Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT PORT ELIZABETH

Case No: PR 150/14

In the matter between:

ARGENT STEEL GROUP T/A SENTECH INDUSTRIES	**Applicant**
and	
MOTOR INDUSTRY BARGAINING COUNCIL	**First Respondent**
EXEMPTION APPEAL BOARD	**Second Respondent**
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**Third Respondent**

Delivered: 30 January 2018

Summary: (Review –exemption board rulings - Condonation application – practice manual time limits –prima facie merits of review application weak – consultation insufficient – financial information opaque – nature of process and application do not necessarily require applicant to be called to clarify incoherent motivation – relative sophistication of applicant also a consideration)

JUDGMENT

LAGRANGE J

Background

[1] This review application concerns the refusal of an exemption board and an exemption appeal board to grant the applicant employer ('Argent') exemption from paying an increase on actual wages paid to its employees falling within the scope of the main collective agreement of the first respondent, a bargaining council ('MIBCO'). Consequently, the application concerns both a review of the dismissal of the appeal against original decision and the original exemption ruling itself. The court's jurisdiction to hear the reviews is derived from s158 (1)(g) of the Labour Relations Act, 66 of 1995 ('the LRA') which provides that it may "... subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law; …" The attack on the boards' decisions is based on reasonableness and being denied a fair hearing.

[2] There are two preliminary issues relating to whether or not the applicants dilatory prosecution of the review application should be condoned and whether or not the review application should be treated as dismissed because of the deeming provision of clause 16.3 of the Labour Court Practice Manual in terms of which an application for review which is archived is treated as if the application has been dismissed.

[3] The 180 employees of Argent who were affected by the application, were all being paid wage rates higher than the minimum wage rates stipulated in the MIBCO main agreement. Argent is a member of one of the employer organisation parties to the collective agreement. The application for exemption from paying the 2013 wage increase (applicable for the period 1 September 2013 until 31 August 2014) was made to the Eastern Cape Regional Council of MIBCO in October that year. The National Union of Metalworkers of South Africa ('Numsa') objected to the application on various economic grounds.

[4] The application was considered at a meeting of MIBCO's wage exemption board on 27 March 2014 and declined. The reasons for declining the application were set out in a letter dated 4 April 2014, in response to a letter from Argent requesting reasons for the board's decision:

> "….
>
> Please be advised that while the board and takes various considerations at this meeting, it is not the Council's intent to supply the extensive detail thereof, but rather, <u>the salient points</u> that resulted in the Wage Exemption Board's decline of your application as follows:
>
> 1. The proof of Consultation was not satisfied in that the Employees appear to be informed rather than consulted. It could not be confirmed that **<u>all</u>** Employees were represented as only the NUMSA representative's submissions were noted.
> 2. The Financial Statements did not support the employer's motivation and some of the reasons supplied were:
>
> 2.1 The Audit Report was not included
>
> 2.2 A detailed income statement was not supplied
>
> 2.3 The projection figures did not make sense e.g. fluctuation in GP% is unjustified. The Net Loss in the projection seems to be overstated."

(emphasis added)

[5] In late April 2014, Argent appealed against the decision. The grounds of appeal were set out in an affidavit from Argent's General Manager, Mr G Lennon ('Lennon'). Amongst other things, the affidavit dealt with the particular reasons why the original application was refused. On the question of the alleged lack of consultation he stated:

> "5.2.7 The Company has not taken the decision to apply for exemption lightly. They take cognizance that their staff are affected by the application, however there is a duty on the Applicant to ensure that all measures are taken in order to ensure that their staff have job security and all employment in future. All employees were consulted on the exemption before the application was made. (Find attached a copy of the letter from Jurie Liebenberg marked Annexure "D" annexed hereto as proof thereof) a

meeting was called with all the monthly paid employees, Supervision and the shop stewards. (Find attached a copy of 8 affidavits from the supervisors marked Annexure "I" annexed hereto as proof thereof.) They were shown the financials of the company and informed of the necessity of applying for exemption. The only point raised was that the employer should have been informed of this before the strike. Management responded by saying that due to the customer base (Motor industries not running during the strike) it would have been forced to implement short time over this period which would have resulted in a loss of income to the employees.

5.2.8 Shop Stewards and supervisors were requested to get the message through to **ALL**[1] the employees in the same manner it had been presented to them (Find attached a copy of the meeting minutes marked Annexure "E" annexed hereto as proof thereof). The employees demanded a meeting with the General Manager on the 23rd October 2014. The general manager explained the reason for the application and explained that he could only make the exemption application once the increase had been finalised. All employees were given a chance to ask questions or give their views. A number of employees said they would rather the company closed down and they be retrenched and keep their jobs without increase."

(emphasis added)

[6] On the financial issues, Lennon's affidavit in support of the appeal stressed the following, which had not been previously mentioned:

6.1 A stock take in April 2014 revealed that incorrect costings of stock had resulted in overstating sales margins on goods sold, when in fact the business had suffered a stock loss of R 7.2 million.

6.2 A shortage of work had added R 4.5 million to this loss.

6.3 The business is a division of the Argent Group Pty Ltd ('the Group') and accordingly the audited figures relate to the group as a whole. The affidavit reiterated that a letter from the group of auditors had been submitted with the original application confirming an extract from the group's annual financial statements relating to the Argent

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[1] Original emphasis

business division, which was again included in the appeal documents.

6.4 Based on updated figures, ARGENT anticipated further losses in the first quarter of the 2014 financial year and if forced to pay the increases due, would incur an additional loss of approximately R1.65 million.

6.5 Various stratagems had been adopted to cut expenses, generate additional income without incurring additional infrastructural expenditure and quoting on additional work.

Lennon also offered to make further oral submissions if additional information was required by the exemption board. He also offered to make the auditors available for questioning by the board if that was required.

[7] The appeal was considered by the wage exemption board appeal body at a meeting on 26 May 2014. In the letter declining to reverse the original decision, the appeal board gave the following reasons:

> "That the committee declined the Sentech Industries-Wage Exemption Appeal application due to the following requirements not being met:
>
> 1. Proof of Consultation
>
> 1.1. The reasons supplied for the initial decline were not remedied that it could not be established that all employees were in fact consulted with and it still remained that the employees were merely informed and not consulted with.
>
> 2. Financials
>
> 2.1. The Audit Report remained outstanding as the letter from Grant Thornton was inadequate to fulfil this requirement of Audited Financial Statements.
>
> 2.2. The income statement was supplied but in the form of Management Accounts which further stipulated a profit figure that was inconsistent with their Financial Statements and their letter dated 25 April 2014, signed off by the financial manager

and detached as Annexure "J"[2] of the employer's appeal application documents; and

2.3. The projected balance sheet figures were still inaccurate that they do not balance."

In short, the appeal was dismissed partly for formal non-compliance, partly for lack of consultation and partly on account of the incoherence of the financial information which was provided.

Condonation

[8] The review application was only finalised approximately eleven months after it was launched timeously on 7 July 2014. There was a delay in obtaining the record which was the responsibility of the first and second respondent for lodging. Mr *Quixley*, appearing for the respondents, argued that the responsibility for filing the record lay with the applicant and they had done nothing to accelerate the process until the second week of November 2014. Although it does not sit well for the respondents to complain that the applicant did not make an effort to ensure the record was lodged timeously, when it the respondents were the ones who had to provide the record, it is true that there is no evidence pointing to an effort by the applicant to obtain the record for a few months.

[9] A further delay was caused by difficulties locating the record at court once it was lodged. The respondents lodged the record on 16 February 2015 but the applicant were only able to locate it at court on 3 March 2015, whereafter they filed it on 30 March, again unnecessarily late. The parties also engaged each other in negotiations to try and settle the matter and the applicant sought and obtained an indulgence from the respondents to file its supplementary affidavit late on 22 April. As matters turned out, the supplementary affidavit was filed on 28 April 2015, a nearly a week after the period of indulgence which the respondents had agreed, and about a fortnight after it was due in terms of Rule 7A(8) . Apparently, this was

[2] Annexure "J" is a letter from Argent's financial manager attaching clearer copies of financial statements signed by the auditors and pointing out that on account of an internal company loan from a sister company, Argent suffered an actual loss of approximately R 600,000 rather than a year-to-date profit of R 6.5 million for the year ending March 2013.

owing to the unavailability of a signatory and an intervening long weekend. The respondents filed their answering affidavit promptly by 12 May and Argent belatedly asked for the resubmission of certain pages which were not legible and then filed its replying affidavit on 4 June, some three and a half weeks' late. The respondents objected to the late filing of the replying affidavit.

[10] In the second half of 2015, negotiations ensued between Argent and NUMSA to try and resolve the underlying dispute without success. Apart from referring to such discussions taking place in August that year, Argent provided no clarity as to when those discussions came to an end. It is trite that a party seeking condonation must explain all periods of delay and what the applicant has provided by way of an explanation for doing nothing to set the matter down between August and December 2015 is woefully inadequate. Moreover, there is no evidence that the respondents would even have been aware of these discussions with NUMSA.

[11] In any event, it was only when the respondents wrote to the registrar pointing out that the matter should be regarded as archived in terms of the practice manual that Argent quickly requested the registrar to set the review application down for a hearing. This was nearly 17 months after the review application was launched. By that stage, it still had not applied for condonation for the late filing of the record or its supplementary or replying affidavits. It also did not make any representations on the archiving of the file despite the respondents' letter to the registrar. It still took another three months for it to file its condonation application, which did on 15 March 2016, without even bothering to explain why it had not done this since July 2015. Consequently, the application was only ripe for hearing nearly twenty months after the application had been launched. This resulted in the file being placed before a judge for a practice direction. The honourable Cele J who considered the application pointed out that the matter could have been set down once pleadings had closed and directed that the issue of condonation be dealt with when the application was set down.

[12] Insofar as the applicant did not comply with section 145 (5) of the Labour Relations Act, 66 of 1995, which requires the applicant to request a review to be set down for hearing within six months of launching the review application, I accept that this would not have applied to a review application launched prior to the LRA amendments which took effect from 1 March 2015.

[13] All things considered, one is left with an overwhelming sense that Argent was no way wanted to expedite the prosecution of the review application. Even if allowance is made for the delay of respondents in lodging the record, the applicant made no attempt to accelerate this until mid-December 2014, nearly 5 months after initiating the review proceedings. In terms of clause 16.1 of the practice manual no further process in the matter had been served for more than six months and the file ought to have been archived. Only when the respondents asked the file to be archived in terms of the practice manual, which had been effective since 1 April 2013), did Argent then ask that the matter to be set down and said nothing about its non-compliance with the time periods in the manual. When it launched its condonation application, it also did not bother to address the failure to comply with the clause 16.1 of the practice manual, which compounds its dilatoriness in the matter. Likewise, it made not the slightest attempt to explain the late filing of the condonation application itself.

[14] It is trite law that a party seeking condonation must apply for condonation as soon as it perceives the need to do so. That should have been clear to Argent by the time it filed its replying affidavit in 2014. In keeping with its casual approach to the condonation application, it failed to even address prospects of success of the review application as it was required to.[3] In short, Argent did not act with the expedition expected in such applications and the explanations for the various delays are weak and, in relation to some periods such as the period between August and December 2015, completely absent. The application was also materially defective in failing to deal with the merits of the review applications. In passing, I note that

[3] See e.g. ***Samuels v Old Mutual Bank* (2017) 38 *ILJ* 1790 (LAC)** at 1796, para [17]

Argent’s attorneys are well versed in practice in the Labour Court’s and ought to have been well aware of what was expected of Argent.

[15] As to the merits of the application, it is true that the matter is a somewhat unusual one dealing as it does with the review of decisions by bodies appointed as part of a self -regulatory mechanism by a bargaining council whose purpose is in no small way dedicated to the enforcement of collective agreements. The nature of the decisions which were taken by the two boards are of a qualitatively different kind to that of typical awards in rights disputes. I accept also that it is a matter of considerable importance to all the affected parties. Nonetheless, an applicant who regards a matter as important ought to demonstrate that in the prosecution of the review and not rely on that as a license to conduct its application in a desultory manner.

[16] Even if I ignore the absence of ARGENT pleading its prospects of success in the condonation application, I am not persuaded that it has a reasonable prospect of succeeding in establishing that either board unreasonably refused the exemption application. In particular this is because it is difficult to see how ARGENT could overcome the requirement that it consulted sufficiently before making the application, even if it might have some prospect, though slight on the evidence, that if it had consulted then appeal board ought to have allowed it to make further inputs giving the incoherent state of its motivation for the exemption. The prospective merits are dealt with in detail below. Accordingly, the application for condonation must be dismissed and consequently the review application as well. For the sake of completeness I will also address the question of ‘reviving’ the review application under the provisions of the practice manual.

<u>Archiving and deemed dismissal of the application under the practice manual</u>

[17] The respondents suggested that Argent also failed to bring an application to revive the review application which ought to be considered dismissed until such time as such an application was brought and succeeded. The pertinent provisions of the practice manual relating to the archiving of the review application are the following:

"11.2.7 A review application is by its nature an urgent application. An applicant in a review application is therefore required to ensure that all the necessary papers in the application are filed within twelve (12) months of the date of the launch of the application (excluding Heads of Arguments) and the registrar is informed in writing that the application is ready for allocation for hearing. Where this time limit is not complied with, the application will be archived and be regarded as lapsed unless good cause is shown why the application should not to be archived or be removed from the archive.

…

16.1 In spite of any other provision in this manual, the Registrar will archive a file in the following circumstances:

- In the case of an application in terms of Rule 7 or Rule 7A, when a period of six months has elapsed without any steps taken by the applicant from the date of filing the application, or the date of the last process filed.

…

16.2 A party to a dispute in which the file has been archived may submit an application, on affidavit, for the retrieval of the file, on notice to all other parties to the dispute. The provisions of Rule 7 will apply to an application brought in terms of this provision.

16.3 Where a file has been placed in archives, it shall have the same consequences as to further conduct by any respondent party as to the matter having been dismissed."

[18] In support of their argument they cited the case of ***Edcon (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others: In re Thulare & others v Edcon (Pty) Ltd*** [4] where Banks AJ, with a classical flourish, expressed the effect of the provisions thus:

"[24] This has been confirmed by Molahlehi J *in Tadyn Trading CC t/a D Tadyn Consulting Services v Steiner & others* from which it is clear that all practice directives are competent and should be adhered to and are not merely guidelines. I respectfully agree with this interpretation, which is fortified by the peremptory language used in clause 16 of the Practice

[4] (2016) 37 ILJ 434 (LC) at 441.

> Manual with regard to the legal effect of a court file having been archived. In my view it seems clear that the deemed archiving of a review court file is to consign the unfortunate file to a form of limbo without ever being formally dismissed and from which the file may never emerge unless a properly motivated revival application demonstrating 'good cause' enters to rescue it from a shadowy netherworld akin to the Asphodel Meadows of Greek Mythology"

[19] This approach was followed in other Labour Court judgements and more recently has been affirmed by the Labour appeal Court in the case of ***Samuels v Old Mutual Bank*** [5]:

> [15] The Practice Manual is not intended to change or amend the existing Rules of the Labour Court but to enforce and give effect to the rules, the Labour Relations Act as well as various decisions of the courts on the matters addressed in the practice manual and the rules. <u>Its provisions therefore are binding</u>. <u>The Labour Court's discretion in interpreting and applying the provisions of the Practice Manual remains intact</u>, <u>depending on the facts and circumstances of a particular matter before the court</u>.

> [16] Clause 16.2 does not specifically state that in an application for the retrieval of the file, a party who brings that application must show good cause why the file must be retrieved from the archive. It however states in no uncertain terms that the provisions of rule 7 will apply in an application brought under the clause 16.2. Clause 11.2.7 applicable to rule 7 and rule 7A applications requires that a party who applies for a file to be removed from the archive must show good cause why the file must be removed from the archive. Furthermore, an applicant who applies for a file that has been archived for failure to comply with an order by a judge to file a pretrial minute, to be removed from archives, has to show good cause why such a file should be removed from the archives. There is therefore no doubt that showing good cause is a requirement for a file to be removed or retrieved from the archives in terms of clause 16.2.

> [17] <u>In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives</u>. Showing good cause demands that the application be bona fide; that the applicant provide a reasonable

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[5] (2017) 38 *ILJ* 1790 (LAC) at 1796-7

> explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised."

(emphasis added)

[20] As I understand the decision, the LAC is unequivocal about the obligation of litigants to comply with the practice manual. That would include an obligation to apply to revive a review application by way of an application under rule 7, which Argent abjectly failed to do in this case. However, on the facts of this case it appears that the review file was not actually archived by the registrar. Instead the file was referred to a judge for a directive, who set the matter down for hearing. In the absence of the file been archived, the deeming provisions of the practice manual did not come into effect and Argent was not obliged to apply for the revival of the application. Nonetheless, the failure to comply with the time periods in clauses 11.2.7 and 16.1 of the practice manual are compounding factors in evaluating the condonation application, as mentioned above.

Merits of the review

The legal framework of the exemption process

[21] In terms of section 31 (k) of the LRA every bargaining Council constitution must provide for a "procedure for exemption from collective agreements." Further, it is a requirement if a bargaining council wishes to extend a collective agreement to non-parties that the agreement must make provision for an appeal forum. The applicable provisions in the LRA at the time the exemption was sought in 2014 read:

"32(3) A collective agreement may not be extended in terms of subsection (2) unless the Minister is satisfied that-

(a) the decision by the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);

(b) the majority of all the employees who, upon extension of the collective agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the bargaining council;

(c) the members of the employers' organisations that are parties to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement;

(d) the non-parties specified in the request fall within the bargaining council's registered scope;

(e) 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;

the withdrawal of such an exemption by the bargaining council;

(f) the collective agreement contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of this Act; and

(g) the terms of the collective agreement do not discriminate against non-parties.

[22] The amendments to the LRA[6], which mostly took effect on 1 January 2015[7], were intended to strengthen the functioning of exemption mechanisms by: requiring bargaining Councils to have effective exemption procedures to deal with applications for exemption by non-parties;

[6] Notice No. 629, GG 37921 of 18 August 2014.

[7] Proc R .87, GG 38317, of 19 December 2014.

speeding up appeal procedures and barring representatives of parties to the Council or their members from participating in appeal bodies.[8]

[23] In conformity with these requirements, the main agreement of MIBCO[9] contains the following provisions :

"CLAUSE 8: ENFORCEMENT

8.1 EXEMPTIONS

(1) General Exemption from all Clauses

(a) Exemption from any of the provisions of any of the Council's Agreements may be granted by the Council or Regional Councils, to any party on application.

(b) Application for exemption shall be made to the secretary of the Regional Council within whose area the applicant operates or is employed.

(c) The Regional Council or the Council, as the case may be, shall fix the conditions subject to which such exemptions shall be valid, and may, if it deems fit, after one week's notice has been given, in writing, to the person(s) concerned, withdraw any licence of exemption .

(d) The secretary of the Regional Council or the General Secretary of the Council, as the case may be, shall issue to every person granted exemption , a licence signed by him setting out -

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[8] More specifically, the new and amended sub-sections read:

"32

… (dA) the bargaining council has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the collective agreement and is able to decide an application for an exemption within 30 days;

…

(e) provision is made in the collective agreement for an independent body to hear and decide , as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against - …

(3A) No representative, office-bearer or official of a trade union or employers' organisation party to the bargaining council may be a member of, or participate in the deliberations of, the appeal body established in terms of subsection (3)(e)."

[9] Extended by the Minister of Labour under R GG No. 37508 : 4 April 2014 GG No. 37508 : 4 April 2014

(i) the name of the person concerned;

(ii) the provisions of this Agreement from which exemption is granted;

(iii) the conditions subject to which such exemption is granted; and

(iv) the period during which the exemption shall be valid.

(e) In respect of establishments registered under Chapters II or III of this Agreement, the following exemptions procedure applies:

(i) An employer that applies for an exemption in order to pay a lesser wage increase or to be exempted from paying on actuals shall complete the wage exemption application form available on request from the local Regional Councils.

(ii) The employer shall consult its employees on the employer's intention to apply for an exemption and the application for exemption must contain details and proof of the consultation process.

(iii) The employer, in the application shall furnish all relevant financial information supporting the motivation for the exemption applied for.

(iv) The employer shall lodge the application for exemption with the local Regional Council and the employer shall specify that it is a Chapter II or III application for an exemption and the employer shall specify the exact nature of the exemption applied for as prescribed in paragraph (e)(i) of this clause.

(v) The Regional Council shall make a decision on the application for an exemption within 30 days from the date upon which the application was lodged with the Regional Council.

(vi) If the application of a non-party establishment for the exemption is rejected, the employer may lodge an appeal with the Independent Board and if the application of a Party establishment is rejected the employer may appeal to the National Council.

(f) The Secretary of the Regional Council or the General Secretary of the Council, as the case may be, shall-

(i) number consecutively all licences issued;

(ii) retain a copy of each licence issued; and

(iii) where exemption is granted to an employee, forward a copy of the licence to the employer concerned.

(g) The Secretary of the Regional Council or the General Secretary, as the case may be, shall issue to every person granted a licence, a letter of authority signed by him setting out, read with the changes required by the context, the information referred to in subclauses (e) and (f) above.

(2) Exemption from the Motor Industry's Retirement Funds

(a) When applications for exemption are received from employers or a group of employees, requesting exemption from the Motor Industry's retirement funds in order to join an alternative approved fund, the following shall be observed: …

(b) The Secretary of the Regional Council or the General Secretary, as the case may be, shall issue to every person granted a licence, a letter of authority signed by him setting out, read with the changes required by the context, the information referred to in sub-clause (1) of this clause.

(3) Exemptions relating to actual/guaranteed increases

(a) Individual employers seeking exemption to pay a lesser actual wage increase and/or a guaranteed increase or to be exempted from paying such, must obtain the wage exemption application form available on request from their local Regional Council.

(b) Applications for exemption not to pay the agreed prescribed minimum wage increases will not be accepted or considered in terms of these exemption procedures.

(c) The application must be lodged with the Regional Council and must include the following supporting documents-

(i) Formal financial information

(ii) A written motivation

(iii) Details and proof of the consultation process between the employer, employees and relevant MIBCO Trade Unions.

(d) Applications must be lodged with the Regional Council and scrutinized within 21 days from the date the Council has circularized all employers with the amending Agreements and wage schedules, either hand-delivered or by registered mail or by fax or E-mail, in the prescribed format.

(e) The Wage Exemptions Board will make a decision on the application within 14 days of the conclusion of the first period, i.e. 21 days as referred to in sub-clause (d) hereof.

(f) Applicant employers will be advised of the outcome within seven days by fax where applicable and by registered mail.

(g) Non-party establishments may appeal to the Exemptions Board and party establishments to the National Council within 14 days from the date of receipt of the registered post or fax advising of the rejection of the application.

(h) Appeal hearings will be attended by the Council's Auditors to assist with the interpretation of the financial information.

8.2 EXEMPTION BOARD

(1) In terms of section 32(3)(e) of the Act the Council hereby establishes an independent body, to be known as the Exemptions Board, to consider appeals from non-parties against a refusal of a non-party's application for exemption from the provisions of a published collective agreement and the withdrawal of such an exemption by the Council.

(2) Any non-party employer may lodge an appeal with the Council against the Council's refusal of an application for an exemption from the provisions of a published collective agreement and the withdrawal of such an exemption by the Council, in which event the following procedure shall apply:

(a) An appeal shall be in writing and shall be addressed to the Regional Secretary concerned for consideration by the Exemptions Board appointed by the Council.

(b) All appeals shall be considered by the Council or regional councils with due regard to the criteria contained in the collective agreement when considering applications for exemptions by non-parties.

(c) All appeals shall be substantiated or motivated by the applicant and shall include the following details:

(i) the period for which the exemption is required;

(ii) the Agreement and clauses or sub-clauses of the Agreement from which exemption is required;

(iii) proof that the exemption applied for has been discussed by the employer, his employees and their respective representatives; and the responses resulting from such consultation, either in support of or against the application, are to be included with the appeal.

(3) The Exemptions Board may, having regard to the individual merits of each appeal, grant or refuse the appeal if-

(a) it does not undermine the agreement;

(b) it is fair to the employer or his employees and other employers and employees in the Industry.

(4) The Exemptions Board shall deal with all appeals within 30 days of the date on which the appeal was submitted: Provided that the Board may defer a decision to a following meeting if additional motivation or substantiation or information is considered necessary to make a decision on the appeal.

(5) Once the Exemptions Board has granted an exemption, it must issue a certificate and advise the applicant(s) accordingly within 14 days of the date of its decision.

(6) When the Exemptions Board dismisses or dismisses part of an appeal for exemption it shall advise the applicant(s) within 14 days of the date of such decision.

(7) Exemption criteria: The Exemptions Board must consider all appeals with reference to the following criteria:

(a) the written substantiation and motivation submitted by the applicant;

(b) the extent of consultation with and the petition for or against granting the exemption as provided by employers or employees who are to be affected by the exemption if granted;

(c) the scope of exemption required;

(d) the infringement of basic conditions of employment rights;

(e) the fact that a competitive advantage is not created by the exemption;

(f) the viewing of the exemption from any employee benefit fund or training provision in relation to the alternative compatible bona fide benefit or provision, including the cost of the employee, transferability, administration management and cost, growth and stability;

(g) the extent to which the proposed exemption undermines collective bargaining and labour peace in the Motor Industry;

(h) any existing special economic or other circumstances which warrant the granting of the exemption ;

(i) cognizance of the recommendations contained in the Report of the Presidential Commission to Investigate Labour Market Policy; and

(j) any recommendation from the Council."

(Emphasis added)

Subclause 8.1 (3) is the provision under which the exemption application was brought.

Grounds of review

Introduction

[24] Argent attacked both legs of the reasoning of the bodies which deliberated on the application for exemption and the appeal. The attack relates to the alleged unreasonableness of the decisions based on supposed material irregularities committed in the form of disregarding material and relevant information and of failing to assess the totality of the information in a fair and balanced fashion, thereby denying Argent its right to a fair hearing. Had the exemption bodies considered the information before them holistically, they could not have avoided agreeing to the application. Argent also claims that if any part of its motivation for exemption was unclear, the two bodies should have allowed Argent to make representations rather than declining the applications.

[25] More particularly, in relation to the finding of both bodies that the consultative requirements for an exemption application were not met, Argent contends that there was sufficient proof of consultation with the affected employees which the two bodies failed to appreciate. On the second leg, the applicant merely baldly states that the bodies' finding that

the financial statements did not support its motivation was not sustainable on the record. What is astonishing is that these sweeping averments, lacking in specificity, were made in the supplementary affidavit *after* considering the record. It seems the applicant contrived to make the respondent justify the decisions in their answering affidavit, which they obligingly, but unnecessarily, did. Even then the applicant avoided dealing with them in reply. Strictly speaking, these contentions advanced by ARGENT are simply conclusions and are lacking in the necessary factual detail necessary to make out a case for review and I would have be inclined to dismiss the application on this ground alone[10], but the

[10] See in this regard, authorities reiterating the trite proposition that new grounds of review cannot be raised in argument viz: *Tao Ying Metal Industry (Pty) Ltd v Pooe NO & others* (2007) 28 *ILJ* 1949 (SCA) at 1986, par [122] and 1979, para [198]; *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) at 396, par [29]; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & others* (2009) 30 *ILJ* 269 (LAC) at 280, par [28] and *Northam Platinum Ltd v Fganyago NO & others* (2010) 31 *ILJ* 713 (LC) at 720-721, paras [27] – [29]. Further, that the facts relied on must be pleaded in the founding papers except where allowance should be made for lay litigants. See, e.g. *Rothschild v AMT Construction* (1999) 20 *ILJ* 2929 (LC) at 2932, par [9] and *National Union of Mineworkers v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 *ILJ* 2913 (LC) at 2924 par [45]. In particular, see the LAC decision in *Comtech (Pty) Ltd v Molony NO and Others (DArgent2/05)* [2007] ZALAC 40 (21 December 2007) in which it was said:

> “[15] The difficulty with the appellant’s case in this regard relates to whether the founding affidavit contains the factual grounds required by Rule 7A (2) (c) of the Rules of the Labour Court. Rule 7A (2) (c) of the Rules of the Labour Court requires a party who applies for a review, such as the appellant in this matter, to deliver a notice of motion that must be supported by “an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.” Rule 7A requires the notice of motion to call upon, in this case, the commissioner “to show cause why the decision or proceeding should not be reviewed and corrected or set aside.”
>
> [16] In my view, the contents of par 15 of the founding affidavit relate to conclusions of law. There is nothing either in par 15 or anywhere else in the founding affidavit which sets out the factual grounds upon which the appellant sought to base its legal grounds of review. In par 15 of the founding affidavit the deponent said that the commissioner erred in his award in that he “failed and or neglected and/or refused to apply his mind to the evidence led at the arbitration proceedings” but did not motivate this bald allegation by reference either to the evidence or the award.”
>
> …

respondents did not complain about the factual paucity of the founding papers, and whether the court ought *mero motu* to dismiss the application on this ground was not canvassed with the parties. Accordingly, I have considered the merits as contended for by the parties both in the affidavits and the argument.

Compliance with prerequisites for exemption

[26] Clauses 8.1 (1) (b) and 8.1 (3) (c) of the main agreement set out the various prerequisites exemption applications must meet. The first contention of the respondents in this regard is that Argent failed to provide proof that it had consulted with all employees about the intended exemption application before submitting it and the documentation only revealed that employees were "informed" about the intended exemption application. As such, Argent did not provide 'proof of the consultation process between the employer, employees and relevant MIBCO trade unions' as required by clause 8.1 (3) (c) (iii).

[27] Such evidence that was provided with the original application were the minutes of two meetings on 22 and 23 October 2013 which merely showed that employees were presented with a *fait accompli* and no genuine opportunity to make their own inputs. The respondents also made something of the fact that Annexure "A" attached to the pro forma exemption application form was not signed by a single employee. The Annexure essentially contains a declaration by individual employees that they were consulted on the application for exemption as provided for in the main agreement. It does not require that they express any view on whether or not they agree with the proposal. However, the respondents did not press this point in argument and acknowledged this was a minor issue.

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[18] It is arguable that the award in this case could possibly be reviewable if the founding affidavit had been properly drawn and the correct grounds of review had been relied upon and proper factual basis for such grounds had been set out. But, as the papers stand, it seems to me that I have no choice but to find that the appeal falls to be dismissed for the absence of a factual basis for the appellants complaints on review."

[28] The minutes of the meeting held on 22 October 2013 with "management, supervisors, team leaders, union representatives at Argent industries" headed "Re: Company's financial situation and decision to submit Application for Exemption from paying increases" (emphasis added) essentially record what Lennon did, namely to explain the company's financial situation and the reasons for the difficulties it was facing including the fact that a strike in the component industry had reduced orders. He also mentioned a loss of approximately R 8.8 million to date and that the increase would cost the company a further R 2.2 million per year. The minute records amongst other things:

> "5. Mr Lennon Has urged all the parties present at the meeting to convey the message to the respective area and try and make the people understand the situation that we all work together to revive the situation.
>
> …
>
> 7. Mr Lennon also explained that the company is going to apply for an exemption for paying increases, because the wage bill is too high. He also noted that the salaried staff had not received wage increases.
>
> Mr Lennon ask whether they were any questions from the attendees.
>
> [The minute then records a question by an employee whether the company could not have addressed workers before the matter went on strike, to which he responded that it would not have made a difference anyway because customers would not drawing stock and the majority of the workforce would have been on short time anyway.]
>
> 8. Mr Lennon has urged once again that the message be conveyed to the workforce in the correct manner."

(*Sic*, emphasis added)

[29] The second meeting on the following day (23 October 2013) was a direct result of the previous day's meeting as reflected in the minutes. This meeting report was described as a meeting "…held with employees at Argent Industries". The summary of the meeting records the following:

> "1. Mr Lennon was summoned to the canteen by the employees. He was informed that they refused to go back to work unless the company

withdraws its application to MIBCO requesting exemption from the pay increase.

2. Mr Lennon mentioned company is having financial difficulties and informed the employees that he was applying for the exemption as the company cannot afford the additional costs.

3. Mr Lennon informed the employees that <u>he was only informing them that he was filing the application, it was up to the board committee to grant the application should it be justi</u>fied.

4. Mr Lennon informed the shop stewards that it wasn't illegal strike and said the employees could face disciplinary action if they did not go back to work.

5. Mr Lennon asked Phaphu the local organiser to come through to convince the employees to go back to work.

6.Phaphu spoke to the employees and <u>informed them that the union would oppose the application</u> and inform the employees to go back to work, which they did at 09H30."

(*Sic,* emphasis added)

[30] After the application had already been submitted, a further meeting about it was held on 28 October 2030 with a NUMSA organiser and shop stewards. At that meeting, the union organiser specifically asked Lennon for "an update on the situation" and if Lennon had "any suggestions to avoid the current situation." It was further recorded that: "Mr Daweti [the union organiser] believes that it is unfair for the company not to pay the increases to the workers after workers have embarked on a four-week strike. Mr Daweti asked if the company have any proposal, offer to put on the table regarding the increases" (*sic*). In response, Lennon reiterated that the situation was unchanged and that the exemption would be considered by the exemption board. The union then reaffirmed its intention to oppose the application and asked the company to submit audited financial statements to the exemption board if requested to do so. The union organiser also expressed his surprise that the company is still in the situation it claimed after implementing retrenchments, to which Lennon

responded that his intention was to keep the company operating and stop further losses.

[31] Argent contended that both boards' had adopted a formalistic interpretation of the requirement of consultation and failed to appreciate that Argent had substantially complied with the consultation requirement. It also argued that by providing evidence of consultations with the workforce when it submitted the application, it had satisfied clause 8.1 (3) (c)(iii).

[32] Similarly, in relation to the requirement to provide "formal financial information", the very nature of that phrase was imprecise and did not prescribe that only particular financial information in the form of audited financial statements would be sufficient to meet the threshold for consideration of an exemption application. Argent argued that the question whether provision of these documents was peremptory was a matter of context and argued that the threshold here was distinguishable from other situations where formal compliance might be considered absolutely essential, such as the provision of valid current tax certificates in the submission of tender documents.

[33] The respondents argued that the application form itself stipulated in paragraph 11.1 that in the case of a Pty Ltd company, audited financial statements for the past three years had to be provided. They made the point that, strictly speaking, the entity applying for exemption was the group and not Argent, because Argent was merely a division and not a separate legal entity. Its non-compliance with the requirement of providing its own audited financial statements rendered the application fatally defective *ab initio*. The extraction of the financial statements of Argent from those audited documents, even if confirmed by the auditors, was not sufficient according to the respondents. Assuming that the application form could stipulate the precise requirements of the financial information to be provided under the heading' formal financial information', in my view, the respondents were somewhat inflexible in interpreting the most appropriate information as being the audited financial statements of the group. A letter from the auditors certifying that the information comprising the financial statements of Argent had been extracted from the group financial

statements ought to have been sufficient to meet the exemption boards' requirements given that Argent was a discrete operational entity within the group but did not have its own audited financial statements. This is discussed further below when dealing with the substantive merits.

An opportunity to be heard at the appeal stage?

[34] The applicant sought to bolster its argument by arguing that the appeal board ought to have provided the applicant with an opportunity to be heard, which it submits at the very least includes an opportunity to deal with any issues of clarity about the application which troubled the board by making written submissions on those issues. Mr *Le Roux*, who appeared for the applicant, argued that this was the type of application which required an additional feature of this nature to make the process fair. At this juncture it should be mentioned that this argument in my view was barely pleaded in the founding papers and it is highly debatable whether I need to deal with it at all. Insofar as it is necessary, I will do so briefly.

[35] Argent likened the process to a tendering process and made reference to Administrative Law in South Africa, where the learned author C Hoexter deals with section 3 of the Promotion of Administrative Justice Act, 3 of 2000, ('PAJA') and what she calls "the variable content of fairness":

> "A crucial consideration is the administrative context of the decision, as it (or more usually the legislation governing it) usually bring special features or meanings to the concept of fairness. For instance, in Metro projects CC v Klerksdorp Local Municipality Conradie JA had the following to say about fairness in the context of procurement:
>
>> Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency competitiveness and cost effectiveness.

The exigencies of the circumstances and the practical limitations also important. For instance, the Constitutional Court has held that consulting hundreds of property owners who are likely to have been affected by designs for roads would have been both costly practically impossible, and that it was therefore sensible to conform maximally to the exigencies and practicalities of the circumstances time.'

In working out what is fair the courts are wary of over judicialising administrative processes. They recognise that administrative decision-makers not courts of law, and that they should not have to adopt the strict procedures of such courts…. Indeed, at common law decision-makers have largely been committed to adopt whatever procedures they like, provided that they observe the principles of fair play. In broad terms, those principles require

> firstly, that the person concerned must be given a reasonable time in which to assemble relevant information and parent forward his representations; secondly you must be put in possession of such information as will render his right to make representations a real, and not an illusory one.

This flexible approach is upheld in the provisions of s 3 of the PAJA, which mirror the principles of the common law in a number of respects. In particular, S 3(2) (k) expressly recognises that a fair procedure 'depends on the circumstances of the case'. Section 3 (2) (b) of the act sets out the minimum requirements of fairness broadly, using open-ended terminology that allows for variations in interpretation in different contexts. For example, the precise form of the first ingredient- a 'reasonable opportunity to make representations'-could vary widely from case to case. Fairness might require a full scale or hearing in the disciplinary setting; but in another context, merely filling in a form might qualify as a reasonable opportunity to make representations.[11]

[36] However, Mr *Le Roux* argued that it was only where the board had difficulty in understanding the motivation for the application that special allowance be made for the applicant to address the appeal board on those points. He also placed reliance on the case of ***Ncungama & others v***

[11] C Hoexter, Administrative Law in South Africa, Juta, (2ed) at 365-6.

Bargaining Council for the Liquor Catering & Accommodation Trades, South Coast, KwaZulu Natal & another[12] , in which it was held in passing that a council's refusal to grant an exemption was found to be procedurally defective because the council did not give the applicants an opportunity to respond to written comments made by their employer opposing their application.[13] In that case, the court was dealing with a single stage deliberative process and the comments were coming from an interested party in the matter, unlike in this instance. Nonetheless, Argent asserted that the guiding principle was that court in that case had taken account of adverse comments without giving the applicants an opportunity to address those. Accordingly, it mattered not where the adverse comment emanated from. Moreover, Argent argued that Lennon's offer in the appeal document to attend the hearing to deal with any issues that might arise in the appeal hearing was another reason the appeal body should have allowed Argent to make representations, though it did not go so far as to argue that making oneself available to make representations created an entitlement to do so.

[37] In general, I do not think that the analogy with a tender process is appropriate. In a tender process, a central object of the process is for the party calling for and considering tenders to make sure that it is able to procure goods or services in the most cost-effective manner without unfairly prejudicing competing tenderers. In that context it makes sense that the procuring party would not want to be deprived of an advantageous tender for want of certainty about the terms of the tender, provided of course that it treats other tenderers in the same way. Secondly, in the tender process in *Metro Projects* the court was not dealing with a procedure which provided for an appeal. In this matter, the applicant effectively had a second opportunity to motivate its application and address deficiencies in it. Also, by the very nature of the exemption application, Argent sought to be treated more advantageously than its competitors and to treat its employees less favourably than others in the same occupations in the sector. The applicant is essentially asking for

[12] [2002] 8 BLLR 766 (LC)

[13] At 771, paras [32] – [33].

exceptional treatment and in those circumstances it really fell to it to persuade the board that it was entitled to more favourable treatment. Furthermore, unlike the tender situation, the information required to consider the exemption application will usually be almost entirely within the applicant's own knowledge and it has to explain the unique position it finds itself that distinguishes it from its competitors and justifies advantageous treatment for itself and disadvantageous treatment for the affected employees. It is not a situation in which its tender terms are being evaluated soley against tender specifications issued by the party considering the tender. In addition, in this instance, the applicant is also not a small business lacking the financial capacity to present a coherent motivation. It is part of a large industrial group comprising 13 business divisions with financial managers and independent auditors. It ought to be able to present its financial arguments in a coherent fashion in motivation of its application, without the assistance of the board. Later on in the judgment the manner in which the motivation was conveyed will be considered. It is sufficient to say at this juncture that it was somewhat perfunctory and poorly explained.

[38] Nonetheless, clause 8.2 (4) of the appeal procedure does provide that the board may defer a decision to a later meeting if additional motivation, substantiation or information is considered necessary to make a decision on the appeal. Clearly, that provision anticipates that there may be situations where a submission is unsubstantiated or where information is provided but motivation based on the information is lacking. In argument, no specific reliance was placed on this clause by Argent, though it did offer to clarify issues at the hearing if the board required it. It is arguable that the appeal board ought to have deferred the decision owing to the confusing state of the financial information and the real motivation, if it was satisfied that sufficient consultations had taken place.

The merits – threshold issues or substantive issues?

[39] Argent contended that both bodies had concerned themselves merely with whether or not the formal prerequisites of the exemption application had

been met without dealing with the intrinsic merits of the material before them.

[40] The board's evaluation of the consultation question led to a conclusion that there had not been with all employees and that the process was merely an information sharing one. In essence, this might be construed as a threshold issue but the appeal board was making a finding which went beyond merely the provision of proof of consultation: essentially its finding was substantive in nature and concerned the *sufficiency* of consultation, which it was required to assess under clause 7(b) of the procedure.

Sufficient consultation?

[41] In respect of the requirement of consultation with employees, Argent argued that the concept of consultation in the context of an exemption application could not be equated with the purposive and extensive form of consultation envisaged when retrenchments are contemplated as in s 189 of the LRA. Further, Argent had candidly conveyed the workforce's complete opposition to the exemption application and was not seeking to represent that they were in any way in agreement with it. Consequently, the board could have no doubt of the attitude of employees towards the application when deliberating on the application. The appeal board's rejection of the appeal relating to financial issues in part dealt with what financial documents had be submitted (a threshold requirement) and in part whether the financial information provided was coherent enough to support the exemption application (a substantive issue). Threshold and substantive questions are addressed below.

[42] Argent argued it was clear from the evidence of the second meeting of 23 October, which was placed before the appeal body, that union and non-union employees had been present and expressed their opposition to the exemption application. In addition, there had been a further meeting with union representatives where there had been an opportunity for an exchange of views which the union had taken. The extent of consultation was something both boards were required to consider in terms of clause 8.2 (7) (b) of the procedure.

[43] The respondents retorted that what was missing from the interactions with employees was an opportunity for the employees to engage with Argent to present their views to it for consideration. At both the meetings in October, the employer made clear that it was merely informing employees of its intention to apply for the exemption. The letter motivating the exemption application was signed on 23 October and even when the company met with NUMSA and shop stewards on 28 October and Argent was asked if it had changed its position, it simply reiterated that nothing had changed and it was submitting the application. The respondents conceded in argument that the process did not require the same kind of extensive consultation envisaged in retrenchment discussions, but it is clear from the minutes of the meetings mentioned that they were essentially to convey the employer's intentions rather than any serious attempt to engage with workers or the union in the form of inviting alternative ways of addressing the financial problem Argent was confronting. The respondents readily agreed that the mere fact that employees had refused to sign the Annexure indicating that they had been consulted, was not in itself fatal to the exemption application. However, it was the absence of a genuine exchange of views in those meetings which justified the conclusion that consultation had not taken place. Such exchanges that are mentioned were reactions to a decision already taken by ARGENT.

[44] On the information before the boards there was sufficient evidence that the process followed by Argent was not a consultative one and the boards were more than justified in concluding that consultation had not taken place, even if they might have been over-strict in interpreting the requirement to mean that the employer should prove every employee participated in it. In that regard, in my view, as long as an employer could show that all employees had an opportunity to make an input in response to management's presentation to employees that ought to suffice. Nonetheless, on the evidence before the boards, the nature of the meetings which were held did not entail a consultative process irrespective of whether they were attended by all employees or not. It was also argued that NUMSA's rejection of the application rendered a consultative process irrelevant. However, the fact that a representative union opposed the

application is not evidence of the existence of a consultative process. At least part of the object of consultation must be to see if the interested parties can open up discussions on alternatives to the exemption. In the absence of sufficient consultation, the application was bound to fail as an important requirement for granting exemption was not met, even if the financial motivation could have been shown to be more coherent after obtaining more clarity on that aspect.

[45] This was also something that Argent could have remedied, simply by inviting the union and employees to make representations on how the company could otherwise address its financial difficulty without resorting to the exemption application and then considering any such representations made and providing feedback, without being expected to try and reach agreement on alternatives.

Financial motivation

[46] On the matter of the financial information before the board, Argent maintained that the threshold requirement had been met with the information provided, and on whatever interpretation of that information could be made the information revealed that even on the smallest historic loss discernible on the documents and on the projections for the forthcoming financial year (2014), which was particularly important, Argent was 'in trouble'

[47] More particularly, in attacking the reasoning of the boards on the financial information, Argent makes the following points:

47.1 As a threshold requirement, there could be no audit report of Argent as such because it was merely a division of the group and such a report would reveal little or nothing about Argent's profitability as an operating division of the group, and it is its profitability as an operating entity which is relevant to the exemption application. Moreover, a letter from auditors confirming that the figures in the financial statement had been correctly extracted from the group financial statements, should have been sufficient to satisfy board of the authenticity thereof. The respondents argued strenuously that it was absolutely essential that the audited group statements should have been provided as per Annexure "D", because they might have revealed that the group as a whole was immensely profitable. I am inclined to agree with Argent that the most relevant information was information relating to the financial viability of Argent as self-sufficient operating entity, albeit that it was part of a bigger company, since Argents was the entity in respect of which the exemption was sought. Looked at from another perspective, it was the impact of the wage increase on the costs and income generating capacity of Argent that ought to have been considered the most relevant factors. The fact that Argent might have had recourse to other sources of finance to bolster its own poor financial situation is a factor which, is really incidental to evaluating the impact of the wage increase on the business's operational viability, which should be the primary concern of the bargaining council, as that is the operational entity falling within the scope of the exemption.

47.2 Argent further argued that the board was unreasonable in concluding that profit figures in the financial statements, management accounts and the letter of the financial manager dated 25 April 2014 were inconsistent. Argent contends that its financial manager's letter directly referred to the financial statements prepared by the auditors which reflected net pre-tax net income for the financial year ending March 2013 as R 6,543,621-00. The letter indicated that once an intercompany loan received from a sister company of R 7, 143, 937-89 was included, Argent suffered an actual loss of R 600,316-00 for the period. Moreover, the loan was clearly reflected on the first page of the trial balance of 31 March 2014 under the description "Loan Account- New Joules North". Two remarks can be made in this regard. Firstly, it immediately raises the question if the inter-company loan ought to have been reflected in the financial statement in the first place as ordinarily a loan would not appear in the income statement but in the balance sheet and only interest payments on the loan which would be reflected in the income statements. Thirdly, the impression Argent sought to create was that the loan would impact on the net profit for the 2013 financial year converting a net profit of R 6, 54 million to a loss of approximately R 600,000, yet it did not explain why the income statement extracted by the auditors did not account for this, if indeed it ought to have been included in calculating the net profit for the 2013 financial year. It is only in the trial balance for the 2014 financial year that the loan appears as an account entry. The information provided by Argent in relation to the 2013 financial year and in particular the derivation of the net profit for the year do raise a number of questions which are not easily answered on the face of the documents provided. Argent's attitude is that the boards ought to have given it a chance to explain itself more fully and that their failure to do so amounted to a reviewable irregularity. Despite the board having the option of deferring the decision to obtain more inputs. In this instance, the explanation of Argent's financial situation in 2013 and 2014 was murky because it offered varying explanations for its predicament and its cross referencing between the explanations and the financial information was poor, despite having had the opportunity to clarify matters at the appeal stage. Secondly, whatever formal financial information was required of it, Argent remained responsible for persuading the exemption bodies that it was deserving of exemption. If its original motivation was not clear, in the context of it being an entity which is part of a large corporate group, comprising 13 divisions, it is only reasonable to expect that it would have been able to at the appeal stage. Argent is not a sole proprietorship owned by someone with limited financial or bookkeeping expertise.

47.3 Argent also claimed that the board's comment that the balance sheet figures did not balance showed that the appeal board failed to appreciate that the line items on the pro forma Annexure D required by the council as part of the exemption application did not comprise a complete balance sheet as such but merely set out most of the items which could be extracted from a balance sheet. Moreover, it contended that this weakness in the design of the form did not detract from the importance of the evidence of the projected figures for 2014, which anticipated a further decline in operating profits dropping from 42% in 2011 to an anticipated 30% in 2013 and a dramatic loss in pre-tax income of nearly R 12 million in 2014.

47.4 In relation to the complaint that the balance sheet items did not balance, scrutiny of the figures used by Argent to populate Annexure D reveals why those figures do not result in the expected equivalence of total assets to total equity and liabilities. For reasons which Argent did not make clear, it did not mention changes in net equity in Annexure D, though this might be in part excused by the absence of a line item for such an entry on the form. More seriously, Argent also failed to include loans from group companies under the entry for current liabilities. These loans account for a very significant part of the discrepancy between total assets and total equity and liabilities each year. To illustrate this with reference to the 2013 figures, 'Current liabilities' were recorded as approximately R 17.1 million on Annexure D, but as nearly R 68 million on Argent's balance sheet. The principal reason for the huge discrepancy is that Argent omitted to include under the item 'Current liabilities' the loans from group companies totalling nearly R 51 million. Leaving aside the fact that the 'balance sheet' portion of Annexure D appears to have erroneously omitted changes in net equity, if Argent had included company loans under current liabilities as it should have, the glaring imbalance on Annexure D would have been far less significant and noteworthy. If it had a reason for this omission it ought to have explained it given the impact it had, but nowhere in the motivation it submitted, did Argent attempt to deal with this omission, which would have gone a long way to explaining why the discrepancy in the balance sheet portion of Annexure D was so immense. Even if the form omitted one line item, that cannot explain Argent's failure to accurately reflect its current liabilities. Given the nature of the application it was for Argent explain apparent anomalies, which would have been obviously apparent to the person preparing the form, if not when the original application was made, at least when the appeal was lodged and the financial manager had become involved in making the representations. Instead, it presented an account which even allowing for the limitations of the form was far from accurate and clearly did reveal an inexplicably large discrepancy in the balance. In this respect and others its representations were incoherent and perfunctory.

47.5 Interestingly, Argent did not take issue with the finding of the exemption board that the financial projections did not make sense and the net loss in the projection appear to be overstated. In Lennon's letter of 23 October 2013 he motivates for the exemption on the basis that Argent had been running at a loss for 'a long period' and outlined measures adopted at that stage had helped to reduce the loss but not eliminate it. That letter makes absolutely no reference as to why the estimated loss for 2014 was expected to be dramatically different. Accepting, for argument's sake, that Argent had in fact suffered a loss of approximately R 600,000 for the 2013 financial year, this was projected to escalate to a massive R 11, 73 million loss in 2014, amounting to a nearly twenty-fold increase in the loss. Such a dramatic increase cannot be explained simply by a continuation of the pattern of the previous year, especially if, on Argent's own account was entirely attributable to the R 7 million inter-company. The projected figure can only suggest some other dramatic anticipated change Argent's financial position, which is nowhere sought to explain. It had the responsibility to justify why it should be treated exceptionally and the projection without an explanation for the projection did not do that.

47.6 It is only when the appeal document was submitted that such an explanation was forthcoming for the vastly different figure. Previously the motivation had been that the company was simply in a loss-making situation and needed relief which could be obtained if it were exempted from the wage increase which it estimated would save it R 2 million. In his affidavit Lennon provides an entirely different explanation:

> "5.3.1.1 The applicant has come under tremendous financial pressure <u>due to incorrect costings</u> that resulted in a stock loss of R

7,207,196-00 caused by overstating margin's. This was picked up when the stock take was carried out in April 2013. The previous managing director did not update the product costing, in order to recover the cost of sales for goods sold he used a theoretical margin. Unfortunately the margin he used was too high this made the company look like it was running profitably unfortunately this was not the case.

5.3.1.2 The applicant experienced further losses due to insufficient work which has resulted in a loss of R 4,528,259-87. This was also highlighted when the correct costings were implemented. By using the actual margins it is now possible to accurately calculate the corrected breakeven point. Thus bringing the total loss for the year to R11, 735,455-87"

Even so, the new explanation does not make any reference to the projected income statement to explain which line items were impacted by this discovery. It also does not seek to explain why the figure did not affect the 2013 financial year rather than the 2014 projection if it was something picked up right at the start of the 2014 financial year. It is also not clear whether those erroneous costings related to forward sales or past sales. At the very least, Argent should have cross-referenced the figures mentioned in his affidavit to the projected income statement. Argent might well have been able to explain these ambiguities and anomalies, though it hasn't done so to date. Apart from this, the statement suggests that the company believed it was running profitably at the start of the 2013 financial year yet this is at odds with Argent's own claim that it ended that year was a loss of R 600,000-00. Once again, the need for clarifying the explanation does not stem from new concerns expressed by the board but from the opacity of Argent's own motivation, which should have been clearer from the start.

47.7 On the information presented to the boards, the explanation for Argent's position was an incoherent one and it would not have been unreasonable for the boards to have rejected the application on financial grounds as inadequately motivated.

47.8 The incoherence of the explanations also makes it questionable whether the appeal board ought to have deferred a decision to allow Argent to be given a further opportunity to provide additional input when it had not been able to present a coherent account of its difficulties even after two attempts with the expertise at its disposal. However, in any event it is not necessary to decide this as I am satisfied the boards were entitled to reject the application on the basis of the insufficiency of consultation'.

<u>Order</u>

[1] The applicant's condonation application is dismissed.

[2] The review application is dismissed.

[3] The applicant must pay the first and second respondents' costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	F Le Roux instructed by Bakker Attorneys
FIRST AND SECOND RESPONDENTS:	G G M Quixley instructed by Cliffe Dekker Attorneys