THE INDEPENDENT BODY

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION (SATAWU) Applicant

and

THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY (NBCRFI) First Respondent

ROAD FREIGHT EMPLOYERS ASSOCIATION (RFEA) Second Respondent

RULING OF THE INDEPENDENT BODY

Introduction

1 On 8 June 2010 an appeal hearing was held in the above matter. The appellant was represented by Mr Van Der Riet SC instructed by attorneys Cheadle Thompson and Haysom Inc. The second respondent was represented by Ms. M. Chenia of attorneys Glyn Marais Inc. The first respondent council was represented by Mr. E. Kok who was present at the proceedings but abided the decision of the Independent Body and made no submissions. At a previous hearing on 22 April 2010 the appeal hearing was postponed by agreement between the union and the RFEA and the tribunal ruled at that time that the issue of costs of that day be reserved.

2 This matter concerns an exemptions application by the RFEA. On 13 July 2009 the Exemptions Body granted an exemption in terms of which the employers in the Furniture Removal sector are for a period of one year from 1 June 2009 exempt from the obligation to pay wages to the extent that they should pay 1% less on minimum wages for the sector. The appellant union has appealed against the exemption granted by the Exemptions Body.

Preliminary point on jurisdiction

3 The RFEA raised a point *in limine* whereby it contends that the Independent Body does not have jurisdiction to consider the present appeal. The contention is that only non-parties to the collective agreement enjoy a right of appeal against a decision of the Exemptions Body to grant an exemption and, because SATAWU is a party to the Council and the collective agreements, no such appeal lies and this tribunal has no jurisdiction to hear the matter.

4 In support of this contention the employers association relies on the wording of clause 4.6 of the Exemption and Dispute Resolution Collective Agreement ("the Dispute Resolution Agreement") and the reasoning of the Independent Body in a previous ruling between the RFEA and the NBCRFI dated 9 November 2009 ("the previous ruling").[1] Clause 4.6 reads as follows:

> "*In the event of the Exemptions Body granting an application, the Council or any other interested party shall have the right to appeal against the decision to the Independent Body and the provisions of clause 4(5) with the necessary changes to its context will apply.*"

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[1] Members D. M. Antrobus SC and L.T. Sibeko SC

Clause 4.5 in relevant part reads as follows:

> "*In the event of the Exemptions Body refusing to grant an application, the applicant shall have the right to appeal in writing against the decision of the Independent Body.*"

5 It is submitted for the RFEA that clause 4.6 must be read not in isolation but together with the remainder of the Dispute Resolution Agreement. This is correct. Indeed, as was pointed out in the previous ruling[2] provisions within an agreement must be interpreted in the context of the agreement read as a whole and against the prevailing background circumstances. The background is that there are a series of collective agreements, including the Main Agreement and the Dispute Resolution Agreement which are negotiated and concluded between the employer and employee parties to the Council.

6 In the course of the previous ruling this tribunal pointed out that a distinction is drawn between clauses 4(5) and 4(6) of the Dispute Resolution Agreement between appeals from a decision of the Exemptions Body to grant an exemption and a decision to refuse an exemption. Clause 4(6) deals with the former and provides that *"any other interested party"* shall have the right to appeal where an exemption is granted by the Exemptions Body. "*Any interested party*" is a wider class of persons than merely the "*applicant*" for an exemption which is the class of persons permitted to appeal under clause 4(5) where an exemption is refused by the Exemption Body. The reason for this distinction is not hard to understand when regard is had to the broader circumstances of the Main Agreement being the collective agreement which

governs the road freight industry and the fact that the Dispute Resolution Agreement is a further collective agreement concluded between the RFEA and various unions which deals with both exemptions specifically in clause 4 and dispute resolution more broadly in clause 5 which provides for disputes regarding the interpretation or application of the collective agreements.

7 As was pointed out in the previous ruling, the collective agreements concluded between the employer and employee parties to the Council :

> *"bind the employer and employee parties on whose behalf those agreements have been concluded. In addition the LRA provides a mechanism whereby those collective agreements can be extended by the Minister to non-parties to the Council who are employers and employees within the industry as defined. Unlike a court of law, the Exemptions Body does not deal with any type of application but deals only with applications for exemption from the otherwise binding provisions of the collective agreements. As one would anticipate against the background situation where one set of parties is bound to such collective agreements through the negotiating efforts of their representatives in the Council and another set of parties is bound precisely because they are not parties to the Council and only because the Minister has extended the applicability of the agreement to them as non-parties, the applications for exemption from the provisions of any collective agreement are usually applications by non-parties who in the first instance took no part in the conclusion of the collective agreement by which they now find themselves bound. However, the ability to apply for an exemption is not limited exclusively to non-parties."* [3]

8 The present case is distinguishable on the facts from the case which resulted in the previous ruling. The previous case dealt with an appeal to this tribunal in circumstances where the applicant for exemption was the RFEA. In that case the Council took the point that the RFEA, as a party to the Council and party to the collective agreements, did not have the *locus standi* to appeal a decision by

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[2] at paragraph 14
[3] at paragraph 14

the Exemptions Body to refuse an exemption application brought by the RFEA. It was held on the facts of that case that the Independent Body did not have jurisdiction to consider that appeal. The present matter is distinguishable because it is an appeal by a person other than the original applicant before the Exemptions Body. In the present case the RFEA applied to the Exemptions Body and was granted an exemption. The present appeal arose because there was an appeal by SATAWU, which is clearly an interested party, and which took part in the initial proceedings before the Exemptions Body, but which was not the original applicant for the exemption. In other words although this is an appeal by a party to the Council and the collective agreements, it is an appeal against a decision to *grant* an exemption rather than a decision to refuse the exemption applied for.

9 The position in relation to an appeal of this nature is governed by clause 4(6) of the Dispute Resolution Agreement and was considered in the course of interpreting clause 4(5) which was the operative clause in the previous case where the exemption was refused by the Exemptions Body leading to the previous ruling. This tribunal considered the meaning of clause 4(5) by way of contrasting its provisions to those of clause 4(6) and considered the differences of significance because different consequences arise for different parties where an exemption is granted on the one hand, from where an exemption is refused, on the other. On the face of it, in terms of clause 4(6) where the exemption application is granted, any interested party has the right to appeal against the decision of the Exemptions Body to the Independent Body.

10 In broad terms, where an applicant, usually an employer member of the Council, applies for an exemption and the exemption is refused, then having regard to the nature of exemptions whereby absent an exemption the same industry rules and terms and conditions of conducting road freight business apply to all parties, other parties to the collective agreements have no particular interest where an exemption has been refused. The position is different where an exemption is granted. The moment an exemption is granted the entity exempted is in a different position from all the other entities covered by the Council's collective agreements. Consequently, those other parties immediately have an interest in the fact that the exemption has been granted, not least of all that they may be able to contend that unfair competition prevails. In the nature of the situation the legal interest is one which arises at the point that the exemption is granted. It is therefore logical that the position as regards appeals should be different in respect of the situation where an exemption application is granted by the Exemptions Body from the position where such an application is refused.

11 In our view clause 4(6) permits SATAWU to appeal in the present case and the preliminary point that the Independent Body lacks jurisdiction because SATAWU is a party to the Council and its collective agreements is without merit. Indeed, insofar as the previous ruling commented in passing (*obiter)* on the meaning of clause 4(6) the interpretation of which has pertinently arisen in the present appeal, the approach of this tribunal in the previous ruling and the present ruling is consistent.[4]

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[4] Paragraph 17 of the previous ruling

12 For the RFEA it was submitted that cognizance should be taken of the fact that all parties to the Council apparently agreed that the right to appeal is only available to non-parties under all circumstances and is not available to parties to the Main Collective Agreement. In support of this proposition reference is made to an amendment agreed between the parties to the Council and signed on 2 March 2010 in which it was agreed that a new clause 4(1) be substituted in the Dispute Resolution Agreement. The proposed amendment agreed between the parties was that the reference in the second sentence of clause 4(1) to "*the Exemptions Body's refusal of a non-party's application for exemption*" be replaced with the words "*the Exemptions Body's refusal of an application for exemption*". It will be noted that the proposed amendment omits the reference to a "*non-party*" and thereby expressly extends the ambit of the Independent Body to hear and decide appeals not only of non-parties whose exemption applications have been refused, but also appeals of parties to the Council and its collective agreements where an exemption has been refused.

13 Whilst this agreement between the parties to the Council reflects an agreement that the Independent Body should provide for appeals against *refusals* of exemption applications brought by parties it does not deal with appeals against decisions by the Exemptions Body to *grant* exemptions.

14 The essence of the RFEA's submissions in this regard was really to point out the response of the Deputy Director: Collective Bargaining of the Department of Labour (Ms Briedenhann) contained in a letter dated 29 April 2010. In that letter Briedenhann expresses the opinion that the amendment proposed *"is in contradiction with Section 32(3)(e)* (of the LRA) *which specifically limits the right*

of appeals to non-parties" and goes on to state that a collective agreement cannot amend an Act of Parliament and the Department cannot recommend publication of the proposed amendment to non-parties. This letter was submitted to show that the Department of Labour supports the view that a party to a collective agreement does not have the right to appeal the grant of an exemption.

15 It is true that section 32(3)(e) of the LRA refers only to the "*refusal of a non-party's application for exemption from the provisions of the collective agreement*" but this is in the context of section 32(3) providing that a collective agreement may not be extended to non-parties unless the Minister is satisfied that there is provision for an independent body to decide an appeal against the refusal of a non-party's application for exemption. In other words, this section does not prescribe what the parties to the collective agreement must agree as between themselves in relation to what parties to the collective agreement may do. Certainly, the consent of the Department of Labour is not required before parties to the Council can conclude collective agreements as between themselves and section 32 (3)(e) does not purport to limit the rights of appeal of parties to the collective agreements. Rather it deals specifically with the requirement that absent a provision for an independent body to hear appeals against the refusal of a non-party's application for exemption from the provisions of the collective agreement, the Minister is not permitted to extend the collective agreement to non-parties.

16 In our view the attitude of the Deputy Director: Collective Bargaining and her interpretation of section 36(3)(e) is misplaced. In any event we fail to see how her opinion in any way constrains this tribunal.

17 In conclusion, we hold that the RFEA's preliminary point that the Independent Body lacks jurisdiction in the present matter and that SATAWU has no *locus standi* in this dispute is without merit.

Procedural Aspects

18 Before turning to deal with the merits of the present appeal it is apposite to consider certain procedural aspects relating to the nature of appeals such as these and more broadly as to the procedures which have been agreed under the auspices of the Council for how exemption applications should be made and how these procedures are in fact applied in the exemption applications which are brought before the Exemptions Body.

19 Clause 4(1) of the Dispute Resolution Agreement refers to the establishment of an Independent Body to hear and decide "*any appeal*" brought against the Exemptions Body's refusal of a non-party's application for exemption from the provisions of a collective agreement or the withdrawal of a non-party exemption by the Exemption Body or the Council. Clause 4(6) refers to any interested party having "*the right to appeal against the decision*" of the Exemptions Body to grant an application. Procedural aspects of appeals are referred to in sub clauses 7 and 9. None of these references in the Dispute Resolution

Agreement expressly indicates the nature of the appeal proceedings, and neither does section 32(3)(e) of the LRA.

20 The word "*appeal*" can have several different connotations. This was recognized by the court in the well known case of *Tikley and others v Johannes, N.O. and others* 1963 (2) SA 588 (T) by Trollip J. who said:

> *"Insofar as it is relevant to these proceedings it may mean:*
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> *(i) an appeal in a wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;*
>
> *(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision and the appeal was given, and in which the only determination is whether that decision was right or wrong;*
>
> *(iii) a review, that is, a limited re-hearing with or with additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly."*

21 This analysis and approach was followed in *Caledonian Airways v Transnet t/a South African Airways* 1997 (1) SA 466 (T).[5] Streicher J (as he then was) in the *Caledonian* case pointed out that the Appellate Division in *National Union of Textile Workers v Textile Workers Industrial Union (SA) and others*[6] stated that to interpret the word "*appeal*" as being restricted to "review" to the exclusion of other meanings is to give the word a meaning which is not its ordinary meaning.[7] The general rule is that the words used are to be construed in their ordinary sense, unless there exists good reason to the contrary in a particular case which would need to be determined from the context of the use of the

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[5] at page 469-70
[6] 1998 (1) SA 925 (A) at 937G-938A
[7] Caledonian at page 470D

word in the statute or contract.[8] In this case therefore any reason to depart from the ordinary use of the word "appeal" must be sought in the applicable collective agreements and the LRA.

22 The use of the word "appeal" in section 32(3)(e) offers no particular indication as to the meaning to be attributed to this word. Section 32(3)(f) provides that the Minister must be satisfied that the collective agreement contains criteria that must be applied by the Independent Body when it considers "an appeal", and that those criteria are fair and promote the primary objects of the LRA. The Dispute Resolution Agreement contains a list of criteria which are set out in clause 4(8), but these criteria, which include considering the interests of the industry, employees and employers as well as special circumstances and any precedent that may be set, as well as the applicant's past record of compliance with the provisions of the Council's collective agreements and exemption certificates, offer no particular indication as to whether a review or a wide or narrow appeal is contemplated.

23 Section 30(1)(k) of the LRA provides that the constitution of every bargaining council must at least provide for the procedure for exemption from collective agreements. The Constitution of the NBCRFI provides in clause 25 that application for exemption from provisions of the collective agreements must be dealt with by the appointed Exemptions Body and the Independent Exemptions Appeal Body respectively in accordance with the Council's Dispute Resolution Agreement. This provision also takes the question of the true nature of an appeal to the Independent Body no further.

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[8] Caledonian case at page 470

24 The Rules for the Conduct of Processes and Proceedings before the Independent Exemptions Body and the Independent (Appeals) Body have apparently been adopted by the Council. We were referred to Rule 7 which deals with the Powers and Functions of the Independent Body and in particular to Rules 7.1 and 7.2 which provide:

> *"The functions and powers of the Independent (Appeals) Body shall be:*
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> *7.1 on hearing of an appeal, to receive further evidence, whether orally or on affidavit;*
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> *7.2 on hearing of any appeal, to receive further written reasons from the Exemptions Body."*

25 It was submitted for the union that these provisions, and Rule 7.1 in particular which permits the receipt of new evidence on appeal, is a strong indicator that what is envisaged is an appeal in the wide sense.

26 No reference was made in argument to Rule 15 which provides that the Exemptions Body must keep a record of any evidence given in any exemption hearing, and that such proceedings may be recorded electronically or by way of handwritten notes and that the certified transcript of the notes and/or recording will serve as *prima facie* proof of its correctness. Rule 15 tends to suggest that a procedure is in place to secure a true record of proceedings before not only the Exemptions Body but also of proceedings before the Independent Body. While it is unclear whether these rules constitute a formal collective agreement, they do constitute evidence of the common conduct of the parties to the Council in the implementation of the collective agreements and as such are relevant to the interpretation to be placed on the nature of the "*appeal*" proceedings which

the parties have agreed on. The requirement that a record be kept of the proceedings before the Independent Body is an indication that an appeal in the wide sense was intended for there would otherwise be no point in this requirement if no new evidence was permitted on appeal.

27 The express provision in Rule 7.1 that new evidence may be received by the Independent Body is indeed a strong indication that an appeal in the wide sense as envisaged in *Tikley's* case is intended. The collective agreements and the rules do not envisage a departure from the normal meaning of the word "appeal" such that what is envisaged is a review proceeding with a limited re-hearing without additional information. What is envisaged is an appeal in the wide sense with a fresh determination of the merits of the exemption and with parties being permitted to lead additional evidence or submit additional information. It is also apposite to observe that new evidence has been admitted in previous appeal proceedings before the Independent Body, although such evidence would generally have been agreed evidence which none of the parties on appeal sought to dispute. We are not aware of any previous matter, and none was pertinently brought our attention, in which the issue of disputed evidence tendered on appeal was raised and decided by the Independent Body.

28 Although SATAWU participated in the proceedings before the Exemptions Body, the evidence presented by the union before the Exemptions Body was lacking in substance. In addition, although the application was for an exemption of 1% increase on both the minimum and across the board increases, the union objected on the basis that its members were not prepared

to accept a wage reduction of 3%.[9] It was perhaps with this in mind that the Exemptions Body expressed the view (in paragraph 5.7 of its decision) that the submissions made by the union did not fundamentally challenge the assertions made by the RFEA[10] which view in part at least informed the decision of the Exemptions Body.

29 On appeal additional evidence was led by the union. This new evidence is considered more fully below as part of the consideration of the merits of this dispute. The RFEA also presented some new evidence on appeal.

Requirements for an application for exemption

30 The parties are not required by the provisions of the Dispute Resolution Agreement to submit their evidence before the Exemptions Body under oath and on affidavit. The requirements for an application for exemption are laid down in the clause 4(3) of the Dispute Resolution Agreement which reads as follows:

> *" Applications shall comply with the following requirements:*
>
> *(a) Be fully motivated.*
>
> *(b) Be accompanied by relevant supporting data and financial information.*
>
> *(c) Applications that affect employees' conditions of service shall not be considered unless the employees or their representatives have been properly consulted and their views fully recorded in an accompanying document.*

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[9] Appeal record, Bundle B, page 59, paragraph 1
[10] Appeal record, Bundle B, page 73, paragraph 5.7

(d) If the nature of the relief sought dictates, the application shall be accompanied by a plan reflecting the objectives and strategies to be adopted to rectify the situation giving rise to the application in indicating a timeframe for the plan.

(e) Indicate the period for which the exemption is required."

31 The Rules for the Conduct of Processes and Proceedings before the Independent Exemptions Body and the Independent (Appeals) Body are also relevant and are set out below in relevant part. to these proceedings.

"8 Application for exemption

8.1 An application for exemption must be in the form of "Form EA 1" ("the exemption application") and must be signed by the referring party or its appointed representative.

8.2 The applicant must attach to the exemption application written proof, as set out in rule 3.2, that the referral document was served on the other party or any other interested party affected by the application.

8.3 The exemption application must set out all the material facts upon which the parties will rely and be guided by the criteria stipulated in Clause 4 of the Exemptions and Dispute Resolution Collective Agreement. All supporting documentation is to be attached.

8.4 Oral submissions can be called for by the Exemptions Body at its discretion, at any time.

8.5 The Exemption's Body can give directions or orders as to the further conduct of the application.

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21 Preliminary and ancillary matters

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Any application in terms of these rules must be brought on notice to all persons who have an interest in the application.

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21.4 The party bringing the exemption must sign the notice of application.

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21.5 The exemption application must be supported by an affidavit. The affidavit must clearly and concisely set out –

a) the names, description and addresses of the parties;

b) a statement of the material facts, in chronological order, on which the application is based, which statement must be in sufficient detail to enable any person opposing the application to reply to the document;

c) a statement of the legal issues that arise from the material facts, which statement must be in sufficient detail to enable any opposing party to answer to the document;

d) the relief sought; and

e) the period for which the relief is sought.

21.6 Any opposing party must, within 10 (ten) days of receipt of the exemption application, deliver an answering statement. The opposing party's answering statement must comply (with whatever changes the context may require) with all the requirements of an exemption application as set out in 8.1 to 8.4 and 20.3 above.

21.7 (a) The party initiating the proceedings may lodge a replying affidavit within five days from the day on which any notice of opposition and answering affidavit are delivered.

(b) The replying affidavit must address only those issues raised in the answering affidavit and may not introduce new issues of fact or law.

21.8 Subject to the discretion of the Exemptions Body or Independent (Appeals) Body, a written statement may be substituted for the affidavits referred to in 8.1 to 8.3 and 21.5.

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21.11 An appeal from a determination by the Exemptions Body or Independent (Appeals) Body shall be made on notice supported by affidavit, substantially in compliance with form EA1. The requirements of rules 3, 4, 8.4, 21,5, 21.6, 21.7 and 21.8 shall apply to appeal applications as well."

32 If regard is had to Form EA1 and the provisions of Rule 21 referred to above, it is apparent that exemption applications are not only required to be in writing but are required to be under oath. Although the RFEA's exemption application in this matter was in writing and the coversheet thereof completed in the format of

Form EA 1 and signed by Ms Brown the Executive Officer of the RFEA, the application was not made on affidavit.[11] The Rules referred to above, also provide for the delivery of an answering affidavit and a replying affidavit before an exemption application or an appeal (subject to the necessary changes contemplated in Rule 21.11) before the hearing of such application or appeal may be set down. In this instance, the union appears to have voiced its opposition orally at the meeting of the Exemptions Body on 18 January 2010 and thereafter filed a letter dated 9 February 2010 in which it made written representations opposing the application.[12] The RFEA replied to the union's representations by way of a further letter dated 10 February 2010.[13] Neither of these letters was under oath.

33 There is potential for abuse of the appeal process if a party to the exemptions application process really only brings the facts on which it relies in support of or in contestation of any application for exemption to light for the first time on appeal.

Merits of the exemption application

34 The RFEA is currently the only employers' association which is a member of the Council. Its members include operators in various sectors within the road

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[11] Record, Bundle B, pages 1-4 with further annexures thereto
[12] Record, Bundle B, pages 59-61
[13] Record, Bundle B, pages 62-63

freight industry and specifically include operators in the Furniture Removal sector.

35 The RFEA applied in writing to the Exemptions Body by way of an application dated 8 January 2010.

36 In its application the RFEA set out the background which is not in dispute. The 2009 wage negotiations were concluded in terms of a written agreement dated 15 April 2009 ("the wage agreement"). This agreement was for a period of operation of two years and was extended to non-parties on 22 May 2009. Clauses 2.1 to 2.4 of the 2009 wage agreement recorded the percentage increases on the minimum wages for grades 1 to 5 as well as an across-the-board increase of 11 per cent for year one and a 9.5% increase for year two. Clause 2.5 of the wage agreement reads as follows:

> *"Furniture Removal: The RFEA may apply for an exemption on behalf of the sector in this regard, which application will not unreasonably be opposed by the Unions. The definition of furniture removal in the main collective agreement shall be strictly applied."* [14]

There was similar agreement in the previous wage agreement that the Furniture Removal sector could bring an application for exemption which would not be unreasonably opposed by the unions. Such an application was duly brought and for 2008 and under the previous wage agreement the RFEA was granted an exemption which permitted an increase of 1% less than the agreed increases on both the minimum and across-the-board increases.

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[14] Record, Bundle The, page 20 – 27 at page 21

37 In May 2009 and pursuant to clause 2.5 of the wage agreement the RFEA brought an exemption application on behalf of the Furniture Removal sector (rather than in the name of individual employer companies) to pay 1% less than the gazetted minimum and across-the-board wage increases for the (two year) period of the wage agreement. The Exemptions Body granted the exemption in part as it granted a 1% less increase on the minimum wage for a period of one year only. The RFEA appealed against that part of the decision of the Exemptions Body which had refused the exemption applied for. The Independent Body ruled that it had no jurisdiction to consider an appeal by the RFEA as a party to the Council against the refusal of the Exemptions Body to grant the exemption. The Independent Body did however indicate by way of an advisory award that the Exemptions Body ought to have granted an exemption to pay 1% less on the across-the-board increases for the full period of the wage agreement.[15] The RFEA then re-applied for an exemption before the Exemptions Body and an exemption was granted. it is against the grant of that exception of that SATAWU brought the present appeal.

38 The motivation of the RFEA for why the Furniture Removal sector warranted a 1% less increase was that in comparison to other sectors it is much more labour intensive. In addition, it is alleged that the global economic downturn directly impacted on the housing market and that the Furniture Removal sector is dependent on the housing market in which demand for household moves was alleged to be down by approximately 40%. It was contended that the 1% exemption sought could well constitute the difference between furniture removal businesses continuing to operate or shutting down.

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[15] Ruling of the Independent Body dated 9 November 2009 at paragraph 34

39 In support of its application the RFEA produced regional schedules of its members in the Eastern Cape, Free State and Northern Cape, Northern Region, Western Cape and the KZN Region. Twenty five members were surveyed in January 2010 by being requested to complete and sign a pro forma statement in which each company was asked to confirm that the past year had seen a decline in business, to state the percentage of such decline and to comment on the reasons therefore. On appeal an analysis of the results of this informal survey was produced which showed that one of the firms (Biddulphs) refused to indicate a percentage decline although it confirmed that there had been a "significant decline". Of the remaining 24 firms the average of the percentage decline in business indicated was 31.3% with the range of drop in business reported as between 10.5% to 63%.[16] Not one company reported trading as "the same" or "better" for the period in question. This survey did not involve the union and no information was sought from the employees at any individual companies and neither were employees at individual companies approached or canvassed to gauge their support for the exemption application.

40 On appeal the union criticised this survey because it failed to comply with the requirements of the Dispute Resolution Agreement in regard to the consultation required by clause 4(3)(c), and because it was not fully motivated and accompanied by relevant supporting data and financial information as required by clauses 4(3)(a) and (b).

41 For the union it was submitted that there are two main reasons why the exemption should not have been, and cannot be granted. The first is that there

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[16] Exhibit C, page 1

has been no consultation as required. The second is that no case has been made out on the merits for an exemption. Each of these arguments will be dealt with in turn.

Absence of required consultation

42 Clause 4(3)(c) of the Dispute Resolution Agreement lays down that exemption applications that affect employees' conditions of service shall not be considered unless the employees or their representatives have been properly consulted and their views fully recorded in an accompanying document. The union contends that the import of this provision is that the employees must be persuaded that the exemption is warranted and their consent, pursuant to proper consultation, must be recorded. In the present case, the individual employees in the affected companies have not been consulted and nowhere is their consent to the exemption application recorded.

43 Instead, the RFEA relies on clause 2.5 of the 2010 wage agreement[17] which in relevant part provides that "*The RFEA may apply for an exemption on behalf of the (*Furniture Removal) *sector in this regard."* The words "*this regard*" must be taken to refer to minimum wages and across-the-board increases which is what is being dealt with in clause 2. The question to be answered is does this clause in the wage agreement constitute compliance with the consultation requirement in clause 4(3)(c)?[18] Clearly the wage agreement was an agreement concluded by "representatives" of the employees as envisaged in clause 4(3)(c). The

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[17] fully set out above
[18] Clause 4(3) is set out in full in paragraph 30 above.

question boils down to whether the agreement recorded in clause 2.5 of the wage agreement constitutes proper consultation with the relevant employees and with the views of such employees being fully recorded.

44 For the union it is contended that there is no support in the language of clause 2.5 for the proposition that consultation is not required. It is contended that the meaning of this clause is simply that the union agreed to consider the merits of any exemption application and, if there is merit in the application, the union would not oppose it. It was pointed out that it is common knowledge that the union has set its face against chamber bargaining and does not accept a chamber arrangement. It is submitted that the only concession made by the union in this clause is that the employers' association could apply for an exemption which the unions would not unreasonably oppose, but that this does not mean that the union agreed to waive its right to consultation with the affected employees. What the union overlooks is that in clause 2.5 of the wage agreement it agreed to an exemption application not on behalf of individual employees but instead on behalf of "*the sector*" referring to the Furniture Removal sector. This in our view connotes a collective approach to the exemption application and insofar as that may contradict the union's usual and general stance that it opposes chamber bargaining, the union must nevertheless in this instance be held to its agreement to deal with wages at sector level.

45 The next question is whether the affected employees – in the entire sector - have through their collective bargaining representatives agreed by virtue of clause 2.5 agreed to waive their right to consultation prior to any exemption

being granted. In considering this aspect it is necessary to briefly consider the principles of waiver, though neither party addressed the tribunal in any detail in this regard. Waiver is contractual in nature and in principle the union as the employees representative could have agreed in clause 2.5 to waive the rights of the employees in the Furniture Removal sector. Whether a waiver of rights has occurred is a question of fact and the party relying on the waiver bears the onus to prove such waiver on a balance of probabilities.[19] Waiver is generally difficult to establish. The courts have said that clear evidence of waiver is required and a party is not lightly presumed to have waived its rights.[20] The test for whether the facts show a waiver remains whether this has been established on a balance of probabilities.

46 There is no express waiver alleged by the RFEA in this case. It is however argued for the RFEA that there is an implied waiver. For there to be an implied waiver the conduct or agreement of the affected employees representatives must, with full knowledge of the rights of the employees, be unequivocally inconsistent with the intention of the representatives of the employees to enforce the employees right to consultation before an implied abandonment of that right can be inferred.[21] The right to consultation is clearly set out in clause 4(3)(c) and the Dispute Resolution Agreement is available and known to the union. In that sense it there is a plausible argument that the union

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[19] Laws v Rutherford 1924 AD 261 at 262-263
Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 A
Borstlap v Spangenberg 1974 (3) SA 695 A
[20] Feinstein v Niggli 1981 (2) SA 684 A
Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 (1) SA 350 (T)
Laws v Rutherford 1924 AD 261 at 263
[21] Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 772 A at 778D -779A
Borstlap v Spangenberg 1974 (3) SA 695 A at 704F-H
Greathead v SA Commercial Catering and Allied Workers Union 2001 (3) SA 464 SCA at para 17

representatives at least satisfied the requirement of having had "full knowledge" of the rights of the employees which they were representing when the agreed to the contents of clause 2.5. The further requirement is not however met in that clause 2.5 is not unequivocally inconsistent with the intention of the union representatives to enforce the affected employees' right to consultation and is at the very least ambiguous in this respect. Accordingly, the implied abandonment of the employees' right to consultation cannot be inferred and we find that there is no abandonment of that right implied in clause 2.5.

47 In the absence of a waiver of the affected employees' right to consultation the RFEA bears the onus to show that the requisite consultation occurred. There is no evidence of such consultation. It was moreover pointed out that the wage agreement was concluded in April 2009 for implementation on 1 March in the years 2009 and 2010. The exemption in question sought by the RFEA was for the period 1 March 2010 for the remainder of the period of the agreement.[22] The intention of the parties in April 2009 in practical terms cannot have addressed the issue of consultation in relation to the financial circumstances prevailing which would justify an exemption for the period March 2010 to February 2011.

48 In conclusion on this issue it follows that because the exemption applied for affects conditions of service, the requirement under clause 4(3)(c) is that the RFEA establish that the employees or their representative – in this case SATAWU - have been properly consulted and their views recorded in an

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[22] Record, Bundle B, page 3 paragraph 6.2.6

accompanying document. The RFEA has failed to establish this and has failed to establish on a balance of probabilities that the affected employees have, through their representatives, waived their right to consultation. The exemption application therefore fails to meet the requirements of clause 4(3)(c).

No merit in the exemption applied for

49 The second main submission of the union is that there is no merit in the exemption application. In this regard for the union it was pointed out that the motivation set out in the exemption application[23] rests on two main propositions. First, that the demand for the services of furniture removal suppliers was down by approximately 40% and that therefore the applicant should be given a special dispensation.[24] Secondly, that the furniture removal sector is labour-intensive in comparison with other sectors of the road freight industry and has been hard hit by the global economic downturn.[25] It was pointed out that this reasoning is meaningless unless a comparison is made with other employers in the road freight industry so that a case can be made out that the furniture removal sector is affected adversely by the recession to a greater extent than other sectors of the industry sufficient to warrant an exemption on wages. There is no evidence of comparable adverse effects with other sectors of the industry in the application for exemption. This accordingly provides no basis for granting an exemption from the general position applicable equally to other employers and employees in the industry as regards wages.

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[23] Record, Bundle B, page 3, paragraphs 7.1.1-7.1.8

50 A third proposition in the application is that because the sector is labour-intensive with potentially five employees to each vehicle, if job losses are to occur, they will be more severe in the furniture removal sector than elsewhere. This argument of course turns on evidence to the effect that job losses either have occurred or will occur. There is no evidence to this effect in the exemption application. The general proposition stated by the Exemptions Body in paragraph 5.8 of its decision[26] that there have been an unprecedented number of job losses in 2009 takes the matter no further as regards the particular impact on the furniture removal sector in comparison to other sectors in the industry. On appeal the union presented hearsay evidence[27] to the effect that employers had not engaged in retrenchment consultations due to an alleged decline in demand, and one company, did retrench workers during 2009 but did so on the basis of stock theft. Once again, while the value and weight to be accorded all of this evidence tendered by the union is doubtful, we do not consider it necessary to make any determination in relation to this evidence, having regard to the conclusions already reached above.

51 For the RFEA it was submitted that the evidence presented by the union was "too little too late" and that the Exemptions Body cannot be faulted for failure to take this evidence into account. It is true that none of this evidence was presented to the Exemptions Body which, in consequence, can obviously not be criticised for failure to take this evidence into account. However, as considered above, it is permissible to lead new evidence on appeal before the Independent Body and, had it been necessary to do so, this tribunal would have

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[24] at paragraphs 7.1.3
[25] at paragraphs 7.1.1 -7.1.2

considered the new evidence by the union. It is perhaps apposite to point out the danger which exists in circumstances where the party can, for the first time, adduce new evidence on appeal. If that new evidence should have been presented before the Exemptions Body but is not so presented, and leads to an overturning of an exemption granted on appeal, it may be that the party presenting new evidence on appeal, despite being successful, will in fairness be required to pay the costs of the appeal where the alteration of the exemption decision on appeal is attributable to the absence of a proper challenge before the Exemptions Body and the failure to lead relevant evidence at that stage.

52 As to the process of an application for an exemption the Dispute Resolution Agreement read together with the applicable Rules do require that exemption applications be made on affidavit and under oath or affirmation. An application must be in writing and motivated, accompanied by relevant supporting data and financial information and evidence of proper consultation with the affected employees needs to be recorded. Although the Independent Body has a discretion to admit written statements in substitution for the affidavits required,[28] the general and usual position is that affidavits are required. For purposes of the present appeal we make no issue of the fact that the proceedings before the Exemptions Body were not on affidavit, but the parties should be aware that in future they risk their exemption application or opposition thereto being rejected on the basis that the procedure was not conducted on affidavit in accordance with the Rules.

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[26] Record, Bundle B, page 74
[27] Record, Bundle A, page 12, paragraph 11
[28] see Rule 21.8

53 There was also some dispute over the fact that the union contended that certain submissions had never been raised before the Exemptions Body whereas the RFEA contended that those submissions had been raised orally at the Exemptions Body hearing. The parties should be aware that where such disputes are likely to arise as to what evidence was presented at the exemptions hearing it is advisable (and may be necessary) to obtain a transcript of the full record of the hearing before the Exemptions Body.

54 Criticism was also levelled by the union at the survey conducted by the RFEA as failing to constitute the "*financial information*" as required by clause 4(3)(c) of the Dispute Resolution Agreement. We point out that this clause does not only require financial information but also requires "*relevant supporting data*". It is at least arguable that the data obtained by the informal survey conducted by the RFEA constitutes relevant supporting data. It is true that on the RFEA's own analysis of this data the conclusion cannot be drawn of a 40% drop in demand for removal services. If one accepts the data at face value a decline of only 31.3% is shown.[29] Whether this type of data is sufficient to constitute the type of evidence which may be relied upon to warrant an exemption is somewhat doubtful, but having regard to the conclusion reached above regarding the absence of consultation and the failure to compare the adverse impact on the Furniture Removal sector with other sectors of the road freight industry, we find it unnecessary to make a determination in this regard.

55 The RFEA pointed out that the union's opposition before the Exemptions Body consisted of little more than bare denials and that there was a paucity if not a

complete absence of supporting evidence for the union's contentions. Whilst there is much to be said for this submission for the RFEA, it is unnecessary to further consider or make any findings in that regard by reason of the fact that the RFEA itself has failed to make out the requisite case to warrant the grant of an exemption. The weakness of the union's opposition is in those circumstances irrelevant where the RFEA has failed to make out a case for exemption in the first place.

56 The union sought to shore up its case on appeal by presenting evidence of its attempts to obtain financial information from various large employers in the sector, which were frustrated by employers not furnishing the requested financial information. By its very nature, what was thereby presented was an absence of evidence regarding the financial situation of certain employers in the sector, and is accordingly unhelpful. The union also presented a First National Bank publication analysing the residential property market as at 1 March 2010 and economic report on residential property and house price growth produced by Standard Bank. A similar report by ABSA Bank was referred to. These reports were relied upon as predictions of percentage growth in house prices varying between 6% and 8% during various periods of 2010. In the nature of an exemption sought for wages to be paid in a future period, it is necessary to seek to assess the likely financial situation over that period, as opposed to looking only at the historical financial situation which may have prevailed in the previous period. It probably is therefore inevitable that some form of financial forecasting will be involved in support of an exemption application of this nature. The economic forecasting contained in the three

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[29] Record, Bundle C, page 1-2

bank forecast documents is of a fairly general nature and it may be doubtful whether it is of specific relevance and sufficient pertinence to the issue of the demand for work in the Furniture Removal sector.[30] Again, by virtue of the conclusions reached above in these findings, we find it unnecessary to make a determination in that regard.

Costs

57 Costs were not sought by the appellant union in the present application. The costs of the previous day's hearing on 22 April 2010 which was postponed by agreement were however sought by the union.

58 It was argued on behalf of the union that the union's affidavit in support of the "*grounds of appeal*" was delivered on 7 April 2010, which allowed the RFEA sufficient time to file an answering affidavit, if it were so advised, before the hearing of the application. It was further submitted that there was, in any event, no requirement for the filing of affidavits in applications of this nature, and further that the RFEA did not itself have an affidavit through which it sought to adduce evidence in relation to the exemption application. It was also contended that the postponement of the matter had also been occasioned by a legal point (which we have dealt with above) regarding the alleged lack of *locus standi* of the union, in respect of which the union had to consider its position before responding thereto. The late raising of this legal point, so the union's argument

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[30] This is more so given that the bank reports contain a disclaimer to the effect that none of them constitutes "**advice and may not be applicable to all circumstances**." None of the banks take responsibility for any representation made in each of the reports. In this regard see: Record, bundle A, page 27; page 39 and page 40.

went, justified the award of the wasted costs occasioned by the postponement against the RFEA.

59 In order to determine whether the RFEA ought to be directed to pay the wasted costs occasioned by the postponement of the matter as prayed for by the union, it is necessary to briefly set out the factual background which appears from the affidavit deposed to by Magretia Brown (hereinafter referred to as "Brown") filed on behalf of the RFEA in its substantive application for the postponement, and which is largely common cause.

60 The RFEA became aware of this application by the union on 23 March 2010, when it received a telefax from the union's attorneys through which it was informed that the union had been "*granted leave to lodge grounds of appeal on or before 23 March 2010*". In that letter, to which was annexed the union's "*grounds of appeal*",[31] the RFEA was informed that the union attorneys "*reserved [their] clients' rights to tender evidence at or prior to the appeal hearing.*"

61 On 24 March 2010, the RFEA was informed by Elvan Kock (hereinafter referred to as "Kock") of the Council that the hearing of the application had been set down for hearing on 22 April 2010, and that the RFEA was required to respond (apparently to the union's "grounds of appeal") by 7 April 2010.

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[31] Annexure "A" to the affidavit in support of an application for postponement.

62 On 7 April 2010, the union served on the RFEA its affidavit in support of its "*grounds of appeal*" which was deposed to by Tabudi Ramakgolo (hereinafter referred to as "Ramakgolo"). It is worth mentioning that while Ramakgolo referred to confirmatory affidavits of certain persons being annexed to his affidavit to confirm the union's contention that there had been no consultation with the employees or the representatives by the employer in the furniture sector or RFEA, when Ramakgolo's affidavit was delivered, it did not have the confirmatory affidavits referred to in his affidavit, and which appear at pages 21 to 24 and 42 to 43 of bundle A of the documents.[32]

63 Reference is made to research conducted on behalf of the union in relation to the RFEA's alleged decline in demand in the furniture removal sector, which was relied upon by the RFEA when it applied for the exemption. The research clearly appears to have been conducted after the exemption was granted, and after the union had delivered its "*grounds of appeal*". Again the affidavit refers to certain emails which had been sent to members of the RFEA on behalf of the union requesting certain information from them in support of the union's appeal. This information was clearly sought after the exemption had been granted and after the union had delivered its grounds of appeal.[33] The RFEA needed time to consult with its members relating to the information sought on behalf of the union.

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[32] Pleadings Bundle, page 21 is a confirmatory affidavit of Praisewell Ntsibande, page 23 is the confirmatory affidavit of Muhammad Irshaad Savant, and page 42 is the confirmatory affidavit of Lucas Tsipa.

[33] See: Record Bundle A, pages 15 – 20.

64 Ramakgolo's affidavit made reference to certain banking reports which suggested that the recession which the RFEA had relied upon in its application for exemption was drawing to a close and that house prices were rising again, albeit gradually, suggesting that there would be a corresponding rise in work in the furniture removal industry which would be brought about by the recovery in demand following greater buying selling of property. These reports[34] were not annexed to Ramakgolo's affidavit.

65 On 8 April 2010, the RFEA, which was at the time represented by Brown who is based in Cape Town appointed its legal representatives and instructed them to deliver a notice of opposition to the application, which notice of opposition was delivered on the same day.[35]

66 On 9 April 2010, the RFEA's attorneys received correspondence from the union's attorneys enclosing a confirmatory affidavit of Praisewell Ntsibande and an enquiry as to when the RFEA intended to respond to the union's affidavit.

67 On 16 April 2010, Ms Mohsina Chenia (hereinafter referred to as "Chenia") of the RFEA's attorneys contacted Mr Reynaud Daniels (hereinafter referred to as "Daniels") of the union's attorneys indicating to him that the RFEA's attorneys had not had sufficient time to consult with their client and asked him for a postponement of the matter. By letter dated 19 April 2010, Daniels responded to Chenia and indicated that the union was "not in a position to consent to a postponement of the appeal, but undertakes to consider the issue further upon

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[34] See: Record Bundle A, pages 27 – 41.
[35] See: Annexures "C" and "D" to Brown's affidavit.

receipt of an application for a postponement. In the interim, kindly advise us whether your client tenders our client's wasted costs (including counsel's costs)".[36] Attached to this letter were the following documents:

67.1 a confirmatory affidavit of Lucas Tsipa; and

67.2 three reports referred to in paragraph 8 of Ramakgolo's affidavit.

68 It was against the background of the facts set out above that the RFEA sought a postponement of the hearing of the appeal, contending that:

68.1 it could not have been in a position to respond to the union's affidavit in support of its "*grounds of appeal*" prior to the hearing, as that affidavit only became complete on 19 April 2010;

68.2 in the light of what is set out in subparagraph 68.1 above, the matter was not ripe for hearing as the union had only furnished the RFEA with documentation in support of its appeal in "dribs" and "drabs", thus making it not possible to file any answering papers in opposition to the union's appeal; and

68.3 paragraph 7 of the "*grounds of appeal*" makes reference to "further evidence which will be tendered prior to appeal hearing" with regard to the absence of consultation with the employees or their representatives, without specifying the nature of such evidence, in order to appraise the RFEA of the case it had to meet.

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[36] See: Annexure "F" to Brown's affidavit.

69 On the day of the hearing, on 22 April 2010, the RFEA further gave notice of its intention to object to the Appeals Body's lack of jurisdiction to hear this matter, based on the Independent Body's previous ruling referred to in the section dealing with the preliminary point on jurisdiction. The union faced with this agreed to the postponement of the matter to allow the union's attorneys to consider the union's position regarding this legal point. This was accordingly the situation which prevailed when the parties agreed that the appeal could not proceed on 22 April 2010. The union indicated at that time that it wanted to argue the question of the wasted costs of the day but we ruled that costs should be reserved.

The legal principles of application

70 Rule 10.1 of the Rules provides that the postponement of a scheduled hearing is an indulgence that a tribunal such as the Appeals Body may grant, based on "*the principles of [expeditious] resolution of matters and a balancing of the interest[s] of all parties.*" The Rule further provides that postponements will not be granted unless:

> *"(a) There is good cause shown;*
> *(b) The application is not motivated by delaying tactics;*
> *(c) The application is made timeously;*
> *(d) There is no prejudice to any of the parties in the matter."*

71 In the case of **Myburgh Transport v Botha t/a SA Truck Bodies**,[37] Mahomed AJA as he then was set out the following principles as being relevant in considering applications for postponements by the courts, which, in our view, apply equally to tribunals such as the Independent Body. They are, *inter alia*, that:

71.1 The trial Judge has a discretion as to whether an application for a postponement should be granted or refused. [38]

71.2 That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.[39]

71.3 A court should be slow to refuse a postponment where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.[40]

71.4 An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant.[41] Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case

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[37] 1991 (3) SA 310 (NmSC)
[38] R v Zackey 1945 AD 505.
[39] R v Zackey (supra); Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398-9; Joshua v Joshua 1961 (1) SA 455 (GW) at 457D.
[40] Madnitsky v Rosenberg (supra at 398-9).
[41] Greyvenstein v Neethling 1952 (1) SA 463 (C).

allow such an application for postponement, even if the application was not so timeously made.[42]

71.5 An application for a postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.

71.6 Consideration of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.[43]

71.7 The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

71.8 Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of the case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be

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[42] Greyvenstein v Neethling (supra at 467D.
[43] Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 453.

directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be.[44]

72 In the present case the parties were agreed that the matter had to be postponed, but the principles set out above are relevant to the assessment of the circumstances which led to the RFEA applying for a postponement. Considering the material facts which have been set out earlier in this ruling, we have come to the conclusion that the fundamental fairness and justice required that:

72.1 the union's representatives should have acceded to the request that was made by the RFEA's attorneys on 16 April 2010, so as to enable the RFEA's attorneys to properly consult with their client to prepare an answer to the union's affidavit which at that stage still had some outstanding documents which had been referred to by Ramakgolo; and

72.2 the RFEA was, in any event, entitled to a postponement on 22 April 2010, as the matter was not ripe for hearing, regard also being had to the provisions of Rule 21.11 read with Rule 21.5, 21.6, 21.7 regarding the filing of affidavits. The Council set a date for the hearing of the appeal apparently without notifying the RFEA which learned of the noting of the appeal from the union's attorneys. The union hedged its bets in regard to whether it would tender additional evidence on appeal when in its letter of 23 March 2010 it reserved its rights in this regard. What appears to have occurred is that the Council then found a date on

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[44] Van Dyk v Conradie and Another 1964 (2) SA 413 (C) at 418; Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E) at 137.

which the members of the Independent Body would be available and proceeded to set the matter down for hearing on that date. In the mean time the exchange of affidavits subsequent to the Exemptions Board hearing began to take place. Although the Council did indicate to the RFEA by when it had to file its answering papers, in effect pleadings had not yet opened and were clearly not yet closed when the matter was set down for hearing. It is worth noting that in terms of Rules 21.9 read with Rules 21.4 to 21.7 and Rule 8 that there are time limits for the filing of affidavits in appeal matters and it is therefore necessary to ascertain from the parties to the appeal whether they intend to supplement the evidence before the Exemptions Body by filing additional affidavits. If so, the hearing should be set so as to allow time for those steps to be taken. As a result of the non-compliance by both the union and the Council with the aforementioned Rules, the matter was not ripe for hearing on 22 April 2010.

73 It is our view further that as the matter was not ripe for hearing on 22 April 2010, as a result of the facts and circumstances set out above, it does not assist the union in its claim for wasted costs to rely on the last minute notice given by the RFEA of its intention to raise the legal point on jurisdiction, particularly in that insufficient time had been given to the RFEA to answer to the union's case as fully set out in its affidavit as supplemented by all the confirmatory affidavits and further documentation in the form of the bank reports that were delivered subsequent to the delivery of Ramakgolo's affidavit.

74 In the light of the aforegoing, and especially the provisions of Rule 21 referred to above, it does appear that the set down of the hearing of the appeal was premature. The attitude of the union's attorneys in refusing to accede to the request for postponement, regard especially being had to the manner in which the union delivered documents in support of its appeal in "dribs" and "drabs", was unreasonable in the circumstances. In any event, no submissions were made in substantiation of any prejudice that would have been suffered by the union as a result of the postponement.

75 In all the circumstances, regarding the costs reserved on 22 April 2010, it is our considered view that justice in this regard would be served by an order that each party pay its own costs.

76 By virtue of the circumstances set out above, and having considered the union's appeal, we make a ruling in the following terms:

76.1 the union's appeal is upheld;

76.2 the exemption granted by the Exemption's Body to the RFEA on 18 January 2010, is set aside; and

76.3 no order is made as to costs.

DATED at JOHANNESBURG on this the 25th day of JUNE 2010

Independent Body Member
D. M. Antrobus SC

Independent Body Member
L.T. Sibeko SC