CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/07
[2008] ZACC 15

CUSA	Applicant
versus	
TAO YING METAL INDUSTRIES	First Respondent
POOE, M NO	Second Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Third Respondent
THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	Fourth Respondent

Heard on : 28 February 2008

Decided on : 18 September 2008

JUDGMENT

NGCOBO J:

[1] This is an application for leave to appeal against the decision of the Supreme Court of Appeal. It raises important questions concerning the role of commissioners of the Commission for Conciliation, Mediation and Arbitration (CCMA) in resolving labour disputes and that of the courts in overseeing the arbitration process. These questions arise from the refusal by Tao Ying Metal Industries (the employer) to comply with wage provisions of the applicable bargaining council agreement claiming

that it had been exempted from complying with the relevant provisions. This refusal gave rise to a dispute between the employer and its workers who comprised 250 workers out of a workforce of 300. The Commissioner who arbitrated the dispute found that the exemptions relied upon by the employer had expired and ordered the employer to comply with the applicable bargaining council agreement.

[2] The employer instituted proceedings in the Labour Court to review the award of the Commissioner. The application was unsuccessful. So too was an appeal to the Labour Appeal Court. But a further appeal to the Supreme Court of Appeal succeeded. That Court, by a majority of three to two, found that the exemptions relied upon by the employer had not expired and held that the Commissioner did not have jurisdiction in respect of the dispute because it concerned the validity of a bargaining council agreement. Neither the Labour Court nor the Labour Appeal Court considered whether the Commissioner had jurisdiction to consider the validity of the exemptions as this was not one of the grounds of review urged by the employer. However, this question featured in the Supreme Court of Appeal.

[3] To put the factual background and the issues in this case into context, it is desirable to describe, in broad outline, the statutory framework within which the dispute between the employer and the representatives of the workers arose. Initially the workers were represented by the Hotel, Liquor, Catering, Commercial and Allied Workers' Union of South Africa. The workers are now represented by the Commercial Workers' Union of South Africa (CUSA).

The legal framework

[4] Section 23(5) of the Constitution guarantees to every trade union, employers' organisation and employer "the right to engage in collective bargaining." To this end, Parliament is required to enact legislation "to regulate collective bargaining".[1] The Labour Relations Act, 1995[2] (the LRA) is the legislation which, among other things, gives effect to this right. The LRA puts in place a scheme for concluding, enforcing and resolving disputes arising from collective bargaining agreements.[3] Broadly speaking, this scheme provides for the establishment of a system of bargaining councils in respect of different sectors and areas.[4] Bargaining councils are established by registered trade unions and employers' organisations. Parties to a bargaining council are therefore indirectly representatives of workers and employers. Bargaining councils constitute forums for negotiating, concluding and resolving disputes concerning collective agreements.

[5] Collective agreements concluded in a bargaining council are binding on the parties of the bargaining council. And they may, by ministerial decree, be extended to apply to all workers and employers in the sector and area in respect of which the bargaining council has been established. These agreements generally deal with minimum wages and other conditions of employment applicable to employers and workers in a particular industry. They therefore set the floor beneath which wages

[1] Section 23(5) of the Constitution. The interim Constitution contained a comparable provision in section 27.

[2] Act 66 of 1995.

[3] Id at section 28(1)(a)-(c).

[4] Id at section 27(1).

and other conditions of employment should not drop. Parties generally conclude the main agreement which deals comprehensively with the terms and conditions of employment. The main agreement generally remains in force for a period of one year in anticipation of the periodical re-negotiation of some of the terms, in particular those that deal with wages, which are reviewed annually. Upon the expiration of its period, the main agreement may be extended as amended by newly negotiated terms and conditions of employment.

[6] As some employers might find complying with the provisions of a bargaining council agreement unbearable, the LRA makes provision for exemption from some of the provisions of the collective agreement.[5] The authority to grant an exemption rests with the bargaining council. The LRA contemplates that the authority to grant exemptions from bargaining council agreements will derive from the constitution of the bargaining council.[6] In addition, a bargaining council agreement that is imposed upon non-parties must provide for an appeal to an independent body from a refusal to grant an exemption to non-parties.[7]

[7] Prior to the enactment of the LRA, the position was regulated by the Labour Relations Act, 1956[8] (the 1956 LRA), which had in place a substantially similar scheme. Section 51 of the 1956 LRA conferred the authority to grant exemptions from industrial council agreements. The terms and conditions of an exemption had to

[5] Id at section 30(1)(k) and 32(3)(e).

[6] Id at section 30(1)(k).

[7] Id at section 32(3)(e).

[8] Act 28 of 1956.

be incorporated in a "licence of exemption".[9] The parties to an industrial council would conclude the main agreement which would deal comprehensively with terms and conditions of employment in the industry in respect of which the industrial council had been established. And this agreement could be extended to non-parties within the industry by ministerial decree. These agreements could be extended annually with or without amendments.

[8] Schedule 7 to the LRA provides for the transition from the old to the new scheme. An industrial council agreement that was registered under the 1956 LRA is deemed to be a bargaining council agreement under the LRA. An industrial council agreement that was binding in the industry prior to the commencement of the LRA remains in force "for a period of 18 months after the commencement of the [LRA] or until the expiry of that agreement . . . whichever is the shorter period".[10] This is subject to certain exceptions which do not apply in this case.[11] After the commencement of the LRA, exemptions could be granted from an agreement which remained in force pursuant to the transitional provisions.[12] However, these

[9] Id at section 51(4).

[10] Item 12(1)(a) of Schedule 7 states:

> "Any agreement promulgated in terms of section 48, any award binding in terms of sections 49 and 50, and any order made in terms of section 51A, of the Labour Relations Act and in force immediately before the commencement of this Act, remains in force and enforceable, subject to paragraphs (b) and (c) of this subitem, and to subitem (5B), for a period of 18 months after the commencement of this Act or until the expiry of that agreement, award or order, whichever is the shorter period, in all respects, as if the Labour Relations Act had not been repealed."

[11] These exceptions deal with the extension or cancellation of collective agreements prior to the expiry of the 18 month period.

[12] Item 12(8)(a) of Schedule 7 provides:

> "After the commencement of this Act and despite the repeal of the Labour Relations Act—

exemptions had to be made and dealt with under the provisions of section 51 of the 1956 LRA and not under the LRA.

[9] While an exemption that was in force at the commencement of the LRA remained "in force for a period of 18 months after the commencement of [the LRA] or until the period for which the exemption had been granted", whichever occurred first,[13] the transitional provisions did not deal with the termination of exemptions granted after the commencement of the LRA. Presumably, exemptions granted after the commencement of the LRA were to terminate upon the expiry of the period for which they were granted. What is immediately apparent from the transitional provisions is that both the agreements and the exemptions that were in force at the commencement of the LRA had a limited life. They were either to remain in force for a period of eighteen months after the commencement of the LRA or until their expiry date, whichever occurred first.

[10] During 1980 the parties to the industrial council for the Iron, Steel, Engineering and Metallurgical Industry (now the Metal and Engineering Industry) concluded an

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> (a) any person or class of persons bound by an agreement or award remaining in force in terms of subitem (1), may apply in accordance with the provisions of section 51 of the Labour Relations Act for an exemption from all or any of the provisions of that agreement or award (as the case may be). Any application so made, must be dealt with in terms of the provisions of section 51 and, whenever applicable, any other relevant provisions, of the Labour Relations Act, in all respects as if the provisions in question had not been repealed".

[13] Item 12(5A) of Schedule 7 states:

> "Any exemption from an agreement or award, or from an order, contemplated in subitem (1), that was in force immediately before the commencement of this Act, will remain in force for a period of 18 months after the commencement of this Act or until the period for which the exemption had been granted has expired, whichever is the shorter period, as if the Labour Relations Act had not been repealed."

industrial council agreement. That agreement was published in Government Notice R1329 of 27 June 1980 (the industrial council main agreement). This agreement has been amended, extended and re-enacted from time to time. It was last re-enacted on 8 November 1996 and published in Government Notice R1802 of the same date. It was due to expire on 30 June 1997. This agreement was re-enacted just three days prior to the coming into effect of the LRA on 11 November 1996. And all this occurred under section 48(1)(a) of the 1956 LRA. It is this agreement that was in force at the time when the employer became a member of the bargaining council. The employer subsequently applied for and was granted exemptions from wage and other provisions of this agreement. As these exemptions were granted in April 1997, they were not operational at the commencement of the LRA. They must thus have been enacted under section 51 of the 1956 LRA read with Schedule 7 of the LRA.

[11] On 31 March 1998 a new agreement, concluded in the bargaining council, was published in Government Notice R404 of the same date (the bargaining council main agreement). This agreement was promulgated under section 32(2) of the LRA. It came into effect on 14 April 1998 and expired on 30 June 1998. There is nothing on the record to show whether any other agreement was promulgated after 30 June 1997 and before 31 March 1998 when the bargaining council main agreement was published. Counsel were unable to refer us to any other agreement that covered this period. None of the courts below dealt with this aspect. In the light of this, the finding by the courts below that the industrial council main agreement expired on 14 April 1998 does not appear to be borne out by the record. But nothing turns on this.

[12] It is the minimum wages provided for in the bargaining council main agreement that the workers, through their union, sought to enforce but which the employer sought to avoid by relying on the exemptions granted to it in relation to the industrial council main agreement. It is undisputed that the employer did not apply for any exemptions from the provisions of the bargaining council main agreement.[14]

[13] The matter must therefore be approached on the footing that the employer did not apply for any exemptions from the provisions of the bargaining council main agreement. At the time when the dispute arose the employer claimed that the exemptions granted to it in relation to the industrial council main agreement also applied to the provisions of the bargaining council main agreement. To counter this claim, the workers disputed the validity of these exemptions. They claimed that these exemptions were invalid because they were granted without prior consultation with them or their representatives. It is this claim and the counter-claim that resulted in the dispute that was eventually submitted for arbitration under the provisions of the LRA.

[14] It is true that, during April 2000, the bargaining council purported to grant certain exemptions to the employer. But this was after the CCMA award had been issued. Upon the receipt of the award, the employer enquired from the bargaining council as to whether the exemptions previously granted "were still valid and enforceable." This enquiry was apparently prompted by the award which ordered the employer to comply with the provisions of the bargaining council main agreement unless it is exempted from its provisions. The bargaining council responded by saying that these exemptions were still valid as they had not been withdrawn. Despite this assurance, the employer insisted on being issued "with a licence of exemption for the period in question." Although it considered the request "a little unusual", the bargaining council purported to issue a licence of exemption in favour of the employer on 12 April 2000. This exemption purported to exempt the employer from "Part 2 wages and/or earnings" of the 1980 and 1998 main agreements. Clearly these "exemptions" do not purport to be exemptions granted under the bargaining council main agreement. They were intended to provide proof that the exemptions previously granted in respect of the industrial council main agreement also applied to the bargaining council main agreement.

[14] It is within this legal framework that the background facts and the issues raised in this application must be understood and considered.

Background facts

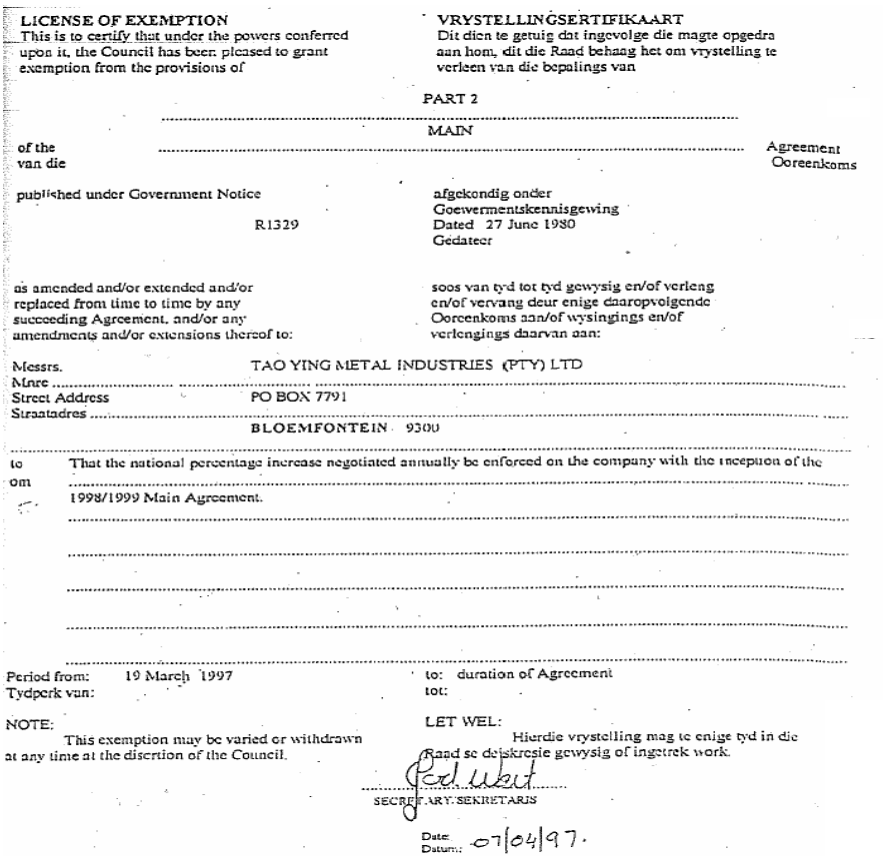
[15] The employer conducts a manufacturing business which falls within the metal and engineering industry. It therefore falls within the jurisdiction of the Metal and Engineering Industries' Bargaining Council (the bargaining council). Botshabelo, the town where the employer conducts its business, previously fell within an area which was designated a homeland under the apartheid legal order. The bargaining council did not have jurisdiction in those areas. Employers who operated in those areas were not, therefore, bound by the bargaining council agreements. As a consequence, they generally offered their workers wages and conditions of employment which were less favourable than those required by the bargaining council agreements. These and other incentives made conducting business in the homelands attractive.

[16] However, with the advent of our constitutional democracy and the new constitutional order, the employer's business, like similar businesses, fell within the jurisdiction of the bargaining council. The employer subsequently became affiliated to the bargaining council. This only occurred in 1997 after the employer was informed by the bargaining council that it was by law required to be affiliated to it.

[17] But the wages and the conditions of employment which the employer offered to its workers were, as already stated, less favourable than those required by the

industrial council main agreement. In order to continue paying these wages, the employer therefore applied for exemptions from the provisions of the main agreement, in particular, those relating to annual leave (clause 12(3)), payment of a holiday bonus (clause 14(1)(a)) and minimum wages (Part 2). It also applied for an exemption from the provisions dealing with pension and provident funds. A committee was appointed to investigate the conditions in the employer's factory and thereafter make recommendations on the application for exemptions. Following the recommendations of this committee, the employer was granted exemptions.

[18] These exemptions and the terms on which they were granted were recorded in full in standard form licences of exemption. The exemption that is in issue in these proceedings is that which relates to minimum wages. This exemption is reproduced below:



LICENSE OF EXEMPTION
This is to certify that under the powers conferred upon it, the Council has been pleased to grant exemption from the provisions of

VRYSTELLINGSERTIFIKAART
Dit dien te getuig dat ingevolge die magte opgedra aan hom, dit die Raad behaag het om vrystelling te verleen van die bepalings van

PART 2

MAIN

of the / van die ..... Agreement / Ooreenkoms

published under Government Notice R1329 / afgekondig onder Goewermentskennisgewing Dated 27 June 1980 / Gedateer

as amended and/or extended and/or replaced from time to time by any succeeding Agreement, and/or any amendments and/or extensions thereof to: / soos van tyd tot tyd gewysig en/of verleng en/of vervang deur enige daaropvolgende Ooreenkoms aan/of wysingings en/of verlengings daarvan aan:

Messrs. / Mnre TAO YING METAL INDUSTRIES (PTY) LTD
Street Address / Straatadres PO BOX 7791
BLOEMFONTEIN 9300

to / om That the national percentage increase negotiated annually be enforced on the company with the inception of the 1998/1999 Main Agreement.

Period from: / Tydperk van: 19 March 1997 to: / tot: duration of Agreement

NOTE: This exemption may be varied or withdrawn at any time at the discretion of the Council.

LET WEL: Hierdie vrystelling mag te enige tyd in die Raad se diskresie gewysig of ingetrek word.

SECRETARY/SEKRETARIS

Date / Datum: 07/04/97.

[19] It is necessary at this stage to draw attention to certain aspects of this licence of exemption. The first is that in the space for recording the period of the exemption, the licence records a period of exemption as "from: 19 March 1997 to: duration of Agreement" (the period of exemption clause). What is immediately apparent from this clause is that this licence of exemption contemplated that the exemption would last for the "duration of the agreement" while another exemption relating to pension and provident funds was to last until a specified date, namely, 7 March 2000. The second matter is that the exemption applied to the industrial council main agreement "as amended and/or extended and/or replaced from time to time by any succeeding Agreement and/or any amendments and/or extensions thereof" (the survival clause). The exemption would continue to apply to the industrial council main agreement if the main agreement was amended, extended or replaced.

[20] The final matter to note is that this exemption was granted on the condition "[t]hat the national percentage increase negotiated annually be enforced on the company with the inception of the 1998/1999 Main Agreement." The reference to the 1998/1999 main agreement is a reference to the agreement that was promulgated on 31 March 1998 and came into effect on 14 April 1998: the bargaining council main agreement. The licence of exemption contemplated that the industrial council main agreement would expire and a new bargaining council agreement would come into force. This is understandable as the exemptions were granted after the LRA had come

into force, albeit under the 1956 LRA. It was anticipated that a new main agreement would be concluded under the new scheme set up by the LRA.

[21] During August 1998, a dispute arose between the employer and the workers regarding whether the employer was exempted from the provisions of the newly promulgated bargaining council main agreement, in particular those provisions dealing with the payment of minimum wages. The workers claimed that the employer was obliged to comply with the new main agreement whereas the employer maintained that the exemptions granted to it under the industrial council main agreement still applied to, and were operational under, the new main agreement. The employer's stance had, as its foundation, the survival clause. The workers took the view that the exemptions upon which the employer was relying had expired when the industrial council main agreement terminated with the coming into effect of the new bargaining council main agreement. The workers further maintained that the exemptions relied upon by the employer were invalid because they were granted without prior consultation with the workers or their representatives.

Conciliation proceedings

[22] This dispute was eventually submitted to the CCMA for conciliation during November 1998. In the form required to be completed in these matters, the union described the dispute as being "Tao Ying Metal Industries's failure to comply with minimum wages and conditions [in terms of the] Metal and Engineering Industries' Bargaining Council". The outcome it sought was the employer's compliance "with

minimum wages [and] conditions [in terms of] the bargaining council agreement. Prohibition of unilateral exemptions by bargaining council".

[23] The CCMA was unable to resolve the dispute and issued a certificate to that effect in December 1998. The union requested that the dispute be submitted to arbitration under the auspices of the CCMA. In its request for arbitration, the union described the issue which was still in dispute as being the "application of [the] collective agreement" and indicated that the decision sought from the Commissioner was one that the "agreement of bargaining council [was] to be applied".

The arbitration proceedings

[24] At the commencement of the arbitration proceedings, the bargaining council, which was initially a party to the proceedings, objected to the jurisdiction of the CCMA. It argued that the bargaining council agreement had its own dispute resolution mechanism, which included arbitration of disputes concerning the application and the interpretation of a collective agreement by a panel of arbitrators established by the bargaining council. The bargaining council submitted that the dispute, which concerned the application of a bargaining council agreement, should not have been referred to the CCMA for arbitration but should have instead been referred to the bargaining council.

[25] The Commissioner dismissed the objection and held that she had jurisdiction to arbitrate the dispute. She reasoned that the bargaining council agreement did not

apply to a dispute which, like the one before her, was initially conciliated under the auspices of the CCMA and which was not processed in terms of the bargaining council agreement. The bargaining council did not take this point further.

[26] When the proceedings later resumed to deal with the merits, the employer objected to the jurisdiction of the CCMA on the ground that the exemptions concerned were issued in respect of an agreement made in terms of the provisions of the 1956 LRA. The employer argued that, in terms of the transitional provisions of the LRA, disputes concerning these exemptions should be dealt with either by the High Court or the Industrial Court and not by the CCMA. The Commissioner, after hearing evidence and argument, dismissed this point too. She held that the agreement which the workers sought to enforce was the bargaining council main agreement which was concluded under the provisions of the LRA and not under the 1956 LRA. The employer did not take this ruling on review to the Labour Court.

[27] On the merits, the Commissioner found that the exemptions relied upon by the employer expired when the industrial council main agreement terminated. She held that the industrial council main agreement terminated on 14 April 1998, this being the date when the bargaining council main agreement came into effect. She accordingly issued an award ordering the employer "to pay to its employees who are members of the Applicant . . . the wages negotiated in the Metal and Engineering Industries Bargaining Council since 14 April 1998 unless exemptions were granted to the Respondent under the New Collective Agreement concluded in terms of the Labour

Relations Act, 1995." She did not make an order as to costs. The new collective agreement referred to in the award is the bargaining council main agreement.

The proceedings in the Labour Court

[28] The employer took the arbitral award on review to the Labour Court pursuant to the provisions of section 145(1) of the LRA.[15] The employer raised two grounds of review. In the first place, it alleged that the Commissioner had exceeded her powers by entering the merits of the dispute in that the CCMA had no jurisdiction to deal with the dispute in issue. This was so because the bargaining council agreement made provision for and set out procedures for dealing with disputes arising out of a bargaining council agreement. This was a revival of a point that had been taken by the bargaining council at the commencement of the arbitration proceedings and which the Commissioner had rejected. Nothing more need be said about this ground of

[15] Section 145(1) and (2) of the LRA states:

> "(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—
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> (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or
>
> (b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.
>
> . . . .
>
> (2) A defect referred to in subsection (1), means—
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> (a) that the commissioner—
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) that an award has been improperly obtained."

review because by the time the matter reached the Labour Appeal Court this ground of review had been abandoned.

[29] In the second place, the employer contended that the Commissioner failed to apply her mind to the provisions of the exemptions previously granted to the employer. The employer submitted that "the exemptions previously granted still enure to its benefit since they were granted in respect of the wage provisions of the Main Agreement published on 27 June 1980: 'as amended and/or extended and/or replaced from time to time by any succeeding agreement'." (The emphasis is original.)

[30] The application for review was late; it was not brought within the period of six weeks contemplated in section 145 of the LRA. The employer therefore had to apply for condonation. This was refused. The consequence was the dismissal of the application for review. The employer appealed to the Labour Appeal Court.

The proceedings in the Labour Appeal Court

[31] On appeal, the Labour Appeal Court condoned the employer's non-compliance with the six week period envisaged in section 145 of the LRA. In that Court the employer expressly abandoned its objection to the jurisdiction of the Commissioner and contented itself with the attack based on the failure of the Commissioner to apply her mind to the provisions of the exemptions.[16] The Labour Appeal Court found that

[16] *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* JA 1/03, Labour Appeal Court, 28 November 2005, unreported, at para 8.

the question which the Commissioner had to consider was whether the employer was obliged to comply with the bargaining council main agreement.[17] This question in turn required the Commissioner to decide whether or not the licences of exemption exempted the employer from the provisions of the bargaining council main agreement, said the Court.[18]

[32] The Court held that on a proper interpretation of the provisions of the licences of exemption, the exemptions were operational only for the duration of the industrial council main agreement. It accordingly concluded, unanimously, that the exemptions relied upon by the employer expired when the industrial council main agreement terminated.[19]

[33] Before leaving this aspect, it is necessary to deal with the finding of the Labour Appeal Court that the Commissioner did not apply her mind to one of the arguments advanced by the employer in that Court. This was the employer's argument based "on the exemption issued under the new collective agreement".[20] The reference to the "exemption" is a reference to an exemption issued to the employer on 12 April 2000, while the reference to the new collective agreement is a reference to the bargaining council main agreement. The Labour Appeal Court held that, to the extent that this "exemption" operated retrospectively, it was ultra vires but, to the extent that it

[17] Id at para 32.

[18] Id.

[19] Id at para 39.

[20] Id.

operated prospectively, "such exemptions were of force and effect and operational."[21] It concluded that it seemed "abundantly clear that the commissioner did not apply her mind to [this argument by the employer]".[22]

[34] Now these "exemptions" were issued on 12 April 2000 and after the Commissioner had rendered her award. They could not therefore have been the subject of the enquiry before the Commissioner. These "exemptions" were granted at the request of the employer after the award was issued. The employer sought to have proof that the exemptions previously granted to it applied to the bargaining council main agreement. And this request by the employer was apparently prompted by the award which ordered the employer to pay the wages prescribed in the bargaining council main agreement "unless exemptions were granted to the [employer] under the New Collective Agreement concluded in terms of the Labour Relations Act, 1995." It follows therefore that the Labour Appeal Court erred in its finding that the Commissioner had not applied her mind to the argument based on the exemptions granted on 12 April 2000. It is not necessary to express any opinion on the validity or otherwise of these exemptions.

[35] However, despite this finding, the Labour Appeal Court upheld the award, dismissed the application for review and made no order as to costs.

The proceedings in the Supreme Court of Appeal

[21] Id.

[22] Id at para 40.

[36] The employer appealed to the Supreme Court of Appeal with the leave of that Court. Prior to the hearing of the appeal, the Supreme Court of Appeal issued a direction requiring the parties to respond to a series of questions. These questions included the question whether the Commissioner had jurisdiction to consider the validity of the exemptions relied upon by the employer. This question was apparently based on the stance taken by the union in the arbitration hearing that the exemptions relied upon by the employer were invalid for lack of prior consultation. However, in the Supreme Court of Appeal the union expressly abandoned this stance.

[37] The majority of the Supreme Court of Appeal found that it was accepted by both parties that the exemptions relied upon by the employer were still operative at the time of the arbitration.[23] Although it found that the proper meaning of the exemptions was of secondary importance in the appeal, the Supreme Court of Appeal held that, upon a proper construction, the exemptions had not expired. It also found that what was in dispute between the parties in the arbitration proceedings was whether the exemptions relied upon by the employer had been validly issued.[24] It held that the Commissioner had no jurisdiction to decide whether the conduct of the bargaining council was invalid for failure to consult the workers or their representatives.

[38] Jafta JA, in a dissenting judgment, found that the real dispute between the parties, and which was submitted for arbitration, was the failure by the employer to

[23] *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* [2007] 3 All SA 329 (SCA); [2007] 7 BLLR 583 (SCA) at para 37.

[24] Id at paras 32 and 37.

comply with the bargaining council agreement. This dispute, Jafta JA held, required the Commissioner to construe the exemptions. He found that the employer's defence was that the exemptions, properly construed, relieved it of its obligations under the bargaining council main agreement. Like the Labour Appeal Court, he held that, upon a proper construction, the exemptions had expired when the industrial council main agreement had terminated. He found that the Commissioner had applied her mind to the exemptions and had correctly concluded that the exemptions lapsed when the industrial council main agreement had terminated.[25]

[39] Musi AJA, like Jafta JA, found that the real dispute before the Commissioner was the enforcement of the bargaining council agreement.[26] He held that the question of the validity of the exemptions which was raised by the union did not detract from the real dispute. He found that the question of the validity of the exemptions and the jurisdiction of the Commissioner to decide this question, had not been raised by the employer in its review application, but was raised for the first time in the Supreme Court of Appeal. He held, however, that the question of the validity of the exemptions "became water under the bridge" because the union accepted the validity of the exemptions.[27]

[40] He further held that the sole issue which was pursued by the employer in the Supreme Court of Appeal, both in oral and written argument was whether the

[25] Id at para 103.

[26] Id at para 115.

[27] Id at para 116.

exemptions applied to the bargaining council main agreement. He also found that the question of the expiry of the exemptions had been properly put before the Commissioner and that this issue was canvassed in the arbitration proceedings.[28] He concluded that the Commissioner had applied her mind to this question and had come to the conclusion that the exemptions expired when the industrial council main agreement terminated and the bargaining council main agreement came into operation.[29]

[41] In the result, the Supreme Court of Appeal set aside the award and replaced it with one declaring that "the arbitrator has no jurisdiction to make an award in respect of the dispute that is the subject of this arbitration."

[42] The present application for leave to appeal is the sequel.

The proceedings in this Court

Contentions of the parties

[43] In this Court the workers attacked the decision of the Supreme Court of Appeal on two main grounds. First, they contended that the question of the validity of the exemptions and the related question whether the Commissioner had jurisdiction was never raised by the employer in the courts below. They submitted that this question was raised for the first time in the Supreme Court of Appeal and in response to the directives issued by the Supreme Court of Appeal. To raise a new ground of review

[28] Id at paras 117-21.

[29] Id at para 122.

seven years after the dispute had arisen detracts from the object of the LRA to have labour disputes resolved speedily and expeditiously, the workers argued.

[44] Second, they contended that the sole ground of review relied upon by the employer in the Labour Appeal Court and in its written argument in the Supreme Court of Appeal was the failure by the Commissioner to apply her mind to the question whether the exemptions had expired. They submitted that the question was properly before the Commissioner. It was canvassed before the Commissioner and the Commissioner found that the exemptions had expired, the workers argued. They submitted that the industrial council main agreement and the exemptions granted in respect of that agreement expired 18 months after the LRA came into operation in terms of the transitional provisions of the LRA. The 18 month period expired on 11 May 1998 and that is the date when the industrial council main agreement and the exemptions expired, said the workers.

[45] Apart from what was described by the employer as "potential attacks", the employer advanced three main arguments in this Court. In the first place it contended that the Commissioner did not apply her mind to the question whether the exemptions had expired. In this regard the employer submitted that the finding of the Commissioner that it was common cause between the parties that the exemptions had expired effectively precluded the Commissioner from considering the question whether the exemptions had in fact expired. In particular, it was submitted that the Commissioner failed to apply her mind to the survival clause of the exemptions.

Upon a proper construction, the survival clause of the exemptions governed the existence of the industrial council main agreement as well as the bargaining council main agreement, so the argument went. In short, the survival clause survived the industrial council main agreement and applied to the bargaining council main agreement. The employer was therefore exempted from complying with the wage provisions of the bargaining council main agreement.

[46] In the second place the employer contended that the expiry of the exemptions was not an issue in the arbitration proceedings. By deciding this issue against the employer in these circumstances, the Commissioner effectively denied the employer the opportunity to address this issue in the arbitration proceedings. It should be mentioned here that this is, however, not how the attack on the award was formulated in the review application. Indeed none of the courts below addressed this issue. In the third place, the employer contended that the misconstruction or proper construction of the exemptions does not raise a constitutional matter. Nor do any of the arguments raised by the workers concern an issue which is connected with a constitutional matter, argued the employer. This, it was said, was fatal to the application.

[47] I did not understand the employer to contend that the Commissioner had no jurisdiction in respect of the dispute. The employer conceded, quite properly in my view, that this is not a ground of review which the employer had raised in the courts below. The Commissioner made no finding adverse to the employer on this point and, as the employer put it, in consequence the employer was not called upon to make it

the subject of a challenge in the ensuing review proceedings. In addition, the question of the validity of the exemptions was expressly abandoned in the Supreme Court of Appeal. As a consequence the workers have to stand or fall by their claim that the exemptions relied upon by the employer expired when the industrial council main agreement expired and did not apply to the bargaining council main agreement.

Issues for consideration

[48] The decision of the Supreme Court of Appeal and the contentions by the parties raise three questions:

(a) Should leave to appeal be granted; in particular does the application raise a constitutional matter or an issue connected with a decision on a constitutional matter.

(b) The real dispute that the Commissioner had to resolve.

(c) Whether the Commissioner applied her mind to the dispute between the parties, in particular, to the question whether the exemptions had expired.

[49] Before considering the main issues raised in this case, it is necessary to dispose of certain preliminary issues. These relate to the failure by the workers to file the record timeously and, in particular, whether such failure should be condoned.

Condonation

[50] The workers filed the record on 13 September 2007 instead of on 31 August 2007 as the directions issued by the Chief Justice required. They sought condonation

for the late filing of the record citing difficulty in obtaining sufficient funds. However, as it turned out, that record was not complete. This led to the postponement of the matter by agreement between the parties. Fresh directions were issued directing the workers to file the record by 15 November 2007. That was done. There was no application for the condonation of the period from 13 September to 15 November 2007 when a complete record was finally filed. Counsel for the workers urged us to have regard to the allegations made in the application for leave to remove the matter from the roll which, he submitted, explained this delay.

[51] It should be mentioned that the parties initially sought to have the matter removed from the roll without a substantive application for leave to do so. They were called upon to launch a substantive application for the removal of the matter from the roll which was in effect a request for postponement. That was done. In essence the reason for the postponement was a lack of agreement between the parties as to what should be included in the record for the proceedings in this Court. Counsel for the workers urged us to have regard to the contents of this application as supplementing the application for condonation.

[52] I am satisfied that the union has provided a sufficient explanation for the delay in filing the record. On this basis alone it should be entitled to an order condoning its failure to file the record timeously. The prospects of success, an important factor in considering an application for condonation, are dealt with in the context of the application for leave to appeal.

The application for leave to appeal

[53] The question whether leave to appeal should be granted depends on whether: (a) the application raises a constitutional matter; and (b) whether it is in the interests of justice to grant leave to appeal. The interests of justice require this Court to consider, among other issues, the importance of the questions raised and the prospects of success of the application. The main contention advanced by the employer in opposing the application for leave to appeal was that the issues that arise in this application do not raise a constitutional matter or an issue connected with a constitutional matter.

[54] In these proceedings the workers are challenging the authority of the Supreme Court of Appeal to decide the question whether the Commissioner had jurisdiction in respect of the dispute between the parties. In addition, they challenge the finding by the majority of the Supreme Court of Appeal that the real dispute between the parties was whether the exemptions relied upon by the employer had been validly granted by the bargaining council. The findings and the conclusions of the Supreme Court of Appeal as well as the challenges to such findings and conclusions raise important questions concerning the role of commissioners in resolving labour disputes and that of the courts in overseeing the arbitration process. These questions go to the jurisdiction of commissioners to resolve labour disputes and that of the courts to review arbitral awards. And these questions manifestly raise important constitutional issues which affect the resolution of labour disputes. The question whether the

Commissioner adjudicated the real dispute between the parties is an issue connected with a decision on a constitutional matter.

[55] The issues raised in this case are matters of public interest. This case also concerns the enforcement of a bargaining council agreement which sets out minimum wages and other conditions of employment and requires us to apply the provisions of the LRA. The right of every trade union and every employers' organisation and employer to engage in collective bargaining is entrenched in section 23(5) of the Constitution.[30] The concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process.

[56] Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and to enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched.[31] The

[30] Section 23(5) of the Constitution states:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[31] Section 23(1) of the Constitution states: "Everyone has the right to fair labour practices."

enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law.

[57] And what is more, this case concerns a claim brought on behalf of 250 of about 300 workers who are complaining that their employer has failed to comply with a binding collective agreement. But the importance of resolving the issues involved in this case goes beyond the employer and the 250 workers concerned. As the Supreme Court of Appeal correctly observed, this case raises important questions concerning the role of arbitrators and that of courts in overseeing the arbitration process. These questions go beyond the litigants in this case.

[58] Finally on this aspect, if this Court were to conclude that the Commissioner did not apply her mind to the question of the expiry of the exemptions as contended by the employer, this Court would still be required to consider the appropriate order to make.[32] There is a compelling argument for the view that, on a proper construction, the exemptions had expired and did not apply to the bargaining council main agreement. This view commanded the support of two judges of the Supreme Court of Appeal and three judges of the Labour Appeal Court. There are therefore prospects that this Court might interfere with the order of the Supreme Court of Appeal. The

[32] Section 145(4) of the LRA provides:

> "If the award is set aside, the Labour Court may—
>
> (a) determine the dispute in the manner it considers appropriate; or
>
> (b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

application therefore bears prospects of success. This fact must also mean that the failure by the workers to file the record timeously must be condoned.

[59] For all these reasons, I am satisfied that: (a) the application for leave to appeal raises a constitutional matter; (b) the application bears prospects of success; and (c) it is in the interests of justice that leave to appeal should be granted. Accordingly, an order condoning the late filing of the record and granting leave to appeal will be made at the end of this judgment.

[60] And now to the merits of the appeal.

What is the dispute that the Commissioner had to resolve?

[61] What divided the Supreme Court of Appeal was what the real dispute was that the Commissioner had to resolve. The debate in this Court also focused on this issue. This debate raised three related questions: the first is the role of commissioners in resolving labour disputes; the second is the proper characterisation of labour disputes; and the third is the role of courts in overseeing the arbitral process. The answers to these questions lie, in the main, in the objects of the LRA.

[62] The role of commissioners in resolving labour disputes is set out in section 138(1) of the LRA which provides:

> "The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."

[63] The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes.[33] This alternative process is intended to bring about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years. The benefit of arbitration over court adjudication has been shown in a number of international studies.[34]

[64] The absence of appeal from arbitral awards was intended to speed up the process of resolving labour disputes and free it from the legalism that accompanies other formal judicial proceedings. By adopting this simple, quick, cheap and informal approach to the adjudication of labour disputes, Parliament intended that, as far as it is possible, arbitral awards should be final and should only be interfered with in very limited circumstances.[35] In order to give effect to these objectives, Parliament deliberately decided against appeals from arbitral awards and opted for the narrowest species of review, namely, that specified in section 145 of the LRA.

[33] *Explanatory Memorandum to the Draft Labour Relations Bill, 1995* (1995) 16 *ILJ* 278 at 318.

[34] Id at 326.

[35] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC); (2007) 28 *ILJ* 2405 (CC) at paras 244-5.

[65] Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities."[36] This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate".[37] But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.[38]

[66] A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties.[39] In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during

[36] Above at [62].

[37] Id.

[38] Id and above n 35 at paras 266-7.

[39] *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd & Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC); (2003) 24 *ILJ* 305 (CC) at para 52.

the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.

[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith.

Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.[40] Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play.

[69] Against this background, I now turn to consider what the real dispute between the parties was and whether the Commissioner applied her mind to this dispute.

What was the dispute between the parties that the Commissioner had to decide?

[70] The workers sought to have the employer comply with the bargaining council main agreement. The employer resisted this effort claiming that it had been exempted from complying with the wage provisions of the agreement. In response, the workers disputed the validity of the exemptions relied upon by the employer saying that they were invalid for want of prior consultation before the exemptions were granted. The dispute between the workers and the employer was, therefore, as the workers put it in the documents submitted to the CCMA, failure by the employer to comply with the bargaining council agreement.

[40] See for example *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 33-9; *Telkom Suid-Afrika Bpk v Richardson* 1995 (4) SA 183 (A) at 195B-D; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23-4; Gerritsen *v Dorpsbestuur, Aurora* 1969 (4) SA 556 (A) at 558; and *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W); [2003] 4 All SA 471 (W) at para 11.

[71] In determining the real dispute between the parties, the Supreme Court of Appeal appears to have placed much emphasis on the counter-claim by the workers that the exemptions relied upon were invalid for lack of prior consultation. This approach to the identification of the real dispute between the parties does not take sufficient account of the substantial dispute between the parties. That dispute was whether the employer was exempted from complying with the provisions of the bargaining council main agreement. What matters is not the form of a dispute, but rather the substance of a dispute. The characterisation of the dispute by the parties is not necessarily conclusive as to the nature of the dispute. It is necessary for a commissioner to look at the substance of the dispute in order to ascertain the real dispute between the parties.[41]

[72] The defence advanced by the employer and the workers' response to that defence did not detract from what was the real dispute between the parties, namely, whether the employer was obliged to comply with the provisions of the bargaining council main agreement. The resolution of this dispute required the determination of two related questions: first, whether there were exemptions which were in operation at that time; and second, if there were, whether those exemptions were invalid for want of prior consultation. If there were no exemptions in operation at the time, then the employer's defence should have failed and the employer should have been ordered to comply with the agreement. In that event, the question of the validity of the exemptions would not arise. On the other hand, if there were exemptions which were

[41] *Coin Security Group (Pty) Ltd v Adams & Others* [2000] 4 BLLR 371 (LAC) at para 15; (2000) 21 *ILJ* 925 (LAC) at para 16.

in operation at that time, then the question of their validity would arise. This in turn may well have raised the question of whether the Commissioner had jurisdiction to determine the validity of an exemption. Counsel for the employer did not contend otherwise.

[73] The proper approach that the Commissioner was required to follow was therefore first to consider whether there were any exemptions currently in operation. If she should conclude that there were no such exemptions currently in operation, that would have been the end of the dispute as the employer would then have been obliged to comply with the bargaining council agreement. And the question whether the Commissioner had jurisdiction to determine the validity of the exemption would not have arisen. The question of the expiry of the exemption was therefore properly before the Commissioner. This is in effect the approach that the Commissioner followed in this case.

[74] The Commissioner considered whether there were exemptions that were currently in operation. She concluded that there were none. She accordingly ordered the employer to comply with the main agreement. The question of the validity of the exemptions did not therefore arise. I consider that it would have been a dereliction of duty on the part of the Commissioner to have refused to determine the dispute simply because the workers disputed the validity of the exemptions. It was incumbent upon her first to consider whether there were exemptions in place. Only if there were exemptions in place would she have been required to consider the response of the

workers, in which event the question of her jurisdiction would have arisen. This approach to the dispute by the Commissioner is consistent with the duty of a commissioner to "deal with the substantial merits of the dispute with the minimum legal formalities"[42] and to do so "fairly and quickly".[43]

[75] I did not understand counsel for the employer to suggest a different approach. Instead, he contended that the Commissioner failed to apply her mind to the question whether the exemptions had expired. It is to that question that I now turn.

Did the Commissioner apply her mind to the question whether the exemptions had expired?

[76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in *Sidumo*, the matter was put thus:

> "It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a

[42] Above n 2 at section 138(1).

[43] Id.

> matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues."[44]

[77] The contention that the Commissioner failed to apply her mind to the question of whether the exemptions had expired rests primarily on the statement by the Commissioner that it was common cause that the exemptions had expired. In her decision, the Commissioner said:

> "It is also common cause that by the time the dispute arose in August 1998 the exemptions under discussion were no longer valid having ceased to be so when the main Agreement in terms of which they were issued terminated and a period of eighteen months referred to in item 12(1) had also expired."

[78] It is difficult to fathom how the Commissioner could have arrived at the finding that the exemptions had expired without first applying her mind to that question. Nor does the statement relied upon in itself demonstrate that the Commissioner did not apply her mind to the question of the expiry of the exemptions. While the Commissioner may not have engaged in a detailed analysis of the survival clause and the period of the exemption clause, it is clear from her analysis of the arguments of the employer that she applied her mind to the question of the expiration of the exemption.

[79] But there are further considerations which militate against the contention advanced by the employer. The passage relied upon by the employer must be understood in the context of the decision of the Commissioner as a whole. In particular, it must be understood in the light of the findings and the conclusions of the

[44] Above n 35 at para 267.

Commissioner and the evidence that was before her in relation to the expiry of the exemptions.

[80] In the first place, before the Commissioner it was apparently argued on behalf of the employer that the exemptions were valid for a period of 18 months after the coming into operation of the LRA. This argument was apparently based on the transitional provisions in Item 12(5A) of Schedule 7 of the LRA. The Commissioner addressed this argument squarely in her decision and held that "these exemptions were not, with due respect to Adv. Beaton, valid for a period of eighteen months." She went on to hold that the exemptions "remained valid for the duration of the main agreement." Here the Commissioner was referring to the period of the exemption clause, which provided that the exemption would be in operation "from: 19 March 1997 to: duration of Agreement."

[81] The reasoning of the Commissioner on the expiry of the exemption appears from the following passage:

> "It is common cause that the period during which the exemptions were valid is well within the eighteen months referred to in item 12(1) of the Act. It is also common cause that the exemptions were granted in terms of an agreement that was concluded in the Industrial Council. The said agreement (Main Agreement) was promulgated in terms of section 48 of the 1956 Act and published in the Government Notice R1329 dated 27 June 1980. These exemptions were not, with due respect to Adv. Beaton, valid for a period of eighteen months. They remained valid for the duration of the Main Agreement. The agreement terminated with the coming into operation of a collective agreement concluded in the Metal and Engineering Industries Bargaining

> council. The said collective agreement was published in the Government Notice R404 dated 31 March 1998 and came into effect on 14 April 1998."

[82] The Commissioner reasoned that, upon a proper construction of the period of the exemption clause, the exemptions were to remain in operation for the duration of the industrial council main agreement. The main agreement terminated on 14 April 1998 when the bargaining council main agreement came into operation. The exemptions therefore expired when the industrial council main agreement terminated on 14 April 1998. In holding that the exemptions were not to remain in operation for 18 months, the Commissioner was right, for these exemptions were granted after the commencement of the LRA and were therefore not subject to the provisions of Item 12(5A) of the transitional provisions. These findings by the Commissioner draw their essence from both the LRA and the provisions of the exemptions. It is therefore plain from this reasoning of the Commissioner and the passage cited above that the Commissioner applied her mind to the question of the expiry of the exemptions.

[83] The findings and the conclusions of the Commissioner on the expiry of the exemptions must of course be understood in the light of the arbitration record. The question of the duration of the exemptions was canvassed in the arbitration proceedings. Mr Coetzee, the regional manager of the bargaining council, testified on the effect of the exemption clause and the survival clause. He was specifically asked about how long the period "from March 1997 for the duration of the agreement" was. He replied that "if the exemption was issued on 19 March 1997 then while the

agreement is in force that exemption would be in force." This appears from the following exchange in the record:

> "How long is that? - - - Can I just refer you to the previous one to make myself clear please? We were referring in the previous one to paragraph 2, Engineering Industries Pension Fund agreement which was published under government notice R627 of 19 April 1996, which is a completely different agreement to the one that we are referring to in the exemption . . . (intervenes)
> I'm quite aware of that. - - - If you look at the list that we distributed a little while ago you will find that the council's main agreement started off in 1980 and it was not rescinded in the sense that there is no such agreement in force any more therefore the agreement which was in force in 1980 is currently today still in force so, to answer your question, if the exemption was issued on 19 March 1997 then while the agreement is in force that exemption will be in force."

[84] What is also significant is that the Commissioner herself canvassed the meaning of the survival clause in the course of the proceedings. She canvassed it in the context of the exemption relating to Part 2 of the main agreement and, in particular, what was meant by "status-quo currently prevailing be retained." The following transpired:

> "Yes this one on page 12. On page 11 is the exoneration from the council's compulsory holiday bonus, and on page 10 it says the status quo currently prevailing be retained. That status quo, what was the status quo? - - - The status quo is that the council will agree if the company continues on the way they did before the council registered this company, we weren't going to disrupt anything.
> You were not going to disrupt anything. So that means if a member of the council, let's take Tao Ying here, had been following a certain procedure prior to approaching applying for your membership, my understanding you say that council would then not interrupt whatever processes and what have you this new member had been following, is that my understanding? - - - If we are referring to Tao Ying . . . (intervenes)
>
> . . . .

> No, no, no, no that with the historical background, I'm quite happy, I don't have any confusion there, I'm quite happy with your explanation, but I'm particularly interested in your response that upon Tao Ying joining the bargaining council this status quo currently prevailing can be retained, how long was the status quo currently prevailing with the way the company, the new member Tao Ying, had been doing its business and that view would be retained. And the period of this retention would be from March 1997 for the duration of the agreement and the question was put which agreement, and then it was the main agreement. - - - That's correct."

[85] It is within this context that the statement by the Commissioner that it was common cause that, by the time the dispute arose in August 1998, the exemptions were no longer in operation as they had expired when the main agreement, in terms of which they had been issued, terminated and a period of 18 months referred to in Item 12(1) had also expired, should be understood. What the Commissioner sought to convey here was that, whether the exemptions were to expire 18 months after the LRA had come into operation as suggested on behalf of the employer or upon the expiry of the industrial council main agreement, the exemptions had expired by the time the dispute arose in August 1998 since both these events had occurred. The 18 month period expired in May 1998 while the industrial council main agreement expired on 14 April 1998, on the reasoning of the Commissioner. By all accounts therefore the exemptions had expired.

[86] Whatever the Commissioner sought to convey by her statement, this does not detract from the key findings of the Commissioner, namely, that: (a) the exemptions remained in operation for the duration of the industrial council main agreement as the survival clause provides; (b) the industrial council main agreement terminated when

the bargaining council main agreement came into effect on 14 April 1998; and (c) the exemptions terminated on 14 April 1998 when the industrial council main agreement terminated. These findings amply demonstrate that the Commissioner applied her mind to the question of the expiry of the agreement. And these findings and conclusions rendered it unnecessary for the Commissioner to consider whether the exemptions relied upon by the employer were invalid for want of prior consultation as the union claimed or whether she had jurisdiction to consider such a claim.

[87] It follows therefore that the contention that the Commissioner did not apply her mind to the question of the expiry of the agreement and, in particular, to the survival clause, must be rejected. The same goes for the argument that the employer was denied the opportunity to deal with the question of the expiry of the agreement.

[88] In support of the contention that the Commissioner did not apply her mind to the exemption, it was submitted that, had she done so, she would have found that the exemptions had not expired. Put differently, the suggestion was that the finding that the exemptions had expired does not draw its essence from the terms of the exemptions and this therefore is the evidence that the Commissioner failed to apply her mind to the exemptions.[45] The question which arises from this contention is whether the Commissioner's conclusion that the exemptions had expired draws its essence from the terms of the exemption. This contention was considered by the

[45] The employer was careful not to contend that the conclusion reached by the Commissioner was wrong and to advance this contention as a stand-alone argument. Had the employer done so the contention would have had to fail because it would be tantamount to treating the review as an appeal. This cannot be done under the LRA as there is no appeal against the decision of the kind involved in this application. See above n 35 at para 186.

Labour Appeal Court and the Supreme Court of Appeal and it formed a large part of the debate in this Court. It is therefore appropriate to consider it in the context in which it was advanced.

The exemptions had expired

[89] The exemptions in issue are contained in a standard form licence of exemption. They "grant exemption from the provisions of Part 2 of the main agreement published under Government Notice R1329 dated 27 June 1980 as amended and/or extended and/or replaced from time to time by any succeeding Agreement and/or any amendments and/or extensions thereof to [the employer]". This is the survival clause. Then the licence sets out the period of exemption and provides that it is the "Period from: 19 March 1997 to: duration of Agreement." It is the survival clause that has given rise to the view that the exemption had a life beyond that of the industrial council main agreement.

[90] The proper approach to the construction of a legal instrument requires a consideration of the document taken as a whole.[46] Effect must be given to every clause in the instrument and, if two clauses appear to be contradictory, the proper approach is to reconcile them so as to do justice to the intention of the framers of the document. It is not necessary to resort to extrinsic evidence if the meaning of the document can be gathered from the contents of the document. What needs to be done in this case is to make sense of the survival clause in the light of the period of

[46] Above n 23 at para 86.

exemption that is specifically set out in the exemption. The period of exemption is stipulated as running from 19 March 1997 until the duration of the agreement. This portion of the exemption cannot be ignored because it specifies the period during which the exemptions would be operational.

[91] What the survival clause recognises is that the industrial council main agreement and its provisions may be amended, extended and/or replaced by a succeeding agreement. It provides that when the provisions of the main agreement are amended, replaced and/or extended, the exemption continues to apply to such amendment or replacement or extension of the main agreement. This is so because the main agreement continues in force in its amended, replaced and/or extended form.

[92] The words "amended" or "extended" do not give rise to the problem of construction. It is the words "replaced" and "any succeeding" which might be thought to give some difficulty. According to the *Oxford English Dictionary Online*,[47] the word "replace" can be used in at least four senses. Only two of those are relevant for present purposes. In the first place, it can be used to mean "to restore to a previous place or position: to put back again into a place." In the second sense, it can be used to mean "to take the place of, become a substitute for (a person or thing)." In the first sense, it means to renew. It is trite that the context in which a word occurs may colour the meaning to be given to a word. The meaning of the word "replaced" as used in the exemption must therefore depend on the context in which it occurs.

[47] *Oxford English Dictionary Online* http://dictionary.oed.com/entrance.dtl (Accessed on 28 August 2008).

[93] The words "amended" or "extended" presuppose the continued operation of the same agreement and the continued application of the exemption granted in respect of that agreement. The exemptions apply to the agreement in respect of which they were granted if the agreement is "amended" or "extended". The meaning of the word "replaced" which fits into this context is "renewal", which is consistent with the continued operation of the same agreement. To my mind the word "replace", as used in the context of the exemption is used in the first sense, namely, to put back again in place or to restore to a previous place or position. In relation to the industrial council main agreement it means to renew or re-enact the main agreement. This meaning of the word "replace" is consistent with the context in which it occurs. It envisages the continued operation of the industrial council main agreement. Indeed, if one has regard to the various government notices that have been published in relation to the industrial council main agreement, they use words such as "re-enactment", "amendment", "extension" and "renewal" of the main agreement.

[94] To construe this word otherwise would lead to an anomaly. The LRA envisaged that the agreements that were in force at its commencement would remain in force for a period of 18 months after the commencement of the LRA or until their expiry date, whichever occurred first. Similarly, exemptions that were in operation when the LRA came into effect had a limited lifespan; they remained in operation either for a period of 18 months after the LRA came into effect or for the period for which they were granted, whichever occurred first. The legislature clearly intended

that both the main agreement and the exemptions granted in respect of that agreement that were in operation when it came into operation, would have a limited lifespan.

[95] Given this clear legislative purpose, it could not have been the intention of the legislature that exemptions granted after the commencement of the LRA and in respect of an agreement whose lifespan was limited by the transitional provisions would nevertheless remain beyond the life of the main agreement in respect of which they were granted. And indeed to have a life beyond those exemptions that were in operation when the LRA commenced. This would be absurd. A legislative intention cannot be construed to bring about an absurdity. It would be inconsistent with the clear intention of the legislature to have exemptions, granted after the commencement of the LRA, continue for an indefinite or indeterminable period. And in construing the exemptions, where possible, they must be construed in a manner that brings them within the terms of the statute that governs them. That is what the requirement of the doctrine of legality, which is an aspect of the rule of law, requires nowadays.

[96] Thus construed, the survival clause can be reconciled with the period of the exemption clause in the exemption. These clauses are therefore fully compatible and, read together, signify that the exemption, subject to it not being withdrawn at an earlier date, is to continue throughout the life of the industrial council main agreement. If the main agreement is not extended or re-enacted or renewed the exemption lapses; if it is, the exemption continues for the extended period or the period of renewal. The “duration of Agreement” therefore means the duration of the

industrial council main agreement. Consequently, the exemption in issue here did not therefore have a life beyond that of the industrial council main agreement.

[97] When the exemptions were granted on 7 April 1997, the industrial council main agreement was still in operation, having been re-enacted by Government Notice R1802 of 8 November 1996. And in terms of clause 2 of the industrial council main agreement as so re-enacted, the main agreement was due to "remain in force until 30 June 1997 or for such period as the Minister may determine." There is no suggestion that the Minister determined any such period. It follows therefore that, by its own terms, the main agreement terminated on 30 June 1997. And similarly, by its own terms, the exemption in issue in this case also expired on that date, that being the "duration of [the industrial council main] Agreement." This was the period for which the exemption had been granted. There were therefore no exemptions in operation at the time the dispute arose in August 1998.

[98] During oral argument, the employer understandably emphasised and relied on the condition in the exemption "[t]hat the national percentage increase negotiated annually be enforced on the company with the inception of the 1998/1999 Main Agreement." The employer contended that this condition could lead to no other conclusion other than that the exemption would apply to the new bargaining council agreement that had yet to be concluded during the following year. This contention was not dealt with by the courts below. I am unable to agree with this contention.

[99] First, as pointed out earlier, in terms of the transitional provisions of the LRA, all industrial council agreements concluded under the 1956 LRA and exemptions granted in respect of those agreements that were in force at the commencement of the LRA were to remain in force until they expired or for a period of 18 months after the commencement of the LRA, whichever occurred first.[48] It is apparent from the transitional provisions of the LRA that the intention of the legislature was to give industrial council agreements and the exemptions issued in relation to those agreements a limited lifespan.

[100] It is true that the exemption in issue in this case was issued after the commencement of the LRA. It is also true that the transitional provisions do not contain an express provision dealing with the expiry of exemptions issued after the commencement of the LRA but granted under the 1956 LRA. What must be stressed is that this exemption was issued under section 51 of the 1956 LRA pursuant to the transitional provisions of the LRA. It seems inconceivable that the legislature, while providing for a limited lifespan for all industrial council agreements and exemptions issued under those agreements, would nevertheless exclude from this limitation exemptions issued after the commencement of the LRA even though these exemptions were granted under the 1956 LRA and were issued in respect of industrial council agreements. There is no basis for treating these exemptions differently to those that were in force at the time of the commencement of the LRA.

[48] Above at [8]-[9].

[101] Like all exemptions that were issued in respect of industrial council agreements, exemptions granted after the commencement of the LRA but in respect of industrial council agreements that were in force at the commencement of the LRA had a limited lifespan. They remained in force, as the exemption in issue here makes it plain, for the duration of the industrial council agreement in respect of which they were issued. They could not have been intended to have an unlimited lifespan which goes beyond the lifespan of the industrial council agreement in respect of which they were issued. The period of the exemption in issue in this case must be construed in the light of this legislative intention. The exemption must be construed in conformity with the intention of the legislature. It seems to me that, where an exemption is capable of a construction that conforms to the statute, that construction should be preferred to one that would conflict with the intention of the legislature.

[102] Second, at the time the exemption under consideration was granted, there was at the very least a possibility that fresh exemptions would be applied for by the employer after this exemption expired at the termination of the industrial council main agreement. The 1997 exemption simply makes it clear that, at the very least, the employer would be bound to pay the national percentage increases agreed on for the 1998/1999 year and that no exemption would be granted for that year that would relieve the employer of this obligation. At any rate, the condition cannot serve to negate the unequivocal terms that the exemption would not last beyond the termination of the industrial council main agreement.

[103] Third, even if it were to be so (and I do not accept that this is the case) that the existence of the condition renders the interpretation contended for by the employer a reasonable one, it would, in my view, not be the only reasonable construction. At best, the construction contended for by the employer would be as reasonable as that urged by CUSA. In my view, the meaning preferred in this judgment accords better with the values of our Constitution. This is so because, on the facts of this case, a labour regime that enabled the greater exploitation of black people in the homelands as part of the apartheid scheme, to the detriment of the workers in these areas, would, on the employer's interpretation, be kept in force for longer than the interpretation preferred in this judgment.

Conclusion

[104] In the event, the conclusion by the Commissioner that the exemption relied upon by the employer had expired at the time when the dispute arose in August 1998, must be upheld. So too must her conclusion that the employer was not exempted from the wage provisions of the bargaining council main agreement at the time when the dispute arose. The order of the Labour Appeal Court must therefore be restored.

Remedy

[105] In her award, the Commissioner ordered the employer to pay to its workers wages negotiated in the Metal and Engineering Industries' Bargaining Council since 14 April 1998, unless exemptions were granted to the employer under the bargaining council main agreement. The bargaining council main agreement, which was

published in Government Notice R404 of 31 March 1998, came into operation on 14 April 1998. In terms of section 2 of the agreement it was due to remain in force until 30 June 1998. On 27 November 1998, the main agreement was re-enacted and published in Government Notice R1491 of 27 November 1998. The award of the Commissioner must be understood to refer to the main agreement for Metal and Engineering Industries published in Government Notice R404 and promulgated on 31 March 1998 as re-enacted or amended from time to time.

Costs

[106] I agree with the Supreme Court of Appeal that the costs must be allowed to lie where they fall in all courts and that no order for costs should be made. This was indeed also the attitude of the Labour Appeal Court. There is no reason to depart from this.

Order

[107] In the event the following order is made:

(a) The failure by the applicant to file the record timeously is condoned.

(b) The application for leave to appeal is granted.

(c) The appeal is upheld.

(d) The order of the Supreme Court of Appeal is set aside and is replaced with the following order: "The appeal is dismissed."

(e) The application by Tao Ying Metal Industries to review the arbitral award made on 27 July 1999 is dismissed.

(f) There is no order for costs either in this Court or in the courts below.

Langa CJ, Kroon AJ, Madala J, Mokgoro J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

O'REGAN J:

[108] I have had the opportunity of reading the judgment prepared in this matter by my colleague, Ngcobo J. Unfortunately I cannot concur in it. In my view, although leave to appeal should be granted, the appeal should be dismissed. I set out my reasons for this conclusion in this judgment.

[109] The facts are set out in the judgment of Ngcobo J and there is no need to repeat them fully here. In brief, the applicant, the Commercial Workers Union of South Africa (CUSA) seeks leave to appeal against a decision of the Supreme Court of Appeal upholding an appeal to it by the first respondent, Tao Ying Metal Industries (Pty) Ltd.[1] The case concerns a dispute as to whether Tao Ying Metal Industries was obliged as at August 1998 to pay to its workers the minimum wages provided for in the main bargaining council agreement for the metal and engineering industries which

[1] *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* [2007] 3 All SA 329 (SCA); [2007] 7 BLLR 583 (SCA).

came into effect on 14 April 1998 (1998 Main Agreement).[2] CUSA is a trade union now representing some of the workers at Tao Ying Metal Industries (the employer). The dispute was originally declared on behalf of the workers by the Hotel, Liquor, Commercial and Allied Workers Union of South Africa. Since then, CUSA has replaced that union as the union representing the workers of Tao Ying Metal Industries in this dispute.

[110] On 5 November 1998, a dispute between the union and the employer was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995. After the obligatory, but failed, conciliation attempt, the dispute was referred to a commissioner of the CCMA for arbitration.[3]

[111] The employer's case was that it was not obliged to pay the minimum wages as the bargaining council had on 7 April 1997 issued an exemption to it. The thrust of the union's response was that that exemption had been adopted without any consultation with the union.

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[2] Government Notice R404 published in *Government Gazette* No 18745 dated 31 March 1998. This agreement replaced the main industrial council agreement (1980 Main Agreement) which was initially given legal effect by ministerial decree in 1980 (Government Notice R1329 of 27 June 1980 published in *Regulation Gazette* No 3137). The practice was to re-promulgate the agreement on an annual basis with the relevant annual changes. It appears that this was last done on 8 November 1996 (Government Notice R1802 published in *Government Gazette* No 17548).

[3] Section 133(2) of the Labour Relations Act 66 of 1995 provides:

> "If a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if—
> (a) this Act requires the dispute to be arbitrated and any party to the dispute has requested that the dispute be resolved through arbitration; or
> (b) all the parties to the dispute in respect of which the Labour Court has jurisdiction consent in writing to arbitration under the auspices of the Commission."

[112] A preliminary point was taken by the bargaining council and the employer that the CCMA did not have jurisdiction to determine the dispute, because the Main Agreement provided that disputes concerning its interpretation and application be determined by arbitrators nominated by the bargaining council. The Commissioner dismissed this preliminary point and ruled that the bargaining council could not be a party in the proceedings before her.

[113] After hearing evidence, the Commissioner reserved her decision. Her award was received by the employer on 30 March 2000.[4] She held that the employer was obliged to pay the wages stipulated in the 1998 Main Agreement. She held that it was "common cause" that the exemption had lapsed with the 1980 Main Agreement and did not apply to the new 1998 Main Agreement.

[114] After receiving the Commissioner's award, the employer wrote to the bargaining council to enquire whether the exemption was still in force, and was informed that it was. Indeed, after the request, the bargaining council furnished a further licence of exemption dated 12 April 2000 stating that exemption had been granted from both the 1980 and the 1998 Main Agreements, pursuant to a decision on 7 April 1997. In the light of this letter, the employer did not immediately seek to review the Commissioner's award. However, once the union made application to the

[4] There is a lack of clarity on the record as to the date of the Commissioner's award. The award itself is dated 23 July 1999, but the employer states in its written submissions that this date is incorrect. In a letter written by the employer to the bargaining council, it stated that it received the award on 30 March 2000.

Labour Court for the award to be made an order of court, the employer sought to review the award in that Court. The only remaining relevant ground for the review was the failure by the Commissioner to apply her mind to the provisions of the exemption granted during March 1997. Because the employer was now out of time to lodge a review, it filed an application for condonation for its late filing of the review application.

[115] The Labour Court refused the application for condonation.[5] The employer then sought leave to appeal to the Labour Appeal Court. The Labour Appeal Court set aside the decision of the Labour Court refusing condonation but dismissed the appeal on the merits. The Labour Appeal Court reasoned that the question that had been before the Commissioner was whether the employer was bound to pay the wage rates established in the 1998 Main Agreement. The Court held that the Commissioner had not applied her mind to the argument of the employer that it was exempted from paying the wage rates in the 1998 Main Agreement; but it held that, properly construed, the exemption did not excuse the employer from paying the rates set in the 1998 Main Agreement, and that therefore the award should stand.

[116] The employer then sought leave to appeal to the Supreme Court of Appeal. The majority in that Court held that the issue before the Commissioner had not been whether the exemption remained in force, but whether it had been validly adopted in the first place in view of the fact that the union had not been consulted prior to its

[5] *Tao Ying Metal Industry (Pty) Ltd v Commissioner May Pooe and Others*, Case No. J4031/00, Labour Court, 29 November 2002, unreported.

adoption by the bargaining council. The majority of the Court held that the Commissioner did not have jurisdiction to determine whether the exemption was valid or not on the basis of the conduct of the bargaining council and that the Commissioner should therefore have found that she had no jurisdiction to resolve the dispute.[6]

[117] The majority furthermore found that the Commissioner's belief that it was common cause that the exemption had expired was erroneous, that indeed it had been common cause at the arbitration that the exemption had not expired and that as a result the award was both a gross irregularity and had no rational basis.[7]

[118] Two dissenting judgments were written in the Supreme Court of Appeal: the first by Jafta JA in which he reasoned similarly to the Labour Appeal Court. He held that the Commissioner had applied her mind to the currency of the exemption and that she had correctly concluded that it did not exempt the employer from the 1998 Main Agreement. The other judgment was written by Musi AJA who held, on somewhat different reasoning, that the exemption had expired when the 1980 Main Agreement expired and he found what he considered to be evidence in the appeal record to suggest that this had been common cause between the parties during the arbitration.

[119] The union now seeks leave to appeal to this Court. I agree with Ngcobo J for the reasons given by him that we should grant condonation for the late filing of this application. In order for leave to appeal to be granted, the first question that arises is

[6] Above note 1 at para 38.

[7] Id at para 45.

whether the case raises a constitutional issue. To answer that question we need to identify the issues in this application for leave to appeal. They are:

(a) Whether the majority in the Supreme Court of Appeal erred in identifying, of its own accord, as an issue for determination the question whether the Commission had jurisdiction to determine the dispute that was in fact referred to it;

(b) What the issue was for determination by the Commissioner and whether the Commissioner had jurisdiction to decide it;

(c) Whether the award falls to be set aside because the Commissioner failed to apply her mind to the terms of the exemption; and

(d) Whether on a proper construction of the exemption it had expired by the time the 1998 Main Agreement came into force.

[120] The applicant argues that these issues raise constitutional issues because they implicate rights guaranteed by the Constitution: the right to fair labour practices (section 23(1)) and the right to administrative justice (section 33).[8] It seems to me that only two issues can be said directly to raise constitutional issues. The first is whether a reviewing court is entitled of its own accord to raise a question regarding the jurisdiction of a CCMA commissioner to determine a particular dispute; and the

[8] Section 23(1) of the Constitution states—

> "Everyone has the right to fair labour practices."

Section 33(1) of the Constitution states—

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

second is whether the award falls to be set aside because the Commissioner failed to apply her mind to the terms of the exemption.

[121] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, five members of this Court firmly held that an arbitration before the CCMA constitutes administrative action within the meaning of section 33 of the Constitution.[9] Section 33 provides that everyone is entitled to administrative action that is "lawful, reasonable and procedurally fair" and in *Sidumo*, those five members of the Court held that section 145 of the 1995 Labour Relations Act must be read consistently with the provisions of section 33.[10] I remain convinced that this approach is correct. A court, therefore, in considering a review (or an appeal in respect of a review) of the CCMA in terms of the 1995 Labour Relations Act is obliged to interpret its powers in the light of section 33 of the Constitution.

[122] The question relating to the power of the Supreme Court of Appeal, of its own accord, to raise an issue that appears on the face of the record before it and which goes to the jurisdiction of the CCMA needs to be considered in the light of section 33 of the Constitution. Similarly, the question whether an arbitrator has applied her mind to an issue before her is a question that needs to be considered in the light of that section. Both these questions thus raise constitutional matters within the jurisdiction of this Court.

[9] [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 88. A sixth, Sachs J, held that the norms contained in section 33 may have application (see paras 146-7 and 158). It is not necessary for the purposes of this judgment to identify the precise ratio of *Sidumo*.

[10] Id at paras 89 and 105.

[123] I should add that, although a review of a decision of the CCMA will always need to be undertaken in the light of the right entrenched in section 33, and will therefore generally involve a constitutional matter, it will often not be in the interests of justice for this Court to entertain such an appeal. This Court must take cognisance that one of the primary purposes of the 1995 Labour Relations Act is to provide for the expeditious resolution of labour disputes. In so doing, this Court will refuse to entertain a matter concerning the review of a CCMA decision unless it raises a matter of particular constitutional importance.

[124] In this case, my colleague, Ngcobo J, has dealt briefly with the first constitutional issue I identify (the right of an appellate court in a review matter to raise an issue going to jurisdiction of its own accord) and at some length with the second (the question whether the Commissioner applied her mind to the meaning of the exemption). I respectfully disagree with his approach in respect of the second of those issues. In the circumstances, therefore, I accept that it is in the interests of justice for this application for leave to appeal to be granted, although I do wish to emphasise that this Court should be alert to the purpose of the 1995 Labour Relations Act and should not undermine it by entertaining labour appeals without careful consideration of whether it is in the interests of justice for the appeal to be heard.

[125] Before turning to deal with these two constitutional issues, I wish to express a point of disagreement between Ngcobo J and me as to what constitutes a

constitutional matter. Ngcobo J states that because this case concerns the enforcement of a bargaining council agreement, and because there is a right in section 23(5) of the Constitution to engage in collective bargaining, the enforcement of a bargaining council agreement raises a constitutional matter. I am not persuaded that this is correct.

[126] If it is clear that the enforcement of the bargaining agreement materially affects the right to engage in collective bargaining or any other right in the Bill of Rights, its interpretation will give rise to a constitutional issue. Where, however, the interpretation is concerned with a provision that does not affect the right to engage in collective bargaining nor any other right entrenched in the Bill of Rights, but concerns substantive terms and conditions which have been negotiated (which by and large are the stuff of bargaining council agreements), it does not seem to me that a constitutional issue is automatically engaged.

[127] In this case, the primary dispute insofar as it relates to the bargaining council agreement turns on whether the wage provisions of the 1998 Main Agreement apply to the employer or whether the exemption granted on 7 April 1997 exempts the employer from those provisions. This does not seem to me to raise a constitutional matter. There is no provision in the Constitution which is directly relevant to the interpretation of either the 1998 Main Agreement or the exemption; nor can it be said that either of the interpretations for which the parties contend gives greater or lesser effect to the provisions of the Bill of Rights. I should add that the exemption itself at

which the interpretive debate is really directed is not "legislation" that falls to be interpreted in a manner consistent with the spirit, purport and objects of the Bill of Rights.[11]

[128] Ngcobo J suggests that the enforcement of collective agreements is crucial to a society founded on the rule of law. I agree. I do not think, however, that the consequence of this assertion is that the enforcement of all collective agreements automatically raises a constitutional matter, for the reasons I have given above. The rule of law of course requires that all binding obligations be enforced. It does not mean, however, that the enforcement of all binding obligations necessarily raises a constitutional matter. The 1995 Labour Relations Act carefully provides procedures to ensure that collective agreements are enforced. Those procedures have not been challenged as inadequate or unconstitutional. This Court should recognise that the Constitution establishes it as a court that has jurisdiction in constitutional matters only; not as a general court of appeal in all matters. This Court must respectfully observe those limits placed on its jurisdiction.[12]

[129] I now consider the two constitutional issues that I have identified in turn.

[11] Section 39(2) of the Constitution provides—

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[12] See section 167 of the Constitution.

The first issue: May a reviewing court raise a point going to jurisdiction of its own accord?

[130] The applicant argues that a reviewing court is not permitted to raise a point going to jurisdiction that has not been raised by one of the parties. It argues that when the Supreme Court of Appeal wrote to the parties in January 2007 requesting argument on the issue of the specific ambit of the dispute before the Commissioner, the Supreme Court of Appeal acted in a manner that a reviewing court may not, because, in effect, it raised an issue that the party seeking to review the CCMA decision had not.

[131] The proposition for which the applicant argues is, in my view, not correct. Where a material irregularity or other defect appears on the face of the record before the reviewing court, which defect would mean that the proceedings before the tribunal were either unlawful, or procedurally unfair or unreasonable, the reviewing court is not obliged to overlook that defect. Of course, the court must act in a manner that is fair to the parties and ensure that they have an opportunity to address the issue the court has identified.[13] This approach is consistent with the approach adopted by our courts in relation to the raising of new matters on appeal by litigants.[14]

[13] See the discussion in *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) at para 18.

[14] See, for example, *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290, and *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380-1 (per Kriegler J).

[132] In *Carmichele*, this Court held that it is the duty of all courts to uphold the Constitution and that a court may thus raise a constitutional issue of its own accord.[15] In the context of labour disputes, it is important to recall that parties are often not legally represented in proceedings before the CCMA and even in the Labour Court and Labour Appeal Court. It might well be that a material irregularity could thus be overlooked by the parties themselves. In these circumstances it would especially not be appropriate or consistent with the principle of legality that underlies our constitutional order to insist that the reviewing court ignore such material error. When such an error is identified on the record by the reviewing court, the parties' attention should of course be drawn to it and they should be given an opportunity to present either written or oral argument on it. This course was followed in the present case by the Supreme Court of Appeal.

[133] In my view, therefore, the applicant's objection to the judgment of the majority of the Supreme Court of Appeal, on the basis that it raised a point of its own accord, must fail. The further issue for this Court to consider which is connected to this decision is the question regarding the ambit of the dispute before the CCMA. This question does not itself raise a constitutional issue. It is concerned only with the ambit of the dispute before the Commissioner – a factual issue. Nevertheless, it is an issue connected with a decision on the first constitutional matter and so does fall within our jurisdiction to determine. However, I do not find it necessary to investigate this

[15] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 33 and 39.

matter given the conclusions that I come to on the second constitutional issue as shall become plain in the next portion of this judgment.

The second issue: Did the Commissioner apply her mind to the meaning of the exemption?

[134] The second constitutional issue is the question whether the Commissioner applied her mind to the period of operation of the exemption. It is clear, as Ngcobo J holds, that a commissioner is obliged to apply his or her mind to the issues in a case.[16] Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.

[135] In answering this question it is necessary first to set out the terms of the relevant exemption:[17]

> "License of Exemption
>
> This is to certify that under the powers conferred upon it, the Council has been pleased to grant exemption from the provisions of Part 2 of the Main Agreement published under Government Notice R1329 dated 27 June 1980 as amended and/or extended and/or replaced from time to time by any succeeding Agreement, and/or any amendments and/or extensions thereof to: Tao Ying Metal Industries (Pty) Ltd, PO Box 7791 Bloemfontein, 9300; to That the national percentage increase negotiated annually be enforced on the company with the inception of the 1998/1999 Main Agreement. Period from 19 March 1997 to: duration of Agreement. Note: This

[16] At [76].

[17] Four exemptions were granted relating to the holiday bonus, the annual leave entitlement, the metal industries' pension fund agreement and wages. Three of the exemptions were for indefinite periods "for the duration of this agreement" and one relating to the pension fund was for a period of three years. The exemption that is of primary importance in these proceedings is the one set out in the text of the judgment. The reasoning relating to it, however, relates also to the other exemptions which were for indefinite periods.

> exemption may be varied or withdrawn at any time at the discretion of the Council. (Signed) Secretary. Date: 7 April 1997."[18]

[136] It is not clear from the text of this licence of exemption that it was intended to lapse once the 1998 Main Agreement came into force. Indeed, the contrary is suggested by the second portion of the exemption which states that from the inception of the 1998 Main Agreement the employer will be required to pay the "national percentage increase negotiated annually". It should be emphasised that the exemption does not require the employer to pay the actual wages set in the 1998 Main Agreement. It is merely required to award its employees the national percentage increase on the basis of their existing wages. The exemption also recognises that it relates not only to the 1980 Main Agreement but also to "any succeeding Agreement" which may replace the 1980 Main Agreement. Despite its inelegant formulation, it seems to me that the meaning of the licence of exemption on a reading of its terms is that an exemption from Part 2 of the Main Agreement, and Part 2 of any succeeding agreement, is being afforded, subject to a requirement that once the 1998 Main Agreement comes into force, the employer will be required to pay the negotiated annual percentage increase.[19]

[137] During the arbitration proceedings it was the employer's case that this exemption continued to exempt it from paying the wage rates stipulated in the 1998 Main Agreement promulgated by the bargaining council even once that Agreement

[18] For a pictorial reproduction of this exemption, see [18] of Ngcobo J's judgment above.

[19] See the further discussion of the proper interpretation of the exemption at [145]-[148] below.

came into force. Indeed, the Commissioner states as much in her discussion of the background to the issue as follows:

> "The Respondent then raised the Exemptions issued under the Main Agreement which was concluded in 1980 and published in Government Notice R1329 dated 27 June 1980. The Respondent was, in terms of the said Exemptions … exempted from paying and giving its employees the minimum wages and conditions of service negotiated in the Bargaining Council."

I should add for clarity that the 1980 Main Agreement related to wages and conditions of service that had been negotiated at the industrial council, not the bargaining council. The employer's argument as recorded by the Commissioner makes clear that the employer considered it was exempted from the minimum wages and conditions of service negotiated in the *bargaining council*, which wages and conditions of service were set out in the 1998 Main Agreement.

[138] Despite this, the Commissioner goes on to state in her reasons that:

> "It is also common cause that by the time the dispute arose in August 1998 the exemptions under discussion were no longer valid having ceased to be so when the main Agreement in terms of which they were issued terminated and a period of eighteen months referred to in item 12(1) had also expired."

She continues:

> "Notwithstanding the above, I do agree with Adv. Beaton that I am excluded from enquiring into the period during which the exemptions were valid because they were issued under the agreement promulgated in terms of the 1956 Act."

[139] These two comments seem to make plain that the Commissioner not only thought that it was common cause between the parties that the exemption had expired once the 1980 Main Agreement had expired and a period of 18 months from the promulgation of the 1995 Labour Relations Act had lapsed, but also that she could not enquire into the period of validity of the exemption because it had been granted under the 1956 legislation. Both these dicta are consistent with the Commissioner not having applied her mind to the meaning of the exemption, as the employer argues.

[140] The first obligation on an arbitrator in determining a matter is to set out the reasons, even if only briefly, for any decision. However, beyond the dicta referred to above, there is no further discussion in the Commissioner's award of the text of the exemption and its meaning. Compare this to the lengthy paragraphs devoted to an interpretation of the text of the exemption by the Labour Appeal Court, both Nugent and Jafta JJA in the Supreme Court of Appeal and Ngcobo J in this Court. If the Commissioner had in fact applied her mind to the question of the meaning of the exemption, one would have expected at least some discussion of its text. This is nowhere evident in the award.

[141] In my view, it cannot be concluded that the Commissioner did apply her mind to the meaning of the exemption. This is consistent with her view that it was common cause that the exemption was no longer valid once the 1998 Main Agreement came into effect, and her conclusion that she in any event did not have jurisdiction to

determine the matter. Nevertheless, she held that as no exemption was in operation, the employer was obliged to pay the wages set out in the 1998 Main Agreement.

[142] There is no doubt, in my view, that it was not common cause that the exemption had lapsed, despite Musi AJA's reasoning to the contrary. A reading of the record before the Commissioner makes it plain that the evidence tendered by the regional manager for the bargaining council, Mr Coetzee, on behalf of the employer was that the exemption was still in operation, and would remain so indefinitely, unless withdrawn by the council. The evidence was that:

> "all exemptions issued stating a duration of an agreement will remain in force for ever and ever more . . . . So it is not only my opinion and my council's opinion, it was also the opinion of the Exemptions and Arbitrations Board, that while this agreement is running the exemption is issued to the company for the duration of the agreement until such time as the exemption is [with]drawn, as you can see in the footnote, the council will have the right to withdraw [the] exemption at any time giving one week's notice."

After this statement was made, Mr Coetzee was asked the following question by counsel for the union:

> "As at today, it is now the year 2000, it is almost three years later, these exemptions are still in place?"

Mr Coetzee answered affirmatively.

[143] The Labour Appeal Court took the view that even if the Commissioner had not applied her mind to the terms of the exemption, the award should stand because on an

interpretation of the exemption, it had indeed lapsed. I have set out at [29] above my preliminary reading of the exemption on its own terms. The Labour Appeal Court ruled it would have been ultra vires had the bargaining council extended the exemption beyond the currency of the 1980 Main Agreement to the provisions of the 1998 Main Agreement. With respect, I do not think that this is a matter that can be determined on the record before us. Section 30(1)(k) of the 1995 Labour Relations Act provides that the constitution of a bargaining council must provide for the procedure to be followed for exemption from collective agreements. We do not have before us, as Nugent JA for the majority in the Supreme Court of Appeal pertinently remarked, a copy of the constitution of the relevant bargaining council.

[144] In the absence of that constitution (and indeed in the absence of the bargaining council which was excluded from the proceedings by the Commissioner) it is neither appropriate nor possible to determine whether or not the council acted ultra vires to the extent that it purported to exempt the employer from the terms of both the 1980 Main Agreement, and its successor agreements, including the 1998 Main Agreement. It cannot be said, therefore, that we must strive for an interpretation of the licence of exemption to avoid this meaning. Nor can it be said that the licence of exemption, without doing damage to the language it contains, clearly lapsed before or when the 1998 Main Agreement came into force.

[145] I cannot, therefore, accept that the interpretation placed on the licence of exemption by Ngcobo J is the correct one. Ngcobo J gives a narrow meaning to the

licence of exemption by giving a narrow meaning to the words "replaced from time to time by any succeeding Agreement" contained in the licence of exemption.[20] In my view, given the express reference to the 1998 Main Agreement in the second half of the licence of exemption relating to Part 2 of the Main Agreement, it is inappropriate to give a narrow meaning to the word "replaced". Similarly, I consider that Jafta JA's proposal that the words "or any succeeding agreement" are meaningless cannot be accepted.[21]

[146] Both these approaches contort the ordinary meaning of the exemption and appear to have been guided by either the assumption that the bargaining council cannot have intended to grant an indefinite exemption beyond the life of the 1980 Main Agreement; or the assumption that it could not do so as a matter of vires. In my view, neither assumption is warranted. The first is a *petitio principii*, in that it assumes as correct the very proposition that needs to be established: Did the exemption purport to relieve the employer of its obligations under the 1998 Main Agreement as well as the 1980 Main Agreement? The second, as I have demonstrated, is not a conclusion that we can draw on the papers as we do not have the constitution of the bargaining council before us.

[147] A related suggestion is the one made by Ngcobo J that the exemption "must thus have been enacted under section 51 of the 1956 LRA read with schedule 7 of the

[20] At [92] and [100].

[21] Above note 1 at para 87.

new LRA."[22] There is nothing to support this assertion. There is no reason apparent from the record to suggest why in April 1997 the bargaining council could not have acted both under schedule 7 of the 1995 Labour Relations Act to grant exemptions for the remaining life of the 1980 Main Agreement, and under its constitution as contemplated by the 1995 Labour Relations Act to extend the operation of the exemptions to the provisions of the 1998 Main Agreement as well. Indeed, the record makes clear that that is what they intended as is evident, amongst other things, from the testimony of Mr Coetzee set out at [142] above and the bargaining council letter of 12 April 2000.[23] In that letter, the bargaining council assured the employer that the exemptions granted on 7 April 1997 continued to operate under the 1998 Main Agreement.

[148] Finally, Ngcobo J states in one sentence that the exemption should be read in the way he proposes "because, on the facts of this case, a labour regime that enabled the greater exploitation of black people in the homelands as part of the apartheid scheme . . . would . . . be kept in force for longer".[24] With respect, this argument ignores the undisputed facts on the record before us. Those facts make plain that when the leather industry required leather companies in Botshabelo to pay the wages provided for in its main agreement and did not issue exemptions, all the leather companies in Botshabelo closed, with the devastating consequence of job losses. Accordingly, when the Department of Labour realised that the metal and engineering

[22] At [10].

[23] See [33]-[34] in the judgment of Ngcobo J.

[24] At [103].

industries bargaining council was about to register employers in Botshabelo, it requested the bargaining council to explore ways of ensuring that businesses were not forced to close as a result of being required to pay wages beyond their means. It was at least partly as a result of this intervention that the council appointed a team of investigators to visit the employer's premises and, in particular, to investigate the financial circumstances of the employer. It was after this visit that the exemptions were granted. In the light of the intervention by the Department of Labour, it seems likely that the exemptions were granted to avoid further job losses in Botshabelo. In my view, the one-sentence argument relied upon by Ngcobo J ignores this complex economic and social background. This Court should be slow to base its reasoning on such arguments, particularly when they have not been raised either by the union or the employer, and when they are likely to mask complex social and economic realities, possibly with harmful consequences, such as job losses.

[149] I should make clear, however, that I do not finally determine the meaning of the licence of exemption in this judgment. In my view, as held by the majority of the Supreme Court of Appeal, that cannot properly be done without the constitution of the bargaining council. My purpose is merely to make plain that it is not self-evident that the exemption bears the meaning proposed by Ngcobo J. Accordingly, it is not possible to reason along the lines, as the Labour Appeal Court did, that the misdirection by the Commissioner need not result in her award being set aside because it was in any event correct in law. This is not a conclusion we can or should reach on this record.

[150] In conclusion, therefore, it is my view that the majority of the Supreme Court of Appeal was correct when it concluded that the failure by the Commissioner to apply her mind to the question of the exemption and its validity deprived the award of rationality and that it should be set aside on that ground. [25]

[151] Given this conclusion, it is not necessary to consider the question whether the real issue before the Commissioner concerned the process by which the exemption had been granted. I accept that in the informal and expeditious proceedings that take place before a commissioner of the CCMA, as Ngcobo J describes, issues are not as crisply and clearly identified as they ordinarily are after the exchange of pleadings and it is undesirable to expect that of proceedings before the CCMA.

[152] I proffer two points of caution. First, it is, at the end of the day, essential for the decision-maker in a fair adjudicative process to understand what the issues for decision are. Moreover, when that process is adversarial, it is necessary that the parties understand the issues as well, so that those issues may be properly engaged. We must be careful that, in attempting to acknowledge the informality of the processes before the CCMA, we do not lose sight of the essentialia of an adjudicative process. Secondly, in this case, a reading of the record does suggest that the key issue debated before the Commissioner was whether the union had been consulted by the bargaining council before it granted the exemption and whether, to the extent that it

[25] Above note 1 at para 45.

had not, that was fair. It is quite clear that the Commissioner did not have jurisdiction to set aside the licence of exemption on the basis that it had been improperly made. There is much, therefore, to be said for the conclusion of the majority in the Supreme Court of Appeal on this issue. Given that it is not necessary for me to decide this matter, however, I refrain from doing so.

[153] In conclusion, then, it is my view that the application for leave to appeal should be granted, but that the appeal should be dismissed. I would make no order as to costs on the ordinary rule that pertains in this Court.

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