



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

REPORTABLE
Case no: C 313 / 21

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD

First Applicant

SIBANYE BUS SERVICES (PTY) LTD

Second Applicant

and

**THE SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

First Respondent

I MACUN N.O.

Second Respondent

S GODFREY N.O.

Third Respondent

TRANSPORT AND OMNIBUS WORKERS UNION

Fourth Respondent

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

Fifth Respondent

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION**

Sixth Respondent

UNITED ASSOCIATION OF SOUTH AFRICA

Seventh Respondent

**NON UNIONISED EMPLOYEES LISTED IN
ANNEXURE “A”**

Eighth Respondent

AND:-

Case no: C 688 / 21

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD

Applicant

and

**THE SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

First Respondent

EBRAHIEM PATELLA N.O.

Second Respondent

CRAIG BOSCH N.O.

Third Respondent

GERHARD WESSELS N.O.

Fourth Respondent

TRANSPORT AND OMNIBUS WORKERS UNION

Fifth Respondent

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

Sixth Respondent

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION**

Seventh Respondent

UNITED ASSOCIATION OF SOUTH AFRICA

Eighth Respondent

**NON UNIONISED EMPLOYEES LISTED IN
ANNEXURE “A”**

Ninth Respondent

AND:-

Case no: C 93 / 22

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD

First Applicant

SIBANYE BUS SERVICES (PTY) LTD

Second Applicant

and

**THE SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

First Respondent

JOYCE NKOPANE N.O.

Second Respondent

TRANSPORT AND OMNIBUS WORKERS UNION

Third Respondent

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

Fourth Respondent

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION**

Fifth Respondent

UNITED ASSOCIATION OF SOUTH AFRICA

Sixth Respondent

**NON UNIONISED EMPLOYEES LISTED IN
ANNEXURE “A”**

Seventh Respondent

AND:-

Case no: C 684 / 22

In the matter between:

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

First Applicant

TRANSPORT AND OMNIBUS WORKERS UNION

Second Applicant

and

**THE SOUTH AFRICAN ROAD PASSENGER
BARGAINING COUNCIL**

First Respondent

R DE WET N.O.

Second Respondent

GOLDEN ARROW BUS SERVICES (PTY) LTD

Third Respondent

SIBANYE BUS SERVICES (PTY) LTD

Fourth Respondent

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION**

Fifth Respondent

UNITED ASSOCIATION OF SOUTH AFRICA

Sixth Respondent

**NON UNIONISED EMPLOYEES LISTED IN
ANNEXURE "A"**

Seventh Respondent

Heard: 23 to 25 October 2024

Delivered: 9 April 2025

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 9 April 2025

Summary: Review application – bargaining council exemptions decisions – s 158(1)(g) of LRA applicable – review test considered – reasonableness and / or legality review applicable – material error of law considered – review test determined and applied

Bargaining Council – exemption procedure – purpose of exemption considered – exemption integral part of sectoral level collective bargaining – exemption cannot be seen to undermine collective bargaining if proper case for exemption exists – exemption procedure in bargaining council considered
Exemption – factors justifying exemption considered – no requirement that there must be financial hardship – exemption justified in special circumstances – circumstances that constitute special circumstances considered – exemption may be proactively sought to ensure future viability of employer

Exemption – wage disparity considered – substantial wage disparity may justify exemption – circumstances and effect of wage disparity considered – unfortunate consequence of sectoral collective bargaining in particular circumstances – exemption needed to remedy anomaly

Exemption – unfair competition – meaning of unfair competition considered – when wage disparity would constitute unfair competition considered – remedying unfair competition may constitute basis for exemption

Exemption – special circumstances – facts showing special circumstances applicable to employer – wage disparity rendering employer unable to fairly compete to retain business in particular market – new competitors would pay minimum wage – wage costs substantial part of operating costs – wage costs cannot be addressed without exemption – attenuated exemption sought designed to reduce disparity over time – without exemption future viability of business at stake – exemption justified and fair

Bargaining Council – exemption proceedings – findings by appeal exemption authorities refusing exemption considered – findings constitute unreasonable outcome; material error of law; misconstruing case and facts – findings

unreasonably and irregularly negating pertinent facts – appeal decisions reviewed and set aside

Review application – remedy considered – s 145(4) of LRA considered – principles relating to substitution of decisions considered and applied – decisions by appeal authorities refusing exemption substituted with decision that exemptions granted

Review application – trade union parties applying to review decision by appeal authority to grant exemption – no case for review made out – conclusion by appeal authority rational; reasonable; supported by facts – review application by trade unions dismissed

Costs – principles considered – no order as to costs justified and fair

JUDGMENT

SNYMAN, AJ

Introduction

[1] This judgment concerns the latest instalment in the Golden Arrow Bus exemption saga,¹ and considering what has gone before, I am pretty sure it is unlikely to be the last. But nonetheless, and in the interest of achieving finality in such an important issue, in order to at least restore some semblance of certainty in the road passenger transport industry, I will provide a detailed judgment, which hopefully will convince the parties to at last live with the outcome. What has been happening until now is clearly contrary to the following dictum in *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*²:

‘Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held: ‘[15] It is now trite that

¹ See *Golden Arrow Bus Services (Pty) Ltd v SA Road Passenger Bargaining Council and Others* (2019) 40 ILJ 2343 (LC); *Golden Arrow Bus Services (Pty) Ltd v SA Road Passenger Bargaining Council and Others* (2021) 42 ILJ 1446 (LAC); *Golden Arrow Bus Services (Pty) Ltd v SA Road Passenger Bargaining Council and Others* (unreported), per Prinsloo J dated 17 October 2019 under case number C 351 / 19.

² (2018) 39 ILJ 1213 (CC) at para 187.

there exists a particular requirement of expedition where it comes to the prosecution of employment law disputes. ...'

- [2] The above being said, what is before Court to decide, in the aforesaid cases, is nothing short of four individual review applications. All these review applications relate to decisions made at the South African Road Passenger Bargaining Council (SARPBC), concerning exemption applications. In three of the applications, the decision sought to be reviewed is a decision refusing exemption from certain provisions of the main collective agreement(s) of the SARPBC, whilst in the last review application, what is sought to be reviewed is a decision granting such exemption.
- [3] All four review applications have been brought in terms of Section 158(1)(g) of the Labour Relations Act³ (LRA). The entire record in this matter is extensive, spanning thousands of pages, and it will be impossible for me to reflect, in this judgment, everything possible raised by the parties as contained in such record. I will therefore only reflect what I believe are the salient and critical facts and considerations necessary to decide the review applications. The parties are however assured that everything as contained in the record was considered. The parties also filed substantial heads of argument, which I found to be of welcome assistance in deciding this case, or better put, cases. In the end, all parties were satisfied that all four review applications were properly before Court and prosecuted to finality, with no preliminary issues to be considered.
- [4] Because of the multiplicity of the parties, in different capacities and citations, I shall refer to parties by name in this judgment, for ease of reference and certainty. In this respect, I will refer to Golden Arrow Bus Services and Sibanye Bus Services jointly as 'GABS'.⁴ As to the only trade parties participating in the review application, being National Union of Metalworkers of South Africa and Transport and Omnibus Workers Union, I will refer to

³ Act 66 of 1995 (as amended).

⁴ I am aware that Sibanye Bus Services is not a party to case number C 688 / 21.

these parties as 'NUMSA' and 'TOWU' respectively. The South African Road Passenger Bargaining Council will be referred to as the 'SARPBC'. And lastly, where I refer to the various individual panellists in the exemption applications, I will refer to them by name, as cited.

- [5] I will now commence this judgment by first setting out, in so far as possible in chronological sequence, the relevant background facts. I say this, because as a result of intervening litigation, what was initially the first exemption application decided, in fact became a later exemption decided, in the chronology. What did however become apparent from the entire record in this matter is that the facts presented in support of and in opposition to the various exemption applications remained more or less the same throughout.

The relevant background

- [6] GABS is an employer carrying on business in the road passenger transport industry, which industry resorts under the scope and jurisdiction of the SARPBC, a bargaining council duly established and registered under the LRA. In the SARPBC, the wages and conditions of employment of employees that are employed by employers in the industry are determined by way of a sectoral collective bargaining followed by a sectoral main collective agreement, which agreement not only binds the parties to the SARPBC, but is also extended to non-parties in the industry in terms of section 32 of the LRA.
- [7] In the past, and until recently, GABS was an actual party to the SARPBC, but that is no longer the case, as GABS has resigned from COBEO, the employers' organisation that is the employer party to the SARPBC. Currently, GABS is subject to the main collective agreements of the SARPBC by virtue of the extension of such agreements in terms of section 32 of the LRA.
- [8] GABS's core business is providing public transport to members of the public, under contract with government institutions, and in particular, the Western Cape Province (*the Province*) and the City of Cape Town (*the City*). It has been doing so since 1995. In the past, GABS did not really have competition

in this market place, and as such, even though it paid its employees significantly higher than other bus operators, and in excess of what provided for in the SARPBC main collective agreements as minimum wages, it could still operate successfully and profitably, as it was able to a large extent to pass on those costs to its customers. In short, and in the absence of competition in the particular market where GABS had its core business, higher wages did not matter.

[9] But this initial monopoly, for the want of a better description, started changing in 2017. Whilst it would ordinarily be true that to allow for competition would obviously be a good thing, in the case of GABS it had an unfortunate consequence. At a level of principle, as discussed below, emerging competition would mean that the emerging competitors would be able to tender / negotiate for business with the Province and / or the City, at what can be described as entry level rates in terms of the SARPBC main collective agreements from time to time. Thus, these competitors can tender / negotiate based on minimum wage. As opposed to this, GABS would be required to pay actual prescribed wages. When these minimum wages are compared to the prescribed wage rates paid by GABS, GABS would simply not be able to compete, and thus its entire business in this particular market would be at risk. Ironically, it is principally because of the historical monopoly GABS had, that it now faced with this predicament, which is certainly ironic.

[10] To put matters in context, GABS indicated that by the time the 2018 main collective agreement was concluded in the SARPBC, the application of this agreement would result in GABS drivers receiving a 32% increase after one years' service, and that, after six years' service, such drivers would be earning 50% more than the SARPBC minimum rate. Added to this, 53% of the operating costs of GABS was made up of these wages.

[11] The change in circumstance came about as a result of the adoption of the policy intention of Government to introduce competition into the process of contracting commuter bus services such as those provided by GABS. In fact, the public transport sector attracted the attention of the Competition

Commission, which carried out an inquiry under section 43B of the Competition Act.⁵ This enquiry led to two provisional reports, one of which dealt with *inter alia* bus transport services. The report was critical of the fact that contracts with bus companies such as GABS, which were intended to be interim in nature, was in existence for more than two decades, and had in fact led to a monopoly. The following recommendation was recorded in the report:

‘The perpetual extension on subsidised bus contracts without going on tender inhibits competition. Where contracts are put on tender. Government (provincial transport departments or the DOT) should consider breaking some of the contracts into smaller contracts in order to create opportunities for new entrants and smaller bus operators should be given preference given the incumbency advantages enjoyed by the existing large bus operators ...

While the subsidy policy is being developed and in order to ensure stability especially in the commuter bus industry, the current contracts should only be extended on a short-term basis. Given the time frame required to finalise the subsidy policy, to support and empower small bus operators in the interim. the subsidy policy should:

Prescribe the conclusion of negotiated contracts (as opposed to tendered contracts) with small bus operators in all the provinces. The negotiated contracts awarded to small bus operators should account for a minimum of 30 per cent of all contracts and progressively increase over time ...’

- [12] What will follow from these envisaged Governmental interventions is that tender / negotiation processes will be undertaken for subsidised bus commuter contracts with national and provincial transport authorities and that pending this, only short-term extensions of current subsidised contracts (such as the contract that GABS has with the Province) will be permitted. Simultaneously, an increasing portion of negotiated / tendered contracts will be awarded to

⁵ Act 89 of 1998.

small bus operators. In the end, there is no longer any guarantee of GABS retaining any remaining portion of the contracts not specifically envisaged for small bus operators, which business it would stand to lose as well.

- [13] The contract that GABS currently has with the Province is an interim contract, terminable at any time on notice by the Province, without cause, whenever the Province deems this expedient. This could be a complete termination of the contract or breaking up the contract to provide for greater competition. GABS mentioned the example where a comparable contract between the Eastern Cape Province and the Algoa Bus Company was terminated on 3 months' notice in June 2021.
- [14] In addition to the changes at provincial level, there are also significant changes at the City level. The City operates its transport system in terms of an Integrated Transport Plan (ITP). The City's Bus Rapid Transport System (BRT) forms an integral part of the ITP. The roll-out of the City's BRT network, MyCiti, would mean that the existing commuter bus arrangements between the Province and GABS for such area effectively fall away, and this would then be replaced by the new MyCiti service. This in turn means that GABS would have to contract directly with the City, and the City has made it clear that it will only contract on the basis of labour costs at the prevailing SARPBC minimum wage rates. MyCiti Phase 1 is already operational, and this has led to GABS being required to give up operating on some routes that were allocated to other smaller service providers, such as Kidrogen and Transpeninsula, and these two operators can only recover labour costs from the City at SARPBC minimum rates.
- [15] Any replacement contracts or awarded contracts under the MyCiti service, going forward, will be allocated on the basis of either open tender or negotiated contract. In this context, the problem GABS has is that it has very limited scope to secure these contracts on the basis of other competitive differentiators, because its costs to provide the service is made up of 53% in labour costs and 25% in fixed fuel costs. Thus, in order to be competitive, GABS

will have to submit bids that are based on SARPBC minimum rates, the same as the new competitors.

- [16] However, the most significant threat to GABS's future business operations lies in the roll-out of MyCiti Phase 2A. This phase will cover the areas of the South-Eastern Metro towards the City, which is GABS's core operational area, where the bulk of its current services are rendered. Full implementation of Phase 2A is expected in 2027, however partial implementation is expected to start sooner. As with Phase 1, the City will enter into negotiations for Phase 2A contracts with GABS and other new competitors intending to provide services in the affected areas. When deciding to which service provider the contract will be awarded, it is obvious that the proposed cost of the service will be a major consideration, if not the most important consideration, and the City will most likely award greater market share to service providers with lower costs. And added to this difficulty is the imperative of favouring new competitors as market entrants.
- [17] There was another consideration that further compounded the difficulties GABS is facing. This is that the new competitors will not start out having to supply their own busses. In terms of the City's MYFIN Plan's Priority Parameter, the City will initially supply and own the bus fleet. With fleet and infrastructure costs borne by the City, and fuel costs (about 25% of the total operating costs) being fixed, the wage differential is even more material where it comes to being able to fairly compete.
- [18] As touched on above, and in this environment, the ability of GABS to fairly compete in securing contracts would be substantially compromised, as it is simply unable to do anything about its ever-increasing wage costs, which comprises more than half of its total operating costs, whilst the new competitors start off with minimum wage, and subsidised infrastructural costs, so to speak. Consequently, the competitors would be able to substantially undercut GABS in this contract tender / negotiation processes.

- [19] Any contracts with the Province, going forward, will face similar obstacles. First, there is the likely 30% allocation to new market entrants that would apply, putting this part of the business of GABS already at risk. It follows that it is imperative for GABS to do what it can to at least remain competitive for the remaining 70% of the market, which remaining share is not even guaranteed business for GABS. Once again, and for the same reason as would be applicable to the City, the cost of the service would be a major factor, and it is likely that future contracts for business would go to the service provider who tenders at the lowest cost. The wage rates of GABS would then render it similarly uncompetitive.
- [20] Accordingly, and as matters stood when the SARPBC concluded and then extended its 2018 main collective agreement, GABS was encumbered by excessively high wage rates, as opposed to any new competitor, which would render it uncompetitive to tender / negotiate for business. As a result of the change in circumstance, discussed above, GABS was simply not assured / guaranteed of retaining any business going forward. It was now entirely exposed to an open market tender / negotiation process, which would more likely than not, inevitably go to the lowest bidder. According to GABS, this constituted unfair wage competition which posed an existential threat to the continued viability of its business. This necessitated GABS to take steps to address the wage disparity, which would only worsen going forward, if not addressed immediately.
- [21] It was not possible, nor would it make any sense, for GABS to wait until having to submit a tender or a negotiation is opened, and then seek to address the wage disparity. By then it would be far too late. GABS thus contemplated immediate and proactive intervention, to at least give it a fighting chance in any tenders / negotiations coming up, which was not in the distant future, but in the foreseeable future. Nonetheless, GABS did not contemplate a wage freeze or wage reduction of the wages of its employees. Instead, it contemplated a solution that would gradually reduce the wage disparity, by, in simple terms, obtaining limited exemptions from prescribed current wage increases.

[22] This envisaged solution then brought the exemption process under the SARPBC main agreements into play. It was common cause that GABS then sought exemption, the precise terms of which will be addressed later in this judgment, from the 2018 main collective agreement (*the 2018 agreement*), the 2020 main collective agreement (*the 2020 agreement*), the 2021 main collective agreement (*the 2021 agreement*), and finally the 2022 main collective agreement (*the 2022 agreement*). This was done by way of four individual exemption applications made to the SARPBC in terms of the SARPBC exemption procedure. In terms of clause 13 of the SARPBC exemption procedure, the following criteria is prescribed for assessing an exemption application:

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

13.1 The applicant's past record (if applicable) of compliance with the provisions of the Council's Collective Agreements and/or exemption certificates.

13.2 Any special circumstances that exist or any precedent that might be set.

13.3 The interests of the industry in relation to unfair competition, centralized collective bargaining as well as the economic stability of the industry.

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

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

[23] GABS applied for exemption from the 2018 agreement on 20 June 2018. It came before an exemption panel consisting of Eleanor Hambridge and Triq Jamodien, and in a finding on 12 August 2018, the panel accepted that an untenable wage disparity had arisen over time as a result of the effect of the successive main agreements, however the panel decided that this anomaly could only be addressed through collective bargaining and not exemption. On 31 August 2018, GABS appealed this decision in terms of the exemption appeals procedure, however this appeal was dismissed on 9 October 2018, without considering the merits, because the appeal panel held that it was not within its powers to grant the relief sought by GABS. This culminated in a review application to the Labour Court, which came before Nieuwoudt AJ on 1 March 2019. In a written judgment handed down on 2 April 2019, the learned Judge reviewed and set aside the ruling of the appeal panel, and remitted the matter back to the SARPBC for consideration *de novo* before a newly constituted appeal panel.

[24] The remitted appeal then came before Pat Stone as appeal panellist. In a ruling dated 13 May 2019, this panellist once again dismissed the appeal. This time, the reason for refusing the appeal was that exemption was only appropriate in the case of '*undue financial hardship*' or where the employer is financially unable to comply with the main collective agreement. According to the panellist, there was no evidence that GABS was financially unable to comply with the 2018 agreement, and as such, the appeal had to fail. Needless to say, another review to the Labour Court followed, which on this occasion came before Prinsloo J on 30 August 2019. In a judgment handed down on 17 October 2019, the learned Judge reviewed and set aside the appeal ruling, on the basis that the panellist misconceived of the true nature of the enquiry and had consequently failed to apply his mind to the merits of the

exemption appeal. The learned Judge was crucial of the finding that the enquiry could only be confined to a '*financial hardship*' issue.

- [25] In the review application before Prinsloo J, and in the event that its review application was successful on the merits, GABS had sought relief of substitution, in that it prayed that the Court should substitute its own decision for the decision of panellist Stone in the appeal proceedings. The learned Judge was not inclined to grant this relief, and instead once again remitted the appeal back to the SARPBC for consideration *de novo* before a newly constituted appeal panel. GABS was not satisfied with this state of affairs, and on 7 November 2019 sought leave to appeal to the Labour Appeal Court, only in respect of the learned Judge declining to substitute the appeal finding, and instead remitted the appeal back to the SARPBC for determination *de novo*. Leave to appeal was granted on 20 June 2020, and GABS proceeded to prosecute the appeal. Simultaneously, NUMSA and TOWU noted a cross appeal against the decision by Prinsloo J to review and set aside the appeal finding in the first place.
- [26] In the interim, and prior to the deciding of the appeal by the Labour Appeal Court, the issue of exemption from the 2020 agreement came up, following the conclusion and then extension of such agreement. GABS applied for exemption on 26 May 2020, which application came before panellists Goldman and Fenn, which appeal was refused on 1 March 2021. This refusal resulted in an appeal by GABS on 17 March 2021 in terms of the appeals procedure, and this appeal came before Godfrey and Macun as appeal panellists. In a ruling dated 30 April 2021, these panellists refused the appeal. The reasons for the refusal, in short, were that negotiations in bargaining councils are confined to setting minimum conditions of employment, as opposed to actual wages and conditions of employment, and that impermissible undercutting can only relate to undercutting by paying below the prescribed minimum wage rate. The panellists also believed there were no special circumstances justifying exemption. GABS has challenged this appeal finding on review to the Labour Court, by way of a review application filed on

14 June 2021, which is one of the review applications I have to decide, being the review application under case number C 313 / 2021.

- [27] On 15 May 2021, the Labour Appeal Court handed down judgment in the appeal and cross appeal against the judgment of Prinsloo J. Both appeals were dismissed. There were however some critical findings made by the Labour Appeal Court in this judgment, which I shall refer to later. The upshot of the judgment of the Labour Appeal Court was however that the refusal of the exemption appeal in respect of the 2018 agreement was yet again remitted back to the SARPBC for determination *de novo* before a newly constituted appeals panel.
- [28] Before the exemption appeal in respect of the 2018 agreement was decided *de novo* in the SARPBC, the 2021 agreement was concluded and then extended, resulting in another exemption application by GABS brought on 28 July 2021. The exemption application came before panellist Du Plessis and was refused on 11 October 2021. An appeal by GABS against this decision followed on 16 October 2021, which came before Nkopane as appeal panellist. In a ruling dated 20 January 2022, this panellist refused the appeal. However, and on this occasion, the appeal panellist did accept the application of the wage parity principle as a relevant consideration when deciding an exemption application, and that the application of this principle *in casu* showed that GABS would be materially inhibited in competing with new entrants into the market. The reason for the refusal, in short, was that GABS had not shown that this competitive disadvantage would apply to all competitors, and thus there was not a sufficient basis grant exemption. Of differently put, the appeal panellist believed that it is only when the City would engage with service providers to provide a service, that proper competitors and issues of competition can be established, and an exemption in advance, so to speak, was not appropriate. GABS challenged this appeal finding on review to the Labour Court, by way of a review application filed on 2 March 2022, under case number C 93 / 22, being another one of the review applications I have to decide.

- [29] Returning to the exemption appeal in respect of the 2018 agreement, this came before Patelia, Bosch and Wessels as appeal panellists. In a ruling given on 16 October 2021, the appeal was refused for the third time. The reasons given for this refusal were that the consideration preventing wage undercutting was only limited to non-parties to the collective agreement paying wages below the minimum wages and had nothing to do with wage parity. Effectively, the appeal panel decided that wage parity was not a relevant consideration. In addition, the appeals panel considered that the issue of exemptions was not there to assist competitors by levelling the playing field, and that, in essence, unfair competition was not a relevant consideration. The panel concluded that it would set a poor precedent to grant exemption to GABS, which is profitable and well-resourced, just so that it could retain market share. This refusal resulted in a review application filed with this Court on 26 November 2021 under case number C 688 / 21, which is also one of the review applications I am called on to decide.
- [30] The saga does not end there. The conclusion of the 2022 agreement and its extension followed, resulting in another exemption application by GABS brought on 4 August 2022. This exemption application came before De Wet as panellist, and this time GABS was successful. In a ruling dated 19 November 2022, De Wet granted the exemption. Basically, it was granted on the basis that the panellist accepted the application of the wage parity principle, and that in this case, due to historical context and the fact that its wage structure rendered GABS unable to fairly compete, this principle had the result that GABS's business was at risk, which justified the exemption asked for. On this occasion, it was NUMSA and TOWU that sought intervention from the Labour Court, by way of a review application filed 18 January 2023 under case number C 684 / 22, which is the final review application I have to decide.

Review Principles

[31] Despite contrary views that had earlier been expressed,⁶ it is now settled that this Court is entitled, in terms of Section 158(1)(g) of the LRA, to review decisions made by exemption bodies of bargaining councils established under the LRA.⁷ In terms of section 158(1)(g), the Labour Court has the power to review the purported performance of any function provided for in the LRA on any grounds that are permissible in law. In *Golden Arrow Bus Services (Pty) Ltd v SA Road Passenger Bargaining Council and Others*⁸ (Golden Arrow LAC), the Labour Appeal Court held:

‘... the grant of an exemption from the collective agreement concluded by the members of a bargaining council must be taken to constitute the performance of a function provided for in the LRA. That a functionary is required to perform the role of deciding whether an exemption should be granted is manifestly a performance conducted under the LRA and accordingly it must therefore follow that, in terms of s 158(1)(g) of the LRA, the Labour Court has jurisdiction to determine the legality of such a mandated procedure ...’

[32] An earlier judgment of the Labour Court in *Golden Arrow Bus Services (Pty) Ltd v SA Road Passenger Bargaining Council and Others*⁹ (Golden Arrow LC), which was unrelated to the judgment of the Labour Appeal Court referred to above, had adopted a similar approach. The Court relied on *Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of SA and Others*¹⁰ where the Labour Appeal Court decided as follows:

‘... 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

⁶ See *National Union of Metalworkers of SA v Metal and Engineering Industries Bargaining Council and Others* (2019) 40 ILJ 399 (LC).

⁷ *Putco (Pty) Ltd v SA Road Passenger Bargaining Council and Others* (2019) 40 ILJ 2389 (LC) at paras 17 – 18.

⁸ (2021) 42 ILJ 1446 (LAC) at para 17.

⁹ (2019) 40 ILJ 2343 (LC) at para 11.

¹⁰ (DA11/09) [2011] ZALAC 35 (1 January 2011) at para 23.

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. ...'

- [33] What is then the review test that would apply to these kinds of review applications under section 158(1)(g) of the LRA? One view would be that the test is one of reasonableness, as established in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.¹¹ This was the approach adopted in *Trafford Trading supra* where the Court held that:¹² '*...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 Other namely whether the decision taken by the tribunal is a decision that a reasonable decision maker could not reach ...*'. Similarly, and in *Putco (Pty) Ltd v SA Road Passenger Bargaining Council and Others*¹³ the Court articulated the test as thus:

'In short: this court has jurisdiction in terms of s 158(1)(g) to review decisions by exemption authorities relating to decisions to grant or refuse exemption from binding collective agreements concluded under the auspices of bargaining councils. The threshold to be applied is one of reasonableness, in the sense contemplated by *Sidumo & another v Rustenburg Platinum Mines Ltd & others ...*'

- [34] The review test contemplated by *Sidumo supra* is trite. It involves a determination whether the decision is: '*... one that a reasonable decision-maker could not reach? ...*¹⁴. This means that the award in question is tested

¹¹ (2007) 28 ILJ 2405 (CC).

¹² Id at para 23.

¹³ (2019) 40 ILJ 2389 (LC) at para 18. See also *Subaru Pretoria (Pty) Ltd v Motor Industry Bargaining Council and Others* (2014) 35 ILJ 1080 (LC) at para 27.

¹⁴ Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96.

against all the facts to ascertain if it meets the requirement of reasonableness.¹⁵ In conducting this test it is necessary for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.¹⁶ It would only be if consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.¹⁷ In addition, where an error of law is committed, and such error is material, it would render the decision arrived at to be unreasonable, and thus subject to being reviewed and set aside.¹⁸ The Court in *Herbert v Head of Education: Western Cape Education Department and Others*¹⁹ articulated the following apposite summary:

‘In *MacDonald’s Transport* it was found that the LRA did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which ‘would be absurd’. The wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by s 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The court concluded that either ‘the reasonableness test is appropriate to both value judgments and legal interpretations. If not, “correctness” as a

¹⁵ See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 43.

¹⁶ See *Herholdt v Nedbank Ltd and Another* (2013) 34 ILJ 2795 (SCA) at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59.

¹⁷ See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

¹⁸ See *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC) at paras 32 – 33; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at paras 21 – 22; *Civil and Power Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2055 (LC) at para 33.

¹⁹ (2022) 43 ILJ 1618 (LAC) at para 24.

distinct test is necessary to address such matters'. This view was echoed in *NUMSA*, in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which 'will result in both an incorrect and unreasonable award', which 'can either be attacked on the basis of its correctness or for being unreasonable'.²⁰

[35] However, another view would be that the kind of review *in casu* would be a legality review, similar to a review application under section 158(1)(h).²¹ This view was adopted in *Golden Arrow LAC supra*,²² where the Court, having accepted that the review is brought under section 158(1)(g), equated the review test pertaining to this section to the test applicable to reviews under section 158(1)(h), and in particular, what had been decided in *Hendricks v Overstrand Municipality and Another*²³ in this respect. The Court in *Golden Arrow LAC* concluded that: '... It does not appear to me that any justifiable distinction can be drawn between a dispute dealing with the decision of an appeal body concerning an exemption application and a disciplinary hearing as was the case which confronted the court in *Hendricks*; hence the dicta in *Hendriks* are relevant to the disposition of the present appeal.' The Court in *Malusi Wekhaya Construction CC v Bargaining Council for the Civil Engineering Industry and Others; H T Pelatona Projects (Pty) Ltd v Bargaining Council for the Civil Engineering Industry and Others*²⁴ similarly followed a legality review approach.

[36] In *Hendricks supra*²⁵, the Court held that the grounds for reviewing a decision included a review '... in accordance with the requirements of the constitutional

²⁰ The Court was referring to *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) at para 29 and *Assign Services (supra)*.

²¹ Section 158(1)(h) reads: 'The Labour Court may - ... review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law ...'.

²² See para 23 of the judgment.

²³ (2015) 36 ILJ 163 (LAC).

²⁴ (2024) 45 ILJ 858 (LC) at para 17.

²⁵ *Id* at para 29.

principle of legality, such being grounds 'permissible in law ...'.²⁶ Elaborating on the meaning of 'legality' the Court in *Hendricks*²⁷ decided: '... *Legality includes a requirement of rationality. It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the rule of law.*' In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*²⁸ 'legality', in the context of a review application under Section 158(1)(h), was described as requiring that '... *all exercises of public power are, at a minimum, lawful and rational. ...*'.

- [37] In *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena*²⁹ the Court described the principle of legality in the following manner:

'... Public functionaries are required to act within the powers granted to them by law. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) at para 58, furthermore, see the seminal judgment in *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC) at para 85, where the court laid down the core element of legality as follows:

'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with

²⁶ In *Merafong City Local Municipality v SA Municipal Workers Union and Another* (2016) 37 ILJ 1857 (LAC) at para 38 the Court similarly pronounced that: '... *Permissible grounds in law would include the constitutional grounds of legality and rationality and, if they constitute 'administrative action', on the grounds that are stipulated in PAJA ...*'

²⁷ *Id* at para 28.

²⁸ (2014) 35 ILJ 613 (CC) at para 28.

²⁹ (2014) 35 ILJ 2131 (LAC) at para 34.

this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement.'

The Court in *Weder*³⁰ then proceeded to consider the component of rationality as part of the legality enquiry, and held:

'In later judgments the court has developed this concept of rationality requiring the executive or public functionaries to exercise their power for the specific purposes for which they were granted so that they cannot act arbitrarily, for no other purpose or an ulterior motive. See *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 47. Furthermore, in *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC) at para 39 Yacoob ADCJ held:

'If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the *means* to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole.'

[38] In my view, the aforesaid discussion reveals that whether one applies a review test based on unreasonableness or one based on legality, the fundamentals are the same. At the heart of it is that the decision made is tested against what is rational and reasonable, having due regard to all requisite available material and the relevant principles of law, and the purpose for which the power forming the basis of the decision was afforded. If the decision does not pass muster against these fundamentals, it would be irrational, unreasonable, and disconnected from the purpose it is meant to serve. On that basis, the decision would fall to be reviewed and set aside.

³⁰ Id at para 35.

Analysis

[39] As a point of departure in deciding this matter, it is important to understand why sectoral collective bargaining resulting in uniformity in a particular sector, is important. In *Kem-Lin Fashions CC v Brunton and Another*³¹ the Court had the following to say:

‘The rationale behind the extension of collective agreements by the Minister of Labour in terms of s 32(2) is to prevent unfair competition which employers who are not party to collective agreements concluded in a bargaining council may pose to their competitors who are bound by collective agreements. This is because a collective agreement concluded in a bargaining council lays down minimum wages and other terms and conditions of employment to be observed in respect of employees.

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 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.’

³¹ (2001) 22 ILJ 109 (LAC) at paras 20 – 21.

[40] The Court in *SA Clothing and Textile Workers Union and Others v Yartex (Pty) Ltd t/a Bertrand Group*³² adopted a very similar approach, where the Court held:

‘The constitution is premised on centralized bargaining between NAWTM and SACTWU, the main purpose of which is to create and maintain uniformity in the determination of wage levels so as to ensure that all employers in a given subsector or section level in this industry are treated in an equitable fashion. Employers and employees in these subsectors should enjoy the same treatment to ensure that employers compete with their counterparts in a fair manner in order to sustain the industry and to prevent job losses.

Any contrary interpretation of the relevant provisions of the Act and the constitution would result in catastrophic circumstances which would be inimical to the operation of the industry in question. Clearly the overarching purpose of the constitution was to avoid fragmentation of the bargaining process.’

[41] Two last apposite references in this regard bear mention. First, the Court in *Komatsu Southern Africa (Pty) Ltd v National Union of Metalworkers of South Africa*³³ held:

‘... the industry prescribes what can generally be termed to be centralized bargaining. This means that all terms and conditions of employment in the industry can only form the subject matter of collective bargaining at central (sectoral) level in the bargaining council itself. By necessary implication and as a matter of logic, any collective bargaining on conditions of employment at plant level with individual employers would be prohibited. The purpose of centralized bargaining is to ensure uniformity and consistency of conditions of employment in

³² (2013) 34 *ILJ* 2199 (LAC) at paras 58 – 59.

³³ 2014 JDR 1455 (LC) at para 32.

an organized industry. This creates a level playing field in an industry where businesses do not compete with one another off the back of the conditions of employment of their employees. Similarly, it prevents individual employers being targeted for further and enhanced conditions of employment just because such employers may be considered to be larger or financially able or susceptible to agree to the same. This kind of situation and regulation is fully in accordance with one of the primary objectives of the LRA ...'

And similarly, the Court in *Bam and Others v BME*³⁴ decided:

'... Where centralised collective bargaining is conducted through a bargaining council, the LRA provides various mechanisms to support negotiations taking place at that level. One of the inducements to parties to participate in such forums is that the agreements reached in such a forum can be extended to non-parties falling within the scope of the bargaining council, subject to certain thresholds of representation being met. This prevents competitors undercutting wages set in the negotiations to the detriment both of the employer parties to the bargaining council and to the detriment of employees of those competitors. The LRA also leaves it up to the collective bargaining partners to determine whether the centralised forum is going to be the sole channel for negotiating terms and conditions of employment, or whether some matters can be dealt with at plant level. In the case of BME and its employees all negotiations on terms and conditions of employment are conducted at a centralised level in the bargaining council. If an employer and employees are able to negotiate issues at plant level, notwithstanding such a centralised bargaining arrangement, it undermines the integrity of the existing centralised bargaining process and encourages a fragmentation of bargaining. To strengthen collective bargaining the LRA gives legal force to agreements concluded between representative registered trade unions and

³⁴ 2022 JDR 2046 (LC) at para 117.

employers. It also promotes industrial peace for the duration of a collective agreement by declaring strike action on an issue dealt with in the agreement to be unprotected.'

[42] In sum, therefore, the import of sectoral level collective bargaining is to ensure uniformity and consistency of inter alia wages of employees in an organized and regulated industry. As a result, a level playing field is created in this industry, where businesses do not compete with one another off the back of the wages of employees. Consequently, competition in the industry would be based on other differentiating factors, and the wages paid to employees would not be decisive when employers seek to compete. There is however a downside to this. The uniformity mentioned, although highly desirable and in keeping with the primary objectives of the LRA, is not without anomaly. It may well be that the application of a uniform standard where it comes to issues regulated by an industry collective agreement in a bargaining council causes undue hardship to a particular employer, which cannot just be left unchecked. This is especially so the uniform standard is enforced upon an employer as a result of extensions of collective agreements in an industry to non-parties, by virtue of section 32 of the LRA. I will later deal with what can be legitimately said to constitute such hardship so as to substantiate relief being afforded to an affected employer. The point that must be made is that it is the concept of exemption that is intended to correct such anomaly. This was made clear in *Golden Arrow LAC supra*, where the Court said:³⁵

'I agree ... that the starting point of the enquiry is s 30(1)(k) which expressly provides for the inclusion of an exemption procedure in a collective agreement concluded by the parties to a bargaining council. It follows that the LRA therefore legally mandates that every bargaining council must provide for a procedure for exemption.'

³⁵ Id at para 17

[43] Specifically in this context, the Court in *Free Market Foundation v Minister of Labour and Others*³⁶ had the following to say:³⁷

‘What is more, the limitation of the right of administrative justice by s 32(2) and (3) of the LRA is ameliorated considerably by two of the substantive jurisdictional preconditions in s 32(3): the necessity for an independent system of exemption and the protection against discrimination. These are ‘the main safety valves’ to protect the interests of non-parties in a majoritarian situation. They are purposely intended as carefully tailored and proportional means to minimise adverse impacts on non-parties.

Once again, it is not the place of the courts to prescribe to the legislature about its preferred policy choices about the means of legislative intervention, provided they are proportionately tailored. Parliament’s choice of this mechanism over a broad ministerial discretion is a legitimate policy preference to favour the resolution of labour issues by domestic expert tribunals. The exemption procedure provides several layers of protection where a majority collective agreement has been extended to non-parties by the Minister. A person wishing to be exempted from an extended collective agreement will have a right to apply to the bargaining council for an exemption; appeal the refusal of exemption to an independent appeal body; and apply to have the decision judicially reviewed and set aside if the application is ultimately denied.’

[44] In the process of deciding exemption, regard must of course be had to the exemption criteria as specified in the relevant collective agreement itself. The LRA requires every bargaining council to specify exemption criteria which are

³⁶ (2016) 37 ILJ 1638 (GP) at para 113 – 114.

³⁷ See also *Confederation of Associations in the Private Employment Sector and Others v Motor Industry Bargaining Council and Others* (2015) 36 ILJ 137 (GP) at para 36; *Kem-Lin Fashions (supra)* at para 23.

fair and promote the primary objects of the LRA.³⁸ As specifically held in *Trafford Trading supra*:³⁹

‘... 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.’

[45] It cannot be legitimately argued, as NUMSA and TOWU does, that the kind of anomaly that arose in this case must be resolved by way of collective bargaining, and not exemption. First and foremost, this kind of approach would entirely negate the object and purpose of exemption, which is provide a safeguard to individual employers from any undue hardship resulting from being bound to the industry collective agreement, as product of the sectoral collective bargaining. In simple terms, this is not an industry issue, and central level sectoral bargaining is designed to cater for rules and standards in an industry, overall, and not to resolve the needs and issues of an individual employer. It is unlikely that GABS would be able to influence any of the bargaining parties to take up its cause. The problem GABS has is only particular to it, and for this industry collective bargaining is not appropriate. There is a policy consideration as well. The LRA specifically recognises that in the case of industry collective bargaining and resulting industry collective agreements, there must be an exemption process provided as a safeguard against undue harm where it comes to the products of such bargaining.⁴⁰ To then contend that the availability of collective bargaining to resolve issues in itself negates the right to seek exemption, is nothing else but a fallacy.

[46] It is not without a sense of irony that one looks at the case *in casu*. From the onset of the SARPBC, GABS has effectively been more than a complaint

³⁸ See section 32(3)(f) of the LRA; *Putco (supra)* at para 29.

³⁹ *Id* at para 24.

⁴⁰ See section 30(1)(k), as well as sections 32(3)(dA), (e) and (f), of the LRA.

employer. It had religiously implemented all SARPBC wage increases, and more. This has resulted in a steady build-up of wage levels, over time, to a situation where it is now paying substantially more than what would be the minimum wage in the SARPBC. This did not matter when it was effectively the only player in the particular market (the Province and the City), as it could provide for these costs in its contracts without much risk of losing out to cheaper competitors. But it is when the market changed, that the approach by GABS to subscribe to uniformity and unconditional compliance is the very thing that placed the continued viability of its business as risk. Surely it can legitimately be said that just as GABS had been compliant in the past where it came to the industry, that same industry should now accommodate GABS to ensure the continued viability of its business.

[47] One must understand the modern economy is not static. The only thing that is certain is that things continuously change. And where things change, employers must adapt, or risk failure of their businesses. There are many examples of this⁴¹, not least the case *in casu*. When it was virtually only GABS in the market, wage rates were not that important, as those costs could be catered for in its contract prices without risk of losing business. Life was good for everyone, including the employees. But policy shifts came. The lack of competitors in the market, from a policy perspective, was no longer palatable. This is evident from the findings of the Competition Commission, referred to earlier in this judgment. The implementation of this policy shift can only mean one thing, and that is the introduction of new competitors. GABS must then adapt to meet this new challenge. However, and if GABS, in adapting, cannot adapt its current wage structure, that must be an albatross around its neck, because wage costs are more than half of its total operating costs.

[48] On the evidence that was presented in all the matters *in casu*, it is undeniable that the change has started. Practicably speaking, it is likely that GABS will

⁴¹ One example that immediately springs to mind is how retail stores had to change to cater for online purchases and then home deliveries. A retailer that does not adapt to provide this service will likely not survive.

lose 30% of its business to smaller competitors, as a policy issue. But that is not what GABS is most unhappy about. It understands this reality, and must therefore focus on trying to retain the 70% market share it would still be eligible for. In this market, and especially considering the plans of the City as set out above, it will face a plethora of new competitors. As yet, one may not know who they are, but one thing is certain, being that these new competitors will come in at SARPBC minimum rates. The City has also made it clear that contracts would be awarded on the basis of contract costs as being the most important factor to consider, and that it would not be willing to consider contract prices that cater for more than the SARPBC minimum wage rates. To be able to effectively compete, GABS must therefore pull back its wage rates, one way or another.

[49] It is in the aforesaid context that the predicament arises. Because of the fact that the industry is regulated at sectoral level, which binds all parties to the industry, it is impossible for GABS to lawfully implement, on a unilateral basis, a pulling back of wages. That would contravene the main collective agreement(s) of the SARPBC, which can then simply be enforced against GABS, under the LRA, and full compliance executed, nullifying any unilateral action taken. This leaves exemption as the only real and viable option.

[50] It is important for GABS to be proactive in pursuing the aforesaid exemption intervention. It is not unheard of that businesses fail because of a failure to identify that change is needed, and / or taking no proactive steps to make such change in order to maintain the viability of the business. For GABS to be reactive and wait until actual tenders / negotiations are issued out by the Province and / or the City, and then only try and obtain an exemption, makes no sense in this context, would be far too late, and is in any event virtually impossible to have any substantial effect at that point. To illustrate, if GABS waits for a tender, surely at the point when it must tender, its wages stand as they are. An exemption will not change this. An exemption in this context can only change things going forward. Considering the extent to which wages form part of its operating costs, GABS would simply not be able to tender at minimum rates, as it would not be possible for it to absorb the total wage

costs. But considering the nature of the exemption GABS seeks, as will be discussed below, to seek that exemption proactively will mean that the wage disparity with new competitors paying minimum wage will diminish over time, starting now. This in turn means that when the time comes in the immediate future that GABS would have to start competing when negotiating / tendering with the City, it will be in a far better position to submit a competitive proposal, even if it some extent must still absorb some higher wage costs. The evidence shows that if successive exemptions sought by GABS is successful, on similar terms, from the date when first applied for and until 2029, the difference in pay between its first year drivers and sixth year drivers would reduce from 59% to 25%, which is substantial. Thus, this continuing reducing trend would go a long way towards achieving what would be fairly close to wage parity. On the facts, an exemption is surely earned.

- [51] This brings me to the issue of financial hardship. Both NUMSA and TOWU argued, and several of the appeal panels found, that exemption is only competent in the case where the employer can prove financial hardship or an inability to comply with the main collective agreement. I am compelled to disagree. First, exemptions are not only competent to remedy a current predicament / hardship. Exemptions are also competent to remedy a contemplated predicament / hardship, provided that such contemplation is realistic and reasonably likely. I draw inspiration in making this finding from the judgment of the Competition Appeal Court in *Sasol Oil (Pty) Ltd v Nationwide Poles CC*⁴² where it was held:

‘Once a supplier has been proved to be dominant in the market and engages in discriminatory pricing practice, the test is whether there is a ‘reasonable possibility’ that competition may be adversely affected by a practice under which the dominant firm sells its goods at a cheaper price to some customers at the expense of others.

⁴² 2006 (3) SA 400 (CAC) at 415I-J.

This approach to evidence has already been set out by this Court, albeit within the context of s 12A(1), in *Mondi Ltd/Kohler Cores & Tubes v Competition Tribunal* (2003) 1 CPLR 25 (CAC) in para [38], as follows:

'The test is not whether a merger necessarily prevents or lessens competition but whether it is likely substantially to so prevent or lessen competition. As this Court observed in *Schumann Sasol (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd* . . . the decision required by s 12A(1) must be made on evidence which is available to the Tribunal. In other words, the Tribunal cannot base its decision upon "speculation of a kind which cannot be attributed to any evidential foundation placed before the Tribunal". But the prohibition against unjustified speculation should not be confused with the need for a predictive judgment. The section enjoins the Tribunal to forecast a likely possibility; that is, it makes a predictive judgment, based on evidence which has been placed before it.'

[52] Further, GABS has not pleaded a current financial hardship, or inability to comply with the various main collective agreements, as a ground for seeking exemption, as this was simply not its case. Its case is founded on future prospects, or differently put, future planning, which it considers essential to resolve a current predicament. This current predicament will negatively impact on the viability of its business, in the foreseeable future. One can perhaps say the exemption is necessitated to prevent the financial hardship which is likely to accrue in the future. In this context, any considerations pertaining to GABS not facing a current financial predicament or inability to comply with the main collective agreement simply has no relevance, and to decide that exemption cannot be granted because this does not exist, is entirely misplaced and unfounded. In any event, it is materially in error to suggest that exemptions are only possible if there exists financial hardship or an inability to comply with the main collective agreements.

[53] However, and in conducting the exemption enquiry in this case, it would not just be about GABS and its interests. Regard must be had to the interests of

the employees. Obviously, an exemption would mean that they would not get the increases that have been bargained for them in the industry, and will be directly financially prejudiced as a result. Is this sufficient, *in casu*, to scupper an application for exemption? I think not. A particular consideration immediately springs to mind. First and foremost, the nature of the exemption sought by GABS to some extent mitigates this financial harm. It is not as if GABS is asking for a wage reduction or wage freeze. No exemption has been sought in respect of those of its employees earning the SARPBC minimum rates. In respect of employees already earning well above the SARPBC minimum rates, the exemption sought by GABS is that it be permitted to pay the greater of: (a) a CPI-linked increase (provided CPI did not exceed the applicable across-the-board (ATB) increase); or (b) an increase equal to the Rand value of the applicable ATB increase on the minimum SARPBC rates. This would reduce the increase in cost to GABS, whilst at the very least maintaining employee wages. This is certainly fair.

[54] One can also not turn a blind eye to the consequences of what will happen if GABS's fears turn out to be substantiated, and it then loses a large chunk of its business to new competitors. This will in all probability result in the mass retrenchment of employees. I am aware that NUMSA and TOWU have effectively argued that if this is the case, then so be it, and employees should not be currently prejudiced as a result of this possible future outcome.⁴³ I must confess I find this view expressed by these unions perplexing and short sighted, especially having regard to the rife unemployment figures applicable in our economy. Surely, if something can be done now that would save jobs being lost in three or four of five years, then that is preferable, and should be afforded its due weight.

[55] I now turn to the issue of unfair competition. In this context, it is the very anomaly in the bargaining council regulating system that has caused the problem. Ordinarily, and where it comes to a particular industry / sector, and

⁴³ This contention is in line with a general position one often finds in trade unions, being, colloquially speaking, that it is better for ten persons to be unemployed, than one person being exploited.

as I have said before, it would be highly undesirable for businesses to compete with one another off the backs of the salaries of their employees, so to speak.⁴⁴ One business should not enjoy an advantage over another business, in the same industry, just because one business can and is willing to exploit its employees more than the other. That is where industry prescribed wages, as contained in extended industry collective agreements, would serve to avoid this scenario. In short, where employers compete in an industry, they should do so on the basis of paying their employees the same wage, as a minimum.⁴⁵ In *Golden Arrow LAC*, the Court said:⁴⁶

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

The Court concluded by saying that the question of whether an employer would then be faced with operating its business on an uneven playing field needs to be taken into account when considering exemption.⁴⁷

[56] This kind of level playing field relating to wages of employees works well in the larger industries where there a large number of employers paying more or less the actual bargaining council minimum wages from time to time.⁴⁸ In those cases, any new business / employer coming into the industry would come in at more or less the same wages as all the other existing employers in the industry.⁴⁹ As such, a material wage disparity would never arise. But the situation in the SARPBC is different. It is a smaller industry, with limited employer participants. In the past, new competitors rarely entered. The growth

⁴⁴ *Golden Arrow LAC (supra)* at para 45.

⁴⁵ Employers are of course always free to pay more, but this the employer’s own election.

⁴⁶ *Id* at para 46.

⁴⁷ *Id* at para 54.

⁴⁸ This is for example the case in the Motor Industry Bargaining Council, the Metal and Engineering Industries Bargaining Council, and the National Bargaining Council for the Road Freight and Logistics Industry.

⁴⁹ There is room for new employers to seek exemptions from, for example, minimum wages, in order to allow for such an employer to establish its business. But those exemptions are normally linked to a phase in period, with the goal being to ultimately achieve the minimum prescribed wage.

in wages, as a result of prescribed increases, over decades, for those employers that were always part of the industry, drastically outpaced in the increase in the minimum wage that a new entrant into the industry would be required to pay. In simple terms, the very measures designed to make the playing field level, ultimately made it not to be level, and this as a matter of undeniable fact would unduly advantage new entrants over existing and long-standing employers. This would in my view be contrary to the very objective sought to be achieved by such industry regulation. In *Yarntex supra*, the Court held that the purpose of centralised bargaining is to ensure that *'employers and employees in these subsectors should enjoy the same treatment to ensure that employers compete with their counterparts in a fair manner in order to sustain the industry and to prevent job losses'*.⁵⁰ I can see no reason why this sentiment cannot apply to any material wage disparity.

[57] In *Kem-Lin Fashions supra* the Court dealt with the notion of unfair competition in the case where the non-party to a collective agreement in an industry, being able to pay wages that are less than employers that are a party to the industry collective agreement. The Court held:⁵¹ *'It is clear from what has been said above that the mischief which the legislature sought to prevent by s 32 is the unfair competition ...'*. I am satisfied that the same basic reasoning should apply to the situation *in casu*. GABS is party, first as actual party and currently as a party to whom the agreement is extended, to the various main collective agreements in the SARPBC. As a matter of principle, it should not be visited with unfair competition that would result from a material disparity caused by this. If this disparity is found to exist on the facts, it may be remedied by way of exemption.

[58] From the aforesaid, the following consequence results, as illustrated by example. There may be two employers in the same industry (SARPBC) rendering the same service using the same resources and equipment, to the same customer (the City). Because the one employer is a long-standing

⁵⁰ Id at para 58. See also *Golden Arrow LAC (supra)* at para 47.

⁵¹ Id at para 22.

compliant employer in the industry, it must, as an example, pay a prescribed wage rate of R10 000.00 per month to its drivers. However, an employer that is a new entrant to the industry only has to pay its drivers the minimum rate at the time, which, again as an example, is R5 000.00 per month. But because of the nature of the industry as a regulated industry, there is nothing the first mentioned employer can do to change its wages to meet / counter those of the new entrant. Then, and considering wage costs are half the operating costs, it does not take a genius to figure out that this sole eventuality would likely render the first mentioned employer uncompetitive to the extent that its business is at material risk.

- [59] The situation *in casu* is made worse by the fact that fuel costs are more or less fixed, being 25% of operating costs, and the fact that the new competitors will to a large extent be supported by the City in establishing their businesses, by way of the City financing and providing the busses. This in reality only leaves the issue of the wages as basis for GABS to try and level the playing field, at least to the level where it is able to fairly compete.
- [60] One question remains. Would the above disparity qualify as being considered to unduly and unfairly benefitting the new competitors to the extent that it is unfair competition? I believe so. No matter how one looks at it, the wage disparity created by the regularity system itself, and nothing else, results in one employer having a significant competitive advantage over another in the same industry, purely off the back of the wages of employees. In *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others (1)*⁵² the Court called this kind of situation: ‘... *an unfair advantage in the industry, because its members are in effect given a competitive advantage off the back of employees’ conditions of employment* ...’⁵³. The point is that as a result of this anomaly, an old employer such as GABS could lose out to a new employer in the industry because it is prescribed that it must pay more, whilst the new competitor, also by way of the same form of prescription, may pay less. In the

⁵² (2019) 40 ILJ 1289 (LC) at para 39.

⁵³ The Court was referring to employer members of the employers’ organisation NEASA, who would pay no wage increases, whilst the other employers in the industry would.

industry *in casu*, and because of the significant nature that the wage component is of operating costs, it is highly likely that this factor is determinative of securing the business. And what makes it worse, is that there is nothing the old employer can do for itself to change this. In *Schultz v Butt*⁵⁴ the Court said:

‘As a general rule, every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader, that constitutes an *injuria* ...’

[61] Whether the above state of affairs would be tantamount to unfair competition depends on a number of factors. In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*⁵⁵ the Court held that these factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system, the question whether the parties are competitors, conventions with other countries, and the motive of the actor. In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others*⁵⁶ the Court described the norm as an objective one, in which the interests of the competing parties have to be weighed, bearing in mind *inter alia* the interests of society, the morals of the market place, and the business ethics of that section of the community where the norm is to be applied.

[62] *In casu*, this is not about GABS seeking to prevent or otherwise stifling competition. It accepts that it must face competition. Insofar as its motives are considered, it is clear to me that all it wants is a chance to be competitive so it

⁵⁴ 1986 (3) SA 667 (A) at 678F-G. See also *Breetzke and Others NNO v Alexander and Others* 2020 (6) SA 360 (SCA) at para 34, where it was held: ‘Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others ...’.

⁵⁵ 2007 (6) SA 350 (CC) at para 34.

⁵⁶ 1981 (2) SA 173 (T) at 188H-189B.

can ensure the viability of its business. In my view, and should it be expected of GABS to compete with new competitors in the market on the basis of the existing material wage disparity, and with no means to remedy it, especially considering that wage costs is the largest component of operating costs, that would constitute unlawful interference with the business of GABS, which is tantamount to unfair competition. It would in reality actually undermine competition, because a competitor that is unable to compete does not constitute real competition, which is what the policy shift demands. The demise of a business like GABS would certainly not be in the interest of the industry, or for that matter the creation of employment. What one therefore has, in this case, is undoubtedly unfair competition. The following *dicta* from the judgment in *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd*⁵⁷ is particularly apposite:

'In unlawful competition cases it has been suggested that the *boni mores* or reasonableness criterion on its own is often too vague to provide a rational yardstick for the delimitation of the right to goodwill in the wrongfulness enquiry. Van Heerden & Neethling suggest that the particular concretisation of the *boni mores* test may be found in what they term the 'competition principle':

'The competition principle is therefore that the competitor who delivers the best or fairest (most reasonable) performance, must achieve victory, while the one rendering the weakest (worst) performance, must suffer defeat. . . .

Victory over a rival may be obtained in two ways: either by offering the same performance at a lower price, or by bettering performance at the same price.'

Van Heerden & Neethling recognise that this principle can be properly applied only where the activities of the competitors are comparable, or expressed differently, where the playing fields are even. Where the

⁵⁷ 2017 (1) SA 613 (CC) at paras 49 – 50.

playing fields are even, or in their terms, where there is 'performance (merit) competition', competitive conduct by a rival will in principle be lawful.'

[63] Next, one cannot wish away, as NUMSA and TOWU seek to do, several pertinent findings already made by the Labour Appeal Court in *Golden Arrow LAC*. These findings, properly considered, support the notion advanced by GABS concerning its current predicament, and what the consequences thereof to its business would be. These findings would certainly support the granting of exemption. Particular reference is made to the following *dicta* from the judgment:⁵⁸

'The narrow approach adopted by the second respondent to the scope of the enquiry as required in terms of clause 13 of the exemption procedure resulted in a decision which had not taken in account of the appellant's central argument, namely that, absent an exemption, it would not be able to compete with new entrants into the market who would only be bound to apply the base minimum wage contained in the 2018 MCA and that, pursuant thereto, the appellant would be obliged to continue to maintain wage rates in perpetuity which were far in excess of the industry minimum. This would allow competing employers, including new entrants into the market, to undercut it on wages by paying a rate which is vastly lower than that which, absent the exemption, the appellant would be obliged to pay. ...'

[64] Exemption applications are commonly used to give new employers a foothold and start in an industry, by allowing such employer to pay less than minimum wage for a period of time. I believe that in the same manner, an exemption application may be used to allow existing employers that are rendered uncompetitive by the application of the industry regulatory measures to remedy that situation. After all, what is fair in a level playing field must be fair to everyone in the industry, and not just some. In short, exemption must be a

⁵⁸ Id at para 48.

competent tool to use to eliminate unfair competition, where the unfair competition results from the application of the very regulatory measures of the industry itself.

[65] In the end, and what GABS brought forward in each of its exemption applications was something quite bespoke, so to speak. The case it advanced, and in respect of which it represented what is in my view largely undisputed evidence, is one based squarely on special circumstances. These special circumstances are: (1) There was a change in policy and circumstance in its market place, which change was out of its control; (2) this change resulted and / or is going to result in it having to compete with a number of new competitors in the market to retain its business; (3) as a result of historical compliance with the SARPBC main collective agreements, it was required and obliged to pay wages which increased over time to be materially in excess of those wages that would be paid by the new competitors, resulting in a material wage disparity in the same market; (4) considering that wage costs are in excess of half of total operating costs, this wage disparity rendered it uncompetitive, which would be unfair; and (5) The exemption was essential to make GABS more competitive and so ensure the continued viability of its business. This was the case the various exemption decision makers had to decide. It was never about conducting some sort of balancing exercise to try and decide what is fair to all parties. In *Putco supra*, the Court was critical of such a general approach being followed where a specific case for exemption was presented,⁵⁹ and held as follows:⁶⁰

‘The applicant, having placed before both the exemption and appeal authority special circumstances in the form of facts and evidence that clearly justify an exemption from compliance with the main agreement, was entitled to expect the respective exemption authorities to interrogate the evidence and to make a considered and reasoned decision, based on that evidence, as to whether or not the

⁵⁹ In *Putco*, the special circumstances case was focused purely on financial distress as ground for exemption.

⁶⁰ *Id* at para 30.

exemption sought ought to be granted. While the factors listed in the main agreement are generally relevant, the crisp issue in the present instance was one of affordability. It was not open to the exemption and appeal authorities to treat the matter as one would a wage arbitration, where the decision maker's function is largely redistributive in the sense of a balancing of competing interests and the determination of a fair outcome that seeks as far as possible to reconcile those interests. The nature of a process in which a party seeks exemption from the terms of a binding collective agreement on the grounds of affordability, raised as starkly as they are in the present instance, is less about reconciling competing interests than the determination of a factual dispute. In this instance, the decision maker is required, primarily at least, to ascertain whether on the evidence, a proper factual case has been made out for an exemption in the terms sought. In the present instance, there was no evidence submitted by the union parties opposing the granting of the exemption that seriously called into question the dire financial straits and issues of affordability recorded in the applicant's submissions. In those circumstances, it was not open to the exemption authorities to reject the applicant's version in the summary terms that they did, and impose their view of an equitable settlement on Solomonian terms.'

- [66] In any event, the case of GABS *in casu* is one that can competently resort within the parameters of clause 13 of the SARPBC exemption procedure. This is because the clause records that '*all relevant factors*' when deciding an application for exemption must be considered. Not only are the considerations advanced by GABS relevant factors, but what the wage disparity and the resultant unfair competition issue contemplate, must surely be special circumstances relating to the continued viability of the business of GABS, being factors specifically mentioned in the clause. In short, there is a proper case made out for exemption in terms of clause 13 itself. As said by Prinsloo J

in *Golden Arrow Bus Services (Pty) Ltd v South African Road Passenger Bargaining Council of South Africa and Others*⁶¹:

‘The Second Respondent had no regard for the factors set out in clause 13 of the exemption procedure and glaringly absent from the appeal ruling is a consideration of ‘all relevant factors’, which were obviously relevant and material in deciding the exemption application. Evidently from the exemption application and the transcript of the appeal, specific submissions were made on a number of issues *inter alia*, on ‘special circumstances’. In fact, it was submitted to the Second Respondent that this was a ‘classic special circumstances case’ with specific reference to the 59% pay disparity.’

- [67] The above being the general considerations *in casu*, as I see them, I will now turn to deciding the four individual review applications, in order to determine whether the exemption decisions made by the SARPBC panellists referred to therein pass muster on review. I will do so in the sequence of the relevant main collective agreements themselves.

The 2018 Agreement – Case Number C 688 / 21

- [68] The exemption appeal pertaining to the 2018 agreement, after two rounds before the Labour Court and one round before the Labour Appeal Court, finally came before panellists Patelia, Bosch and Wessels. As indicated above, the panellists refused the appeal. The core reasons for refusing the exemption appeal have been touched on above, and are dealt with below.
- [69] From the outset, it is apparent to me that the panellists had very little regard to what constituted the core of GABS’s case, which case I have already summarized above. In the context of such a case, the panellists needed to consider and decide a number of crucial considerations. The first is whether, on the evidence, it had been shown that the wage disparity existed. Second, it

⁶¹ Unreported Case Number C351 / 2019 (dated 17 October 2019) at para 57.

had to be determined whether such disparity resulted in GABS being subjected unfair competition, which could only be remedied through exemption. The third is whether the viability of the business of GABS, as a result of the predicament it was facing, was being threatened. Once these three questions were answered in favour of GABS, on the facts, there would be no reason why exemption could not be granted. If positive answers to these three questions were not proven, then the exemption case had to fail. This approach would be in line with what the Court said in *Putco* and *Tradex Trading*.

[70] But instead of answering these questions, it appears to me that the panellists instead sought to contradict the very notion of unfair competition, as relied on by GABS, as being able to serve to substantiate an exemption. They found that '*unfair competition*' in the context of exemption only meant unfair competition relating to SARPBC minimum wages, or in other words where one employer in competing with another, pays less than the minimum wage. They also believed that it was not the function of exemption to '*assist*' a competitor by levelling playing fields. I must confess I find this approach perplexing, considering the fact that the panellists were favoured with the judgment of the Labour Appeal Court in *Golden Arrow LAC supra*, containing the clear sentiments discussed above. I must add that where the main collective agreement, as is the case with the 2018 agreement, prescribes ATB increases on employees' actual wages, it renders this increased wage to be a prescribed wage the employer would be bound to. When compared to employers only required to pay the minimum prescribed wages, this leads to a material wage disparity between employers bound by the same collective agreement, hence the need for exemption. The panellists failed to have regard any of this.

[71] The panellists also found that amongst competitors, in general, there is seldom a completely level playing field. This may be so. But the point was that GABS was never seeking to stifle competition through obtaining exemption. Instead, it was seeking fair competition through exemption. As I have discussed above, and in the context of competition, a level playing field does

not contemplate zero differentiation. It is only when the playing field is so unequal that it can be considered to be unfair towards a particular player, that competition on such basis would be unfair. Unfair competition is actionable, and in this case, that action would be seeking exemption. The panellists irregularly failed to appreciate this.

[72] In the end, the panellists materially erred in adopting the approach that they did where it came to the issue of unfair competition, for the reasons already elaborated upon earlier in this judgment. On this basis alone, the appeal decision falls to be reviewed and set aside.

[73] Whilst the panellists accepted the evidence that competition will increase as a result of the policy objectives set out earlier in this judgment, they nonetheless concluded that it was '*... uncertain as when the increased competition will become a reality ...*'. This reasoning shows that GABS's actual case was misconstrued, and to an extent, certain facts were also ignored. Whilst it cannot with certainty be said at what point GABS would have to start submitting competitive tenders / negotiations, the undeniable reality is that it will have to do so at some point in the foreseeable future. The probable timelines appeared especially from the MyCity RBT plans, which confirmed that this will happen in the foreseeable future. This meant that if GABS wanted to be competitive when the time came, it needed to take remedial action now. In short, proactive immediate action was essential to the future viability of its business. The panellists needed to make a determination on the issue of this foreseeability. They simply failed to do so, thereby negating pertinent facts.

[74] The panellists accepted that a wage disparity existed. So at least that part of the case was proven. However, the panellists negated this fact by finding that '*... it is not envisaged or required that employers in an industry pay the same wages ...*'. Whilst this may be correct, this is not the point. The point is that a material wage disparity that had a particular adverse result, such as depriving one employer of the ability to fairly compete with the other employers, is the real issue. This issue cannot be decided by simply saying that this

differentiation is all right, because it is not expected or required that all employers pay the same. So, the panellists misconstrued this issue, thus committing a material error of law.

[75] It appears to me that what the panellists proceeded to do was to seek to apply the individual provisions as contained in clause 13 of the exemption procedure, on the basis of a check list kind of approach, in order to establish why GABS should not be granted exemption, despite the actual case GABS sought to present. This is not in line with the proper approach to be followed, as I have discussed above. The provisions of clause 13 are not some kind of check list, in respect of which all the boxes must be ticked before exemption is granted. For example, and as relevant *in casu*, there may be particular special circumstances in a case that would justify exemption on its own, without having to trawl through all the other listed considerations, individually. GABS essentially relied on special circumstances that detrimentally affected its continued viability, if left unchecked. This case was effectively ignored by the panellists, in favour of a check list approach. It follows that the approach adopted by the panellists in deciding the exemption is in error, and irregular.

[76] Turning then to some of the individual findings made by the panellists, it was held that it would set a poor precedent to grant an exemption to GABS, as it was a '*profitable and well-resourced*' employer. Yet again, this finding completely misses the point and is tantamount to adopting the wrong approach. First, the finding contemplates that for GABS to succeed it must show immediate financial distress. As discussed, this is not a requirement that must be satisfied to attain exemption, and in any event, it was never GABS's case. Second, there can never be an issue of a '*poor precedent*'. Exemption in a case such as this is uniquely fact specific pertaining to a particular employer, and granting exemption in such a bespoke circumstance cannot serve as a precedent for others. Every employer seeking exemption on a particular basis must prove its case on the particular facts. Regardless, and as discussed earlier in this judgment, it is open to GABS to proactively take action to ensure the future viability of its business, without staring actual immediate financial disaster in the face, provided it can prove the risk to its

continued viability. On the facts, this is what GABS did. Consequently, the panellists misconceived the nature of the enquiry and applied irrelevant considerations.

[77] The panellists were critical of the fact that it could not be shown that there were no other existing employers in the industry who paid more than the minimum wage or who might also have their own notch systems. This is a misdirection. It does not serve any purpose to conduct a comparative exercise to see if there are other existing employers in the industry having the same predicament. Even if there are others, who do not seek exemption, that cannot by any measure disqualify GABS from obtaining exemption. GABS conducts its own business, in its own unique circumstances, in which it faces its own predicament. *In casu*, the approach adopted by the panellists negates material facts. GABS's predicament was never caused by existing competitors. It was caused by the contemplated introduction of new competitors into the same market that GABS operates in. The undisputed evidence establishes the basis upon which these new competitors will compete with GABS, and that is the issue. As such, this consideration relied on by the panellists as one of the factors to decline GABS's exemption is irrelevant, and was not a valid consideration.

[78] As GABS has pointed out, the actual wage rates paid by other existing employers in the industry are not publicly available. In addition, and considering the industry, where business is ordinarily secured by way of tender, competing employers would be unwilling to make this information available to GABS. This made it impossible for GABS to place comprehensive information before the panellists regarding actual wages paid by other existing employers in the industry. To make matters worse, NUMSA and TAWO made application to the SARPBC for disclosure of the wage rates paid by all employers in the sector, which application GABS supported. But the SARPBC conveyed that this information was not available to it and the panellists accepted that this wage information was not in the possession of the SARPBC. It was thus not possible to place the kind of information the

panellists alluded to, before the panellists. Nonetheless, GABS did what it could. It showed that most of its wage rates exceeded even the existing competitors, such as Algoa Bus and Putco. It gave examples of its 'five years of service' rate being 54% higher than that of Putco, and its 'seven years of service' rate being 32% higher than Algoa. But none of this mattered much, as there were no suggestions nor evidence that any of these two competitors would compete with GABS in its principal market, being the Province and the City. But at least GABS did show material wage disparity, even with current competitors.

[79] The panellists found that it was not apparent that the new competitors would supplant GABS as service provider and that it would remain what the panellists termed '*a significant player*'. These findings are not based on any facts, and are nothing more than assumptions. Properly considered, these assumptions are irreconcilable with the established facts. These actual facts have been ventilated above, and there is little doubt, on the probabilities, that if the material disparity between the wage rates of GABS and any new competitor paying minimum wage remain as they are (or even increasing which would be case without exemption), GABS is likely to lose a substantial part of its business. It should not be expected of GABS to have to run this risk. In any event, what is a '*significant player*' is a subjective view. I cannot accept that it can justifiably be argued that if GABS for example is likely to keep only 30% of its business, the fact that it would still be a '*significant player*' in this context should serve to deprive it of exemption. This reasoning of the panellists is factually unsustainable, and a misdirection.

[80] The panellists even went so far as to find that the conduct of GABS in prosecuting its exemption application had a negative effect on its relationship with trade unions. This finding is entirely inappropriate. This is not only a completely irrelevant consideration, but seeks to chastise GABS for exercising a right it has under law, as afforded by the LRA, and the 2018 agreement itself. It can surely never be said that because an employer applies for exemption, that act itself should serve as a factor to be considered to refuse exemption, because trade unions are not happy with it. I venture to say

that it will be a rare occurrence indeed for trade unions to be happy with any such application for exemption. This issue simply cannot feature in the equation.

[81] But in the end, a material failure perpetrated by the panellists is that a large portion of their reasoning is devoted to the issue of the absence of financial distress. The panellists were at pains to illustrate that as far as they were concerned, GABS did not qualify for exemption, because it was not in financial distress, it was financially strong and profitable, and it could afford to pay the increases. So, they decided against GABS on the basis of a case that was never GABS's case. As discussed earlier, GABS never sought to suggest that it was in financial distress, nor did it seek to present evidence to support such a conclusion. It was thus inappropriate for the panellists to consider this as an issue in refusing exemption.

[82] Overall considered, the appeal determination by panellists Patelia, Bosch and Wessels is unsustainable on review. Whether the reasonableness test is applied or the review is considered on the basis of legality, the review must succeed. In sum, this is firstly because the panellists decided the exemption on a basis they were never called on to decide, which is irregular. Where it comes to the case they were actually called on to decide, a material error of law was perpetrated in considering the issue of the wage disparity and the unfair competition complaint associated with it. Then regarding the facts, the panellists misconstrued the same by taking into account irrelevant considerations, and negating relevant and important facts, which would certainly render the outcome unreasonable. And finally, undue emphasis was placed on entirely irrelevant considerations, which equally leads to an unreasonable and irregular outcome. As said in *Putco supra*:⁶²

'In summary, the failure by the third and fourth respondents in their capacities as the exemption authority, and the second respondent, in his capacity as the appeal authority, to interrogate properly the

⁶² Id at para 34.

evidence before them, and to provide substantive reasons for their decisions, constitute material misdirections. The appeal determination thus falls to be reviewed and set aside.’

It follows that the appeal determination be reviewed and set aside.

The 2020 Agreement – Case Number C 313 / 21

- [83] The exemption appeal relating to the 2020 agreement came before panellists Macun and Godfrey. This exemption appeal was considered before the judgment in *Golden Arrow LAC* came to hand, and this judgment itself was therefore not before the appeal panel. This appeal was also refused by the panellists. It is noteworthy that much of the reasons for refusing the appeal were the same or similar to the reasons given for the refusal of the exemption appeal in the case of the 2018 agreement, discussed above. This included that: (1) impermissible wage differentiation that results in unfair competition only relates to employers competing by not paying minimum wages; (2) immediate financial hardship being required and not being proven; (3) the lack of proof of comparable wage rates / wage notches at other competitors; and (4) applying a check list approach to deciding the exemption application without deciding the real case presented by GABS.
- [84] Where the reasons for refusing the exemption appeal pertaining to the 2020 agreement overlap with those for refusing the appeal relating to the 2018 agreement, I do not intend to deal with those reasons again, and I simply repeat what I have already said, above. Therefore, on the same grounds that I have already summarized, this reasoning by panellists would be unsustainable on review, and would fall to be reviewed and set aside.
- [85] Ironically, the panellists appeared to acknowledge that the effect of the ATB increases prescribed by the main collective agreements, as applied to wage notches in place at GABS, meant that these increased wages then become ‘locked-in’ as prescribed wages. But despite contemplating this, the panellists still found that the notion of a level playing field must be confined to

precluding employers paying less than prescribed minimum wages. This reasoning is contradictory, for the simple reason that a prescribed wage in this context would be the same as a minimum wage. There is no reason why the level playing field principle should not equally apply in such a case.

[86] The panellists also accepted that GABS's areas of operation and its market would be subjected to significant competition in future, and in particular, this would directly impact on its key areas of operation. It was further accepted that negotiations / tenders for business in this market would be assessed by the City with direct reference to SARPAC minimum wages, and that this provided the new competitors, which would come forth, with a competitive advantage over GABS. And finally, it was accepted that not granting the exemption could potentially have negative consequences for job preservation should GABS be unable to compete effectively. These findings of the panellists themselves certainly do support the granting of exemption to GABS. Yet, inexplicably, it was refused.

[87] Some of the reasoning of the panellists bear specific mention. According to the panellists: *'Granting an exemption at present would therefore be unlikely to solve the problem the applicants face in bids that would have to be submitted for contracts within the next three to four years.'* This finding is not supported by the facts. Although it is likely, considering the limited nature of the exemption sought by GABS, that it would take longer than three to four years to achieve what can be considered to be acceptable wage parity, what was not appreciated is that GABS must start somewhere. It has chosen a course of action that was not excessively interventionist, and which gave due consideration to its employees. That meant it would take longer to solve its problems. It is in my view an untenable proposition that this should be held against it. But this finding of the panellists misses a crucial point, which I have already dealt with, but which I feel I must emphasize. Undoubtedly, the problem exists and must be solved. The quicker GABS starts to remedy the problem, considering what will come, the more likely it is that it will be able to fairly compete when the time to do so arises. In the end, the lesser the wage disparity each time GABS is required to negotiate or tender, the better

GABS's position would be with regard to its ability to fairly compete. As the saying goes, this is not a sprint, but a marathon. Effectively, the panellists held it as a factor against GABS that it had tailored the exemption relief sought to strike a balance between ensuring the future viability of its business, whilst at the same time balancing the interests of its employees to ensure that their wages are at least not eroded away. This finding is irrational and unreasonable.

[88] The panellists decided that the delay in the devolution of contracting authority function from the Province to the City, in respect of the contracts GABS had with the Province (which was still being maintained on an entirely temporary basis), was an impediment to the introduction of competition within the Cape Metropole. There is however no factual substance of this finding. On the facts, the City has actually rolled out the MyCiti service, and implemented the first part of it, with Phase 2A looming, and this is the biggest competitive threat to GABS's operations. In short, what the City has announced it is going to do is effectively a done deal, and this will to a large extent replace the contract with the Province. There is no delay in devolution as the panellists believe. The devolution has been decided, and its roll out has started. That is the trigger, a fact which the panellists unreasonably failed to appreciate.

[89] Just as it was with the exemption appeal finding relating to the 2018 agreement, the panellists placed some emphasis on the notion that GABS must resolve its predicament by way of collective bargaining. As I have already said, this is no solution at all. I may add that collective bargaining in this context is about the industry and not about GABS's individual interests. I in any event find it highly unlikely that the trade unions in the industry would ever agree to anything that compromises wage increases negotiated for employees. This is certainly substantiated by the fact that the trade unions believed that the wage disparity in this instance is reasonable, appropriate and actually contemplated by collective bargaining, so there is hardly a reason for them to agree to anything that would contradict this view. Further, and on the evidence, the other employer parties to the SARPBC had no interest in assisting GABS. Considering the aforesaid true facts, as well as the principles I have already

discussed, the finding by the panellists that this is any kind of solution to GABS's problems is misdirected and irrational, and as such reviewable.

[90] But to make it even worse, the panellists suggested that GABS had the option to attempt plant level bargaining, and was critical of the fact that there was no evidence that this option had been explored. The suggestion that it was open to GABS to pursue plant-level bargaining is patently wrong. This is because wages for the industry are bargained and then agreed to, only at a central level in the SARPBC. In this context, plant level bargaining is prohibited.⁶³ It is impossible for GABS to negotiate itself out of the wages prescribed in the 2020 agreement by way of concluding a plant level agreement with the trade unions and its employees, as it will always remain bound by the terms of the 2020 agreement which can be enforced against it, despite any plant level agreement.⁶⁴ The only remedy available is exemption.

[91] And finally, similar to the 2018 exemption appeal findings, the panellists were concerned that granting the exemption would create the wrong precedent and even went so far as to find that this could: '*... lead to a situation where there is instability in the bargaining council and a possible increase in unfair labour practice disputes in terms of section 186(2)(a) of the LRA*'. As I have discussed earlier, exemption bodies deciding exemptions under the auspices of a bargaining council do not make findings that bind future exemption bodies, as such decisions are very much individual employer and fact specific. But more importantly, to in effect say that a factor to be considered in refusing exemption is because other employers may seize on it and seek exemption, is simply not acceptable. The fact is that if other employers believe they may have a case for exemption based on similar grounds as GABS, those employers must still prove the existence of those

⁶³ See *Wallenius Wilhelmsen Logistics Vehicle Services v National Union of Metalworkers of SA and Others* (2019) 40 ILJ 1254 (LAC) at paras 27 – 28; *Air Chefs (Soc) Ltd v National Union of Metalworkers of SA and Others* (2020) 41 ILJ 428 (LC) at para 20.8.

⁶⁴ See section 33A of the LRA. In *SA Local Government Bargaining Council v Ally NO and Another* (2016) 37 ILJ 223 (LC) at para 71, the Court said: '*The real purpose of s 33A was to enable bargaining I councils to enforce, on behalf of employees under their jurisdictions the provisions of the bargaining council main agreements where it comes to employment conditions and benefits applicable to such employees under the collective agreements...*'.

grounds, on the particular facts. And finally, there was simply no evidence of significant numbers of employers facing similar predicaments, and standing in a queue to follow GABS's lead. The opposite was in fact true, in that GABS's predicament was uniquely bespoke in a specific market, and this in all likelihood will apply to no one else.

- [92] Therefore, it is my view that the appeal decision by panellists Macun and Godfrey is unsustainable on review, as it is irrational, constitutes an error of law, is founded on a number of misdirections, and simply cannot be considered to be a reasonable outcome. It must be reviewed and set aside.

The 2021 Agreement – Case Number C 93 / 22

- [93] The exemption appeal relating to the 2021 agreement was decided by panellist Nkopane. On this occasion, it appears that the panellist had proper regard to the judgment of the LAC in *Golden Arrow LAC*. This is evident from the fact that the panellist correctly identified the case GABS had advanced in support of its application for exemption, as being the wage disparity resulting from the historical events in the SARPBC, and the consequent unfair competition GABS would be subjected to as a result of policy changes effected in the industry introducing new competitors, and in particular, in the market in which GABS did business. The panellist then accepted this case as constituting proper grounds for the granting of exemption. This meant that all the panellist had to decide was whether the wage disparity issue in this case would likely lead to GABS being subjected to unfair wage competition with the new employers to be introduced into the industry, which involves a determination of whether the facts supported this notion.

- [94] In this instance, NUMSA and TOWU accepted that the market in which GABS would continue to operate would change, and will increasingly be characterised by greater competition, specifically where it came to smaller bus operators and the introduction of new operators. NUMSA and TOWU further accepted that the Province and the City has every intention of giving effect to the policy changes requiring this competition in the industry. This meant that

an important factual consideration was actually undisputed. In this context, the panellist held: *'... because of the constitutional and statutory imperatives applicable in the bidding process, from a pricing perspective the appellants would not be competing on an equal footing with the new entrants in the market due to the high wages that they are locked in ...'*. In particular with regard to whether there would be competition in the context of the City's MyCiti project, the panellist said: *'... there will definitely be competition ...'*. As to why GABS would not be able to fairly compete, the panellist decided: *'... On the evidence which is also undisputed GABS submitted that the City is only willing to pay labour costs at a minimum rate agreed to within the Council. In relation to Phase 2A GABS would be seriously threatened as this has been its core operation if it is unable to compete with the new entrants on an equal footing ...'*. And finally, the panellist specifically accepted that GABS's high wage rates would render it unable to compete with the new competitors paying minimum wage, by finding: *'... I agree with the Appellants that when competing for these contracts the Appellants would not be competing on the same footing with the new entrants in the market as the wages that they pay would be higher.'*

- [95] So far so good. In fact, and having accepted that the case of GABS would justify the granting of exemption, and that the aforesaid facts supported such a case, there would be no reason why the exemption should not be granted, especially considering the limited nature of the exemption sought. But that is not how matters unfolded. Instead, the panellist decided that exemption should not be granted, for the simple reason that GABS had failed to show that it would be disadvantaged against every possible competitor with whom the City might wish to contract. According to the panellist, a comparison that is limited only to GABS and the envisaged new competitors does not take into account the fact that at this stage there is no basis to conclude that competition would only be between these role players, and it is only when the City commences with negotiations that all possible competitors could be determined. I must confess that I find this reasoning difficult to comprehend, especially considering the panellist's own factual findings. The gist of what is contemplated by the City, especially in Phase 2A of the MyCity project, is the

introduction of new competitors. There was never really an issue of a threat that the market will be opened up to existing operators. It would in any event be unlikely that existing operators would be only paying minimum wage. The panellist became embroiled in completely irrelevant considerations, as it clear on the facts that the real issue was the new competitors, and this alone would justify the granting of exemption. Considering more in this context is just speculation.

[96] In any event, the reasoning of the panellist referred to above, despite her own earlier findings, returns to the proposition that it is not permissible to take proactive measures to mitigate the wage disparity as cause for the unfair competition. This seems to contradict her own reasoning. Nonetheless, earlier in this judgment, I have already dealt with the entitlement of GABS to take proactive measures to ensure the viability of its business. To reiterate, to wait for the negotiation to first happen before seeking exemption is simply far too late, and will serve very little purpose. This reasoning of the panellist is thus reviewable.

[97] In this exemption appeal, NUMSA and TOWU suggested that GABS set up its own new competitors, and then compete using these new entities. The fallacy with this reasoning is that these new competitors would have to be staffed by GABS's existing staff complement, who would then have to accept minimum wage in those new entities, which is highly unlikely. Further, it may well be said that this conduct would constitute a transfer of part of a business, as contemplated by section 197 of the LRA, which means that there would have to be movement of the existing staff of GABS to the new entities on the same terms and conditions of employment. And finally, even if GABS is able to staff new entities with new staff at minimum wage, its existing employees would face retrenchment, with all the costs and job losses associated with it. This proposed solution is no solution at all.

[98] The panellist, just as happened in the previous exemption appeal, attached some importance to what was described at GABS's legacy advantages. These so-called legacy advantages relate to GABS's long history in the public

transport sector and its relationship with the City, which, according to the panellist, would not readily be discarded by the City. It was reasoned that this considered, it was likely that GABS will still retain significant business, even if it may lose some of it. This purported advantage based on historical dealings with the City is without foundation in evidence, and nothing but pure speculation. The assumption in any event flies in the face of the panellist's own finding of fact that that the City would not consider proposals / tenders not based on SARPBC minimum wage, which will be the decisive factor, which effectively negates any historical advantage.

[99] The panellist also dealt with GABS's contract with the Province, finding that the fear expressed by GABS of losing the contract with the Province may be a possibility, but it is not supported by any evidence. This finding negates undisputed evidence. As stated earlier, the contract GABS currently has with the Province is an 'interim' contract, the continued existence of which was precarious, being terminable at any time on notice without cause, by the Province. Added to this, there are the recommendations of the Competition Commission set out earlier in this judgment, which makes this termination likely. Then there is also the fact that the City would take over most of the transport functions of the Province. GABS also presented the recent example of the Eastern Cape Province terminating Algoa's interim contract on three months' notice. In the end, the risk is real, and it was irrational of the panellist to find otherwise.

[100] Therefore, and in the case of the exemption appeal pertaining to the 2021 agreement, the panellist's own findings of fact and law should have resulted in exemption being granted. However, the panellist became embroiled in irrelevant or unfounded considerations, which was irregular and unreasonable, rendering her decision reviewable. It falls to be reviewed and set aside.

[101] The last episode in the current saga relates to the exemption application in respect of the 2022 agreement, which came before panellist De Wet. In this instance, however, GABS emerged victorious. The panellist accepted the case of GABS I have set out on several occasions earlier in this judgment, and further accepted that the facts established that exemption should be granted to GABS on the basis of such case. For all the reasons already dealt with in this judgment, these findings by panellist De Wet cannot be faulted.

[102] This time the exemption decision has been challenged by NUMSA and TOWU. The grounds for the challenge are essentially based on the same grounds for opposing exemption throughout, and which featured in the earlier exemption appeals. I have discussed all these grounds in detail, and do not intend to do so again. For the reasons already given, I do not believe these grounds have substance, and thus cannot serve as a basis for the successful challenge of the decision by panellist De Wet.

[103] I will however touch on some issues raised. NUMSA and TOWU complained that GABS was successful and profitable, can afford to pay the bargained increases, and was thus not deserving of exemption. This kind of submission completely misses the point. This may be the position with GABS currently. But that may well not be the position in the next few years. In fact, and once the evidence is properly considered, GABS's position will be substantially worse once the new bus transport dispensation is rolled out by the City. What NUMSA and TOWU appear not to be able to comprehend is that if attenuated measures can be taken now to avoid GABS staring down the barrel of a gun when the time comes, then surely that could and should be done. As I have said, is not only about financial distress.

[104] According to NUMSA and TOWU, granting exemption will undermine the institution of collective bargaining. I cannot see how. Integral to the very system of collective bargaining at a sectoral level is the availability of exemption, should circumstances at a particular employer justify it. If the very notion of granting exemption undermines collective bargaining, which is what NUMSA and TOWU appear to suggest, then it would render the institution of

exemption superfluous. That would be contrary to the very scheme propagated by the LRA. The simple reality is that the institution of sectoral level collective bargaining may on occasion give rise to inequitable results. These kinds of results must be able to be remedied. Hence exemptions, which are entirely fact specific. The current matter, in my view, is a perfect case in point. The contention raised by NUMSA and TOWU in this respect is unsustainable.

[105] NUMSA and TOWU suggest that granting exemption will give GABS an advantage relative to other employers in the sector who pay above the minimum wage. Notionally, this can perhaps be said. But it completely discounts the bespoke and fact specific nature of the exemption sought. In this case, it is simply not about GABS competing with other established competitors. It is about GABS having to compete with new competitors in its core marketplace forming the greatest portion of its business, in which specific market the other established competitors do not compete. An unfair advantage being afforded by the exemption over the other established competitors paying more than minimum wage must at least be foreseeable and realistic. It is not. The contention, in my view, has no substance, if regard is had to the specific facts of this case.

[106] A further argument presented by NUMSA and TOWU is that the purpose of sectoral level bargaining is not to set equal actual wages across a sector, and that wage bargaining in this context does not aim to achieve complete consistency in wage levels in a sector. According to NUMSA and TOWU, sector collective bargaining is also not an exercise in eliminating differences in salaries as between companies (employers). I accept that there is merit in these arguments. It has never been the case that sectoral level collective bargaining envisages that wages paid by all employers in a particular sector must always be as level as a glass plate. I also accept, as I have already discussed, that at least the accepted notion of unfair competition sought to be eliminated by sectoral level collective bargaining is that all employers must at least pay the prescribed minimum wage and cannot be allowed to compete with wages below the minimum wage (this is a notion supported by NUMSA

and TOWU themselves). But what the aforesaid argument by NUMSA and TOWU fails to appreciate is that sectoral level collective bargaining on wages does two things. First, it sets a minimum wage level from time to time. Second, and for those employers paying above minimum wage, there is a prescribed wage increase for employees. Once this prescribed wage increase is applied, the increased wage at the employer becomes the prescribed wage. The next wage increase will then apply to this earlier prescribed wage, with the further increased wage then becoming the next prescribed wage, and so on. If this is applied over time, it could lead to a significant wage disparity between the minimum wage, and what is effectively the prescribed wage. In turn, there are only two ways to counter this. The first is that all employers in the industry always pay more or less the same wage, by paying what is the minimum wage from time to time. There are many industries that work this way. A particular example is the contract security services and contract cleaning services sectors. The second is that a particular anomaly pertaining to a particular employer can be addressed by way of an exemption. The case *in casu* is an example in point. In the end, wage differentiation between employers in a particular sector is not *per se* a prohibited thing. But what is not allowed is wage differentiation that translates into a substantial disparity that could impact on the continued viability of an employer due to compromising its ability to fairly compete. In short, things are not as simple and straight forward as NUMSA and TOWU suggest, when it comes to the institution of sectoral collective bargaining.

[107] NUMSA and TOWU further argue that granting an exemption will set a precedent that every employer paying above minimum likewise qualifies for an exemption. I have to some extent dealt with this kind of argument already, earlier in this judgment. But a specific point must be made. As appears to the case with several of the arguments raised by NUMSA and TOWU, it starts at the correct point, but then does not continue far enough to reach the logical and proper conclusion. Yes, it may well be that because of granting an exemption *in casu*, any other employer in the industry paying above minimum wage can then seize the opportunity and come and ask for exemption. But what the argument ignores is that no matter what, any employer can always

ask for exemption, and the real question each time is whether the employer asking for it deserves it. Deserving an exemption where it comes to wages in particular is far more than an employer just paying more than minimum wage and thus being entitled to back down to minimum wage. The employer must prove, on the particular facts of a particular case, that a significant inequity exists as a result of paying more than minimum wage that could reasonably compromise the continued viability of the employer. This is a significant hurdle to cross. The argument raised by NUMSA and TOWU is unduly short sighted, and ignores the realities of what an exemption application would be.

- [108] The facts *in casu* illustrate the point I have made above. What one has in this particular instance is what can be described as a perfect storm of quite unique factors which led to the need for exemption. First, the industry was limited, long established, with a handful of competitors not really competing on the basis of wages, and with these competitors being more or less market (area) specific. In this context, even a disparity of wages would not cause much risk to continued viability. Second, a material shift in policy took place, in terms of which greater competition in the industry was prescribed, with the principal customers of GABS being the kind of customers that are compelled to give effect to these policy changes. The upshot of these policy changes is a significant introduction of new competitors into GABS's very marketplace. Third, the new competitors come in at minimum wage, under circumstances where the City has made it clear that it will only negotiate / contract for business based on minimum wage. Fourth, the historical context meant that the prescribed wages being paid by GABS was substantially more than minimum wage. Fifth, the wage costs comprise 53% of GABS's operating costs, with fuel costs being fixed as a further 25% of operating costs. This makes it impossible for GABS to effectively take alternative measures to otherwise reduce costs to make it more competitive. The situation is exacerbated by infrastructural support being given to the new competitors by the City, removing this as a possible basis to level the playing field. Sixth, it is undeniable that this new structure for the industry will be rolled out in the foreseeable future. And finally, on the facts, the disparity in wages means that GABS is unable to fairly compete with these new competitors, placing the

continued viability of its business at material risk. It must surely be patently apparent that such a culmination of factors is not an everyday occurrence, and can be described as rare and being special circumstances. It is impossible that granting exemption in such a case could create some undue precedent.

[109] NUMSA and TOWU give some exposition of how the employees would be prejudiced by the exemption. I accept that prejudice to the employees would result from exemption. But what must be considered is that losing jobs as a result of retrenchment emanating from GABS losing a significant position of its business must be worse. And then, the attenuated nature of the exemption sought by GABS cannot be ignored. At the very least, the nature of this exemption would maintain wages of the employees, as increases will simply be limited, with no actual wage reductions being proposed. It can hardly be said, in these circumstances, as NUMSA and TOWU argue, that ‘... *the exemption gravely harms employees’ ability to maintain their standard of living ...*’ Even if a balance of prejudice is applied, I am comfortable in saying that in this instance, the balance favours GABS.

[110] For all the reasons as set out above, the review application by NUMSA and TOWU must fail. For once, the panellist properly appreciated the legal principles and case at hand. She properly applied the facts to this case, and came to a conclusion that was rational, reasonable and supported by the facts. The decision of panellist De Wet is therefore unassailable on review, and must be upheld. It follows that the review application by NUMSA and TOWU must be dismissed.

The remedy

[111] Considering that the three review applications brought by GABS have succeeded, where to now? Both parties ask that the exemption appeal decisions be substituted with a decision by this Court, rather than remitting these appeals back to the SARPBC for determination *de novo*.

[112] In terms of section 145(4) of the LRA, this Court is entitled, once an arbitration award is reviewed and set aside, ‘... to determine the dispute in the manner it considers appropriate’. It is of course true that section 145(4) relates to arbitration awards issued by arbitrators of the CCMA, which is sought to be reviewed under section 145 of the LRA. The case *in casu* is a review application under section 158(1)(g), and thus section 145(4) does not directly apply. However, and in my view, there is no reason why section 145(4) cannot apply to review applications under section 158(1)(g) of the LRA, which an approach that has also been followed in other judgments.⁶⁵

[113] I find support for the view that I have expressed above in the judgment of the Constitutional Court in *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and Others*⁶⁶. That case concerned a demarcation award made by a CCMA arbitrator under section 62 of the LRA. There are many similarities between the kind of decision made by an arbitrator in a demarcation case, and the decision made by a bargaining council in an exemption application. In a demarcation case, one of the questions an arbitrator would decide is whether the business of a particular employer is bound by a main collective agreement of a bargaining council, on the basis that the business of the employer, as determined on the facts, would resort under its scope and jurisdiction. In an exemption, the decision would be whether a particular provision in the bargaining council main agreement would apply to a particular employer, based on certain criteria also substantiated by the facts. In *National Union of Metalworkers* the Court accepted that the power of the Labour Court to review demarcation arbitration awards is sourced from section 158(1)(g) of the LRA.⁶⁷ Having so found, the Court then held as follows as to the application of section 145(4):⁶⁸

⁶⁵ See *Uber SA Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* (2018) 39 ILJ 903 (LC) at para 100.

⁶⁶ (2022) 43 ILJ 530 (CC).

⁶⁷ *Id* at para 57.

⁶⁸ *Id* at para 62.

‘Section 145(4)(a) provides that if an arbitration award is set aside the Labour Court may determine the dispute in the manner it considers appropriate. That expressly gives the Labour Court wide powers that include substituting its decision for that of a CCMA commissioner. There is no specific or implied exception or exemption in s 145(4) for demarcation awards that limit the Labour Court’s powers in respect of such awards. Legal scholars support this interpretation. ...’

[114] The next question is whether it can be said that there is anything in the exemption process under the SAPBC main collective agreements that specifically dedicate and preserve exemption decisions only for the SARPBC (assuming this is even possible, which I have my doubts about). The simple answer is that there are none. There is nothing in the main collective agreements that indicate that this Court, having reviewed and set aside a decision of the SARPBC, is not able to substitute that decision with a decision of the Court itself. A similar analysis was conducted by the Court in *National Union of Metalworkers supra* pertaining to what was contained in the demarcation provisions under section 62 of the LRA, and the Court held:⁶⁹

‘There is therefore no merit in NUMSA’s contention that the Labour Court lacked the power to substitute the CCMA’s decision for that of its own. Substitution, by definition, entails a court taking a decision that has been assigned to a specific functionary. Courts describe substitution as ‘tak[ing] the decision for the administrative decision-maker’ and the substituting court as ‘assum[ing] an administrative decision-making function’. The essence of substitution is therefore the taking of a decision that in the ordinary course would be taken by a different decision maker. Although s 62 clearly contemplates that demarcation is firmly within the rarified realm of the CCMA and specialist commissioners, it does not follow that substitution is not competent.’

⁶⁹ Id at para 66

[115] In the end, I believe that any Labour Court judge is generally as well-placed and competent as any CCMA or bargaining council decision-maker to determine a dispute falling within the ambit of the LRA. This would include an exemption decision made in the SARPBC, which would qualify as such a dispute. This was recognized in *National Union of Metalworkers supra*.⁷⁰ *In casu*, therefore, substitution as prayed for by the parties would be competent.

[116] So, since this Court is competent and able to substitute its own decision for the decisions of the appeal panellists in the SARPBC, how is this exercise to be conducted? Again, the Court in *National Union of Metalworkers supra* provides an answer, where the Court held:⁷¹

‘... Whilst the Labour Court enjoys a wide discretion to determine the dispute in the manner it considers appropriate, this does not mean that it should readily substitute its decision for that of the commissioner. Concerns relating to the doctrine of separation of powers are acute, because of the danger of courts usurping powers assigned to a different sphere of government, and the Labour Court should exercise a measure of judicial deference, and only substitute decisions in exceptional circumstances. The Labour Court is restricted to the grounds of review in s 145 of the LRA and the remedies permitted within its powers in s 158 of the LRA. However, judicial deference should not be interpreted to mean that the Labour Court does not have the power to substitute demarcation arbitration awards.

This court had occasion to consider the test for exceptional circumstances in *Trencon*,⁷² where it held: ‘To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make

⁷⁰ Id at paras 64 – 65.

⁷¹ Id at paras 67 – 68.

⁷² The Court was referring to *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd and Another* 2015 (5) SA 245 (CC).

the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.⁷³

[117] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*⁷⁴, the Labour Appeal Court set out the approach to be applied when deciding whether to remit or substitute, as follows:

‘Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is “in as good a position” as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner. Thus, where the issues are largely common cause, the pleadings comprehensive, the full record of both the disciplinary and arbitration proceedings are before the court,

⁷³ The Court did dispense this warning at para 69: ‘...There are guidelines in place for courts to consider before they exercise the discretion to substitute or not. Moreover, courts will only substitute in exceptional circumstances. Because the demarcation decision is so polycentric and policy laden, substitution will rarely be appropriate and courts will rarely be in as good a position as the commissioner to take a demarcation decision ...’.

⁷⁴ (2015) 36 ILJ 1511 (LAC) at para 58.

and there has been a elapse of almost 20 months from the date of dismissal to the date of finalisation of the review G application, such as in this case, the consideration of bringing the dispute to a speedy finality would certainly have a bearing on the decision of the reviewing court to decide the dispute, and not remit it to the CCMA, because it is 'in as good a position' as the CCMA to do so ...'

[118] In *Putco supra*, the Court specifically dealt with the appropriate remedy to be afforded where an exemption decision of the SARPBC had been reviewed and set aside, and held:⁷⁵

'... the applicant submits that the present case is exceptional in that the same issue has been considered four times by the same authorities and that given the outcome in each instance, they have no faith in those authorities to afford them a fair hearing. This court is inclined to substitute the decision maker's finding for one that is appropriate after considering whether the result is a foregone conclusion, any prejudice that would be caused to the applicant by further delay, whether the decision maker has exhibited bias and whether the court is in as good a position to make the decision itself. In this court, the statutory imperative of expeditious dispute resolution is a primary factor in the exercise of the discretion to remit or substitute. ... Expedited finality is thus an important consideration in the determination of whether to remit the matter for reconsideration, or to substitute ...'

[119] Where a decision is made on the basis of flawed reasoning, or an error of law, there is similarly no point to remit the matter back for determination *de novo*, where the facts remain the same.⁷⁶

[120] Applying the aforesaid *in casu*, it is my view that it would be appropriate to substitute the decisions of this Court for the decisions of the three exemption

⁷⁵ Id at para 36.

⁷⁶ See *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 417 (LC) at para 28.

appeal panels in the SARPBC that have been reviewed and set aside. All the facts in all three the matters were basically the same, and contained in a substantial and complete record, spanning thousands of pages, which I have fully considered. Based on this evidence, I believe that I am in as good a position as any exemption appeal panel at the SARPBC to decide the exemptions. My decisions would be based on same evidence and arguments that was before the various panellists. And lastly, this would be the exact same evidence and arguments that will again feature before any reconvened exemption appeal panel at the SARPBC, meaning it would simply be counterproductive and entirely unnecessary to go through this whole exercise all over again. It is in any event now high time to bring this entire matter to a conclusion, once and for all, considering the requirement of the expeditious resolution of employment disputes. And considering the purpose the exemptions seek to serve, it may well render the same valueless if this case must be decided from scratch, all over again, delaying its conclusion even further. GABS has explicitly said that it has no faith in the exemption authorities at the SARPBC rationally and reasonably deciding the matters, and considering what had happened in the past, this view seems justified. One can also not ignore the current wishes of the parties in this context, expressed above. All considered, it would be just and equitable to substitute the decision of the three appeal exemption panels, by an order granting the exemptions sought by GABS, on the terms set out in the order below.⁷⁷

Costs

[121] GABS has asked for an award of costs, in the event that it is successful. In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. In *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*⁷⁸ the Court said:

⁷⁷ Compare *National Union of Metalworkers (supra)* at paras 70 – 71; *Uber (supra)* at paras 101 – 102; *Malapalane v Glencore Operations SA (Pty) Ltd (Goedgevonden Colliery) and Others* (2018) 39 ILJ 2467 (LAC) at paras 21 – 22; *Putco (supra)* at para 37; *Ally (supra)* at paras 46 – 47.

⁷⁸ (2021) 42 ILJ 2371 (CC) at para 35. See also *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC) at para 24; *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC) at para 60.

'In the labour context, the judicial exercise of a court's discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it ...'

[122] Applying the aforesaid *dictum* in *SA Custodial Management*, it is my view that this is not a case that justifies a departure from the ordinary principle that costs do not follow the result. *In casu*, I do not believe any of the parties acted unreasonably in bringing the applications, or in opposing the same. I also consider that as a result of the applications, I have been afforded the opportunity to finally decide this matter. The manner in which the parties conducted themselves in the litigation was exemplary, and both parties were of assistance to this Court to enable me to effectively decide this matter. This was certainly a case that called for the attention of this Court. Also, and considering that GABS and NUMSA / TOWU must still maintain a workable relationship going forward, it would be unfair to mulch any party with a costs award.⁷⁹ All considered, I believe that it would be just and equitable that no costs order be made, in any of the applications.

Order

[123] In the premises, I make the following orders:

Under case number C 688 / 21

1. The exemption appeal ruling, issued by the second, third and fourth respondents on 16 October 2021 (the Ruling), in terms of which the applicant's appeal against the refusal of its exemption application from

⁷⁹ Compare *National Union of Metalworkers* (*supra*) at para 77.

certain terms of the first respondent's 2018 – 2019 main collective agreement (the 2018 agreement) was dismissed, is reviewed and set aside.

2. The Ruling is substituted with a ruling upholding the exemption appeal and granting an exemption to the applicant, for the period 1 April 2019 to 31 March 2020, in the following terms:

- 2.1 With effect from 1 April 2019, and in respect of all drivers (i.e. 'driver-conductors' under the 2018 agreement) employed by the applicant, except those who commenced employment with it on or after 1 April 2018:

- 2.1.1 The applicant is exempted from the provisions of clause 3.4 of the 2018 agreement, in that the across-the-board increase of 8% (eight percent) on their base rate of pay as at 31 March 2019 will not be applied, and instead the applicant will pay the greater of:

- 2.1.1.1 an across-the-board increase of R183.51 per week for the period 1 April 2019 to 31 March 2020 (being the Rand equivalent of 8% (eight percent) of the minimum weekly rate of R2 293.92); or

- 2.1.1.2 an increase equivalent to the Consumer Price Index as at 1 April 2019.

3. For the avoidance of doubt, it is confirmed that drivers who commenced employment with the applicant on or after 1 April 2018 will receive the full across-the-board increase of 8% (eight percent) on their base rate of pay as at 31 March 2019, as provided for in clause 3.4 of the 2018 agreement.

4. The applicant is exempted from the provisions of clause 30 of the 2018 MCA, in that:

- 4.1 With effect from 1 April 2018, the applicant is not required to increase the minimum wage thresholds applicable to its drivers in their first to sixth years of service (the existing notches'); and
- 4.2 With effect from 1 April 2019, the applicant is not required to apply the existing notches to its drivers.
5. There is no order as to costs.

Under case number C 313 / 21

1. The exemption appeal ruling issued by the second and third respondents on 30 April 2021 (the Ruling), in terms of which the applicants' appeal against the refusal of their application for exemption from certain terms of the first respondent's 2020 main collective agreement (the 2020 agreement) was dismissed, is reviewed and set aside.
2. The Ruling is substituted with a ruling upholding the exemption appeal and granting an exemption to the applicants, for the period 1 April 2020 to 31 March 2021, in the following terms
- 2.1 The exemption shall apply only in respect of the following employees (the affected employees):
- 2.1.1 All of the applicants' employees who are employed in the following job categories:
- 2.1.1.1 driver-conductor;
- 2.1.1.2 maintenance assistant;
- 2.1.1.3 ticket seller;
- 2.1.1.4 stores driver;
- 2.1.1.5 maintenance technician;
- 2.1.1.6 shunter driver;

and

2.1.2 whose actual wages as at 31 March 2020 were higher than the minimum wage prescribed for his or her respective job category under the first respondent's main collective agreement concluded by the parties to the first respondent on or about 21 May 2018 (the 2018 agreement) in respect of the period from 1 April 2019 to 31 March 2020 (the 31 March 2020 minimum rates).

2.2 The applicants are exempted from applying the 6% (six percent) across-the-board increase, prescribed in the 2020 agreement, to the affected employees' actual wage rates as at 31 March 2020.

2.3 The applicants will apply, in respect of each of the affected employees, the greater of either:

2.3.1 an across-the-board increase to the affected employees equal to 6% (six percent) of the 31 March 2020 minimum rates, namely the following amounts:

2.3.1.1 Driver-conductors: R148.65 per week;

2.3.1.2 Maintenance Assistants: R137.20 per week;

2.3.1.3 Ticket Sellers: R131.47 per week;

2.3.1.4 Stores Drivers: R97.15 per week;

2.3.1.5 Maintenance Technicians:

(a) R149.11 per week (for those on a 44-hour week);

and

(b) R152.50 per week (for those on a 45-hour week);

2.3.1.6 Shunter Drivers: R102,99 per week;

or

2.3.2 an increase equivalent to the Consumer Price Index as at 1 April 2020.

3. The applicants are exempted from the provision in the last clause of the 2020 agreement, to the effect that the '*Status quo will apply for all other items*' and, to the extent that it is incorporated into the 2020 agreement, clause 30 of the 2018 agreement, in that, for the period 1 April 2020 to 31 March 2021, the applicants are not required to increase the minimum wage thresholds applicable to their employees in their first to sixth or seventh (as the case may be) years of service nor to apply the previous notches to their employees.
4. There is no order as to costs.

Under case number C 93 / 22

1. The exemption appeal ruling issued by the second respondent on 20 January 2022 (the Ruling), in terms of which the applicants' appeal against the refusal of their application for exemption from certain terms of the first respondent's 2021 main collective agreement (the 2021 agreement) was dismissed, is reviewed and set aside.
2. The Ruling is substituted with a ruling upholding the exemption appeal and granting an exemption to the applicants in the following terms:
 - 2.1 The exemptions shall apply only in respect of the following employees who are employed in the following job categories (the affected employees):
 - 2.1.1.1 driver-conductor;
 - 2.1.1.2 maintenance assistant;
 - 2.1.1.3 ticket seller;
 - 2.1.1.4 stores driver;
 - 2.1.1.5 maintenance technician;

and

2.1.2 whose actual wages as at 27 June 2021 were higher than the minimum wage prescribed for his or her respective job category under the first respondent's main collective agreement concluded by the parties to the first respondent on or about 25 March 2020 (the 2020 agreement), alternatively for the period from 1 April 2020 to 31 March 2021 (the 27 June 2021 minimum rates).

2.2 The applicants are exempted from applying the 4% (four percent) across-the-board increase, prescribed in the 2021 agreement, to the affected employees' actual wage rates as at 27 June 2021.

2.3 The applicants will apply an across-the-board increase to the affected employees equal to 4% (four percent) of the 27 June 2021 minimum rates, namely the following amounts

2.3.1 Driver-conductors: R105.04 per week;

2.3.2 Maintenance Assistants: R96.96 per week;

2.3.3 Ticket Sellers: R92.91 per week;

2.3.4 Stores Drivers: R68.42 per week;

2.3.5 Maintenance Technicians:

(a) R105.37 per week (for those on a 44-hour week); and

(b) R107.77 per week (for those on a 45-hour week).

2.4 All employees employed in the above-mentioned job categories who commence(d) employment with the applicants on or after 28 June 2021 will receive the minimum wage prescribed for their respective job categories under the 2021 agreement, namely the relevant minimum rate applicable to the applicants as at 27 June 2021 under the 2020 agreement, increased by 4% (four percent).

2.5 the applicants are exempted from clause 31 of the 2021 agreement in that, for the period 28 June 2021 to 31 March 2022, the applicants are not required to increase the minimum wage thresholds applicable to their employees in their first to sixth or seventh (as the case may be) years of service, nor to apply the previous notches to their employees.

3. There is no order as to costs.

Under case number C 684 / 22

1. The applicants' review application is dismissed.
2. There is no order as to costs.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For GABS:	Adv A J Freund SC together with Advocate G A Leslie SC
Instructed by:	ENS Africa
For NUMSA and TOWU:	Advocate S Harvey
Instructed by:	Cheadle Thompson & Haysom Inc Attorneys