

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
[HELD AT DURBAN]**

CASE NO: DA11/09

In the matter between:

TRAFFORD TRADING (PTY) LTD

APPELLANT

AND

**NATIONAL BARGAINING COUNCIL
FOR THE LEATHER INDUSTRY OF
SOUTH AFRICA**

FIRST RESPONDENT

**EXEMPTION APPEAL COMMITTEE
OF THE NATIONAL BARGAINING
COUNCIL FOR THE LEATHER
INDUSTRY OF SOUTH AFRICA**

SECOND RESPONDENT

MARK FUTCHER NO

THIRD RESPONDENT

GINA BARBIERI NO

FOURTH RESPONDENT

JUDGMENT

Tlaletsi JA

Introduction

[1] The appellant is an incorporated company that falls within the jurisdiction of the National Bargaining Council for the Leather Industry of South Africa ("the first respondent"). The latter has been established in terms of the Labour Relations Act No 66 of 1995 ("the Act"). The appellant applied to the first respondent for exemption from complying with certain provisions of a collective agreement entered into under the auspices of the first respondent and as extended to non-parties by regulation of the Minister of

Labour. The application for exemption was considered by the first respondent's Exemption Committee¹ and was declined.

- [2] The appellant appealed to the second respondent being the Exemption Appeal Committee of the first respondent. The appeal was also unsuccessful. The appellant thereafter brought an application in terms of section 158 of the Act to review and set aside the decision of the Exemption Appeal Committee. The review application was dismissed by **Cele J** sitting in the Labour Court, Durban. The appellant now appeals against the judgment and order of the Labour Court, having obtained leave from that court. A brief factual background is apposite.

Factual background

- [3] At all relevant times the footwear industry was regulated by at least five collective agreements that were concluded within the first respondent. The said agreements are:

- 3.1 The Footwear Section Collective Agreement;²
- 3.2 The Provident Fund Collective Agreement;
- 3.3 The Sick Benefit Fund Collective Agreement;
- 3.4 The Administrative Fund Collective Agreement; and
- 3.5 The Footwear Section Technological Fund Collective Agreement.

- [4] Each of the said collective agreements have been extended by the Minister in terms of section 32 of the Act by way of publication in the Government Gazette respectively, from time to time and at different dates. The Footwear Section Collective Agreement makes provision for parties falling within the first respondent's (also referred to as the Council in this judgement) registered scope to apply to the latter for exemption from any or all of the provisions of the agreement and prescribes a procedure to be followed for such applications. Such applications must be in writing on an

¹ The Exemptions Committee is also referred to as the District Committee or the National Exemption Committee.

² The parties that concluded the collective agreement are the South African Footwear and Leather Industries Association and Association of Small and Medium Manufactures of Footwear and Allied Products as the employers' organisations, on the one part, and National Union of Leather and Allied Workers and the South African Clothing and Textile Workers' Union as the trade unions on the other part.

application form provided by the Council³. In terms of clause 14(3) of the Collective Agreement, the Exemption Committee when considering the applications for exemption must take into account:

- any written and/or verbal substantiation provided by the applicant;
- fairness to the employer, its employees and other employers and employees in the industry;
- whether it will make a material difference to the viability of a new business, or a business previously outside the jurisdiction of the Council;
- unexpected economic hardship occurring during the currency of the agreement and job creation and/ or loss thereof;
- the infringement of basic conditions of employment rights;
- the fact that a competitive advantage might be created by the exemption;
- comparable benefits or provisions where applicable;
- the applicant's compliance with other statutory requirements such as the Occupational Injuries and Diseases Act or Unemployment Insurance Act; or
- any other factor which is considered appropriate.

[5] The Exemptions Committee is required, on approving the application, to advise the applicant within fourteen days of such decision and issue a Licence of Exemption setting out: the full name of the person or enterprises concerned; the provisions of the agreement from which the exemption has been granted; the conditions subject to which exemption is granted; the period of exemption; and the date from which the exemption should operate. In cases where the exemption application is either wholly or partly not approved, the Exemptions must advise the applicant within fourteen days of the date of such decision, providing the reason(s) for such decision.

[6] The collective agreement provides for the appointment of the Independent Appeal Body as required by section 32(3)(e) of the Act to hear and decide any appeal brought by a party or non-party against the decision of the Exemptions Committee refusing an application for exemption or the withdrawing of an exemption. The written application for appeal as well as

³ Clause 14.1

the original application for exemption and its supporting documents shall be forwarded to the Independent Appeal Body. The latter body is enjoined to decide the appeal in a manner it considers appropriate to determine the applications fairly and quickly. The Independent Appeal Body may limit itself to a consideration of written motivation or may hear evidence and arguments⁴. It must however consider all applications with reference to the criteria referred to in paragraph (4)⁵ above. The Independent Appeals Body is further required to issue its decision with full reasons within fourteen days and must issue the applicant with a licence of exemption if the appeal is successful⁶. The Independent Appeal Body may make an order of costs against an unsuccessful applicant.⁷

[7] It is not in dispute that the first respondent demanded payments in the amounts of R366 828.58 and R117 490.39 from the appellant being payments due in terms of the collective agreements. Private arbitration proceedings, presided by Professor Alan Rycroft were instituted to arbitrate the dispute relating to the payments due. A pre-arbitration agreement as to how the proceedings were to be conducted was concluded by the parties. It was agreed inter alia, that quantum would be separated from the merits of the dispute and was to be determined at a later stage, failing which the arbitrator would be called upon to determine the quantum.

[8] On 31 May 2005 the private arbitrator made a determination to the effect that the appellant was bound by the collective agreements and as such liable to pay the amounts to be agreed to by the parties.

[9] On 8 September 2005 the parties ultimately agreed through their attorneys that the following amounts were due by the appellant to the first respondent:

- 9.1 R205 363.02 for the underpayment of wages for 1 May 2003 to 16 February 2004, and
- 9.2 R77 490.51 emanating from the statement of claim and being for the period 1 May 2003 to 18 February 2004.

4 Clause 9 of the collective agreement.

5 Clause 10 of the collective agreement

6 Clause 11 of the collective agreement

7 Clause 12 of the collective agreement

[10] The aforesaid agreement on the amounts due was made an award of the private arbitrator on 2 November 2005. The appellant failed or neglected to pay the amounts due to the first respondent. Several attempts were made to recover the amounts without success. The parties exchanged a string of correspondence which also did not bear any fruit.

[11] Sometime in 2006 the first respondent lodged an application in the Kwa-Zulu Natal High Court, to have the appellant liquidated. On 2 March 2007 an order by consent was issued by the High Court. The effect of the order was *inter alia*:

- 11.1 to direct the first respondent's exemption committee to consider and decide the appellant's application for exemption within four weeks;
- 11.2 that in the event of the appellant wishing to appeal against the decision of the Exemptions' Committee to do so within four weeks;
- 11.3 that in the event that the appellant is aggrieved by the Independent Appeal Body's decision to bring an application for review in the Labour Court within four weeks of such determination.
- 11.4 The order read further that:

"5. In the event that the review eventuates at the instance of the [appellant], then it is recorded that this Consent Order is taken without prejudice to the [appellant's] rights to raise in such review inter alia:-

- (a) [First Respondent's] initial refusal to consider [appellant's] Exemption Applications,*
- (b) [First Respondent's] refusal to do so on the grounds that such Exemption Applications were not competent on the basis that:-*
 - (i) in respect of the period 1 May 2003 to February 2004 award had been made;*
 - (ii) in respect of the other periods, it was not competent to bring Exemption Applications retrospectively.*

That the recordal in paragraph 5 of this order is made without prejudice to the [First Respondent's] right to challenge in any such Review, the correctness of what is set out in paragraph 5(a) and (b) of this order". (sic)

[12] On 21 June 2006 the appellant submitted an application for exemption to the first respondent for the payment of monies due to the first respondent for the periods:

12.1 1 March 2003 to 30 June 2003.

12.2 1 July 2003 to 30 June 2004

12.3 1 July 2004 to 30 June 2004

12.4 1 July 2005 to 30 June 2006

[13] The appellant's application for exemption served before the Exemptions Committee of the first respondent and was unsuccessful. The following were the reasons for the decision of the Committee. The reasons relate to the issues that had to be considered when determining an application for exemption:

13.1 The Committee found that the appellant was operating its business based on a model which it described as a "*cut, measure and trim service*" to an entity known as Spectrum. By this system the appellant was providing a low costs labour service to Spectrum who in turn was competing in the retail market. Justification by the appellant of the model of its business was that it competed with the low labour costs of the footwear producers operating within the Far Eastern countries. The Committee found that to allow the appellant to continue on the basis of being viable only because of its low labour costs regime would be unfair to other employers in the industry. It was also found to be unfair to the appellant's employees because on the appellant's own admission it was paying its employees 60% of the prescribed wage as per the Collective Agreement. The employees had not been given any increase in the periods applied for exemption and that what they were currently paid was substantially less than 60% of the applicable prescribed wage rates. Furthermore, it was found that the appellant was not making any contributions to the social benefit funds constituted in

terms of the provident and sick fund collective agreements. The fact that the employees had agreed to be paid these low wages was rejected on the basis, *inter alia*, that the employees were desperate for employment and vulnerable and were being exploited by the appellant.

- 13.2 That granting the exemptions would undermine the collective agreements' function of establishing a consistent labour cost and benefit regime applicable to all employers and employees; would discourage council membership by employers and be detrimental to orderly collective bargaining in general and at sectoral level, and defeat the primary objects of the Act.
- 13.3 That whereas granting the exemption would contribute to the viability of the appellant's business based on its model, it would mean that the appellant would be allowed to "*trade on the back of its labour*" and that it would cause social injustice to allow the employees to sacrifice their right to fair terms and conditions of employment in order to provide for the appellant's business model.
- 13.4 The Committee further found that Mr Shaik, the joint managing director of the appellant and Spectrum had been involved in the shoe manufacturing industry through Spectrum and Fargo Shoes for a while prior to the dates relevant to the exemption applications and was therefore aware of the economic conditions surrounding the industry. It was found that he had therefore designed the appellant's business model in such a way that it would only be viable and successful if it did not comply with the applicable laws. Allowing the appellant to continue as modelled with exemptions, would jeopardise the job security of employees employed by compliant employers.
- 13.5 That the appellant severely undermined employees' rights to fair basic conditions of employment and was depriving them and their dependants of retirement and sick fund benefits.
- 13.6 That allowing the appellant low labour costs would give it a substantial advantage over local compliant competitors.

13.7 The appellant conceded that it did not provide benefits comparable to those that the exemption was sought.

13.8 Although the appellant appeared to comply with the Unemployment Insurance Act and the taxation legislation for employees, it did not appear to be complying with the skills Development Act.

13.9 Other factors were that exemption from complying with the Technological and Bargaining Council Fund, the appellant would be to reduce the fund's capacity of sponsoring research and development intended to promote the industry at large. It was found that it would therefore be unfair for the appellant to benefit from the development of the industry without making any contributions towards the costs thereof. The bargaining council would also be without levies to enable it to perform its statutory functions.

[14] The Exemption Committee further noted that the exemptions were intended for employers to cater for exceptional and mainly unexpected circumstances. That since the appellant's main complaint was in relation to the challenges posed by the importation of footwear at costs they found difficult to match, this was not at all unexpected, exceptional or unique to the appellant. This was a challenge to all employers in the industry and many had adapted and were conducting viable businesses as evident from the growth of the industry from 140 registered employers in 2000 to 149 in 2006.

[15] Aggrieved by the refusal of its exemption application the appellant lodged an appeal with the second respondent. Its appeal was similarly unsuccessful. The Independent Appeal Body was chaired by the third and fourth respondents. It held thus:

15.1 There was nothing before it which established that the Exemptions Committee had misdirected itself in coming to its decision and that it had applied its mind properly to the criteria set out in the collective agreement.

15.2 Were the Independent Appeal Body to consider the appeal in terms of a "*wide appeal*" it was satisfied that there was no new evidence before it which took the matter further for the appellant.

15.2.1 That the only criterion established by the appellant was the fact that three out of 52 employees had consented to be paid the low wages mentioned in the exemption application.

15.2.2 That there was nothing before the Independent Appeal Body to indicate that were the appellant to be granted the exemption, it would be the breathing space it required within a defined period to enable it to "*catch up*" and eventually pay the requisite minimum wages and benefits to its employees.

15.3 That no grounds of appeal had been established and that the decision to refuse the exemption was fair and reasonable in the circumstances.

Proceedings in the labour court

[16] The appellant then launched its application in the labour court to have the decision of the second respondent reviewed and set aside. The grounds of review relied upon by the appellant were: that irrelevant considerations were taken into account, or relevant considerations were not taken into account; the decision was given in bad faith; was arbitrarily or capriciously taken; was not rationally connected to:

16.1 the purpose for which it was taken;

16.2 the purpose of the empowering provisions.

16.3 the information before the Administrator; or

16.4 the reasons given for it by the Administrator.

[17] In its evaluation, the labour court noted that there were two decisions which were the subject of review *viz*, the decision of the Exemptions Committee and that of the Independent Appeal Body. The labour court thereafter made *inter alia*, the following findings:

- 17.1 The Exemptions Committee considered each and every ground listed in clause 14(3) of the collective agreement. It did not just list the grounds but dealt with each in relation to the application and as such *"acquitted itself in the manner it handled each of the 6 general bases upon which the exemption application was premised."*
- 17.2 The Exemptions Committee accepted the fact that the appellant's application was supported by all employees of the applicant and correctly held that the employees were vulnerable to threats of losing their employment.
- 17.3 The appellant's low labour cost business practices gave it substantial advantage over local competitors who comply with the collective agreements and the law.
- 17.4 The appellant was entitled to the information relating to the exemption applications granted to other employers on previous occasions as requested. However, failure by the first respondent to provide the appellant with such information *"did not have fatal consequences"* as there were other relevant considerations.
- 17.5 For the appellant to qualify for a wage reduction of 60% of the prescribed rate, it had to be a *"semi-formal sector establishment"*. The appellant was not such an establishment according to its *"classification form"* and as such the exemption could not have applied to the relevant period of indebtedness to the first respondent until September 2005.
- 17.6 The Independent Appeal Body correctly found that there was no new evidence submitted for the consideration of the appeal and any criticism against its remarks do not at all amount to there being reviewable irregularities or the matter not being fully and fairly tried.

[18] The labour court then dismissed the review application with costs and ordered the first respondent to pay the costs of 25 May 2007 and 11 June 2007 occasioned during the initial application for exemption as well as the

costs for the application for a postponement of the review application pending the access to information application.

The Appeal

[19] The appeal before us is only against that part of the order of the labour court dismissing its application for review with costs. The grounds of appeal relied on may be summarised as follows: That the court *a quo*:

19.1 erred in finding that the appellant was alleging that only the second respondent committed a gross irregularity in various ways in the matter;

19.2 ought to have concluded that the first respondent committed gross irregularities sufficient to vitiate first respondent's consideration of appellant's exemption application;

19.3 ought to have found that the first respondent committed gross irregularities by demonstrating an overt bias against the appellant and by failing to apply its mind to the criterion set out in clause 14 of the collective agreement as it was enjoined to do;

19.4 erred in not concluding that the first respondent as a reasonable decision maker, could not have come to the decision which it did which was to dismiss the appellant's exemption application.

[20] As regards second respondent the appellant contends that it committed gross irregularities sufficient to vitiate the proceedings because of its overt bias towards the appellant; failure to furnish reasons for its conclusion that it was satisfied that the Exemptions Committee had applied its mind properly to the criteria set out in the collective agreement; failure to consider the matter afresh having regard to the criteria in clause 14 of the collective agreement and finally that second respondent as a reasonable decision maker, could not have come to the decision which it did.

Analysis

[21] The decision that was the subject of the review application is that of the second respondent. One can say that the second respondent was

established *inter alia*, as a result of sec 32(3) of the Act. I say this because sec 32(3) (e) provides that a collective agreement may not be extended in terms of subsections (2) unless the minister is satisfied that, *inter alia*, provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, any appeal brought against the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement; and the withdrawal of such an exemption by the bargaining council. The appellant in this matter is a non-party to the collective agreement and is bound by the provisions of the collective agreement as a result of the minister's extension of the collective agreements referred to above to non-members.

[22] Although it is the decision of the second respondent that was the subject of review, the decision of the Exemption Committee of the first respondent is also affected. As indicated above, clause 14(10) of the collective agreement obliges the second respondent to consider all applications referred to it with reference to the criteria set out in clause 14[4] applicable to the Exemption Committee. This means that in addition to any further evidence that the appellant may have placed before the second respondent the latter body was also enjoined to also consider the material that was placed before the Exemption Committee. The powers of the second respondent in considering the applications referred to it are therefore less circumscribed.

[23] The application to review the decision of the second respondent was brought in terms of sec. 158(1)(g) read together with sec 32(3)(e)(i) of the Act. Sec 158(1)(g) provides that the labour court may review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law. In this case the second respondent when considering the application referred to it was performing a function under sec. 32(3)(e)(i) of the Act. The first respondent is a body accredited by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Act. That being the position the test for reviewing an award or decision of a tribunal such as the second respondent is as provided in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*⁸ namely whether the decision taken by the tribunal is a decision that a reasonable decision maker could not reach. See also an analysis of

⁸ (2007) 28 ILJ 2405(CC);

the test by this Court in *Fidelity Cash Management Services v CCMA & Others*⁹.

[24] The exemptions committee as well as the second respondent correctly, in my view, approached the matter on the basis that the appellant was obliged to comply with the provisions of the collective agreement. For an exemption to be granted the appellant must establish a justifiable reason why the collective agreement should not be complied with. It is therefore incumbent upon the applicant for exemption to place facts and evidence, before the two tribunals, representing special circumstances that justify the exemption of the applicant from complying with the collective agreement.¹⁰ This approach makes sense since the purpose of the Act as stated in sec.1 is also the advancement of economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act. Subsection 1 (c) states as one of the primary objects of the Act, provision of a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and formulate industrial policy.

[25] In considering the applications for exemption it is important to bear in mind the rationale for the extension of the terms of a collective agreement to non-parties like the appellant. The rationale is inter alia, to prevent unfair competition which employers who are not a party to collective agreements may pose. This Court per *Zondo JP* held as follows in *Kem-lin Fashions CC v Brunton and Another*¹¹.

"If the collective agreement is not extended to non-parties, the non-parties would be able to pay employees at rates which are lower than those which their competitors who are party to collective agreements have to pay to their employees. The result of this would be a serious threat to the business of those who are parties to collective agreements. This would seriously discourage orderly collective bargaining in general and collective bargaining at sectoral level in particular which are part of the primary object of the Act. If this were allowed, there would be little, if any, point in

⁹ (2008) 3 BLCR 197(LAC);

¹⁰ (See: *Ram International (Pty) Ltd and Nation* (2002) 23ILJ 1943 (BCA).

¹¹ (2001) 22 ILJ 109(LAC) AT 115h-j;

any employer seeking to be party to a bargaining council. That would be a threat to one of the pillars of the labour relations system in this country."

[26] One of the acts that constitute gross irregularity by the exemptions committee as contended by the appellant is that the initial refusal by the Exemption Committee to consider the appellant's application for exemptions is a display of an overt bias towards the appellant and its exemptions applications. For the appellant to succeed on this ground it must show on a balance of probabilities that the Exemption Committee approached the issues in its application with a mind which was in fact prejudiced or not open to conviction.¹² The fact that the Exemption Committee wrongly believed that it could not entertain the application is in my view not sufficient to establish a reasonable apprehension of bias. Its initial refusal has not been shown to have prevented a fair consideration of the issues subsequently.

[27] It was further contended on behalf of the appellant that the Exemption Committee failed to apply its mind and merely listed the criteria for exemption applications as catalogued in clause 14 of the collective agreement and concluded after a "*general and nebulous discourse*" under each criterion that they all fell to be decided against the appellant. I find no merit in this contention whatsoever. The exemption committee as expected of it, considered each and every criterion against the information supplied by the appellant, and provided its reasons for its conclusion on each aspect. It is not surprising that the labour court quoted the entire section of the analysis by the exemption committee at paragraph 9 of its judgment. It made a detailed and lengthy analysis of the application. I find it therefore unnecessary to burden this judgment with a detailed analysis as the labour court did. It is therefore incorrect, in my view, to suggest that the Exemption Committee failed to apply its mind and as such committed a gross irregularity. The finding of the labour court in this regard is therefore correct.

[28] What is evident is that the appellant is not seeking an exemption as a temporary measure to recuperate or resuscitate its business and to comply with the collective agreements once its business has fully

¹² (BTR Industries SA (Pty) Ltd v Metal & Metal & Allied Workers Union 1992(3) SA 673 (AD) at 690A-B).

recuperated or in good health. This was not the request that they made to the exemptions committee as well as to the second respondent. The following factors relating to the appellant are fundamental:

- 28.1 When the appellant commenced business on 1 May 2003, the leather industry was already facing difficulties dating back at least 1999;
- 28.2 Apart from foreign competitors there were local competitors performing a similar function to that of the appellant;
- 28.3 Since its inception, the appellant's business model could be viable only when it is granted exemption from complying with the law. Without exemption its business would never be viable;
- 28.4 The appellant designed its business model less than two weeks before it registered with the first respondent in order to apply for an exemption.

The conclusion that granting the appellant an exemption would undermine the collective agreement as well as the bargaining process is not, in my view, unreasonable. By granting the exemption, the appellant would be given an unfair advantage against other competitors in the industry who are willing to comply with the law under difficult circumstances.

- [29] Furthermore, nothing was unexpected in the economic hardship encountered by the appellant. Its managing director, the deponent to the founding affidavit was found by the respondents to have been long in the industry and understood its operations and conditions quite well. It is correct that the appellant's employees have no objection to the granting of the exemption. It must be understood that from inception these employees have not been paid the regulated wages. The conclusion by the respondents that they are vulnerable and would agree to anything given to them is in my view not unreasonable. There is in my view nothing that justifies depriving these employees of their basic conditions of employment especially in the circumstances where the business model of their employer was designed such that it can only succeed if the applicable basic conditions of employees are not complied with.

[30] Both the Exemption Committee and the second respondent have rendered detailed reports that are well reasoned. They have dealt with each and every matter that was placed before them. The two bodies as well as the labour court applied their minds to the issues before them. In the result the appeal falls to be dismissed with costs.

[31] In the result the following order is granted:

The appeal is dismissed with costs.

Tlaletsi JA

I agree

Mlambo JP

I agree

Mailula AJA

For the appellant: Adv O A Moosa SC

Assisted by: M T Hutson

Instructed by: C M Sardiwalla & Company

For the respondent: Adv L B Broster SC

Instructed by: Cox Yeats attorneys

