IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: **C201/2024**

In the matter between:

SVENMILL (PTY) LTD Applicant

and

EXEMPTION APPEAL BODY OF THE NTBC First Respondent

NATIONAL TEXTILE BARGAINING COUNCIL ((NTBC) Second Respondent

T MANGANYI N.O. Third Respondent

SACTWU Fourth Respondent

Date of hearing: 6 November 2025

Date of delivery: 25 November 2025

Summary: Review of refusal to exempt Applicant from the annual bonus requirement contained in a Bargaining Council Collective Agreement – factors to be considered in exemption application – evidence required where the issue of

affordability raised – no ground for reviewing the decision of the Exemption Appeal Committee.

JUDGMENT

A OOSTHUIZEN AJ

1 Second Respondent to these proceedings is the National Textile Bargaining Council ("*the NTBC*"). The parties to the NTBC concluded a Main Agreement for the Textile Industry, which provides that each employer in such industry must pay an annual bonus as specified in Part 2 of the Main Agreement. The calculation of that bonus depends on the length of service of each employee.

2 Some years ago, the Main Agreement was extended to non-parties. It consequently became binding on the Applicant, and remains binding on the Applicant.

3 In November 2023, the Applicant applied for exemption from the obligation to pay bonuses in terms of the Main Agreement at the end of 2023. The application for an exemption was refused by the Exemption Committee in February 2024, and the refusal was upheld by the Exemption Appeal Committee. The Applicant seeks an order in terms of Section 158(1)(g) read with Section 30(1)(k) of the Labour Relations Act, No 66 of 1995 ("*the LRA*"), setting aside the exemption appeal outcome, and substituting such

outcome with a finding that the appeal was successful or, alternatively, remitting the matter for hearing before a fresh presiding officer.

4 Before dealing with certain procedural aspects, and the relevant factual determinations, the nature of an application for exemption from the provisions of a bargaining council collective agreement require emphasis.

5 Section 31 of the LRA unequivocally affirms the binding nature of a collective agreement on the parties stipulated in Section 31(a) to (c). Section 32 empowers the Minister to extend a collective agreement to non-parties, but then circumstances under which this may be done are spelt out carefully and in detail. The self-evidently important role which collective agreements play, in regulating employment contracts in the sector to which each agreement applies, is trite and well-established.

6 Bargaining Councils fulfil the function of imposing terms and conditions of employment, and norms pertaining to other workplace aspects, on the industries over which they have jurisdiction. The legislature has promulgated a dispensation under which businesses in particular industries have to comply with the terms of Bargaining Council agreements. An applicant for exemption is in effect asking to be placed in a position different from other businesses in that sector, and such applicant should therefore clearly establish the facts which justify an applicant not being bound by an agreement which applies throughout the particular industry.

7 Various factors might play a role in deciding the fate of an exemption application. They include:

7.1 Whether the exemption will give the employer an unfair competitive advantage (**Ram International Transport (Pty) Ltd v NBC for the Road Freight Industry (2002) 23 ILJ 1943 (BCA)**; **Superstone Mining (Pty) Ltd v NBC for the Road Freight Industry (2004) 25 ILJ 1567 (BCA)**);

7.2 Whether the exemption would undermine collective bargaining in the relevant sector and area (**SATAWU v Road Freight Employers' Association (2004) 25 ILJ 1556 (BCA)**; **Loutrans v NBC for the Road Freight Industry (2008) 29 ILJ 498 (BCA)**);

7.3 Whether the employer is proposing any acceptable alternatives aimed at fulfilling the requirement from which exemption is sought (**Henro Bulk Carrier Trust v NBC for the Road Freight Industry (2008) 29 ILJ 2326 (BCA)**);

7.4 Whether the consent of affected employees has been sought, and obtained (**Armstrong Interiors v Furniture, Bedding & Upholstery Business (2001) 2 BALR 107 (CCMA)**;

7.5 The extent to which the employer is suffering substantial detriment and/or having its future placed in jeopardy;

7.6 The applicant's past record of compliance with the provisions of the council's collective agreements.

8 Whether each of these factors should be taken into account in a particular exemption application and, if so, what weight is to be attached to them, is always a matter within the discretion of the Exemption Authority, having regard to all the facts presented.

9 Clause 40.4 of the National Textile Bargaining Council's Collective Agreement ("*the Main Agreement*") sets out the information furnished by the party seeking exemption, being:

9.1 The provisions of the agreement in respect of which exemption is sought;

9.2 The number of persons in respect of whom exemption is sought;

9.3 The reason why the exemption is sought;

9.4 The nature and size of the business in respect of which the exemption is sought;

9.5 The duration and lifetime of the exemption for which application is made;

9.6 The business strategy and plan of the applicant seeking the exemption;

9.7 The applicant's past record of compliance with the provisions of the Main Agreement;

9.8 The recorded views of the trade union;

9.9 Other relevant supporting data and financial information.

10 Clause 40.15 of the Main Agreement sets out the factors which the Exemptions Committee or the Exemptions Appeal Committee must take into account in deciding an exemption application. These factors are:

> *"40.15.1 Whether the granting of the exemption or appeal will prejudice the objectives of the Bargaining Council or contravene the provisions of any labour legislation or Collective Agreements;*
>
> *40.15.2 The circumstances prevailing in the Textile Industry as a whole or the subsectors/sections likely to be affected by the application and/or the interest of the industry regarding unfair competition, collective bargaining, potential for labour unrest and increased employment;*
>
> *40.15.3 the nature and size of the business in respect of which the application is made;*
>
> *40.15.4 whether the duration of the exemption or appeal is for a limited or specified period;*

40.15.5 any representations made by the employees likely to be affected by the application and interest of employees as regards exploitation, job preservation, sound conditions of employment, possible financial benefits, health and safety of workers and infringement of basic rights;

40.15.6 whether the business strategy and plan presented by the applicant demonstrates that the granting of the exemption will make a material difference to the long-term viability of the business in respect of which the exemption or appeal is sought;

40.15.7 whether a refusal to grant an exemption or appeal will result in undue financial hardship to the applicant; financial instability, impact on productivity, future relationship with the employees trade union and operational requirements;

40.15.8 whether the granting of the exemption or appeal will undermine collective bargaining and be likely to cause undue financial hardship to the employees affected;

40.15.9 whether the granting of the exemption or appeal will impact negatively on parity agreements; and

40.15.10 whether the granting of the exemption or appeal will impact negatively on local competitors who are complying with Collective Agreements; and

40.15.11 Whether the employees or their representatives have been consulted and their views recorded, and/or any agreement reached between the applicant and the workforce;

40.15.12 Any other relevant supporting data and financial information as prescribed by the Bargaining Council and supplied by the Applicant."

11 Where, as is the case here, the Employer's main argument is one of affordability, the Exemption Committee and Exemption Appeal Committee are called upon to consider two competing interests. On the one hand, there is the primacy of collective agreements, and the need to ensure that employees do not receive less than their statutory entitlement. On the other hand, the Exemption Authorities must be aware of, and take into account, the danger that refusing an exemption might give rise to an application for winding-up or business rescue, with concomitant loss of employment. The benefits flowing from the fact that a business can sustainably continue to operate, and the adverse consequences to employees if the business closes down and retrenches its workforce, both need to be carefully considered.

12 Which of these countervailing interests will outweigh the other depends on the case advanced by the applicant for exemption, and the facts put up in support of their case. The position cannot be that whenever an employer

advances economic necessity as one of the grounds for seeking an exemption, that affordability outweighs all other factors which an appeal functionary has to take into consideration. A carefully considered decision which seeks to find a balance between the aforesaid two public policy considerations should be the aim of the Exemption Authorities.

13 I turn to the facts of this application.

14 The decision in **Putco (Pty) Ltd v SA Road Passenger Bargaining Council & Others** **(2019) 30 ILJ 2389 (LC)** usefully illustrates the manner in which the issue of affordability must be dealt with in exemption applications. In that matter, the Applicant had provided considerable detail as to its precarious financial position, and its efforts to address the financial problems. It disclosed details of its cost rationalisation measures, which included a delay in implementation of wage increases for about ten months, and an exemption from payment of the annual bonus, and explained how both of these would provide cashflow relief and avoid the risk of employees being subject to business rescue. The Exemption Authority had granted partial exemption, but its ruling did not take into account the detailed information placed before it regarding Applicant's financial position, and the measures Applicant had taken to resolve its financial difficulties.

15 The **Putco** judgment does not state that, where affordability is raised as a reason for seeking exemption, the exemption Tribunal is obliged to grant the application even if the information regarding the financial dilemma and

the remedial steps taken is inadequate. The **Putco** decision does nothing more than reaffirm the well-established principle that a decision-maker must take into account all relevant information placed before that decision-maker.

16 The approach adopted in **Argent Steel Group v Motor Industry Bargaining Council (unreported case number PR156/14)**, in which judgment was delivered on 30 January 2018 ("***Argent***"), is of assistance. At **para 37** of that judgment, the Court said the following:

> *"Also, by the very nature of the exemption application, Argent sought to be treated more advantageously than its competitors and to treat its employees less favourably than others in the same occupations in the sector. The applicant is essentially asking for exceptional treatment and in those circumstances it really fell to it to persuade the board that it was entitled to more favourable treatment. Furthermore, unlike the tender situation, the information required to consider the exemption application will usually be almost entirely within the applicant's own knowledge and it has to explain the unique position it finds itself that distinguishes it from its competitors and justifies advantageous treatment for itself and disadvantageous treatment for the affected employees.*"

17 In **Argent**, the Court also emphasised why an applicant for exemption must furnish details of consultations with its workforce, and said the following at **para 44**:

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

18 It is appropriate to evaluate the exemption application submitted by the Applicant, in the light of the requirements of the Main Agreement, and the above-quoted authorities. At page 14 of the Exemption Application, the Applicant is required to furnish details of consultations held with employees. A diagonal line is drawn through this section of the form, and no information whatsoever is furnished. At page 8, Applicant is asked to explain how the exemption application impacts on the interests of the industry in regard to unfair competition, collective bargaining and the potential of labour unrest. Applicant furnishes no meaningful information on these aspects.

19 At page 4 of the Exemption Application, Applicant is required to furnish a statement of material facts in chronological order. Applicant lists the fact that the business is "*still in a loss making position. This has been since*

2018, in addition our costs have increased over time". This is a woefully inadequate response.

20 It goes on to record that "*our utilities costs remain very high. We have outstanding debts with the CoCT*" (the City of Cape Town). No details are furnished as to how the Applicant proposes addressing what it identifies as these primary problems, namely the high utility costs and the outstanding debt with the City of Cape Town. Indeed, in its supplementary submissions it advanced verbally at the exemption hearing, these factors were not even mentioned by Mr Greenblatt, the sole director of the Applicant who was the primary representative of the Applicant at the exemption hearing.

21 These are substantial and serious shortcomings in the exemption application. There is an additional aspect of concern to me. An applicant for exemption must ensure that the Exemption Tribunal is furnished with current and up to date financial information. The exemption application meeting was held on 20 March 2024. The financial documentation placed before the Exemption Committee was a draft annual financial statement, not signed by the auditor who compiled the statement, for the year ending 31 December 2022. It is difficult to believe that the Applicant did not have substantial information in the form of, for example, monthly management accounts.

22 Although these would not have been embodied in an audited financial statement, they would have provided the Exemption Tribunals with up to

date financial information. One cannot assume that the Applicant did not retain information on its financial affairs on a month-to-month basis because the Applicant was statutorily obliged to keep adequate records reflecting its financial and business affairs, and there is no suggestion that it did not do this. The Applicant has only itself to blame if the financial information it provided was inadequate.

23 A further factor, which cannot be disputed on the evidence, is the finding of the Third Respondent that the Applicant did not have a plan in place which demonstrated that the granting of an exemption would make a material difference to the long term viability of the business. Unlike the applicant in the **Putco** case, the present Applicant furnished no details of any strategy which it has in place to utilise the money it will save, if not obliged to pay bonuses, in order to put the Applicant in a position where it is trading profitably and able to pay annual bonuses. The paucity of information furnished indicates, if anything, the opposite position, namely that Applicant is trading unprofitably and will continue to do so in future.

24 To grant an exemption in those circumstances sets a dangerous precedent where an applicant can simply, in subsequent years, approach a bargaining council and proclaim that it continues to trade unprofitably and should, for that reason alone, be granted further exemptions. To grant an exemption in such circumstances substantially undermines the Bargaining Council Collective Agreement.

25 This particular factor was, in my view, correctly considered by the Third Respondent who found that the perpetual granting of exemptions to the Applicant prejudices the objectives of the Main Agreement. That finding cannot be faulted.

26 Having regard to all off the aforegoing, I cannot find that Third Respondent's award exhibits any reviewable irregularity, or that Third Respondent's decision is one that no reasonable functionary could have reached on the available material. The application for review falls to be dismissed.

27 Lastly, I deal with Second Respondent's procedural contention, based on Section 32(3)(e) of the LRA. That section requires that, when a collective agreement is to be extended to non-parties, the Minister must be satisfied that provision is made in the collective agreement for an independent body to hear and decide on appeals against, *inter alia*, the Bargaining Council's refusal of an application for exemption. It is common cause that the independent body appointed in this matter is TOKISO. The argument advanced is that TOKISO is a necessary party, and that failure to join TOKISO renders the application for review defective.

28 The founding papers allege that the Third Respondent is a TOKISO appointed panellist. The papers reveal that the only role played by TOKISO is that Third Respondent was appointed from a panel put together by TOKISO. Other than the compiling of this panel, TOKISO does not appear to have played any role in the exemption procedures

which led to this review application, and certainly exercised no decision-making function apart from that exercised by its duly appointed panellist, the Third Respondent.

29 The question of whether it is necessary to join a party depends on the extent to which the court order may affect the interests of that party (**Amalgamated Engineering Union v Minister van Landbou 1948 (3) SA 637 (A)** at **657**; **Benson v Joelson 1985 (3) SA 566 (C)** at **569F – 570B**). There are no facts before me showing that the interests of TOKISO would be affected to any extent by the order made in the review proceedings.

30 If Second Respondent viewed the joinder of TOKISO as necessary Second Respondent could, of course, itself have applied for such joinder. It did not do so, and instead raised the procedural point of non-joinder in its answering papers. The approach thus adopted is unhelpful, and does not assist in expeditiously resolving the merits of the matter, and should be discouraged. I am disinclined to uphold the non-joinder argument advanced by Second Respondent.

31 In the circumstances the following order is made;

Order

1. The application for the review and setting aside of the Exemption Appeal outcome is dismissed, with costs.

AC OOSTHUIZEN A.J.

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant :	Adv L Myburgh
Instructed by:	Bagraims Attorneys
For the Second Respondent:	Brett Purdon, Purdon & Munsamy Attorneys