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

In the matter between:

COLYN'S TRANSPORT 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 1 March 2013 at Road Freight House, Braamfontein in this matter. Presiding were D.M. Antrobus SC and Mr I. Haffegee. Mr P. Mndaweni appeared for the Council. Also present at the hearing were Ms N. Seegers of the administrators (SALT)[1] of the Road Freight and Logistics Industry Provident Fund and the Chief Benefits Officer of the Council Mr N Bopape. The appellant was represented via tele-conference call by Ms Y.van der Merwe and Mrs B. Colyn assisted by Mr L. Engels a broker and Ms L. Bredenkamp of Old Mutual.

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[1] Smart Administration Leveraging Technology (SALT) Employee Benefits

2 The appeal was approached on the basis that all the documentary evidence presented to the Exemptions Body[2] was handed up, together with the decision of the Exemptions Body in terms of which the application for exemption was refused on 2 November 2012. In addition the tribunal was furnished with an abridged quotation prepared for the appellant by Old Mutual dated 17 July 2012. A series of e-mails reflecting correspondence between the various players and the Fund administrators was also presented. It was pointed out during the appeal hearing that the list of employees read together with the letter to employees dated 13 August 2012 (both of which also formed part of the documentation before the Exemptions Body) fails to indicate whether the employees are indeed in favour of the exemption now applied for. With the consent of the Council the appellant therefore undertook to obtain proof of support by its employees for the exemption applied for and to submit such proof to the Independent Body via the Council's offices which further document was provided to the members of the tribunal on the 15 March 2030. During the course of the appeal hearing a letter dated 28 February 2013 from the Principal Officer of the Fund was handed up. This letter was a response to the appellant's written appeal submissions. The appeal hearing was then adjourned to permit the appellant an opportunity to consider and respond to this letter and its contents. The parties then proceeded to make their submissions and address their arguments to the tribunal based on these appeal documents.

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[2] Including the exemption application form, resolution by the members of the applicant CC; the letter of 13 August 2012 (Member Communication), a Vehicle List, List of Employees.

The merits of the appeal

3 The appellant confirmed during the appeal hearing that it is a member of the Road Freight Employers Association (RFEA). The appellant is therefore represented on the Council through this employers' organisation and is currently bound by the Provident Fund Collective Agreement[3] which argreement has recently been extended for a further period ending 28 February 2014.[4]

4 In terms of clause 6 of the Provident Fund Collective Agreement the employees of the appellant are obliged to become members of the industry Fund ("the Fund"). The appellant seeks a permanent exemption from this requirement in respect of all of its 25 employees.

5 The letter of 13 August 2012 titled "Member Communication" which formed part of the appeal documentation was amended to include the names and places for signature of the 25 employees. 21 of the employees have signed this document which, as previously indicated was made available to the tribunal post the hearing and on 15 March 2013. It is apparent from this document that 4 employees have not signed in support of the exemption applied for. This letter

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[3] Government Notice R 612, GG No. 27713 dated 1 July 2005

[4] Government Notice R 117, GG 36166 dated 22 February 2013

is of doubtful value as evidence of the employees' attitude being one of support for this exemption application because it fails to state more than that an exemption has been applied for and that reliance is placed on the fact that the employees "*understand information given to us with this writing*". There is however no indication as to what that accompanying information was, so that the document falls short of constituting a proper confirmation by the employees that they understand the exemption which has been applied for and that they are in favour thereof. For present purposes, I shall nevertheless accept that this letter does show that at least 21 of the 25 employees support the application for exemption.

6 The respondent Council opposes the exemption sought.

7 The appellant applied for the exemption on 22 August 2012 when it lodged the exemption application. The exemption sought is based on appellant having obtained a quotation from the private sector which it contends is a product which provides "*better benefits in terms of retirement funding*" than does the industry Fund. In support of this the appellant has produced an abridged quotation from Old Mutual dated 17 July 2012. Appellant maintains that this quote is made on the same basis as the current benefit structure currently in place. It transpired however during the hearing that one of the appellant's major complaints is that it has not been provided with the information which it has requested from the Fund in order to make the comparison. The obvious question therefore arose as to how the appellant is able to contend that the Old Mutual proposal offers superior benefits than does the Fund if certain vital

comparative information from the Fund has not been produced in order for the appellant to make the comparison. To that question there was no real answer provided during the appeal hearing.

8 The debate in the appeal hearing centred on appellant's letter dated 6 December 2012 to which the Principal Officer of the Fund responded by way of letter dated 28 February 2013 which was handed up at the hearing.

9 The first point raised by the appellant is that it had not obtained clear answers to its queries addressed to the Fund administrators. A perusal of the e-mail correspondence between the appellant's representatives and Ms J Stout of the Administration Department of the Fund reveals that the appellant did request certain information regarding risk and administration costs, the lump sum payment on termination of employment and the investment portion. Also requested was what is referred to as "*Provident Fund Fact Sheets*". It is apparent from the exchange of e-mails that the Fund administrators did not fully answer these queries. In paragraph 1 of the letter of 28 February 2013 the Principal Officer responded by pointing out that the Fund benefit structure is as prescribed in clause 5(2)(iii) of the Provident Collective Agreement and then restated certain provisions of that clause. He then pointed out that the actual Rand amounts may differ from member to member depending upon their salaries. Whilst these answers may not be altogether satisfactory, as has already been alluded to, it is the appellant's case that the benefits available under the proposed Old Mutual fund are better than those provided by the industry Fund. The onus is on the appellant to produce satisfactory evidence in

support of that claim on a balance of probabilities. The situation is really no different from that which prevailed on 6 December 2012 when appellant stated that it was waiting on information as requested in its e-mails. The appellant has therefore quite simply failed to produce the comparative evidence which it itself regarded as important and this tribunal is consequently left in the dark as to whether there is any merit in the appellant's claims that the proposed alternative fund offers superior benefits.

10 Appellant's next complaint was that the death claim of one P F Maas made in 2010 is still outstanding. The response of the Principal Officer was that the administrators had reviewed the files relating to this death claim which revealed that information which had been requested of the claimant by the Fund in its letter dated 27 November 2012 and in an e-mail dated 29 November 2012 remained outstanding. During the appeal hearing we were informed that the administrators had finally received a response from the claimant on 26 February 2013 which, being just a few days prior to the appeal hearing, had therefore not yet been dealt with. It was furthermore pointed out that the Fund was obliged to comply with the requirements of section 37C of the Pension Funds Act, 1956 in regard to the disposition of these death benefits once the Fund was in possession of the requisite information. This process requires a decision by the trustees of the Fund but is dependent on the information referred to. In the appeal hearing we were moreover informed that the administrators of the Fund had recently been replaced with SALT, the new administrators, having taken over the administration of the industry Fund. There was an acknowledgement by the Council that there have been lapses in the

administration of the Fund and that the new administrators were in the process of working through a backlog of claims. Nevertheless, the current administrators undertook at the hearing to respond immediately by e-mail and to resolve this matter, which was further complicated by the death of a further family member, as soon as possible. This debate about the long outstanding death claim has little bearing on the issue of whether an exemption should be granted or not. It is really only relevant in so far as the inference can be drawn from the circumstances that an inordinately lengthy period of time has passed without this particular death claim having been finalised. Apart from the fact that we are not fully appraised of the circumstances under which this claim apparently complicated by the further death, and may therefore have taken longer than usual to determine, it does not follow that the failure to expeditiously address a single death claim shows that the administrators are so inept that the appellant should be exempted from dealing with the industry Fund.

11 Next, the appellant contends that its members should have freedom of choice in relation to their pension benefits. In this regard the appellant contends that this choice has nothing to do with collective bargaining and that the Fund and the Council do not act in the best interests of their members. The industry Fund is the product of the collective agreement referred to in paragraph 1 above. Indeed the appellant is a member of the Road Freight Employers' Association which is one of the parties which bargained for and concluded this collective agreement on appellant's behalf. The argument that individual members must in those circumstances be entitled to the freedom of choice in relation to their

pension fund and consequent benefits, accordingly does not hold. Appellant's remedy insofar as choice of fund is concerned is not limited to to obtaining an exemption, but is primarily to have its representative employer association negotiate a different agreement and perhaps thereby establish a different industry fund.

12 The appellant's remaining complaints addressed the issue of lack of transparency in regard to the benefits and costs associated with the industry Fund and allegations of poor communication between the Council and employers. The specific complaint was that employers do not receive annual benefit statements and that the individual members also do not receive such statements. The new administrators acknowledged that there has historically been a lack of communication but pointed out that in January 2013 a first interim benefit report had been sent out and that if the appellant employer did not obtain that report, it was probably because it's relevant contact details were out of date. It was acknowledged that these were interim benefit statements and that complete and verified statements would only be available by June or August 2013. This situation is in consequence of the new administrators having to reassess the Fund's data whilst at the same time addressing administrative backlogs which had developed under the previous fund administrators.

13 It is necessary at this juncture to address the principles according to which an exemption application of this nature is to be determined. 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[5] 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 proposed 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*".[6] The permanent exemption applied for in the present case is fundamentally similar to that sought in the *RAM International Transport* case (albeit that the appellant in this case is a party to the collective agreement as opposed to a non-party to whom the agreement was extended). The relevant factors considered in the *RAM International Transport* case are similarly relevant to the present case and in particular the discussion[7] concerning the approach to be adopted under the Labour Relations Act ("LRA") in evaluating and deciding exemption applications of this nature. In what follows I address those same considerations.

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[5] 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 1943 (BCA)

[6] unreported judgement (supra) at para 12

[7] at paragraphs 20 to 30

14 Clause 4(8) of the current Dispute Resolution Agreement[8] 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 subparagraphs 8(a) to (f) of that collective agreement. Firstly, the Independent Body is clearly not limited to a consideration of the listed criteria, but should at least have regard to those criteria. The first three listed 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 in turn each listed. The approach to applying these criteria was considered previously by the Independent Body in the case of *Rocket Trading 133 CC t/a Govendor's Transport v the National Bargaining Council for the Road Freight Industry*[9] to which I refer below.[10]

15 The appellant in the present case did not seek to address separately each of the factors mentioned in clause 4(8) of the Dispute Resolution Agreement. This

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[8] Signed on the 14th of August 2007

[9] an unreported decision of Antrobus and Sibeko dated 12 November 2004, at paragraphs 39 to 44

[10] See too: *M4 Carriers & Accounting and National Bargaining Council 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.

tribunal must nevertheless consider those factors insofar as they are relevant and I turn to consider those factors.

16 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 Council accepted that the appellant's past compliance is good.

17 The next factor is special circumstances which may exist (clause 8(b)). The appellant did not set out special circumstances in its original exemption application but in its letter of appeal has relied on the following which it says constitute special circumstances in this case.[11]

17.1 The greater transparency on the part of the proposed broker when compared with the lack of transparency on the part of the Fund.

17.2 Poor communication by the Fund with the employer and employees who do not receive annual benefit statements. The absence of the cost component being reflected on the Fund's annual benefit statements and the fact that members' annual benefit statements cannot be downloaded from the Council's website.

17.3 The fact that the death claim for a member one Maas referred to above has not been finalised since 2010.

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[11] Paragraph 6 of the appeal letter of 6 December 2012

17.4 The absence of clarity as to who manages the funds invested by the industry Fund.

17.5 The fact that poor communication by the Fund to the employer and the employees who are fund members has resulted in both the employees and the employer choosing to apply for an alternative fund.

18 The Council does not accept that special circumstances have been shown. The question of what constitutes "special circumstances" was considered in some detail in the decision of the Independent Body in *Rocket Trading 133 CC t/a Govendor's Transport* decision.[12] The considerations regarding special circumstances mentioned in 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 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

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[12] at paragraphs 39 to 44

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)"*

19 It is however not appropriate to seek to circumscribe the precise parameters of the meaning of the term "special circumstances" in all circumstances. In *Loutrans and National Bargaining Council for the Road Freight Industry*[13] 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.*[14] Both those cases appear to have been applications for permanent exemptions. A similar 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.[15] The common instance in which an exemption will be granted is where a temporary exemption is sought and is found to be warranted by a temporary inability to comply, usually 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 employer anticipates that it will recover in the near future. Neither the *Loutrans* nor the *Milltrans* or the *Superstone Mining* decisions should be read to mean that special circumstances can never be widely applied so as to encompass such a possibility. That is too narrow a construction of the meaning of special circumstances.

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[13] (2008) 29 ILJ 498 (BCA)

[14] (2002) 23 ILJ 1930 (BCA)

20 The appellant relies on the circumstances described in paragraph 17 above as constituting special circumstances, but those factors whether considered individually or cumulatively do not in my view constitute special circumstances as envisaged in the collective agreement. It is also argued that the contributions made by the appellant to the Council's Fund and the appellant's proposed Fund are stated to be identical[16] and that the allegedly superior benefits offered by the Old Mutual Fund constitutes a special circumstance. A detailed comparison of the benefits applicable under the two funds was not undertaken by the appellant. That is unsurprising given that the appellant complained of the lack of available information from the Fund and, as already adverted above to the appellant has not been able to compare the benefits of the two funds in any meaningful way.

21 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 to be elevated above the others and is merely one factor to be weighed along with all the others. Even if one were to accept – which on the evidence has not been shown - that the appellant's proposed fund *de facto* presently offers better benefits than those offered through the 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. The comparison is a difficult one to perform directly in order to be sure that one is

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[15] (2004) 25 ILJ 1567 (BCA) at 1571F-G

[16] Page 11 para (f) (i) of the exemption application

truly comparing apples with apples. In the result and in the absence of convincing evidence as to the comparison 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 the difference in the way that the proposed Old Mutual fund is to allocate the membership contributions is to be accepted as constituting a special circumstance then there are probably many employers in the industry which will be able to arrange quotes from alternative funds of a similar nature. As was pointed out for the Council in argument, and indeed conceded for the appellant, there is nothing to prevent the alternative fund from increasing its premiums in the forthcoming year, having secured the appellant's business by offering an apparently highly competitive rate. Employees who switch to the alternative fund are accordingly exposed to this risk. This is not what the collective agreement envisages by way of special circumstances.

22 The next factor is any precedent which may be set (clause 8(c)). The appellant, contends that no precedent will be set in the industry if an exemption is granted. The Council contends otherwise arguing that to grant an exemption in the present circumstances would lead to the opening of the floodgates with numerous employers seeking and being entitled to obtain exemptions from membership in the industry Fund. Certainly, it would be easy for many employers to obtain an alternative quote from a friendly broker and on that basis obtain an exemption. 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 would open the door to other employers to set up

their own funds in competition with the Council's industry Fund merely on the basis of a favourable competing quote from an alternative 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 Collective Agreement. There are advantages to requiring most if not all employees in the sector to belong to an industry fund such as economies of scale, consistency and uniformity of benefits and penalty free transfers of employees from one employer to another within the industry. These factors must be weighed up in the evaluation and militate against the grant of an exemption to the appellant.

23 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. The interests of the industry as regards collective bargaining favour the refusal of an exemption and would in a real sense amount to a threat of the unravelling of the collective agreement reached through the process of collective bargaining, namely that an industry provident fund be established together with a requirement that all employees in the industry engaged after a certain date are obliged to join the industry Fund.

24 In regard to the criteria of the interests of the employees (clause 8(e)), the appellant does not allege any facts in its application form. It merely contends

generally that the financial benefits to the employees will be greater under the Old Mutual Fund. However, for the reasons already canvassed above that has not been shown in this case.

25 As regards the interests of the employer (clause 8(f))) it is merely pointed out by the appellant that the contributions to the competing funds would be identical. At best, for the appellant this is a neutral factor.

26 Weighing up the various factors mentioned above I am not convinced that the appellant ought to be granted a permanent exemption and that to exempt the appellant would be in the interests of the balanced interests of the employees, the employer and the industry. 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 inevitably result in dramatically increased provident fund premiums in the alternative fund in order to sustain those promised benefits. Even if one accepts for the sake of argument that the benefits of the Old Mutual 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.

27 The appellant seeks a permanent exemption. The exemption application and the evidence presented before the Exemptions Body and the evidence and argument before this appeal tribunal was all on the basis that a permanent exemption was sought and there is no suggestion that a temporary exemption should be granted. That is the only question which this appeal is required to determine and 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.

28 The appeal is accordingly dismissed.

DATED AT SANDTON ON THIS 5th DAY OF APRIL 2013

D.M. ANTROBUS SC
Member of the Independent Body

I. HAFFEJEE
Member of the Independent Body