



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 4/2020

GOLDEN ARROW BUS SERVICES (PTY)

Appellant

and

THE SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL

First Respondent

COMMISSIONER PAT STONE N. O

Second Respondent

TRANSPORT AND OMNIBUS WORKERS UNION

Third Respondent

NATIONAL UNION OF METAL WORKERS OF

SOUTH AFRICA

Fourth Respondent

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS UNION

Fifth Respondent

UNITED ASSOCIATION OF SOUTH AFRICA

Sixth Respondent

NON-UNIONISED EMPLOYEES

Seventh Respondent

Heard: 18 March 2021

Delivered: 14 May 2021

Coram: Davis JA, Coppin JA and Savage AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This appeal concerns an inquiry into the consequences of a collective agreement for a member of a bargaining council in which a binding agreement was concluded, notwithstanding the opposition of the particular member. Appellant is an employer which carries on business within the road passenger transport industry. Accordingly, it falls within the scope of the first respondent and is subject of to the latter's main collective agreements. Appellant contends that, as a result of that which it describes as "a historical anomaly" relating to the application of an "notch" system which predated the formation of the first respondent, a substantial disparity exists between the wages which appellant is obliged to pay its employees and those which its competitors in the industry are obliged to pay their employees.
- [2] In order to alleviate what appellant considers to be a wage disparity problem, in June 2018, it sought a partial exemption from the terms of the first respondent's main collective agreement ('the 2018 MCA') which provided for an 'across the board' wage increase of 9% for the year ending 31 March 2019 and for a similar 8% increase for the year ending 31 March 2020. By seeking a partial exemption, the appellant sought to be allowed to depart from the obligation to pay the full 8% increase to all of its drivers in respect of the second year of the agreement. It emphasised that it did not seek any exemption in respect of drivers already on the first respondent's scale of minimum wages who had received the full increase of R 183.51 per week.

- [3] The application which it made for a partial exemption meant that all other drivers regardless of their length of service would not receive the full 8% increase calculated on their actual wages in the second year of operation of the 2018 MCA. Instead, they would receive the rand equivalent of an 8% increase on the minimum rate, being R 183.51 per week.

The exemption process

- [4] The application was duly considered by an exemption panel which adopted the view that while there may be merit in the appellant's argument that an untenable wage disparity had arisen, upheld the argument that the issue could only be addressed through a further process of collective bargaining. It went on to find:

'On a careful reading of the application for exemption, it is also our view that applicant for exemption is in fact seeking from us to "strike down" the status *quo* clause, as contained in the current Main Collective Agreement. We would be exceeding our powers in doing so, as such may be perceived to undermine the processes of collective bargaining. Should the applicant be aggrieved by the status *quo* clause, which it clearly is, such should be renegotiated on its behalf by COBEO at centralized level.'

- [5] The appellant lodged an appeal against this decision on 31 August 2018. On 9 August 2018, the appellate body dismissed the appeal. It determined thus:

'The applicant is seeking confirmation or approval of its decision to not apply the notch increases. As mentioned, this is already the subject of a dispute and it is not within the powers of the Appeal Authority to confirm what is already a fait accompli. In addition, the applicant is not seeking exemption from applying the increase to the minimum notch levels, but an amendment to apply the increases differently. It is beyond the powers of the Appeal Authority to grant amendments to the application of the Main Agreement. It would further appear that the outcome of the dispute lodged might give more clarity on this issue.'

- [6] The appellant then launched an application to review and set aside this ruling on 16 November 2018. Sitting in the Labour Court, Nieuwoudt AJ found that the appellate exemption body had failed to consider the issues that had been placed before it and accordingly remitted the matter to a 'properly constituted appeal panel.' The second respondent was then appointed by the first respondent to determine this appeal. He issued a ruling on 13 May 2019 wherein he dismissed the appeal on the following basis:

'The exemption application is primarily based on the argument that a primary objective of the Labour Relations Act is to promote collective bargaining at sectoral level and that given that the objective of sectoral bargaining is to eliminate unfair competition between employers in the same industry in respect of wages, the bargaining outcomes negotiated in the MCA undermines orderly collective bargaining at sectoral level and that the exemption applied for should be granted in order for the long term survival of centralised bargaining in the industry sector in question. While I accept that any part of a bargaining council collective agreement must be capable of a challenge in terms of an exemption application, I find that the "safety valve" should be restricted to motivations based on either-

- (a) employers and/or employees experiencing or potentially experiencing serious hardship whether it be a "financial" or a "job security" hardship as a consequence of complying with the collective agreement in question, or
- (b) the collective agreement in question results in unintended consequences for parties bound by that agreement.

In this matter there is no evidence that the appellant company is financially unable to comply with the terms of the MCA. The company may have a preference to distribute its revenue in other ways but this cannot be the subject matter of an exemption.'

- [7] In his determination, the second respondent went on to examine the purpose of sectoral bargaining:

‘As a consequence, the Labour Relations Act only promotes the development of bargaining councils on a voluntary basis in the context of self-regulation. I, therefore, find that any exemption application must confine itself to issues surrounding “ability to comply” with the requirements of a bargaining council collective agreement or in circumstances where the collective agreement has “unintended consequences”.’

- [8] The dismissal of the application for partial exemption by the second respondent resulted in a review application brought before the court *a quo* which was heard on 30 August 2019.

The judgment of the court *a quo*

- [9] Sitting in the court *a quo*, Prinsloo J found that the second respondent’s reasoning had not taken account of a series of relevant facts. In the view of the learned judge, the second respondent had incorrectly confined his inquiry to the question of whether the appellant had shown “undue hardship” or “unintended consequences”. Further, he had erred by way of the finding that the wage disparity issues could only be addressed through collective bargaining.

- [10] Considerable emphasis was placed by the parties on the wording of clause 13 of Annexure C – Exemption Procedure of the 2018 MCA which provides:

‘In considering an application, the exemption authority shall take into consideration all relevant factors which may include, but shall not be limited to, the following criteria;

1. The applicant’s past record (if applicable) of compliance with the provisions of Council’s Collective Agreement and/or exemption certificates.
2. Any special circumstances that exist or any precedent that might be set.

3. The interest of the industry in relation to unfair competition, centralised collective bargaining as well as the economic stability of the industry.

4. The interest of employees as regards exploitation, job preservation, sound conditions or employment, possible financial benefits, health and safety as well as the infringement of basic rights.

5. The interest of the employer as regards its financial stability, the impact on productivity, its future relationship with employees and recognised Trade Union(s), operational requirements and the viability of the employer's business.'

[11] Prinsloo J noted that 'the second respondent had no regard for the factors set out in clause 13 of the exemption procedure and glaringly absent from the appeal ruling is a consideration of 'all relevant factors' which were obviously relevant and material in deciding the exemption application. In fact, it was submitted to the second respondent that this was 'a classic special circumstances case' with specific reference to the 59% pay disparity. The appellant did not request the second respondent to reduce or freeze wages until they go down to the minimum but indicated that the disparity should be addressed and that the appellant was prepared to pay all its drivers an increase equal to or more than the inflation rate. Put differently, the appellant submitted that it offered to pay at least inflation rate at the same Rand value increase for all its drivers.

[12] On this basis, Prinsloo J found that the second respondent had misdirected himself as to the nature of the inquiry and had committed a gross irregularity by failing to consider the appeal on its merits. For these reasons, the appeal ruling had to be reviewed and set aside.

[13] Turning to the question of relief, Prinsloo J did not accept the appellant's submission that the court substituted the appeal ruling with its own but considered that it be in the interests of the parties and of justice to have the

matter properly decided. Accordingly, she remitted the appeal for consideration *de novo*.

The appeal

[14] Appellant approached this court on appeal against that part of the order of the court *a quo* of 17 October 2019 which remitted the exemption appeal for hearing *de novo* before the first respondent. At the same time, the third and fourth respondents lodged a cross-appeal in which they contend that the court *a quo* did not enjoy jurisdiction in respect of the dispute. In the alternative, they seek to appeal the court *a quo*'s decision to review and set aside the second respondent's exemption appeal ruling.

Did the court have review jurisdiction

[15] In terms of s 158(1)(g) of the Labour Relations Act 66 of 1995 ('LRA'), subject to s 145, the Labour Court has the power to review the purported performance of any function provided for in the LRA on any grounds that are permissible in law. Ms Harvey, who appeared on behalf of the third and fourth respondents, submitted that the function of deciding whether to grant or refuse exemptions of parties to collective agreement is not one which is provided for in the LRA; hence s 158(1)(g) does not apply. In substantiation of this submission, Ms Harvey referred to s 30(k) of the LRA which provides that, in order to qualify for registration, the constitution of a bargaining council must include an exemption procedure. According to Ms Harvey, it therefore followed that it was left to the parties by private agreement to determine an exemption procedure.

[16] This submission does not however engage with the appellant's reference to s 158(1)(j) which provides that the Labour Court has the powers to deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law.

- [17] I agree with Mr Freund, who appeared together with Mr Leslie on behalf of the appellant, that the starting point of the enquiry is s 30(1)(k) which expressly provides for the inclusion of an exemption procedure from a collective agreement concluded by the parties to a bargaining council. It follows that the LRA therefore legally mandates that every bargaining council must provide for a procedure for exemption. It cannot follow that there is no supervision to be exercised by the Labour Court in respect of the manner in which a bargaining council conducts its activities or complies with a mandate specifically provided for in the LRA. Thus the grant of an exemption from the collective agreement concluded by the members of a bargaining council must be taken to constitute the performance of a function provided for in the LRA. That a functionary is required to perform the role of deciding whether an exemption should be granted is manifestly a performance conducted under the LRA and accordingly it must therefore follow that, in terms of s 158(1)(g) of the LRA, the Labour Court has jurisdiction to determine the legality of such a mandated procedure. There is thus no need to have recourse to s158(1)(j) to determine this issue.

The merits of the review application

- [18] Although the substance of the review application decided by the court *a quo*, other than the relief granted was only the subject of a cross appeal, it is appropriate, in my view, to deal with the cross-appeal and then decide whether the decision to remit the exemption application *de novo* should be upheld.

- [19] The appellant's primary ground of the successful review application had been that the second respondent had acted ultra vires by unduly fettering his discretion and thus limiting the ambit of the enquiry which he was required to determine.

- [20] Much reliance was placed by Ms Harvey on the decision in *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight*

Industry 2010 (5) SA 457 (SCA) (Calibre Clinical Consultants) to the effect that, as the decision of a bargaining council was a private domestic one, it could not be subject to a kind of review sought by the appellant. In *Calibre Clinical Consultants*, the parties to the bargaining council had agreed to establish a welfare fund that would, amongst other things, introduce and maintain a programme to provide anti – retroviral treatment to employees in the industry. Eventually, the council appointed a particular entity to be the service provider to manage and administer the programs.

- [21] The Supreme Court of Appeal was confronted with an appeal against a decision to appoint a particular service provider. This necessitated an initial enquiry as to whether a review in this case was legally justifiable in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Nugent JA held at para 41:

'A bargaining council, like a trade union and an employers' association is a voluntary association that is created by agreement to perform functions in the interest and for the benefit of its members. I have considerable difficulty seeing how a bargaining council can be said to be publically accountable for the procurement of services for a project that is implemented for the benefit of its members – whether it be a medical aid scheme, a training scheme or a pension fund or in this case its wellness programme'.

Nugent JA then held at para 44:

'That procurement of goods and services by the council – for whatever purpose – is not a public function – it seems to me to find support in the Constitution itself. Government and its agencies are expected to be publically accountable for the contracts that they conclude because they are spending public monies and there are two principle reasons why that should be so. In the first place the public is entitled to be assured that its monies are properly spent. And secondly, the commercial public is entitled to equal opportunity to benefit from the bounty of the State to which they are themselves contributories.'

- [22] That the facts in *Calibre Clinical Consultants* are entirely different from those which apply to this case, is manifest. But, even if it is correct to find that the decision of an exemption panel does not constitute administrative action as defined in PAJA, most certainly it has been long established law that decisions of domestic tribunals may be subjected to review on common law grounds. This position has been clear since the decision in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) where the court held that an internal tribunal which had not afforded a jockey a fair and impartial hearing was invalid because the principles of natural justice were violated. The court in *Turner* went on to hold that, where the decision of a tribunal is vitiated by a disregard for the principles of natural justice, the matter cannot be corrected by the appeal proceedings before a higher tribunal but only by way of a complete rehearing of the matter *de novo*.
- [23] Of equal relevance to this issue is the decision in *Hendricks v Overstrand Municipality* [2014] 12 BLLR 1170 (LAC) where this Court recognised the broad powers of review which had been conferred particularly in terms of s 158 (1) (h) and by extension by s 158 (1) (g) of the LRA.
- [24] Murphy AJA, in a carefully considered judgment, held at para 21 that there is strictly speaking no need to classify the decision as administrative action in terms of PAJA before a review will be competent under s 158(1)(h) of the LRA. This provision does not say that the Labour Court may review decisions of the State acting as employer on the grounds of review applicable to administrative action under PAJA. It does say that the Labour Court may do so on any grounds "permissible in law". Review under PAJA is only one kind of administrative law of review. Exercises of the public power are also reviewable on constitutional grounds of legality and rationality. Murphy AJA then went on to say that the submission by the appellant that review should be excluded because of the contractual arrangement and the private nature of the powers was not well founded. The judicial review of contractual disciplinary proceedings is permitted in our law. Consequently, the application

for review was permitted on these grounds which are 'permissible in law' as contemplated in s 158(1)(h) of the LRA.

- [25] It does not appear to me that any justifiable distinction can be drawn between a dispute dealing with the decision of an appeal body concerning an exemption application and a disciplinary hearing as was the case which confronted the court in *Hendricks*; hence the *dicta* in *Hendriks* are relevant to the disposition of the present appeal.

Application to the facts

- [26] Upon this legal basis, I turn to deal with the substance of the cross-appeal. Ms Harvey's central submission was that the court *a quo* had been clearly wrong in finding that the second respondent had restricted the enquiry and thus failed to consider the appeal on its merits leading to an unreasonable outcome. She submitted that a reasonable decision-maker would, on the evidence placed before the second respondent, have come to a similar decision because it was reasonable to reject the special circumstances motivation of appellant based as it was on the alleged purpose of centralised collective bargaining being to level wages and the consequent argument that the effect of the 2018 MCA holding the consequence of "unfair competition". Further, because on a proper consideration of the remaining four factors to be taken into account in terms of clause 13 of the exemption procedure together with the omnibus provision of 'all other relevant circumstances', it was reasonable deed and indeed to refuse to grant the exemption in the light of a purpose of the power to exempt a party from a term of a collective bargaining agreement .

- [27] In amplification of her submissions, Ms Harvey submitted that the prime purpose of centralised collective bargaining was to give effect to the legislature's policy choice in favour of self-regulation of the conflict between employers and employees. For this reason, bargaining councils are not concerned with competition between employers which is the subject matter of

the market mechanism which falls outside of the bargaining council's sphere of competence or indeed interest. The fundamental purpose of a collective agreement is to establish a minimum floor of employment conditions. To the extent that there is a power to exempt an employer from a negotiated term of an enforceable collective agreement, the provision of an exemption procedure is designed to create a "safety valve" in an exceptional case where an individual employer may experience hardship.

[28] Applied to the facts of the present case, third and fourth respondent's argument that the 2018 MCA required all employers to increase their wage bill by the same percentage could not be considered to be unfair. The bargaining parties to the 2018 MCA had agreed to an 'across the board' increase to actual wages subject to an agreed minimum floor.

[29] It was thus a contemplated outcome that some employers would pay more than others. Furthermore, Ms Harvey pointed to the fact that the appellant did not have any competitors as it was the only public subsidised commuter bus services contracted by the Western Cape government. It followed that, viewed in this fashion, the case of the appellant fell outside of the purpose of the exemption provision purpose, which, in Ms Harvey's view, was correctly summarised by Du Toit et al as follows:

'The scope for granting exemptions must be considered in the context of the sanctity of collective bargaining agreements and the statutory prioritisation of such agreements over individual agreements. The purpose of the exemption mechanism, it has been emphasised is 'not to make a new agreement merely because the exemptions appeal tribunal believes that the parties who concluded the CA agreed on unfair, inequitable, oppressive or unjust terms' but 'rather to create a safety valve to deal with cases in which individual employees or employers may experience undue hardship' or 'deal with unintended consequences'. This suggests that, as a rule, exemptions should be narrowly construed.' (Labour Relations Law: A Comprehensive Guide (6th ed) at 323-324)

- [30] Ms Harvey further submitted that beyond any considerations raised in the factors set out in clause 13, the exemption fell to be refused even if the second respondent had not taken into account of all the factors as set out in clause 13. The reasons raised by the appellant, to effectively circumvent the collective agreement concluded by bargaining council of which appellant was a member, did not justify preferring the arguments of the appellant over the core purpose of an agreement which was the product of collective bargaining. Thus, on the facts examined holistically, the outcome reached by the second respondent was nevertheless reasonable and correct and did not stand to be set aside.

Appellant's case

- [31] In defence of the judgment of the court a quo to set aside the decision of the second respondent, Mr Freund submitted that it was important to look at the relevant clauses of the 2018 MCA. Clause 3 thereof provided for a 9% 'across the board' increase of the hourly wage rate of employees from 1 April 2018 to 31 March 2019 and an 8% increase of the hourly wage rate of employees from 1 April 2019 to 31 March 2020. Clause 30 provided thus:

'All substantive terms and conditions of employment and benefits that were applicable at an employer as at the effective date of this agreement and are not regulated by the agreement, shall remain in force and effect. Further any existing substantive terms and condition (sic) of employment and benefits that were applicable as at the effective date of this agreement at a level higher / better than regulated in the agreement, such higher / better terms and conditions of employment and benefits shall continue to apply'.

- [32] In Mr Freund's view, the effect of clause 3 read together with clause 30 was that the appellant was obliged to increase its drivers' actual wages by 9% from 1 April 2018 and by 8% from 1 April 2019. He noted that the conclusion of this agreement had been preceded by an industry wide industrial action. The appellant had not voted in favour of the conclusion of the agreement on

the terms contained therein but was outvoted by the other members of the employer organisation.

[33] The objection raised by the appellant to the agreement was to the future application of the same percentage of increases to those of its drivers who were already earning notch related rates which greatly exceeded the minimum wages laid down by the first respondent. Mr Freund contended that this ongoing application of the 2018 MCA would entrench and indeed exacerbate the existing wage disparity within the appellant's own structures and between the appellant and the other employers in the industry. In the first period of the agreement ending on 31 March 2019, the appellant implemented the 9% 'across the board' increase for all drivers on the respective actual wages. This was not the subject matter of the exemption for which it had applied. What the appellant did not implement was the increase of each of the various minimum wage thresholds; that is, it froze these thresholds at the levels applicable immediately before the commencement of the 2018 MCA. In essence, the dispute giving rise to this appeal was that the appellant had, as a past practice, applied the 'across the board' increases to each of the various minimum wage threshold or notches so that the minimum rates for each notch increased annually. The appellant was however of the view that the provision contained in clause 30 of the 2018 MCA did not oblige it to apply its past practice of increasing the minimum rates for each notch by way of the 'across the board' percentage. For this reason, it had granted all its drivers the higher of a 9% increase or an increase to the next applicable notch as that notch had stood prior to the commencement of the 2018 MCA. It was of the view that in order to place the matter beyond any reasonable doubt, that an exemption be sought from any obligation it might be thought to have had to increase the minimum rates for each notch by the agreed percentage.

[34] Turning to the second year of the agreement, the appellant had sought an exemption to the following effect: while in respect of newly appointed drivers,

being drivers employed after 1 April 2019, that the minimum rate for that year of R 2477,43 per week that is the 2018 minimum rate, would be increased by 8%, But in respect of all other drivers, regardless of their length of service, the increase would be in respect of the rand value, which was equivalent to 8% of the minimum rate of R 2293,92 a week; that is R 183,51 per week. Alternatively, if that increase was less than the cost of living index ('CPI') as at 1 April 2019, the drivers in question would receive an increase equivalent to CPI.

- [35] As an illustration of the effect of the grant of this exemption, the appellant compiled a table presented to the second respondent which indicated the disparities in remuneration between the various categories of drivers. A driver, with one first year of experience, after the increase would earn R 2293,92 in the 2019 year, whereas a driver with six years' service would earn R 3654,21 which constituted a 59% difference in pay. However, were the appellant's application for the exemption to be accepted, this would reduce to 25% by 2029.
- [36] While accepting the difference in remuneration based on years of service may be justifiable to a point, once a differentiation becomes disproportionate, the appellant contended that it was not justifiable and indeed may be regarded as unfair discrimination.
- [37] Given that competitors operated under a different system of remuneration, the appellant contended that the perpetuation of the status quo was inimical to the economic stability of the industry, undermined sectoral collective bargaining and gave rise to a practice of unfair competition based on very significant wage differentials between industry participants. Compared to a case where an employer sought to pay less than its counterparts, in this case the purpose of the exemption was to allow the appellant to reduce the level of unfair competition to which it had been subject.

- [38] Turning to the question of the interests of employees - the appellant's contention was that a primary aim of the exemption was to reduce unjustifiable pay disparities between employees performing the same work. The lowest paid employees would continue to receive the full increases determined in terms of a MCA, while the highest paid employees would receive increases, albeit slightly lower in percentage than their more lowly paid counterparts but no lower than the CPI linked increase. All other conditions of employment would remain the same.

Evaluation

- [39] Despite Ms Harvey's submissions to the contrary, it does appear from the wording of the ruling of the second respondent, which has been reproduced in this judgment, that the basis of the refusal to grant an exemption was predicated on the principle that any evaluation of an exemption application must be confined to issues surrounding ability to comply with the requirements of a bargaining council collective agreement, or circumstances where the collective agreement had unintended consequences. The only unintended consequence considered by the second respondent was the widening pay gap which he held to be an unintended consequence of the 2018 MCA. As the second respondent held: 'The parties provided for a percentage increase on actuals, which self-evidently widens the gap. The parties to the agreement did not agree to make all wages the same. Should the bargaining partners wish to narrow pay differentials or set a maximum level of pay or provide for rand increases across the board instead of percentages, they can so agree.'

- [40] Clause 13 sets out factors to be considered and then expressly provides: 'which may include but shall not be limited to.' That certainly means that the enquiry can range beyond the factors expressly provided for in the clause. However, among the factors expressly set out is 'the interest of the industry in relation to unfair competition'. Another is 'its future relationship with the

employees and recognised trade unions'. No attention was given to these considerations, whether express or implied by clause 13.

[41] There is thus merit in Mr Freund's argument that the second respondent did not fully appreciate the broad range of considerations which could and should have been taken into account by him in addressing the merits of the application for exemption as brought by the appellant.

[42] In dealing with the issue of collective agreements, albeit in terms of the discretion granted to the Minister of Labour to extend collective agreements to non-parties, Murphy J held in *Free Market Foundation v Minister of Labour and others* [2016] 37 ILJ 1638 (GP) at para 29:

'Self-regulation on the basis of majoritarianism and voluntarism is a corner stone of the policy of industrial pluralist... the Minister affirmed a view that orderly bargaining would be eroded...the parties know that notwithstanding their endeavours and hard fought agreements the Minister had an open ended discretion to refuse to extend the collective agreements or to alter their terms.'

[43] Accepting that the *Free Market Foundation* case concerned itself with an extension of the collective agreement, the fundamental point that an exemption should be narrowly construed and that collective bargaining which culminates in an agreement is a reflection of the principles of voluntarism are reinforced in this dictum. Thus a careful approach has to be adopted in respect of an application for an exemption. The decision to exempt a party from the terms of a collective agreement must be evaluated through the prism of the principle of voluntarism. But any decision by an exemption panel, as was required by the second respondent, cannot invoke the principle of voluntarism to eschew a careful examination of the list of criteria set out in clause 13.

[44] A reading of the ruling of the second respondent supports a contrary conclusion to that urged upon us by Ms Harvey, namely that the second

respondent had impliedly understood that there was no numerous *clausus* of circumstances which could justify the requirements of an exemption. The express finding as set out in the written reasons provided indicates that the grounds on which the exemption may be granted were limited to financial hardship or a narrow construction of the meaning of 'unintended consequences'. Regrettably the decision omits a detailed engagement with the question of unintended consequences. To state the obvious: the parties did not agree to make all the wages the same. Thus the policy reasons for the retention of a sector level bargaining and its effect on exemption procedures were never canvassed by the second respondent.

- [45] Professor Halton Cheadle has described the policy reasons for the retention of sector level bargaining as follows:

'By setting reasonable standards **applicable to all employers in a local market**, competition between those employers should be based on productivity rather than the socially undesirable reduction of wages or the extension of working hours.' (my emphasis)

- [46] If employers in the same industry were able to undercut each other on wages or should they not be bound to pay the same wage rates, then the harmonisation of wage rates throughout the industry which is one of the objects of sector level bargaining would be undermined.

- [47] This point was emphasised by this Court in *SA Clothing and Textile Workers Union v YarnTex (Pty) Ltd t/a Bertrand Group* [2013] 34 ILJ 2199 (LAC) at para 58 namely that the purpose of centralised bargaining is to ensure that 'employers and employees in these subsectors should enjoy the same treatment to ensure that employers compete with their counterparts in a fair manner in order to sustain the industry and to prevent job losses.'

- [48] The narrow approach adopted by the second respondent to the scope of the inquiry as required in terms of clause 13 of the exemption procedure resulted

in a decision which had not taken in account of the appellant's central argument, namely that, absent an exemption, it would not be able to compete with new entrants into the market who would only be bound to apply the base minimum wage contained in the 2018 MCA and that, pursuant thereto, the appellant would be obliged to continue to maintain wage rates in perpetuity which were far in excess of the industry minimum. This would allow competing employers, including new entrants into the market, to undercut it on wages by paying a rate which is vastly lower than that which, absent the exemption, the appellant would be obliged to pay. The upshot of this omission is that the second respondent's decision failed to do that which a reasonable decision-maker in the circumstances was obliged to have done, namely to consider all the relevant factors and not limit the enquiry to but two narrow factors, notwithstanding that they were to be found in the wording of clause 13.

- [49] The conclusion that a broader inquiry was required to be undertaken by the second respondent and that the appellant's central argument about unfair competition and stability of the industry was not properly examined by the second respondent leads inexorably to the conclusion reached by the court *a quo* and thus to the question of relief to be granted in the light of this finding.

Relief

- [50] In deciding that it would be in the interest of the parties and of justice to remit the application for exemption for consideration *de novo*, Prinsloo J justified the order she granted as follows:

'The applicant's prayer for substitution is not sustainable in view of the main ground for review raised namely that the second respondent committed a gross irregularity in the proceedings with the effect that the parties were deprived of a fair hearing and that the appeal ruling consists of a failure to take a decision. In light of these complaints it is not appropriate to substitute the appeal ruling, but rather to remit the matter for consideration *de novo*.'

[51] In its appeal, the appellant contends that the court *a quo* ought to have substituted its decision for that of the second respondent by upholding the exemption appeal and granting the exemption as sought. Mr Freund submitted that the relevant facts giving rise to exemption were common cause or not in dispute. Thus all the material facts were contained in the record of evidence placed before the court *a quo* which accordingly was in a position to have substituted its own decision for that of the second respondent. Significantly the third and fourth respondents agreed that all the relevant facts and argument were on the record and hence this Court was in as good a position to make a decision as was the exemption appeal authority.

[52] Regrettably this does not appear to be the case. Simply put, there is inadequate evidence available to this court to make a clear finding on what is clearly a central issue, namely whether the perpetuation of the status quo is inimicable to the interest of the industry in relation to unfair competition, the objectives of centralised bargaining and the economic stability of the industry. This problem is particularly exacerbated when consideration is taken of the submission of third and fourth respondents, namely that the appellant has no competitors and is the only public subsidised commuter bus services contracted by the Western Cape government. There is insufficient evidence placed before this court to evaluate the merits of this argument. Furthermore, the fact that the bargaining parties agreed to an 'across the board' increase of actual wages subject to an agreed minimum floor raises the argument that there was a contemplated outcome that some employers would pay more than others and that this was not a case of unfair competition.

[53] Appellant did not vote in favour of the conclusion of the 2018 MCA and was outvoted by the other members of its employer organisation Commuter Bus Employers' Organisation (COBEO) but, nonetheless, it was bound by the terms of this agreement by virtue of its membership of COBEO.

[54] A decision to grant an exemption will therefore have to take careful consideration of the fact that the appellant was a party to the bargaining council and thus was bound by the consequences of the outcome thereof. This fact needs to be weighed against the central argument of what effect this agreement is on competition within the industry and the particular hardship to the appellant that might flow as a result of a failure to be granted an exemption. The question of whether it would then be faced with operating its business on an uneven playing field needs to be taken into account. None of this evidence is available in sufficient detail for this Court to make an informed decision.

[55] Accordingly, the approach adopted by the court *a quo* must be followed to the extent that the order which was granted by the court *a quo* must be confirmed.

[56] In the result therefore the following order is made:

1. The appeal is dismissed.
2. The cross-appeal is dismissed.
3. There is no order as to costs.

Davis JA

Coppin JA and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv Freund SC and Adv Leslie
Instructed by Edward Nathan Sonnenbergs
Attorneys

FOR THE THIRD AND FOURTH
RESPONDENTS

Adv S Harvey
Instructed by Cheadle Thompson &
Haysom Inc and Justine Delmonte &
Associates