

## **IN THE EXEMPTION APPLICATION OF:-**

**FAST 'N FRESH TRANSPORT**

**Applicant**

**and**

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

**Respondent**

---

## **D E C I S I O N**

---

1. The Applicant applied for exemption not to contribute to the Leave Pay Fund and Holiday Bonus Fund.
  
2. At an Exemptions Body meeting on the 18<sup>th</sup> July 2011. The Exemption Body postponed the application pending the outcome of a decision at Exco on the issue of compliance.
  
3. On the 30<sup>th</sup> August 2011, the Exemptions Body was requested to deal with the application as a decision had been made by Exco;

4. **APPLICANT'S SUBMISSIONS**

4.1 The Applicant submits, inter alia, as follows:

***“Exemption from the Council’s Leave Pay and Holiday Bonus Funds in order to pay holiday bonuses and leave pay directly to our employees.***

***Fast ‘n Fresh Transport had an exemption from the Council’s Leave Pay and Holiday Bonus Funds as part of the Imperial Logistics Group and we have paid holiday bonuses and leave pay directly to our employees since November 2009. The Exemptions has, however, expired on 28 February 2011 without us being aware of it. We thus would like to renew the exemption.***

4.2 The Applicant in further submissions stated as follows:

***“1. PREAMBLE***

***In 2009, Imperial Logistics was granted an exemption certificate (Annexure A) not to pay leave pay direct to the Council’s leave pay fund but directly to its employees as and when their leave was due. Corollary to that, Fast ‘n Fresh Transport as one of the companies belonging to Imperial Logistics were by default of that certificate, were compelled to comply with such. Same exemption expired in 2011 May when the new wage agreement came into effect thereby making all previous agreements null and void.***

***With respect to the previous exemption, our company has been paying people their monies directly and efficiently. We have been complying fully with the exemption and leave payments we done accordingly together with their 13<sup>th</sup> cheque which was paid to them on 30<sup>th</sup> November each year. Our people supported the initiative and no prejudice was encountered in that regard. It is on the same breath that we would like to further apply for similar***

*exemption as it was found to be viable both administratively and otherwise. Should this application be granted, a proposal is that, the exemption be granted for the duration equivalent to the current wage agreement which is until 28<sup>th</sup> February 2013.*

## **2. FACTORS LEADING TO APPLICATION FOR THE EXEMPTION**

### **2.1 PAST RECORDS OF COMPLIANCE**

*Before the promulgation of the new wage agreement, Fast 'n Fresh possessed a valid exemption certificate exempting us from paying the leave pay direct to the Council but straight to the people as and when they go on leave. That had happened with no recourse and complications during the past years. Even before granting of such exemption, the Applicant was fully complying with the main collective agreement including that of paying leave pay direct to the Council. There was never a dispute regarding interpretation and application against us or non-compliance. There are no records of non-compliance in our chronicles proving that we once contravened that. The same shall go without saying with the Council also. We believe there is no outstanding issue under our levy numbers in that regards.*

### **2.2 SPECIAL CIRCUMSTANCES**

*Our people have welcomed and acknowledged the pace at which their leave monies were paid to them each time they go on leave. With mutual individual agreement, two options were provided with regards to the payment of leave pay, people can either apply for advance from their wages on the first day of their leave or be paid their on the next pay day of them returning from their annual leave. This is purely democratic and decided upon by leave*

*Applicant at their own discretion. This will automatically change this year should this application not be granted. This was not a unilateral decision by the employer; a petition was done whereby all affected employees were asked to append their signature should they still prefer their leave pay to be paid as previously paid (while still governed by the exemption) 66% of our affected employees signed the petition with only 34% out of reach due to their operational commitments like long distance driving. However, we have their undertaking in this regards and promise to furnish you with updated list as and when they come back from their commitments. It will be detrimental to the affected, i.e. 63% who opted for their benefits to be handled like previous should this application not be granted.*

### **2.3 PRECEDENT THAT IS SET**

*We set a precedent during the previous two years in that our people were used to be getting their monies as and when they go on leave. The same happened with their 13<sup>th</sup> cheque that as a precedent was paid the 30<sup>th</sup> of November each year respectively. There is a going to be a labour dissatisfaction and unhappiness should this not be granted. We had meetings with our workforce and their understanding is that they are expecting their monies to be paid on time exactly like previous times to avoid any inconvenience and such should be as usual. This is the fair expectation and a fear of course from the Applicant side. We have already secured a bank guarantee cheque of 2.5 (two point five) million rand to cater for the employees' cheque on 30<sup>th</sup> November 2011. This was furnished as documentary evidence with initial*

*application.*

## **2.4 INTEREST OF THE INDUSTRY**

### **2.4.1.1 UNFAIR COMPETITION**

*There is no unfair competition on the side of the interests of the Council which forecasted in this regards as all monies due to the Council will still continue to be paid in full. The only provision made is for leave pay-out to the leave pay fund. There are no intentions of competing with the Council whatsoever, we belong to the RFA and we will remain members of that. We will continuously be bound by the main collective agreement.*

### **2.4.1.2 COLLECTIVE BARGAINING**

*ILRS (Imperial Logistics Refrigerated Services) previously known as Fast 'n Fresh as a company is belonging to Imperial Logistics, a full affiliated members of the RFA. There will always be collective bargaining with the tribunals. Apart from that, we have recognised SATAWU under our establishment and that shall remain like that. There is no prejudice to the current state of affairs with regards to the collective bargaining. We have our own RA (Recognition Agreement) with the trade union and we see no harm to that relationship.*

### **2.4.1.3 POTENTIAL LABOUR UNREST**

*We anticipate this should the exemption not be granted. Currently a norm here is that employees get their leave payout each time they go on leave and that has been a practice and a precedent set for the past two years. Although consultations were made with them regarding this application, their understanding is that whatever comes out as a result of this application, should not*

*impair their relationship with us and their times they used to be getting their leave pay and 13<sup>th</sup> cheque payments. We will have to explain to them the reasons for changing payments methods as truly, there will be changes to their expectations and it might have huge labour unrest.*

#### **2.4.1.4 INCREASE EMPLOYMENT**

*There are no future predictions of increased employment.*

### **2.5 INTEREST OF EMPLOYEES**

#### **2.5.1 EXPLOITATION**

*Employees shall receive their monies due to them with no exploitations and on time. All benefits in line with the main collective agreement and the wage agreement shall be respected. The only difference will be that the payments shall come straight from us to them and not from the Council. We have a recognised trade union on side with elected shop stewards, whom we believe should there be any dissatisfaction or contentions regarding payments of their benefits, there are dispute resolution mechanisms in place to can be followed. With no records of dispute from out site, is evident that there are no exploitations.*

#### **2.5.2 JOB PRESERVATION**

*Our employees are the best assets of the company. There shall be no loss of jobs as results of this. Should there be any likelihood for job losses, right protocol shall be followed at all times. Be it resulting from operational requirements, misconduct or incapacity, guidelines in terms of*

*schedule 8 and 189 of LRA 66 of 1995 shall always be considered to the latter.*

### **2.5.3 SOUND CONDITION OF EMPLOYMENT**

*There will be a great sound of employment conditions emanating from approval of exemption. There is an arrangement that should an employee prefer to be paid his/her leave pay on the first day of resumption of his/her leave period that shall happen. While being mindful of the fact that some people prefer to receive their money on the next pay day jointly with their salary, we are flexible in that regards. There is provision for that. The system is flexible.*

### **2.5.4 POSSIBLE FINANCIAL BENEFIT**

*No party will be benefiting out of this process. The only benefit is that employees will receive their monies as and when convenient for them to receiving them. Previously, most of the leave Applicants go on leave without their leave payments and thus frustrates them. With this projected system in place, drivers will benefit much from that as they will get their money at the time convenient for them. This is a benefit. We have their best interest at heart. Good sound labour relations emanates from well-established industrial relations. This is the premises of such.*

### **2.5.5 HEALTH AND SAFETY**

*No impact whatsoever on this, we have a Risk Office on side responsible for this and the status*

*quo shall remain. There will be no alterations / deviations to compliance with OHSA and any prescript governing the health and safety at work place. This is the same with the basic rights. No infringements is purported to happen in that regards. The government prescripts governing this will always supersede the internal procedures. We can however strive to go beyond the legislated but no purpose of over righting the existing ones.*

## **2.6 INTEREST OF THE EMPLOYER**

### **2.6.1 FINANCIAL STABILITY**

*The company's finances are stable considering the fact that the company has just renewed its five years contract with one of their biggest client. For the term of the contract, subject to any failures, breach or deviations, there is no possibility of financial loss on the side of the drivers. This will enhance the flow of finance fluently and there will be upfront budgeting for this purpose and employees will have their leave planned. There will be no need for bank guarantee cheques. There will be no additional financial benefits on the side of the employer as a result of the exemption.*

### **2.6.2 IMPACT ON PRODUCTIVITY**

*Happy employees produce good and quality out product. The fact that people go on leave and come back without leave pay, affects the production.*



*People are either absent from work claiming that they have no money to come to work as a result of not being paid their leave pay. Under circumstances where the leave pay is paid by the Council, employees are faced with deficit each time they come back from leave resulting from the fact that they will have their money paid out while on leave and the company pays the difference depending on the number of days worked when they resume their duties from leave. These reduce their morale and have huge impact on production for the whole of the next month from leave. High absenteeism increases drastically as people go on AWOL (Absent without leave) because of not having money for taxi fares to work. The company can only have solid productivity levels if people are happy and treated as such.*

### **2.6.3 FUTURE RELATIONSHIP WITH TRADE UNION**

*The relationship with the union will even become more stronger considering the fact that there will be no dissatisfactions resulting from non-payment of leave days at times when people goes on leave. Trade union functions and operates for the interest of its members. Where there is harmonious industrial relationship, the ties between the employment and the union is even stronger.*

### **2.6.4 OPERATIONAL REQUIREMENTS**

*Nothing under this is anticipated.*

5. **COUNCIL'S SUBMISSIONS**

The Council submits as follows:

***“The Applicant is currently not complying with the Leave Pay and Holiday Pay bonus clauses in that it does not contribute to the two different funds after the Applicant’s exemption had expired on 28/02/2011.***

***The Applicant’s exemption application does not conform to the criteria as set out under clause 4(8) of the Exemptions and Dispute Resolution Agreement and therefore its application should fail.”***

6. **MTWU**

The MTWU opposed the application by the Applicant on the basis that consultation did not properly take place with the Union and the Union opposed consultations directly with shop stewards.

7. **ANALYSIS**

The Exemptions Body is required to consider the application in terms of the criteria set out under clause 4(8) of the Dispute Resolution Agreement. Clearly, the Exemptions Body is not limited to a consideration of the listed criteria. The first three criteria are the Applicant’s past record of compliance with the provisions of Council’s collective agreements; any special circumstances that exist; and any precedent that might be set. Thereafter the criteria of “the interests of the industry”, “the interests of employees” and “the interests of employers”, each of which is broken down into various sub categories of criteria which are listed.

## 8. PAST RECORD

If regard is had to the Applicant's past record, it is clear that Applicant has not been complaint from 1<sup>st</sup> March 2011. In terms of an Exco decision the following is noted:

***“A Decision made by EXCO for companies who did not comply in contributing towards funds that they were exempted from for the period 01/03/11 to 20/05/11 will not be seen as none compliant. However should they be in contravention of the clauses in question after the 20/05/11 than they are none compliant. We hereby request that a ruling be made on all outstanding applications.*”**

***Council can also confirm that none of these companies are in compliance after the 20/05/11.”***

## 9. SPECIAL CIRCUMSTANCES

9.1 In terms of special circumstances the Applicant relies on options provided to its employees. Employees by way of a petition preferred to be paid via the Company.

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

***“To qualify for an exemption an Applicant must be in a situation which is somehow exceptional and not merely run-of-the-mill. However, proof that the Applicant is in an exceptional situation does not in and of itself warrant the granting of an exemption. The exceptional situation of the Applicant must constitute*”**

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

9.3 The Appeal Body went on to state that the correct approach as canvassed in the cases referred to is that the Appellant has to show special circumstances and that this factor is not to be elevated above the others and is merely a factor to be weighed along with all the others.

9.4 In the present matter the preference of employees does not constitute a special circumstance.

#### 10. **ANY PRECEDENT THAT MAY BE SET**

A precedent was set in the previous 2 years. Clause 21(12) provided for a special dispensation, which was negotiated by the parties for a trial period. In terms of the current dispensation Clause 21(12) has been repealed.

11. **INTERESTS OF EMPLOYEES AND CONSULTATION WITH TRADE UNIONS**

11.1 The Employees will receive their monies due to them, with no exploitation and on time. The difference is payment will go straight to them and not Council;

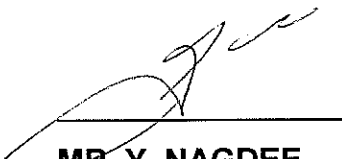
11.2 The Exemptions Body believes that the employees' interests will be served if payment is made by Council.

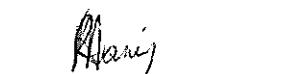
12. **DECISION**


12.1 Adopting a holistic approach to all the factors to be considered in an application of this nature, the Exemptions Body finds that the Applicant has not met all the criteria. The application is opposed by the MTWU and the Applicant has not been compliant after the exemption licence expired.

12.2 Further, the Exemptions Body cannot find any special circumstances and accordingly the application is refused.

DATED THE 9<sup>th</sup> DAY OF September 2011 AT BRAAMFONTEIN, JOHANNESBURG.

  
**MR. Y. NAGDEE**  
 Chairperson of the  
 Exemption Body

  
**MRS R. MANNING**  
 Member of the  
 Exemption Body  
**I agree**

  
**MR G. WESSELS**  
 Member of the  
 Exemption Body  
**I agree**