being a primary requirement which establishes an initial hurdle which all applicants must clear is in our view not the correct approach.

15. Applicant in the present case relied upon the fact that its terms and conditions of employment are better than the minimums laid down in the collective agreement. This fact was not disputed by the Council, and for the purposes of this award, will be accepted. This fact must however be viewed in the light of the fact that there are many employers in the industry who pay better wages and afford better conditions of service than those stipulated in the collective agreements. Accordingly, the fact of payment of better benefits will as a single factor seldom create a position that an employer should be exempt without regard to further factors being established which set that employer apart from others in the industry.

16. Whether or not a precedent will be created in this case is a factor which requires consideration. There is no merit in the contention that simply because applicant pays its employees better than what is provided for in the agreement, that this entitles it to an exemption even with the support of the affected employees. I agree with the contention made on behalf of the respondent that many employers who pay their employees better than what is provided for in the agreement would no doubt seek to be exempted simply on that basis. This would negate the underlying

basis for concluding the collective agreements in the first place. In any event, there is nothing that distinguishes the applicant's conduct in paying its employees more that what is provided for in the agreement, from the many other employers who do the same thing."

36 The appellant in the present case addressed each of the factors mentioned in clause 4(8) and I turn to consider those arguments.

37 The applicant's past record of compliance with the various collective agreements (clause 8(a)) is not a factor which is in any way adverse to the appellant as the only instance of non-compliance as I understand the case is the very issue of whether the appellant is obliged to join the Council's Provident Fund. For purposes of the present dispute it is common cause that the appellant's past compliance is good.

38 The next factor is special circumstances which may exist (clause 8(b)). The question of what constitutes "special circumstances" was considered in some detail in the 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.*[26] The considerations on that case bear repeating:

"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*

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[26] at paragraphs 39 to 44, a decision of Antrobus and Sibeko dated 12 November 2004

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 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)"*

39 In *Loutrans and National Bargaining Council for the Road Freight Industry*[27] the Exemptions Body adopted a narrower approach to what constitutes "special circumstances" and placed reliance on the decision of the Exemptions Body in *Milltrans and National Bargaining Council for the Road Freight Industry.*[28] Both those cases appear to have been applications for permanent exemptions. A similarly approach was adopted by the Exemptions Body in *Superstone Mining (Pty)Ltd and National Bargaining Council for the Road Freight Industry which was an application for an exemption for a limited period.*[29] I agree that the 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. There may however be particular circumstances in which a permanent exemption may be warranted in circumstances other than that of temporary financial difficulties from which the

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[27] (2008) 29 ILJ 498 (BCA)

[28] (2002) 23 ILJ 1930 (BCA)

[29] (2004) 25 ILJ 1567 (BCA) at 1571F-G

employer anticipates that it will recover in the near future. I do not read either the *Loutrans* or the *Milltrans* or the *Superstone Mining* decisions to mean that special circumstances can never be widely applied so as to encompass such a possibility, and insofar as that is what any of those decision means then I disassociate myself from that view which I think is wrong and too narrow a construction of the meaning of special circumstances. It is however not appropriate to seek to circumscribe the precise parameters of the meaning of that term in all circumstances.

40 The contributions made by the employer to the Council's Fund and the appellant's FundsAtWork Fund are identical. The appellant in the present case argues that the significantly superior benefits offered by the Momentum FundsAtWork Fund and the better disability benefit in particular constitutes a special circumstance. Mr Yeo the witness for the appellant pointed to 31 points of comparison between the two funds and in 23 instances says that the appellant's fund offers better benefits than does the Council's fund. The Council in argument pointed out that there were two instances conceded by Mr. Yeo where the Council Fund is better in terms of its benefits. The more important point made by the Council is however that the appellant's argument regarding better benefits focuses on the insurance benefits in the Momentum scheme verses the insurance benefits in the Council scheme. The difficulty with this approach is that by the very nature of these provident funds the critical issue in relation to the financial benefits ultimately received by a member-employee is

what percentage of the fixed contribution[30] is put towards investment for pension funds and what percentage of the member's contribution is put towards insurance aspects. This ratio is a matter of choice made by the fund administrators of each fund and may in fact be varied from time to time by the administrators. This means that the apparent comparative benefits can be altered from time to time and in that sense can be "manipulated". So for example, the Council's administrators could next year change their insurance benefits to match those of the Momentum FundsAtWork fund and therefore appear to provide an equally good benefit when compared with the disability benefit for example. However, the inescapable effect of this change would be that less of the money which makes up the employee-member's fixed contribution will be applied by the administrators of the Council's fund towards the pension component of that fund. This reduced investment will over time inevitably tend to reduce the financial "*benefit*" paid out to members in the form of their pensions. This is an important argument which illustrates that attempts to conduct direct comparisons between different funds and their likely benefits is not straighforward.

41 The correct approach as canvassed in the cases referred to above is that the appellant has to show special circumstances and that this factor is not elevated above the others and is merely one factor to be weighed along with all the others. If one accepts that the appellant's fund *de facto* presently offers better

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[30] Both the Council's Fund and the appellant's fund are fixed contribution pension funds and not fixed benefit funds

benefits than those offered through the Council's fund, that fact is certainly not determinative and is only one consideration in the matrix of facts which requires consideration in terms of clause 4(8) of the Dispute Resolution Agreement. Arguably it is a relatively minor consideration. The "vast gap" in benefits relied upon by the appellant is in the circumstances more apparent than real when regard is had to the nature of the administration of these provident funds and the appellant's focus on one particular type of benefit being an insurance benefit, which necessarily means that the investment component is probably adversely affected in the long term. The comparison is a difficult one to perform directly so that one is truly comparing apples with apples. The same is true of the cost of administration of the Council's fund is which at 5.83% the Council argues is overstated because it is calculated on a different basis, namely as a flat fee per fund member. In the result and in the absence of expert evidence by an actuary I do not think that the appellant has shown better benefits which are of such a nature as to constitute special circumstances as envisaged in clause 4(8) of the Dispute Resolution Collective agreement. If this difference in the emphasis in the way that an alternative fund is to allocate the resources which is the fixed membership contribution is to be accepted as constituting special circumstances then there are probably many employers in the industry which will be able to arrange alternative funds of a similar nature which channel a higher proportion of the members contributions into the insurance benefits so as to enhance the insurance benefits for comparative purposes. This is not what the collective agreement envisages by way of special circumstances.

42 In addition the appellant's submissions failed to recognise the fact that the Council has a Wellness Fund which seeks to address the needs of AIDS sufferers by supplying anti-retroviral drugs which are not currently covered by the Council's disability benefits through its provident fund which covers only accident benefits.

43 The next factor is any precedent which may be set (clause 8(c)). The appellant, understandably, had very little to say in favour of why granting the exemption it seeks will not set a precedent in the industry. Having regard to the considerations in the previous paragraph, in my view the grant of a permanent exemption of this nature would clearly set a precedent and open the door to other employers to set up their own funds in competition with the Council's industry fund and to carefully structure the insurance benefits of their competing fund so as to appear superior to those of the Council's Fund. Had it been the intention of the parties to the collective agreement to simply require membership of the Council's Fund until such time as an employer could demonstrate that it had secured a provident fund with superior benefits, then the collective agreement could have recorded that approach in simple straightforward language. That however is not the import of the Provident Fund Agreement. There are advantages to requiring most if not all employees in the sector to belong to the industry fund such as economies of scale, consistency and uniformity of benefits and penalty free transfers of employees from one employer to a another within the industry. These factors must be weighed up n the evaluation and militate against the grant of an exemption to the appellant.

44 In regard to the interests of the industry (clause 8(d)) the criteria of potential for labour unrest and increased employment do not have any particular relevance or impact in the present case. In relation to the latter factor the appellant contends that the better benefit for partial disability will have the result that the likely scenario to play itself out in most cases of employees suffering from HIV/AIDS is that employees will be enabled to take off 3 months to recover and will therefore be more likely to return to work earlier and be more likely ultimately be able to continue their employment. This argument is speculative by its very nature.

45 In regard to the criteria of collective bargaining reliance was placed by the appellant on section 23(5) of the Constitution whereby:

> *"(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)."*

It is argued that this provision guarantees the right to collective bargaining not only at sectoral level but also at plant level as between employer and employee and that the employees in the present case have presented a united front of approval of the employer's provident fund. It was argued that the appellant's approach does not undermine collective bargaining but promotes it. This argument fails to recognise that the starting point is that the industry has a collective agreement which requires membership of the Council's fund and that what is sought at plant level is an exemption which is directly in conflict with

that agreed sectoral standard. The contradictory approach at enterprise level directly conflicts with the industry approach and does therefore undermine collective bargaining at sectoral level which, as discussed earlier in this judgment is the stated object of the LRA which is the very national legislation in place to give effect to the rights in section 23(5). The suggestion that the employer's and employee's rights at enterprise level outweigh those at sectoral level is in the applicable legislative scheme to be rejected. In my view the criteria of collective bargaining – which is at industry or sector level – in the circumstances clearly favours the Council. So too does the factor of unfair competition in that if the appellant is correct that it can offer its employees an enhanced benefit for the same monetary provident fund contribution, that would be a competitive advantage over other employers in the industry.

46 In regard to the criteria of the interests of the employees (clause 8(e)), the appellant submits that the employees are not being exploited and that membership of its fund will assist in job preservation for the employees. It contends that the financial benefits to the employees will be greater under the FundsAt Work fund. However, for the reasons canvassed above it is doubtful that this has been convincingly shown if regard is to be had to the full package of benefits including likely pension benefits. The superior disability benefit it is argued will enhance the health and safety of the employees. This is possible, but is somewhat speculative and is in my view probably a factor with very marginal if any impact on the health and safety of employees. Finally, it is argued that the employees basic rights under the Constitution are infringed – an argument already dealt with above and which is to be rejected.

47 As regards the interests of the employer (clause 8(f))) it is argued that the financial stability of the employer is enhanced because unlike the Council fund which pays out a fixed disability benefit and then once that is used up the employees tend to return to ask for financial assistance from the employer, the alternative fund continues to assist disabled employees, thus relieving the employer of the financial burden of impecunious returning employees. There may be some merit in this contention, but there is no evidence of this problem and this submission too remains rather speculative. In regard to the impact on productivity of the employer this it is contended is assisted by the scenario that the employees will generally be happier given their unanimous support for the alternative fund; that the disability benefit will enable them to take time off to recuperate; and that employees will be funded while off work and can then return to work once properly recovered. Again this scenario is possible, but rather speculative, there being little evidence in support thereof. In regard to the impact on future relationships the appellant maintains this is not a problem, though the employer is not unionised. In regard to operational requirements it is argued that the appellant will be less affected where the alternative fund assists temporarily disabled employees financially to a greater extent and that the payment of future contributions where the employee is permanently disabled will lessen the financial burden on the Council's fund. This latter argument does not follow in my view. If the exemption is granted the employees will simply not be members of the Council's fund and will not affect it financially whether they are disabled or not.

48 Weighing up the various factors mentioned above I am not convinced that the appellant ought to be granted a permanent exemption and that this is in the interests of the balanced interests of the employees, the employer and the industry. No answer is given to the Council's contention that when asked to quote for the underwriting of the Council's fund Momentum did not provide a similarly competitive quote when appraised of the industry statistics over an extended period of time, the Council's Fund having been extant since 1991. The danger is that the alternative fund offers certain insurance cover and benefits now based on the employer's profile of its limited number of employees, only to find that in the longer term those superior benefits cannot be sustained, which will result in dramatically increased provident fund premiums in the alternative fund in order to sustain those promised benefits. Even if one accepts that the benefits of the Momentum fund are superior, it does not follow, having regard to a consideration of all the factors which we are required to consider in clause 4 of the Dispute Resolution Collective Agreement, that a permanent exemption should be granted. In particular, in my view as discussed above, the superior benefits do not in this case constitute a special circumstance as envisaged in clause 4.

49 The appellant was initially adamant that the relief it seeks is a permanent exemption, but in reply the appellant eased its stance and submitted that if the tribunal is not minded to grant a permanent exemption that it should grant a temporary exemption subject to review in one years time. The question of the time needed to arrange the transfer of fund credits from the appellant's fund to the Council's fund was raised before the Exemptions Board and Mr Yeo

indicated that compliance with section 14 of the Pension Funds Act could take between 6 to 18 months.[31] In replying argument it was submitted that the appellant may need an exemption for the purpose of transfer to the Council Fund.

50 The whole focus of the exemption application, the evidence presented the Exemptions Body and the argument before this tribunal was on the basis that a permanent exemption was sought. That is the case that the Council addressed in its responses. There is no proper evidence before this tribunal to enable it to make an informed assessment in regard to possibly granting a temporary exemption for the purposes of facilitating the transfer of appellant's employees from its fund to the Council's Fund. The question of making temporary arrangements to meet these practical difficulties is something for the parties to resolve as between themselves, and moreover, as I understood Mr Beckenstrater the Council has no difficulty in principle with accommodating such difficulties. There is no sense in this tribunal trying to second guess the problems that may arise in regard to a transfer of members from their existing fund to the Council's fund. The starting point for any transfer would obviously be the final determination of whether an exemption should be permitted in the first place. The subject of the dispute has been an application for a permanent exemption and that is the question which this judgement should determine. It is best left to the parties to negotiate over and resolve any difficulties which may arise from any determination that the exemption applied for is to be refused.

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[31] Record page 34

51 For the above considerations it is my view that the order of the Exemptions Body is the correct one and that no permanent exemption should be granted.

52 The appeal is accordingly dismissed.

DATED AT JOHANNESBURG ON THIS 26th DAY OF JANUARY 2010

D.M. ANTROBUS SC
Member of the Independent Body

M. CHENIA
Member of the Independent Body