

IN THE EXEMPTION APPLICATION OF:-

B M HAULIERS AND LOGISTICS

Applicant

and

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

Respondent

DECISION

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

Present on this day were:-

- | | | | |
|-----|--------------------|---|--|
| 1. | Adv. R. Rawat | - | Chairperson of the Exemption's Body |
| 2. | Mr. Y. Nagdee | - | Member of the Exemption's Body |
| 3. | Mr. T. Short | } | Road Freight Employers Association
(RFEA) |
| 4. | Mr. G. van Niekerk | | |
| 5. | Mr. P. Mndaweni | - | National Bargaining Council for the
Road Freight Industry (Council) |
| 6. | Mr. A. Ramakgolo | } | South African Transport & Allied Workers
Union (SATAWU) |
| 7. | Mr. J. Gamede | | |
| 8. | Ms. Susan Tricker | - | Applicant's Attorney from Tricker & Associates |
| 9. | Mr. Swanepoel | - | Owner of Applicant |
| 10. | Mr Piet Oosthuizen | - | Attorney from Viljoen and Meek |

This is an Application for Exemption from the payment of the compulsory contributions to the NBCRFI (Council) to the following funds:-

1. Sick Pay Fund;
2. Leave Pay Fund;
3. Holiday Bonus Fund;

The Application for Exemption from the Holiday Bonus Fund was withdrawn by the Attorneys for the Applicant, namely Ms Tricker and Mr. Oosthuizen. This was done after

Ms Tricker and Mr Oosthuizen were afforded the opportunity to consider their position as they had failed to follow the requirements for such an application.

As regards the Applications for Exemption from the Sick Pay and Leave Pay Funds of Council, the primary thrust of Ms Tricker's argument was that the Applicant pays far in excess of the minimum wage. It was submitted that the average wage earned by employees at B. M. Hauliers and Logistics was 4 times in excess of the minimum wage. Mt. Swanepoel, the owner of B. M. Hauliers and Logistics, himself, addressed the Body and states that he had been in the Road Freight Industry for approximately 26 years and having himself at some point, being a long distance driver, he was aware of the extreme difficulties and personal sacrifices required of such a person, that, when he became an employer, endeavoured to ensure that his employees received food reimbursement their gruelling jobs. Mr. Swanepoel also outlined the other benefits he provides for his employees, one of which is a medical aid package from Discovery Health of which the Applicant paid 2/3's of the contribution and the employee 1/3 of the contribution.

Ms Tricker, when questioned by the Exemption Body about the consideration of Collective Bargaining, Unfair Competition and Special Circumstances, responded that she saw no problem as the employees were being very well paid.

Mr. Mndaweni of the Council opposed the applications for, inter alia, the following reasons:-

1. Such an exemption would have a negative impact on the whole notion of Collective Bargaining;
2. The fact that employees were being well paid did not constitute a Special Circumstance;
3. The Applicant, if it were so granted an Application for Exemption that it sought would in fact be receiving an unfair competitive advantage as it could utilise monies due to be paid to Council and which regretfully belongs to the

employees, for its own advancement;

4. A precedent would be created.

Mr Ramakgolo of SATAWU agreed with Mr Mndaweni and stated further that to grant such Applications for Exemption would be to defeat the whole purpose of the very existence of Council and the process of Collective Bargaining.

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

- “(a) The Applicant's past record (if applicable) of compliance with the provisions of Council's Collective Agreements and Exemption Certificates;***
- (b) any special circumstances that exist;***
- (c) any precedent that might be set;***
- (d) the interests of the Industry as regards:-***
 - (i) unfair competition;***
 - (ii) collective Bargaining;***
 - (iii) potential for labour unrest***
 - (iv) increased employment.***
- (e) the interests of employees' as regards:-***
 - (i) exploitation;***
 - (ii) job preservation;***
 - (iii) sound conditions of employment;***
 - (iv) possible financial benefits;***
 - (v) health and safety;***
 - (vi) infringement of basic rights.***
- (f) the interests of the employer as regards:-***

- (i) *financial stability;*
- (ii) *impact of productivity;*
- (iii) *future relationship with employees' trade union;*
- (iv) *operational requirements."*

In the reported decision of:-

Milltrans vs NBCRFI

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

1. *The National Bargaining Council for the Road Freight Industry is the product of Centralized Collective Bargaining as contemplated in section 3 of the Labour Relations Act 66 of 1995 ("LRA") and economies of scale, uniformity of benefits and contribution rates, and cost and penalty-free transferability result from uniform national enforcement of the provisions of the scheme.*
2. *Exemptions are, in terms of section 32(3)(e) of the Labour Relations Act, No. 66 of 1995 (the Act), intended to accommodate permitted non-compliance with the agreement on criteria which the enforcing Bargaining Council is entitled and obliged to specify.*
3. *The criteria are designed to accommodate motivated temporary non-compliance, against certain assurances given by the Applicant and designed to protect the industry, interest parties, the Bargaining Council's statutory function and the institution of Centralized Collective Bargaining.*
4. *These requirements require a structured reasoning process in terms of which the values of collective bargaining and uniform enforcement are required to be upheld in the manner contemplated in section 3 and 28(1)(b) of the Act.*
5. *The Council contends for a two-stage reasoning process comprising an enquiry into:-*
 - 5.1 *special circumstances and precedents;*
 - 5.2 *a balancing of interests as between the industry,*

employees, and employer.

6. *On this reasoning process, mere consensus between employers and employees is insufficient as it amounts to second-tier bargaining and "contracting out". It is not in itself a "Special Circumstance".*
7. *As the Council sets minimum conditions, more favourable arrangements are, generally speaking, not the subject matter of Exemption. Voluntary second-tier bargaining leading to more favourable conditions does not fall within the scope of the exemptions process.*
8. *The membership of the Council's Funds are an exception to the minimum standards argument in that membership of the Funds is compulsory in terms of the agreements. Compulsory membership is accordingly not a "minimum condition", but an actual requirement aimed at achieving the Fund objectives.*
9. *Special circumstances accordingly need to be shown in respect of this actual requirement."*

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

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

*"To promote and facilitate collective bargaining at the workplace and sectoral level".
Section 1 of the Act, which sets out the purpose of the Act, states in:*

- 1(c) *to provide a framework within which employees and their trade unions, employers' and employers' organizations can collectively bargaining to determine wages, terms and conditions of employment and other matters of mutual interest; and*
- 1(d) *the purpose is "to promote:-*
 - (i) *orderly collective bargaining;*
 - (ii) *collective bargaining at sectorial level".*

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

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

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

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

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

The argument advanced by the Council in this instance that mere consensus between employees and employers is no more than “second – tier bargaining and contracting out”

is very convincing as seen against the wider prospective of the objectives and vision of the Labour Relations Act.

On a thorough examination of the facts and arguments presented not only by the Applicant but also the other parties present, the Exemptions Body finds that the mere fact that an employer pays far in excess of the minimum wage cannot in itself create a special circumstance which obviates the necessity of belonging to the NBCRFI as a role-player in the Industry.

Whilst in no way vitiating the passion shown by Mr Swanepoel in his role as an employer who seeks to do the best for his employees, this cannot create an expectation that such an employer is entitled to be released from being an intricate and interwoven thread of the ball of Collective Bargaining.

The issue of who the levies paid to Council belong to, is one which has arisen on numerous. This being so, the employer cannot seek to withhold such levies by way of an exemption application so as to enhance its own status as an employer by paying more to his employees. This would lend itself to the employer enjoying an unfair competitive advantage over other complaint employers in the Industry. As such, is such an exemption were to be granted, a dangerous precedent would come to exist, opening the flood gates to other applications for Exemption on such a ground as the employer relies on in this application.

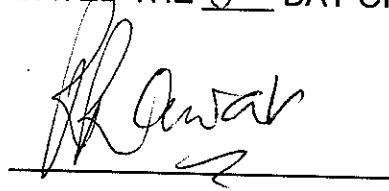
The Exemptions Body therefore finds that the scales tip most heavily in favour of, inter alia, the wider issues of Collective Bargaining, an unfair competitive advantage and a precedent being set. The arguments of the Applicant were myopic and lacking in an understanding of the aforementioned concepts. These concepts are the cornerstone of the promotion of Collective Bargaining in the LRA 6 of 1995.

The necessity of creating self regulating and functions Bargaining Councils to serve the parties to its specific Industry would be lost, leaving in its wake, a heavier load on the already overloaded CCMA, less industry driven units of speciality and perhaps most

importantly a diffusion of the concept of joint decision making of all parties in any particular industry.

The Exemptions Body, therefore finds itself unanimous on the finding that the Applications for Exemption in this matter must be refused.

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



ADV. R. RAWAT

Chairperson of the
Exemption Body



MR. Y. NAGDEE

I agree