IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JA 1/03

In the matter between:

TAO YING METAL INDUSTRY(PTY)LTD	**Appellant**
and	
MAY POOE N.O	**1ST Respondent**
Commission for Conciliation, Mediation and Arbitration	**2ND Respondent**
HOTELLICA	**3RD Respondent**
CUSA	**4TH Respondent**
THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**5TH Respondent**

JUDGMENT

Zondo JP

Introduction

[1] The appellant is a registered company and operates a certain manufacturing business in the metal industry in the Free State Province. The third and fourth respondents are the Hotel Liquor,

Commercial and Allied Workers' Union of South Africa which, for short, is known as HOTELLICA. The fourth respondent is the Commercial Workers Union of South Africa which, for short, is known as "**CUSA**". The third and fourth respondents are both trade unions which at some or other stage relevant to this matter had as its members some of the employees that were in the appellant's employ. The fifth respondent is the Metal and Engineering Industries Bargaining Council.

[2] The appellant fell within the jurisdiction of the Metal and Engineering Industries Bargaining Council ("**the bargaining council"**). For some time the bargaining council had granted the appellant exemption from complying with obligations imposed by the main agreement of the council on employers falling under its jurisdiction. The obligations from which the appellant had been exempted related to benefits that it otherwise would have been obliged in terms of the main agreement to provide to its employees or at least to certain categories of its employees. The period of operation of the main agreement that had been applicable during 1997 or most of that year expired at some stage during 1998. a new agreement was concluded among the parties in the bargaining council.

[3] A dispute arose between the appellant, on the one hand, and its employees represented by the third respondent on the other on whether the appellant was exempted from complying with obligations imposed by the new main agreement in respect of the

provision of certain benefits to certain of its employees. The third respondent contended that the appellant was obliged to comply with the new main agreement whereas the appellant maintained that it was not. The appellant's basis for its contention that it was not was that the exemption that it had been granted under the previous main agreement still applied to, and, was operational under, the new main agreement. It would seem that this stance had as its foundation the fact that the exemption document had, among other things, the following words written on it, namely, "**as amended and/or extended and/or replaced from time to time by any succeeding agreement and / or any amendments and/ or extensions thereof**." The third respondent took the view that the exemption which the appellant had had during the operation of the main agreement which applied during most of 1997 had lapsed when that agreement lapsed and had no application during the life of the new main agreement.

[4] In November 1998 the third respondent referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**"), which is the second respondent in this matter, for initially conciliation and, later, arbitration. The dispute was classified as a dispute about the application of a collective agreement. The bargaining council was also cited as a party to the referral of the dispute to the CCMA. The appellant raised certain objections to the jurisdiction of the CCMA. On each occasion the CCMA commissioner who is the first respondent in the matter dismissed the appellant's objections.

[5] The CCMA commissioner then proceeded to arbitrate the dispute on the merits and issued an award. The award on the merits effectively ordered the appellant to comply with the new main agreement of the bargaining council but added the following: "**unless exemptions were granted to the [appellant] under the New Collective Agreement concluded in terms of the Labour Relations Act, 1995**". He made no order as to costs. The first respondent's ruling on the first objection by the appellant to the jurisdiction of the CCMA was issued on the 23rd July 1999. The award on the merits of the dispute was issued on the 23rd July 1999 but was only received by the appellant on the 30th March 2000.

[6] On or about the 11th October 2000 the appellant launched an application in the Labour Court for an order reviewing and setting aside both the first respondent's ruling on the first objection to the CCMA's jurisdiction as well as the first respondent's award on the merits. The review application was opposed – not by the third respondent - but by the fourth respondent. For present purposes it is not necessary to go into the reasons for this.

[7] The appellant sought condonation for the late launch of the review application. In so far as the review application related to the setting aside of the award on the merits, the appellant was required by sec 145 of the Labour Relations Act, 1995 (Act 66 of 1995)("**the Act**")

to have launched the review application within six (6) weeks from the date when the award was served on it. In so far as the review application related to the setting aside of the ruling on the jurisdictional objection, it was required to be launched within a reasonable time from the date of the delivery of the ruling. As the appellant received the award on the 30th March 2000, the period of six weeks expired about mid May 2000. In due course the review application was set down for hearing and was heard by Francis J in the Labour Court. Francis J dismissed the appellant's application for condonation with costs without considering the merits of the review application. He later dismissed the appellant's application for leave to appeal. Thereafter the appellant petitioned the Judge President for leave to appeal. This Court then granted the petition and gave the appellant leave to appeal to this Court against the judgment of the Labour Court.

<u>The appeal</u>

[8] Before us Counsel for the appellant indicated that the appellant was abandoning the application to review and set aside the first respondent's first ruling on the jurisdiction of the CCMA to arbitrate the dispute. He indicated that the appellant was pursuing the application to review and set aside the first respondent's award on the merits. In order to properly assess the merits of the appellant's appeal against the Court a quo's decision on the condonation application, it is necessary to set out the sequence of the steps that the appellant took between the time when the

appellant received the award on the merits – which was on the 30th March 2000 – and the date when the review application was launched which was on the 11th October 2000. These are set out below:

The sequence of events preceding the launch of the review application.

[9] **30 March 2000**:

On the 30th March 2000 the appellant received the award. The appellant states that the third respondent "**withdrew from the dispute"** but it does not give any date when this occurred nor does it give details to support this; it does not say that it was told this by an official of the third respondent nor does it give any source for this information; the appellant says that, because of this and the fact that it had a *bona fide* belief that its exemptions were valid, it thought that it was unnecessary to bring a review application to set the award aside.

[10] **6 April 2000**:

On this date the appellant's Mr Henderson addressed a letter to a Mr Bill Coetzee who appears to have been the secretary of the bargaining council. In that letter the appellant informed the council of receipt of the award from the CCMA and the terms of the award. The appellant's Mr Henderson then said: "**Based on the above we would like to obtain clarification as to whether our exemptions which were granted on 7 April 1997 were still valid and**

enforceable during the period 1 April 1998 to date."

[11] **11 April 2000**:

On this date the manager of the bargaining council, Mr Coetzee, addressed a letter to the appellant for the attention of Mr Henderson in reply to the latter's letter of the 6th April 2000. In that letter Mr Coetzee informed the appellant that he had undertaken further research and could not find any withdrawal of the appellant's exemptions by either the bargaining council or the Minister of Labour. Mr Coetzee went on to say that, although a new agreement had been published on the 31st March 1998, there was no indication therein that the appellant's exemptions had been withdrawn or declared null and void by either the bargaining council, the Minister or by the Independent Exemption and Arbitration Board. He concluded the letter thus: **"I can therefore see no reason why your current exemptions which do not reflect a specific date of withdrawal should not be considered valid."**

[12] It appears from Mr Coetzee's letter that the appellant was being advised to in effect run its affairs on the basis that the exemptions were still valid. The significance hereof is that, if the exemptions were still valid, then they would constitute a valid defence to any attempt to enforce the award because the award was framed in terms that ensured that it could not be enforced if there were valid exemptions. What was then happening is that a statutory body

whose function it was to enforce the agreement that that the union sought to enforce was officially advising the appellant that its exemptions were valid. This was another way of saying that that body would not enforce the agreement against the appellant because it viewed its exemptions as valid.

[13] **12 April 2000**:

On this date the appellant's Mr Henderson responded to Mr Coetzee's letter of the 11th April 2000. In part Mr Henderson had this to say in his letter to Mr Coetzee:

> "I appreciate the correspondence and your explanations therein, but I am afraid that if I am confronted by the members of Hotellica, claiming back pay, that they will not be able to understand your correspondence. It would therefore be appreciated if you could issue us with a License of Exemption for the period in question. If this is not possible, please suggest something more literate which can now finally close this matter."

Mr Coetzee responded to Mr Henderson's letter of the same date and agreed to issue a licence of exemption which he said should be read with the appellant's other licences of exemptions. Mr Coetzee issued a licence of exemption in favour of the appellant. The licence of exemption exempted the appellant from "**the provisions of Part (11) of WAGES/or EARNINGS of the new agreement published under Government Notice R1329 dated 27 June 1990 R404 dated 31 March 1998 as amended, extended or replaced from time to time".** The licence of exemption also had a paragraph that read thus: "**Maintain the then existing status quo**

and the national percentage increase negotiated annually be enforced on the company with the inception of the 1998/1999 main agreement. The aforementioned exemptions is (sic) to be read in conjunction with this exemption.”

Just before Mr Coetzee’s signature and the date thereof which was given as the 12th April 2000, the following appeared:

“**Period from: 19 March 1997**	**To: expiry of agreement (30 June 2001)**
_________	_________________________
Date	**REGIONAL MANAGER**

Please Note: This exemption may be varied or withdrawn at any time at the discretion of the Metal and Engineering Industries Bargaining Council.”

The fact that the bargaining council had issued these new licences of exemption meant that the appellant would have felt more protected against the enforcement of the arbitration award than they might have felt before.

[14] **21 June 2000**

It appears from a letter dated 5 July 2000 from Mr Coetzee to Mr Holiday, an industrial relations consultant representing the appellant, that a committee had been appointed by the bargaining council to inquire into the validity of the appellant's exemptions. This was done after some trade union had made an inquiry in this regard. It appears from Mr Coetzee's aforesaid letter of 5 July 2000 that on this day that comittee held a meeting and concluded that the appellant's exemptions remained in force "**until the expiry of the Agreement or until such time as it is withdrawn by the Minister or the Council**."

[15] **28 June 2000**

It would appear from a letter dated 5 July 2000 addressed by Mr Coetzee to Mr M.L Holliday that the latter had written a letter to Mr Coetzee on this day with regard to the exemptions. However, there is no copy of that letter in the record.

[16] **29 June 2000**

The notice of motion of the fourth respondent's application to make the award an order of court bears this date as the date when it was signed but what is strange is that the date on which the founding affidavit for that application appears to have been attested to is the 10th July 2000. No explanation is proffered as to why it took about 11 to 12 days after the signing of the notice of motion to get the founding was attested to.

[17] **10 July 2000**

It appears that it was on this day that the founding affidavit in support of the fourth respondent's application to make the award an order of court was attested to.

[18] **25 July 2000**

It would seem that on this day the fourth respondent's attorney transmitted by fax to Mr Holiday a Notice of Motion intended for an application to the Labour Court in terms of sec 158 of the Act to make the award an order of court. This transpires from Mr Holiday's letter of the 26th July 2000 addressed to Messrs Lovius – Block Attorneys representing the fourth respondent. No explanation is proffered as to why it took the fourth respondent's attorneys 15 days after the founding affidavit had been signed to serve the sec 158 application.

[19] **26 July 2000**

On this day Mr Holiday addressed a letter to Lovius – Block Attorneys. From that letter it seems that Mr Holiday and the fourth respondent's attorney had had a telephone conversation concerning the fourth respondent's application to the Labour Court to make the award an order of Court. In summary Mr Holiday informed Lovius – Block Attorneys in the letter that:-

a) the fourth respondent's application to the Labour Court to make the award an order of court was frivolous and vexatious and warned them that, if they proceeded with it, the appellant would seek a cost order against the attorneys de boniis propriis as well as against Mr Makara personally. (Mr Makara had been employed by the third respondent and had dealt with the dispute while there but, it seems that, he had in the meantime resigned from the third respondent and had become employed by the fourth respondent and sought to continue with this dispute even when he was employed by the latter union);

b) the fourth respondent had no locus standi in the matter;

c) Mr Makara had no authority from the individual employees to pursue the matter;

d) the appellant had valid exemptions from compliance with the agreements; the relevance of Mr Holiday's advice to Lovius-Block Attorneys that the appellant had valid exemptions is that the award they sought to have made an order of court was to the effect that the appellant had to comply with the obligations provided for in the agreement only if the appellant did not have exemptions; accordingly, if the appellant had valid exemptions, the award could not be made an order of court;

e) "(**T)o expose us to unnecessary litigation in this regard and the harassment which our client receives from Makara through his frivolous and vexatious continuation of hampering, letter writing and aggressive attacks on the Company to satisfy his hidden agenda, will no longer be tolerated."**

f) "We therefore request from yourself, as a legal person, to properly investigate this matter and to advise Makara and his

> union accordingly … we request clarification from your intentions (sic) by no later than 28 July 2000 at close of business whether you are going to proceed or not, failing of which (sic), we will accept that you are going to proceed with this matter and will then continue with the preparation of our defence."

[20] **28 July 2000**

It would appear from Mr Holiday's letter of the 2nd August 2000 that Lovius-Block wrote a letter to Mr Holiday on this day in response to his letter of the 26th July 2000. Unfortunately that letter appears not to be in the record.

[21] **29 July 2000**

On this day the fourth respondent launched its application to make the award an order of the Labour Court. Although on the papers there are statements suggesting that the application was launched in June 2000, Counsel for the appellant as well as the fourth respondent's attorney who appeared before us were agreed that the correct date is the 29th July 2000. Although there does not on the record appear to be a letter from Lovius-Block Attorneys responding to Mr Holiday's letter of the 26th July 2000, their launching of the sec 158 application constituted an answer that made the fourth respondent's intentions clear, namely, that they were pursuing the dispute despite what Mr Holiday had said in his letter.

[22] **2 August 2000**

On this day Mr Holiday addressed a letter to Lovius-Block Attorneys as a reply to their letter to him of the 28th July 2000. Mr Holiday's letter was a long letter. It appears from the letter that the parties had decided to enter into discussions aimed at a possible settlement of the dispute and that, pending the outcome of such discussions, the sec 158 application was to be held in abeyance. The first three paragraphs of the letter read thus:

"**We refer to your correspondence dated 28 July 2000, and wish to advise as follows:**

1. **We accept, unless otherwise indicated by yourself, that we will not continue with the statement of our defence until such time that you have taken instructions from your client. Upon receipt of your instructions we will then commence with the drafting of our defence in terms of your application.**
2. **We also accept that you condone the time periods until such time that you advise us regarding your continuation with the matter.**
3. **In order to avoid unnecessary litigation and costs in this regard we will accept that the parties to this matter will not continue with litigation until such time that a deadlock has been reached, and that the condonation of the peremptory time periods are agreed to by the three parties in this matter. We, however, serve ex abundante cautela a notice of**

defence in the spirit of this letter.”

Mr Holiday then went on to say in the second paragraph of the second page of the letter:-

> “We do not believe to flout (sic) the Labour Court with unnecessary litigation and wish to advise that this is a mere attempt from the [appellant] to avoid litigation and costs in resolving this matter”.

In the second page of the letter Mr Holiday also wrote thus:

> **“In view of the above we reiterate the following:**
>
> 1. **We await your final decision to litigate against our client, Toa Ying Metals, and that we will, with effect from your final decision to litigate against Tao Ying Metals, count the 10 days for our reply and that you agree to any preventative measures which the respondent, being Tao Ying Metals, wish to employ to avoid unnecessary litigation.**
> 2. **You will also not if any further litigation occurs, employ or use time periods as any strategy, intent, or purpose to raise any points in limine against the respondent, Tao Ying Metals.**
> 3. **In the event of no agreement of settlement being reached between the three parties, inclusive of the Bargaining Council, the respondent reserves its right to defend itself without any prejudice to time periods and/or submissions submitted in terms of your application to the Labour Court.”**

[23] **10 August 2000**

The appellant delivered its opposing affidavit in the sec 158 application. The basis for its opposition to the award being made an order of court was that it had exemptions from obligations arising from the new agreement. In its condonation affidavit it says that, after it had delivered its opposing affidavit, it awaited the fourth respondent's reply to clarify its intentions in the light of the appellant's defence as contained in such affidavit.

[24] **29 September 2000**

The appellant received a letter from the fourth respondent's attorneys requesting dates for a pre-trial conference. It is not clear why the fourth respondent's attorneys sought to have a pre-trial conference in respect of a motion matter because the requirement of a pre-trial conference, as the term itself says, applies to trial matters.

[25] **9 October 2000**

On this day Mr Holiday addressed a letter to the fourth respondent's attorney advising that he was still awaiting the fourth respondent's attorneys' replying affidavit. In its affidavit the appellant states that, given the request by the fourth respondent's attorney for a pre-trial conference, it assumed that the fourth respondent intended to pursue the sec 158 application.

[26] **11 October 2000**

On this day the appellant received a letter from the fourth respondent's attorneys advising that they had served the replying affidavit by fax at Mr Holliday's offices in Welkom already on the 1st September 2000. The appellant states in the affidavit that Mr Holliday had been moving offices during this period from Welkom to Pretoria and spent most of the time in Pretoria and his Welkom office had failed to bring the replying affidavit to his attention. The appellant states that, as soon as it had established that the fourth respondent's intention was to pursue the sec 158 application, it decided to launch the review application. On this day the appellant also launched the review application.

[27] It is clear from the above sequence of events and steps taken by and on behalf of the appellant that, if there is one thing that the appellant cannot be accused of, it is, as was contended by Counsel for the appellant, that it sat back and did not do anything to deal with the matter. After receiving the award, it wasted no time in approaching the bargaining council for advice whether the exemptions it had were still valid. When the bargaining council's representative advised that they seemed to be still valid because they had never been withdrawn either by the council or the Minister, the appellant thought such advice might not be good enough and sought a fresh exemption. The bargaining council furnished it with a fresh licence of exemption whereafter the appellant then sought to secure an agreement from the fourth respondent that the matter should not be taken further. The appellant sought to avoid unnecessary litigation and costs. The

appellant even threatened the fourth respondent with costs de ponies propriis if it pursued the application to make the award an order of court. When discussions failed, the appellant then delivered the affidavits to oppose the sec 158 application and launched the review application. On a conspectus of all the affidavits, annexures thereto and other documents, I am satisfied that the appellant furnished an acceptable explanation for the delay in launching the review application. I am satisfied that even without considering the merits, good cause had been shown for the delay. Accordingly, the appellant's delay in launching the review application is hereby condoned. What now remains is the consideration of the appeal with regard to the merits. I now turn to consider that aspect of the matter.

[28] A number of grounds were relied upon in the appellant's founding affidavit to have the ruling and the award set aside but only one was relied upon before us in this Court. That is that the commissioner "**failed to apply her mind to the provisions of the exemptions previously granted to the [appellant] during March 1997.**" In regard to this ground the appellant went on to say in the founding affidavit:

> "**It is the [appellant's] position that the exemptions previously granted still enure to its benefit since they were granted in respect of the wage provisions of the main agreement published on 27 June 1980:**
>
> > 'as amended and/or replaced from time to time by any succeeding agreement …"

[29] In the next paragraph in the founding affidavit the appellant stated: **"Should [the commissioner] have considered [the exemptions] properly she would not have given the award she did."** It was then submitted in the next further paragraph that "**the conduct of the [first respondent] as outlined above amounts to:**

(i) a defect as contemplated in subsection (sic) 145(1) of the Labour Relations Act, No 66 of 1995; alternatively;

(ii) a permissible ground in law as provided for in section 158 (1) (g) of the Act to review and set aside the function and/or act performed by the first respondent."

[30] The commissioner found that the exemptions which had been issued to the appellant before 31 March 1998 when the new agreement was published were no longer valid because they fell away when the new agreement came into operation on the 14th April 1998. In this regard it needs to be pointed out that the commissioner did not in her award refer to the appellant's argument that such exemptions continued to apply during the life of the new agreement because, they had been issued on the basis that they would continue to operate if the agreement was "**amended and/or extended and or replaced from time to time by any succeeding agreement and/or any amendments and/or extensions thereof …".** The quoted portion is taken from about the middle of the page containing the terms of each one of the licences of exemption issued by the bargaining council on the 7th April

1997.

[31] The appellant contended in the founding affidavit that, had the commissioner applied her mind to the appellant's contention referred to above, she would not have reached the conclusion that she reached in her award on the merits of the dispute. Is this correct? I am not sure. A consideration of this contention requires that the question that the commissioner had to deal with be considered.

[32] The question that the commissioner had to consider was whether the appellant was obliged to comply with the relevant obligations imposed upon employers by the relevant collective agreement(s). In considering that question he was required to decide whether or not the licences of exemption to say that it was not obliged to comply with the obligations imposed upon employers by the relevant collective agreement(s).

[33] The difficulty with the exemptions that were issued in April 1997 is that, with regard to the question of how long they would operate, they contain what appears to be two conflicting provisions. The one is in the middle of the document containing the terms of the licence of exemption. This one says that the exemption is granted from the provisions therein specified of the main agreement "**as amended and/or extended and/or replaced from time to time by any succeeding agreement and/or any amendments and/or extensions thereof …".** These terms of the exemption suggest that

the intention was to make sure that the employer so exempted would not need to make further applications for exemption from certain provisions of the main agreement each time there was an amendment, extension or a replacement of such agreement with another agreement. It seems that it was an exemption for an indefinite period. It purported to be a permanent exemption.

[34] The other provision dealing with the question of how long the exemptions would be operational is to be found at the bottom of the document containing the terms of the exemption. This one seems to have been specifically designed to be the area in the document in which the duration of the exemption would be dealt with. It is reflected thus:

"**Period from: to:**
Tydperk van: tot: "

After the relevant information had been was filled in, the provision read thus:

"Period from: 19 March 1997 to : duration of agreement

Tydperk van: "

What is clear is that the portion appearing in the middle of the document containing the exemption purports to give exemption for ever so that there would be no need for further applications for extensions of the exemption or for further exemptions whereas the part appearing at the bottom of the document specifically limits the duration of the exemption to the life of the agreement which would mean that, if the agreement expired and another one was concluded, the exemption would not be operational beyond the expiry of the agreement in respect of which it was issued. What then is the answer to the question whether or not the exemptions issued in April 1997 were operational beyond the duration of the agreement that was operational when they were issued?

[35] It seems to me that there is room for the proposition that the terms contained in the middle of the documents containing the exemptions were not really intended to deal with the period of operation of the exemptions. However, I do not think that it is necessary to go into details thereanent because, even if they did, they are general provisions of the document and must yield to the provisions appearing at the bottom of the documents because those are specific to the issue of the duration of the exemptions. They deal specifically with the question of when the exemptions would apply. A specific answer is given as to the duration of the exemption and it is that the exemptions concerned applied only for the duration of the agreement. The intention is made very clear.

[36] Furthermore, in determining which of the two provisions of the licence of exemption should prevail as to the period of the exemption, regard must also be had to the powers that the bargaining council had in regard to the determination of the period of exemption. The position was governed by the law as it was immediately before the commencement of the Act. That is immediately before the 11th November 1996.

[37] Section 51 of the Labour Relations Act, 1956 (Act NO 28 of 1956) ("**the old Act**") dealt with exemptions. Sec 51(1) of the old Act dealt with applications for exemption from provisions of an agreement entered into by parties to a conciliation board which was binding in terms of the old Act. It gave the power to grant exemptions in such cases to the Minister of Labour in certain

circumstances which were spelt out therein. Sec 51(3) dealt with applications for exemption from provisions of a bargaining council agreement. In the light of the importance of the provisions of sec 51(3) of the old Act, I propose to quote the provisions in full. They read thus:

> "**Application for exemption from all or any of the provisions of an agreement entered into by parties to an industrial council which is binding in terms of this Act may be made to the industrial council concerned, or to any committee to which the powers of the council under the section have been delegated in terms of section 25; and the powers conferred on the Minister by subsection (1) may mutatis mutandis be exercised by such council or committee."**

[38] The provisions of ss(3) contemplate an "**exemption from all or any of the provisions of an agreement … which is binding in terms of this Act…".** What does this mean? In my judgement it means that the agreement from which an exemption can be applied for or granted is only the agreement which is in existence at the time of the making of the application for exemption or the agreement which is in existence when the exemption is granted. There is no provision in sec 51(3) for an application to be made for exemption from future agreements that may or may never come into existence or whose terms and conditions were not known at the time of the making of the application for exemption or at the

time of the granting of the exemption. Accordingly, to the extent that the contents of the licences of exemptions purports to grant exemption from provisions of any collective agreement other than the one that was in existence at the time of the granting of the exemption, it was ultra vires as the bargaining council had no power to grant exemption for any period beyond the life of such agreement. Accordingly, the provision of the licence of exemption appearing in the middle of the exemptions issued on the 7th April which purports to extend the life of the exemptions beyond the collective agreements operational at the time of the granting thereof cannot be given a construction the effect of which is that the bargaining council acted ultra vires. As far as possible it must be construed in keeping with the powers of the bargaining council. To interprete that provision so as to mean that the provision in the middle of the exemption means something that the bargaining council had no power to do must be avoided as far as possible.

[39] If one adopts the above approach, the result is that the exemptions in question lasted only for as long as the collective agreement lasted. In the circumstances I conclude that the period of the application of the exemption is the period appearing at the bottom end of each licence of exemption. Accordingly, subject to what I say below, the appellant did not have any valid exemptions from any provisions of the collective agreement(s) entered into in the bargaining council for the relevant period. The appellant also relied on the exemption issued under the new collective agreement and made retrospectively applicable. The appellant submitted that it

had exemption and was not liable to pay to the employees any amounts relating to the arbitration award for such period. In my view, to the extent that such exemption was retrospective beyond the dates on which the applications for exemption had been made, such exemptions were, to that extent, ultra vires. To the extent that they purported to run from the date of such application or thereafter and were prospective, such exemptions were of force and effect and operational.

[40] The Commissioner held thus: "**In the absence of exemptions issued under the New Agreement, the Respondent does not have a valid reason at law not to pay the minimum wages negotiated in the Bargaining Council after the main agreement was in operation.**" From this it seems abundantly clear that the commissioner did not apply her mind to the appellant's argument referred to above. If she had applied her mind to it, she would, I have no doubt, have dealt with that contention in her award.

[41] I conclude therefore that the defence raised by the appellant on the merits cannot be sustained. That being the case the application for review should have been dismissed by the Court a quo. As to costs, both parties argued the matter on the basis that costs should follow the result. The appellant was successful in reversing the decision of the Court a quo on the issue of its application for condonation. The respondent(s) who opposed the appeal were successful on the merits of the matter. In these circumstances what do the requirements of law and fairness dictate with regard to an award of

costs? The issue of condonation was not a minor part of this matter. Argument on it took a substantial part of argument. It seems to me that the requirements of law and fairness dictate that no order should be made as to costs. I propose to give effect to this approach.

[42] In the result I make the following order:

1. The appeal is upheld in part and dismissed in part.
2. No order is made as to the costs of the appeal.
3. The appellant's appeal on the merits of the review application is dismissed.
4. The appellant's appeal against the order of the Labour Court relating to condonation is upheld and such order is set aside and replaced with the following one:

"**(a) The applicant's application for condonation in regard to the launching of the review application is granted.**

b) The applicant's application for review is hereby dismissed.

c) There is to be no order as to costs."

Zondo JP

I agree.

Nkabinde AJA.

I agree.

R. Pillay AJA

Date of judgment: 28 November 2005